THE PROPERTY OF MARRIED PERSONS ACCORDING TO THE LAW OF SCOTLAND

VOLUME I

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SUMMARY

The purpose of the thesis is to set out and examine the existing rules of Scots Law upon the property aspect of the marriage relationship (Chapters 1 - 5), to study the property rules which obtain in other comparable legal systems (Chapter 6), and tentatively to suggest, on the basis of the foregoing, that there may be an argument for at least the consideration of a different, and more systematic, approach to the subject in Scotland, and to put forward (in Chapter 7) a new (and optional) system of property rules, which has been termed "Separation of Property with Concurrent Compensation of Gains."

Chapter 1 explains the historical background to the present law: thereafter property rights stante matrimonio are described, beginning with the law of bankruptcy as it affects husbands and wives (Chapter 2), diligence and litigation (Chapter 3), and the rules of aliment (Chapter 4). Chapter 5 deals with the subject of Property Rights on Divorce and Death.

The System of Separation of Property with Concurrent Compensation of Gains would provide for joint ownership of the matrimonial home and "family assets", and for joint and several liability for household debts. Otherwise there would be separation of property. The new feature of the system would be the monetary compensation made during marriage by the economically stronger spouse to the other, thereby, it is hoped, making possible the amassing of property by both spouses during marriage, and rendering simpler the division of property at divorce, and treatment of property on death. New matrimonial remedies would require to be introduced, rules made as to contracting-in and contracting-out, and as to treatment of property on divorce and death. Rights of third parties must be protected. The only (generally) unalterable rule would be the co-ownership of the matrimonial home.

There would be a great measure of choice, the aim being to be protective and efficient, but not officious, and to retain as much as possible of the freedom which is associated with a system of separation of property, while affording an opportunity to those who wish to do so to redress any imbalance which a system of separation may create.

Only brief reference has been possible to Scottish Law Commission Consultative Memorandum No. 57: Matrimonial Property, in view of the date of publication of the Memorandum and the date of submission of the thesis.

CHAPTER 1

HISTORICAL REVIEW

Introduction

Before the series of legislative reforms initiated in 1855 by 'Dunlop's Act' (The Intestate Moveable Succession Act, 1855[1], a statute which, inter alia, aimed to eradicate unfairness to husbands rather than to wives in the matter of succession to the husband's estate), marriage, now so often referred to as a partnership, could be regarded justly as a partnership so one-sided in its benefits, in the financial aspect at least, as to be leonine[2] -- as scrupulously as the lion in the fable did divide the prey and with as much relish as he devoured it, did the Victorian husband, upheld by Victorian thinking manifested and reflected in judicial utterances and in the absence of more enlightened legislation, direct his mind to the niceties of the nature of things heritable and moveable, in order that he might enjoy to the full the spoil of both, because marriage operated as a legal assignation to the husband of the wife's moveables, under deduction of certain items classified as falling within paraphernalia or peculium[3], categories closely defined and forming, in the general case, no substantial exception, in size or value, to the general assignation, and on marriage the husband obtained not only the jus mariti, or right of property /

1. 18 and 19 Vict. c.23
2. "Leonina Societas":- an arrangement under which one partner bears all the loss, while the other reaps all the benefit, and a situation which was not recognised, in Roman Law or in Scots Law, as constituting partnership: see "A Textbook of Roman Law", W.W. Buckland, 3rd ed., p.508; "Law of Partnership and Joint-Stock Companies", F.W.Clark, Vol.1 p.46; Latin Maxims and Phrases, John Trayner, p.307-08; see modern discussion, "The Law of Partnership in Scotland", J. Bennett Miller, pp.7-13. The 'leonine' analogy is drawn by Murray, p.1.
3. However, see Fraser's advocacy (I.791) of the practice of using the word peculium to denote property from which the jus mariti had been excluded. This is a later use, since such exclusion of the jus mariti was thought at first not competent.

property in her moveables, but also the right of administration of her heritage. The wife came under the curatory of her husband, and while the curatory of a minor is terminated at his majority, "that of a married woman continues through the married life.[1]"

The analogy with partnership may be followed with profit a little way perhaps, since references to "society" in relation to the married state are found in many places in the earlier writers, though they are at pains to point out that the communion, if such it be (and indeed it may be well to follow the advice of Lord Fraser and spurn the words communio bonorum, so doubtful is the history and applicability of that phrase in our law[2])".....is not to be understood as if a real partnership were the consequence of it; as if the rights of both spouses were the same, or as if the wife had the same power which the husband has over those goods which are said to fall under communion; 'tis much otherwise .... For by her marriage, she loses the property of her whole moveable estate; it becomes immediately, wholly and entirely, the property of her husband; he acquires all the rights, and may alone exercise all the powers, which by law belong to the proprietors of anything. Hence marriage is called a legal assignment, made by a wife to her husband of all her moveable estate. For it is by the law itself, vested in him without any intimation, delivery or apprehension /

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1. Fraser I, 514-515, in a passage in which he distinguished between the effects of the curatory of a minor and that of a married woman. See also 516-517, upon the true character of the husband's position.
2. "The term communio bonorum represents no patrimonial interest of either husband or wife, and is quite out of place in the legal nomenclature of Scotland. It has given rise to many profitless legal arguments, and has not infrequently led to a miscarriage of justice." Fraser I,648; see generally Fraser Chap.IX, 648-678, upon the history and nature of the communio. See also Murray,pp.10-11.

apprehension of possession[1]."

Again, Erskine says[2], almost in the tone of an apologia, "By the common rules of society, the administration... ought to be vested equally in the husband and wife, who are the two "socii". But as the wife is by nature itself placed under the direction of the husband, the husband hath by the law of Scotland the sole right of administering the society - goods", and subsequently, in the same paragraph, "This absolute power in the husband over the moveable estate belonging to the wife, may be thought inconsistent with the notion of the communion of goods; but it can be no matter of wonder, to find strong deviations in the society of marriage from the nature of an ordinary co-partnership; since the husband's confessed superiority over the wife must necessarily give to this particular communion, properties very different from those which obtain in the ordinary contract of society."

Perhaps at this stage should be abandoned notions that, in points of difficulty, recourse might be had to the general rules of partnership for aid. The marital partnership to the middle of the nineteenth century - and indeed in some respects to 1920 - was a strange one.

The idea of male superiority was deeply rooted, not only in the context of the law of marriage, but also in that of succession, and perhaps in succession principally. Not until the Succession (Scotland) Act, 1964[3], were blows struck successfully against the feudal-based doctrine of male primogeniture, which favoured the claim of the male first-born in matters of intestate heritable succession.

"Vir est caput uxoris", said Sir Thomas Hope, "et censetur dominus omnium bonorum quae possidet uxor de jure /

1. Commissary Wallace; 4, 6, 206, quoted by Fraser I, 665.
2. Ersk. Inst. 1, 6, 13.
3. 12 and 13 Eliz.2. c.41.

jure nostro, and therfoir may be denunced to the horne for her caus", (C.490)[1] and, again[2], "The husband may annalyie his wyfe's goods and geir without her consent and she at no tyme befor or efter his deceis may seek restitutione." (Bal. Pr. Tit. 'materis concerning the husband and the wife,' c.4).

"Vir est caput uxoris" might indeed have been the maxim of the Victorian lawyer, or the hypothesis upon which he based his thinking, the yardstick against which he measured possible reforms and found them distasteful.

Ample authority in support of such an attitude may be found in the Old and New Testaments. Stair[3] quoted Genesis:iii:16, where the Lord God said to Eve, "... thy desire shall be to thy husband, and he shall rule over thee," and in the writings of St.Paul much assistance might be found ... "Wives, submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife ..." (Ephesians, v.21-22)

There abounded a curious mixture of, at worst, male arrogance, greed and opportunism, and, at best, paternalism and chivalry - an extraordinary double standard which resulted in a denial for many years that a wife was liable to aliment her husband although she was in a position to do so, and he was incapable of supporting himself[4], and this state of affairs was not rectified until the passing of the Married Women's Property (Scotland) Act, 1920[5] (s.4), while at the same time there was expressed the opinion[6] that, "To allow a partition of power between the /

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1. Major Practicks, II, Tit. 17, 13.
2. Hope, op.cit. II, 17, 2.
3. 1, 4, 9.
4. Fingzies v. F. 1890, 28 S.L.R.6.
5. 10 and 11 Geo.5, c.64.
6. Colquhoun v. C. (1804), Mor. App.1.; Sentiment quoted, and case discussed, by Walton, pp.190-191. In this case, it was decided that a wife could not compel /

the husband and the wife, and a liberty of resistence of the latter to the will of the former in the regulation of the household, would induce perpetual discord, and prove destructive of domestic happiness, and the best interests of society.... It is only where the wife has suffered personal injury that the courts of law will interfere with the husband in the regulation of his household. The more delicate, though not less acute, sufferings of the mind come not within the cognisance of any earthly tribunal." (Of course, since the introduction of cruelty as a ground of divorce by the Divorce (Scotland) Act, 1938, and particularly since the development in more recent years of the concept of mental cruelty[1], this is no longer the case, even if it ever, in truth, was so.) Possibly the dichotomy between the two attitudes is not so striking as at first it appears, and is simply an example of the obverse in a small way of the saying, "No power without responsibility."

In a description of the law of Scotland, and of England, down to the second half of the nineteenth century, there is an 'embarras de richesses' of quotations apt to explain the situation in which a married woman of that era found herself. It might almost be thought that the law was an inducement to the woman of independent mind and property to remain unmarried/

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compel her husband to maintain her in his house, he having provided a separate residence for her. Fraser II 869-872 also discusses the case ("the decision sustained to its utmost latitude the power of the husband, as the dignior persona, of fixing the domicile of both spouses, and of deciding whether the wife shall reside with him or not.") and extracts from it the rule that the proper course for a married woman to take in these circumstances is to seek adherence and aliment and, after the requisite period had elapsed, to sue for divorce on the ground of desertion.

1. See "The Evolution of the doctrine of Matrimonial Cruelty". (Grant v. Grant 1974 S.L.T.(Notes) 54), A.M.McLean, Journal of the Law Society of Scotland, January, 1975, Vol.20. No.1. pp.26-27.

unmarried, although it must be admitted that for the penniless, marriage might provide a buttress against the realities of life (though[1] not always), and further it must be admitted that for the rich, the device of the marriage-contract was available, and many availed themselves of the aid which it offered. "It is competent for the parties to settle by marriage contract their several rights and interests, provided that they do not agree to conditions inconsistent with the conjugal relation, against the public law, or in violation of morals" said Fraser, and continued, in amplification, "Hence it is illegal to contract, that the husband shall be divested of his right as head of the family, and placed in subjection to his wife...."[2]

In England, too, the married woman was under disability, since her legal personality was merged with that of her husband. She was said to be under coverture, and she acted only under the cover, or wing,[3] of her husband.

Fraser[4], who finds the basis of the Scots and English rules to be the same here (that is, the consolidation of the wife's rights and duties with those of the husband) expresses the Scots position thus:- "The/

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1. Fr.I, 509 ("...the wife, even in the richest countries of Europe, is found often toiling voluntarily in the brickfield and in hard mechanical labour, to secure a living for her household", cited as an exception to the general rule that "it is only among the barbarous and the savage" that the wife works out of doors.)
2. Fr.II, 1334: even when it was acknowledged that both rights might be excluded (see infra p.54-58) matters were not made subject to the wills of the parties to the extent that the husband's position as princeps familiae might be given up, as Fraser's rule (found in the 1876 as in the 1846 edition) clearly shows. At I,511, Fraser says "The husband cannot renounce his rights as princeps familiae. The husband has the custody and government of his children, not for his own gratification, but as a matter of responsibility and duty, which is imposed on him for the welfare of the public; and any agreement to transfer this duty to the wife would be void".
3. 1 Bl.Comm. c.15.
4. Fr.I, 508, 507.

"The marriage operates in regard to the wife, so as to sink her person in the eye of law. The husband and wife are one; and the unity of persons is so complete, that the legal existence of the wife is said to be suspended during marriage, or at least is incorporated with, and consolidated in, that of the husband. Such, at all events, is the language of our legal writers and our Courts of Law. The wife is without legal persona."

In the words of Erskine[1], "The husband acquires by the marriage a power over both the person and estate of the wife. Her person is in some sort sunk by the marriage, so that she cannot act by or for herself: And as for her estate, she has nothing that can be truly called her own, where matters are left to the disposition of the law."

The Position at Common Law

Lord Fraser[2] says that, according to many legal treatises, there was created, by virtue of the marriage, a communion of all the moveable property which the spouses possessed, but continues that, though "the civil interests of each in their moveables are communicated to the other", yet "The administration of the common fund is not, as in ordinary partnership, given to both the "socii"; but the husband alone, as the dignior persona has it."

This is the most favourable interpretation which could be put on the situation, and leads to a discussion of the husband's twin rights of jus mariti and jus administrationis.

Jus Mariti

The jus mariti was a right of property, or was almost /

1. Ersk. Inst. 1, 6, 19.
2. Fr. I, 648.

almost universally deemed to be so, notwithstanding Stair's view to the contrary. "According to the nature of society, there is a communion of goods betwixt the married persons; which society, having no determinate proportion in it, doth resolve into an equality: but so that, through the husband's economical power of government, the administration during the marriage of the whole is alone in the husband; whereby he having the sole and unaccountable administration, his power may rather seem to be a power of property, having indeed all the effects of property during the conjugal society, yet is no more than is above exprest[1]." This statement may have contributed to the confusion which existed as to the significance of the two rights. Fraser[2] quotes Dirleton[3], who says that "it is the essence of a fee to have power to dispone", and remarks that in Baillie v. Clark[4], the Court expressly laid down as a general principle that "full property is nothing more than a liferent, with a power of disposal at pleasure." The jus mariti was something "separate and superior; its purpose being to transfer the property from one spouse to the other[5]."

According to Fraser, "the jus mariti, as soon as the marriage is solemnized, operates as a complete assignation or transference of the entire moveables belonging to the wife, in favour of the husband, whose absolute property they thereafter become[6]." Unlike other assignations, no intimation or solemnity of any kind was required, "the fact of being husband calling the right into being, and publishing it to the world[7]."

Indeed, /

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1. Stair 1, 4, 9.
2. Fr. I, 673-4.
3. Doubts v. Fee. p.141.
4. 23rd Feb. 1809. F.C.
5. Fr.I.677.
6. 1st ed. I, 346-7.
7. I, 679, and authorities there cited.

Indeed, gratuitous alienations granted by the woman after the banns had been called or even after betrothal or agreement to marry but before the ceremony took place, might be reduced as in fraud of the other contractor of the marriage, on the ground that they defeated his legitimate expectations. (A fine morality emerges from the decisions. Fraser's blunt approach[1] is, "The fact of the woman having means may be, and generally is, an important consideration to the man in entering into the marriage;" He cites the judicial indignation encountered in the case of Auchinleck v. Williamson[2], in which the woman had left nothing to her future husband beyond her own self ("past sixty years") which, "the Lords thought a very cheat." The conveyance of a liferent to her son was challenged successfully by the husband even though the banns had not been read. There was clear evidence of intent to marry. Normally, however, it would appear that questions tended to arise where the transaction complained of had taken place "not only after treaty of marriage, but after the banns have begun to be proclaimed.")

The publication of the treaty for marriage thus formed the starting-point of the husband's rights, and Fraser devotes time[3] to the subject of the lack of validity of the woman's deeds executed between betrothal and marriage and to the rules and authorities relating thereto, and to Erskine's view[4], from which he dissented, that proclamation of banns in the bride's church was necessary (proclamation in the bridegroom's church being insufficient) to interpel anyone not having private knowledge of the intended union from contracting with the woman. (McDougal v. Aitkin[5]) Fraser comments[6] that, "in /

1. I. 680.
2. M. 6033 (1667).
3. I. 680-687.
4. 1, 6, 22.
5. M. 6027 (1623).
6. at I, 682.

"In so far as it seems to imply that if there be no proclamation of banns, a wife is untrammelled in regard to her property, although she is under an agreement or contract to marry, it erroneously limits the general rule of the right to challenge, on the ground of fraud, to the special kind of circumstances in which, in the particular cases, the challenge was made." To the extent that Erskine intended to convey the view that a woman under contract to marry, but not yet married, might enter into onerous contracts, Fraser concurred with him, but cites as a good exposition of the principle under discussion, the English view as expressed in White and Tudor's Leading Cases in Equity[1], namely that "if a woman, during a treaty for marriage holds herself out to her intended husband as entitled to property which will become his upon the marriage, and then makes a settlement of it without his knowledge or concurrence, actual fraud will be imputed to her, and the settlement will be set aside in a court of equity." Presumably (as Fraser suggests in relation to Erskine's view), that opinion was intended to refer to the making of a gratuitous settlement, as it is difficult to argue against the making by the betrothed of an astute bargain (or the payment of a due debt[2]) during the betrothal period.

On marriage, the husband became ipso jure owner of his wife's moveable property; he might sell or dispose of it at his pleasure, and his creditors might attach it for his debts. (Fraser v. Walker[3].) The wife had no influence in (or no legal right to influence) decisions upon the treatment or disposal of anything falling under the jus mariti. In desertion as in cohabitation, "all she earns, all she saves, becomes the property of the husband, and, if he becomes bankrupt, passes /

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1. Vol. i. p.334.
2. Fr. I. 687.
3. (1872) 10 Macph. 837.

passes to his creditors[1]."

A striking example of the injustice of these rules is found in the case of Milne v. Gauld's Trs.[2] where, the wife having been falsely imprisoned, she could not, after the death of her husband, recover solatium because it was considered that the claim for damages for the unwarranted treatment of the wife vested in the husband jure mariti, and transmitted to his executor[3].

The first right in the categorisation, compiled by Stair[4], of the four rights arising from marriage, was the jus /

1. Murray, p.8.
2. (1841) 3D. 345.
3. See, however, the possibility that actions not primarily concerned with property (but having to take that form by reason of some rule of law) but truly concerned, for example, with vindication of character, might not require the consent of the husband's representatives, and might constitute rights of the wife independent of her husband: Smith v. Stoddart (1850) 12 D.1185; Fr.I.574-77; Horn v. Sanderson and Muirhead (1872) 10 Macph.295, in which the bankrupt husband was held by the L.P. not to have lost his character as her administrator-in-law. His Lordship considered that the wife was the proper pursuer, in view of the husband's bankruptcy, his renunciation of the jus mariti (though he would not commit himself upon the question whether, by the terms of his universal renunciation, the husband had given up all claim to acquirenda, and if so, whether that would include such an action as was here presented) and the fact that part of the action was concerned purely with a claim for damages for injuries suffered by the wife alone. As regards the other head of damage (that the husband had suffered patrimonial loss through losing the benefit of his wife's assistance in his business) the husband could not sue, being bankrupt and his trustee declining to sist himself to the action. Nevertheless, no curator ad litem was necessary for the wife, since the husband's bankruptcy, as above stated, did not prevent him from giving his concurrence to the suit. (He was not only entitled, but bound, to act in that capacity.) As to the effect upon the wife's powers to sue her own action, of the husband's renunciation of the jus mariti-(Fr.I 576-77; Murray, p.8, footnote 3; L.P.'s remarks or queries in Horn.)
4. I, 4, 9.

jus mariti, "or conjugal power of the husband over the wife" (it may be said that in the earlier writings, the line between jus mariti and jus administrationis, which is quite distinct, sometimes is not drawn satisfactorily[1]), "her person and goods, and therewith by consequence the obligement for her debts."[2]

From the distinction between the two rights flowed the importance of correct classification of property as heritable or moveable. "What is considered moveable property by the law of Scotland pertains to the husband jure mariti, and everything heritable remains, notwithstanding the marriage, the property of the wife[3]."

Many rules[4] were developed to determine questions of classification of property as heritage or moveables. The character of the property, as heritable or moveable, was determined as at the date of the marriage, or as at the date of acquisition if it came to the wife during marriage. An intriguing situation thus arose from which the ingenious wife might derive benefit. If the property in question at the time of the marriage was a sum of money, it was held therefore to be moveable, notwithstanding that it represented the sale of a house, and it would remain the property of the husband even though after marriage he changed its character, by investing it in the purchase of land[5].

Thus, although it sprang from heritage, and became /

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1. Campbell Paton (p.100) considers that the terms were confused by Stair and Erskine (see supra, p. 8) see also Fr.I. 676-678.
2. Stair stated that the other rights arising from marriage were:-
   2. "His power, and the wife's security, whereby during the marriage she cannot oblige herself."
   3. The husband's obligement to entertain the wife, and provide for her after his death.
   4. Her interest in his goods and moveable estate at the dissolution of the marriage."
3. Fr.I. 687-8, and authorities there cited.
4. Fr.I. 687-741.
5. Fr.I.689.

became heritage, the property was regarded by the law as moveable, and, by the legal assignation of marriage, as belonging to the husband.

The reverse applied. If, at the date of the marriage, the wife had heritable property, it would not become the husband's property, even if it was sold for a cash price thereafter - except in the case where the wife acted in such disregard of her own interests as to consent to the change from heritable to moveable expressly "for the purpose of allowing it to fall under the jus mariti[1]."

Taking the simple view, it would have seemed advisable for a woman contemplating betrothal and matrimony to invest her money in land, before the treaty for marriage was made, and certainly before the banns were proclaimed, and then, at a safe distance after the marriage, sell it, and spend or save her own money, thus safeguarded.

In practice, this expedient was encircled by rules and presumptions (beneficial, in the main, to the woman); if, when she married, the wife owned heritage, and, stante matrimonio, it was changed to moveable property, by sale or otherwise, certain principles were evolved to regulate the situation[2].

Accordingly, where such a change took place in the character of the property, a presumption arose that this had been done in order to reinvest the price in heritage, and that it was not the parties' intention that the husband should attach it jure mariti. As has been noted, such an intention, however, (otherwise) was irrevocable /

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1. Fr. ibid. At I, 707, he writes:- "after this intention" (of the wife) "has once been unequivocally expressed, and carried out to execution, it cannot be retracted so as to recall the property, except under the law of donatio inter virum et uxorem." The intention could be drawn from facts and circumstances as well as from statement.
2. Fr.I. 703-709.

irrevocable, except under the rules of 'Donationes inter virum et uxorem[1].'

Fraser notes[2] that the presumption that the change was made in the ordinary course of the administration of the wife's estate, and made for the purpose of reinvestment in heritage, was not overcome by the lapse of a long period of time, and that the wife might safely allow her husband to use for his own ends the proceeds of the sale of her heritage for a time, without losing to his dus mariti her right of property therein. (It is interesting that Lord Fraser[3] suggests that the wife could not recoup expenditure of her funds, made with her concurrence, for the benefit of the family, or even made for the husband's own advantage with her permission. He cites the interesting case of Hutchison v. H.. This is only one of the passages in which he displays a forward-looking and egalitarian attitude to the subject .) Fraser emphasises one of the most difficult aspects of the law concerning the property of married persons, no less now than then, when he adds, "The only difficulty will be as to the identification of the money. If this difficulty be removed, then the law holds the husband who appropriates the money received for the wife's heritable estate to be personally liable for it to her or her representatives. If it cannot be identified, she is entitled to rank as a creditor on the husband's estate."

The development of this mode of reasoning, and the principles born therefrom, are the more laudable when it is considered that the law here, at least, was concerned to affect the realities of the situation, to /

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1. Fr.I. 707; Donationes inter virum et uxorem - see brief discussion infra, Chapter 5, p.654-660-cf.generally.
2. Fr.I. 706.
3. At I. 707.

to protect the wife from her own probable ignorance of the law (which, normally, it will be recalled, nemi nem excusat when adjudging the wisdom of the terms of a contract[1]) and of property management, and to protect her also from less than disinterested advice from her husband[2].

It is clear that it was possible for some benefit to the wife to be obtained through the judicious management of her estate after marriage, by her or perhaps by her father (although of course all acts of administration regarding heritage required the husband's consent, and, as far as moveables was concerned, he was both owner and administrator: the function or exercise of the jus administrationis was submerged in the general powers of ownership) or indeed by an enlightened husband - for such there must have been, despite the conditioning of Victorian education and social thinking - which would result in a more favourable situation financially for her, although it must be admitted that such expedients would commend themselves more to the wealthy middle and landed upper classes who would probably in any case resort to the device of the marriage-contract to circumvent the law. However, that the wife of more modest, or no resources, would have less reason to circumvent the law renders a discussion of the devices available to the wealthy no less interesting.

A wife whose advisers were considering such plans had to take care to ensure that the change in the nature of the property took place after marriage. The benevolent presumption would be of no value to her if that change occurred before marriage, as that which was at /

1. Walker, Prins.I, 579; but see 580.
2. Fr.I.706: and 703 ("...a considerable jealousy has been felt of the husband, because the change is one to his advantage, and to the wife's loss." Thus there arose the need for the rules.)

at the marriage moveable did, of course, remain moveable in the view of the law. Again, if the wife's moveables were utilised to purchase heritage, after the marriage, that heritage fell to the husband, because at the marriage, all moveable property became his, and, as has been seen, the criterion date for classification of property was the date of the marriage.

It is found as a thread running through the cases that subjects deemed heritable as between heir and executor were so classified as between husband and wife[1]. In respect of property regarded as moveable by the law of Scotland, it might be said with confidence that it was presumed to belong to the husband unless the jus mariti had been excluded[2]. However defective the law as regards social policy and sexual equality, its clarity was admirable. The Victorian lawyer would be astonished to hear the doubts expressed today as to the ownership of a washing-machine bought under hire-purchase or its equivalent in terms of the Consumer Credit Act, 1974, for which the deposit had been paid from the wife's personal funds, and the instalments partly by the husband's earnings, and partly by the wife's savings from the housekeeping, or to encounter problems such as those posed by Professor Kahn-Freund in the Josef Unger Memorial Lecture 1971, "Matrimonial Property: Where Do We Go From Here?"[3]

Admittedly, a stumbling-block was met with in relation to money, "which many lawyers have ranked as a fungible" and "which cannot be so easily identified as other moveables[4]." The general rule was that moveables, including or especially money, in the possession /

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1. There were exceptions to this rule (heritable bonds). See Fr.I.688 (general rule) and 723 (exception).
2. Fr.I.689: exclusion of jus mariti - infra. p.37 et seq.
3. See Chapter 7; see Clive & Wilson pp.294-315. Contrast Fr.I.689 et seq.
4. Fr.I.690.

possession of the spouses, belonged to the husband, unless the jus mariti had been excluded. However, Lord Fraser notes Lord Pitfour's opinion in Dods v. Wood[1] that the presumption was not "invincible" that, stante matrimonio, a married woman who bought items, bought them with her husband's money, and he refers also to the bankruptcy case of Boaz v. Loudon[2], in which money supplied to the wife of a bankrupt by her friends was held not to be attached by his jus mariti. Nevertheless, it remains difficult to understand how, in accordance with the common law rules, a wife could have amassed much money to her separate use and in her separate ownership, except by virtue of the terms of a marriage-contract, which themselves would regulate such matters. The defence was sustained that, since the husband was bankrupt, the money must have been advanced on the wife's credit alone and for her behoof, and did not fall under the jus mariti.

Generally, though, even where the character of the property was such as to be productive of difficulty, a wide yet detailed scheme of rules was available to help determine the problem[3].

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1. Hailes 12 (1766).
2. (1829) 7 S.555.
3. See Fr.I.687-741 ("Heritable and Moveable") where Lord Fraser while denying his intention "to introduce here a treatise that would have any pretensions to be complete, on the law of heritable and moveable", presents a formidable catalogue of rules and authorities, completing his review with the opinion that uncut trees do not fall to the husband, but 'thinnings' may fall under a destination of moveables. (Breadalbane's Trs. v. Pringle (1854) 16 D.359, where the price of thinnings was held to fall under the term, "the whole free proceeds", used in a trust-settlement). Cf. (or contrast) the widow in right of terce (liferent of one third of the husband's heritage) (before the Succession (Scotland) Act, 1964, which, by S.10(1), abolished terce and courtesy), who was entitled to coal, limestone, and timber from the estate for necessary domestic uses, but was not entitled to commence mineral workings for a profit.

It is important to note that a guard against the vindictive use by the husband of his wife's property was provided by the principle that the husband could effect no deed which injured his wife's interest and yet conveyed no benefit to himself, nor any deed which came into operation against her only at his death[1]. Within this far boundary, much damage might yet be done.

Paraphernalia

Did any value to the wife exist in the exceptions from the husband's ownership, of paraphernalia and peculium previously mentioned?

Fraser says[2] that the nature of paraphernalia cannot be understood properly without reference to Roman law. The term is taken from the Greek " παρα φερνη ", equivalent to the Latin "extra dotem", and meaning those things which are over and above the dowry, property distinct from the dowry (the Scots tocher) to which the wife is entitled and which remains her separate estate[3].

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1. G.C.H.Paton, p.100.
2. I,770.
3. Murray (p.2/3 footnote 3; see generally Murray, pp. 1-4) directs his attention to the confusing terminology of dowry and dower. The Roman "dos" signified the dowry, in Scotland the tocher (which he notes elsewhere - p.88 - is a word of Celtic origin), brought by the wife to the marriage. It seems that another word having the same meaning was "maritagium".

   Later, the word "dos" came to be understood as equivalent to the English word "dower", which at first was part of the bride-price paid to the father and "settled on the daughter", and subsequently it appears (Fr.I.259) was that sum given by the man to his future wife at the door of the church.

   In the Regiam Majestatem, the two meanings of 'Dos' are noted, it seems (see Murray, p.89, footnote 1 - Reg. Maj. ii, c.18)(the Roman meaning being the second meaning explained), and, as far as the English meaning is concerned, the amount of the sum is quantified/

He writes that, by Roman law, at marriage, all the property of the wife was divided into two portions, one part (the 'Dos' or Dowry) being given to the husband ad sustinenda onera matrimonii (and this might consist either of moveable or immoveable estate) and the other part, being the whole of the remainder, moveable or immoveable, fell to be called the paraphernal goods.

"Hac lege decernimus, ut vir in his rebus quas extra dotem mulier habet, quas Graeci parapherna dicunt, nullam uxore prohibente habeat communionem, nec aliquam ei necessitatem imponat[1]."

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quantified as "ane (reasonabill tierce)" (Fr.I.259, footnote (b) - Reg.Maj.ii, c.16, sec.1.).

Fraser notes the similarity of ancient Scots and English practice in this respect, and points to a statute of Alexander II (cap.22, sec.5) which provided ("for hir dowrie", the statute confusingly says, presumably meaning "for her 'Dos' (English meaning) or "for her dower") for a widow (married in church (Fr.I.259), but having received no "dowrie" at the church door) the third of all her husband's lands.

A connection has thus been drawn between Dower and Terce (see Murray, p.69, footnote 1; cf. Fr.I.259).

See also Paton, p.107, where is clearly described the historical development of the financial arrangements made between parties on marriage, and certain of the rules regarding the husband's "donatio ante nuptias" and "donatio propter nuptias" to the wife are set forth. It would appear that its function was similar to that of the English dower.

In short, it would appear from Murray's research that while the dowry was bestowed upon the husband by the wife or wife's father, the dower came to the wife from the husband through the medium of her father, and later, at the church door, directly from the husband.

1. Code V. XIV.8; quoted by Walton, p.219; see Chap.XXIV, pp.219-22, "Paraphernalia and Pin-Money."

Although Scots law adopted the word 'paraphernalia', there was no substantial equivalence between its meaning in Roman Law and its meaning in Scots law. It existed in our law in an attenuated form, and was held to encompass only those things pertaining to the wife personally, and to her "world" - her clothes, furniture in which to keep them, her jewels (provided that they were not family heirlooms[1]) and trinkets. Fraser divides property of this type into three categories - property sua natura paraphernal (as above described); property given before marriage by the man to the woman qua paraphernalia, though not in its intrinsic nature paraphernal (but requiring, it seems, "a close alliance to paraphernalia proper"); and property not paraphernal in character, but given qua such by husband to wife stante matrimonio[2].

Non-paraphernal goods made paraphernal by the gift of /

1. Earl of Leven v. Montgomery 1683, M.5803. Jewels of great value might have been intended to be worn by a wife when a wife, and then to go to the heir, although such intent might be unspoken, and therefore she could not claim them if she had, by her conduct (adultery) "defeated the marriage understanding of the parties". (Boyd v. Dundas (unrep.) 13 June, 1781. Lord Dreghorn's Sess. Papers vol.1111. No.62. Adv. Libr. Discussed and cited by Fr.I.773). See also the suggestion in Dicks v. Massie M.5821 (1695) that "a merchant or jeweller's wife having many watches or rings, etc. in her possession, ought not to make them her's or her executors, because they are in such cases designed for sale." Non-heirloom jewels were clearly paraphernal proper. See Mistress of Gray v. The Master M.5802 (1582), in which the Master was ordered to return gold chains and rings and other ornaments, "quae fuerunt de mundo muliebri".
2. See further Fr.I.770-775; Walton pp.219-221; Paton, pp.102-103; Murray, pp.11-13; In these passages, the authors trace the origins of some of the rules which were applied, as, for example, the German 'Morgengabe' (Morning Gift). See also Baron Hume's Lectures (1786-1822), Vol.1. Stair Society (5) pp. 105/106.

of the man to the woman before marriage took upon themselves the paraphernal nature only during the donor's life[1], and if the woman re-married, would not be so protected from the second husband's jus mariti unless he also made them over to her as paraphernal[2].

It will be noted that jewels (non-heirloom) acquired during marriage were included as paraphernalia, and of course these might be of great value. If the concept of paraphernalia had survived, a modern husband might think carefully before giving his wife valuable jewels if, in the event of dispute, they were not to be regarded judicially as investments for the future security of both spouses, but rather for the pleasure, and as the personal property, of one.

The rule was that those things which were in their intrinsic nature paraphernal could not be attached by husband or his creditors. They were the wife's alone.

The only exception to this was the case in which jewellery (by nature paraphernal) was a family heirloom and given to the wife to be worn by her only when she was wife. (see supra, p. 20).

These objects falling into the second category - resembling paraphernalia and given by man to woman before marriage - could be attached by the husband's creditors, but were not subject to revocation by the husband, as they had not been made statute matrimonio.

The third category, comprising articles given by husband to wife during marriage, and being not ex sua natura paraphernal - were attachable by creditors, and revocable /

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1. Dicks v. Massie, 1695, M.5821.
2. (Presumably also before marriage - "unless he shall in like manner appropriate them to her" (Ersk.1, 6, 15.)). In the wife's adultery, the paraphernalia would not pass to the lover, nor revert to the husband - Young v. Wright (1880) 7 R.760.

revocable by the husband as a donatio inter virum et uxorem. (Such donations between husband and wife were rendered irrevocable, as far as the husband, but not, in certain prescribed circumstances, as far as his creditors were concerned, by the Married Women's Property (Scotland) Act, 1920, S.5). Could stante matrimonio gifts of "non-family heirloom" jewellery (intrinsically paraphernal), though not subject to revocation as being not truly paraphernal, yet be revoked on the broader ground of the revocability of gifts inter conjuges before 1920[1]? In view of the rule importing the irrevocability of donations inter virum et uxorem unless made within a year and a day of the donor' sequestration[2], and of the less strong presumption against donation between spouses[3], there remains a risk to the husband in making such 'gifts', if his intention is investment rather than outright donation.

Fraser says that neither the creditors nor the husband could attach that which was ex sua natura paraphernal, even if given by the husband to the wife during marriage[4]. Thus, it is clear that paraphernal gifts were an exception to the general rule and never were subject to the claims of husband or creditors.

Walton (p.221) therefore wonders what effect the Act of 1920, S.5 may be said to have upon husband/wife gifts which were at common law irrevocable. Would gifts of jewellery within a year and a day of the donor's sequestration be safe from the claims of the donor's creditors?

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1. See generally, Fr.I.774, and authorities there cited.
2. M.W.P.(Sc.) Act, 1920 (10 & 11 Geo.5.c.64), S.5. But see discussion infra of interpretation difficulty.
3. See Clive & Wilson, Chapter 10, and in particular pp.290-291.
4. See generally, Fr.I.775, and authorities there cited.

This is an interesting question. It has been said (Walton, p.176) that the general effect of the 1920 Act was to supersede and render superfluous the previous (statute) law, while not expressly repealing it. Certainly to leave so potentially large a loophole cannot have been the Parliamentary intent. It is suggested that the peremptory tone of the enactment ("Donations inter virum et uxorem shall be irrevocable by the donors") together with its two provisos (one preserving the application of the old rules for pre-Act donations, for one year from the date of the Act, and the other allowing revocation by creditors of gifts made within a year and a day of the donor's sequestration) tend to indicate the advent of a new rule of universal application to all donations. (Nevertheless, the word "all" was not used, and perhaps significance could be found in that absence of what might have been a normal word to have used. Further, Walton's query in itself (at 1950) is interesting).

Parliament must be presumed to know the prior law, and to have known that certain donations were at common law irrevocable and not attachable by creditors. Creditors' rights were a subsidiary point, albeit important, and it is a pity that the Act did not deal specifically with creditors' rights quoad paraphernal gifts after 1920[1].

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1. The Act of 1920 in many ways was not well drafted, and this is not the only matter which it leaves in limbo. Others are the type of curatory of the husband of a married female minor (paternal or marital), the competence of the exclusion by ante-nuptial marriage-contract of the jus mariti and the general scope of power of the post-nuptial marriage-contract, and the lack of explanatory amplification of the wife's duties to support the household, or contribute to its support, where the husband is not indigent. Perhaps the last-mentioned is not a defect of grammatical construction or an error of omission, but an intentional omission, acceptable possibly in 1920, but less so, if at all, now. (See, upon these points, infra, pp. 109 - 112.

The Act has not melded the old and the new rules well here. Another aspect of its deficiencies is that the creditors' common law right to attach a non-paraphernal or quasi-paraphernal pre or post-marriage gift was unlimited. It is difficult to see from the terms of S.5 whether the S.5(a) retention of the old rules for a year is to signify only the rules regarding revocation. Were creditors' rights cut down immediately under S.5(b) or retained in their broader power for a year in relation to pre-Act donations under S.5(a)? Obviously the most important question, though, is whether the common law rule prohibiting attachment by creditors of the paraphernal subject of gift has or has not been left in being by the 1920 Act.

One of the leading cases on paraphernalia is Dicks v. Massie[1], which examines with a regard to detail which seems extraordinary to a more modern way of thinking, but which must have been necessary in the circumstances of the time, the classification of objects as paraphernal or not. Amidst quaint concessions (and restrictions), it is found that wedding presents made to the wife (other than by her husband and even if by her husband, according to Hume pp.105/106, if of ordinary household articles, not being paraphernal or similar to paraphernal in nature) unless strictly paraphernal in nature did not qualify as paraphernalia. It also seems remarkable to a later generation that Lord Deas[2] exercised his mind to decide whether a husband's use of his wife's wardrobe for three months was sufficient to alter the legal character of the wardrobe. His opinion was that it did not. Ludicrous as such attention to the minutiae of the law might seem, it cannot be denied that the parties to a happy marriage in that era were much more certain as to/

1. 1695, M.5821.
2. In Cameron v. McLean 1870, 13 S.L.R. 278.

to the ownership of the various household goods than their modern counterparts. Therein might lie no true advantage, however, for today division of household effects will be made in the event of marital upset[1], and a clear, but inequitable rule, is perhaps not a rule worthy of respect. Stante matrimonio, does the ownership of the matrimonial assets matter?[2]

Paraphernalia (such as it was) did not fall under the jus mariti, but Paton[3] points out that the wife had not full power over it, for, despite Craig's views and early eighteenth century decisions to the contrary, she could not dispose of it inter vivos without the husband's consent, though it did pass on her death to her legatees or next of kin. Walton[4] cites the case of Young v. Wright[5] as authority for the proposition that a wife could test on her paraphernalia. "Where the wife survives, the paraphernal goods continue her property, and cannot be attached by the husband's creditors. If the wife die first, they go to her children or her other next of kin[6]".

Peculium /

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1. See Chapter 4 (Aliment) and 5 (Divorce and Death).
2. See Chapter 7, where it is argued that rules concerning ownership of goods stante matrimonio, are important.
3. Paton, p.103.
   Fr.I.805/806 also states that the fact that items were paraphernal excluded the jus mariti, but not the jus administrationis, and here discussed the weight of the relevant authorities.
4. p. 221.
5. (1880) 7 R.760. The argument was concerned principally with the question whether the goods were paraphernal, and upon whether the mutual settlement under discussion was granted ob turpem causam. If turpis causa did not exist, and if the goods were paraphernal (both of which were accepted by the Bench) the wife's testamentary capacity over paraphernalia seems to have been allowed without question. Lord Deas, at p.763, says, "The aunt had a right to make that bequest independently altogether both of her husband and of her paramour. The jewels did not belong either to the husband or to the paramour."
6. Erskine, 1, 6, 41.

Peculium

Another exception which curbed the scope of the jus mariti was the peculium (a word the use of which was advocated by Fraser as a useful generic term to describe all the property of the wife excluded from her husband's control[1]) or (in its particular sense) "Lady's Gown", which had its basis in an old custom, fallen into desuetude (at least by the first (1846) edition of Fraser), that when a married woman consented to the sale by her husband of property over which she had a jointure (or in certain other circumstances - in leases, and in sales of cattle[2], or of land of which the wife was a tercer[3]), the purchaser gave her a present in money or goods, donated with the intention that she might buy therewith a gown, which, being clothing, was paraphernal: even though a gown was not purchased, that money so given was treated in the same way as the paraphernal goods for which it might have been exchanged.

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1. Fraser (I.791) remarks that "it would save considerable superfluity of language" if the term peculium were more widely adopted. He states that the paraphernalia of the Roman Law corresponded to the property from which the jus mariti was excluded in our law, and on the Continent (whence we derived our law of husband and wife), it was given the name of peculium.

   As to the use of the word peculium in its broader meaning, see Biggart v. City of Glasgow Bank (1879) 6 R.470, per L. Deas at p.474, where he quotes Erskine 1, 6, 25. With reference to that same case, Gondy (" A Treatise on the Law of Bankruptcy in Scotland" 4th edn. p.69) also uses peculium in that sense, to describe what was the wife's own property (there bequeathed to her by her father exclusive of the husband's jus mariti and jus administrationis.)
2. Fr.I.775; Paton, p.103.
3. Paton, p.103; Murray, p.13.
   "jointure":- property settled on a woman at marriage to be enjoyed after her husband's death. (Chambers' Twentieth Century Dictionary).

A certain amount of controversy surrounded the peculium, however, some authorities holding it to be paraphernal and hence outwith the grasp of the husband's creditors, and others being of the opinion that it was a donation made, stante matrimonio, inter virum et uxorem, and that thus it was revocable and able to be attached by those creditors. The former probably was the preferred view, though, the matter being of no current interest to him, Fraser does not commit himself upon the point[1]. Certainly its value to the wife was very small indeed if it was to be regarded merely as a donation by the husband quae morte confirmatur. As Fraser notes[2], the latter was the conclusion of Kilkerran's report of Douglas v. Kennedy[3]. Murray believes[4] the peculium, "like paraphernalia", was "not attachable by the husband's creditors."

Pin-Money

Pin-money, which was a term of English Law, meaning, in Walton's words[5], "pocket-money", was given sometimes to a wife for the purchase of clothes and ornaments, either before marriage or periodically throughout the marriage.

Walton remarks[6] that there seemed to be no Scots authority on the subject, and that the courts would probably follow English judicial thinking in ascertaining the effect of such an allowance. The question arose through the occasional use of the term in Scots marriage-contracts.

If any bills for goods of that nature were paid by the husband, he was entitled to deduct the price from such/

1. See generally Fr.I.775-776.
2. Ibid. 776.
3. M.6019 (1751).
4. p.14.
5. p.221.
6. pp.221-222.

such allowance. If the wife did not dress according to her (his) station, the husband might refuse to pay the pin-money, a rule which might help to preclude her from saving it or spending it to other, or better, effect. (Fraser[1] and Paton[2] use the words, "to apply to her separate expenditure", in describing pin-money, but it would seem that "her separate expenditure" must be read subject to this limitation.) The aim was that the wife, by the elegance of her appearance, should reflect her husband's generosity and position in life. ("...there is annexed to a wife's pin money an implied duty of applying it towards her personal dress, decoration, and ornament[3]").

Upon the death of the husband, the wife's claim for arrears was limited to one year's arrears (unless exceptionally[4]), and not even to that, or to anything, if she had not been in the habit of receiving pin-money during the course of the marriage. The money, if given, was earmarked for the wife's personal expenses and was not intended to accumulate; there was no question of any entitlement of her executors to claim arrears from the husband. In cases of doubt, recourse was had to English authority[5]. At common law, her claim was not to pin-money but to aliment. A right to pin-money came into being by specific stipulation and agreement in the marriage-contract.

These then were exceptions from the husband's jus mariti of particular types of property. There were other examples of exclusion of his powers, some arising from /

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1. I.776 (later qualified - see footnote 3 infra.).
2. p.103.
3. Fr.I.777. where he cites Jodrell v. J. 9 Beav.45; 15 L.J.Ch.17. However, the matter was subject to the agreement of the parties: see liberal English decisions, Fr. ibid.
4. Ridout v. Lewis (1738), 1 Atk.269 (Walton, p.222).
5. See, upon Pin-Money, Fr.I.776-778, and Walton, pp.221-2.

from changes in his status, and another arose from the declared nature, or function, of the property. This was the grant to the wife of an "alimentary" fund.

The Alimentary Provision

This derogation from the effective power of the jus mariti was to the effect that provisions truly alimentary in character were held not to fall to the husband jure mariti, but inhaerere ossibus, and to exclude, without need for express reference, the jus mariti and jus administrationis.[1]

It was not necessary that such a provision be bestowed upon the wife by a stranger: the husband himself could do so (or the wife herself), so long as the provision was made ante-nuptially[2]. Fraser notes[3] that too enthusiastic use of this device, resulting in an exorbitant provision, lost for the provision its alimentary nature and protection, quoad the excess, and that that excess was able to be attached by the husband's creditors. However, deeds by third parties, the terms of which were said not only to be alimentary, but to exclude the jus mariti, were generally[4] safe from attack, however generous their provisions, though that would not be the case where the fund was described merely as "alimentary". It was certainly the safe rule, and was at least highly desirable, and perhaps even necessary, to use the word "alimentary" in the grant, though there were opinions that the provision did not need so to be described on the face of the grant, because it was competent to prove its alimentary character aliunde[5]. The fund, to be protected, had to be intended for the wife's support and maintenance, and to be of a size commensurate with the spouses' standard of living.

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1. Fr.I.764 et seq.
2. I.765.
3. Ibid.
4. I.765-766.
5. I.767-768.

The deed conferring the benefit of the fund upon the woman would dictate her powers over it. The essence of an alimentary fund was that it should be non-assignable[1], but if the fee was in the wife, the restrictions on the use of the fund in its character as an alimentary fund would cease upon the dissolution of the marriage[2].

A beneficial rule was that, since the fund belonged to the wife exclusive of the jus mariti, savings therefrom were accorded the same protection from the husband as were savings from other property held exclusive of the jus mariti. The savings retained the alimentary character of the fund from which they sprang[3,4].

Husband's Liability For Wife's Ante-Nuptial Debts

Stante matrimonio, the wife was exempt from personal diligence for her ante-nuptial moveable debts, though such moveable estate as was excluded from the ambit of the jus mariti remained liable for such debts. Her liability to personal diligence arose once more upon the dissolution of the marriage. The husband was not responsible for the principal sums of her heritable debts /

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1. I.764.
2. Martin v. Bannatyne (1861) 23 D.705. Per L.J.Clerk Inglis, at p.709, "...while I am disposed to read this as an alimentary provision with a view to the marriage relations, the moment these came to an end that alimentary provision came to an end also, and the lady became, as before, absolute and unlimited fiar of her own fortune." (in the circumstances of the case) and, earlier at p.709, "it is possible that a fund may be alimentary for certain purposes, during a certain period, and in certain events, and yet lose its alimentary character in other circumstances." "This was her own fortune, which was settled for the purposes of the marriage, and as soon as these purposes were served or superseded, it was her own property as much as before."
3. Fr.I.769; 699.
4. See generally, on alimentary provisions, Fr.I. 764-769; see also Chapter 3, pp. 242-247.

debts, but would be liable for the interest thereon[1].

Ante-nuptial debts were those debts contracted before the proclamation of banns[2]. The husband was liable in full for his wife's ante-nuptial moveable debts, "debts such that if they had been due to her, they would have fallen under the jus mariti[3]", and these debts included the accounts for her marriage-clothes[4], liabilities for damages[5], and the aliment of the /

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1. Fr.I.587-88.
2. Ibid. 592.
3. Paton, p.101; Walton, p.211.
4. though Fraser (I.590-591) and Walton (p.211) note that such a debt has been regarded as the husband's own debt, in rem versum of him, and not as a debt in the nature of an ante-nuptial debt of the wife. Hence, though the husband's liability for his wife's ante-nuptial debt ceased upon the dissolution of the marriage by death (of the wife; on the death of the husband, his heirs were not liable, the wife herself being liable (Fr.I.594)) or divorce, "specially if the divorcement was deduced in default of the wife" (Fr.I.593 quoting Killoch v. Murray, 1612, M.5861.), his liability on that head continued after the dissolution of the marriage ...Alston v. Philip 1682, M.6007.
5. This cannot be stated without qualification. (Fr.I.591); Murray, p.22 (husband not liable for wife's delicts or quasi-delicts.) Fraser states that delicts or quasi-delicts of the wife committed during marriage did not bring upon the husband liability therefor, while reserving his opinion on the question of ante-nuptial wrongs. Hume (pp.136-138) also states that neither the husband (his person or estate) nor even the goods in communion, "which are in a manner his for the time" was liable for "the patrimonial consequences of these her delinquencies". "...a married woman is, and must be nearly - not absolutely - but nearly, in the same case as a single woman in regard to obligations arising ex delicto" (but see footnote 1, p.137). Her own estate, heritable or moveable (and even her person, if imprisonment was competent) was liable - so long, Hume suggests, citing More, Notes, xxii, § 25 as no interest of the husband was prejudiced; in addition, he cites an instance in which adjudication took place on the wife's heritage, but this was held in abeyance till dissolution of the marriage, in order that "the rents and profits which are in communion (though the estate itself is not) shall come free and entire into his pocket in the meantime". (Friend v. Skelton (1855) 17 D.548; Scott v. Baillie 19 Feb. 1790 M.6083, sub nom. Chalmers v. Douglas). Similarly if she had no separate estate, the debt arose and was exigible on the dissolution of the marriage.

the wife's indigent relations (numbering among those any illegitimate children of the wife[1].)

An important point was that, at common law, these liabilities consequential upon marriage arose ex lege, no matter how little property had passed to the husband by virtue of the marriage: indeed, even if none had passed, the duties came into being since the decision in Gordon v. Davidson[2] that, "though the Lords thought the defender's position very hard"; "yet, ita lex scripta est, the same was now turned into a fixed known custom and law".

The rule that the husband was liable stante matrimonio for his wife's ante-nuptial moveable debts whether he was lucratus by the marriage or not, and that his liability ceased upon dissolution of the marriage, must be understood subject to the qualification that if he had been lucratus by the marriage, any such debts outstanding upon the dissolution of the marriage were repayable by the husband, and this not so much upon the basis of the general rules described, but rather on the basis that "he should have no more of his wife's means, jure mariti, but what was free of debt...[3]"

Erskine[4] sets forth the exceptional circumstances in which the husband would be liable for these debts after dissolution of the marriage, one being the case where diligence had been completed by that date against his estate; and, second, if the wife's creditors had been unable to obtain payment after her death, out of her share of the society goods, a liability "not indeed in solidum - but in quantum lucratus est, in so far as he hath enriched himself, or been a gainer, by the marriage /

1. Murray, p.22; Walton, p.211; Paton, p.101.
2. M.5789 (1708).
3. Fr.I.599 quoting Cunningham v. Dalmahoy, M.5870. (1662). see also 593-4.
4. 1, 6, 17.

marriage; "Equity would not allow the husband to profit at the expense of the creditors. Only what was regarded as over and above a moderate tocher (judged according to the rank and fortune of the parties) was counted as lucrum[1]. However, even in that case, as his liability was still only subsidiarie, no action could lie against him, as having been lucratus by the marriage, by his deceased wife's creditors, till the wife's representatives, the primary debtors, were first discussed.

Stair, Bankton and Erskine affirmed[2] that these rules upon the husband's liability proceeded from that phenomenon, elusive to be grasped (or proved), of the communio bonorum, but other writers considered that it flowed from the fact of the personal subjection of the wife. It is significant that, even if the husband denuded himself of his twin rights, he still could not render the wife's person subject to diligence. Could part of the rationale have been the protection of creditors? "By marrying her he withdraws her person from diligence, and it is only reasonable that he should substitute his own[3]". Among the successful pleadings for the pursuer in Gordon v. Davidson, supra, was the argument:-

"Esto there was some hardship in a husband's being liable for his wife's debts, public utility must overrule it, for preventing embezzlement in prejudice of lawful creditors, and sopiting pleas betwixt man and wife;" -- "The husband covers the wife from personal execution, and therefore himself should answer for her." Further, it was said, "Again, man and wife are understood to have entered /

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1. An ordinary tocher (ad sustinenda onera (matrimonii)) is not lucrum - Burnet v. Lepers M.5865 (1665).
2. 1, 4, 17, 5; 1, 5, 92; 1, 6, 16, respectively; see cited at Fr.I.586, fn.(a).
3. Fr.I.592.

entered in a society of well and woe, loss and gain, which implies an obligement to relieve one another of their debts and burdens; and if the husband has right jure mariti to his wife's moveables he must likewise be liable to her debts, according to the rule, cujus commodum, ejus et incommodum."

In Fountainhall's report of the case, is found - "the reason is, the husband by his marriage has right to all the wife's moveable goods, ergo by analogy of law and paritate rationis, he must pay all her moveable debts; and, a contrario sensu, as he has no right jure mariti to her heritable sums, so he cannot be subjected to her heritable debt, though he is free of both by the dissolution of the marriage." - "the laws of the sovereign courts of Europe have now fixed on this, that the husband becomes personally liable for all the wife's moveable debts, Gudelin de jure novissimo, et les coutumes de Paris, p.344."

Paton comments[1] on the possible grounds of the wife's general immunity, (the exceptions being decrees ad factum praestandum and punishment for crime) noting that sometimes it was attributed to the possession by the husband of his wife's moveable property, and sometimes to "the super-eminent nature of the contract and state of marriage - propter fragilitatem sexus, according to Stair[2]." In his capacity as editor of Baron Hume's Lectures, Paton[3] writes that the inability of a married woman to contract debts was a disability, and not a privilege or protection. "It arose from absolute disability to bind herself personally with or without consent and not from any privilege." Hume states[4] that /

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1. p.101.
2. Stair, 1, 4, 22.
3. Baron Hume's Lectures, Stair Society, supra, p.129, footnote 6, citing Fr.I.520-2; Ersk. 1, 6, 19, and directing attention to Biggart v. City of Glasgow Bank (1879), 6 R.470.
4. Op.cit. pp.129/130.

that the disability was intended "to protect her from the influence and importunity of the husband, to keep her free of the bustle and business of the world, which is not her sphere." According to Erskine[1], "her person, while she is vestita viro, is free from all execution upon debts contracted by herself; which, by her coverture, she becomes disabled to pay." The passage goes on to say that the husband, "who is not the proper debtor," will be liable to personal diligence at the instance of the wife's creditors, though the wife might be compelled to perform acts (such as to enter the heirs of her vassals) which she alone could perform.

It has been seen that the husband was not in general liable for his wife's heritable debts, though he was liable for the interest thereon[2]. However, exceptions to that rule existed in that the husband was liable (for heritable debts) quantum lucratus by the marriage, quoad the surplus of her estate which he received, and which was not used up in meeting the wife's personal debts, "for equity will not allow him to be enriched with another's loss, by cutting off from the wife's creditors their only fund of payment[3]", and, moreover, the husband would be liable where he received a ("lump") conveyance of all his wife's property per aversionem. "In other words, a person who gets a universal right to all the estates belonging to another, per aversionem, really acquires right to no more than to that surplus which remains after payment of all debts[4]."

Thus, /

1. 1, 6, 19.
2. Fr.I.587-88 supra; Osborn v. Young M.5785 (1696).
3. Fr.I.597. (The wife's heritage had first to be looked to for payment of the debt; in addition, the result of various authorities was, as has been noted, that the husband would not be considered lucratus, unless the tocher which he received was sizeable in proportion to "the burden of the marriage." ibid. 598. Burnet v. Lepers supra.)
4. Op.cit. 599.

Thus, where the husband received all of his wife's property, he undertook liability for all of her ante-nuptial debts, heritable and moveable, and his liability did not cease upon dissolution of the marriage.

It is important to remember, however, that in other cases where there was no 'lump' conveyance, the wife's separate (moveable)estate (for the principal sums of heritable debt the husband was not liable), such as it was, was always primarily liable even during the subsistence of the marriage. The liability of the husband was subsidiarie, and he had a right of relief against his wife's separate estate - nor, during marriage, could his claim prescribe[1.2].

Although it is not desirable to anticipate the statutes to come, as this might tend to distort the narrative of the state of the law before 1855, and of the awakenings of male conscience, and female indignation, it is of interest to note that under the terms of the Married Women's Property (Scotland) Act, 1877[3], s.4, the liability of the husband for his wife's ante-nuptial debts was limited, in the case of marriages celebrated on or after 1st January, 1878 (and now, by the passage of time, therefore, in all marriages) to the value of property received by him from, through or in right of her at, before or after marriage. Clive and Wilson note[4] that a wife is not liable for her husband's ante-nuptial debts.

The capacity of a married woman at common law to bind herself in contract, and to incur debts, are discussed briefly above. It must be remembered that, in the absence of private paction, her opportunity to do so was not great. With regard to her /

1. Gordon v. Maitland. M.11, 161 (1757).
2. See generally, on this subject, Fr.I.586-603; Paton, p.101 and p.105; Walton, pp.210-212; Murray, p.22.
3. 40 and 41 vict. c. 29. See Clive and Wilson, pp.265-66.
4. Op.cit. p.266.

her heritable estate, though the fee remained in her, she required her husband's consent, exercised under his jus administrationis, to any transaction concerning it. Naturally her own heritage, during as before marriage, was liable to meet any obligation so incurred[1]. With regard to moveables, the topic may be seen in four aspects - the first, that since much of her moveable estate fell to her husband jure mariti, and since he had full rights of property therein, so much the less was her liability and her power; second, in certain exceptional circumstances arising by reason of the perhaps temporary absence or change of status in the husband, she received power to transact, and undertook consequent liability in her (perhaps temporarily) separate estate;[2] third, the wife might bind her husband for necessaries reasonably suitable to their way of life, in her role as praepesita rebus domesticis[3]; and fourth, where both rights of her husband were excluded, her capacity to contract was as femme sole.

Exclusion of the Operation of the Jus Mariti

The view was taken originally that the jus mariti was so inextricably a part of the husband's position that it could not be renounced by him. The renunciation itself fell under the jus mariti, it was thought, "and so disappeared, according to the brocard vinco vincentem vinco te[4]." Any reservation, or renunciation reverted inevitably to him, "as water thrown upon an higher ground doth ever return[5]." To exclude the husband's right,/

1. Hume, pp.132-133; during his discourse, he cites the case of Elsis v. Keith (1665) M.5987, "where the wife's heritable bond was found null as to the obligation to pay, and good as to the warrant to infeft." Reference, inter alia, to Stair 1, 4, 16 and Fraser I.809-810, and cases there cited.
2. See infra, p. 47 ; Baron Hume's Lectures, pp.131-144.
3. Cf. Chapter 4 , pp. 438-439 and Chapter 3, p. 227 et seq.
4. Murray, p.19.
5. Stair, 1, 4, 9.

right, the wife required to convey, before marriage, the subjects which otherwise would fall under the jus mariti, to a third party[1].

However, in 1730, in the case of Walker v. Her Husband's Creditors[2], it was decided that it was competent for a husband to renounce his jus mariti. Thus, an outdated situation was improved, but Fraser notes[3] that, strangely, even before that date, the old rule does not seem always to have been upheld by the decisions. Of the earlier writers, only Dirleton[4] had thought renunciation competent, and Mackenzie and Stair[5] had not countenanced such a view. Despite the decisions of Collington v. C.[6] - the rubric of which, as Fraser notes, ran, "A husband may renounce his jus mariti, in so far as relates to his interest in his wife's moveables," and in which a distinction was drawn between the right of property, which the more enlightened considered not obligatory upon an unwilling and liberal husband, and the administrative right of the husband to rule his wife and family and their affairs, which, in 1667, and for many years thereafter (till Dalrymple's case, and beyond, so far as the role of princeps familiae was concerned) was deemed right and proper, seemly and suitable, in all cases, a burden and privilege always to be shouldered and never to be cast off - and Greigs v. Wemyss[7], there had been controversy and conflicting decisions, and Walker's case was the more welcome, therefore /

1. The intervention of a third party was necessary: Fr.I.781. See e.g. Standard Property Investment Co. v. Cowe etc. (1877) 4 R.695, per L. Gifford at p.703. Murray v. Dalrymple (or Dalrymple v. Lockhart) infra.
2. M. 5841; see also Dalrymple v. Lockhart M.5842 (1745) - ius administrationis.
3. Fr.I. 781-5.
4. Dirl. v. Jus Mariti.
5. Mackenzie, Institutes of the Law of Scotland 1, 6, 50; Stair, 1, 4, 9.
6. M. 5828 (1667); see Fr.I.782.
7. M. 5832 (1670).

therefore.

Thus, by 1730, the "refined subtlety" of Stair's argument that "the very right of the reservation" (that is, by the husband, or the spouses jointly, to the wife) "becomes the husband's jure mariti, and makes it elusory and ineffectual, as always running back upon the husband himself; as water thrown upon an higher ground doth ever return", which had, as its basis, the view that a wife, by reason of her sex and nature, which for some unexplained reason did not affect the single woman or the widow, was "absolutely incapable of holding any right of property, independent of her husband", and which had "regulated a series of decisions" had been ousted[1]. Thereafter it was accepted that a husband might renounce his jus mariti as to the whole or part of his wife's moveables and as to acquisita or acquirenda or both.

No voces signatae were necessary, as long as the intention to exclude the operation of the jus mariti emerged clearly[2]. Fraser notes[3] that, despite Bell's views to the contrary[4], the use of the phrase "exclusive of the jus mariti" was not necessary, though, in doubt, the presumption was against the exclusion of the husband's right. Thus, he advocates[5] that, in the case of furniture, an inventory be made up of those pieces which are the wife's exclusive of the jus mariti. This expedient, as Fraser himself demonstrates by the citation of certain instances, was not always successful[6]. He notes[7] the distinction between ante-nuptial and post-nuptial exclusions of the jus mariti. In the latter case /

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1. Fr.I.781, incorporating the famous quotation from Stair, 1, 4, 9.
2. Dick v. McKenzie (or Wilson's Trs. v. W's Factor) (1868) 7 Macph. 136.
3. I.784.
4. Prin. 1562.
5. I.790.
6. I.790; 793-6.
7. I.793; see also Paton, p.102.

case, presumably because of the danger of fraud upon creditors, the husband could not exclude his jus mariti without "making a reasonable provision, when solvent, to the wife, to come into effect after his death; quoad the excess above this, it is revocable as a donation[1]." Subsequently in this passage[2], the inability of the husband so to transfer property of his, stante matrimonio, to his wife, on certain narratives ("by declaring it to be alimentary; or exempt from the jus mariti; or not assignable or attachable by creditors[3]") is noted. The conclusion to be drawn seems to be that, by ante-nuptial contract, the wife's own property might be secured to her, but that conveyances by husband to wife of the husband's furniture even before marriage[4], and certainly after /

1. See the important and interesting case of Shearer v. Christie (1842) 5 D.141, narrated and discussed by Fraser at 793-795; and at 790.
2. I.796.
3. and authorities cited footnote (a) p.796.
4. Brown v. Fleming (1850) 13 D.373 (ante-nuptial contract, but no effective transference of property, even though an inventory had been endorsed on the marriage-contract. L.J.C.Hope at p.375 refused to differentiate title from possession because the two were inseparable where the public was concerned, upon subsequent production by the spouses of a latent deed. Even on the assumption (which his Lordship doubted on the basis of some of the clauses of the deed) that a de praesenti conveyance to the wife was intended, this could not be achieved where the husband outwardly remained as much a master of his property as he was before. Such a purported conveyance could not bar the claims of creditors or result in a preference for the claim of the wife over that of the trustee in sequestration for the creditors.

   The case highlights the particular difficulties of proof of ownership of furniture and like articles having by their nature no documentary title, and of the hardship arising to spouse or creditor because of the necessarily "artificial" element in inter-spouse transfers where each continues to use the object of transfer, which, in addition, moves not at all from its former position. Would public notice of change of ownership (if such were possible) have altered the decision? Campbell v. Stewart (1848) 10 D.1280: from the terms of the marriage-contract, it could be seen that no right of fee resided in the wife.

after marriage, "the possession being[1] unchanged," could not prevail against the creditors' demands. Fraser already had emphasised that ante-nuptial alimentary provisions by the husband, notwithstanding that the property in question passed out of the hands of the donor, might be reduced by his creditors quoad excessum[2].

Probably the significance of these rules lies more in the greater weight given to creditors' claims and security (which it seems the courts were always jealous to protect, mindful, possibly rightly, of the opportunities to defraud creditors which the property rules afforded: the artificiality of the husband - wife - property relation, then as now, could result in unfairness to spouse or creditor and as permission was given for the avoidance of the substantive rules by private paction, so the likelihood of confusion increased) than in the spouses' interests or property relations inter se.

Exclusion of the jus mariti need not be express. Indeed, the decision in Smith v. Smith's Trustees[3] made it clear that so flimsy a clue to the husband's true intent as an entry in his private cash-book was adequate to justify retention by a wife of what was thus proved to be her own property. An inference, from facts and circumstances, therefore, if sufficiently well-founded was sometimes taken. (In Smith, however, the husband had maintained a meticulous record of all sums due by him to his wife (whom he had married without a marriage-contract) and to various members of his family. The principal problem was that since he himself kept the cash-book, there had been no delivery to the wife. Was there sufficient transfer to constitute donation? Lord Shand[4] states that, had the wife had the book in her own /

1. I, 795.
2. See supra, p. 29.
3. (1894) 12 R. 186.
4. at p. 189.

own possession, "there could have been no question between the parties. The note at the beginning of the book is a distinct acknowledgement of debt, and if she had had the book she might have produced it as conclusive evidence of her right. No doubt that debt arises by way of donation on the part of the husband, but it is very natural that the husband should take this way of renouncing his jus mariti and setting aside his wife's estate for her own behoof." In the result, it was decided that the deed must be held as delivered, because the husband was the natural and proper custodier of his wife's deeds. The facts of the family situation render difficult compliance with, or proof of compliance with, requirements as to delivery). Further, it was competent for a stranger to the marriage to exclude the operation of the husband's jus mariti, when binding himself to repay money to the wife, or in a conveyance to her of property.

For a little time, doubt existed as to whether renunciations of the jus mariti were effectual quoad creditors (especially with regard to acquirenda of the wife[1]), it being argued that a creditor was entitled to rely on the marriage having conferred upon the husband the rights in the normal case endowed upon him by the law, and that a creditor might justifiably presume that there had been no derogation therefrom, in the same way, perhaps, that the public may presume that, in matters concerning the ordinary administration of a company (its "indoor management") "omnia rite ac solemniter acta". ("the rule in Turquand's case" - Royal British Bank v. Turquand[2].)

Whatever may have been the merits of this argument in a particular situation, it soon became clear that the renunciation /

1. Fr.I, 791.
2. (1856) 6 E. & B. 327.

renunciation or exclusion was effectual against creditors (both as regards acquisita and acquirenda) and that without intimation. "No party has a right to assume that a wife was married without a marriage-contract, and that all her property must have passed to her husband by operation of law. Parties interested must inquire what were the actual conditions of the marriage." (per L.O.Mackenzie in Rollo v. Ramsay[1].) His Lordship in that case also stated, "As to intimation - if the jus mariti had been expressly excluded, intimation of such exclusion never is held necessary, even to bar the debtors of the wife from paying to the husband, far less to exclude the creditors of the husband from taking the wife's separate estate." In Greenhill v. Ford[2], the reporter notes - "The court were unanimously of opinion, that the provisions of the marriage-contract amounted to an exclusion of the jus mariti as to the property of the acquirenda;"

Exclusion of Jus Mariti by reason of a Change in Status of Husband.

Moreover, the jus mariti might be excluded automatically and involuntarily by reason of a change in the status of the husband. This is interesting, in view of the strength of the jus mariti where it had not been excluded by agreement or third party deed. "So omnipotent are the husband's powers regarded by the law, and so strongly founded is the jus mariti, that it would not be excluded, although the wife should be induced to enter into the marriage, by fraudulent representations as to the husband's character or his circumstances[3]." In /

1. (1832) 11 S. 132. The L.O.'s judgment is printed as a note in the report, and part of it is quoted by Murray at p. 21.
2. (1824) 3 S. 169.
3. Fr.I, 778, where is cited Lisk v. L. M. 5865 and 5867 (1785).

In that case, a husband's creditors, and even the husband himself, profiting from his own "crime" (a result surely contradictory of other principles of law elsewhere so proudly held[1]) might have all the rights which any husband, or his creditor, might enjoy over the wife's property.

However, the presumption that all the wife's moveables automatically belonged to the husband by virtue of the silent assignation jure mariti, which has been seen to have been established not to be irrebuttable if there was reasonable evidence to indicate a husband's renunciation of his rights over them[2], was shown also to be able to be overcome in the case of the bankruptcy of the husband[3].

On the other hand, a voluntary separation did not affect the jus mariti, and acquirenda of the wife after the separation still fell to the husband jure mariti. Indeed, even a judicial separation did not denude the husband of his marital rights in respect of his wife's property. All her moveable property fell to him as if they cohabited still[4]. The rule was based on the logical grounds that, to an innocent third party, a creditor, or the world at large, voluntary and judicial separation look the same. According to Hunter[5], actions and deeds required to be judged by the necessity or expediency of acting when the consent of the husband could not be obtained, not by the tenor of a decree which did not, presumptione juris et de jure, involve a dissolution of the husband's curatorial power.

Scots /

1. Cf. e.g. In re Cora Crippen [1911] P.108 (It is not suggested that the crime against the wife was comparable)
2. See Smith v. Smith's Trs., supra.
3. Boaz v. Loudon (1829) 7 S.555.
4. The position was changed by the Conjugal Rights (Sc.) Amendment Act, 1861, s.6 (infra, pp. 76-77, and see also s.5).
5. Hunter, Landlord and Tenant, 3rd edn. I, 158; the passage is concerned mainly with the husband's right of administration over his wife's heritable property.

Scots law here was found to be in communion with English, as can be seen from two English cases[1], from which it is clear that, though the husband and wife be divorced a mensa et thoro (being equivalent to a Scottish judicial separation, no true divorce being found in England till 1857[2]), nevertheless if a legacy was bequeathed to the wife, the husband alone could discharge it; "consequently to him alone it is payable," and the wife had to rely on her husband's goodwill and conscience for its delivery to her.

It should be noted that there was support for a different view from that taken by Hunter[3], and this was that judicial separation operated as a stripping from the husband of his curatorial power, and that the dispensing with his consent was attributable to "something more than mere actual non-cohabitation of the spouses, and consequent difficulty of obtaining the husband's consent[4]."

Generally, said Fraser[5], it was felt that a wife in such a case could act without her husband's consent, yet Pothier's view was that her deeds must be confined to acts of simple administration or management and that she was not entitled to alienate or burden her property /

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1. Stephens v. Totty. Eliz. 908 & Moore, 665, & Noy, 45; Green v. Otte 1 Sim. and Stu. 250, cited by Fraser in the 1846 edition but not in that of 1876.
2. Matrimonial Causes Act, 1857. Prior to that Act, divorce a vinculo matrimonii could be obtained in England only by the prohibitively expensive means of a Private Act of Parliament. See "A Century of Family Law 1857-1957" (editors: R.H.Graveson and F.R.Crane). Chapter 13, "Matrimonial Relief in English Law", C.E.P. Davies, especially pp.315-317.
3. i.e. that the husband's consent remained necessary for the wife's acts of administration of her property after judicial separation. See supra, fn.5, p.44.
4. Fr.I, 431 (1st edn.).
5. I, 431-432 (1st edn.).

property with debt not rendered necessary for her aliment. Lord Fraser recommended as the best answer that, as this doubt existed, application should be made to the court to authorise a curator to concur with the wife in granting leases, uplifting bonds, or in the general management of her separate estate.

A differentiation, therefore, was made at this point between the incidents of the husband's administrative and curatorial power, and the (non) effect upon property falling under the jus mariti of a decree of judicial separation. The matter was resolved by the 1861 Act, s.6 (where the wife obtained the decree of separation: where the husband was the successful pursuer, his rights over her property remained) and, by s.5, the same effect attended the grant to a wife of a Property Protection Order.

Where there occurred the civil death of the husband (for example, by outlawry or condemnation to transportation), his curatorial power was annihilated[1], but the position with regard to his right of property over his wife's moveables was less clear, although a wife might have been forgiven for viewing the distinction with a cynical eye. In the case of outlawry, the punishment (in the pocket) was forfeiture of all the moveables of the husband to the Crown under the single escheat. Thus, the husband's right of jus mariti also would be excluded during his outlawry, and there was punishment for the wife too, as her moveable property, and the rents and profits thereof, would pass, with his property, to the Crown.

This consequence followed upon every case where the single escheat came into effect upon conviction[2], but /

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1. "Annihilated" is used by Fraser I, 780, in relation to outlawry, penal servitude or condemnation to capital punishment but perhaps "suspended" is the more appropriate word, at least in cases in which the husband could regain his lost status, for then the ius administrationis arose once more; see infra, p. 47. More's opinion.
2. Examples: 2 Hume, 473. (Fr.I.780).

but there was doubt as to the outcome (as regards the jus mariti) where the husband was convicted of a crime upon which the single escheat did not fall[1]. Further, the question arose whether, if the crime were not so serious as to import loss of status and civil death, would the wife, in her husband's absence (in prison), be entitled to act, and would he, on his return, be bound to recognise acts done during that period which affected his patrimonial interests?

Once again, resort could be had to the expedient of having the court authorise the wife's act or the appointment of a curator to act in the interim, but Fraser favoured the opinion of Professor More that, in the case of banishment (at least) , the husband's curatorial power was in abeyance for that period, and once returned, he took up the reins of gubernator again, but that he could not impugn the validity of any acts done by his wife during his absence[2]. It does appear that when the husband returned from prison (and if prison, why not upon lawful return from exile?) he took up the reins, which he might be said to have let slip in the interim because of practical difficulties, and the property itself. That would seem to be the natural private result of his public re-instatement.

If the husband became insane, the right of administration terminated[3].

The effect of an exclusion or renunciation of the jus mariti was that the wife's moveable estate became, or remained, her own property, but, unless there was also exclusion or renunciation of the husband's jus administrationis, the victory was no true victory for the wife, nor could she be said to enjoy the essentials of /

1. Fr. I, 780-781.
2. See generally Fr.I. 818-819.
3. Fr.I, 819, 548.

of ownership. The twin rights of the husband were distinct from each other and severable, though in the case of moveable property over which the ius mariti subsisted, the ius administrationis could not be seen[1]. Thus, unless both rights were removed by agreement, the wife was not unfettered in her control of what was her own, her husband's consent being necessary to any act of administration, as much with regard to her moveable property as it always had been with regard to her heritage[2].

Jus Mariti: Jus Administrationis

The jus mariti was a right of property: the jus administrationis, as its name suggests, was a right of administration of the wife's estate, both heritable and moveable. The two rights were distinct, though the terms were confused on occasion[3]. As to the latter, Fountainhall's general description (used in narrating the reclaimer's argument) - that she came under her husband's "headship and gubernative administration" - is convenient and has been quoted often[4].

The /

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1. Fr.I, 797; infra, p.
2. See generally, upon exclusion of the jus mariti, by reason of a change of status in the husband, Fr.I.778-781.
3. This point is taken by Fraser at I, 676-77; see also Paton, p.100; Hunter, Landlord and Tenant, I,157, where he cites as an illustration of the older attitude to the terms, Stair, 1, 4, 9, and Brodie's note thereon, (footnote a, p.30, 4th edn.).
4. See e.g. Murray, p.7; Paton, p.99. The phrase is taken from the case of Gordon v. Campbell, Decs.ii, p.220. It is interesting that Fountainhall, in narrating the reclaimer's argument, used also the English expression, "femme coverte" (see Murray, p.4, fn.4), and the expression "vestita viro". The substance of the case concerned the liability of a husband to meet the heritable debts of his wife, it being decided here that the basis of the husband's liability for the wife's debts lay in the notion of communion of property, not simply in the substitution of the husband for the wife by reason of the headship which he assumed on marriage. Thus, the husband was held liable only for the annual rents, not for the principal sums, of his wife's heritable debts, such a situation corresponding to the rights under the "communion", so termed.

The jus administrationis quoad moveable property arose only where the jus mariti had been excluded, since if there had been no such exclusion the husband administered that part of his wife's "property" as proprietor thereof. "When the jus mariti has been barred, he manages the property as caput et princeps familiae, in virtue of his right of administration. For, notwithstanding, that the jus mariti be expressly renounced or debarred, this does not exclude the separate and distinct right of administration[1]."

Thus, every act of administration which concerned the wife's separate estate (in this context, heritage was principally concerned: such was the nature of paraphernalia, little administration thereof was necessary, and many wives might never enjoy peculium or pin-money, the uses to which the latter at least might be put being circumscribed in any event) required the husband's consent, though "he was bound to exercise his powers in her interests and could not arbitrarily refuse his consent[2]."

Murray says[3] that the wife's civil capacity was suspended by the marriage and that she became practically a minor, not, he adds, by reason of want of a disposing mind, as in the case of a minor, but from want of disposing power, a method of expressing the situation which he says is English, but is equally applicable to Scotland./

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1. Fr.I, 797.
2. Paton, p.104.
3. p.15, where the author cites Lush, Married Women's Rights and Liabilities (London, 1867), p.26, and Fraser, I, 517 (where Lord Fraser states that the husband's office is "certainly ... sui generis" (partaking of the character of both tutor and curator)) and 520; see also Fr.I, 796 ("The right is one of a peculiar nature" ... and springs not from defect of capacity, but because "there is a necessity, from the character of the relationship, that the administration, management, and control should be in the hands of one of the two parties."

Scotland.

Hence, it was necessary for a wife to obtain her husband's consent before "suing debtors, drawing the rents of her heritage, granting discharges, executing dispositions. In short, every act of management of that part of the wife's property, not carried to himself, in virtue of his jus mariti, must be sanctioned with his concurrence[1]." She could not sue or be sued in respect of her separate estate without the addition of her husband, "to fortifie, assist, and authorize hir[2]." It can be seen that little scope was left to the wife for the exercise of initiative or for independent action in matters concerning her own property.

The husband's consent was necessary, but it was not always sufficient to bar reduction. It did not operate to remedy (other) defects. As happened in Gibson v. Scoon[3], the plea of enorm lesion would obtain, in suitable circumstances, even though the husband was a consenter to the deed, and the wife would be entitled to have the contract reduced within the quadriennium utile.

If the husband was unable or unwilling to give his consent, in litigation by his wife or to defend in an action against her, the Court would appoint a curator[4]. Murray points out[5] that the authority in law of the husband /

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1. Fr.I, 797.
2. Balfour, Practicks, p.93.
3. 6 June, 1809, F.C.
4. See Mackenzie v. M's Trs. (1878) 5 R.1027, in which the minor husband, whose domicile was English, sued with his major wife, as a consenter to the action and for his own interest, and in which the Court, before disposing of the case, appointed a curator ad litem, to consider the proceedings (and the terms of a proposed deed) in order to ensure that no prejudice had been done to the wife, and that all had been "properly conducted in her interest."
5. pp. 15/16.

husband was appendant to the relation of husband and wife and not to the person. In the absence of private agreement, the rule did not bend to meet the circumstances of a particular case. His example is that a mature woman aged fifty, on marrying a callow lad of twenty one, would come under his curatorial wing ipso jure and lost immediately her right to deal unfettered with her property. If her husband had been minor, his own curator would have had to concur in his concurrence with any proposed act of administration concerning her estate[1].

Where the jus mariti was excluded, but the right of administration was not, although every act of management by the wife had to be performed with the consent of her husband, nevertheless she was "entitled to insist that all her property (shall) be applied for her own behoof[2]." It is clear that, notwithstanding the exclusion of the jus mariti, he retained the chief management of her estate, and therefore "her security against his improvidence, or his misfortune, was not complete[3]", but Fraser notes that she still had a remedy. Since her husband was her manager, she might require him to find caution for his intromissions and counsel, which would provide a safeguard for her if any maladministration on his part occurred.

However, the husband could only consent, and could do no more. He could not initiate an action, or sue without her consent[4]. Earlier judicial opinion was that generally husband's consent, if given only after the event, came too late, but this view, in the eighteenth century /

1. Fr.I, 517.
2. Fr.I, 797.
3. Fr.I, 798.
4. Paton, p.104; (see, for an early example of the rule, Melvill v. Dumbar 1566, M.5993).

century, was reversed[1].

In this sphere, as in others, a choice had to be made between an onerous and innocent third party, and a person who granted or consented to a deed in ignorance or through fear, and until 1841, a wife who could establish that a deed had been extorted from her by her husband, vi et metu, could have the deed reduced.

Judicial Ratification

Thereafter an expedient, first seen in Glen v. Danielston[2], and seized upon immediately by the legislature[3], was evolved, this being the device that the wife ratify the deed (being a deed relating to her own estate granted by her in favour of a third party) in the absence of her husband (vital) before a judge (usually, latterly at any rate, a Justice of the Peace). The ratification formed a security to the third party, which, if adopted by him, safeguarded his position, and, if not adopted by him, had the result of allowing her to have the deed reduced if she could establish that force and fear had been imposed on her by her husband. (Erskine on the other hand,(1, 6, 34)seems to consider that after ratification, and extract thereof, the wife is "for ever cut off from her right of impeaching the deed ratified" even though she has the clearest evidence of having been compelled to grant it). In other words, he does not take Fraser's "adoption" distinction. The lack of judicial ratification per se did not render the deed null, though, as /

1. ibid. It is not quite clear from Paton's writing whether he intends this comment to relate to the situation where both rights of the husband remained, or only the jus mariti but the strong inference of the passage is that he means the statement to describe the general position (both rights intact). He remarks that the husband could dispense with the wife's consent only where she refused it in connection with property falling under the jus mariti.
2. 6 Mar. 1841. cited Fr.I, 820. See generally Fr.I, 819-825.
3. Act 1841, c.83.

as Fraser comments, the lack would be a useful weapon in the wife's armoury, if important interests of hers had been compromised by the deed[1].

It was found that the leaning was in favour of the wife, partly because of "the favours bestowed on the sex", and partly because "the law presumes that deeds manifestly prejudicial have been involuntary" (and Fraser notes that Bell's opinion was that want of ratification raised a presumption that the deeds had been executed under the husband's influence[2]).

Adopted(?) ratification barred for ever any plea by the wife, no matter how strong and convincing her testimony, that she acted or gave her consent under duress of the husband, and that although the husband had profited by the transaction[3]. What then was the effect of a ratification itself purportedly extorted?

Erskine maintains, persuasively[4], that the law will not accept such a ratification, but an offer to prove that a wife ratified ex vi aut metu of the husband was refused in the case of Grant v. -[5], (1642), and the tenor of Fraser's discussion[6] of authority is against Erskine's view. Adopted(?) ratification did not bar the wife from attacking the validity of the principal deed on other grounds such as fraud or intimidation /

1. Smith or Mayne v. McKeand, 4 June 1835, 7 Jurist, 397; cited by Fraser I, 821.
2. Prin. 1615; Fraser ibid.
3. Ersk. 1, 6, 35.
4. Ersk. 1, 6, 34.
5. M.16, 483.
6. Fr.I, 822-3.

intimidation (on the part of third parties, presumably[1]).

The Conveyancing (Scotland) Act, 1924[2], s.20 provides that it shall be no objection to any deed, relating to land or not, granted or concurred in by a married woman, before or after the commencement of the Act, that it had not been judicially ratified by her, but in a sense that had always been so. The device was one to safeguard third parties and to facilitate transactions with married women. It was never the case that an unratified deed was null[3]. The section merely reflects the new position (the jus administrationis had been abolished four years before by the Married Women's Property[4] (Scotland) Act, 1920, s.1) and sets "judicial ratification" in its historical perspective[5].

As happened in the case of the jus mariti, the older writers declared themselves to be unequivocally opposed to the possibility of exclusion or renunciation of the right of administration; even though it might have been accepted that the jus mariti could be renounced, "a husband may not renounce his right of administration, headship, and management; for that were to unhusband himself, and renounce the privilege given /

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1. Fraser, ibid. Third party intimidation: Ersk. 1, 6, 35, where also he distinguishes the subject under discussion from that of the revocability of donations granted for love by wife to husband. Ratification there, says Erskine, is inappropriate: "the law of donations between husband and wife would turn out a most hurtful one to the wife, whose donations to the husband might be made irrevocable by her ratification, while the donations by the husband to her would stand exposed to revocation all his life long." See now M.W.P. (Sc.) Act, 1920, s.5.
2. 14 & 15 Geo. 5, c.27.
3. Ersk. 1, 6, 36.
4. 10 & 11 Geo. 5, c.64.
5. See generally, upon this subject, Erskine 1, 6, 33-36; Fr.I, 819-823. ("Judicial Ratification of Deeds by Wives.")

given him by the laws of both God and nature[1];" Even when renunciation of the jus administrationis became accepted, it was not competent for the husband so to denude himself of his rights as to abandon his role as princeps familiae, and something of the same attitude be it right or wrong persists today.

Fraser /

1. Dickson v. Braidfoot 1705, M. (whence quotation taken) 10,396; Collington v. C. 1667, M. 5828; Dick v. Pinkhill 1709, M.5999.

Invocation of the deity was found once again to be a useful weapon in the armoury of a privileged class in defence of their rights.

In Collington, the opinion is expressed with force, that any agreement to take "the power and government of the family from the husband and stating it in the wife, is contra bonos mores, and void, and that the jus mariti, as it is properly taken in our law, for the husband's interest to the wife's moveables, being renounced, cannot be understood to reach to the renunciation of the husband's power to rule his wife and family, and to administrate the aliment thereof."

Similarly, in Dick v. Pinkhill, in reply to an eloquently told tale of woe by the defender ("she acknowledges she had made an unfortunate choice" (of husband), "who in sixteen months time has dissipated a great part of her means and livelihood, to her utter ruin and starving, what by his creditors' poinding and arresting all, and what by his own drunkenness and prodigality; and if he get the disposal of this small reserved aliment of 800 merks, he will reduce her to a cake of bread;") it was stated that, "Both by the laws of God and the land, the husband was princeps et caput familiae, and to divest him of that power, and invest it in the wife was against the laws of nature, and contra bonos mores." However, in that case, the question of which partner should manage the fund in question was referred to the Lord Prestonhall, the Reporter, with the aim of excluding misapplication and squandering. The result of the Reporter's deliberations is not disclosed in Morison, but it is to be hoped that perhaps circumstances there might have overcome the general rule, or at least that the husband was not left in sole administrative control.

Fraser notes[1] that even when the notion of divine or public policy prohibition was abandoned (as to the power of administering the property as opposed to the role of head of the family), the courts still hesitated to give women the unbridled government of their own affairs, displaying an attitude understandable in view of the nature of female education, and lack of opportunity to gain business experience - but, of course, the lack of education and experience was a lack equally affecting the independent unmarried woman and the married woman during viduity, "though perhaps necessity (through absence of "coverture") would teach them at least some degree of business acumen". In the context of judicial proceedings, and during the course of an explanation of the requirement that a married woman, about to engage in litigation, should have appointed to her a curator ad litem if her husband could not or would not concur in the action she intended to raise, Fraser quotes Pothier, who stated that, "une femme mariée n'a pas la raison plus faible que les filles et les veuves, qui n'out pas besoin d'autorization". The aim was to ensure that the wife's suit was managed competently, ("He is curator, not to the wife, but of the lis;") "not so much for the wife as for the absent husband" (and, hence, for the other party to the action). "If he" (the husband) "be not a party to the process at the instance of or against the wife, the other litigant is not safe; and in order to ensure such safety, when the husband will not concur, the Court appoint a neutral person whose actings bind him[2]."

In Dalrymple v. Murray (1745)[3], the competence of exclusion, not only of the jus mariti, but also of the jus administrationis, was accepted, though in that case it /

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1. Fr.I, 798-9.
2. Fr.I, 570.
3. M.5842; Kilkerran v. "Husband and Wife", No.VIII.

it is significant that the exclusion was effected by means of an ante-nuptial trust deed.

By 1774, (Annand v. Chessels[1]), it was well recognised that a third party might exclude by the terms of a deed a husband's right of administration as well as his jus mariti, and it was argued for the wife that the husband himself might so renounce his "curatorial power", or right of administration. The latter notion seems at least to have been entertained (and perhaps accepted) by the Lord Ordinary in Gordon v. Gordon[2] - although the report makes mention, in the main, of the jus mariti - but the Lord President reserved his opinion and refused to pronounce upon the matter in the particular case. The case of Wilson's Trustees v. Wilson's Factor[3] was another instance in which a father by trust-deed excluded his son-in-law's (potential) jus mariti and right of administration from certain funds. Fraser in 1876 is able to say[4] that "the difficulties once thought to exist on this subject are now entirely disregarded. It is held now to be as competent to exclude the husband's right of administration as it is to exclude the jus mariti", and he cites inter alia, the cases above mentioned, Keggie v. Christie[5], and Gowan v. Pursell[6]. The latter appears also to be an exclusion (of what is termed "the jus mariti") effected by a party other than the husband or wife. Possibly the best case is that of Keggie, where it was clearly considered that "a husband's right of administering his wife's property, as well as his jus mariti, might be effectually renounced, and that, in this case, it had been renounced by the terms of the deed of separation" (made by both parties /

1. M.5844.
2. (1832) 11 S.36.
3. (1868) 7 Macph. 136.
4. Fr.I, 799.
5. 25 May, 1815, F.C.
6. (1822) 1 S.418 (1 S. (N.S.) 390)

parties). It is particularly of value, since the distinction between the jus mariti and right of administration is taken. Murray's Trustees v. Dalrymple and Colquhoun (or Annand) v. Chessels[1], are relied upon, and the court seems to have been prepared to take the further step of countenancing such exclusion, where it was made neither by a third party nor through the medium of a trust. However, Fraser[2] insists that the renunciation cannot be to such an extent as entirely to take away from the husband "the right to act as head and chief of his household".

The exclusion need not be express. Necessary implication sufficed.

Since frequently the intention of the truster or other interested person was to guard against the profligacy of the husband or son-in-law, it was possible that the right of administration might be directed to be excluded only if the latter party became insolvent. It can be seen from the terms of the settlement in Annand v. Chessels the manner in which the claims of the husband's creditors might be excluded effectively.

Duty of Wife to Contribute to Household Expenses

The wife's position as regards her property was equivalent to that of an unmarried woman, where both the jus mariti and jus administrationis were excluded, though within the family she retained her position subordinate to the husband, and it was considered, quite rightly, that the wife, out of her separate estate, was bound to aliment her husband and family, when he was unable to maintain the household, and that there was "an obligation of reciprocity and duty on both husband and wife to that effect" - perhaps even when the husband's resources /

1. both supra.
2. ibid.

resources were sufficient for the purpose[1].

When discussing the nature and effect of the Married Women's Property (Scotland) Act, 1877[2], Fraser notes[3] that, as regards the mode in which the wife must employ her separate property, the English Act of 1870 provides in S.4 that, "A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children; provided always that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children", and that a similar provision is found in most of the American Codes, and was just and reasonable, and he asserts that his view, expressed earlier, that a wife when she has separate estate ought to contribute to the maintenance of the common family was the stronger, when, by the terms of S.3 of the Act of 1877, she was enabled to earn her own livelihood.

This being Fraser's opinion, it is illuminating to search out the opinion of a later writer, Walton[4], who quotes Erskine[5] as authority for the proposition that it is a husband's duty as head of the family to defray the expenses of the household, and to maintain and educate the children of the marriage. Guardedly, he states that the duty of a wife with separate estate to contribute to household expenses while her husband was indigent had never been decided. It was clear, that, where the father was dead, the mother was required to /

1. Fr.I, 800; see now M.W.P. (Sc.) Act, 1920, s.4; Chapter 4, "Aliment" p. 392 et seq.
2. 40 & 41 Vict. c.29.
3. Fr.II, 1517; see also I, 539-40, 800, 815-16, and 837-9, and authorities considered and cited therein.
4. Chapter XXV, pp.223-4.
5. 1, 6, 56.

to aliment the children of the marriage[1], and he quotes Bankton[2] - "If the wife has a subject exclusive of the husband's right she must contribute proportionally towards the maintenance of their common children, and in default of the father she is simply liable". Walton says that there did not appear to be any case in which the wife, during the husband's lifetime, was held bound to maintain the children if he was unable to do so.

On the other hand, such an obligation, he was bound to admit, had the support of some eminent authorities[3]," but the language of these authorities is consistent /

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1. Buchan v. B. 1666 M.411, and cases cited at p.223 fn.3. See also 'The Younger Children of Bisset (of Lessindrum) v. Their Brother', 1748, M.413, where the duty to aliment the minor children was laid both upon the heir and the widow, in proportion to their resources. Had the heir "been possessed of an opulent estate", the whole obligation might have been placed upon him, as representing his father. See Chapter 4 (Aliment).
2. 1, 6, 15.
3. viz., Bankton, 1,6,15; Stair 1,5,7; Fraser (Parent and Child) 100 ("but, first, children must aliment indigent relations; then the father; then failing the father by death or incapacity, or otherwise, the mother is next liable.") Walton cites Ersk. 1, 6, 56 (referring to the note in Nicolson's edition). The note in Nicolson's edition states that Erskine, in his Principles, iii, 1, 4, places the mother's liability directly after that of the father and fore the grandfather. The editor considers that "this seems more consonant to reason than that stated in the text", and refers to Stair, Bankton and Fraser, but there (in the text) the liability of the paternal grandfather and other male ascendants of the father is said to come immediately after the father and before the mother and her ascendants: More's Notes, XXIX.

   See generally cases sub nomine "Aliment", Morison's Dictionary. That the mother comes next in line of liability to the father is supported by modern writers e.g. Gloag and Henderson (7th ed.) p.685. See case there cited - Ewan v. R. & W. Ferguson 1932 s.c.277; Walker, Principles, I,315. It seems that the mother's liability comes before that of the paternal grandfather, whose liability next arises. The order of liability is there given.

consistent with the view that it is only after the husband's death that the wife's liability emerges". He concludes the argument with himself by deciding that "it would probably be held that a wife who is able to maintain her children must do so if her husband is incapable, subject to any claim she may have against him for relief." (Why she should have such a claim is apparently so self-evident that no explanation or justification of it is offered. Thus, the question is begged of the existence or extent of the wife's basic duty to aliment the family while her husband is alive, but unable himself to do so, or at least, a denial of the existence of the duty is not given ("any" claim she may have against him for relief), and a common-sense solution without citation of authority is supplied. Liability to aliment the (indigent) husband is not discussed expressly).

Walton then poses the question: In what does the wife's liability consist if the husband is not indigent? His example is that if the husband is a clerk with £100 p.a. and his wife has a separate estate of £1000 p.a., is she entitled to allow her income to accumulate, or to spend it entirely as she chooses, without regard to family expenses, and to leave her husband to support her and their children entirely unaided, or must she contribute to defray the common expenses, in proportion to her means?

Walton's understanding of Fraser[1] is that the wife's liability to contribute is a legal consequence of recognising her right to hold separate estate but that Fraser does not consider the point to be decided, and Walton adduces the clever argument that, "there is no legal obligation upon her to contribute, but if she does contribute whether out of her income or capital she /

1. I, 837.

she does not constitute her husband her debtor therefor[1]." He says that no new liability was imposed on the wife by the Married Women's Property Acts, which contained no express reference to family expenses and contributions thereto. The Act of 1920, s.4.[2], he contends, imposes liability on a wife to support an indigent husband, but contains no clause in respect of the support of children, or a non-indigent husband. Liability to aliment the (indigent) husband as opposed to meeting the expenses of the household, and the upbringing of the children is not considered expressly till the end of Walton's discussion, when he says that, until 1920, it had seemed that though the wife was in a position to support him, and he was unable to support himself, yet she was not liable to aliment him[3].

In /

1. Hedderwick v. Morison, (1901) 4 F. 163. See Chapter 4 ("Aliment") p.
2. M.W.P. (Sc.) Act, 1920, s.4:- in the event of a husband being unable to maintain himself, his wife, if she shall have a separate estate, or have a separate income more than reasonably sufficient for her own maintenance, shall be bound out of such separate estate to provide her husband with such maintenance as he would in similar circumstances be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance. See e.g. Adair v. A. 1924 S.C. 798.
3. Walton, p.224, citing Fingzies v. F. 1890, 28 S.L.R. 6, per L.Kyllachy. For example, in L.Kyllachy's opinion at p.7, his Lordship considers the "general question whether a wife with separate estate is liable to aliment her indigent husband - this is a question on which, so far as I can find, there is an almost entire absence of authority. For any data which can be appealed to appear to me to relate to a somewhat different question, viz., the liability of a wife with separate estate to contribute to the expenses of the household, e.g., her own aliment and that of her and her husband's common children." The question had to be considered as open, and if any liability attached to the wife, it must rest on contract - "that is to say must rest on something implied by law in the contract of marriage". At common law, L.Kyllachy felt /

In England, by the M.W.P. Act, 1882, s.20, a wife with her own estate was bound to prevent her husband (and her children and grandchildren) from becoming chargeable to the parish. Nevertheless, at common law in England, no such liability existed, and except where statute had intervened, as it had with regard to indigent husbands, Walton thought the older English cases regarding (non) liability of a married woman to aliment her relations[1], would be followed.

Thus, in general, Fraser's views upon this topic seem much more enlightened and egalitarian than Walton's, though advanced so many years earlier. Nevertheless, considering that the object of making possible the exclusion of the two rights was to save the wife from the consequences of her husband's folly, greed, bankruptcy or improvidence, Fraser is less than forward-looking when he says that[2], while this is attained, "an evil is caused by giving the wife an independent and uncontrolled power over her estate, which often is productive of family quarrels", and therefore recommends the introduction in the deed of arrangement of a clause prohibiting the wife from alienating or assigning the fund from which the husband's powers were excluded, and solemnly /

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felt such a liability to be impossible because "apart from special paction (she) had nothing wherewith to aliment any body", and alternatively the terms of any special agreement would regulate matters. The Married Women's Property Acts had made no difference. "For those Acts carefully express the consequences which are to follow from the changes which they introduce, and the imposition of any new liability on the wife in the case of her husband's indigence is not one of them." (that is, not until 1920).

1. e.g. Coleman v. Birmingham Overseers 1881 6 Q.B.D. 615 (no liability upon a woman during her husband's lifetime to aliment her grandchildren though able to do so). The argument quoad statutory provisions was concerned principally with the M.W.P.Act, 1870, s.13 (liability to support children) and also with an old Act of Elizabeth I - 43 Eliz. c.2, s.7.
2. Fr.I, 800.

solemnly directs attention to the unpleasantness of family quarrels encountered in Gordon v. Gordon, Keggie v. Christie, and Gowan v. Pursell, supra, which are among the cases he was pleased to cite earlier as decisions which brought the law to the position in which it could be said that the jus administrationis, as well as the jus mariti, might properly be excluded from the husband's ambit of power. Could restriction in the husband's power without equivalent gain in the wife's amount to true progress?

Before 1860, therefore, the wife could be in one of three situations as regards her property. If neither of the husband's rights had been excluded conventionally, they would subsist for his lifetime, unless interrupted by an event such as bankruptcy or civil death, "and even though he were on deathbed, a deed by his wife, without his concurrence, would be null[1]".

The necessity to obtain the husband's consent to acts of administration may not have given rise to difficulty in every case, and in certain marriages may have been a formality only, but it is impossible to escape the conclusion that it was assumed generally that the reins of government would be, and should be, in the husband's hands. Validation of a deed by subsequent ratification by the husband was in time accepted[2], although this might not take place after the wife's death, because at that point his marital curatorial power ceased[3]. Fraser notes[4] that informal evidence of consent by the wife[5] to acts concerning her separate estate /

1. Fr.I, 803; Brownlee v. Waddell (1831) 10 S.39.
2. Lady Cochran v. Duchess of Hamilton, 1698, M.6001; contrast Melvill v. Dumbar 1566, M.5993 and Dumbar v. Melville M.6001. Supra, pp. 51-52.
3. Bullions v. Bayne M.6149 (1793).
4. I, 809.
5. Cheshire or Wallace v. Duke of Portland, 20 Feb. 1830, 2 Jur. p. 259.

estate, but not generally of the husband's consent[1] to such acts, would be acceptable.

Although the husband possessed the right to administer his wife's separate property, his rule was not without restrictions. The concepts of property and of management, in relation to her separate (principally heritable) property, were kept distinct, and the husband could not, for instance, sell the heritage or burden it with long-term debt. Fraser summarises the position in the sentence, "He cannot do anything which will permanently affect it[2]".

When the limitations on his powers of action are considered, together with the husband's duty to act in his wife's best interests, in the exercise of his jus administrationis, and not capriciously or unreasonably to refuse his consent to her actions, a situation somewhat less unsatisfactory than would appear at first, emerges, although it is undeniable that the married woman was "cribb'd, cabin'd and confined" in no small measure, and it must be remembered that not only would the initiative in taking acts of administration concerning the wife's property lie with the husband in most cases, but also that, as regards the wife's moveable estate falling under the jus mariti, the husband became absolute proprietor thereof, and might use his new-found wealth as his whim directed. It is true that Paton suggests[3], in the context of the jus mariti, that the husband "could not do any deed which injured his wife's interest without any benefit to himself or which took effect against her only as at his death", but in a previous sentence he seems to accept the notion that the husband might "even squander her /

1. See facts of Robertson or Rennie v. Ritchie 4 Bell's App. 221.
2. Fr.I, 811.
3. p.100.

her moveable property", and many instances are found of fortune-hunters and husbands prodigal with their wives' money. Enjoyable squandering of his wife's money would not, presumably, infringe the rule. Moreover, the husband was proprietor of all subjects falling under the jus mariti, "and can therefore dispose of and use them as he would any property he had acquired by gift or purchase ... it is only when the jus mariti is excluded that the right of administration begins to operate[1]". Fraser distinguishes[2] the husband's powers over the principal from those over the income of the wife's separate heritable property. It is suggested that the combination of proprietorship (if that word is accurately used) and consequent lack of necessity to look to the wife's wishes in the disposal of those moveables, would tend to discourage the husband from observing too strictly, in relation to subjects falling under the jus mariti, the standard of care which, in Paton's view, was required of him. Even if that standard was required, it has been noted already that, within that wide or loose standard, much injury might be done to what had been - and would become upon dissolution of the marriage (if anything remained) - the separate property of the woman. Within that standard, unwise or even "quasi-fraudulent" use of property (in the sense of irresponsible squandering of money: a man cannot defraud himself of what is his own, and the wife's rights of property therein were suspended during the marriage: could such action (now) be said to be a fraud against her reversionary interest or, in the less than honest phraseology of the time, against the fictional notion of the goods in communion? At any rate, the conduct was regarded then as acceptable[3]) was /

1. Fr.I, 797.
2. I, 811.
3. See e.g. per L.Monorieff in Wight v. Brown (1849) 11 D.459, at p.467/8:- "It is surely a fundamental rule in this matter, that, during the subsistence of a marriage, the husband has the entire command of all the /

was permitted.

Second, if the jus mariti was excluded, the wife's power over her own estate was greater. The property in the moveables, as well as in the heritage, resided in the wife, but she could not sue, without her husband's concurrence, for recovery of sums due to her (as, for example, rent) nor, without her husband's concurrence, "grant leases or feus, or remove tenants, or alienate her estate[1]". In other words, the functions and powers of the jus administrationis remained. However, even while the latter right stood, the exclusion of the jus mariti brought one major advantage, and that was that the husband's creditors could not attach the moveable property[2], any more than they could attach the separate heritage, of the wife. Moreover the husband himself, being no longer proprietor of the property in question, could not dispose of it or make any arrangements concerning it which were not in accordance with his wife's wishes.

Finally, where both rights were excluded or renounced, the wife became true and full proprietor of her own property, and might act in respect of it "without his authority, and in opposition to his will[3]". She might "deal with her separate estate both heritable and /

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the personal funds belonging to either spouse, and may dispose of them according to his own discretion. He may spend the whole of them, which too often happens, and neither the wife nor her executors can prevent this, or have any claim against other parties who may be affected thereby." See also per L.Kinloch in Fraser v. Walker, infra, pp. 72-73.

1. Fr.I, 813. - "the wife is entitled to enjoy her rents, fruits, and interests, when these are actually recovered "but not to recover them (unless the jus administrationis is also excluded).

2. Annand v. Chessels, supra, and authorities cited Fr.I, 813, footnote (c). The consequences of the exclusion of one right highlight the difference between the rights.

3. Fr.I, 814.

and moveable as if the husband did not exist[1]."

Once again is met the perpetual fear of having travelled too far towards equality where married women were concerned[2], and Fraser[3], having explained the position in detail, cautiously adds that, though her property is then her own, yet there exists a doubt as to her powers over it, and that the husband being still the ruler and head of his household, she must not use her property in such a way as to overturn this authority. In addition, it was possible[4] that there was a duty upon her to use some of her separate estate for the maintenance of the household, though objection could hardly be made to this.

Contractual Capacity of Married Women

The general common law rule was that all personal obligations granted by a married woman were ipso jure null, and could not be enforced against the wife's person or estate during the subsistence of the marriage or after its dissolution[5].

Walton's /

1. Murray, p.21. Accordingly she might sue (Fr.I,572) - and, presumably, also be sued - in her own name with regard to such property. Fraser thought the practice of appointing a curator ad litem in such a case to be of doubtful necessity.
2. In the context of the allegedly greater power possessed by married women in relation to paraphernalia, than in relation to heritage, this attitude is seen in Fringles v. Irvine 1711, M.5970 (cited, Fr.I,806), a case which had decided that a wife was entitled to pledge her paraphernal goods without her husband's consent but which was carried by "a scrimp plurality" and later overruled. Fraser remarks that it was said that "some of the Lords merrily said, this was too great an interlocutor in favours of women" and that the decision was later overruled, since the husband remained his wife's curator, notwithstanding that she was absolute proprietor of her paraphernalia.
3. Fr.I,815.
4. Discussed, supra, pp. 58-64.
5. Fr.I,520.

Walton's summary[1] of the rights of a wife at common law in respect of the validity of her personal obligations was that such an obligation would be sustained only if it was in rem versum of the wife, or granted when the husband was imprisoned or civiliter mortuus, or was an obligation ad factum praestandum, or made when the wife was in trade[2] and the contract was in the course of her trade, or where the contract was in respect of necessaries for herself and her children. Again, when her husband was abroad, or they were living apart and the wife had agreed to maintain herself or was alimented by her husband or the separation was brought about by her fault - in short, he says, "in every case in which she had no mandate to bind her husband",-the wife's obligation would be enforceable. Moreover, her contract might be enforced against her where she had held herself out to be unmarried in circumstances in which the person with whom she had contracted had no reasonable opportunity to ascertain whether or not that was the true /

1. p.196.
2. In this case, as with minors - see, generally, upon minors in trade O'Donnell v. Brownieside Coal Co. 1934 S.C.534 per L.O.Moncrieff at pp.539-40 and per L.J.Cl.Aitchison at pp.543-44 - there is the difficulty:- when was the first venture into trade? At what juncture could she be said to be 'engaged in trade'? Up to what point was the husband's consent necessary? (Paton at p.105 says, "she could contract with the husband's consent in her separate concerns or trade or estate;" rendering her separate estate liable).

   See generally, Churnside v. Currie 1789, M.6082 in which, where a married woman had entered into trade to maintain herself and her family upon her husband having left the country (the husband having become bankrupt), she was held subject to personal diligence. "To refuse the ordinary legal compulsatories, in such circumstances as these, would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support".

true situation[1].

In these cases (and in others of statutory creation, later discussed), liability arose, sometimes quoad her property merely, and sometimes also personal diligence was permitted[2].

These exceptions, or examples, are in addition to the largest exception to the rule, namely, that a married woman, whose husband's jus maritl and jus administrationis had been excluded by deed, had capacity to grant personal obligations, and would incur liability under them, but the liability attached only to her estate, and no personal liability would follow[3]. It must also be remembered that for ante-nuptial heritable debts of the wife, her heritable estate was liable, and for ante-nuptial moveable debts, any separate moveable estate which she retained after marriage was primarily liable[4].

Before leaving the common law to view the fundamental changes wrought upon it by the series of legislative /

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1. Fr.I, 520.
2. For general discussion, at length, see Fr.I, 535-556. See generally, also, Paton, p.105. During the course of his discussion, he notes that personal diligence was competent in certain cases against a married woman - as where a decree ad factum praestendum was made against her, (See Fr.I, 555-6), and, at p.101, where he states that the law admits of personal diligence against her where she has been convicted of a crime and sentenced to imprisonment. (Fr.I,545, which deals with other punishments for crime, states that, for a fine, her husband is not liable, though her own separate estate may be, provided that the husband's interests were not prejudiced thereby; that personal diligence could not follow for non-payment, though she could be arrested as in meditatione fugae; and that she might be compelled to return stolen property. See delictual liability - supra, p. 31, Fn. 5.
3. Murray, p.25. (unless the obligation was one ad factum praestandum.)
4. Supra, p.30, et seq "Husband's Liability for Wife's Ante-Nuptial Debts".

legislative changes beginning in 1855, the words of Lord Kinloch in the case of Fraser v. Walker[1], provide an admirable summary of what has been discussed.

"In so far as the mere phrase is concerned, there can be no doubt that a communio bonorum is recognised by our law as existing between husband and wife, in regard to their mutual moveable property ... But ... we must not be led astray by a mere phrase, but must carefully inquire into what the phrase has truly signified." Taking his Lordship's opinion in a slightly different order from that in which he presented it, Lord Kinloch considered that the phrase communio bonorum might be legitimately employed only to denote the rights which (until The Intestate Moveable Succession Act[2], 1855, s.6) attended the dissolution of the marriage by the death of either partner viz., the right of the surviving wife to one half of the moveable estate jure relictae, and the right of the predeceasing wife to transmit that one half share to her representatives or their right to claim such share after her death. "It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution, and that, so far from a communio bonorum giving rise to the rights emerging at dissolution, it was the existence of these rights which brought the phrase communio bonorum into use. At all events, nothing else was ever legally comprehended under that name except the two rights referred to. Communio bonorum in the law of Scotland means these two rights, and nothing else." He could not consider the ius relictae to be anything other than a widow's right over a certain part of her deceased husband's estate. The right of the predeceasing wife to a part of the "husband's" estate, which likewise contained /

1. (1872) 10 Macph. 837, at pp.847-8.
2. 18 Vict. c.23.

contained the essence of a right in communio, "has been unknown to the law since the date of the statute on 25th May 1855." The ius relictae, which was the twin evidence of a communion of goods in Scots Law, was given only to a widow (of which category the divorced pursuer was not a member: there had been a conjoined action of divorce, and decree had been pronounced against both parties) and there was no rule in our law to the effect that upon dissolution of the marriage, for whatever reason, each "partner" was entitled to one half of the effects. (Should there now be such a rule?) The pursuer erred in taking the words "communio bonorum" to mean a true and real partnership.

Again, at p.847, Lord Kinloch gives what has become a well-known and forceful denial of the existence of the communio bonorum in Scots Law[1], and a clear exposition of the common law upon the rights of the spouses stante matrimonio:-

"Pursuing this investigation, it becomes obvious that no such thing has ever been denoted by the expression as a proper partnership or society between the spouses during the subsistence of the marriage. Emphatically the reverse has been again and again held. During the subsistence of the marriage the husband is not merely administrator, he is the dominus or absolute proprietor of all the moveable estate belonging to both parties. Whatever is the wife's passes to him by an implied legal assignation, and becomes his as much as what is primarily his own. He can dispose of it at pleasure without any accountability. It is all liable for his debts to the extent of one shilling, nor can she withdraw any part from her husband's power, nor in any way interfere with his absolute proprietary right. All this is triti juris. It /

1. quoted by Murray, p.198.

It is in vain, therefore, to say that during the subsistence of the marriage a society or partnership, or anything resembling it, exists between the spouses. The wife is destitute of any right. The whole belongs to the husband. To call any part of the effects the wife's own during the subsistence of the marriage is a legal solecism."

Reform By Statute

The Intestate Moveable Succession Act, 1855

The movement for reform began in 1855, when there was passed The Intestate Moveable Succession Act, 1855[1], known as "Dunlop's Act", having been piloted through Parliament by Murray Dunlop, M.P. for Greenock[2].

By s.6 of that Act, the right, to a share of the goods "in communion", of the representatives of a wife who had predeceased her husband, was abolished, "nor shall any Legacy or Bequest or Testamentary Disposition thereof by such wife affect or attach to the said Goods or any portion thereof", in cases where the wife died after the date of the Act (25th May, 1855), the old rule (that her representatives were entitled to a one half share of the husband's moveable property (of the goods "in communion") as at the date of her death) being accepted should the wife have died before that date[3] (or one third if there were children).

Thus, as Lord Kinloch explained[4], one of the main links with a true communion of property (owned by both spouses but managed during their joint lives by one, and therefore, on the dissolution of the marriage by the death of either party destined to return to that party's side of the family, or choice of legatees - in other words, becoming separate once more[5]) was broken /

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1. 18 Vict. c.23.
2. See Murray, p.44, footnote 1.
3. Kennedy v. Bell (1864) 2 Macph. 587; Murray, p.44.
4. Fraser v. Walker, supra, pp. 71-72.
5. See, upon this argument, and the elaboration that the communio comprised three partners (husband, wife, and children) Fr.I, 671-2.

broken by this Act, while the pseudo-characteristics or alleged characteristics or consequences of the communio (the husband's twin rights) continued in force for some years, as Clive and Wilson note[1].

By s.7, it was provided that "where a Marriage shall be dissolved before the Lapse of a Year and Day from its Date, by the Death of One of the Spouses, the whole Rights of the Survivor and of the Representatives of the Predeceaser shall be the same as if the Marriage had subsisted for the Period aforesaid."

Murray remarks[2] that although it appeared that the Act was intended to affect moveable estate only, the provision was so general in its terms that it covered terce. The result was that a widow would take terce whether or not the marriage had subsisted for the time previously prescribed, (that is, a year and a day) but, on the matter of equality of treatment between the sexes, he comments that the Act did not alter the prerequisite of courtesy, namely, that a live child should have been born of the marriage. (If such child had been born, a claim for courtesy arose, however short the marriage, and if not, no claim arose, however long the marriage.)[3]

The Conjugal Rights (Scotland) Amendment Acts, 1861-1874

There followed the Conjugal Rights (Scotland) Amendment Acts, 1861[4] and 1874[5], and in his consideration of them, Murray comments[6] that the concept of the jus mariti /

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1. p.287.
2. p.45. See also Fr.II, 1083.
3. Fr.II, 1121 and authorities there cited. No such requirement applied to terce.
4. 24 and 25 Vict. c.86.
5. 37 and 38 Vict. c.31.
6. p.45. (though Murray says that the husband took the produce of his wife's heritage as her administrator, "and the arrangement was probably reasonable in early times." Re industrial, and natural, fruits of land (the latter when attached to, and when separated from, the soil; the former deemed moveable even when still attached to the soil) see Fr.I, 694-5.)

mariti entered the law at a time when the scope of moveable property as a source of wealth had not been comprehended fully, and at a time when "wealth consisted solely in land." A wife's paraphernalia and peculium would cover with their protective cloak most, or all, of the wife's moveables, and though the corpus of her heritage was hers, and the fee resided in her, nevertheless, in a broad sense, "her possession was his possession", and he took the fruits of the land, jure mariti, and, in his role as administrator, managed the heritage. Later, when the potential of other forms of wealth became apparent, and the flow of ready money increased, "the only form of investment known was the lending of it upon the security of land," and the law viewed all such loans as heritable in nature, with the important consequence that, if they had been made by the wife, they remained her property, and, if they had been made by the husband, they were not liable to terce, "unless constituted by infeftment". Similarly, Murray says, "permanent loans on personal security were likened to land, and bonds bearing interest or having tractus futuri temporis became feuda pecuniae, and when a wife had such investments they remained her own[1]."

Thus, the common law appeared to be adapting itself with remarkable and admirable flexibility and ingenuity to the new situation, but the extraordinary upheaval of eighteenth and nineteenth century industrialisation, and the growth of joint-stock companies, of forms of investment so novel that the old rules could not bend to compass and accommodate them, and which, as a result, became the husband's jure mariti, revealed a lack in the law, as did the continued resort of the upper and middle classes to the /

1. p.46.

the marriage-contract, to alleviate the difficulty[1].

A report was published by the Law Amendment Society on the state of the law: the history of attempts to reform the law thereafter, culminating, for Scotland, in the Conjugal Rights (Scotland) Amendment Act, 1861, is described by Murray[2].

The Act, by s.1., entitled a deserted wife to obtain a Protection Order, and the effect of this was to safeguard from the husband, his assignees or creditors, the wife's moveable property otherwise destined to fall under the jus mariti, provided that that property was acquired, inherited, or earned by her after the desertion.

This protection did not arise where the husband, or other party claiming through him, had obtained lawful possession of the property in question before the "Protection Order" proceedings had begun, or diligence against the property was well in hand before that date (s.4). Matters would return to the previous position (before protection) if cohabitation was resumed, except that the wife retained her new-found powers over the property which she had acquired in the interim, "protection" period (s.3). The same result followed where the parties resumed cohabitation after judicial separation (s.6), subject to any other written agreement between them.

It was notable that, in order that the beneficial effects of the Act should follow, the wife should have obtained the decree of separation (s.6). In that case /

1. See infra. p. 104 where the wife held her property exclusive of her husband's jus mariti and jus administrationis (Biggart v. City of Glasgow Bank (1879) 6 R.470: in that case the wife had received the property, with which she made the investment, by bequest from her father, which bequest excluded the husband's rights).
2. pp.46-48.

case, and in the case where she had obtained a Protection Order (s.5), her powers over acquirenda were those of the unmarried woman, and this included the result that her intestate estate would devolve upon her own representatives "as if her husband had been then dead". (s.6.)[1].

The jus mariti and jus administrationis, therefore, were excluded from the acquirenda of the wife, upon the grant of decree of judicial separation to her, or upon the making and intimation of the Protection Order. (s.6: s.5.. S.5 equated the consequences of a Protection Order and a decree of separation "in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued".) During the subsistence of the Protection Order, and during separation, the wife could sue and be sued as freely as could an unmarried woman (s.6.).

Conversely (s.6.), the husband "shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful Act or Omission by her, or for any Costs she may incur as Pursuer or Defender of any Action, after the Date of such Decree of Separation and during the Subsistence thereof; provided that where upon any such Separation Aliment has been decreed or ordered to be paid to the Wife and the same shall not be duly paid by the Husband, he shall be liable for Necessaries supplied for her Use."

Section /

1. See infra Chapter 5 (2) (Rights on Death). This section still provides the rule upon succession to the intestate estate, acquired after decree of separation, of a married woman holding such decree. The deceased wife must have been the pursuer in the litigation, and must have died intestate, and the estate in question must have been acquired after separation. The provision is therefore most specific, and is a "curious" legacy of an older "matrimonial regime" and is perhaps in need of amendment (Clive and Wilson pp.690-1).

Section 16 contains a provision which was beneficial (though the benefit was more modest than the pomposity of language at first suggests) to married women generally, and not simply to those, deserted or in marriage difficulties, who had taken steps by litigation to protect their property or regulate their position. Acquirenda obtained by the wife, by means of succession, donation, bequest, "or any other Means than by the Exercise of her own Industry", was not able to be attached by the husband, or any person claiming through him, as forming part of the communio bonorum, or as falling under the jus mariti or jus administrationis, "except on the Condition of making therefrom a reasonable Provision[1] for the Support and Maintenance of the Wife, if a Claim therefor be made on her Behalf;". Again, the rule was made subject to the husband's not having obtained possession of the property or his creditors' not having exercised diligence over it (once more to the point of arrestment and furthcoming, or poinding and sale) before the claim for the wife was put forward.

The manner of expression of this provision is somewhat grandiose, and not altogether clear. An affirmative /

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1. See Clark v. C. (1881) 8 R.723, particularly per L.P.Inglis at p.725. Taylor v. T. (1871) 9 Macph. 893 (which states that the beneficial effect of s.16 could apply to property acquired before the passing of the Act - see per L.J.Clerk Moncreiff at p.895). Jack v. Ferguson (1878) 5 R.624. Ferguson v. F. (1871) 10 Macph.54; Somner v. S's. Trustee (1871) 9 Macph.594, per Ls. Cowan and Neaves at p.598; and see Murray, p.50, footnote 3. See generally Fr.I. 830-836. He comments (835-6) that a provision made under s.16, though made stante matrimonio and by husband to wife (in a manner of speaking), was not revocable nor revoked by his sequestration, unlike a voluntary, common law donation (For peculiarities of donations between husband and wife - at least at common law - as to what was only paraphernal, (irrevocable and non-attachable) see supra, pp. 21 - 22 et seq.

affirmative statement, such as that the husband would have right to acquirenda as defined, only upon the making therefrom of a reasonable provision for the wife, would have been preferable. Further, it is suggested that the grudging element introduced by the apparent necessity of the wife to claim the provision (see phrasing of Act and tenor of cases) could have been excluded with profit. In other words, the wife was now entitled to a reasonable provision out of a defined part of her own property but only upon demand made before the husband took possession of the property or his creditors completed diligence over it.

In 1870, the (English) Married Women's Property Act, 1870[1], was passed. This secured for married women the separate ownership of their earnings (obtained after the passing of the Act) from employment carried on separately from the husband, or arising from the exercise of literary, artistic or scientific skill, and the investment income from those earnings.

Similar provisions were made concerning deposits in savings banks, bank stocks, joint stock company shares, and building or other society shares, which thereafter might be held in the wife's name as her separate property. She might also, under the terms of the Act, effect a policy of insurance over her own or her husband's life for her own use and benefit, and sue in any litigation concerning her separate property or wages. The (justifiable) obverse, as it were, was the removal from the husband, and the imposition on the wife, of liability for the wife's ante-nuptial debts, and the duty to maintain her husband, if she was able to do so, and if he was unable /

1. 33 and 34 Vict. c.93.

unable to maintain himself, and so also to maintain her children, (though, upon construction of the statute not (yet) grandchildren, Coleman v. Birmingham Overseers, supra) in the same way as liability therefor fell to a widow, but with the difference that "nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children."

Thus, the reforms continued, and with them grew a realisation that, as the benefits for married women increased, so must greater responsibilities fall upon them. A refinement upon the 1870 provisions concerning liability of the wife for her own ante-nuptial debts and applying also to tortious liability of the wife or liability for breach of contract, is contained in the Married Women's Property Act (1870) Amendment Act, 1874[1], principally in s.5, and imposed on the husband liability generally where, and to the extent to which, assets of the wife had vested in the husband.

The Conjugal Rights (Scotland) Amendment Act, 1874.[2]

Justice for the less wealthy was secured by the grant to the shrieval bench, of jurisdiction to determine applications by deserted wives for protection orders, and the recall thereof. Nevertheless even recourse to the Sheriff courts was expensive, and possibly the growing statutory protection of wives was denied to many wives most in need of it. To some extent, those able to avail themselves of the Act's provisions were those whose property was likely to be protected by private paction[3]. Otherwise, much would depend /

1. 37 and 38 Vict. c.50.
2. 37 and 38 Vict. c.31.
3. Marriage-contracts were a device for the wealthy, and judicial utterances reflect this position. An example is found per L.Deas in Rust v. Smith (1865) 3 Macph. 378 /

depend on whether husband or wife was liable for the legal expenses involved in obtaining relief under the Acts of 1861 or 1874[1]. It is to be noted that the Act of 1861, s.6, imposed on the successful wife pursuer, liability for her own "costs" in any action she might sue or defend, "after the Date of such Decree of Separation and during the Subsistence thereof." (Neither the Act of 1877 nor that of 1881[2] absolved the husband of his liability to meet all the expenses of divorce at his instance, (or, presumably, at her instance) unless the wife had separate estate, which in this context was held to mean something more than possibly fluctuating wages. If the husband was unable to do so, an application for the admission of him and his wife to the poor's roll was in order.) In Milne v. Milne,[3] there is an interesting sociological note in Lord Adam's opinion: " - if we look above the labouring classes, where a wife may be capable of earning wages, ninety-nine married women out of a hundred have no separate estate of their own, and no power of earning it;".

The Married Women's Property (Scotland) Act, 1877

As England borrowed, in the sphere of matrimonial property law, from America, so did Scotland, in 1877, borrow from England in order to create the Married Women's Property (Scotland) Act, 1877[4]. Murray remarks[5] severely that this Act "is merely a clumsy adaptation /

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378 at p.383:- "There was no antenuptial contract, which is not to be wondered at considering the position in life of the parties, the husband being at that time a journeyman cooper, earning only about 14s. per week.".

1. See generally Clive & Wilson pp.597-601; Article "Expenses in Divorce Cases", Frank Bat . 1974 S.L.T. 45.
2. discussed generally infra.
3. (1885) 13 R.304, at pp.308/09.
4. 40 and 41 Vict. c.29.
5. p.53.

adaptation " of parts of the English Acts, and that the Bills of 1857 or 1869 (the history of which he describes) were to be preferred in any case to the final English legislation upon which the Scots Act of 1877 was modelled. Fraser is even more scathing in his opinion[1] - "It is to be regretted that the Government of the day acquiesced in imperfect amateur legislation like this, touching as it does interests so delicate and important. The Act unsettles everything, and settles nothing." Nevertheless, the principle of change had been accepted, however defective may have been the vehicle bearing it.

The husband's jus mariti and jus administrationis were excluded, under this Act, from 1st January, 1878, from the wages and earnings of any married woman, acquired or gained by her in any employment, occupation or trade in which she was engaged or in any business carried on under her own name, and also from any money or property acquired by her through the exercise of any literary, artistic, or scientific skill, "and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property and investments thereof." (s.3.).

Thus, there was extended thereby a protection to all married women whose circumstances were covered by the terms of the Act. It completes the protection provided by s.16 of the 1861 Act, which protected acquirenda of the wife obtained by "any other Means than by the Exercise of her own Industry".

Section 4 limited the husband's liability in any marriage taking place after the Act for the ante-nuptial debts /

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1. Fr.II, 1511.

debts of his wife to the value of any property (unspecified as to type, and hence, as Fraser notes, heritable or moveable) "which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage", and any court which came to deliberate upon the issue of liability for such debt should "have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property". This is still the rule which governs a husband's liability for his wife's ante-nuptial debts, though the frequency with which such questions will arise or in which the provision will be useful cannot be great[1]. Prior to the coming into effect of this provision, the husband's liability was for all the ante-nuptial moveable debts of the wife[2]. This statutory modification and re-statement of the husband's liability (approximating to the English position as modified by the M.W.P.Act (1870) Amendment Act, 1874[3]) did not take from the primary liability of the wife's separate estate (if any) for these debts[4]. The Act of 1877 was productive of many queries[5].

Section /

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1. See Clive and Wilson, pp.265-266.
2. supra, p. 31.
3. supra, p. 80.
4. Fr.II, 1518.
5. For a discussion of the possible personal liability to diligence for trade debts of a married woman trader, and the possibility at that date (1876) of rendering her bankrupt, see Fr.II, 1518-19; for other consequences of her hybrid, "adolescent", position in the business world, see Murray, p.57 § 77. (discharge by married woman of office of trustee.) Upon the changing nature (and potential size) of a wife's ante-nuptial debts, see Murray, pp.58-60. (including the property consequences for the spouses where the wife was a contributory of a company which became wound up).
   See generally Walton, Chap.XXII; duration of liability - Fr.II, 1518: Walton, p.210.

Section 5 preserved the rights of married women generally as to acquirenda obtained other than by earnings, which had been conferred by the Acts of 1861, and 1874[1].

The Act was admirable in its aims, but in its wording a determined husband could find areas of doubt to be exploited. For example, the Scots Act confined its benefits quoad business profits, to "any business which she carries on under her own name". The English Act used slightly different terminology, and endowed with protection wages and earnings acquired or gained "in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband". (s.1.). As far as wages and earnings were concerned, the latter phrase was omitted from the Scots Act, "thus leaving room for the construction, that the earnings belong to the wife if the trade be in her own name, though she and her husband be living together; and even in England such would seem to be the law[2]". Griffith comments[3] that the mere fact that the husband was living in the house at the time the business was being carried on did not deprive the wife of the protection of the Act, but that /

1. The statutory improvements were preceded in some cases by a softening judicial trend of opinion and a willingness to look behind the strict rule. For example, in Rust v. Smith supra, per L.Deas, again at p.383, is found the following sentiment:- "It is no doubt true that the whole profits of the grocery business belonged, in law, to the husband, but it does not follow that we are not to take into view that the source of these profits was the industry and exertions of the wife, as an equitable consideration in the question whether this conveyance was a reasonable provision for the wife". Murray, p.54, footnote 2, takes this point, and also (footnote 3) notes the visible traces of the English parentage of the Act in the phrase, "deemed to be settled to her sole and separate use".
2. Murray, p.56, quoting Fr.II, 1514.
3. p.47-48, citing Lovell v. Newton 4 C.P.D. 12, per Denman, J.

that, if the spouses lived in the same house, it might be more difficult to be certain that the trade was truly separate, especially if the business was carried on there. However, he felt that, in principle, cohabitation was irrelevant. Murray agrees that this result was intended by the statute, but adds that, "before the wife can carry on such a trade she must, while living with her husband, have his consent[1]".

It might be possible to take issue with Murray here, and to do this reference may be made with profit to the American authority cited by Fraser in his consideration of the Act of 1877, where he says that in every State except Virginia, the old common law as to husband and wife had been modified to a greater or less degree, and thus provided a rich seam of decisions to be explored.

The American legislators, he says, profited from experience and in the later statutes refrained from "the dangerous generality and looseness" of the earlier ones. The wife's powers, the time when she might exercise them, the measure of the husband's liability and her own, and the requisite public notice of her intended independent action, were defined with an exactitude sadly lacking in the Scots Act.

Fraser notices[2] that s.3 at once suggests a number of questions, of which the most important is:- can the wife, without her husband's consent and against his wishes, "hire herself out to labour in order to earn wages", or open a shop and take the profits thereof? The Act deals expressly only with the secondary matter - having earned the wages, she may use them as she wishes.

Might she, against his will, devote her whole time to the exercise of any literary artistic or scientific skill /

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1. p.56.
2. Generally Fr.II, 1511-1516.

skill with which she may have been endowed in order to earn money and profits which she herself is to enjoy, and which, according to some[1], she need not apply for the benefit of husband and family? If it was not the legislative intent that she should be able to do so, how was her husband to control her? If she act, against his will, and achieve success in her chosen field of paid endeavour, was the profit arising hers alone or hers at all? Did her disobedience of the wishes of the pater familias debar her from the absolute use thereof, as if s.3 had never been enacted? "If the husband does not consent to his wife becoming a trader, will any bills she grants, or contracts she enters into, be binding upon anyone?" What are the rights of a third party whom she has thus embroiled in the complex marital property relationship?

These are intriguing questions, and it is intriguing to see that they exercised the minds of both Fraser and Murray, and troubled the legislature apparently not at all. The Act left many matters to conjecture.

There arose questions such as, "Is she herself alone liable for trade debts, or does her husband's common law liability for a wife's debts continue, notwithstanding that he receives no part of the profits?" (Presumably his liability for her ante-nuptial trade, as well as other, debts, would be regulated by the terms of the Act of 1877, s.4, which does not define more precisely "ante-nuptial debts" - or would it? Admittedly, liability under the 1877 Act was limited, but if he was held not to be liable for such debts incurred after marriage, why should he be required to undertake any liability for those incurred before marriage? Was the "benefit received from /

1. Supra, p. 58 et seq.

from wife" criterion to apply only in the latter case, and not in the former?) In any discussion of property and other relations between husband and wife, the concept and language of partnership is not far distant, and here once more inter conjuges would be a partnership so leonine, this time in favour of the wife, that it is outwith the knowledge of writers on partnership.

Even on more orthodox partnership terms, would there be any barrier to a partnership in trade between husband and wife? It appears that this was not competent, even though the wife enjoyed separate estate, from which her husband's right of administration was excluded[1]. Leaving aside the question of the competence of partnership between spouses, could she, asks Fraser[2], employ her husband as her shopman or commercial traveller at weekly wages? He answers his own question in the affirmative[3], but warns that, if she did not choose to have her husband as her partner, employment, especially unpaid employment, of the husband, might raise a suspicion that the business truly belonged to the husband. Murray's view[4] was that the husband, if employed merely as agent of his wife in her business, or if he took nothing to do with her business, incurred no liability in connection therewith for trade debts or under any other head. Only if he was her partner (possibly not competent in Scotland) or played such a part in the business as to make it truly his, not hers, did liability arise.

If the husband's consent to his wife's commercial activity was necessary, how, the statute being silent, was that consent to be given and notice thereof to be published to the world[5]?

These /

1. Macara v. Wilson (1848) 10 D.708; Murray, p.77.
2. Fr.II, 1511.
3. 1515.
4. p.56.
5. 1512.

These subjects proved fruitful of discussion and argument, and Murray[1], for instance, appears to have reached a conclusion (that the wages of a wife employed in her husband's business would be protected by the Act) which does not accord with later authority[2], which was to the effect that, for the operation of s.3 of the 1877 Act, it was necessary that "the wife must have some other "employer" than the husband, or the "occupation or trade" must not be simply the occupation or trade of her husband if it is to yield "earnings" in the sense of the section." "In other words, I hold that not only must the employment be under some other person than her husband, but that the trade or occupation must not be one which is carried on jointly or along with her husband, but must be entirely removed from his participation and control". (per L.Ardwall in Dryden v. McGibbon, supra.)

Upon the question whether a married woman might set up in trade without her husband's consent and against his wishes, Fraser[3] looked for aid to America, and England, finding in judicial utterances in the case of Martin v. Robson (1872)[4], the view that in an ostensibly liberalising statute, giving the wife an entitlement to her own earnings, free from her husband's interference, "The practical enjoyment of this right presupposes the right to appropriate her own time. The right to take and possess the wages of labour must be accompanied with the right to labour. If the husband /

1. p.56.
2. see e.g. Dryden v. McGibbon 1907 s.c.1131, which concerned the profits of an hotel business, and in which L.Ardwall at p.1142, concurred with L.P. Robertson's opinion in McGinty v. McAlpine (1892) 19 R. 935 at p.940. Clive & Wilson, p.288.
3. II, 1512, et seq.
4. 16 American R. 378 (1872) (relating to an Act of the State of Illinois).

husband can control, then the statute has conferred a barren right. If the wife can still only acquire earnings with his consent, then the statute was wholly unnecessary, for she might have done this prior to its enactment."

The English view as expressed in Ashworth v. Outram[1] was much more conventional and less enlightened, being to the effect that it was not competent for a married woman to set up in trade without her husband's consent, but that, having obtained that consent, the profits and the stock-in-trade (if originally her own) belonged to her[2].

Ashworth's case was distinguished in that of Ferguson's Trustee v. Willis, Nelson & Co.[3], in which L.P.Inglis said, "... it is to be observed that although a wife may carry on a separate business from her husband, it clearly cannot be contended that she may do so without the consent of her husband. Supposing the husband is of opinion that it is not consistent with the wife's health or her morals that she should engage in any separate trade, is it to be said that the curatorial power of the husband is to be abolished, and that the wife is to be allowed to do as she desires against her husband's wishes?" Even Murray remarks[4] that the statement of the law in Ferguson "seems to be too broad."

The case is interesting for its own sake. It reveals the extent of the inferiority of the wife's position even after the reforming statutes. Where spouses /

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1. L.R. 5 Ch. Div.934.
2. Griffith (p.47) merely remarks, as if the matter contained no controversial element whatever, "... The consent of the husband to the married woman carrying on such separate trade is a question of fact." (see Pearse v. P. W.N. (77) 120).
3. (1885) 11 R. 261, at p.268.
4. p.77. footnote 3.

spouses had been married in 1872 without a marriage-contract, and without exclusion of the husband's property rights, and where the wife before and after marriage had carried on the business of a milliner's shop, the profits of which supplied the needs of the household, the wife, it seems, being better equipped by nature for a business life than was her husband, it was held that while the effect of the 1877 Act was to protect the wife's earnings in such a case, the wife's creditors (or creditors of the business) could not attach stock in trade which had passed to the husband jure mariti. Both before and after the Act, the business in question had been carried on under the wife's maiden name. L.P.Inglis emphasised[1] that at common law, "where a wife carries on a business in her own name, if she has not been deserted, she carries it on as her husband's agent and the effect is that not only is the stock in trade his, but also the whole earnings produced from it." When the Lord President came to consider s.3 of the 1877 Act, he distinguished the use of the word "property" as being strictly referable to the qualifying words "acquired ... through the exercise of any literary, artistic and scientific skill." He felt it impossible to construe the section which in his opinion, in relation to a wife's own business, concerned only the "earnings" therefrom, in such a way as to consider that the Act effected a transfer of stock-in-trade ("property") from husband to wife. "I am of opinion that it is impossible to read these words in any more extended sense than as protecting wages which the wife might earn in employment, or the periodical profits which might be earned in the conduct of business carried on in her own name." Since the marriage, the business had belonged to the husband. This was the crux of the /

1. at p.266/7.

the matter: through inadvertence, or ignorance, perhaps, the stock in trade at the date of the marriage had passed to the husband, and the Act, while protecting earnings, did not covertly, as it were, remove the husband's *jus mariti* therefrom by transferring property *ipso jure* from husband to wife. Even if the stock in trade originally belonged to the wife and, by agreement, remained hers after the marriage, the Act's provisions were still required to safeguard her business earnings. L.P.Inglis noted[1] the difference in wording between the English, and the Scots, Act ("I am not surprised that it should be so, because they are intended to apply to a very different system of jurisprudence") and distinguished the English authority (Ashworth) referred to on the ground, *inter alia*, that English equitable rules "with which we have nothing in common in Scotland", had been at the basis of the decision. Lord Deas[2], who dissented from the majority opinion, felt that the absence of express transfer to the wife did not preclude the conclusion that there had been a tacit transference of the stock in trade from husband to wife, by reason of the carrying on of the business after the marriage "exactly as it had been carried on by her before it, and in her maiden name..."

Fraser summarises the situation, by posing the question[3] - if the husband's consent be required, what was the necessity for the Act? He points out that by the common law of Scotland, a wife might carry on business as a trader with her husband's consent. She would act in this context as his agent, but if her husband permitted[4] her to keep what she earned, renunciation /

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1. pp.268/9.
2. p.269.
3. II, p.1513.
4. It must be said, however, that, after the Act, the wife did not need to rely upon her husband's generosity. Fraser himself says that the Act might be regarded as enlarging the wife's powers to contract in connection with her trade, allowing her independence in litigation concerning it, and protecting her earnings from her husband's creditors.

renunciation of the jus mariti would be presumed, and this (renunciation) was competent at common law.

It must be concluded that some questions were left answered unsatisfactorily, or not answered at all, (not even envisaged, it seems) by the Act, and that in consequence many points of difficulty arose for the courts, practitioners and academics[1].

A study of the late nineteenth century legislative provisions as to the right of a wife to her wages or earnings "acquired or gained in any employment or occupation in which she is engaged", leads to the enquiry whether she could possibly have been entitled to claim wages for the performance of her duties as wife and mother, and, while this topic belongs properly to the consideration of present or future law, it is interesting to note Lord Fraser's views thereon, and, in this connection also, he refers to American authority[2].

He states that some, but not all, of the American Codes expressly denied the existence of such a right. One which did not was that of Iowa (sec.2211), which contained a clause so potentially fruitful of litigation as, "A wife may receive the wages of her personal labour and maintain an action therefor in her own name, and hold the same in her own right". This gave rise to interesting cases, one such being McWhirter v. Hatton (1875)[3], in which the Chief Justice, delivering the judgement of the Supreme Court of the State of Iowa, said:- "... In a word, she is entitled to the wages for her personal labour or services performed to others; but her husband is entitled to her labour and assistance in the discharge of those duties and obligations which arise out of the married relation. We /

1. See e.g. Fr.II, 1511-17; Murray, pp.55-57, p.77; Walton, p.199; Clive & Wilson, p.288.
2. Fr.II, 1515-16.
3. 20 American R. 620 (1875).

We feel clear that the Legislature did not intend ... to release and discharge the wife from her common law and scriptural obligations and duty to be a "helpmeet" to her husband". In the absence of "positive and explicit legislation", he could not contemplate that such a construction could be put upon the statute as to give to the wife "a right of action against the husband for any domestic service or assistance rendered by her as his wife". If that implication could be taken, "For her assistance in the care, nurture and training of his children, she could bring her action for compensation. She would be under no obligation to superintend or look after any of the affairs of the household unless her husband paid her wages for so doing".

That this view was taken in 1875 is not surprising in the least: the fact that the very notion was formulated in words (so similar to those used in the 1975 "Wages for Housework" campaign), even if to be rejected, is remarkable.

Today, it is argued that, if the wife works outside the home, and does not keep house - though most such wives attempt to do both - it will be necessary for paid help to be obtained for the management of the house. Moreover, it is said that the good order of the house and the efficient running of the household, enabling the husband to concentrate upon his work or to find on his return an atmosphere conducive to overtime work or study (or relaxation), depends on the wife, and in this way she is making a contribution to the earning of his salary, and proving herself to be a worthy and working partner of the husband and wife salary-earning partnership, whether or not she also works outside the home, and in recognition of the taxing rôle she fulfils, she ought to be entitled to part of the salary earned, and this not springing from patronising husbandly largesse /

largesse, ("housekeeping") but as of right. This does not detract in any way from her willingness to carry out those duties, nor lessen the distaste with which most would view the plea in the American case of Grant v. Green[1], where an unsuccessful action was raised by a wife against the administrator of her deceased husband's estate, for caring for the husband during his insanity. (She had, however, been employed by her husband's guardian to do so.)

Even without having regard to the marriage vows, it is the basic and honest and best reaction to feel that each spouse must care for the other, in sickness and health, with no thought of reward or compensation, but that is not to say that in the ordinary running of the household and bringing up of the children, especially where the wife is (perhaps temporarily) not a salary-earner, that she should not be entitled to a certain proportion of his income[2].

Fraser approved the views revealed in the American cases (that is, that the wife would have no claim under that head), and considered that they would be adopted in the construction of the 1877 Act, and he points out further that a wife might waive the protection thus afforded to the wages she earned from strangers, and, having allowed her own and her husband's funds to be intermingled, she could not reclaim what was hers[3].

It is worthy of notice that Fraser takes time, at this point in his treatise[4], to stress that a wife might not only invest in stocks and heritage, but also in corpora mobilia, and thus in furniture, and hence a situation /

1. 41 Iowa R.88: 20 Americ. R. 621: Fr.II, 1516.
2. Part of that entitlement might be earmarked for domestic expenditure, and part for expenditure entirely within her own choice and discretion. See generally, infra. Chapter 7.
3. He looks again to American authority here - viz. Hawkins v. Providence Co. 20 Americ. R. 354 (Mass.)
4. II, 1517.

situation might arise in which the whole of the household plenishings belonged to the wife, and were therefore not able to be attached by the husband's creditors. A situation where all the "consumer durables" of an establishment belong to the wife while used and enjoyed by the husband and the whole family tends to be thought of as a modern phenomenon. Indeed, much controversy results from the truth that, now, as then, that situation is rare. It is much more common for a wife (especially one who has not worked for any substantial period, or at all, outside the home) to have lived a hard-working life, contributing thus indirectly (or non-materially) to the prosperity of the home, and yet to have title to none of the assets (except in prospect, should she survive her husband, or - at present - become the successful pursuer in marital litigation)[1].

Insurance Policies

At Scots common law, a wife had an insurable interest in the life of her husband, as did he in her life, but in England no such insurable interest existed in either case until the Married Women's Property Act, 1870, s.10 of which enabled a married woman to effect a policy of insurance (assurance) upon her own life or her husband's life for her separate use. As far as Scotland is concerned, Murray[2] reminds us that the insurance (assurance) of a wife's life by her husband stands on common law still, but a similar statutory provision to the English one was provided for Scotland by the Married Women's Policies of Assurance (Scotland) Act, 1880[3], by which "a married woman may effect a policy of assurance, on her own life or on the life of her /

1. See Chapter 5(1): property rights upon divorce, and Chapter 4 (Aliment upon Separation). See generally, Chapter 7. See now Div.(Sc.) Act, 1976, s. 5.
2. p.61.
3. 43 & 44 Vict. c.26. But, as to Eng. common law position on insurable interest in life of spouse, see Reed v.Royal Exchange Co. (1795), Peake Add. Cas.70; Personal Accident, Life and Other Insurances, E.R. Hardy Ivamy (1973), pp. 89-90.

her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her and her heirs, executors and assignees, excluding the jus mariti and right of administration of her husband, and shall be assignable by her either inter vivos or mortis causa without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman". (s.1.). "This places married women in the same position as they occupy in regard to earnings under the Act of 1877, and to this extent a married woman is treated as a feme sole"[1].

The provisions of s.2 of this short Act are well known. They enable a man to take out a policy of assurance on his own life, "expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children", in such a way as to create a trust for them, the policy vesting in him or his representatives or trustees nominated in the policy or subsequently by written intimation to the assurance office, in trust for the purposes specified, and which policy "shall not otherwise be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency". There is an important proviso to the effect that creditors may claim repayment of the premiums paid under the policy, out of the proceeds thereof, if the life assured becomes bankrupt within two years from the date on which the policy was effected, or if it be shown that the whole was entered into with intent to defraud creditors.[2]

The Act does not specify that delivery of the policy (normally necessary) is essential here. Murray's conclusion /

1. Murray, p.62.
2. See also as to policies of assurance, Chapter 2, pp. 210-219.

conclusion[1] is that the absence thereof does not affect the beneficiaries' rights therein.

The benefit of the trust thus created is not withheld from those born after the policy has been entered into, and has vested in the husband, his representatives or trustees[2,3].

Thus, as Clive and Wilson comment[4], a steady increase was taking place in the types of property which a married woman could call truly her own, that is, property safeguarded in the general case from the claims of her husband's creditors (though not necessarily from her own, for that is the price of separate property), and in respect of which the jus mariti and jus administrationis could competently be or were by statute excluded. The next step was the total removal, by statute, of the jus mariti.

The Married Women's Property (Scotland) Act, 1881.

The next year was passed the Married Women's Property (Scotland) Act, 1881[5], which received the Royal Assent and came into effect on 18th July, 1881.

The date is important, as the Act made certain distinctions /

1. p.65. (i.e. delivery, active or constructive, to the trustees - or to the beneficiaries presumably). Clive & Wilson, p.315 also state that no delivery or intimation to the prospective beneficiary is necessary.
2. Murray, p.64, citing McGregor v. McG. 1 De G.F. and J.63 and In re Seyton. Seyton v. Satterthwaite L.R. 34 Ch.D.511. See per North, J. at p.513; "The fact that the policy was an immediate declaration of trust would not prevent the children born subsequently to its date, but before the trust fund came into existence, taking as joint tenants with those already born". (McGregor etc.). In Seyton, the effect of the deaths of children at various dates is also taken into consideration.
3. See generally, Murray, pp.61-65, and pp.195-7. (annotations on statute).
4. p.288.
5. 44 and 45 Vict. c.21.

distinctions in its provisions between the effect it was to have on marriages contracted before, and those contracted after, the passing of the Act.

Neither the Scots Act nor its English equivalent of 1882 (which, being significantly more far-reaching, was not a true equivalent) received a favourable judicial reception[1]. Nevertheless, it introduced extensive changes, the most important being the abolition (for the future and unless retained by marriage-contract) of the jus mariti.

By s.1(1), the wife's whole moveable estate, acquired before or after marriage, was to be vested in the wife as her separate estate, not subject to the jus mariti, provided that the husband was domiciled in Scotland at the time of the marriage and the marriage took place after the commencement of the Act. The same estate was protected further by the provision (s.1 (3)) that, as long as the wife's property stood clearly in her own name ("except such corporeal moveables as are usually possessed without a written or documentary title"), it should not be subject to arrestment, or other diligence, of the husband's creditors.

An additional benefit was the weakening (by s.1 (2)) of the husband's right of administration, though this was limited in extent. The wife's own receipt was thenceforth to be sufficient in relation to the income of property thus rendered separate, "but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate". By s.5, the husband's consent, otherwise necessary, to a deed, might be dispensed with where the husband had deserted the wife, or the wife was living apart with the husband's consent. As far as the fruits of the wife's heritage were concerned, /

1. Murray, p.65 (footnote 4).

concerned, s.2 provides that, in the case of marriages contracted after the Act, both the jus mariti and the jus administrationis of the husband should be excluded.

Where money or property of the wife had been immixed with the husband's funds - which must have been common, in view of the (then) modernity of the statutes of reform, and of the husband's generally continuing jus administrationis - the whole was to be treated, in the husband's bankruptcy, as his estate, the wife ranking merely as a creditor, and as a creditor whose claim was postponed to that of other creditors for value in money or money's worth. (s.1(4)).

The Act stresses, at s.1(5) and s.8, that ante-nuptial or post-nuptial contracts of marriage, made before or after the date of the Act, remained competent - and, where present, pre-eminent - regulators of the property consequences of an individual marriage. ("But neither ante-nuptial nor post-nuptial contracts are to have more extensive privileges than before[1]".).

Once again, there is found almost a quid pro quo for the Act's benefits, and of course this was just. By s.6 and s.7, the husband and the children acquired the rights of jus relicti (not so named in the Act) and legitim respectively in the estate of the wife and mother, these being equivalent rights to those previously, and still, enjoyed by wife and children in the estate of the husband and father[2].

These /

1. Murray, p.201, footnote 1.
2. See Chapter 5 (1), (divorce) and (2) (death). The terms of the Act were construed strictly. Thus, the fact that the statute referred to a husband's rights in the estate of a wife "who may die domiciled in Scotland" was held subsequently to exclude a husband's claim as pursuer for jus relicti in a successful divorce action against the wife. Jus Relictae, the wife's equivalent right, rests on common law and, before 1964, was exigible by an innocent pursuer wife on divorce.

These rights arose where the death took place after the passing of the Act. The date of the marriage, not mentioned in the Act in this connection, was held, in Poe v. Paterson[1], not to be relevant. (Different provisions, in terms of the Conjugal Rights (Scotland) Amendment Act, 1861, s.6 and s.5, existed and exist where the deceased wife had obtained a decree of judicial separation or a property protection order[2].) Since husbands no longer, except by paction, were to have rights of property in their wives' moveable estate jure mariti, the likelihood of their being liable, in terms of the 1877 Act, s.4, for their wives' ante-nuptial debts decreased accordingly.

It remains to consider those sections (3 and 4) which relate to marriages contracted before 18th July, 1881.

By s.3, it is provided that the new rules supplied by the Act should not apply to those marriages, if the husband, before the passing of the Act, had "made a reasonable provision for his wife in the event of her surviving him", and this by irrevocable deed or deeds. Where he had not done so, the Act's provisions should not apply except with regard to the wife's acquirenda after the passing of the Act. With regard to such property, the husband's jus mariti and jus administrationis were to be excluded "to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof".

Furthermore, those persons married before the Act were enabled to take advantage - if advantage they (or the husband) considered it to be - of the Act's provisions by declaration by mutual deed (registered and /

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1. (1882) 10 R.356; subsequently affirmed by H.L.: L.R.8 App.Ca.678. Murray, pp.74/75.
2. Supra, pp. 76 and 77.

and publicised in the manner prescribed, including advertisement thrice in two local newspapers, an interesting sidelight on the importance of local notification - to shopkeepers and other potential creditors - of the state of the property rights between the parties) that the wife's whole (moveable) estate, provided that it was clearly distinguished from that of the husband, should be subject to the regulation of the Act. The old rules, otherwise applicable, were to apply in relation to any debt or obligation of the husband contracted before registration and advertisement of the deed.

The Act achieved a considerable measure of reform. Most writers, however[1], are at pains to stress that it left to the husband's jus administrationis much of its previous scope. "The right of administration and the husband's curatorial power remain as they were, save as regards rents and receipts for income."

The Married Women's Property Act, 1882.

In 1882, there was passed for England only, the Married Women's Property Act, 1882[2], "to consolidate and amend the Acts relating to the Property of Married Women", and repealing, by s.22, the Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, under the proviso that acts done or rights acquired while those Acts were in force, or rights or liabilities of persons married before the commencement of the Act (to sue or be sued under the terms of those repealed Acts in respect of "any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband /

1. Walton, pp.199-200; Murray, pp.67-68; see generally also Paton, pp.104-105.
2. 45 and 46 Vict. c.75.

husband or wife before the commencement of this Act") should not be affected by the new Act.

This was a bolder piece of legislation than had been provided for Scotland in 1861.

By s.1 of the 1882 Act, an English married woman was rendered capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property as if she were a feme sole, and moreover of binding herself in contract in respect of such separate property, and of suing and being sued, in contract, tort or otherwise, as if she were a feme sole, being entitled to any damages or costs awarded to her, and liable for any damages or costs awarded against her. "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown". (s.1(3).).

Such contracts were to bind, not only her existing separate property, but her separate property acquirenda (s.1(4)), and every married woman engaged in trade separately from her husband was to be subject, in the same way as would a feme sole, to the bankruptcy laws in respect of her separate property. (s.1(5)).

The benefit of s.1 was given to all married women in England, whenever married (since nowhere in that section is the phrase "a married woman" or "every married woman" qualified by date of marriage), though Murray suggests[1] that women domiciled in Scotland might profit thereby, if they held property situated in England.

By s.2, those women married after the commencement of the Act (1st January, 1883) had right, as their separate property, to all real and personal property belonging /

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1. Murray, p.79, citing Griffith, p.147.

belonging to them at the time of marriage, or acquired by them or devolving upon them after marriage, including wages, earnings, money or property gained or acquired in any employment, trade or occupation in which they were engaged or which they carried on separately from their husbands, or by the exercise of any literary, artistic or scientific skill. Those already married by 1st January, 1883, were catered for by s.5, which states that they should be entitled to all real and personal property their title to which "whether vested or contingent, and whether in possession, reversion, or remainder" should accrue after the commencement of the Act, including wages, earnings, money and property gained by them as above described, as their separate property. Where property was so held as separate property, their powers and position in regard to it were to be as specified in s.1.

Similarly, under the head of separate property, were subsumed bank deposits, company stocks and shares, building society shares and other like interests already standing in (s.6) or to be transferred into (s.7) the name of a married woman, "unless and until the contrary be shown", and giving her sufficient prima facie evidence that she was entitled to receive and transfer them, and to receive the dividends without her husband's concurrence, and that she was also obliged to meet any liability or indemnification arising out of her separate estate, which "shall alone be liable". Companies had a right to refuse applications for admission to membership as shareholders by married women if to accept them would contravene an Act of Parliament, charter, bye-law, articles of association or deed of settlement regulating the company. (Contrast the dictatorial anti-"prejudice" or pro-equality philosophy of the Sex Disqualification (Removal) Act, 1919, The Equal Pay Act, 1970 and the Sex Discrimination Act, 1975, inter /

inter alia.)

These provisions are similar to ss.3-6 of the (thereby repealed) Married Women's Property Act, 1870.

The same results followed (s.8) quoad the estate, right, title or interest of the married woman, where the investment was held in the name of the husband and wife jointly with any person(s) other than the husband.

The husband's consent was not necessary for the transfer of such stocks by the wife where they stood in her name alone, or in joint names as long as the joint holder was not the husband.

However, where it could be shown that a wife had used her husband's money, without his consent, to make such investment (s.10), the court was empowered (upon an application under s.17) to have the investment and dividends transferred and paid to the husband. This section also guards against the possibility of fraudulent misuse of the provisions of the Act. Where any "gift" was made by husband to wife, and the subject of the gift remained in the power of the husband, or investment was made in the name of the wife with the husband's money in fraud of his creditors, "any moneys so deposited or invested may be followed as if this Act had not passed", nor would such a "gift" be valid against the claims of creditors[1].

In /

1. Much of the interest of these provisions lies in the fact that they must probably have been supplied to meet a need, viz. a clarification of the rights and liabilities of wives who wished to take advantage of the new way of holding wealth (in company shares). No doubt, wives, husbands, and company officials and advisers were anxious to know. Cf. generally Biggart v. City of Glasgow Bank (1879) 6 R.470, per L.P.Inglis, at p.481. In that case, none of the judgments appeared to find the slightest difficulty or incompetence in the investment by a married woman of her separate funds in the purchase of shares in a joint stock company. See per L.Deas at p.476, "I have not been able to discover the slightest ground for holding that she could not purchase and hold shares in a banking company, just as she could purchase and hold any other kind of property."

In s.11, is a slightly abbreviated version of s.11 of the Married Women's Property Act, 1870, upon the point that a married woman might effect a policy on her own or her husband's life for her separate use.

Section 12 provides for women (married before or after 1st January, 1883,) the same civil remedies against all persons, including her husband, to protect her separate property as if she were a feme sole (except that there was to be no inter-spouse litigation in tort), and the same "redress by way of criminal proceedings" as a feme sole against all persons, including her husband (except that criminal proceedings should not be brought by wife against husband if they were living together, in respect of any property claimed by her-thus precluding prosecutions for theft during cohabitation, it would seem - nor while they were living apart, in respect of any act done by the husband while they were living together concerning property claimed by the wife - thus precluding prosecution after the cessation of cohabitation for theft during cohabitation[1]? - "unless such property shall have been wrongfully taken by the husband" (not by the wife? This was not an Act to protect the property of husbands, it seems.) "when leaving or deserting, or about to leave or desert, his wife".) However /

1. Later rule - Chapter 3. For Scottish position, upon theft between spouses, see Harper v. Adair 1945 J.C.21 (see opinion of L.J.-Gen.(Normand): discussion of the older law (not always clear) and conclusion that the 1881 Act s.1 separated the wife's property from that of the husband. Misappropriation by either of the other's property was therefore theft, just as, in H.M.Adv. v. Kilgour (1851) J.Shaw. 501, property of the wife, rendered separate by marriage-contract, if misappropriated by the husband, was theft by him: in delict, see Law Reform (Husband and Wife) Act, 1962: see generally Clive & Wilson, Chapter 13 (Miscellaneous Legal Effects (Litigation)) and Chapter 3 hereof.

However, it was provided that evidence in such litigation by husband against wife or vice versa should be competent, and that "In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property;" The technicalities of the raising of questions between husband and wife as to title to or possession of property are considered in s.17.

Sections 13-15 are concerned with the (English) rules upon liability of husband and wife for the ante-nuptial debts of the wife, which may be summarised as imposing a primary liability therefor on the separate property (as increased in scope by the 1882 Act) of the wife, unless the spouses had agreed otherwise, and a liability upon the husband "to the extent", but no further, "of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife" - a similar position to that which obtains in Scots law - "after deducting therefrom any payments made by him, and any sums for which judgment may have been bona fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage". As with the equivalent Scots provision, there is power to any court adjudicating upon such an action against the husband for any such debt "to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property". (s.14). By s.15, it was made competent for a plaintiff to conjoin husband and wife as defendants in an action for payment of an ante-nuptial debt or satisfaction of other ante-nuptial obligation. If the husband, in sole or conjoined action, was absolved from liability, he should be entitled to the costs of his defence, and if the husband, in a joint action against both spouses, was /

was found liable for the whole, or part, of the sum sued for, decree should pass therefor against the husband personally, and against the wife as to her separate property. For any remaining liability, judgment should pass against the wife's separate estate only.

Finally upon the matter of litigation, s.16 made a wife subject to criminal proceedings by her husband if she had been engaged in any act in relation to the husband's property which, if done by her husband in relation to her property, would found an action by her against him.

A married woman, acting as trustee or executrix, was provided by s.18 with the same powers as a feme sole to sue or be sued or transfer stocks or other like interests without her husband, in connection with her functions in that office.

The 1882 Act (s.19), emphasises, as does its more timid Scots counterpart, that ante-nuptial and post-nuptial settlements were not to be affected by its provisions (though there were added here peculiarly English provisions concerning restrictions against anticipation).

It is the nature of these Acts to bring with reform, and benefit, corresponding responsibility, and s.20 imposed on a wife the duty to maintain her indigent husband, if she had separate estate to do so, in the same way as a husband could be rendered liable for the maintenance of a wife who had become "chargeable to any union or parish". Similarly, by s.21, she was rendered liable for the maintenance of her children and grandchildren, but this liability was not to relieve the husband of any liability to maintain her children and grandchildren.

It should be noted that, for the purposes of the Act /

Act, the rights and liabilities of a married woman in respect of separate estate, and her liability to a jurisdiction, transmitted upon her death to her legal representatives (s.23).

The Scottish Position

It can be seen that, by 1882, Scotland, which, to this point, had kept in step with England - or perhaps had been one step behind, but still had followed closely in the footsteps of English law - had fallen behind to a significant degree.

In Scotland, after 1881, the wife's heritable and moveable property were her own: the husband's *jus administrationis* and *jus mariti* over the rents and produce of her heritable property had been excluded[1]; the *jus mariti* no longer formed part of the law[2]. Yet, though the wife might competently grant receipts for the income of her moveable property, ("and to this extent the husband's right of administration shall be excluded") she could not assign prospective income, nor dispose of such moveable estate without her husband's consent. Thus, with the small exception of receipts for income from moveable property, and with the exception of the rents and produce of heritable property, the *jus administrationis* remained. The speed of reform had been latterly much greater in England, and it was not until the passing of the Married Women's Property (Scotland) Act, 1920[3] (s.1) that the husband's *jus administrationis* was abolished ("wholly", as the Act says /

1. M.W.P. (Sc.) Act, 1881, s.2. Murray (p.83)notes the restricted meaning of the words "as her separate estate" in the Act of 1881 (contrast English Act of 1882): only the *jus mariti*, not the *jus administrationis* was intended to be excluded.
2. Act of 1881, s.1(1): see also s.1(2) re *jus administrationis* over income of moveable property.
3. 10 and 11 Geo.V, c.64.

ceys.).

The Married Women's Property (Scotland) Act, 1920.

The final loosing from bondage was expressed in the following terms:-
"After the passing of this Act the property, heritable or moveable, of a married woman shall not be subject to the right of administration of her husband, and that right is hereby wholly abolished, and a married woman shall, with regard to her estate, have the same powers of disposal as if she were unmarried; and any deed or writing executed by her with reference to her heritable estate in Scotland or to her moveable estate shall be as valid and effectual as if executed by her with consent of her husband according to the present law and practice." (s.1).

Additional provisions were that a female minor shall come under the curatory of her husband until she reaches majority unless her husband also is minor, or subject to some legal incapacity, in which case her father[1] or other curator, will be entitled to continue to act in the capacity of curator until her majority, or until her husband becomes capable to act.

Full contractual capacity, and power to sue, and liability to be sued, and consequent exclusion of any liability of the husband for her contracts or obligations, incurred by her on her own behalf, is provided by s.3(1), but the husband whose wife was living apart from him or who had deserted his wife was not relieved of any duty which he might have "in accordance with the present law", for payment of goods and furnishings supplied to the /

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1. M.W.P.(Sc.) Act, 1920, s.2. See now the co-extensive right of the mother to that office: Guardianship Act, 1973, s.10(1)(et seq.) 21 and 22 Eliz. 2. c.29. See also footnote - infra. p. 111 (Fn. 2)

the wife for herself or her children, though the married woman so contracting is deemed, in terms of s.3(2), to be binding her own estate therefor as if she was unmarried.

For the first time, the liability to maintain an indigent husband was placed upon the wife having separate estate, or having a separate income more than reasonably sufficient for her own needs and maintenance[1].[2]

Section 5 concerns donations inter virum et uxorem which thenceforward would be irrevocable, unless the donor, within a year and a day of the completion of the donation, was sequestrated. In that event, it became revocable at the instance of the creditors. One year's grace under the old rules was allowed in respect of donations made before the passing of the Act. It mattered not that the donor was not domiciled in Scotland if the subject of the donation, being situated in Scotland, was according to the law of Scotland, heritable as between husband and wife (s.7(2)).

Generally, however, the Act applies where the husband is domiciled in Scotland, except that the provisions of s.1 apply to the heritage, if situated in Scotland, of the wife, even though the husband is not domiciled in Scotland.

Once again, the regulating power of the marriage-contract (ante-nuptial) is emphasised. The terms of such (ante-nuptial) marriage-contracts, made before or after the Act, may competently rule subject in this Act however to the over-riding authority of s.1 in abolishing the jus administrationis. The question must then be asked:- in view of the words, "and a married woman shall, with regard to her estate, have the same powers of disposal as if she were unmarried;", which /

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1. See common law aspect, discussed supra, p. 58, et seq.
2. S.4.

which, from their grammatical juxtaposition with the preceding phrase, would tend to suggest that the jus administrationis (only) was referred to, but which in themselves seem to imply that the jus mariti can no longer have application by reason of its retention in a marriage-contract, is it now incompetent to provide by ante-nuptial contract for the husband to enjoy the jus mariti? May postnuptial marriage-contracts (not mentioned) competently ignore s.1? The guide "expressio unius est exclusio alterius" has been said to be of limited application[1,2].

Although neither rights now form part of our substantive law, the 1881 Act saves freedom of contract here, and the 1920 Act does not preclude in express terms the operation of the jus mariti in privately-made arrangements. However that may be, few wives would give their consent to a return to a marital property /

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1. D. M. Walker, Scottish Legal System, 4th edn. p.352. ("Construction or Interpretation of Legislation.")
2. This is not the only respect in which the draftsmen of the 1920 Act could be criticised for being less than explicit in conveying their meaning. For instance, the genus of husband's curatory of the minor wife is not made clear. Is it the sui generis husbandly curatory previously discussed (though without its accoutrement, the jus administrationis) or is it to be assimilated to the curatory of a father? Does it reduce the minor wife post 1920 to her pre 1920 restricted contractual ability qua wife, or is her position to be regarded simply as that of a "normal" minor? If the curatory is marital, could it be renounced? What is the effect of forisfamiliation? Since by the same Act, the jus administrationis is abolished (thus placing all women in the position of those who had been fortunate in previous years in having the husband's rights excluded by marriage-contract), the latter, and simpler, suggestion perhaps should be favoured.
(See discussion of these points: Clive & Wilson, pp.247-50. South African position: see Nehlo, p.104.).

property situation so laboriously changed for their behoof[1].

After 1920, therefore, a married woman may "execute any deed or transfer without his consent, may assign the prospective income of her estate, burden or alienate the capital or corpus, grant leases, elect as between conventional and legal provisions, and sue and defend actions in her own name as freely as if she were not married[2]."

The corollary was, of course, that she lost her privilege of immunity from personal diligence.

Walton notes[3] that this Act, unlike that of 1881, made no distinction between the effect which it had on marriages which took place before, and upon those which took place after, its date, and thus applied to all married women, and also comments that, though it did not repeal any of the statutes previously considered, "its provisions have the effect of superseding them or rendering them superfluous."

By 1920, the married woman had "entire and sole control and power of administration and disposal of her estates heritable and moveable, free of any interference from her husband[4]". Her separate property - if she had such, and provided that she could prove it - was her own, free of the jus mariti and jus administrationis.

The Way Forward

At this point is reached the end of the first episode /

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1. This is not to say that, in a new marital property régime, the device of the marriage-contract might not be useful.
2. part of Walton's summary, p.195-6, of the post-1920 position.
3. p.196.
4. Walton, ibid.

episode in the history of the subject. For those who had argued for the separate property of a married woman, and believed that therein lay justice, the victory was won.

If marriage-contracts be excluded from the discussion (and as they were never common except among the wealthy to circumvent that which they did not favour in the substantive marital property law, so they have become less common still through the lack of need for them to avoid the consequences of the general law), the position of the married woman, in social and legal terms, had changed out of all recognition.

In the years which have followed, there have been other changes affecting marital property indirectly or directly[1], but it was not until 1964 that legislation began to encompass the new notion that the strict rules of separation of property, once hailed as a panacea to cure the injustices affecting the married woman, might not necessarily reflect a just regulation of property rights between married persons. There was passed the Married Women's Property Act, 1964[2].

In itself the statute was a modest improvement (securing for a wife an equal share with her husband in any money or property derived from any allowance made by the husband to meet the expenses of running the home: in other words savings made by the wife therefrom no longer were to be regarded as the husband's property, and in strict law returnable to him[3]) but it has /

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1. e.g. changes in the rights of parties upon dissolution of the marriage by death or divorce. Divorce (Sc.) Act, 1938 (see property consequences on insanity s.2, inserted by s.7 of Succession (Sc.) Act, 1964); Succession (Sc.) Act, 1964 (infra Chapter 5(1) and (2)). See now Divorce (Sc.) Act, 1976, ss.5-8.
2. 13 and 14 Eliz.2. c.19.
3. Savings had been firmly regarded as belonging to the husband - Cf.e.g.Hoddinott v. H. [1949]2 K.B.406; Preston v. P. 1950 S.C.253.

has marked the beginning of a new era of thinking on the subject, which can be seen and studied, in statutory form, in England, though not so yet in Scotland, perhaps because property changes anterior to change in the substantive rules of divorce (or anterior to a fixed determination not to have those rules changed) was thought inappropriate and premature. There have been other relevant changes in thinking, embodied in statute for both countries, however[1].

Throughout the remainder of the discussion, it is suggested that certain questions should be borne in mind, and be posed for consideration beside the existing rules.

Should the "contribution" factor (in cash or kind) enter into questions of property between spouses, or should the old, strict rules of ownership remain? If 'guilt' and 'innocence' in matrimonial matters are excised, technically at least, from our law,[2] is the concept of "need" after divorce relevant or can a satisfactory solution be found by applying the old rules as to property, and ignoring the lack of opportunity for the non-earning partner stante matrimonio to acquire property? Is it reasonable to begin a discussion on the basis that each spouse has an equal capacity or opportunity to acquire property? If that basis was not reasonable perhaps ten years ago, is it reasonable now, amidst the fashionable talk of "rôle-sharing", the improved birth control measures, and the apparent reluctance of some women to rear their own children? For an increasing number of women, also /

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1. e.g. Sex Disqualification (Removal) Act, 1919; Equal Pay Act, 1970; Sex Discrimination Act, 1975, and setting up of Equal Opportunities Commission thereby authorised. (Cf., on a wider canvas, the history of the extension of the franchise to all women (as to all men) over the age of eighteen.).
2. However, see now acceptance of "irretrievable breakdown" as sole ground of divorce in Scotland, as from January 1, 1977 - Divorce (Sc.) Act, 1976, s.1. It may be that the time is now right for a thorough consideration of the subject of matrimonial property in Scotland.

also, it is necessity, and not style, which dictates work outside the home during their children's pre-school years. How are the courts to adjudge the financial effects of marriages entered into when such modern notions were unheard of, and when other economic conditions required the retirement of women from the employment market upon marriage? How may the (financial) future of children best be safeguarded in marital difficulty? Is there need for a "Family Court" in Scotland[1]? Is there room for a concept of "family property", held for behoof of both parties and any children born to them or adopted by them, in respect of which the spouses and major unmarried children have limited powers of disposal inter vivos and mortis causa? Is the notion of the separate property of the spouses and its undoubted benefits of independence and freedom of action compatible with a new régime of that type?

What criteria should be adopted to determine questions of the ownership of the matrimonial home and other assets in order to do justice between the spouses?

Is change of any kind necessary or desirable? Is the present system, providing for separate property, of any relevance until the occurrence of marital discord? If not, then are not its faults, if any, modified by judicial arrangements upon separation and divorce? Is not any system of rules of marital property academic unless and until such event occurs? Are the arrangements or results consequent upon death, testate or intestate, of either partner adequate?

Rules of ownership of property stante matrimonio can /

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1. A Discussion of 'Family Courts' is to be found in "The Journal of the Law Society of Scotland", January, 1976, Volume 21, No.1, (et seq.) p.12, by Ronald W. Phillips.

can be stated with reasonable or moderate certainty[1], if that is not a contradiction in terms, but this cannot be said to be a well-charted area of law, which is not surprising in view of the non-litigious character of a happy marriage. Should this branch of the law remain as it is, or would there be advantage in a re-formulation or re-statement of the rules, that the rights of parties be either changed fundamentally, or be understood more clearly?

In the knowledge of the fictitious quality of the communio bonorum, could the term arise again to signify a true form of communion? If there is merit in this suggestion, is there also merit in the modification thereof to allow scope for a certain proportion of private, separate property of each spouse within a marriage?

These are important and topical questions, but it is suggested that they cannot be answered satisfactorily without the setting out as a basis for discussion the rules presently applicable in Scots Law upon the various aspects of marriage and its dissolution which impinge upon questions of ownership of property between spouses.

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1. See Clive and Wilson, Chapter 10 ("Property") pp.289-321. ("The present law is easy to state but difficult to apply").

CHAPTER 2

PROPERTY RIGHTS STANTE MATRIMONIO

THE LAW OF BANKRUPTCY AS IT AFFECTS HUSBANDS AND WIVES

Historical Introduction

The status of the married woman at common law, and the sinking of her legal personality in that of her husband, has been studied and noted[1], but it is necessary, nevertheless, in the context of the subject of bankruptcy, to make a brief statement of the wife's position before the commencement of the stream of reforming legislation discussed in Chapter 1.

Since married women "had no power to incur obligations without the sanction of their husbands, (and) bankruptcy consequently could not be constituted against them in respect of such obligations. But though this was the rule, many exceptions were engrafted on it[2]." These exceptions Goudy classified into five different situations already familiar.

He states[3] that where the wife had separate estate, she could, of course, render it liable for obligations entered into by her, and, in respect of such debts, she might be made notour bankrupt.

In the well-known case of Biggart v. City of Glasgow Bank[4], the wife had purchased shares in the City of Glasgow Bank, using money bequeathed to her by her father exclusive of the jus mariti and jus administrationis of her husband. Her name was entered in the share register of the Bank. After the notorious fall of the Bank, both she and her husband were placed on the list of contributories. It was decided, with little difficulty, that Mrs. Biggart's name stood rightly on the register and the list of contributories, as she was the exclusive proprietor /

1. See generally, Chapter 1, pp.1-72.
2. 'A Treatise on the Law of Bankruptcy in Scotland', Henry Goudy (4th edn.), p.68.
3. Ibid. p.69.
4. (1879), 6 R.470.

proprietor (or proprietrix) of the shares (which had been converted subsequently into stock). Her husband's name was excised from the list of contributories. The fact that he had signed certain writings pertaining to the shares was of no consequence (his consent being not necessary, but, if given, not productive of any alteration in ownership or liability), nor was the fact that the exclusion of the husband's rights of property and administration did not appear on the face of the writings vesting the property in Mrs. Biggart. "What is necessary is that we should be able clearly to trace that the purchase of that property was with her own separate estate...[1]".

Again, where the wife was carrying on a trade or business by herself, or was engaged in commercial activities in which her husband was not interested, she could be rendered bankrupt[2].

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1. Ibid. per L. Deas at p.477.
2. Churnside v. Currie 1789, M.6082. (This is the case in which it was said that, in circumstances in which a wife entered into trade upon the departure from the country of her bankrupt husband, the wife must be subject to diligence. "To refuse the ordinary legal compulsatories, in such circumstances as these" - the husband being abroad and the wife having contracted the debt in her own name - "would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support". That sentiment, though old, contains lessons for the future, in the context of possible new rules concerning household debts or spouse-creditor relations generally, and spouses' rights to administer their own, and common property, if the notion of common property, in any of its forms (see Chapter 6), is ever adopted in this country (see Chapter 7).) The case of Churnside was regarded as setting the law on this point - see opinions in Orme v. Diffors (1833) 12 S.149.
See Goudy, p.68 and authorities there cited; supra, Chapter 1, pp.68-70. ("Contractual Capacity of Married Women").

In cases of the husband's outlawry, conviction, or general incapacity for or deprivation of civil rights (as by having the status of alien enemy and possibly and probably (though not, according to Goudy[1], absolutely certainly) insanity), a wife was not immune from bankruptcy proceedings, nor was she immune if she had obtained a decree of separation or a protection order under the Conjugal Rights (Scotland) Amendment Act[2], or where the debt which she had incurred was *in rem versum* of her[3], or had obtained credit by having held herself out, fraudulently, as unmarried.

These four exceptions last-mentioned having been set out, it must be said that, as a practical matter, the remedy or sanction was only of use if the wife had separate estate. Its effectiveness naturally depended upon her possession of such property.

In Gray v. Wylie[4], the wife, while living apart from her husband, had employed a law agent to act on her behalf, in the matter of obtaining a declarator of marriage and legitimacy of a child. She was successful, and her husband was ordered to pay certain sums *per annum* to his wife and child. These sums he failed to pay, and he refused also to pay his wife's account to her agent. The wife it seemed had used inhibition against her husband's property sufficient to cover the arrears /

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1. p.68 (citing Ersk. 1.6.27 on the general point: "Where the husband is, from furiosity, or other disability, rendered incapable of interposing his consent as curator, the necessity of the case may support a deed granted by the wife alone, affecting her heritage, if it be rational"; citing also Bankt. 1.5.67; Bold v. Montgomerie 1729 M.6002).
2. 24 & 25 Vict. c.86, ss.5 & 6.
3. Goudy refers to Bell, Prin. § 1612, which contains a good, brief summary of the exceptional cases in which, at that date, a wife might bind her own estate (though not her person).
   Gray v. Wylie (1840) 2 D.1205.
4. *supra*.

arrears which he owed her. The agent was held entitled to sue the wife for his account. She had instructed him when she was living apart, and by his efforts a separate estate had been created for her, which was liable in satisfaction of his claim.

As always then, however, all personal diligence was suspended during the marriage[1]. Normally, where the wife was successful in such litigation and had no estate, "her agent looks to the husband for payment of his account[2]." In this case, though, "Undoubtedly the husband of the defender was liable for the debt, but payment cannot be recovered from him. In these circumstances, the sum pursued for having been in rem versum of the defender, I think the Lord Ordinary has rightly held that any separate estate of hers is liable for it[3];"

Goudy notes[4] that before the passing of the Married Women's Property Act, 1882[5], the English Courts had held that, though a wife had estate of her own, and had incurred post-nuptial obligations, she was not liable to be made bankrupt, and this in a case in 1879[6], the same year as that of Biggart[7] and Wishart[8], and the other "Fall of the City of Glasgow Bank" cases contained in 6 Rettie.

Goudy[9] also notes that, before the limitation placed upon a husband's liability for his wife's ante-nuptial /

1. if even then, in the circumstances of the case, it arose at all: see per L. Gillies; contrast L. Mackenzie, both at p.1209.
2. per L. Mackenzie at p.1209.
3. per L.P.Hope, ibid.
4. p.70.
5. see in particular, s.1(5). Goudy notes that this extended to wives generally the custom of the City of London.
6. Jones, 1879, 12 Ch.D. 484.
7. supra.
8. (1879) 6 R. 823.
9. ibid.

nuptial debts by the Married Women's Property (Scotland) Act, 1877, s.4, it was possible for an unfortunate husband to be rendered bankrupt in respect of an obligation undertaken by his wife while she was still unmarried. She herself was not answerable therefor. After 1877, however, the married woman might be rendered bankrupt on that account, if she had separate property. Thus, in Wishart[1], the City of Glasgow Bank having stopped payment two weeks after the parties' marriage, and the husband finding himself upon the list of contributories, as husband, in respect of the liability which the liquidators "say attaches to him because of the shares held by his wife[2]", the latter offered "to surrender all that he got, as a condition of his being discharged from liability."[3] This solution the Lord President approved ("...it appears to me therefore that Mr. Wishart is entitled to be relieved of the obligation for this debt of his wife upon surrendering any sum of money or other valuable consideration which he obtained upon the occasion of the marriage[4]"), being of the opinion that the wife had /

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1. supra.
2. per L.P.(Inglis) at p.825. His Lordship did not elaborate upon whether the liquidators placed this liability upon the husband by reason of the jus mariti (the wife and her father having invested in the bank before the wife's marriage, there having been no marriage-contract, and the origin of the property not being such as to receive protection from the husband's grasp in terms of the 1877 Act, s.3, which concerned money or property obtained through the wife's own work and efforts, and investments thereof) or on the liability for ante-nuptial debts or both.
   The husband's case was based, quoad ante-nuptial debt, on the Act of 1877, in respect of which he was successful, and, second, that his wife's right as fiar in the stock did not emerge until the death of her father, who had the liferent, and that therefore his wife was not a partner in the bank (unsuccessful).
3. L.P.Inglis, ibid.
4. at p.828.

had become a partner in the bank, and that this was an ante-nuptial debt[1], albeit perhaps not prestable till the bank or its creditors called upon the partners thereof to discharge their obligation.

Though matters were changing, and it could be said that a wife, in view of the increasing potential scope of her separate property, was both more immune from attack by her husband's creditors and less immune to attack by her own, certain anomalies persisted - for example, even where she was a separate trader, until the 1861 Act, ss.5 and 6 (in respect of separation and protection orders: and see also s.16), "the goods belonging to her in connection with such business none the less fell under the jus mariti and were attachable by her husband's creditors[2]", and the "stock-in-trade" exception (Ferguson's[3] Trustee v. Willis, Nelson & Co. (1883) 11 R.261) to the beneficial effect of the 1877 Act has been noted[4].

Of course, the common law position was that all moveable property of the wife (in the absence of private agreement and with certain minor exceptions[5]) passed to the husband jure mariti, and could be attached by the husband's creditors for his debts and in his sequestration. That which was her own by private paction could not be attached by them.

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1. The Lord President disliked the term. "Now, I do not know that "antenuptial debt" is a very happy expression. I am not aware that it has been used before this time in any Act of Parliament or by any law-writer, but I think it can admit of only one meaning: It means debts contracted by the wife before marriage; ..." (p.827). The expression appears to have been used freely by Lord Fraser, however, in 'Husband and Wife'.
2. Goudy, p.288.
3. F.v.W.N.& Co. (1883) 11 R.261.
4. See Goudy, ibid. See Chapter 1, supra, pp.89-91.
5. See generally Chapter 1.

It is interesting to see that Goudy[1] likens the wife's right to a reasonable provision from her own estate before it became swallowed up in the husband's property jure mariti[2], to "the wife's equity to a settlement" of English law. The wife's claim under the 1861 Act for such provision was not competent if her husband had obtained possession of the property in question, or if his creditor had "attached the Property by Decree of Adjudication or Arrestment, and followed up the said Arrestment by obtaining thereon Decree of Furthcoming, or has poinded and carried through and reported a sale thereof" (s.16[3]).

The road to the separation of spouses' property has been followed, and the growth of a wife's corresponding responsibility noted[4]. When separation of a wife's moveable property eventually became general by the Married Women's Property (Scotland) Act, 1881[5], so much more likely became the possibility that a wife might be rendered bankrupt - in respect of that separate property. In an unexceptionable and logical manner, as sanction was given to greater freedom and rights /

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1. p.287.
2. given to her by the Conjugal Rights (Scotland) Amendment Act, 1861, s.16, discussed supra at Chapter 1 pp.78-79 at which point the manner of the Act's expression is criticised.
3. As to the construction of these clauses of the provision, see Fr.I. 832/33. Goudy, p.287.
4. See generally Chapter 1; see also Goudy, pp.68-70; 286-289.
5. 44 & 45 Vict. c.21, s.1(1) - though, equally, by s.1(3) such property as clearly appeared to be her own was protected from the husband's creditors. However, where funds were immixed, or where the wife was the lender of funds to the husband, under s.1(4), she ranked merely as a postponed creditor therefor (see supra Chapter 1 pp. 98-99) and this is still the case - infra, pp. 128-143, and pp.153-159.

rights in property to married women, so also increased the concomitant, and proper, answerability. Thus, Goudy is able to say[1] that "A married woman may now be made notour bankrupt like any ordinary debtor", and to affirm that "The Bankruptcy Act, 1913, makes no exceptions or limitations, so that every person who is liable for debt may be constituted notour bankrupt[2]."

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1. p.70 (4th edn. - at 1914).
2. Ibid., p.68 (See the expansion of this declaration in Chapter VIII("Persons Liable to Notour Bankruptcy") which follows the sentence quoted).
The process of sequestration (which is one of the paths to the constitution of notour bankruptcy: Bankruptcy (Sc.) Act, 1913, s.5. By s.7 thereof, "Notour bankruptcy shall be held to commence from the time when its several requisites concur, ...": Gow, pp.625-626) is applicable, in qualifying circumstances (see ss. 11-13), to the "estates of any person subject to the jurisdiction of the Supreme Courts of Scotland .... The estate of a partnership, or of a corporate body, such as a royal burgh, may be sequestrated, but the process is not applicable to a company registered under the Companies Acts, nor to an unincorporated association". (Gow, p.629) nor probably (Gloag and Henderson, "Introduction to the Law of Scotland" 7th edn., 1968, p.720) "to any body established by private Act of Parliament". (The example there given, and also by Goudy p.72 is that of a railway company).
The references in the Act (ss.6 and 11) to notour bankruptcy and sequestration of a "company", "shall include bodies corporate, politic, or collegiate, and partnerships; "partner of a company" shall include the members of such bodies; "debtor", "bankrupt", and "creditor" shall apply to companies as well as to individuals, and shall include aliens;" (Bankruptcy (Sc.) Act, 1913, s.2).
However, a comparison of the cases, contained in the same volume, of Standard Property Investment Co.Ltd. v. Dunblane Hydropathic Co.Ltd. (1884) 12 R.328, and Clark v. Hinde, Milne & Co. ibid. 347, produces the conclusion that a company incorporated under the Companies Acts may be rendered notour bankrupt (Hinde) but cannot be sequestrated (Dunblane Hydro.) The winding-up of a company (the 'liquidation' thereof) "must take place according to the provisions of the Companies Acts exclusively" (per L.Shand referring to the case of Dunblane /

The Bankruptcy (Scotland) Act, 1913: Matters of a Technical and Procedural Nature

Mention should be made of those provisions of this important, consolidating and still current Act of 1913[1], which for more than sixty years has governed Scots law on the subject[2], which readily present themselves as affecting the rights of spouses from a procedural or administrative point of view - though indeed these ostensibly procedural measures may have substantial repercussions in property matters, and such a differentiation owes more probably to ease of treatment and convenience of classification than to fundamental difference in genus of rule - before the commencement of a more general study of the rights in property of bankrupt, spouse, and creditor, and the problems which arise when one spouse is a creditor of the other.

On this topic, Clive and Wilson comment that "The general rule is that the law governing bankruptcy procedures gives no special recognition to the spouse as such. To this rule there are two exceptions[3]." The second exception which the authors note is the matter /

Dunblane Hydro, in Hinde at p.353.)
"A company, although it may be made notour bankrupt, with the statutory effects on diligence and securities for prior debts, cannot be sequestrated. Once incorporated it cannot as a legal entity be extinguished unless removed from the register as defunct or liquidated by the statutory machinery of winding up." Gow, p.609.

1. 3 & 4 Geo.V, c.20. (commencement 1st January, 1914: the rule and transitional provisions - ss. 192 and 177.)

2. It is clear that the statute is now ageing: any new Bankruptcy Act will possibly attempt to achieve some degree of rapprochement with England, which in turn will aid 'harmonisation' with the E.E.C. Uniform Law of Bankruptcy.
See also Insolvency Act, 1976.

3. p.341.

matter of the judicial examination of the bankrupt's spouse.

By ss. 86 and 87 of the Act, the wife of a bankrupt may be compelled to answer on oath all lawful questions relating to the affairs of the bankrupt, the rules of confidentiality, it appears, having no place, because "The examination ... being a mere statutory inquiry ... is not subject to the strict rules of evidence[1]."

The first exception concerns the disability of the wife to vote in the election of trustee or commissioners. "... the wife of the bankrupt and any /

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1. Goudy, p.236, citing Sewers v. Balgarnie (1858) 21 D. 153, in relation to "confidential communications between a bankrupt and his wife". Clive and Wilson also refer to this case, making reference to the opinion of L.O.Kinloch in his Note there reported (at p.154) which was to the effect that to exclude such evidence would be to neutralize its detective force, "in the very cases in which it is especially serviceable". See also per Lords Cowan and Benholme, who laid stress, inter alia, upon the evidential specialties, and particular purposes, of bankruptcy proceedings and investigations.

   The examination authorised by s.86 is of "the bankrupt's wife and family, clerks, servants, factors, law agents and others ...". One of the difficulties of the 1913 Act is its general silence upon questions involving equality of treatment of husband and wife. Thus, nothing is said there about examination of a bankrupt's husband. No doubt, at that date, there were fewer married female bankrupts, although, as has been seen, that juxtaposition in 1913 was no contradiction in terms. (supra, p.123). Clive and Wilson (p.342) say, "Although there is no specific reference to a bankrupt's husband, there can be little doubt that he would be included in the term "family"", and this seems a most sensible view. Contrast the non-application to husbands of bankrupt wives of the restrictive provisions of s.60. (Clive and Wilson, p.341, infra, p.128).

any trustee for her shall not be entitled to vote in the election of trustee or commissioners, but in all other respects such person may be ranked as a creditor[1]." Any participation by the wife in this procedure is barred. "Where you are removing the trustee, you are taking the first of two steps for the election of a trustee. Therefore the disability attaching in terms to the wife's voting for the election of a trustee applies with equal force to her voting for the removal of the trustee who has been appointed[2]." Clive and Wilson /

1. s.60.
2. MacNaught v. Sievwright 1928 S.C.687, per L.Ormidale at p.690. In that case, it was decided that a wife was not entitled to vote for the removal of the trustee, because to do so was to participate in effect in the procedure to elect a new trustee. The inter-action of sections of the Bankruptcy Act here in question was between ss.60 and 71: see decision to the opposite effect upon the inter-action of ss.34 and 60, MacNaught v. Sievwright 1927 S.C.285, infra, p.150, and Clive and Wilson, pp.341-342. Clive and Wilson (p.342) incline to a sceptical attitude here, taking the view that "The real reason for this decision seems to have been a consideration of the absurd consequences which could follow in a small sequestration if the wife could vote for removal but not appointment of a trustee". This may be so, but, on the other hand, if, for some reason (which seems to arise not perhaps from the wife's rôle as wife, but rather from her membership of that least-favoured category, the class of postponed creditors (see "The Scottish Bankruptcy Manual" J.B.Wardhaugh 5th edn. 1955, p.17, footnote 37 where, however, Wardhaugh mentions, in his list of non-entitled persons, the wife, and the postponed creditors in different sentences as though treating of the wife qua wife (as a special case) rather than qua postponed creditor. This may be attributable to the special treatment of wives and those acquiring debts after sequestration otherwise than through succession or marriage, by s.60 of the Act, whereas the disentitlement of postponed creditors generally appears to rest on the common law. (See reasons in Sheriff's note, R.Scott Cram & Co.'s sequestration (1909) 25 Sc.L.Rev. 238 at p.240): it is fair to say, though, that this may be mere coincidence of similarity of treatment from which no conclusion as to theory or reasoning should be drawn /

Wilson, noting that the Interpretation Act 1889 "does not provide that words importing the feminine gender shall include males", remark[1] that this rule does not apply to the husband of a bankrupt woman.

The order of ranking is familiar:- the order is first, preferential (secured, or privileged) claims, then ordinary claims and contingent claims, and thereafter only are entertained the postponed claims (if any sums remain). All prior-ranking claims must be met in full before the claims of postponed creditors can be considered, but it does appear that the latter will rank on the fund before the ordinary creditors for their interest[2].

The 'Lender-Wife' in the context of Partnership

The lender of money to a partnership upon interest varying with profits[3] or in return for a share of the profits (compare Cram, supra), the seller of goodwill to a partnership in consideration of a share in the profits[3] and the married woman for funds lent or entrusted /

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drawn - and, in any case, what is it but relationship which places the wife-creditor in the class of postponed creditors? The nub is: what is the reasoning or philosophy behind that?) the wife is to be excluded from the election procedure, there seems to be no reason (both in the meaning of "justification" and of "point") for her to participate even on the periphery of the process. Moreover, before a new trustee can be elected a former one must be deposed, and to that extent the wife is participating in the process. Similarly, to that (limited) extent, the "point" of her vote would have to be admitted, and accordingly the meaning of the word "reason" as used in the above argument would require to be restricted to that of "justification".

1. p.341. Contrast ss.86/87 supra.
2. Goudy, p.331 (text, with footnote (d)). On ranking, see generally Goudy, pp.330-331, Wardhaugh, pp.43-44.
3. Partnership Act, 1890, s.3. See "The Law of Partnership in Scotland", J. Bennett Miller, pp.93-96.

entrusted to her husband or immixed with her husband's funds[1], are Wardhaugh's examples[2] of the postponed creditor. He continues[3], "A married woman is, however, entitled to the benefit of any security received by her from her husband for the loan (Commercial Bank v. Wilson, 1909, 1 S.L.T. 273)," and furthermore, "on the principle that a firm is a separate persona," apart from the constituent partners thereof, "a loan to a firm in which the creditor's husband is only one of the partners" (a situation which might arise fairly frequently and is by no means fanciful) "is not a loan to her husband in the sense of the Act of 1881, and is not postponed in the ranking on the firm's estate (nor apparently on the husband's estate either, in respect of the deficiency). (Lumsden v. Sym (1912) 28 S.C.R. 168; English case, Re Tuff (1887) 19 Q.B.D. 88, referred to.)" Wardhaugh goes on to say that the form of the transaction will be important. A loan might be made directly to the firm, or to the husband who thereupon lends the money to the firm, but in either case surely, the wife should be advised to be cautious - might she not, if she escaped classification as the lender of money to her husband, or an entruster of money to him or of having immixed her funds with his, nevertheless find herself to be a postponed creditor by classification as a lender of money to a partnership? In the latter case, though, she would be the postponed creditor of the firm while in the former the postponed creditor of an individual partner. (The disadvantages under which /

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1. Married Women's Property (Scotland) Act, 1881, s.1(4).
2. p.44. See also Goudy, p.351, who, with reference to postponed creditors, states that "Two such classes of creditors" (being those mentioned in the text above) "are known to the law."
3. ibid.

which the 'private' creditor labours are discussed briefly, infra.). On the other hand, she would enter that category only if she lent upon interest varying with profit or in return for a share of the profits in circumstances which might suggest that she herself was a partner. A straightforward loan to her husband's firm would not, then, appear to place her in any position lower than that of an ordinary creditor, of the firm, provided presumably that the loan was made to the partnership, and not through the medium of the husband (unless possibly the medium speedily despatched the money to the ultimate recipient, this being the most convenient arrangement in the circumstances?) since the latter situation might cause entanglement with the provisions of the 1881 Act if the husband delayed to transfer the funds. This may be a simplistic view. There are two points to note: first, that the court is more likely to look to the substance than to the form of the transaction, and second, that, the husband being a partner in the firm, and being therefore "an agent of the firm and his other partners for the purpose of the business of the partnership:" (s.5, Partnership Act, 1890), having, let it be supposed, no restriction upon his general authority to act in matters concerning the business of the partnership and the "carrying on in the usual way business of the kind carried on by the firm of which he is a member", the use of the husband as a medium (even a tardy medium) in the transfer of loan funds to the firm would not alter the character of the wife as a lender to the firm if that, in essence or in substance, was the nature of her advance.

It is thought that that is the better opinion: though the interests of others might lead them to argue that the placing of the wife's money in the husband's bank account amounted to an immixture of funds /

funds or a purely inter-spouse loan, and/or that the husband had no authority to accept and handle the loan, surely the citation of s.5 by the wife would be a sufficient answer for her, unless of course she knew that her husband had no such authority if indeed he did not, or did not know or believe her husband to be a partner?

On the other hand, a loan by wife to husband made, for example, with the aim of allowing him to make his capital contribution to the firm, would seem to be, in its nature, a personal loan to the husband, though it will come to represent part of the capital of the firm. It is suggested that the firm is not concerned with the private financial arrangements as a result of which a partner is enabled to make or 'top-up' his capital contribution[1].

These thoughts tend to suggest that to lay great stress on the form of the transaction under consideration may be ill-advised. Neither benefit nor form appears to be a good guide: all depends on whether the loan was truly to the firm or to the individual partner personally. Wardhaugh himself merely states, without explanation, that the form of the transaction will be "important", and in his next sentence envisages both direct loan to the firm, and loan through the husband to the firm,- his sentence construction rendering it impossible to judge whether he considered the methods to be equally competent /

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1. Cf. Miller, pp.258-263 (in the context of arrangements as to capital contribution before the partnership is formed) and (in relation to third party loans to existing partners) pp.256-258. "The firm is in fact a creditor in the partner's obligation to contribute the property and a creditor is not bound to inquire as to the means by which his debtor has put himself in a position to discharge his obligation." (p.257) (where the partner is obliged to make such contribution and obtains the wherewithal on his own credit from a third party).

competent and desirable, or whether it was the distinction between them which was "important".

"Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner[1]." Normally, therefore, on the bankruptcy of the husband partner, the firm will be dissolved, and, in the situation envisaged, the wife will rank as a postponed creditor of her husband (who himself "may be a creditor of the firm in some respects and a debtor of the firm in others[2]", besides standing also perhaps in the relation of debtor or creditor to other individual partners thereof[2]) on such estate as remains for the satisfaction of the claims of his postponed creditors. The claim of his ordinary creditors is as against his estate tantum et tale as it stood in the bankrupt (see Goudy, p.582). " ...the creditors of the firm rank on the firm's estate to the exclusion of the creditors of an individual partner[3]", in the firm's sequestration.

Goudy[4] writes that the partner is cautioner for the /

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1. Partnership Act, 1890, s.33(1). See 'Partnership' J.B.Miller, pp.446-450. Professor Miller at p.448 emphasises that, because of the separate 'persona' of the firm in Scotland, " - a firm may be sequestrated while the individual partners remain solvent. Conversely one or more of the partners may be sequestrated while the firm itself remains solvent." It may be, of course, that it happens that the firm, and all its partners, are sequestrated. (For a discussion of the consequences of each of these three possibilities, see Miller, pp.554-566).
2. Miller, p.562 (and if a debtor to the firm, the firm, or, if sequestrated, its trustee, will rank as his ordinary creditor. "And the ranking in the latter case in no way affects the right of the company's creditors through their trustee to claim in addition directly against the private estate of the partner as cautioner for the company's debts." (Goudy, p.578).
3. Gloag and Henderson, p.277, citing in the 6th edn. (at p.259) Clark, Partnership, p.753, and in the 7th edn. (at p.277) Goudy, Bankruptcy, pp.578-9.
4. p.578.

the firm's debts and that "The trustee on the joint estate, in ranking on a partner's estate for debts due by such partner to the firm on capital account, is acting rather as the ingatherer of the firm's estate than as a creditor representing the other partners. His right so to rank is of great importance to the company creditors, as it increases the divisible fund of the company." Further[1] he says:- "Creditors of a bankrupt or insolvent firm are entitled to be ranked on the firm's estate for the full amount of their debts, to the entire exclusion of the separate creditors of the partners. They are further entitled to be ranked on the separate estates of the partners for the balance left unpaid after exhausting the funds of the company, pari passu with the separate creditors of the partners.

The above rule of ranking is different from what prevails in England...".

If it is the case that the firm is bankrupt and the partners, or some of them, are solvent, "no difficulty of ranking arises. The partners are liable to creditors jointly and severally, as co-obligants for the whole debts, but in relation to each other they stand in the position of co-cautioners, and entitled to relief, so far as they pay in excess of their respective proportions. Accordingly, if one solvent partner pay the whole debts, he may claim against the several estates of the other partners, for their respective proportions, just as in the ordinary case of co-cautioners[2]."

The lender-wife is in an unenviable position for it seems that if she is not a creditor of the firm, she /

1. Ibid.
2. Goudy, p.582.

she can only be a postponed creditor of an individual partner[1].

The query which this reasoning takes as its starting point is as follows: if a wife lends to a partner who is her husband, and it is agreed that the loan in the circumstances is not a loan to the partnership, is there any authority to suggest that she can be regarded as an ordinary creditor of an individual partner, if that partner is her husband? Is Wardhaugh to be understood as suggesting that there are three possibilities - first, that the wife is an ordinary creditor of the firm, second, that the wife is an ordinary creditor of an individual partner, who happens to be her husband, and, third, that the wife is a postponed creditor of her husband, who happens to be a partner?

Wardhaugh states[2] that a loan to a partnership of which (only) one of the partners is the husband of the lender "is not a loan to her husband in the sense of the Act of 1881, and is not postponed in the ranking on the firm's estate (nor apparently on the husband's estate either, in respect of the deficiency)." The cases cited by the author, in support of this view (and of the view in parenthesis?), are those of Lumsden v. Sym[3], and the English case Re Tuff[4] therein referred to: Lumsden bears only upon the primary point that a married woman who lends money to a partnership of which her husband is a partner is not (necessarily? always? unless in exceptional circumstances displaying a true intent only to lend to the husband personally?) to be taken as "lending" within the meaning, and with the consequences of the 1881 Act, s.1(4).

Where /

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1. See infra
2. p.44.
3. (1912) 28 S.C.R. (or Sc.Law Review) 168.
4. (1887) 19 Q.B.D. 88.

Where a wife made such a loan, and upon the question arising whether the provisions of the 1881 Act applied, Sheriff Orphoot in Lumsden said[1], "I am of opinion that they do not. It is to be kept in view that the claim is made upon the estates of a firm of which the appellant's husband is only one of the partners, and it is a claim for money lent to the firm, and not to the husband. In our law a firm is a separate and distinct persona. It may consist of many partners, and I do not think that if the wife of one of the partners lends money to the firm it can be said that she has lent it to her husband in the sense of the provisions of the Act of 1881. I am fortified in this opinion by the fact that the same view has been taken in England ...".

From the English case, there is to be elicited perhaps a certain guidance on the secondary point which forms the substance of the query.

There, (the primary point having been decided as it was in Lumsden), Cave, J. gives an inkling of the basis of the reasoning behind the specially unfavourable rules governing the treatment of inter-spouse loan. When the legislature, he says, gave married women a property in their own earnings and power over them, "it had to consider the case of what was to happen if the wife lent such money to her husband for the purpose of his trade or business; and --- it identified the wife with the husband to this extent --- that if she chose to make use of this power which was given to her and to say that the money was hers and must be treated as a loan to her husband, then that she, at all events, should be identified with him to such an extent that she should not be able to claim a dividend until the other /

1. at pp. 169/170.

other creditors had received 20s. in the pound[1]." (Hence, the ground here adduced for the less good claim of a wife in her husband's bankruptcy in respect of inter-spouse loan is that of identification of her with him.).

However, where the husband was in business with another person or other persons, the matter, in the opinion of Cave, J., was different[2]. "... I think, therefore, that where there is a loan by the wife of a trader to the firm of which her husband is a member[2], that /

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1. at p.90.
2. The fact that this judicial distinction was drawn here is all the more significant in the English context, since English law, neither at common law nor under the Partnership Act, 1890 (s.4(1): contrast Scotland, s.4(2): see the saving of the rules of common law and equity, s.46), recognises the separate personality of the firm. (See Miller, p.1 and footnote 3 and also pp.14-16. The firm in Scotland is most frequently referred to as a "quasi-person", a description which has certain merits, but is perhaps not entirely a happy one. (p.16). Consider Miller, pp.448-449 upon the significance and purpose of s.47(2) of the Partnership Act, 1890, which Professor Miller writes, "appears to be to conserve the special treatment accorded by Scots law to the firm and its partners in cases of bankruptcy - a treatment which is necessitated because of the fact that the firm in Scotland is regarded as a person distinct from the individual members .... The most significant aspect of the Scots law on this subject relates to the ranking of creditors on the sequestrated estates and is derived from the doctrine of the separate persona of the firm and the accessory obligation of the individual partners as cautioners or co-obligants in the debts of the firm."

   s.47(2):- "Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof." (Neither does the Act of 1913 appear to have made any substantial change therein, but see Miller, pp.560-561, and pp.577-582).

that she may prove in respect of such a loan. The circumstances of the two cases are entirely different. In the one case a woman lends to her husband, and to him only, he being the sole trader, and she will share with him in the whole of the benefits which will arise from the success of his trading. In the other, instead of being the sole trader he is one of a firm, one, it may be, of two or three, or it may be of ten or twelve, and it is obvious that her interest is totally different from what it was before. Before, she and her husband were together interested in the whole of the profits to be derived from the trade. In the case I have put her interest may become a comparatively minute one. She, no doubt, is interested in the success of her husband, and to that extent she will benefit by his success, but instead of having with her husband the whole of the profits of the trading venture, she, with her husband, will only enjoy that portion which the husband may be entitled to derive from the firm[1.2]."

Having differentiated between the case of a loan to the husband as sole trader and a loan to the husband as a partner, Cave, J. then says, in a partnership circumstance, "the question which I shall have to ask myself in each case will be, whether there was really a loan to the husband in order that he might do what he pleased with it, contributing it to the firm or not as he thought proper, or whether it was a /

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1. pp.90-91.
2. Whether or not the judicial trust in the certainty of the sharing by the wife of the profits of the husband's sole trading was, or is, well-founded, the philosophy is clear. The concept of benefit or profit appears here as a variant on the identification theory above noted. Certainly the provisions of the Partnership Act, 1890, s.3 appear to rest on a similar basis. See Miller, p.94: such a lender or seller "has to some extent involved himself in the fortunes of the business...".

a loan by the wife to the firm? In this present case I am of opinion that this was a loan by the wife to the firm, and that she is entitled to prove for it against the joint estate of the firm[1]."

This approach seems to suggest that, in loan to partnership, the loan may be "partnership-oriented" or "husband-oriented", and that the lender will be treated as ordinary firm creditor, or postponed creditor of husband accordingly, (which simply is a re-formulation in different terms of the preliminary question: is this truly in substance a loan to the firm, or a loan to the husband personally?), and that where the wife lends to the husband (the latter being a sole trader) for business purposes, there is nothing which <u>should</u> distinguish this from any (purely domestic) inter-spouse loan, unless, of course, the circumstances are such (compare the tone of the opinion of Cave, J. on this point, <u>supra</u>,pp.135-7, though he does not appear to have followed the point to this extent) that, despite the terms of s.2(3)(d) of the 1890 Act, the spouses are held nevertheless to be partners <u>of each other</u>, which brings a new dimension to the question. (As a partner, the distribution on dissolution would be governed by s.44 (and see general liability - s.9 and s.4(2)) and her position and risk (if necessary, unlimited liability after the liability of the firm) would be indistinguishable from that of any other partner. The advantages of this position vis-à-vis other situations postulated would depend entirely on the circumstances of the case).

Walton's comment[2], made with reference to the case of Laidlaw v. L's. Trustee (1881) 10 R. 374, that "A wife who out of estate separate by contract made /

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1. p.91.
2. p.189.

made advances to her husband for his business, was held entitled to rank in his sequestration as an ordinary creditor. In this case, which was subsequent to the Act of 1881, it was said that donations by her for this purpose would have been revocable", is misleading in its brevity: this was a case where a husband was a sole trader and in which he received for his business, money from his wife in circumstances in which it was clear that she had not made a gift to him thereof. The wife was held entitled to rank as his ordinary creditor therefor, and there is no mention in the report of the terms of the Married Women's Property (Scotland) Act, 1881, s.1(4) (which came into operation on 18th July, 1881, the date of the decision being December 16, 1882, though it appears that the loan was granted some time before the date of the Act) nor (except in the argument of the trustee, in reclaiming against the L.O.'s interlocutor, where it is reported that he took the view that the husband and wife were joint adventurers and that the money was advanced for the wife's as well as for the husband's use) of the possibility that the wife was the husband's partner.

Unless other indications are awry, this decision must surely be explicable only on the grounds of the non-retrospective character of the 1881 Act. Of course, conjugal finances are usually so inter-twined that a domestic loan could facilitate indirectly a business arrangement (which inter-relation primarily in other aspects (especially that of the power to amass 'consumer durables') lies at the heart of the argument against separation of property) and so perhaps it is right that all solely inter-spouse loans should be treated in the same way. Whether that way (generally preferential to (other) creditors at the expense of the spouse) is the best and fairest which can /

can be devised is a matter for discussion[1.2.].

It does appear that there are but two forms of loan by the wife to the partner-husband, and that if the loan is truly for the husband's benefit alone, then an inter-spouse loan with all its disadvantages from the wife's standpoint has been constituted. (Moreover, the loan must still be proved[3]). If a loan to the partnership has been constituted, however, the wife cannot regard her ship as in calm waters, but here the hidden rocks hold no especial danger for married women, but for any unwary creditor.

It seems to come to this, then, that a personal loan by a wife to her partner husband, even though for purposes connected with his business and even though the subject of the loan may find its way into the coffers of the firm, renders her a postponed personal creditor of her husband in his bankruptcy, in terms of the 1881 Act. So too would a personal loan to her sole trader husband for use in his business (but see below). There appears to be no case (in the context of loan: ordinary debtor-creditor relations will apply in an inter-spouse sale, however, or other "onerously incurred non-alimentary debts"[4]) in which the wife may attain the status of ordinary creditor of her husband.

On the other hand, for what is truly a loan to the firm, the wife will rank as an ordinary creditor of the firm. If her loan is made on interest varying with profit, or in exchange for a share of profit, she will rank[5] as a postponed creditor of the firm (or joint /

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1. Chapter 7 (and cf. other systems - Chapter 6).
2. As to treatment of "lender-husband", upon which there seems to be little guidance, see infra, p.149, footnote 4.
3. infra, p.145 et seq.
4. Clive and Wilson, pp.340-341.
5. Partnership Act, 1890, s.3,

joint adventure) and if indeed the circumstances reveal that she has, in fact, become a partner or joint adventurer[1] with her husband, then, as in her position as firm creditor, all sex bias or "married woman specialty" disappears, and her rights and liabilities are governed by the same rules of statute and common law (so far as not inconsistent therewith (1890 Act, s.46)) as govern any other partner.

This at least would seem to be the broad rule. As with all instances in the sphere of partnership, the facts and circumstances of each case would require scrutiny. Prima facie, at any rate, it is not thought that in the general case (private debtor-creditor husband-wife partner relations apart)[2] the terms of s.1(4) of the 1881 Act (entrusting or 'immixing') would affect in any way the wife's position as a partner in a firm (being a separate persona from the partners thereof) which happened to include her husband as a partner. Similarly, even joint adventure in Scotland carries with it the notion of limited legal personality - but to dwell further on these complexities would be out of place in this discussion.

(A married woman can, of course, be an ordinary creditor of an individual partner who is not her husband, while not being a creditor of the firm[3]. It is the fact of marriage - for whatever reason (and the reason has not been explained very satisfactorily on grounds of identification or interest in profits) - which has set aside the normal commercial and property relations here).

Where /

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1. though see Miller, pp.261-3 as to commencement of such joint adventure.
2. Miller, p.562, line 30.
3. The rules reveal the inferior position of such a creditor to that of a creditor of the firm - see supra pp.132-3 and infra p.142.

Where both the firm and the partners thereof are bankrupt, "the entire assets of the firm are available to meet the claims of the creditors of the firm, and until those creditors have received payment in full, the creditors of the individual partners are excluded from any claim upon the firm's assets in respect of the bankrupt partner's share and interest in them[1]." On the assumption that in the circumstances of the particular case, the wife is not the lender of money to the partnership, but rather to an individual partner (her husband), the trend of argument suggests strongly that she can be regarded only as a postponed creditor of the husband.

All Wardhaugh appears to say ("... on the principle that a firm is a separate persona, a loan to a firm in which the creditor's husband is only one of the partners is not a loan to her husband in the sense of the Act of 1881, and is not postponed in the ranking on the firm's estate (nor apparently on the husband's estate either, in respect of the deficiency[2])"), is that, should the funds of the partnership be insufficient to meet the claim of this particular firm creditor (the wife), she may rank as an ordinary, and not as a postponed, creditor on her husband's estate. In that case, however, the husband, having met the amount due (in a situation in which the firm was sequestrated while the partners or some of them remained solvent), would be entitled to claim relief from the other partners, that entitlement, in the case of insolvent partners, being a right "to rank on the estates of the partners who are insolvent for the proportion due from those partners in relief of the payment that (they) have /

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1. Miller, p.565 and see following sentences therein. See also Goudy, pp.579-581.
2. p.44.

have made[1.2]."

The conclusion seems to be that where the circumstances of the loan are such as to permit the raising of questions as to whether the Married Women's Property (Scotland) Act, 1881, s.1(4) applies, the lender wife has guided her ship into dangerous waters. It can be seen that the best and safest course is to attempt always to ensure that the loan is regarded as a loan to the partnership (not at a rate of interest varying with the profits, nor carrying in exchange a share of the profits), and not as an inter-spouse loan. It is suggested that too much significance should not be read into Wardhaugh's sentence concerning the form of the transaction.

An interesting and fairly recent case impinging upon the subject of spouses' rights of property in relation to partnership is that of Adam v. Adam[3], in which /

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1. Miller, p.555.
2. This discussion concerning the rights of a lender-wife has involved a very brief outline of a very complex subject. See Miller, Chapter XIII, "The Firm and The Partners in Bankruptcy", and Chapter X, "Dissolution and Expulsion", pp.446-451 (wherein is to be found a consideration of the significance of s.47(2) of the Partnership Act 1890 noted supra, footnote). See also pp.294-295; from which much help has been derived, and Goudy, Chapter XLVI, "Ranking on Company and Partners' Estates"; F.W.Clark, "A Treatise on the Law of Partnership and Joint-Stock Companies According to the Law of Scotland", (1868), Chapter IX, "Bankruptcy"; Goudy, Chapter XLVI, "Ranking on Company and Partners' Estates."
3. 1962 S.L.T.332 (See Miller, p.383). Another recent case (Armour v. Learmonth 1972 S.L.T.150) demonstrates that a question may arise the other way about from that which is discussed in this part of the text. There, action was raised by the trustees for the creditors for whom a trust deed had been signed by all the partners of a firm of stockbrokers against the wife of one of those partners, seeking declarator that an ante-nuptial payment by one of those partners to his fiancée was a gratuitous alienation to a conjunct person and void in terms of the Act 1621, c.18. The claim was unsuccessful.

which the husband and wife were joint adventurers and where the wife averred that the heritage was her property, though it stood in her husband's name as the business was that of a public house and the licence was to be held by the husband. The principal point concerned the mode of proof of the wife's averments. It was decided that she should be limited to the defender's writ or oath. The defender's argument that the circumstances of the case fell within the scope of the Act 1696, c.25, since essentially it was an instance of the seeking of a declaration of trust, was successful, and the pursuer's arguments that three specialties - namely, the relationship of husband and wife (here not operating, as it transpired, to set aside a general rule of law) the joint adventure aspect and the terms of P.A.1890, s.20 - avoided the application of the Act, failed.

Hence this is not a case of inter-spouse loan in partnership; rather is it a warning of the dangers inherent in the deprivation or yielding up of the simple badges of property in a system which clings to separation of property.

The wife may vote and rank[1] for a dividend, but, like all other creditors wishing to take part in the sequestration, she must produce an oath as to the debt, and the account and vouchers necessary to prove it[2]. Such evidence may be impossible to obtain, and unrealistic to expect, in a domestic arrangement.

However, s.46, which contains provisions to regulate the situation where these are not in the creditor's possession, speaks of the grant of an oath by the creditor to explain the cause of the failure /

1. See Goudy, p.323, text and footnote (g): meanings of "ranking".
2. Bankruptcy (Sc.) Act, 1913, ss.45-47.

failure to produce vouchers, and their location; "which oath shall entitle him to have a dividend set apart till a reasonable time be afforded for production thereof, or for otherwise establishing his debt according to law[1];"

In the case of Agnew[2], a wife was refused a ranking on her husband's sequestrated estates for money which she claimed had been loaned by her to her husband, and for which she had no greater proof than I.O.U.'s granted by him to her. The Sheriff's Note, annexed to the report, states, "The trustee was undoubtedly right at the time in issuing the deliverance in question. He had before him an affidavit founded on the I.O.U.'s granted by the bankrupt to his wife, and it was expressly admitted, in answer to his call, that she had no further vouchers to produce. He had therefore no alternative but to refuse a ranking and leave her to prove her claim under an appeal, as she has proceeded to do." This is an interesting insight into the procedure there adopted. However it must be noted that the proof or argument was concerned to a large extent with the question whether the wife's money which was the subject of the loan (acquired partly by inheritance and partly from her mother in circumstances in which the Sheriff could regard it as "earnings") was the wife's own separate property of which to dispose (which, under the Married Women's Property (Scotland) Acts, 1877 and 1881 it was decided to be) and not whether the transactions were truly loans. (A parallel to-day with the former question would be the determination whether, in the circumstances, the property "loaned" was the husband's or the wife's, but the primary matter of proof of inter-spouse loan might /

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1. emphasis added.
2. 1894, 10 Sc.L.Review, 106.

might cause greater difficulty).

Loans of money in excess of £100 Scots (£8.33) "unless admitted without qualification can be proved to have been made and to be resting-owing only by the debtor's writ or his admission on oath. The requisite writ may be a formal personal bond, a holograph IOU, a letter, entries in the debtor's business books, or similar acknowledgement. It may be the writ of an authorized agent. A cheque in the debtor's favour, endorsed by him, does not by itself instruct loan and the creditor may not prove by parole the circumstances in which the cheque was granted but an endorsed cheque may prove advances in a continuing account. A writing admitting receipt of money does not prove present indebtedness to repay. Proof by writ or oath has been held applicable only where the loan is an isolated transaction and if the loan is alleged to be one incident in a series of transactions between parties any evidence which is natural proof in the circumstances may be admitted ... if it is alleged, as it may be, in defence to a claim for repayment that the money was a gift the mode of proof may not be restricted but the onus is on the defender ... In bankruptcy writ dated after the commencement of sequestration and reference to the bankrupt's oath are both incompetent, though an acknowledgement granted when the debtor was insolvent or within sixty days of notour bankruptcy may suffice[1]."

It is the duty of the trustee to adjudicate upon claims and, if satisfied, admit them to a dividend. Goudy explains[2] that three courses are open to him - to /

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1. Walker, Prins. II pp.1557-1558.
2. pp.323-326.

to admit the claim, to reject it (with reasons), or to require further evidence in support of it. "Where a claim is insufficiently instructed and the trustee requires further evidence in support of it, he may pronounce a formal deliverance to that effect. He has the power of examining the bankrupt, the creditor, or any other party on oath respecting the claim; and as the power is given him, so is it his duty to take such evidence as may be available .... It is also the trustee's duty, where he thinks further evidence necessary, to call parties before him, and not leave the initiative of leading evidence entirely to the creditor concerned. As a rule, the trustee should call for further evidence wherever he has reason to think that the creditor's claim is bona fide, although ex facie it may be doubtfully vouched, and that there is a likelihood of its being established by legal evidence[1]." The phrase "such evidence as may be available" appears therefore subsequently to be cut down to mean "such legal evidence as may be available[2]."

In the case of Latta[3], also, the same Sheriff (A. Erskine Murray) in his note appended to the decision, stated that, "There being no entries in the books of Latta & Co. bearing on the subject of the claim, the respondent could not well do otherwise than leave it as he has done for investigation in Court". In the absence of a sufficiently vouched debt the procedure at least before 1913[4] seems therefore to have been for the trustee to refuse /

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1. p.325. See B. (Sc.) Act, 1913, s.123.
2. Cf. s.46 ("... or for otherwise establishing his debt according to law;")
3. 1894, 10 Sc.L.Review, 232.
4. For a description of post-1913 procedure, see Goudy pp.325-326. Appeal against any deliverance of the trustee or commissioners or creditors' resolutions, to the Lord Ordinary or the Sheriff is authorised by the 1913 Act, s.165. Goudy ibid says:- "Where /

refuse a ranking to any creditor in that position, including a wife, and leave the latter to go to court to appeal against the trustee's decision.

In that case, the Sheriff said, "As to the law of the matter, the case of Williams, referred to in the interlocutor of 26th February last, and still more that of Laidlaw, 16th December, 1882, 10 R. 374, go to show that in circumstances like the present, where the money is held to have been transferred by loan or donation, the wife is entitled to rank as regards the principal sum in the event of the husband's bankruptcy, though not as regards interest."

(In Laidlaw v. Laidlaw's Trustee, at pp.376-377, the Lord President (Inglis) had said, " ...and there can be no doubt that he "(the husband) "got it either as a loan or as a donation from his wife. It is no matter which is the true state of the case, as either would afford a good ground of claim."). By the Married Women's Property (Scotland) Act, 1920, s.5, however, donations between husband and wife were rendered irrevocable, unless made within a year and a day of the donor's sequestration, when they may be reduced /

"Where the trustee has not called for further evidence, the Court, on appeal, may do so, by remitting back to the trustee either to call for production of further vouchers or to take proof at large, or by ordering proof to proceed before itself. But it will adopt the last of these courses only in special circumstances, as proof can be taken more easily and cheaply by the trustee. On the other hand, cases sometimes occur in which the facts in dispute are so involved or complex that the trustee's prudent course may be to reject the claim, so that the facts may be elucidated by proof in an appeal." Thus, in circumstances such as those last-mentioned, the practice does not seem to have changed.

reduced at the instance of creditors[1]. Thus, it will matter very much now whether a passing of money between spouses amounts to a loan (for which the lender wife may[2] rank as a postponed creditor), or a gift, which may be reduced, but only by, or on behalf of, and for the benefit of, the creditors, and cannot subsequently be revoked, or found a claim by, the donor spouse - unless perhaps the latter is also a creditor of the donee spouse. This raises two interesting points - first, whether a spouse in the capacity of creditor can triumph over the specialties imposed on her (him[3]?) through identity as a spouse, and second, whether it is the case that the "lender-husband" also, though not specifically mentioned by the 1881 Act, can attain a status no higher than that of postponed creditor in his wife's estate[4]?

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1. Supra, Chapter 1, p.110. See interesting annuity problem, Clive & Wilson pp.340-341. See also op.cit. pp.332-337.
2. Clive & Wilson, p.339, point out that this is the wife's best position: she has no claim at all if the money has been used for household expenditure (to which she will be presumed to have consented or of which she will be thought to have given to her husband as an (irrevocable) donation.) They note that the onus lies on the wife to show that her funds (or income at least) has been used not for household but for husband benefit.
3. See second question postulated.
4. Cf. supra, footnote 3. There appears to be a dearth of authority on this point, but in the nature of things, and in view of the husband's primary duty to aliment, the 'household expenditure' rule would surely apply to bar the husband's claim to be his wife's (postponed? ordinary?) creditor even more strongly - and much more frequently - than vice versa. (see Clive & Wilson, p.339, footnote 75). For debts which do come within the scope of s.1(4) of the 1881 Act, a spouse will be an ordinary creditor of the other spouse (in Clive & Wilson's example at p.340, for the unpaid balance of an inter-spouse sale: the authors in Chapter 11 ("Competition Between Spouse and Creditors") make no reference to the applicability of s.1(4) to the lender-husband but it is perhaps not too much to say /

A vote that the estate be wound up under a Deed of Arrangement (s.34) may be carried out, at the meeting for election of the trustee in sequestration or at a subsequent meeting called for the purpose, by the vote of a majority in number and three-fourths in value of creditors present in person or represented, and the bankrupt's wife is not debarred from voting. (MacNaught v. Sievwright[1]).

In Sievwright, the inter-action of sections 34 and 60 were considered, and it was decided that, despite the fact that the result of the approval of the resolution to have the estate wound up under a deed of arrangement was that the appointment of a trustee was unnecessary, nevertheless the participation by the wife in the former vote was not equivalent to the participation by her in the vote for the appointment of a trustee or commissioners[2].

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say that the inference of the sentence at p.340, beginning, "Subject to the rules of section 1(4) ..." is that husbands too may be included in its ambit. Such a conclusion would be, moreover, desirable on the grounds of uniformity and equality (of disadvantage: some rationale must lie at the root of the unfavourable treatment). On the other hand, are there any indications to support it? (Cf. Clive & Wilson, p.341, footnote 92, with regard to s.60 of the Bankruptcy (Sc.) Act, 1913: contrast ss.86/87 ibid. p.342.) It seems that there are not, and the aim of the Act, being a provision drafted with wives in mind, appears to have been directed here against inter-spouse collusion against creditors, since previously few wives had any separate property with which to endow their husbands by way of loan, entrusting, or immixture. The reverse route was used but not with great success, and was viewed with suspicion. Was it thought perhaps not to be necessary to legislate for that case?

1. 1927 S.C.285.
2. Contrast MacNaught v. Sievwright 1928 S.C.687 supra, p. 127. See Clive & Wilson, pp.341-342.

"In my opinion, a resolution brought up at a meeting for the election of a trustee that the estate ought to be wound up under a deed of arrangement is a question distinct from, and preliminary to, the question of who may or may not be elected as trustee, and, accordingly, it is one upon which the wife is perfectly entitled to vote[1]."

With reference to s.60, the Lord President (Clyde)[2] commented, "According to that section the wife of the bankrupt is not entitled to vote "in the election of trustee or commissioners, but in all other respects such person may be ranked as a creditor." She may, therefore, be ranked as a creditor for voting purposes in all respects with the single exception which the statute makes. It may be that the bankrupt's wife is not unlikely to cast her vote with other motives - possibly - than those of a mere creditor; but the statute frankly contemplates that, except in the election of trustee and commissioners, she has the same right to vote as any other creditor."

Presumably also, the spouse, provided his/her claim is fixed, not contingent, and is sufficiently vouched, is as entitled as any other fixed creditor to petition for the sequestration of the other spouse, although it is a right which surely a spouse would be loathe to exercise[3].

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1. per L. Blackburn, at p.288.
2. at p.287.
3. s.12:- "Petitions for sequestration may be at the instance or with the concurrence of any one or more creditors whose debt or debts together amount to not less than fifty pounds, whether such debts are liquid or illiquid, provided they are not contingent." (as amended by Insolvency Act, 1976, Sched. 1 (£200)).

As well as in the case of inter-spouse sale, a wife ranks as an ordinary creditor for the aliment of her illegitimate child fathered by the bankrupt until the child attains the age of thirteen[1]. "Primarily, it is the child's claim; but as the mother is bound to maintain the child, she has a claim against the father for contribution. Whether the claim is the claim of the child or the claim of the mother, it is the claim of a creditor; and accordingly I am of opinion that the mother is entitled to rank on the bankrupt estate of the admitted father of her illegitimate child[2]", but not for "future aliment decerned for in a separation and aliment, this being incapable of valuation, nor for an alimentary annuity[3]." The claim for the child's aliment is a contingent claim[4].

Immixture /

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1. Downs v. Wilson's Tr. (1886) 13 R.1101. But see Scottish Law Commission Memo No.22 "Aliment and Financial Provision": 2.118, where the claim of the illegitimate child for aliment in its parent's bankruptcy, it is stated, has become "suspect in view of the changes made by the Illegitimate Children (Scotland) Act 1930" (and see reasoning - footnote 27). Moreover, one of the propositions of the Commission (2.18 - Proposition 6: see also 2.19) is that "The alimentary obligation between parent and illegitimate child should be the same as that between parent and legitimate child" and accordingly, "If this is accepted, there will be no ground for any distinction in relation to bankruptcy." (2.118).
2. ibid. per L. Shand, at pp.1102-1103.
3. Walker, Prins. II 2078, and cases there cited. See infra, pp
4. Downs, supra: Goudy, p.181 (see generally, Goudy, pp. 180-181, "what debts are contingent"): see treatment of contingent debts - Bankruptcy (Sc.) Act, 1913, s.49. (Valuation of claim depending on a contingency.).

Immixture of Funds: Inter-Spouse Loans

In terms of the Married Women's Property (Scotland) Act, 1881, s.1(4), "Any money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

This provision applies to all marriages contracted after the passing of the Act, which must now include all marriages at present subsisting[1], and this, therefore, is the rule which founds the categorisation of such claims by wives as those of postponed creditors[2].

Our law of bankruptcy thus places a spouse creditor firmly behind all other types of creditor in terms of strength of claim[3], as opposed to formal entitlements such /

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1. For the transitional provisions and the option open to those married before 1881 to choose to submit to property regulation by the Act, see supra, Chapter 1, pp.100-101.
2. See Walker, Prins. II, p.2078.
3. Compare and contrast continental and other attitudes to bankruptcy and debt as they affect spouses. (See generally Chapter 6, and Chapter 7.) In general, the approaches adopted by other systems appear to have been less blunt and more detailed, but it is true to say that, in previous discussion, attention has been paid to the "creditor v. spouses" side of the triangle of relationships involved - that is, to the plain issues of creditors' rights against spouses, and spouses' rights inter se in the matter of debt (the "external" and "internal" aspects alone) - and that in any form of community system, the rules, in general, and in this context, are bound to be more complex than those found in a system which proclaims and upholds the barren (? - see Chapter 7) virtues of separation of property.
Nevertheless /

such as voting rights and ability to participate in procedure. This means that the determination to adhere to the strict consequences of separation has bent before the specialties (and are not these, in truth, property specialties[1]?) of the institution of marriage.

It is clear that, by virtue of the nature of the marriage relationship and cohabitation, the definition of "immixture" of funds is likely to be productive of dispute and difficulty[2], because, prima facie, in practical terms at least, 'immixture' is so often the case, and yet it is obvious that a wife would wish to show that the property in question was in fact hers, and, even if apparently 'immixed' in fact, was not 'immixed' in law.

Clive and Wilson, commenting on ss.1(3)[3] and 1(4), /

Nevertheless, the claim of the "spouse-creditor" is inevitably linked with those subjects and is dealt with in that treatment, often possibly at the end of the community when so much "balancing" is done: it is the nature of the separation system which throws it into high relief and, in so doing, might be said to demonstrate its own inadequacy to meet satisfactorily every contingency.

1. As the greater number of specialties are found, or grudgingly or impliedly, recognised by the law, so much the more doubt is thrown upon the virtues and sufficiency of the separation system.
2. Cf. Agnew 1894, 10 Sc. Law Review, 106; Latta, 1894, 10 Sc. Law Review, 232; Robertson's Tr. v. R. 1900 8 S.L.T. 101; (1901) 3 F. 359; Anderson v. A.'s Tr. (1892) 19 R. 684; National Bank of Scotland Ltd. v. Cowan (1893) 21 R. 4; Adam v. A.'s Tr. (1894) 21 R. 676. See Walton, p.189.
3. s.1(3):- "Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband."

1(4), remark[1] that, "It might be thought that these subsections would not normally apply to furniture and other corporeal moveables of the wife: they are expressly excluded from subsection (3) and in the ordinary case are unlikely to be "lent or entrusted to the husband, or immixed with his funds for purposes of subsection 4."" Thereupon, they set against this opinion the case of Anderson supra, which, however, after discussion, they consider to be special, and "probably best regarded as turning on the lack of bona fides in the transaction[2.3]."

In the case of Robertson, supra, which concerned also the points of donations revocable by the husband's trustee[4], the right of the trustee to reduce alienations which were in favour of a conjunct and confident person[5], and the further aspect of the 'immixture' of furniture[6], nevertheless - in favour of the wife - there is emphasised a most important point, and that is that the spouses' funds, it seems, may be disentangled - and those of the spouse who subsequently maintains his/her solvency thus protected - at any point before sequestration. "At the date of the sequestration, there was no immixing, and I take it that the provision of the Act must refer to the date of sequestration, and does not otherwise apply. If a wife's money be mixed with her husband's and they foresee the impending bankruptcy of the husband I see nothing at common law or in the Bankruptcy Statute[7] to prevent the wife withdrawing /

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1. p.338.
2. ibid.
3. See further consideration of Anderson, infra, pp. 177-179.
4. See Chapter 1, pp.29-30 and pp.39-41. Clive and Wilson, pp.332-337.
5. Act 1621, c.18 - infra, p. 189 et seq.
6. Infra, p. 162 et seq and see Chapter 1, pp.39-41.
7. being that of 1856, presumably: Bankruptcy (Sc.) Act, 1856 (19 & 20 Vict. c.79).

withdrawing her money for the very purpose of avoiding the consequence of its being found immixed with her husband's. No case deciding that such an act could be challenged was referred to[1]". Moreover, that argument was not pleaded (which is unfortunate from the point of view of the strength of the opinion quoted), and the pursuer's case, here, the Lord Ordinary says, "is rested on the averment that the payment of this money was a revocable donation of Donald Robertson's money to his wife, which has not been established in point of fact[2]."

On appeal[3], Lord Kincairney's judgment for the defender upon the reduction of the assignation of a lease and an insurance policy, was reversed (dissenting Lord Young). The assignation Lord Moncrieff considered to be either a gratuitous donation inter virum et uxorem made stante matrimonio, "or, as I think, a purely collusive attempt by the male defender to put his whole estate beyond the reach of his creditors while truly retaining control of it. In either case it is revocable and reducible[4]." The same conclusion was reached by Lord Trayner[5] (though the judgment was on the ground of gift): "I think that purpose" (of the conveyance) "was to put the estate of Robertson beyond the reach of his creditors, but not beyond the reach of his own enjoyment." In Robertson (in the Outer House), Lord Kincairney would have been inclined to reduce - had he been asked to do so - the assignation of furniture to the wife, it being "neither inventoried nor in any form delivered", while favouring the validity of the other two parts of the assignation.

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1. per L. Kincairney at p.105. (S.L.T.).
2. ibid.
3. See (1901) 3 F. 359.
4. at p.369.
5. at p.367.

It appears that, in the appeal, the pursuer withdrew his claim for delivery of the furniture, partly because its value was not great, and partly "looking to the evidence as to part of the furniture being the property of Mrs. Robertson", the defenders having deponed that many of the items of furniture were hers, "irrespective of the assignation". Unfortunately, the report affords no detailed information concerning such averments (if any) as may have persuaded the trustee to abandon his claim on this head. Possibly the explanation is that he foresaw success in the other two branches of the claim (the lease and the insurance policy) and was satisfied.

In any event, it does not appear that the ultimate result detracts from the Lord Ordinary's remarks upon time-sequence[1] though it emphasises the obiter nature thereof. A disentangling of spouses' assets before (or even in contemplation of[2]) the bankruptcy of one is easily distinguishable - in theory, if not in practice, by reason of the confusion surrounding the financing of a common household - from an inter-spouse gift or a collusive attempt by spouses to place the property of that partner whose solvency seems in danger into the hands of the other, and so to place it outwith the reach of creditors.

Albeit obiter[3], and therefore never of more than persuasive authority (and voiced in the lower court, the decision of which was reversed on appeal, though not, of course, on that point) this is a most important interpretation of the 1881 Act. The message to spouses is clear: where bankruptcy threatens, and so long /

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1. quoted supra, pp. 155-156.
2. ibid.
3. See D. M. Walker, Scottish Legal System (4th ed.) pp. 392-394, ("Ratio and Obiter Dictum".).

long as our present system of separation of property continues, steps should be taken promptly to "unscramble" funds. This will not necessarily obviate dispute - indeed it might inspire claims of donations revocable by creditors, and of alienations by a person who, it might be argued, was truly insolvent, in favour of a conjunct and confident person (to bring the argument within the scope of the Act of 1621 c.18) - but, nevertheless, it is a welcome escape-route, and a valid one (as it should be, on grounds of equity, if we cling to the notion of separation) provided the property of each spouse can be identified clearly[1]. Often the precise financial state of someone vergens ad inopiam is known only to that person, or to him and his wife (which, of course, together with motive, opportunity, and general confusion surrounding title to, and the presence of joint possession and use of, the property of each spouse, is why so much suspicion, no doubt well-founded in many cases, and so many restrictive rules surround inter-spouse transactions before sequestration).

By the Mercantile Law Amendment (Scotland) Act, 1856[2], s.1[3], it is provided that, "where goods have been sold but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent to any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration /

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1. This is the crux of the problem. It has been noted, however, that s.1(3) makes an exception from its "clear separate identification" rule, of corporeal moveables usually possessed without a written or documentary title (though this may make confusion worse confounded). See Goudy, p.289.
2. 19 & 20 Vict. c.60.
3. repealed by Sale of Goods Act, 1893, s.60.

sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser".

Lord Young in Anderson supra (Lord Trayner concurring) was of the opinion that an inter-spouse transaction even if possessed of "integrity", was not the type of transaction which properly came within the spirit of the **Act**, though it might come within its letter. Moreover, "In considering that Act we are in the region of fine distinctions. The cases on that Act and the considerations arising in them create fine distinctions[1]."

Reputed Ownership

Goudy[2] explains that at one time "reputed ownership", based on possession, consent of the owner, and repute of ownership, was regarded as sufficient to found the possessor's creditors' claims, against that property, but even at the time of the Fourth Edition of his work (1914), this was a doctrine much less favoured and more restricted.

Thus, though S.1 of the 1856 Act[3] stated that goods sold and left in the custody of the seller would not fall to the seller's trustee in bankruptcy, yet if the buyer allowed the seller so to use the goods as to suggest that he (the seller) owned them, it had been held that the plea of reputed ownership could arise. (This would not be so if "it could be shown that he held possession bona fide under a subordinate /

1. at p.687.
2. pp.295-298.
3. supra, pp. 158-159.

subordinate title, such as lease or loan, from the buyer[1].") Goudy points out that this section was repealed by the Sale of Goods Act, 1893[2], in terms of which there are rules to govern the rights of seller and buyer in the matter of transfer of property (and of risk, and of title[3]) but suggests that the same principles of reputed ownership would apply in cases under the 1893 Act where a buyer allows a seller to retain and use goods sold[4]. The Sale of Goods Act, 1893, in s.61(1) states that "The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained", and in s.61(2) that, "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act ... shall continue to apply to contracts for the sale of goods." Further (s.61(5)), "Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland[5]." It might be that the doctrine would not apply where the item in question was of a type or class of object known, in many cases, to be hired rather than owned[6].

When these principles came to be applied to the marital household, Goudy (at 1914) identifies five different /

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1. p.296.
2. s.60. (as also were repealed ss.2-5 of the 1856 Act).
3. See 1893 Act, Part II: Transfer of Property as between Seller and Buyer, ss.16-20: Transfer of Title ss.21-26).
4. See ss.25(1) and (as amended by Consumer Credit Act, 1974, Sched.4, para.4) 25(2); see also Factors Act, 1889 - as extended to Scotland by Factors (Scotland) Act, 1890, ss.2, 8, and (as amended by Consumer Credit Act, 1974, Sched. 4, para 2) 9.
5. As to landlord's hypothec, see infra, p. 181 et seq. In "consumer credit" transactions, see Consumer Credit Act, 1974, s.104.
6. Goudy, p.297.

different situations which might exist[1]. The first (where the furniture was the ante-nuptial property of the wife and the marriage took place before the date of the 1881 Act, in which case "the husband's trustee will take it as vested in the bankrupt jure mariti, apart from" (meaning, "unless there is"?[2]) "any plea of reputed ownership") can have no application now, nor can Goudy's second example which supposes a pre-1881 marriage, the furniture being the ante-nuptial property of the wife, but in this case having been "settled on her by antenuptial contract", and where "the doctrine of reputed ownership will not be applied in favour of the" (husband's) "trustee".

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1. ibid. at pp.297-298.
2. The complexities of this, fortunately obsolete, sentence are formidable. It would appear that the meaning is that the furniture belonged originally to the woman, and became the husband's jure mariti on marriage. Since therefore it was the husband's property, there could be no question of the competency of the trustee's actings in taking it, "apart from any plea of reputed ownership", a proviso which perhaps means that the wife's use and enjoyment of what had been her own property might allow the doctrine of reputed ownership to arise - but to what effect? The discussion is of the position of the husband's creditors, not the wife's: reputed ownership in the wife surely would not prevent the husband's creditors from attaching what was "truly" his. The doctrine was intended it might be thought to be helpful to, not to be restrictive, of creditors. (A competition between creditors of each spouse at that date (involving reference to the husband's marital property rights) would raise many difficulties, now obsolete - though it is very clear that problems as to ownership of property in dispute involving bankrupt, spouse, and creditor still may arise.)
The more likely meaning is that the husband's trustee would take the property in any case - as being the husband's jure mariti - without recourse to the doctrine of reputed ownership.

In marriages before 1881, therefore, it would seem that household furniture belonging to the wife before marriage would be safe from the husband's creditors only if excluded by antenuptial contract from the husband's jus mariti.

Similarly, the husband's trustee would be excluded if the settlement excluding the jus mariti had been executed postnuptially, provided it was made by a third party[1].

It is clear that those examples are not of practical guidance today.

The fourth instance envisaged is that of a marriage to which the Married Women's Property (Scotland) Act, 1881, applies, and where the furniture is the wife's, having been acquired by her either before or after marriage. In that case, "the trustee cannot claim it, as the terms of that Act exclude the presumption of ownership in the husband[2]."

Here, however, there is being discussed the question of ownership and the effect (if any, now, for all marriages now must postdate the date of coming into operation of the 1881 Act, and succession ramifications, for example, of the pre-1881 law, must be few) of reputed ownership[3]. Goudy is not writing about immixture of funds and the effect and disentanglement thereof, which is now so peculiarly the problem of bankruptcy when it occurs during marriage. It is the nature of the married state that each spouse may use and enjoy (apparently as owner) /

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1. Goudy, p.297, and see generally Chapter 1, pp.
2. that is, the modern situation - and see Adam v. A.'s Tr. (1894) 21 R.676, where however the problems brought by s.1(4) are clearly seen. No reference there was made to "reputed ownership."
3. See also Fr.II, 1344-45.

owner) items of furniture and household equipment, no less so now than in earlier times; at least the question of ownership is freed from complications such as that of the jus mariti. We may decide the matter by referring to our present crude tests, and it is precisely at this point that a consideration of the immixture of funds (perhaps to effect payment of the price of the item in question) may take place.

Fraser[1], speaking of moveables, recommends the preparation of an inventory of the moveables such as household furniture, which were the property of the wife and from which the jus mariti was to be excluded so as to bar the husband's creditors, and to overcome the (then current) presumption that all moveables belonged to the husband. He writes that if the property is identified, the exclusion, before marriage, by a third party or the wife, of the jus mariti, will prevent the husband's creditors from interfering with it[2]. However, "The case of Shearer v. Christie[3] shows" - "that the jus mariti with regard to moveable property, can only be excluded by antenuptial contract, or at least (where the husband renounces) only with regard to moveables acquired (during marriage) subsequent to the renunciation of it, and even then it may be revoked as being a donation[4]."

It clearly was impossible for a husband "even in an antenuptial contract, and still less by deeds executed stante matrimonio," to secure to his wife furniture which belonged to him, and the possession of /

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1. I, 790 (but see contra where the property is the husband's, II, 1344-45).
2. See Young v. Loudoun (1855) 17 D.998.
3. (1842) 5D.132.
4. Fr. ibid: see Chapter 1, pp.37-43, especially pp.40-42. (The case of Smith's Trs. there quoted did not involve the claims of creditors).

of which remained unchanged, safe from the claims of creditors[1]. Neither, as has been seen, could a husband postnuptially competently convey to her an "alimentary" fund, or a "separate" fund or a fund not assignable nor attachable by creditors, even though the property therein purported to pass to the wife[2], nor could he retain within his own power and management the property of both spouses, on a provision that his jus mariti and jus administrationis, should fall away in the event of his insolvency, with consequent benefits in the wife's estate as against creditors[3].

The point which now arises is whether the principles embodied in these rules would have any effect today if the practice of drawing up marriage-contracts (to "contract out" perhaps of a statutory system of community of property) became common once more, and if a similar aim of protecting part of the funds of one party were sought by a re-casting of such provisions in modern language. Probably within any new statutory norm for matrimonial property, a new code of debt and bankruptcy rules as they affect the relationship, and rights and duties, existing between spouses and third party and spouse creditors, would be necessary, and what would be required for the dissenters would be guidance upon the extent to which 'contracting-out' thereof was to be competent, and then, within the sphere of separation of property elected in the first instance by those persons (assuming that such choice was allowable), (new?) rules /

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1. Fr.I, 795.
2. Fr.I, 795-796, and see Chapter 1, pp.29-30 ('The Alimentary Provision'). As to position in the modern context, see Clive & Wilson, p.340, lines 11-17, and pp.340-341.
3. Bell's Com.1,638,639 (which see generally on this subject.)

rules concerning immixture of property, and the need (or not) for, and efficacy of, inventories listing the separate property of each, would be drawn up.

The question of ownership of household furniture is a large issue, though, and one ready for reform. It might be that no "contracting-out" of the new provisions in this sphere would be permitted[1].

Fifth, where the furniture was the antenuptial property of the husband, and, by antenuptial contract, was settled on the wife, Goudy noted that, according to several pre-1881 cases[2], the doctrine applied in suitable circumstances (to the effect of allowing the husband's trustee to attach the furniture).

By reason of the change effected by the 1881 Act in the "presumption as to ownership", Goudy doubted[3] whether /

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1. cf. generally Chapters 6 (foreign systems) and 7 (possible reform).
2. as examples of which he cites Shearer v. Christie (1842) 5 D.132, Brown v. Fleming (1850) 13 D.373, and refers to Campbell v. Stewart (1848) 10 D.1280, commenting, "The indorsing an inventory of the articles on the marriage contract was held in these cases to be immaterial". p.298, fn.(b). In these cases, concerning furniture, the trustee's claim triumphed, it being held, in Brown, that there had been no effectual inter-spouse transfer and, in Campbell, that the wife had not truly enjoyed the fee thereof. These are examples of a type of marriage-contract provision which L.J.Clerk Hope in Loudoun described (at p.1000) as "stated to have been very commonly used in Glasgow about the years 1846-47, when a number of mercantile failures had taken place, because they held that they were truly attempts, by appearing to give the wife an interest, to protect the husband's property, of which he was allowed the full enjoyment and possession, against attack by his creditors." (see also per L.J.Clerk Hope in Brown at p.375: "...I own, after the decision in June, 1848, in the case of Campbell, I am surprised to see this form of deed continued in Glasgow, where it is said to be common.") The inventory, therefore, was by no means a secure protection.
3. p.298.

whether, even in relation to pre-1881 marriages, the decisions of more modern days would uphold the doctrine, which, therefore would appear, in his opinion, in relation to husbands and wives, to be of little or no account.

The doctrine of reputed ownership owed nothing to notions of contribution in cash or kind, but all to possession. As such, it might still be a useful concept (though of greater use to creditors then to spouses, surely?), its effect, as Professor Walker states, being "to bar the true owner from asserting his right of ownership against the creditors[1]." He comments that some fraud or gross fault by the true owner, "whereby false credit has been given" would be necessary to sustain the plea of reputed ownership[2], but, "In modern practice the doctrine is not important because ownership and possession are now so frequently separated that persons dealing with a possessor are not warranted merely by his possession in believing that he is the owner thereof, and there must be other factors present before the owner will be held barred from vindicating his property from a creditor of the possessor. Mere possession does not confer even apparent authority to dispose of the property, and does not preclude the owner from vindicating his property from one who has dealt with the possessor[3]." Gloag and Henderson[4] also state that "Owing to changes in the law this doctrine is no longer of much importance," and cite the case of Robertsons v. McIntyre[5], a case involving /

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1. Prins. II, 1547.
2. Goudy speaks of the 'Consent, express or implied, of the true owner', p.295.
3. Walker, ibid: see, of course, Sale of Goods Act, 1893, s.25: Factors (Sc.) Act, 1890, ss.8 and 9.
4. p.499.
5. (1882) 9 R.772.

involving an inter-family (brother / sisters) sale, which, in the circumstances, was held truly to have occurred and to have been bona fide, and in which the Lord Justice-Clerk (Moncrieff)[1] remarked, "The doctrine of reputed ownership, to which repeated reference was made during the discussion, has been paid little attention to of late years, and is no longer of much importance."

It would appear, therefore, that, nowadays, where bankruptcy takes place during a marriage, and there is dispute about the fate of household furniture, the approach is first of all to attempt to categorise the items into those belonging to the bankrupt spouse and those belonging to the solvent spouse (according to our present rules, and, it would seem, without reference to the doctrine of reputed ownership), bearing in mind throughout however, that " - if a wife lends or intrusts her moveables to her husband, or allows her funds to be mixed with his, his trustee will take them, with the result that the wife will have no claim until the claims of onerous creditors of the husband have been satisfied[2]." Perhaps circumstances which earlier might have resulted in the coming into operation of the doctrine of reputed ownership (with an effect which in the particular case /

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1. at p.778.
2. Goudy, p.298. There seems to be no reason to suppose that a husband who lends to his wife, or, on her bankruptcy, is found to have immixed his funds with her, should be treated, by analogy, as being a creditor only of the postponed category. But see supra, p.149, footnote 4. Contra, the doctrine of reputed ownership, its benefits and disadvantages do not appear to have been confined to one sex (though Goudy's treatment (pp.297-298) seems to view the matter from the standpoint of the husband's trustee - possibly because the bankruptcy of the male was - and, despite the advent of women into business, probably still is - a more common occurrence.)

case favoured the trustee, and the creditors of the husband) might now be held to amount to an "intrusting" by wife to husband (with the effect, again, of favouring the husband's trustee and creditors). If both husband and wife contribute to the purchase of a case of wine, does this item fall to the trustee on the husband's bankruptcy (leaving the wife a perhaps worthless last ranking) as being a product of the immixture of their funds[1]? This is unlikely to be a question of survival, of course: the bankrupt may be given an allowance and possibly an additional allowance[2], and is entitled to "the necessary wearing apparel" of himself, his wife, and family[3], but that is small comfort if items which the wife considered but could not prove to be hers, or to the purchase price of which she had contributed (especially if the notion of contribution in kind is given wholehearted recognition,which recognition, however, would be accompanied probably by a new and comprehensive property régime which would include debt and bankruptcy rules), are gone with the trustee[4].

The result is unsatisfactory, unpredictable, unrealistic, outmoded, inaccurate and inequitable. The treatment of debt and bankruptcy in marriage is ripe for reform. As it stands, it displays the shortcomings and fictions of a system of separation (unless /

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1. See terms of M.W.P. (Sc.) Act, 1881, s.1(3) and 1(4).
2. B.(Sc.) Act, 1913, s.74: Goudy, pp.359-360: and see Clive & Wilson, p.340 - 'beneficium competentiae'.
3. ibid., s.91 (Oath): Goudy, p.371 (in footnote 'c' it is noted that, "in England the bankrupt is permitted to retain household apparel and bedding, and the tools of his trade to the aggregate value of £20. See 46 & 47 Vict. c.52, s.44(2).") See generally Goudy, pp.364-371. (The Rights of Property of the Bankrupt.).
4. See infra, p. 181 et seq her position where the landlord under the landlord's hypothec attaches and sells property belonging to the wife.

(unless painstaking records and inventories are kept, that is, unless separation in theory matches separation in practice[1]) and the keeping of such is an unattractive task, both in purpose and in implementation - whether the marriage subsists under a separation or a community system of marital property: moreover, even if that were done on a sufficiently wide scale to support the practical feasibility of a rule which favoured those meticulous in keeping such records, in a system which was one of separation of property, the basic unfairnesses of economics, biology and opportunity remain.

However, it seems[2] that if the wife takes furniture which belonged to her before marriage to the marital home, this action does not constitute a loan or the entrusting of it to her husband, nor an immixing of it with his funds.

In the case of Adam (1894), the marriage had taken place in 1885, and the defender (the husband's trustee in bankruptcy) admitted that the property in /

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1. though, if 'reputed ownership' is no longer an applicable doctrine, use by both is not a factor which has any relevance. "The fact of joint use does not raise a presumption of joint ownership." (Clive & Wilson, p.294) - though see landlord's hypothec, infra, p.181. In Young v. Loudoun,(1855) 17 D.998, L.J.Clerk (Hope), upon the argument that ostensible ownership of furniture might raise a constructive property in it, at p.1001, said,

   "But if I am right in the remark that presumed ownership is not the overruling consideration, what distinction can be drawn between one kind of moveables and another? No doubt, in general talk, one may be more apt to say of furniture than of other moveables, that it is likely to be the husband's; but no such distinction is known in the law of moveables, or of husband and wife."

2. Adam v. A.'s Tr. (1894) 21 R.676.

in question had been purchased by the wife before marriage. The furniture naturally was to be found in the matrimonial home (as was the husband's furniture), and the question was whether presence in the same place (and use by the same persons - that is, by the husband as well as by the wife) amounted to 'entrusting' or 'immixture' of funds. The Sheriff-Substitute found that it did not, and that the wife's property was "capable of being identified and distinguished from the estate of the husband."

On appeal, the respondent argued that the exceptions of immixing, lending and entrusting applied to money and not to corporeal moveables.

Lord Young noted that the defender's (appellant's) case rested upon immixture, rather than on lending or entrusting. Since it was admitted that the furniture had been bought by the wife before marriage, and since that property was clearly identifiable (a matter which, in the nature of things, is more likely to be so than in the case where the property was bought by the wife postnuptially allegedly out of her own resources), he concluded that "there was no immixing in this case, at least no immixing that was not capable of immediate separation or unmixing[1]." On the other hand, Lord Young did not think it "impossible[2]" that a wife might lend or entrust her /

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1. at p.678.
2. making reference to his own judicial opinion in Anderson's Trs. (at p.687 thereof) (infra) to the effect that inter-spouse 'entrusting' of furniture was quite possible, and must be taken to have happened in the circumstances of that case: sale was ruled out by the bench because of a lack of bona fides. See Clive & Wilson, p.338 where the case is discussed, decided to be special, and by inference probably not detracting from the view that ss.1(3) and (4) apply normally only to funds and not to other corporeal moveables - and see infra /

her own furniture to her husband. Hence, the inference is that his Lordship did not here approve the proposition that s.1(4) of the 1881 Act was intended to apply only to "money, or its equivalent." "But where a woman who is in possession of furniture marries a man who has no furniture at all, or very little, and brings it into his house, or it may be into her own house, I do not think that she thereby lends or entrusts it to her husband within the sense of section 1, subsection 4, of the statute[1]."

The Lord Justice-Clerk (Macdonald) observed, "If we decided this case in favour of the defender, I do not think that there could ever be a case in which a wife's furniture when brought into her husband's house could be prevented from becoming his property[2]." Clive and Wilson, while noting that the same judge, in Anderson[3], was prepared to accept the notion of "entrusting" of furniture, appear to adopt a similar approach to that taken by the Lord Justice /

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infra, p.172-3, fn3 L.Young, in Adam, at p.679, explained Anderson's distinguishing feature as follows:- "I think the case of Anderson was a very special one, and I do not think that it was decided on any ground of immixing ... I was of opinion that the transaction was not in bona fide. But the case there was not one of immixing; the case was that even if there had been a valid sale the wife had lent or entrusted the furniture to her husband". Can it be that the inference of "lending or entrusting" or "immixing" is more likely to be made when there is a breath of mala fides or expediency in the air?

The sum of L.Young's views as expressed in these two cases seems to be that lending, entrusting, and immixing of corporeal moveables of the wife to the husband or with his "funds" (the word used by the Act, in s.1(4)) was within the contemplation of the Act.

1. at p.679.
2. at p.679.
3. at p.686.

Justice-Clerk in Adam: "There is no reason why a matrimonial home should not be furnished with the wife's furniture. If the wife owns the furniture in the first place it could hardly be argued that she had "entrusted" it to the husband merely by allowing it to be used in the matrimonial home ...[1,2]."

The hypothesis used in Adam scarcely reflects the practical situation today, except perhaps in second marriages or marriages later in life, when the parties have had opportunity to amass furniture. Basic furnishings are likely to be purchased by both parties before marriage - and separately, or jointly, thereafter - out of the resources earned by each of them or donated by third parties to either or both. One may furnish the home, while the other makes the deposit for the purchase of the home. There are innumerable variations. How can the plain rules of ownership, upon which rest many other legal consequences, including, as has been seen, priority of ranking in bankruptcy, meet satisfactorily so many permutations of facts? Moreover, the position is likely to be less clear-cut, for it will often be the case that title to the house will be held in joint names[3]. Nevertheless, where the /

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1. p.338. The remainder of the sentence ("...and the fact that the furniture is derived from the husband should not, logically, make any difference.") must surely be a reference to a bona fide inter-spouse transaction (of sale, presumably, since donations and gratuitous alienations hold dangers).
2. Similarly, it has been said that 'lending' or 'intrusting' in the sense of the Act of 1881 is something different from merely so placing the property that it may be conveniently used or shared by both spouses.
3. Since it is lending, immixing or entrusting which should be avoided, it is the joint use with the husband of the matrimonial home (See Wardhaugh's understanding of the case) rather than the ownership (cf. p.177, para.3) thereof /

the facts suit, (and now where the dispute may be as to one item of furniture) Adam, though decided in /

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thereof which matters: that is, the mixing of wife's with husband's furniture might raise the issue. On the other hand, if a wife brings furniture to her husband's house, is she not 'lending, or entrusting' that furniture to him? The problem is one of construction of the sentence in the Act. Mention is made of "money, or other estate", but also of "immixed with his funds". Now, Clive & Wilson (p.338) say that "furniture and other corporeal moveables" are "expressly excluded from subsection (3) and in the ordinary case are unlikely to be "lent or entrusted to the husband, or immixed with his funds"; could it not be however that, though immixture may have been intended to refer only to money, "other estate of the wife" (which, in the absence of definition, would surely include corporeal moveables as well as, for example, negotiable instruments and such items as more closely represent money: there is no identifiable genus arising from the enumeration of several like items - Walker, Sc.Legal System, p.317 'Statutory Interpretation' Eiusdem Generis Rule; on the other hand, consider the rule, Noscitur Sociis - yet in truth it is difficult to understand the significance of the insertion in this case, or the breadth of its application, if other estate of all kinds, is not intended to be included. Sed quaere, on that basis, what is its application if any to the wife's heritage, which however presumably is less usually lent or entrusted, and could hardly be immixed with his funds?) is capable of being lent or entrusted to the husband so as to bring the provision into operation? (The opinions both of the Sheriff-Substitute and of the Sheriff-Principal in Allan v. Wishart (1889) 6 Sh.Ct.Rep.185 are opposed to the notion that s.1(4) was intended to apply also to corporeal moveables but the tenor is that such a construction, in view of the common use of moveables in a household, would be against the policy of the Act: the point is not taken that "use" may be distinguished from loan, entrusting and immixing. The practical result in the majority of cases would be the same - the furniture would be safe from the husband's creditors.

in 1894, seems to represent the current rule[1]. There were two necessary stepping-stones, however, on the route to that result, and these are, first, ability to trace the source of the property (about which, in Adam, there was no argument), and, second, ability to use that knowledge to identify the separate property of the spouses, and hence to differentiate the property of the husband from that of the wife. Today, if the answer to the first query is forthcoming, the second will usually be easily (if not necessarily equitably) answered, but the difficulties of proof in effecting even this rough justice should not be underestimated.

On the other hand, in the case of National Bank of Scotland Ltd. v. Cowan[2], a wife claimed against her husband's trustee in bankruptcy part of the sums represented by two deposit-receipts, "which bore the terms, "Received from John and Betsy Cowan, Calder, Coatbridge, payable to either or the survivor". She averred that £70 of the contents of the deposit-receipts was her own money, owned at marriage, and that other funds therein had been donations to her by her husband. Her claim was to £70 only, since she admitted that her husband's sequestration had revoked the donations - (being pre-1920 law). With considerable /

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1. The result accords with the view that s.1(4) of the 1881 Act does not apply to corporeal moveables, but whether the ratio of the case can be stated so broadly and without reference to the particular facts there present, is doubtful. Wardhaugh, for example, merely states (p.79) that, "The transfer of furniture belonging to the wife to a house occupied by her and her husband does not necessarily mean that it is "lent or entrusted" in the sense of the M.W.P.Act," and Lord Young, after all, at p.678 said, "I have said there was no immixing in this case, at least no immixing that was not capable of immediate separation or unmixing". See p.170.
2. (1893) 21 R. 4.

considerable ingenuity, she argued that the donations, while they stood, were good, and thus, if the sum of £70 had been immixed with any other funds, they had been immixed with her own.

The trustee contended that the destination, under which the husband could have withdrawn the money from the bank at any time, made it quite clear that the £70 claimed had not been kept separate from the husband's property. With the latter view Lord Young concurred[1]. This is a salutary lesson of the danger of immixture of funds in joint bank accounts (from the wife's standpoint, especially - if it is correct that the 1881 Act, s.1(4) applies only to the lender-wife), and of the desirability of "unmixing" at a date before sequestration[2], the latter process being attended, so as to minimise future dispute, with as much evidence of source of funds and transparent honesty of division as is possible in the circumstances.

This, therefore, is an example of what is probably the most common situation in which a wife's money may be immixed with her husband's funds. Yet, "Joint property is not, however, necessarily constituted by a bank account in joint names, and on which either may draw, as such may be merely a convenient arrangement[3]." In /

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1. "Now, can it be said that the wife here has kept the property which she said she had at the date of the marriage unmixed up with her husband's estate, when she has put the money along with other money which admittedly passes to the husband's trustee on two deposit-receipts, which bear that the money was received from her and her husband, and to be payable to either or the survivor?" per L.Young at p.6.
2. cf. Robertson, per L.Kincairney, supra, pp. 155-156.
3. Walker, Prins.I, p.262, citing Marshal v. Crutwell (1875) L.R. 20 Eq. 328.

In Marshal v. Crutwell[1], a husband changed his bank account from his own name, to his own and his wife's names, directing the bank to allow his wife to operate thereon. Sums were drawn out by the wife, on the instructions of the husband, and used to meet household expenses. The intention of the husband in creating the new account was not explained to the wife, but it was understood generally by the bank manager that the balance in the account should belong to the survivor of them. The wife, being the survivor, claimed the balance in the account, but failed because, "I come to the conclusion that it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it leaves the money therefore still his property[2]."

This is an old case, and an English one, and special in its facts, but obviously the ratio could still apply in suitable circumstances. It will be more common for the modern joint bank account to import joint property, however. In the case of In re Figgis, Decd.[3], the English presumption of advancement[4], with regard to funds in a joint bank account /

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1. as footnote 3, p.175.
2. per Sir G.Jessel, M.R., at p.331.
3. [1969] 1 Ch.123.
4. the presumption of advancement and resulting trust:- akin to gift or benefit - see Chapter 6 (England) and "Principles of Family Law", S.M.Cretney (1974) pp. 153-157, where it is pointed out that, since Pettit, the strength of the presumption that "...if the husband makes a payment for or puts property into the name of a wife, he intends to make an advancement to her" (a quotation from the judgment of L.Evershed, M.R. in Silver v. S.[1958] 1 All E.R.523 , at p.525, noted by Cretney) has lessened greatly. See e.g. Boydell v. Gillespie (1970) 216 E.G.1305 (conveyance of properties to husband and wife in joint names: subsequent assignation by husband of all his property to trustees, who thereafter successfully claimed a one half share of the sale price of the properties, the express terms of the conveyance having excluded any resulting trust in favour of the wife).

account, was not rebutted by the facts. There, Megarry J. appears to consider that the presumption of advancement does apply to a joint bank account, though the circumstances of a particular case may render it inapplicable. Much is made of the question whether the wife knew of the existence of, and in fact operated regularly, the account. Nevertheless, the fact that convenience might be one factor which prompted the husband to open a joint account, "...does not mean the husband had no thought of the account forming a provision for his wife if he were to be killed[1]" (in World War I). Moreover, even an account opened initially for convenience, could change its character over the years. In the result, the balance in the account was held to fall into the wife's estate (for her death followed her husband's within, on the method of computation adopted - which is another facet of the case - three months).

Such cases as these reveal the extent to which, especially in England[2], reliance is, or at least, was placed upon intention in matters of matrimonial property, and the uncertainty, and possibly the injustice, bred thereby.

The Act of 1881, however, does not demand that joint property be constituted, but merely that the wife's money or other estate be lent or entrusted to the husband, or immixed with his funds, before her ranking therefor be postponed.

In Anderson v. Anderson's Trustee[3], where furniture, originally belonging to the husband, was sold to his wife a few months before his sequestration in /

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1. at p.145.
2. See Chapter 6, (England) and Chapter 7, (views of Professor Otto Kahn-Freund).
3. (1892) 19 R.684.

in repayment of certain sums lent by her to him (for which in his sequestration, therefore, she could have ranked only as a postponed creditor), and was retained in the house and used by the spouses as before, it was held that the trustee was entitled thereto, on the ground that, even assuming the transaction to be bona fide[1] (about which there was doubt), it had been "intrusted" to the husband in the sense of the Act. Lord Young[2] gives his view of the meaning of "entrusting to the husband" as being to permit him to fulfil his duty of providing for his wife and family a furnished home. Here, therefore, that masculine duty and feminine privilege would work rather to the disadvantage of the female: however, it seems that the provision for himself of a furnished home was a factor which did not escape the notice of the remainder of the bench, and, as Clive and Wilson note[3], Lord Young also appears to have considered that there had been no "honest lawful sale to the wife[4]."

Whether or not this case[5] be taken to suggest that it is not impossible for a wife to 'entrust' furniture or other moveables to her husband in the sense of the Act of 1881, perhaps the practical conclusion to be drawn is that joint use thereof in the matrimonial home /

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1. that is, that the narrative on which it was based was true: general "straightening-out" and disentanglement of property when sequestration threatens, appears (supra, pp. 155-158) to be permissible (while gratuitous alienations and fraudulent preferences (q.v.infra), of course, are not).
2. at p.687.
3. p.338.
4. at p.687.
5. see Clive and Wilson, p.338, where the case is studied closely and thought to turn on "the lack of bona fides in the transaction".

home does not necessarily amount to "entrusting[1]", and that if the property of each can be identified, it should be separated on the sequestration of one. It is suggested, it is hoped not over-optimistically, that to add to the problems of proof the disadvantages (to the wife, at least) of the 1881 Act - except possibly in a case where the circumstances suggest an "entrusting" over and above that of joint use (for the case against the Act's application to moveables is perhaps not fully made out) - is not sensible, desirable, or warranted.

The Wife as an Ordinary Creditor[2]

According /

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1. Adam, supra: Wardhaugh p.75 (repeated at p.79); see also infra, p. 184, footnote 1. Re the position before 1881, and subsequent to it (re-inforced by s.1(3)) wherever s.1(4) can be said to have no application, see Fr.I, 790, and II, 1517, the latter being quoted in Adam by the Sheriff-Substitute, and drawn on by him in support of his view that, the wife's furniture, though in the husband's house along with his furniture, being, in his opinion, not lent or entrusted to him nor "immixed with his funds" in terms of s.1(4), the property was therefore her own: (and see also per L.Young at pp.678-9):- "The investments in which the wife may put her earnings, may be furniture or any other corpora mobilia, as well as stocks or heritage; and thus, although the two spouses be living together, the whole of the plenishings - apparently his - may be the wife's property, and cannot be taken by the husband's creditors." (1517)
That sentence is contained in the Supplement (I) to the work (1876 ed.), concerning the M.W.P.(Sc.) Act, 1877. Fraser notes the absence in the Scottish Act of a saving provision, such as was contained in the English M.W.P.Act, 1870, to frustrate fraudulent schemes to place the husband's money in the wife's name to defeat creditors' claims, but remarks, "It is thought that this law would be followed in Scotland, although there is no such express provision in the Scottish Statute."
2. that is, in addition to her claim, already noted, for the aliment of her illegitimate child until the latter attains the age of thirteen - supra, p. 152, Walker, Prins.II, 2073. Generally, for aliment, other /

According to Wardhaugh[1], if "the bankrupt has sold corporeal moveables belonging to the wife as separate estate, she is entitled to rank for the price along with his other creditors[2]." Further, if the husband's stock-in-trade has been enhanced in value by her exertions[3], she can claim on his sequestrated estate for the amount of such enhancement (which it might be thought may be difficult to value), in company with her husband's other creditors[4].

On /

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other than for arrears under decree, the wife is postponed - Clive & Wilson, pp.339-340, infra, pp. 220-224 . For legal and prior rights, the wife or husband "ranks" on the net estate - see discussion of her hybrid position, not quite creditor and not quite heir, Chapter 5(2).

1. p.75. See also Clive and Wilson, p.340, footnote 87.
2. citing Montgomery v. Hart (1845) 7 D.1081.
3. as, for example, if she is acting as his cashier, secretary, or shop assistant?
4. Wardhaugh ibid. cites L.Shand in Ferguson's Trs. v. Willis, Nelson & Co. (1883) 11 R.261 at p.272, where he said, "The creditors of the wife will have a claim against the husband's estate if they can shew that the stock in trade has been enhanced by the wife's exertions and that the husband has been benefited by the acquisition of stock from time to time which was acquired for him and became his property". The case was concerned, in particular, however, with the 1877 Act, s.3 (earnings) (authority discussed generally, Chapter 1), and the sentence under discussion is an elaboration upon L.Shand's contention that (presumably in the case of pre-1881 marriages generally), the creditors of a businesswoman should not assume that the stock in trade as well as the earnings were hers. Thus, he says, so to act "would exclude the view that the wife often acts as her husband's agent in carrying on a business", and this is the context in which the sentence above quoted was uttered. Nevertheless, the opinion is phrased in terms which suggest a general rule and it may be that, though the state of the law which prompted its expression has long since changed, that principle remains, however infrequently called upon or glimpsed.

On the other hand, Wardhaugh notes[1] that savings made by a wife from the "housekeeping" money provided by her husband were regarded (formerly[2]) as belonging to the husband (and hence his creditors) as too, in the absence of any other agreement, were savings made from housekeeping contributions made by children living at home[3]. Now that such savings are taken to be the joint property of the spouses, may the husband's trustee attach them as being "wife's money immixed with husband's", for which she will have merely a postponed ranking? The Act in terms[4] speaks of the money or the property representing it, as belonging to the husband and wife in equal shares "in the absence of agreement to the contrary: perhaps where the property of each is readily ascertainable, and division easily made, the "immixture" rule - which, of course, is a negation of the philosophy of that well-intentioned but unsatisfactory and short-sighted Act of 1964 - would not apply.

Also in Wardhaugh's Manual is a discussion of creditors' securities and preferences[5], in which, speaking of the landlord's hypothec[6] for rent over agricultural and urban subjects, the author says[7] that that hypothec relating to urban subjects and covering invecta et illata will convey generally "the furniture and plenishing or stock-in-trade which to all appearance is the property of the tenant (Hunter on Landlord and Tenant, vol.ii, p.374), including property under contract of hire-purchase[8] by /

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1. p.75.
2. before the M.W.P.Act, 1964 - q.v.Chapter 1, pp.113-114.
3. Smith v. S. 1933 S.C.701.
4. s.1.
5. p.77 et seq.
6. (being a right in security without need of possession) See generally, Walker, Prins.II 1593-1601.
7. p.79.
8. cf. now Consumer Credit Act, 1974, s.104.

by the bankrupt ...".

Thus, there arises an intriguing situation. According to the 1881 Act, s.1(3), the wife's moveable estate is not subject to diligence for the debts of the husband. Thus if it is clear (from whatever source: s.1(3) makes an exception to the "title in name of the wife or in such terms as show it clearly to be her property" rule for such corporeal moveables as are usually possessed without a written or documentary title) that the furniture in the bankrupt's house is the wife's, his (general) creditors cannot attach it (a rule enabling many a door to be shut against many a Sheriff Officer, and one tending to confirm that either because joint use does not amount to 'entrusting', or that s.1(4) of the 1881 Act does not apply to furniture[1], the wife's furniture in her husband's house or in their jointly-owned house is safe from his general creditors), but there appears to be one privileged creditor, who is the landlord of the bankrupt spouse, because that furniture, if appearing to belong to the bankrupt tenant, will be subject to the landlord's hypothec. It has been seen that, in our law, a right of property cannot arise - at least in the matrimonial context - from possession, but it is obvious that even shared possession can easily give an impression of ownership (and raise in the possessor[2] perhaps even a belief of ownership) and nowhere more so than in /

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1. See Clive and Wilson, p.338, and discussion, supra.
2. cf. the confusion in the minds of many as to their rights in "matrimonial" property, (Professor Otto Kahn-Freund: Chapters 6 and 7), if such a genus of property indeed exists - in our present system, it is a misleading misnomer.

in the matrimonial home.

Wardhaugh states[1] that if furniture which the wife can prove to be her own is sold by the landlord, and she has received an assignation of the landlord's rights against the bankrupt, then "she will be entitled to a preference in respect thereof to the extent of any furniture belonging to the bankrupt subject to the hypothec which has not been sold by the landlord or, if sold, of any part of the proceeds of such remaining after satisfaction of the rent secured, and to an ordinary ranking for any balance of her claim". It can be seen that the landlord's position in this respect is remarkably strong vis-à-vis other creditors, and vis-à-vis the wife, who, it would appear, must act quickly and arm herself with proof of her ownership of the property carried off, or attempted to be carried off, by the landlord. Presummably she may stop a sale of her own property on production of proof of ownership at any point before sale; thereafter, it seems her claim is, _qua_ creditor, and not _qua_ owner, to a preferential ranking which however, though "preferential", is postponed to the landlord's claim for rent.

Wardhaugh's wording is perhaps not entirely clear: whether or not all the furniture (of the wife) has been sold in satisfaction of the landlord's claim, it appears that the wife ranks after the landlord, for the sentence seems to bear the construction that, if the whole mass of the furniture did not need to be sold to meet the debt, the wife is entitled, before any person (other than the landlord whose claim, _ex hypothesi_, has been satisfied) interested in the husband's estate (if the landlord's hypothec is utilised /

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1. Wardhaugh, _ibid_.

utilised, it is perhaps a reasonable assumption that the debtor may have other creditors also and indeed Wardhaugh's discussion is of the rights of the various creditors of a bankrupt, and in this context of the landlord, the bankrupt and the bankrupt's spouse), to claim what is her own. Similarly, out of the balance of the proceeds, if all the furniture was sold or if a balance remained after sale of only part thereof, after payment of the rent, she is entitled to a first (or 'preferential') claim, but if the funds are insufficient to meet her claim for the value of the subjects sold, she will rank only as an ordinary creditor (but, at least, it would appear, not as a postponed creditor under the 1881 Act, for ex hypothesi, she has proved the furniture to be her own, and the argument advanced earlier was that a fair degree of "entrusting[1]" of furniture would be required /

1. This suggested guide may be of little use in practice: it seems clear that joint use does not amount to "entrusting" - what more could a wife do to "entrust" her furniture to her husband? Perhaps if it could be proved that she had given him carte blanche to sell or pawn it, she might be held to have entrusted it to him. Contra, in that case, she might be held to have made a donation to him of it, and donations, inter virum et uxorem are now rendered irrevocable by the donor spouse. (M.W.P.(Sc.) Act, 1920, s.5). Similarly, if she had made such an agreement with him in order (even impliedly) to help him meet household expenses, she has no claim at all as a creditor. (See Clive & Wilson, p.339). Certainly, though, the issue is, as it were, "at one remove", when the subjects involved are corporeal moveables, rather than money ("Moreover there has been held to be a presumption that the husband's use of his wife's funds (at least if they are of an income nature) has been for family expenses: if the wife avers that he has used them to swell his own estate the burden of proof is on her". Clive & Wilson, ibid.), but the principle is the same. Wardhaugh makes no specific reference to the effect of s.1(4) on his statement that, for the balance, the wife ranks as an ordinary creditor, but the next sentence /

required before the placing of her furniture in the matrimonial home brought s.1(4) into operation if indeed it be accepted that s.1(4) may apply to furniture) on the remainder of her bankrupt (or, of course, possibly solvent) husband's estate.

The fact of cohabitation in the (rented) matrimonial home, and the joint use of property which is separately owned, thus places the spouse of a tenant who is bankrupt, vergens ad inopiam, or generally a reluctant payer, in a potentially disadvantageous position. Would any person living with a debtor tenant and allowing him to give the appearance of owning what he does not own, run the same risk[1.2]? The rule is that, "Hypothec does not cover /

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sentence of the paragraph reads, "The transfer of furniture belonging to the wife to a house occupied by her and her husband does not necessarily mean that it is "lent or entrusted" in the sense of the M.W.P.Act", which from its position in the midst of his discussion upon hypothec, must be his answer to the unspoken query.

1. See Bell v. Andrews (1885) 12 R.961, a case which concerned the right (or not, as it was decided) of a landlord to attach by his hypothec a piano belonging to the daughter of the defaulting tenant. Leaving aside the question of the nature of a piano as "furniture", it is interesting that the judicial opinion stressed that the piano could not be kept by the minor daughter in any other place than in her father's house. The same is true in the case of a wife - or, at least, the only sensible place for the keeping of her furniture, is in the matrimonial home - but the marital relationship and finances may cloud the issue. Here, the daughter had received the piano as a gift from her grandmother, and it was undeniably hers. Similarly, the property of a "stranger" may be distinguished with much greater ease from the property of the tenant than may the wife's property.
The L.P. (Inglis) at p.962, said "The law of hypothec proceeded upon the footing that moveables in the house of a tenant are presumably his property. Although the right of property in these may be in another, there are certain cases in which they will nevertheless /

cover /

nevertheless fall under the hypothec". (The example here given is that of hired furniture)... "But the ratio does not always apply to single articles. No case has yet been decided to the effect that a single article belonging to a third party, and not hired, falls under the hypothec". Surely more than one item, if timeously proved not to belong to the tenant, would escape the hypothec?
Lord Mure at p.963 ascribed the basis of the tacit hypothec claim (an exception to the rule that "a man cannot pledge property which is not his own") as resting on "a presumption of the consent of the real owner by the possession voluntarily given, and the title of such possession as implying such consent" (both quotations taken by him from the judgment of L.Moncrieff in Jaffray v. Carrick (1836) 15 S.45), which is an interesting echo of the doctrine of reputed ownership.

2. See "The Law of Landlord and Tenant in Scotland", G.C.H.Paton: generally Chapter XIII, "Landlord's Right of Hypothec", and in particular, pp.202-206 thereof. ("The property of children of the tenant, of his guests, of his servants and of his lodgers is excluded in accordance with the general rule. In any event, such property is not normally part of the ordinary plenishing, but comprises specific personal items" (which perhaps explains the reference above to a "single article")."If, of course, furniture materially different and more various is brought in by a lodger, it may be held that he is really a subtenant" ("The goods of a subtenant are included in respect of his own rent ...", footnote 47) "and if most or the major part of the furniture is owned by a third party, such as a lodger, then the hypothec may apply to it, if it is, for example, given to the tenant to enable him to furnish a boarding house, though it would not apply if the lodger has taken the furniture there for his own convenience. Apart from such instances, however, the right of hypothec has been held to extend to property of which the tenant is not owner and which does not belong to someone in the house, on the theory of presumed consent of the owner, evidenced by his giving possession to the tenant, a theory which has been attacked by Rankine as "unsatisfactory" but as one to be followed "without too close a scrutiny into the principles.""). (There follows a discussion of articles hired).

cover goods not belonging to the tenant, such as those of one of his family, or of a lodger ...[1]", which would include both the wife and the lodger. "The true owner's remedy in these cases is to appear before the Sheriff and claim to have them withdrawn from the sequestration[2]." The wife's claim may be more difficult to establish, however.

Where the subjects let come under the Houseletting and Rating Act, 1911, the hypothec does not cover bedding material, or tools, used by the occupier or any member of his family for his livelihood, or furniture and plenishing to the value of £10 selected by the occupier[3].

Summary

The modern situation is, therefore, that "Property genuinely belonging to the bankrupt's spouse is not affected by the sequestration[4]." Donations inter virum et uxorem are revocable by the donor's creditors if made within a year and a day of the donor's sequestration[5], and policies of life assurance taken out by a husband for the benefit of his wife and family are outwith the grasp of the husband's trustee, unless they were made within two years of the bankruptcy of the life assured, or unless the policy was effected with intent to defraud creditors[6], in which case the creditors may seek repayment of the premiums /

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1. Walker, Prins.II, 1594.
2. ibid. 1425.
3. ibid. A similar prohibition appears to exist generally at common law in respect of the tenant's money, clothes, and tools. - 1425.
4. Walker, Prins. II, 2073.
5. M.W.P.(Sc.)Act, 1920, s.5(b). q.v. Chapter 1, p.110. See generally Clive & Wilson, pp.332-337.
6. Married Women's Policies of Assurance (Sc.) Act, 1880. q.v. Chapter 1, pp.95-97; and see Professor Walker's examples, II, 2073, footnote 4.

premiums paid, from the trustee of the policy, out of the proceeds of the policy, for the satisfaction of their claims.

Goudy[1] comments in the following terms:- "Though the wife's property is thus protected," (by the M.W.P. (Sc.) Act, 1881) "her moveable estate will be liable to be taken by the husband's trustee, if it be not invested, placed, or secured in the wife's own name, or in such terms as shall clearly distinguish it from the husband's estate, except in the case of such corporeal moveables as are usually possessed without a written or documentary title." (s.1(3)). "This provision is intended to prevent fictitious claims by a wife upon property which truly belongs to the husband, so as to defraud his creditors. And any money or other estate lent[2] by the wife to the husband or immixed with his funds will be treated as his upon his bankruptcy, under reservation of the wife's claim for the value thereof as a creditor postponed to his other creditors for valuable consideration in money or money's worth." (s.1(4)). "An assignee of the wife has no higher right than she herself[3]."

Fraudulent Preferences and Gratuitous Alienations.

J. J. Gow, in "The Mercantile and Industrial Law of Scotland[4]", gives a brief description of the general position /

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1. p.289.
2. Though, if lent on security, the wife is entitled to the benefit of that security - Commercial Bank v. Wilson 1909, 1 S.L.T. 273.
3. For this proposition, Goudy cites the case of Cochrane v. Lamont's Tr. (1891) 18 R. 451. See also Clive & Wilson, pp.338-339.
4. (1964) Chapter 12 (Law of Bankruptcy) p.616 et seq. See also Goudy, 'The Law of Bankruptcy', Introduction (pp.1-11).

position at common law, of a bankrupt. As is well known, there was then, and probably always must be, though nowadays to a much more restricted and regulated extent, an undignified race of diligences - a "scramble" for such funds as the debtor possessed. In earlier days, too, there existed the threat of perpetual imprisonment of the bankrupt, a factor which might well lead him, by means of a cessio bonorum, to cede his effects to his creditors, and in this way protect his physical freedom but at the same time fetter his spiritual freedom. Indeed he might be 'selling his soul', for the expedient of the 'cessio' did not afford him his discharge, and "left the debtor destitute with little hope of ever getting once more on to his financial feet[1]." "As always repression begat evasion[2]." Debtors began to dispose of their assets gratuitously, or in trust, to friends and relatives. Moreover, they might give a fraudulent preference to a favoured creditor. Among creditors, at that date, the race was to the swiftest, with few rules or handicaps. The common law "did frown upon the evasions of gratuitous alienations and fraudulent preferences but, apparently, not severely enough[3]."

Therefore, by the Act 1621, c.18, an attack was made on gratuitous alienations by insolvent debtors to those near to them in blood or friendship, and, after diligence had been set in motion by any creditor, on voluntary alienations by the debtor to anyone, but Gow says that this measure did not eliminate fraudulent preferences to creditors, and, by the Act 1696, c.5, all alienations made by a notour bankrupt[4], within sixty /

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1. Gow op.cit., p.616.
2. Gow Ibid.
3. Ibid.
4. See Gow, pp.624-629; Wardhaugh, pp.6-7; Walker, Prins. II 2048-2053.

sixty days prior thereto or at any time thereafter, were deemed fraudulent and to be of no effect. He notes that both Acts remain in force. Gow's view, however, is that the common law attitude to the control of the race of diligences - namely, that, "the de'il took the hin'most[1]" - was not greatly changed by these Acts.

By the Act 12 Geo.3, c.72, an attempt was made to control the race, but the concept there introduced to this end of conveying the property to an independent intermediary (factor or trustee) for the recovery and management and thereafter for the equal distribution thereof, brought in by the Act last-mentioned in 1772 to apply to the moveable estate of trading debtors, was not adopted with regard to the moveable and heritable estates of all debtors, "whether alive or dead, and whether engaged in trade or not[2]", until the Bankruptcy Act, 1856[3].

Gow says that the Debtors (Scotland) Act, 1880[4] substantially (that is, except for non-payment of aliment[5], and generally for failure to implement a decree ad factum praestandum) abolished imprisonment for debt, and thus "rendered impractical the common law process of 'cessio bonorum', but created a statutory 'cessio'," which was removed in 1913, by the Bankruptcy (Scotland) Act of that year, in terms of which there was substituted a summary sequestration, in addition to the sequestration introduced by the 1856 Act.

Potentially unfair transactions are those where a debtor, knowing himself to be insolvent[6], gives away funds /

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1. Gow, p.628.
2. Gow, p.617.
3. 19 and 20 Viet. c.79.
4. 43 and 44 Viet. c.34.
5. See Chapter 4, pp.
6. See Gow, p.618; Wardhaugh, p.1; Walker, Prins.II, 2043-2048.

funds which properly ought to be the subject of division among his creditors, or favours one creditor as against another.

A challenge on either head may be made at common law, provided, inter alia, that at the material time the debtor was insolvent[1]. Moreover, under the Act 1621, c.18, challenge may be made of gratuitous alienations (the burden of proof lying on the challenger being somewhat less than that imposed at common law[2]) and also of voluntary alienations made after the challenging creditor had commenced diligence "of such a kind that when completed it would attach or be appropriate to attach the subject of alienation." Such an alienation would be void against such a creditor. Gow remarks however[3] that "The practical utility of this enactment has been in substance destroyed by the emergence of the concept of notour bankruptcy constituted by insolvency coupled with diligence". Reference is made to Goudy[4] where it is stated that this (second) branch of the Act of 1621 was enacted when the principles of bankruptcy law were little understood and that its effect was "prejudicial, rather than otherwise, to the equitable distribution of bankrupt estates. It tended to encourage competition of diligences among creditors by establishing a right of preference in such as were first in the race. Now, however, that the expiry of a charge - concurring with insolvency - constitutes notour bankruptcy[5], it has become of little practical importance, and it is rarely now that a creditor can gain /

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1. See Gow, pp.618-624; Goudy, Chapters III - VI; Walker, Prins.II. pp.2044-2048, 2049-2053; Wardhaugh (Table) pp.1-5; and see generally, Bell, Comms.II 154-232.
2. See infra, p.193.
3. p.624.
4. p.57.
5. Bankruptcy (Sc.) Act, 1913, s.5.

gain any benefit from a challenge under its provisions." Under the Act 1696, c.5, as well as at common law, challenge may be made of fraudulent preferences[1].

Gratuitous Alienations

"The challenge extends to alienations of every kind of right that can be made available in any way by creditors;[2];"

The onus, in accordance with the principle "ei qui affirmat non ei qui negat incumbit probatio", is upon him who challenges. The burden of proof to be discharged at common law is threefold: First, that the alienation was non onerous[3]; Second, that the debtor is insolvent and was so at the date of alienation; and, Third, that the alienation was made to the prejudice of lawful creditors[4].

The debtor being insolvent, animus fraudandi is not necessary. A presumption of fraud, in the sense of breach of trust, is created by the force of the common law, which is sufficient to set aside the gratuitous alienation without proof of actual intent to defraud on the part of the debtor[5]."

"The Act" (1621, c.18) "declares that all alienations made by a debtor of any of his lands etc.... 'to any conjunct or confident person, without true, just, and necessarie causes,[6] and without a just price really payed, the same being done after the contracting of /

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1. See Wardhaugh, Table, pp.4-5; with reference to Gratuitous Alienations see Wardhaugh Table, pp.2-3. In both cases, reduction under the appropriate Act and at common law is compared and contrasted.
2. Goudy, p.23.
3. Thus, "An alienation for adequate money or money's worth is unimpeachable". (see Goudy, p.25)
4. See Gow, pp.619-620 - the threefold burden of proof.
5. Goudy, p.24: See also Gow, p.620.
6. emphasis added.

of lawful debts from true creditors' shall be null when challenged by the creditors injured[1]."

Intent to defraud may be established by writ or oath of the receiver of the alienation to the effect that there was no onerous consideration for the transfer. In sum, at common law, there must be proof of non-onerosity, of insolvency at the date of granting and at the date of challenge, and, if these requirements are met, fraudulent intent is presumed: under statute, if insolvency at the date of challenge be proved, all other necessary points are presumed[2]. Thus, the task of the challenger is rather easier under statute than under common law. He must prove that he himself is a prior creditor, that the debtor at the date of the raising of the action was insolvent, and that the alienation was made to a conjunct and confident person[3]. In Gow's discussion[4], he explains that if these three points are proved, the following three points - namely, that the alienation was made without true, just, and necessary cause, was made at a time when the debtor was insolvent, and was to the prejudice of prior creditors - are presumed (though they may be rebutted by proof by the debtor of his solvency at the date of the alienation or of the true, just, and necessary cause of the alienation), and, while they must be averred, they need not be /

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1. Goudy, p.43.
2. See Wardhaugh, Table, pp.2-3.
3. Contra, at common law, any prior or posterior creditor may challenge, whereas under the Act, only a prior creditor, or the trustee in sequestration, may challenge; further the Act's application is limited to alienation to 'conjunct and confident persons', while at common law alienations to any person other than a creditor may be attacked. (Wardhaugh, p.3).
4. pp.623-4.

be proved[1].

Hence, alienations to "conjunct and confident persons" are deemed worthy of instant suspicion. Such persons are those related to the bankrupt by ties of blood or marriage, (conjunct persons), "or in intimate friendship and confidential communication with the bankrupt" (confident persons). Such "may be supposed to sympathize with his distress, and to be inclined to assist him in his schemes;" In the body of the Act, the words used are "any conjunct or confident person" and in the Preamble these are detailed as "wives, children, kinsmen and allies, and other confident and interposed persons[2]."

"To secure due impartiality in a witness and in a judge, no one can be called upon to act in either of these capacities where his near relation is concerned; and as the same affection which is presumed to deaden the sense of justice, or lead to a deviation from truth, may be supposed capable of seducing a person to participate in devices for saving his /

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1. Clive & Wilson, p.330, note however that "there are transactions (for example, cash payments) which are not covered by the terms of the Act and which must be attacked, if at all, under the common law". (See Walker, Prins.II 2045-46.) Note also Clive & Wilson, p.330, footnote 9 (doubting whether Bell's view (and Goudy's), that even at common law a transaction inter conjunctos imported a presumption of insolvency, was adequately substantiated.) ("In a challenge on the common law, insolvency (which in a reduction under the Act is presumed, and must be refuted by him who supports the deed) is required to be established by proper evidence. But where the connection between the parties has been very close and intimate, the Court has raised a presumption to the effect of throwing the onus probandi of solvency on the holder of the deed" (Comm.II.184)).
2. Bell, Comm.II, 175.

his friend, the Court has in questions under this Act applied the same test[1]." Thus, in addition to those persons specified in the Preamble, Bell lists brothers[2], sons-in-law[3], and uncles[4], and also step-sons[5] and sisters or brothers-in-law[6]. Cousins were a doubtful case[7] but uncle-in-law and nephew-in-law were held not to be conjunct, "because uncle and nephew by affinity are not hindered to judge in one another's cause by Act 13, Parliament 3, Charles II[8]."

Goudy[9] states that "Intending spouses entering into a marriage contract fall within the statutory definition[10.11]".

Confident Persons

"It is not easy to define what in law is held as a confident person, nor is it settled by any established test who are included under this description. The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business; ....To hold a person as comprehended within the description of confident in this Act of Parliament, has only the effect of throwing the onus probandi on the granter[12]; and no man ought to /

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1. ibid.
2. Finlaw, 1621, M.895.
3. Gibb v. Livingston 1766, M.909.
4. Tapersie's Creds. 1673, M.900.
5. Mercer v. Dalgarno 1695, M.12563.
6. Hume v. Smith 1673, M.899.
7. L.Elibank v. Adamson & Callander 1812, M.12569.
8. Sinclair v. Dickson 1679, 1680, M.12562.
9. Whom see also pp.45-46.
10. McLay v. McQueen, (1899) 1F.804.
11. See also generally Clive & Wilson, pp.330-331 where it is suggested that separated spouses would be conjunct but divorced spouses would not be conjunct in terms of the Act.
12. in effect usually the grantee of the alienation, the holder of the deed. (see also p.175, last line).

to accept a conveyance while he stands in a confidential relation to the granter, without being aware of the justice and necessity of proving its onerous cause if challenged by the granter's creditors[1]."

Wardhaugh notes[2] that the case of insured and insurer does not seem to fall into this category, and Goudy comments[3] that sometimes the distinction between the two categories has not been strictly adhered to, "and it has been thought sufficient to hold that the grantee partook of the characteristics of both. Thus a man's paramour and bastard children have been held both conjunct and confident in relation to him[4]." That a paramour should be regarded as conjunct and confident is interesting.

The position is that it is for the creditor first to prove, if disputed, the characteristic (as conjunct and/or confident) averred[5]. Having done so, and having shown that the alienation took place, that the debtor at the date of the action was insolvent, and that he (the creditor) is a prior creditor, the remainder is presumed, though it may be rebutted by the defender in the manner described by Gow[6].

Gow[7] points out the common law defect of the heavy /

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1. Bell, Comm. II, 175.
2. p.3, fn.6., citing Todd v. Anglian Insurance Co. 1933 S.L.T. 274 (no conjunct or confidential relationship between insurer and insured).
3. p.46.
4. citing Ballantyne v. Dunlop Feb.17, 1814 F.C.; citing also Carphin v. Clapperton (1867) 5 Macph. 797, with regard to fiancé and fiancée.
5. "The proof of this confidential situation, or of a relation of kindred sufficient to bring a person within the description of conjunct, must of course lie upon the challenging creditor. It is the very groundwork of his challenge and the foundation of that presumption of fraud which the holder of the deed is bound to overcome." (Bell, ibid.)
6. pp.623-4; and see supra, p. 193.
7. at p.623.

heavy onus which rests on the challenger of the deed and comments that the Act 1621, c.18 lightened the burden considerably, where the deed had been granted in favour of a member of a certain category of person. Pre-eminent in that category, for the purpose of this discussion, are spouses.

Spouses

There is no doubt that the most important classes of person, for these purposes, are spouses, and intending spouses entering into a marriage-contract - for it has been decided[1] that the latter also are conjunct persons.

Now, the holder of the deed, to defeat the challenge offered, must show that the alienation was made for true, just and necessary cause, or that the debtor was not insolvent at the date of the alienation[2].

Goudy[3] subdivides the topic of "true, just and necessary cause" into four heads - alienations for value received in money or money's worth, alienations in fulfilment of prior obligations, alienations in respect of obligations undertaken or liability incurred in counterpart, and alienations in respect of natural obligations. Of these, this discussion is inextricably entangled with the latter two causes, as they impinge by their nature on the relationship of husband and wife, and/or that of parent and child.

Naturally, an alienation for full consideration is not struck at, nor is the fulfilment of an obligation /

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1. McLay v. McQueen (1899) 1 F.804.
2. Clive and Wilson (p.333) note that the particular value to creditors of the M.W.P.(Sc.) Act, 1920, s.5 is that "the donation can be revoked even if the donor is proved to have been solvent at the time when it was made."
3. pp.46-50.

obligation undertaken during solvency.

Goudy states[1] that "A true, just, and necessary cause for the alienation may consist in some obligation undertaken or liability incurred by the grantee", and remarks that disputes about this are found mainly in connection with grants made in marriage contracts, by the spouses inter se, or by the parents of the spouses in favour of the spouses, or by the spouses in favour of the children of the marriage. "There is no contract which the law regards as more onerous than a marriage-contract", says Commissary Wallace, and adds that it does not affect the onerosity of an ante-nuptial marriage contract, that the whole money is provided by the husband, and none by the wife, citing, inter alia, the cases of Lockhart v. Dundas[2] and Blackburn v. Oliver[3].

"Marriage, itself, in the absence of fraudulent contrivance between the intending spouses is held to be a true, just, and necessary cause in the sense of the statute for the provisions in the antenuptial deed", writes Goudy[4]. According to Walton[5], "Marriage is the highest consideration known to the law", and the standard of the Act did not change the nature of the onerosity of the marriage consideration. Provided that the antemuptial arrangements are reasonable and suitable with regard to the circumstances of the parties /

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1. p.47.
2. 1714, M.956.
3. 29 May 1816, F.C.
4. p.48.
5. p.178.

parties, and not exorbitant[1], and no suspicion of fraud (as evidenced by the known insolvency of the husband) exists, marriage (that is, forthcoming, not antecedent, marriage[2]) will justify the provisions[3]. As far as provisions to the wife are concerned, these "are /

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1. Carphin v. Clapperton (1867) 5 Macph. 797; McLachlan v. Campbell (1824) 3 S.192; it was thought that the case of Thoirs v. Middleton 1729, M.984, in which there was sustained a provision made by the husband's uncle, might be the outer limit of the list of relations in the remoter degree whose settlements would be upheld in this way.
Bell (Comm.II.176), making the point that, for a deed to be onerous, it is not necessary that the debtor himself shall have received valuable consideration therefor, says:-
"So, on occasion of a marriage, provisions which a relation of one of the parties settles by separate deed or in the marriage contract on the other party, or on the children, are onerous and not challengeable by the creditors of the granter, the marriage being held as entered into in consideration of these provisions; and this more especially where such provisions are the counterparts of a mutual contract by which other reciprocal provisions are settled." (Case of Blackburn v. Oliver supra, cited and discussed briefly at 176, fn.5.) "But where the sum or estate so settled is placed entirely at the disposal of that party by whose relation it is given (as if, in a conveyance to a son in his marriage contract, the sum or subject be given to him and his assignees)," ("Hepburn v. L.Strathmaven 1712, M.930".) "the alienation is held to be gratuitous."
2. see infra. pp. 205-207.
3. For our purposes today, this summary of the position is probably adequate. (See, for example, short, clear paragraph in Clive & Wilson, p.331 and, in their "donation" aspect, p.333). For a more detailed discussion, reference might be made to Fr.II 1350 et seq, criticised by Goudy, p.26 et seq. Although concerned with marriage-contracts - at the present time almost unknown - the "husband/wife/creditor" triangle (which for matrimonial property law is as eternal a triangle as is the spouse/spouse/paramour relationship to the novelist), these studies eloquently present the argument for the creditor (Fraser), and for the wife (Goudy).

"are the conditions on which she has entered into the contract[1.2]."

The "reasonable provision" rule does not apply unless the subjects are placed outwith the husband's control[3] - as it has been said[4], a provision to be secure against the husband's creditors, must be secure against himself. The mere insertion in a deed of a declaration that his income is alimentary or non-assignable cannot remove from him the obligation to apply his funds to pay his debts[5].

The same principles of onerosity and reasonableness of provision were applied to determine the safety from creditor-attack of ante-nuptial provisions for possible future issue. "The children's provisions, however, must be so expressed as to amount to a jus crediti, as distinguished from a mere right of succession[6]."

Similarly treated were provisions by the parents of the spouses in an ante-nuptial contract, though in this case, Goudy says[7], "Knowledge, however, on the part of the spouses of the granter's insolvency at the date of the deed, may be sufficient to bar them from claiming the grant in their favour to any extent". However, where a purely inter-spouse contract /

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1. Bell, ibid.
2. The M.W.P.(Sc.) Act, 1920, in introducing the new rule concerning inter-spouse donation, expressly (by s.6) left the common law rules of ante-nuptial provision in being. (Walton, p.180 and Clive & Wilson, p.333).
3. Walton, p.178.
4. Walton, ibid.
5. Walton, p.179. See generally pp.178-180, and cases there cited and narrated.
6. Goudy, p.28, and authorities there cited. The same applied to provisions in favour of a wife, which were in the nature of rights of succession. (Fr.II, 1356). Contrast allowable post-nuptial provisions (infra, p.207) and see Clive & Wilson, p.331, fn.22 and p.336, ""Reasonable provision" for spouse."
7. At p.29, citing Wood v. Reid 1680, M.977.

contract was concerned, he writes[1], "In none of the authorities does importance seem to have been attached to the fact that insolvency was known to the favoured spouse at the date of the antenuptial contract. But undoubtedly where anything like deliberate fraud, or collusion between the spouses, can be made out, the settlement will be liable to be set aside". Thus, Goudy appears to consider that the trend of authority is that the receipt by a future wife of a provision from her future husband, whom she knows to be insolvent, does not amount, per se, to fraud[2]. The rules here, therefore /

1. p.28.
2. See the case of McLay v. McQueen, supra, which demonstrated that intending spouses came within the category of conjunct and confident persons; there, the (future) wife's non-participation in the "fraud" saved the deed. However, the case does not clarify the point at issue, because the future wife was ignorant of the state of her fiancé's finances. "Whether it would invalidate a marriage settlement that a wife knew that, upon an exact balance of her intended husband's affairs, he was just solvent and no more, we need not consider, because it is not proved, in the present case, that the wife knew anything of her husband's affairs, ..." per L.McLaren at p.811. The husband's state of mind is estimated by L.Adam at p.809:- "I do not think there is any evidence that the marriage was contracted by McQueen for the purpose of defrauding his creditors, but I think that he availed himself of the opportunity afforded by his marriage in order to defraud them. It may be doubted whether he would otherwise have been so liberal in providing for his wife. But, on the other hand, I think that there is no evidence that she, before her marriage, knew anything of, or participated in, the fraud".
In addition to the citation of McLay, Goudy refers to the opinion of Lord Ormidale in Watson v. Grant's Trs. (1874) 1 R.882 at pp.887-888 where he gave an example of circumstances in which he considered that an antenuptial contract might be reduced: "Suppose the pursuer had been on the point of completing a nexus on this estate for payment of his debt, that there had been negotiations with the intended husband and wife, and that they had besought him to abstain from proceeding to complete his nexus, and that he had agreed to do so on the promise by them that his debt /

therefore, appear to be indicative of a certain attitude to the broader subject under discussion, which is at variance for instance with Fraser's philosophy[1].

At any rate, where the ante-nuptial provision fell within the rule, as generally agreed, the wife's claim therefor was superior to the claim of any (other) creditor[2].

Where the provision was by a parent in favour of the intending spouses, a now unusual method of explaining the point is used by Goudy[3] (during his discussion of gratuitous /

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debt would be paid before they did anything to affect his debt, but that, instead of fulfilling this promise, they had conspired to execute an antenuptial contract, whereby they thought the pursuer might be cut out from payment of his debt, I could very well understand that such a palpable case of fraud might support a reduction. But no such case, or anything like it, is here alleged." Something more than absence of inquiry about the betrothed's doubtful financial situation, or even knowledge of his insolvency, is required, therefore, to allow an inference of fraud, it seems. Marriage is consideration enough to support a reasonable ante-nuptial provision, in the absence of fraud, in the sense of collusive machination between the prospective spouses.
(In the recent case of Armour v. Learmonth 1972 S.L.T.150, it was made clear that no allegation of personal fraud against the defender, or of collusion between her and her husband was made).

1. Displayed at pp.1349-1350 (40 years earlier).
2. See Fr.II, 1355.
3. p.29. But see Wood v. Reid supra. There, the father-in-law was generally reputed to be bankrupt: see L.McLaren's opinion in McLay v. McQueen, supra, at p.811, that:- "I do not think that a debtor is to be held insolvent either in the sense of the statute of 1621 or in the other sense merely because, being solvent, he enters upon obligations, or disposes of his property for onerous causes, which will have the effect of diminishing his estate, and reducing it below the point of solvency. Solvency must always be estimated as at the moment when the deed was executed". Goudy's illustration postulates that situation. Goudy himself, however, (though referring to the above opinion) states, at p.32, with reference to challenge at common law of gratuitous alienations, that, "If, apart from the alienation complained of, the debtor would have been solvent, but the effect of it be to create insolvency, the transaction will be set aside".

gratuitous alienations at common law) when he says that the rule applicable here is illustrated by a text of the civil law:- If a father-in-law gives his son-in-law a tocher, thereby rendering himself insolvent, the son-in-law cannot be sued by the insolvent's creditors, unless he had participated in the fraud against them (for such it be, intentional or not, and it must surely be presumed that the father-in-law was aware of his circumstances: is it to be presumed that the son-in-law was not?). The son-in-law, explains Goudy, is in the position of a purchaser for valuable consideration as (it is said) he probably would not have married without the tocher. However, according to some authorities, if the wife should thereafter obtain the tocher, as upon divorce, the father's creditors may take action against her, even if she did not know of her father's insolvency when he granted the tocher, because, as far as she is concerned, the tocher is gratuitous[1].

Obviously, then, this example is one based on counterpart. It is odd in the sense, that if a woman's future husband makes provision for her, and she is ignorant of any question of fraud, and he becomes bankrupt, her provision is safe so far as it is reasonable, but if the provision is made by her father, and is, strictly speaking, money from her side of the family, given, in the first place, not to her, but to her husband to aid him in his support of her (and, often, in support of himself), then if she, by force of circumstances, comes into ownership of it, whether or not she herself was innocent concerning any arrangement which might have had the effect of defeating her father's legitimate creditors, she may lose the provision to them, on the insolvency of her father. The /

1. Dig.42. 8. 25. 1.

The tocher would then be seen as a gratuitous alienation because consideration was not given therefor. The consideration given by a wife for an ante-nuptial provision was regarded as clear - in these days of nominal equality of job opportunity, and no general shortage of employment for married women, nor stigma attaching to the performance of it, would the same view today be taken automatically? Much of the reasoning, therefore, must rest upon counterpart and consideration.

Fourth[1], provisions may be safe against challenge by creditors if they are made pietatis causa - out of a fraternal, filial, parental or marital sense of duty and responsibility, but it remains in doubt how far such a natural obligation will constitute a true, just and necessary cause in the sense of the statute. "This kind of consideration being imperfect, is inferior to those that have been considered. The latter have been seen to be based on the principles of contract; this arises "ex jure naturae[2]."

Postnuptial Settlements

Into this category ('pietatis causa') may be placed postnuptial /

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1. Goudy treats challenge and defence of gratuitous alienations at common law, under the heading of "want of onerous consideration", in four aspects - value in money or money's worth, prior legal obligation, counterpart, and natural obligation. Antenuptial marriage-settlements are discussed under the title of counterpart. See generally pp.25-32. Subsequently (at p.46), he states that the statute's "true, just, and necessarie causes and without a just price really payed" has been construed as meaning common law onerosity, and that hence the same principles apply to alleged gratuitous alienations at common law and under the Act 1621, c.18.
2. Goudy, p.29.

postnuptial settlements on wives, about which, both at common law and statute, the rules are unclear. The early tendency was to uphold such provisions so far as reasonable, but the opposite view later gained ground[1].

Fraser expresses the distinction between the two cases thus[2]:- in entering into an antenuptial contract, the wife gives an equivalent, "and the provisions in her favour are regarded in the same light as an ordinary debt, unless they be altogether exorbitant; in which case the Court will reduce the excess. But in postnuptial contracts the wife appears in a different position, having already allied her own with her husband's fortunes and rendered herself incapable, in certain cases, of claiming as an onerous creditor on his bankruptcy. The husband has already received the valuable consideration, - marriage, - and the wife gives him nothing when he makes to her a conveyance based on it as a consideration." Subsequently[3], he cites the even blunter statement of Lord Mackenzie in Guthrie v. Cowan or Bell[4], where he remarked, "as to /

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1. op.cit. p.30.
2. Fr.II, 1498. Goudy (p.31) says that the consideration given by a wife in such a case is not the marriage itself, nor the wife's contribution of tocher, nor her renunciation of her legal provisions, but "It is properly the debitum naturae on a husband to provide for the support of his wife after his death; and as such it is different in kind from the consideration implied in a contract of sale or an antenuptial contract. Being of this imperfect character, the question comes to be:- Is it sufficiently onerous to compete with, or exclude, proper contract creditors, when there is insolvency at the date of the grant? And it is thought the answer to this question should be in the negative". (Goudy was discussing here the postnuptial provision made by an insolvent husband to benefit his wife after his death).
3. at II.1502.
4. (1846) 9 D.124 at p.128. Subsequently (at p.130), he remarked upon the injustice to the first family of the situation found in the circumstances here: "I was never much a lover of that part of our law. It is hard to hold even an antenuptial contract good as against /

to antenuptial contracts, a man buys a wife as he buys a horse; he must buy her on conditions".

Bell also[1] distinguishes between antenuptial and postnuptial provisions. In an antenuptial contract, he says, "the provisions to the wife make it an essential condition of the marriage that she shall not entirely follow the fortunes of her husband, but be entitled to rely on those provisions; and the provisions to the children are the conditions on which alone those interested in their future existence have consented to that contract from which they were to spring[2]. In postnuptial contracts, the wife and children are already wedded to the condition of their husband and father, and can take nothing against his creditors, unless what he during his solvency can legally give away."

It seems, therefore, that the "alliance of fortune" philosophy - the notion of "throwing in one's lot and taking the chance of financial good or evil" (now less dependent entirely on the husband's efforts, of course) - is deep-rooted.

In the modern context, a clear difference exists in some jurisdictions today between what may be done antenuptially /

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against creditors. But then, on looking at the decisions, I find it fixed by a series rerum judicatarum, that the law of Scotland will support a postnuptial provision to a moderate extent."

1. Comm.I, 687.
2. "Pre-natal" provision for possible future children - which regrettably might often be a poor provision compared with their entitlement at common law (cf. e.g. the parents' discharge of their prospective children's legitim - see Chapter 5) - was often explained in terms of the "contract" from which alone they could spring. (See Clive & Wilson, p.343, fn.4).

antenuptially and what may be done postnuptially. Indeed it may be that "contracting-out" of a system of community of property may be carried out only antenuptially[1]. On the other hand, it may be that there is perfect freedom to modify property relations to suit the parties at any point during the marriage[2].

That which was struck at with certainty was the postnuptial contract which was to benefit the wife during the subsistence of the marriage. Such an arrangement was regarded as a donation[3] inter virum et uxorem, and hence was revocable by the granter's sequestration (at common law). On the other hand, a postnuptial provision which a solvent husband granted, to take effect on his death, was safe if reasonable in amount. The doubt arose, therefore in the case of those provisions made by an insolvent granter to take effect on the termination of the marriage by the latter's death, and Goudy's view, as noted , was that the consideration in that case was insufficient to support the provision against the creditors[4]. A similar result attended /

1. Cf.South Africa (Chapter 6).
2. Law Commission W.P.No.42 in its (aborted) suggestion of English community of property (see Chapter 7) favoured this course.
3. See Clive & Wilson, p.330 and 332-333.
4. See generally Goudy, pp.29-31 and Clive & Wilson, p.331 and fn.22., where an interesting tactical distinction is drawn between gratuitous alienation and revocable donation - the creditor would often choose to attack the transfer as a revocable donation, "as this precluded the defence of solvency at transfer." See also thereon, p.336 (alienation/donation) and generally, pp.332-337. At p.336, the authors note that the law of inter-spouse donation differs from that of gratuitous alienation in that "the former affords protection to a reasonable provision for a spouse to take effect after the dissolution of the marriage." If such a provision is irrevocable, made when the granter is solvent, is reasonable in amount, and expressed to take effect only at the dissolution of the marriage, "it will not be revocable by creditors as /

attended postnuptial provisions in favour of children.

Of all these points, Bell makes a succinct and lucid summary[1].

These, then, are the rules in outline which governed the determination of rights between the granter's creditors and the granter's wife in the days when marriage-contracts were common. In so far as marriage-contracts are used today - which use is almost unknown[2,3] - it would appear that they would still apply, subject to the provisions on donations introduced by the 1920 Act[4].

The /

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as a donation between husband and wife, even if sequestration follows within a year and a day." This conclusion meets that of Goudy (p.30) though the latter appears to treat this species of arrangement as coming under the head of allowable post-nuptial settlement. Walton (pp.177-178) entitles his discussion thereof, "A Reasonable Provision was not a Donation Revocable." ("If it were excessive it would only be reduced quoad excessum", p.178).

1. Comm.I, 641-643.
2. A prime example of its use in a modern, analogous situation, is cited by Clive & Wilson, p.331 - Armour v. Learmonth 1972 S.L.T.150. See per L. Cameron, at p.154 "If alienation by means of an ante-nuptial marriage contract would be saved and outside the grip of the statute and that for the reasons to which I have referred," (the onerous consideration of the marriage itself given for marriage-contract provisions (see p.153)) "I do not think that a cash provision to an intended wife to meet the purchase price of a house to be acquired by her and to be intended for and actually occupied as the matrimonial home of the spouses, when the provision was admittedly used for that purpose, should be held to fall within the scope of the Act. The reasons and purposes of the transaction are basically and fundamentally the same in both cases and I therefore think that the same legal consequences should also follow." (see p.153, to the effect that "true, just, and necessary causes" be read as disjunctive).
3. See Clive & Wilson, Chapter 12, "Marriage Contracts".
4. See Wardhaugh, pp.76-77.

The question to be answered is whether these, or similar, principles are to be relied upon in determining such disputes if there is a revival of interest in marriage-contracts on the emergence, if such ever comes about, of a new system of matrimonial property for Scotland[1], or whether an entirely new régime of rules and principles is to be /

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1. or even in its absence - see Clive & Wilson, pp. 346-349. It can be seen that cases revealing the 'tangled web' of rights and liabilities of husband, wife, and creditor when the bankruptcy of one or both spouses occurs are not infrequent: matters may be complicated further by the existence of a business of one spouse, in which the other participated without comprehending the consequences of her action. Thus, it is reported in the press that a wife successfully obtained a discharge at London Bankruptcy Court, having been made bankrupt in 1975 with debts exceeding £16m, though it seemed unlikely that the creditors would be able to recoup any of their funds. "Her husband had made her a director of his building company and she had "signed guarantees at his request without knowing what it was all about."" Her husband, whose debts exceeded £10m, had not applied for discharge. According to The Times report (21/7/76) Mrs. Godfrey said she wished to be freed for her own peace of mind, and Mr. Registrar Hunt was of the opinion that no useful purpose would be served by keeping her bankrupt, though there was little chance of creditors receiving anything. She had never been in business on her own. When she was made bankrupt in February, 1975, her debts were estimated at over £16m., "with expectations of £5.5m. ranking for dividend." Her current income was £1050 p.a. with "spasmodic" aliment from her husband from whom she was separated of £20 per week for support of two teenage children. No further details are available at present.
It would appear from these few facts that the case fell under the rule (or its English equivalent) that, if no dividend of 5s.(25p) in the pound or security therefor is found, a discharge may yet be granted (at the appropriate time in terms of the Bankruptcy (Sc.) Act, 1913, s.143) if "failure to pay such amount has, in the opinion of the court, arisen from circumstances for which the bankrupt cannot justly be held responsible. The burden is on the bankrupt specifically to aver and prove the circumstances from which the failure to pay has arisen and why he cannot justly be held responsible." (Gow p.646; 1913 Act, s.146) (cf.Spark, 1974 S.L.T. (Sh.Ct.)10). (Glasgow Herald 21/7/76 - Godfrey).

be drawn up to cater for spouse-creditor-spouse-bankruptcy-debt cases, both in and out of community.[1]

Challenge of Deeds

In terms of the Bankruptcy (Scotland) Act, 1913, s.8, "Deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect, as to the party objecting to the deed, as if such decree were given in an action at his instance: and this section shall apply as well in the Sheriff Court as in the Court of Session."

Challenge may be by creditor, or by the trustee on the sequestrated estate. In the latter case (s.9), the trustee, "whether representing prior creditors or not, shall, under this Act, be entitled to set aside any such deed or alienation for behoof of the whole body of creditors, and in so doing shall be entitled to the benefit of any presumption which would have been competent to any creditor." "When action is raised by a creditor, it concludes merely to have the deed set aside; when by a trustee in a sequestration, etc., it usually concludes also for restitution of the subject, or count and reckoning[2.3]."

Policies of Assurance

The common law position with regard to the provision by husband to wife of assurance on his life was that such an antenuptial provision was effectual "at least to the effect of making the premium during the /

1. See Chapter 7.
2. Goudy, p.55.
3. cf. Armour v. Learmonth 1972 S.L.T. 150.

the husband's life a debt claimable on the principle of an annuity, so that a dividend may be drawn for it. But no security can be given for the regular payment of the premium, unless the obligation be fortified by heritable bond or other security. If a policy were opened in name of the wife and children, and the premium regularly paid under such antenuptial contract, the benefit of the insurance would certainly not be demandable by the creditors as part of the husband's estate; while a claim would lie for the future premiums at the instance of the wife[1]."

These rules were overtaken by the Married Women's Policies of Assurance (Scotland) Act, 1880[2]. According to s.2 thereof, "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children" - and such a policy is declared to vest in the husband and his representatives in trust for the purposes so expressed, or in any nominated trustee, and not to form part of his estate, or to be liable to the diligence of his creditors, or to be revocable as a donation, or reducible on any ground of excess or insolvency.

However, if it be proved "that the policy was effected /

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1. Bell, Comm. I, 639. See also Chapter 1, p.95.
2. of which, see discussion in the context of the historical development of the present rules of matrimonial property (Chapter 1, pp.95-97). See also Walton, Chapter XXVI and Clive and Wilson pp.315-321.

effected and the premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof[1]." (It may be that suspicions would be aroused if the annual expenditure on premiums was inordinate. It has been said that the size of premiums must be reasonable in terms of the total yearly expenditure)[2].

In Chrystal's Trustee v. Chrystal[3], a husband effected an "endowment bond" with a life assurance society, the principal sum with interest and profits to be payable to him on the elapse of twenty years, but in the event of his death before expiry of the term, the same to be paid to his widow, whom failing, to his executors. In the events which happened, the husband died within the twenty year period, survived by his wife, and the husband's estate thereafter was sequestrated.

In these circumstances, the Court decided that the policy effected was "expressed upon the face of it to be for the benefit of his wife", as the statute specifies /

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1. S.2 (continued). See generally Stewart v. Hodge 1901, 8 S.L.T. 436.
2. though perhaps a single premium policy will be more suspicious. cf. "Family Law", E.L.Johnson 2nd ed. p.116 "Probable intent to defraud creditors could be inferred if that was the necessary or probable result of effecting the policy, as for example if a man who was much indebted, or who was about to embark on a hazardous speculation, were to use a considerable part of his assets in taking out a single premium policy for the benefit of his wife and children." P.M. Bromley, Family Law, 4th edn. p.372, fn.15.
3. 1912 S.C. 1003.

specifies (s.2), and that, therefore, the claim of the wife triumphed over those of the husband's creditors.

According to Lord Johnston[1], "The statute does not say that the benefit of the wife must be absolute and void of contingency, so as to leave nothing in the husband. It is recognised that her interest may be clogged with the contingency of her survivance of her husband, and that should she not do so, his radical right may result ... The Act declares the policy together with all benefit thereof to be deemed a trust for the benefit of the wife for her separate use, ...; and to be not otherwise subject to the husband's control or to form part of his estate. I cannot read the statute as requiring that the policy must be in favour of the wife unconditionally to admit of it, "together with all benefit thereof", being deemed a trust for the benefit of the wife. I read the enactment as providing that the policy and all benefit thereof shall be deemed a trust for the benefit of the wife for her interest, as that interest is defined or expressed in the policy[2]."

At 1912, before the coming into operation of the 1920 Act rendering donations inter virum et uxorem irrevocable /

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1. ibid. at p.1008.

2. If contra the interest in the policy has vested in the wife, then it will form part of her estate on her death even if she predeceases her husband - that is, on its maturity on her husband's death or on its earlier surrender, her estate will receive the sums due, subject possibly to a claim by the husband's executors for repayment out of the proceeds, of the premiums paid since the wife's death. (Gloag and Henderson pp.670-671: Clive & Wilson pp.319-320.)
   Of course if, as in Chrystal (where the wife did survive her husband) the wife's right was contingent upon her survivance of her husband, these rules would have no application. If she predeceased, she would lose all claim to benefit from the policy. (Clive & Wilson, p.320).

irrevocable by the donor, Lord Johnston points out the special protection afforded by the 1880 Act to such "husband to wife" provisions - the policy, immediately on its being effected vests in the husband and is not subject to his control, nor does it form part of his estate, nor is it liable to the diligence of his creditors, nor revocable as a donation, nor reducible on any ground of excess or insolvency. "An argument was maintained by Mr. Chrystal's trustee as to whether, having regard to his marriage-contract, the effecting of the policy in question was not in excess of a reasonable provision and revocable as a gratuitous donation and was revoked by his insolvency. But that objection is just one against which the statute expressly protects the wife. The point is, I think, beyond argument[1]."

Lord Mackenzie referred to the comparable English provisions, and to the cases of Holt v. Everall[2], and Seyton v. Satterthwaite[3] as having decided that "the possibility of a resulting trust in favour of the husband's representatives did not exclude the operation of the Act[4]."

The opinion of the Lord President (Dunedin) was in agreement with these sentiments but with less enthusiasm, being swayed from the original position that the policy was not prima facie one for the benefit of the wife, by the strength of the arguments to the contrary, and, in addition, it seems, being motivated by considerations of humanity and good sense: "I feel also that the Act is an enabling statute, and the /

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1. p.1009(emphasis added).
2. 2 Ch.D.266.
3. 34 Ch.D. 511.
4. at p.1011.

the class of insurance which is here disclosed, seems to be a very sensible one ...[1]". Had it not been for the passing of the Act, he notes, "this money would, undoubtedly, belong to the husband's creditors."

A widower has been held to fall within the meaning of "any married man", as used in the Act[2], and it has been decided[3] that where a husband becomes unwilling or unable to keep up the payments on a policy under the Act, it may be surrendered at any time by the trustee (who will usually be the husband, though "the personality of the trustee has nothing to do with the object of the clause, it is merely a convenient arrangement[4]") with consent of the wife (the beneficiary) or even[5] by the trustee alone without consent of the wife, unless the insurance company "had notice of any contemplated breach of trust[6]." The possibility that the sum obtained may then be seized by the husband is not always faced squarely[7].

In /

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1. at p.1011.
2. Kennedy's Trs. v. Sharpe (1895) 23 R.146.
3. Schumann etc. v. Scottish Widow's Fund Society (1886) 13 R.678. See Walton, p.227.
4. Schumann, per L.P. Inglis at p.681.
5. ibid. per L.Shand at p.683.
6. ibid. per L.Shand.
7. See Walton, p.227; L.Stormonth Darling in Donald, infra, at pp.201/2, with reference to Schumann, notes that there, no means was, or probably could be, taken to prevent such a result, but considers that it was clear there "that the Court refused to regard as in contemplation the breach of trust which would have been involved in the husband using the money for his own purposes." If the future use of the redeemed sum cannot be restricted in favour of the wife, then the benefit to wife by husband is revocable: contra, if the keeping up of premiums has become an expensive luxury to the family, should not the wife's provision be transmuted to augment the family resources? (Sc.Law Comm.Memo.No.22 recommends the placing of a fully reciprocal duty of aliment on husband and wife - Para.2.13.). Is not talk of "breach of trust" inappropriate except in /

In the case of The Scottish Life Assurance Co. v. John Donald Ltd[1]., a policy effected under the Act by a husband for the benefit of his wife had been assigned subsequently by him with her (apparent) consent (though the wife's evidence was that she had no knowledge of what she had signed), and the widow on his death disputed the validity of this. It was decided that the /

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in a case of premeditated 'fraudulent' calculation by a husband (though such, of course, might indeed be found)?
However, Clive and Wilson (p.318), with reference to the cases of Donald and Schumann, affirm that, "The proceeds of surrender will continue to be subject to the trust for the wife's benefit." The position there set forth appears to be that the husband may surrender the policy, but the trust purposes will remain good. See per L.Adam in Schumann, at p.683:- "It is the policy itself and all benefit thereof which is to be held in trust for the wife. That indicates very clearly that she is to have the whole beneficial interest in it, and if that is so, I can see no reason why she, having the sole beneficial interest, may not deal with it as she thinks proper. What is to be done with the proceeds I do not know; they may be required for immediate support, or they may be invested by the husband. I cannot tell what it may be thought right to do with them, but I see no reason to suppose that the wife is disabled from uplifting them." (As to discharge now by wife, see infra.)
Murray (pp.62/63 and fn.1) writes, "Whether the trust remains in the husband, or is transferred to other trustees, it creates an interest in the beneficiary which is indefeasible, so far as the husband is concerned. The wife or children, as the case may be, may, however, surrender the policy, and deal with the proceeds." Similarly (Clive), "A purported assignation by the husband alone, as trustee of a policy for his wife's benefit, would hardly be accepted by creditors or other third parties, but in any event would be ineffective so far as inconsistent with the trust, the mere terms of the policy being sufficient to alert the assignee as to the trust's existence."

1. (1901) 9 S.L.T. 200.

the trust[1] created in her favour by the policy could not be discharged by her stante matrimonio[2]. It was noted that a distinction was drawn by Lord Kyllachy[3] between such action and surrender of the policy, which "indeed, might be quite necessary for its protection." (Lord Stormonth Darling in Donald explained Schumann's result of placing the policy funds "at the mercy of the husband" by reference to the Court's apparent refusal to recognise the possibility of such breach of trust by the husband (as noted infra) and also because of "the peculiar nature of a policy of insurance which a husband may be unwilling or unable to keep up, and the benefit of which might therefore be altogether lost, if surrender were not allowed[4].")

Clive and Wilson, however explain that "There is now nothing to prevent a married woman from dealing as she likes with her interest in the trust created by the Act[5]."

A succinct exposition of the 1880 Act is given by Lord Stormonth Darling, in Donald, as follows[6]:- "A policy of assurance effected by a married man under the second section of the Act of 1880 has certain high privileges. If expressed upon the face of it (as this policy is) to be for the benefit of his wife and children, it is deemed a trust for her or their benefit. It immediately vests in him and his legal representatives, or in any trustee, duly nominated /

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1. See the wording of s.2.
2. See also Barras v. Scottish Widow's Fund and Life Assurance Society (1900) 2 F.1094.
3. In Barras above. (L.O.'s opinion reported at p. 1096.)
4. at pp.201-202. (cf. L. Shand in Schumann at p.683).
5. at p.318, making reference to the important 1950 case of Beith's Trs. v. B. 1950 S.C.66 .
6. at p.200.

nominated, for the trust purposes so expressed; it is not otherwise subject to the husband's control; it does not form part of his estate; it is not liable to the diligence of his creditors; it is not revocable as a donation; and it is not reducible on the grounds of excess or insolvency. In these two latter particulars, its privileges are higher than those of a policy effected by a husband at common law and assigned to trustees for the benefit of his wife. In short, it is a postnuptial provision of peculiar sanctity[1]."

The Act of 1880 (s.1) speaks of policies effected by a married woman on her husband's life (or her own life) for her separate use, and in s.2, of assurance by the husband of his own life for the benefit of his wife and/or children. It is s.2, however, which confers the special benefits, and only to policies falling within its ambit. The aim which s.1 set out to serve was achieved for all cases by the Married Women's Property (Scotland) Act, 1920, s.1[2].

According to Murray[3], the assurance of the wife's life by the husband still stands on common law[4]. What was to be the rule where the provision was made by a wife on her own life for the benefit of her husband? The 1880 Act is another example of legislation the silence of which on certain points denotes an earlier and different social era. The extraordinary - but beneficial /

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1. Of the "reasonable provision" (taking effect on death) possibility, Clive and Wilson (p.336) write, "The doctrine of reasonable provision has been applied to a provision by way of an insurance policy and could still be useful in this context in the case of a policy not falling under the Married Women's Policies of Assurance (Scotland) Act, 1880".
2. Walton, p.225: p.195.
3. p.61 (Chapter 1, p.95)
4. See, for equivalent English rule, that a husband has an insurable interest in his wife's life (a point long in doubt in English law) Griffiths v. Fleming [1909] 1 K.B.805.

beneficial - aspect of this is that the English Married Women's Property Act, 1882, s.11[1], did encompass the possibility of this desire, with the result that policies to this end have been taken out under the English Act[2].

Otherwise, presumably, until 1980, such a provision, made by wife for benefit of husband, would be considered an inter-spouse donation in terms of the Act of 1920[3], of which Walton points out[4] that these "like other gratuitous alienations, may of course be attacked by creditors if they are struck at by the Act 1621, c.18. The effect of the Act of 1920 was not to confer any special privileges on such donations, but merely after the lapse of a year and day to put them upon the same footing as other gratuitous gifts[5]."[6]

Inter /

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1. See Chapter 1, p.105.
2. See Clive and Wilson, p.317, fn. 75.
3. and therefore irrevocable: could it then be surrendered by the wife, on condition that the proceeds were to be applied to the husband's benefit? Cf. position with regard to the 1880 Act, supra, pp.215-216, fn. 7. There is, of course, a presumption against donation, which applies - but not so strongly - between spouses (Clive & Wilson, pp.290-291; Walton, p.181). The lack of specific provision for this type of insurance arrangement (by wife for husband) in the 1880 Act may be attributable to the view that she had no general legal obligation (See Chapter 1, pp.58-64, esp.p.62, fn.3, so to provide for him, nor, probably, the means to do so. Cf. Walton p.178 ("A Reasonable Provision was not a Donation Revocable"):- "And although a wife is not perhaps under a natural obligation to provide for her husband, yet it can hardly be doubted that a post-nuptial settlement by her of her estate for behoof of her husband and children would have been in most circumstances secure against revocation".
4. p.180.
5. Contrast, therewith, therefore, the "high privileges" of the 1880 Act.
6. But see now Married Women's Policies of Assurance (Scotland) Amendment Act, 1980, which extends the benefit of s.2 of the 1880 Act to policies taken out by married women or unmarried persons and expressed upon the face of them to be for the benefit of spouse or children (s.1). See also ss. 2 and 3.

Inter-Spouse Transfers Generally

All inter-spouse transfers potentially dangerous or prejudicial to creditors cannot be subsumed under the headings of gratuitous alienations, life assurance provisions, marriage-contract provisions (now rare) or donations[1]. "The separate property system gives spouses considerable freedom to transfer property between themselves to the prejudice of their creditors," comment Clive and Wilson[2], who thereafter point out that, quite apart from the above specialties, a creditor may be able to attack successfully a transfer on the ground that it is "sham or simulate", or on the ground that, in the particular case, the mode of transfer was ineffective to transfer the property, or perhaps on the basis that the transferor is not divested fully of the property "transferred", a principle which "applies to revocable transfers[3]."

Aliment

According to Walton[4], a wife, for her maintenance during cohabitation, must rank always after the husband's (other) creditors. "... the husband cannot resist an action for a lawful debt on the ground that he must maintain his wife", and he also states that "The wife has no claim for aliment against her husband's bankrupt estate, except under a marriage contract"[5.6.7].

This philosophy, if adhered to throughout the changes necessitated by an adoption of some form of community of property, if that were contemplated, would /

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1. As to donations, see Clive & Wilson pp.332-337 ("Revocable Donations between Husband and Wife") and Walton, Chapter XVIII.
2. p.329.
3. Op.cit. pp.329-330.
4. p.142.
5. p.156.
6. Clive & Wilson, pp.339-340
7. See Memo. No.22: 2.118.

would have far-reaching effects. In any new scheme, the respective rights of the family unit, and third party creditors of the family unit, or of one member thereof, would require careful thought and clear treatment[1].

Such /

1. See generally, new thoughts on the specific, but related topic of aliment, Scottish Law Commission Memorandum, No.22, 'Aliment and Financial Provision', discussed infra.
Finer Committee Report, "One-Parent Families" (1974) Cmnd. 5629.
It is noted also that there is at present in preparation by the Scottish Law Commission a Report on Bankruptcy which will consider inter alia "Problems of the ranking of the claims of an alimentary dependant on the debtor's bankruptcy". (Memo. No.22: 1.38). Memo. No.22 itself makes certain recommendations pertinent to this dicsussion. These may be studied at 3.92 - 3.95 (and see Summary - Vol.1 - 85).
At 3.92, it is suggested that in the unlikely event of a payment on divorce being ordered from a party who shortly thereafter becomes bankrupt, that payment could not be regarded as challengeable and reducible as a gratuitous alienation at common law (q.v. generally supra). It is argued that the payment is neither voluntary nor gratuitous in those circumstances. There is the further problem - encountered in Learmonth, supra, - that the transfer, being a cash payment, would not be challengeable under the Act 1621, c.18. As to an order for property transfer, it is suggested that parties on the point of being divorced from each other might not be treated as 'conjunct' or 'confident' in relation to each other and that a financial provision order on divorce might not be regarded as a transfer lacking true, just and necessary causes. The order(s), thus, might not be open to challenge either at common law or statute. "The matter, however, should not be left in doubt." (3.93) similarly, it is suggested that such transfers would not be challengeable as fraudulent preferences. (ibid.)
Public opinion is sought on the question of the proper priority of a spouse and the creditors of the other spouse. It is noted that legal rights are exigible out of the net estate and that a divorce transfer in England (Matrimonial Causes Act, 1973, s.39) may be set aside by the trustee in bankruptcy /

Such a position appears to be an example of the "participation in good or bad fortune" attitude, already noted[1], to conjugal finances, which, in contrast with those notions which underlie the theory of separation of property generally, tends to arise in /

bankruptcy of the transferor. The Commission's Proposition 85 (3.94) is therefore that - "a transfer of property between spouses should not be immune from challenge as a gratuitous alienation at common law by reason only of the fact that the transfer has been made by or under an order of the court on divorce, but the Bankruptcy Act 1621 (under which alienations to "conjunct and confident persons" are presumed in certain circumstances to be gratuitously made by an insolvent) should not apply to such a transfer." "The effect would be that creditors could reduce a transfer of property if they could prove that the transferor-spouse was insolvent and that (apart from the court order) the transfer was gratuitous at the time it was made. But they would not be aided by presumptions which would be artificial and unrealistic in the normal, non-collusive divorce situation". (3.94) It can be seen that the discussion in these paragraphs is limited to the effect of bankruptcy on pecuniary and property orders on divorce. ("Normally an insolvent spouse or a spouse verging on bankruptcy at the time of a divorce action would not be ordered to pay a capital sum or to transfer property on divorce. He would be able to demonstrate that his means were not sufficient. It is conceivable, however, that through inadvertence or collusive agreement between the spouses, a capital payment or property transfer could be ordered." (3.92)).
Where the payer becomes insolvent after the court order but before implementing the capital payment or property transfer therein contained, it is suggested that "the payee should be able to rank as an ordinary creditor for any outstanding amounts due but unpaid. This would be the present position and we make no suggestions for change. The question of ranking for future instalments of periodical allowance is similar to that which arises in relation to future aliment and we think it is best dealt with in the context of bankruptcy law reform".(3.95) On these and other suggestions made in the Memorandum, and matrimonial property law reform generally, see Chapter 7.

1. See supra, and Chapter 1.
See also Memo No.22, 3.94.

in those (exceptional) aspects[1] of the separation system which display the characteristics of community of property.

It is clear that a husband cannot set aside funds for the future maintenance of his wife secure from the claims of creditors[2], and it has been seen that the wife cannot rank simply qua wife for aliment (future or arrears)[3]. Where she holds decree of separation and aliment, she may rank for arrears but not for prospective future payments[4], and Clive and Wilson /

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1. being, chiefly, the rules concerning aliment stante matrimonio, and on separation, financial provision on divorce, and rules of testate and intestate succession favouring the surviving spouse and family.
2. Walton, pp.180-181; Clive & Wilson, p.332, p.340 (contrast the discussion of the problems to creditors posed by the non-alimentary annuity, pp.340-341); contra, consider the reasonable, non fraudulent, ante-nuptial provision, and the postnuptial provision to take effect on dissolution of the marriage, supra pp.
3. Clive and Wilson, pp.339-340. See Chapter 4.
4. ibid. p.340; Walker, Prins.II,2078. Memo.No.22: 2.118 suggests that the reason for the spouse's inability to rank for future payments under decree is not so much the traditional view that such a claim is incapable of valuation, but rather that "of its nature the claim cannot compete with the claims of ordinary creditors". (anterior explanation therein contained) The paragraph continues, "A countervailing advantage is enjoyed by the alimentary creditor in that the bankrupt's discharge does not affect his liability for future aliment." ("Marjoribanks v. Amos (1831) 10 s.79"), and concludes, " ... there is an unsatisfactory element of uncertainty about the law on alimentary claims in bankruptcy although the more recent cases seem to conform to principle and commonsense. We think that, if clarification is required here, it should be dealt with in the context of the law of bankruptcy rather than the law of aliment."

Wilson doubt whether she would succeed in an attempt to claim payments due under an alimentary allowance[1]. In truth, in time of stress, the defective nature of aliment (from the wife's standpoint) is clearly evident: in non-emergency, its presence may hardly be noticed (though its absence would quickly be apparent) except perhaps in the tangible form of the "housekeeping allowance", which itself is another topic[2].

1. This follows from page 223, fn.2: such an allowance, say Clive and Wilson at p.340, if not to be regarded as a gratuitous alienation (though see at p.332 the opinion expressed that past payments of aliment due under common law, separation agreement or decree could not be regarded as gratuitous alienations) or a donation possibly revocable by creditors, might be considered to be a device in fraud of creditors.
2. See Chapter 3 ('praepositura': pp. 227-237); see generally Chapters 4 (Aliment) and 7.

CHAPTER 3

DILIGENCE AND LITIGATION

DILIGENCE AND LITIGATION

Another aspect of the relationship of husband and wife in property matters, and one which can be of great importance, is that of the right of action available to a wife against her husband, or to a husband against his wife.

It has been seen that in the past litigation by or against a married woman required the concurrence of the husband or the citation of the husband for his interest[1].

Having stated the procedural position, Erskine[2] sternly sets out the substantive aspect - "Yet a wife is not to be authorised to sue her husband, except in necessary or urgent cases, ex.gr., if he be 'vergens ad inopiam' (Ross, 16 Nov. 1704, M.6050) [Macpherson, 18 Jan. 1773, M.6052, where the husband was "obaeratus" and "latitans"] or if he has wilfully diverted from or thrown off his wife: Lady Foulis 21 Dec. 1626. M.6158." However, he adds, "Process is sustained at the suit of the wife, though no curator be authorised, where she sues her husband, after separation, for payment of a yearly sum which he had agreed to give her in name of alimony; E.Argyll 7 Nov. 1695, M.6054; for if her person be in that case so far recovered from her husband's power, that she is capable of enjoying the property of an alimentary provision, she must also be capable of holding plea for the recovery of that provision."

The text states that a wife may use caption against her husband for the arrears of a separate aliment due to her; Maclachlan 25 May, 1809, F.C., but that it would appear, from a case abridged in the Folio Dictionary, that "once, the Lords gave their opinion that no action nor no diligence can proceed betwixt man and wife while the marriage subsists" 1 Fol.Dict. p.406; Hamilton, 11 Jan, 1625. However, it is suggested in the text that the /

1. Erek. 1.6.21.
2. ibid.

the abridged report when compared with the principal one (Durie, p.155, M.6048) was stated too broadly, and at any rate reference is made to a contrary decision pronounced soon afterwards; Lady Glenbervie, 13 July 1638, M.6055.

It is pointed out that a husband, on showing cause, may obtain a caption on letters of lawburrows against his wife; Thomson, 7 March, 1815, F.C. (see also Calder 24 Feb. 1841, 3 D.615) and that (Fr.i.467) a wife may also obtain lawburrows against her husband. A discussion on this subject will always turn to diligence, its effectiveness, procedural modes of performance, and competence against married women.

DILIGENCE

According to J. Graham Stewart's Treatise on the Law of Diligence (1898)[1], where the debtor was a married woman, the charge would be directed against her and against her husband as her curator and administrator-in-law (Muir v. Hood 1845, 7 D.1009) and he adds that it made no difference that she was under age.

While advising that that was the prudent course, the author doubted whether it was necessary to charge the husband where the wife had obtained a decree of separation, or an order of protection, or where the obligation was a trade obligation, contracted when the husband was abroad, civilly dead or insane, or contracted with reference to a business carried on in the name of the wife, "or is an obligation for necessaries when living separate from the husband or is in rem versum, or ad factum praestandum, or for damages ex delicto[2]".

On the other hand, where a married woman was the creditor in the matter, the charge was to run at her instance with the concurrence of her husband, and demanding /

1. p.295.
2. ibid.

demanding that the debt be paid to her[1]. By the same token, the husband's consent was not necessary where the debt was one for which she had a title to sue without his concurrence, as in cases where his 'jus mariti' and right of administration were excluded or, as the author explains, if the matter related to a trade asset acquired when the husband was insane, abroad, civilly dead or otherwise incapacitated[2].

Thus, generally speaking, the charge required the husband's concurrence, but the subsequent concurrence of a husband, obtained in a suspension of the diligence, would cure the defect[3].

Again, it was possible for a wife[4] to use inhibition against a debtor without the husband's concurrence if she was separated from him. The usefulness of inhibition as a remedy against married women, must have increased progressively, measuring its tread with her increasing independence granted by the Married Women's Property Acts.

The Praepositura

The means by which a husband terminates formally his wife's praepositura is by Letters of Inhibition, being in this context a writ in the name of the sovereign inhibiting traders from dealing with her without her husband's special authority and inhibiting her from incurring debts to his prejudice or selling, or attempting to sell, or otherwise deal with his property[5]. [6]

The procedure involves the presentation of a petition to the Outer House of the Court of Session and the /

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1. Graham Stewart, p.307, citing Wight v. Dewar 1827, 5 S.349 (N.E.516).
2. Ibid. and cases there cited.
3. Ibid.
4. Gillillan v. Monkhouse 1824 3 S 23 (N.E.16).
5. Inhibition "is a remedy competent to every husband whose wife discovers an inclination to live beyond his fortune". Erak. 1.6.26.
6. Doubts have been expressed about the law governing inhibitions of wives, on the grounds that it is unrealistic, and that the procedure is complex and expensive (and capable of being used vindictively against the wife - 10.8), S.L.C. Consultative Memo No. 54, 10.19.

the registration thereof in the General Register of Inhibitions and Adjudications. Thereafter, the praepositura, the wife's powers as the party charged or entrusted with the running of the household (praeposita negotiis domesticis) and with the incurring of debts incidental thereto, is terminated in a question with everyone, whether cognisant of the taking of this step or ignorant of it[1].

The husband then is not liable for his wife's purchases of that nature, except that his obligation remains, while his duty to aliment subsists, to supply necessaries, as does his wife's implied agency in case of necessity to pledge her husband's credit for such. However the husband is not liable therefor if the wife is in desertion, or, if living apart with due cause, she has separate estate, or if, in the circumstances, she is receiving a sufficient allowance[2]. In other words, despite Inhibition, the duty to aliment[3], in qualifying circumstances, remains.

The praepositura stems from, or reflects, the usual family situation, in which everyday household purchases are made by the wife[4]. In the case of Debenham v. Mellon[5], Lord Blackburn remarked, "I think that /

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1. Topham v. Marshall, 1808, M. "Inhibition" App.No.2. Another, less effective, method of terminating the praepositura is by advertisement, but "a husband is not entitled to advertise unless he had bona fide ground for believing that the wife intended to pledge his credit; Vickers v. V. 1966 S.L.T. (Notes) 69" - Walker, Prins. 2nd ed. p.259. Such advertisement secures the desired effect only if it is proved that the particular supplier had notice thereof. Special notice, of course, may be given to a particular tradesman.
2. cf. Star Stores Ltd. v. Joss. [1955] C.L.Y. 3288.
3. See Chapter 4.
4. Since she "is formed by nature for the management within doors" - Ersk. 1.6.26, in a passage which discusses the wife as praeposita negotiis and as praeposita negotiis domesticis.
5. (1880) 6 App.Cas. 24 at p.37.

that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a bona fide authority did or did not exist. This is not a case of withdrawing authority once given. The question is whether the Plaintiffs who had never dealt with the husband before were entitled to assume that there was such an authority to the wife implied in the mere fact that the wife was living with her husband; and I think the law is not so." If this be true, much of the accepted body of rules concerning the praepositura loses its foundation. As Clive and Wilson point out[1], how can private prohibition - or, here, private agreement that the wife's authority, implied by law, shall not begin to arise - affect an agent's ostensible or presumed authority, bestowed by the law upon the domestic manager?

The conclusion which Dr. Clive draws is that, in Scotland, private prohibition may not affect third parties. The matter must be referred to the general principles of agency. If, at the time of contracting, the wife appeared to the trader as an agent (wife) acting within her ostensible authority - and not as a principal acting on her own behalf, in which case presumably the husband would be bound only if his wife had acted within her actual authority and the supplier elected to sue the husband upon his emergence as principal or if he chose to ratify her actings[2] - then the husband must be bound, and Dr. Clive in consequence submits that "it is no defence for a husband, when sued on a contract within the scope of his wife's praepositura, to show that she was provided with an adequate allowance[3]." Strictly /

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1. p.261 and at pp.253-4.
2. See Gow, The Mercantile and Industrial Law of Scotland, pp.520-521, and p.523 et seq.
3. p.254, concluding that Walton's view (at p.201) is wrong. See Ersk. 1.6.26. infra.

Strictly, the authority which is under discussion is presumed authority[1] which may perhaps for this purpose be regarded as a category within the genus of ostensible authority. It is also spoken of as 'implied authority arising from cohabitation'. The special rules governing the praepositura mean that public notice of withdrawal of authority operates to remove the authority as regards all traders; certainly, in the absence of public notice, or private notice to the trader concerned, actings within the scope of the praepositura would appear always to bind the husband. Whether 'adequate allowance' can be a good defence to an action by a trader upon a contract entered into by the wife under her implied agency to pledge her husband's credit in case of necessity[2] is less clear. Dr. Clive's reasoning should apply equally to that case ("[T]he question is not whether the wife is entitled to assume that she has authority but whether the trader is entitled to assume that she has authority. The husband's liability does not depend on the wife's actual authority but on her ostensible or apparent authority.")[3], but such a defence appears to have been accepted[4], and here the answer seems to be that the husband's liability arises under the head of recompense. His liability arises, in terms of the Married Women's Property (Scotland) Act, 1920, s.3(2), "if he shall be liable therefor in accordance with the present law". Hence, in circumstances in which he is not bound to aliment his wife, he owes no duty to recompense those who have supplied her with goods of that 'necessary' nature.

These distinctions reflect only part of the confusing and unsatisfactory nature[5] of the treatment of this /

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1. See Walker, Prins. (2nd ed.) pp.711-716; see also Gow, pp.517-520.
2. Walker, ibid. p.258.
3. Clive & Wilson, p.254.
4. Star Stores Ltd. v. Joss, supra: and see Walker, p.258.
5. See S.L.C. Consultative Memorandum No. 54 (March 1982) 'Some Obsolete and Discriminatory Rules in the Law of Husband and Wife', 10.1. - 10.22. (ful discussion and provisional conclusion that the praepositura be abolished and liability left to the general law).

this aspect of the financial management of a marriage. The underlying philosophy of the praepositura is also, it is submitted, outdated. Surely, a clearer, more equitable and more consistent body of rules can be devised[1]?

According to Erskine[2], the wife, as praeposita rebus domesticis, "hath power to purchase whatever is proper for the family; and the husband is liable for the price, even though what was purchased may have been applied to other uses, or though he may have given the wife a sum of money aliunde, sufficient for the family-expense; ...".

"Whatever is proper" must be interpreted with reference to the husband's means, if his is the sole income (if it is not, as is often the case today, the wife may use her own funds to meet the cost of the management of the household, or part thereof, in which case, of course, she would be limited in her purchases only by the length of her own purse)[3], and is not necessarily equivalent to the wife's own desires or ideas as to what is proper. For goods and services which are not "normal household necessaries" (according to the standards of the particular household in question), the husband will not be liable under either the "implied agency of necessity" or the "agency presumed from cohabitation"[4]. Liability will arise only if the wife had received express authority from the husband to /

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1. See Chapter 6 (solutions found by other systems) and Chapter 7 (possible future developments).
2. 1.6.26.
3. The doctrine of husband's liability would have no application so long as it was clear that she was pledging her own credit - cf. M.W.P.(Sc.) Act, 1920, s.3(1), and see s.3(2) (infra, p. 235). Cf. wife contracting ostensibly as principal, supra.
4. Terminology adopted in Walker, Prins. (2nd ed.) pp. 258-9.

to incur the debt. The onus of proving that the subjects in question are "necessaries" in view of the life-style adopted by the household, lies on the creditor[1]. If the wife, by private domestic arrangement, has undertaken responsibility for part or all of the cost of running the household, it would seem that, in the event of non-payment by her, the husband's liability quoad the creditors, must remain. As between the spouses, the enforceability of the agreement is a matter of speculation. Even supposing that the court were to entertain the notion of a contracting-out (in effect) of the rules of aliment, could such an agreement be regarded as intended to have binding contractual force, as opposed to a mere informal, flexible, domestic arrangement for the convenience of the parties[2], and how would proof be established? Presumably such would be held an innominate and unusual contract[3]. It may well be thought that, while a certain economic independence of husband and wife is desirable, separation as regards household debts is, to some extent, at least, "on the surface /

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1. Phillipson v. Hayter (1870) L.R. 6 C.P.38. See per Willes,J. at p.42:- "What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife. And it is incumbent on the tradesman who relies upon the goods coming within that description to prove affirmatively that they do so. The burthen of proof lies on him ...It is not enough, where the burthen of proof lies on the plaintiff, for him to prove facts which are equally consistent with the affirmative or the negative of the proposition sought to be made out." Cf. generally supply of "necessaries" to minors, pupils, and incapacees - Sale of Goods Act, 1893, s.2. e.g. Nash v. Inman [1908] 2 K.B.1.
2. Stair 1.10.13. "In the act of contracting, it must be of purpose to oblige, either really or presumptively, and so must be serious, so that what is expressed in jest or scorn makes no contract."
3. Ersk. 4.2.20 "...in verbal agreements, in which the articles to be fulfilled by the parties do not necessarily arise from the nature of any known contract, but depend entirely on the import of the words uttered by the parties, inattentive hearers may, either by misplacing/

surface" only. She who pays the gas bill does not necessarily fill the petrol tank.

Though the recent trend is for the wife to remain in employment during the early years of marriage, she is less likely than is the husband to be consistently and continuously a salary-earner, and a third party must be entitled to look to someone of substance when he supplies goods necessary for the family[1]. On the other hand, in modern circumstances, the cases in which a third party "allows necessaries to the family on the credit of the husband", unless perhaps for household repair bills, must be rare. At least as far as food is concerned, the grocer is being replaced by the supermarket, and the husband is likely often to be present in person at the check-out point where payment is made in cash.

In any case, the notion that the husband does pay, and must pay, all necessary household expenses, is perhaps a little unrealistic. Dr. Clive suggests[2] that an approach analogous to the partner's joint and several liability for partnership debts might yield a better solution than that afforded by the present reliance on the rules of agency.

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misplacing what was spoken, or by mistaking its true meaning, be apt to change the obligation into something quite different from what the debtor intended": an opinion which might describe well the circumstances surrounding many a domestic arrangement. Cf. Fisher v. F. 1952 S.C. 347.
Proof by writ or oath would be required. Production of the former would be unlikely, and the latter extremely so if the matter had come to court. See generally Gloag on Contract pp.320-321.

1. It is generally thought desirable that, in any system, matrimonial property relations, to an outsider (a creditor, a stranger to the marriage) should appear reasonably straightforward. See "Comparative Law of Matrimonial Property" (1972) ed. Albert Kiralfy.
2. at p.262. See Chapter 7.

If the praepositura is withdrawn, bills only for what is necessary must be met by the husband[1], unless presumably he is barred by acquiescence or ratification from disclaiming liability for some item or items not falling within that description. It is even possible that continued acquiescence in his wife's agency in domestic matters might bring about a revival of the inhibited praepositura, but this is by no means clear[2].

The doctrine of the praepositura is not confined to wives: the presumption of agency may arise also where a sister, daughter or housekeeper (presumably of either sex, and of any relationship, or none, to the breadwinner and owner of the establishment) is entrusted with the management of the household[3].

The wife's position as praeposita negotiis domesticis is presumed "while she remains in family with her husband": the wider praepositura noted by Erskine may be constituted "either expressly, by a written commission or factory, or tacitly, when the wife has been in use, for a trace of time together, without a formal mandate, to act for her husband, while he either approves of her management by fulfilling her deeds, or at least, being in the knowledge thereof, connives at or acquiesces in it /

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1. and presumably not over and above aliment, or an allowance duly paid. Cf. Conjugal Rights (Sc.) Amendment Act 1861, s.6 and see Star Stores Ltd. v. Joss (1955). In the absence of an adequate allowance, and if the wife has insufficient means of her own for her maintenance, the husband's liability to aliment (if otherwise the wife is entitled thereto) means that third parties may look to him for payment - see the terms of M.W.P. (Sc.) Act, 1920, s.3(2).
2. Ker v. Gibson (1709) M.6023; see Clive & Wilson, p. 260. Inhibition is normally "taken off" by voluntary discharge by the creditor or by Court order (Graham Stewart, p.567).
3. See e.g. Hamilton v. Forrester (1825) 3 S.572.

it. Dirl. 319 Wilson (Dict. p.6021).[1]" Many cases in which it may appear that one spouse has or must undertake liability on the contracts of the other are to be explained in terms of agency and mandate[2]. The first principle, of course, under our present rules, is that neither spouse incurs liability in respect of contracts entered into by the other[3].

In Sandilands v. Mercer[4], where the wife, before marriage, had retained for herself an alimentary liferent safe from the jus mariti, and where it appeared that, after the marriage, she and her husband had granted a bill in respect of loans made for aliment of the family, the creditor was held not to be entitled to attach those funds of the wife in repayment thereof.

Such a debt was thought indubitably to be a debt for which the husband (alone) must be liable. Lord Cringletie[5] states that, as far as the law of Scotland was concerned, "Any debt contracted after marriage for the maintenance of the family, is undoubtedly the debt of the husband[6]."

The general rule that obligants to a bill are always liable singuli in solidum[7] had thus been waived, and favour to the wife displayed, and prejudice done perhaps to the creditor, who, in ordinary circumstances, could have chosen which co-obligant he should pursue, without /

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1. Ersk. 1.6.26.
2. or liability to aliment. See Clive & Wilson, pp.251-2.
3. See M.W.P. (Sc.) Act, 1920, s.3(1) (no liability upon husband for wife's contracts or debts). As Dr. Clive points out, and as is explained in Chapter 1, at pp.82-83, the only remaining circumstances in which a husband may incur qua husband liability for his wife's contracts is in relation to ante-nuptial debts, in terms of M.W.P. (Sc.) Act, 1877, s.4.
4. (1833) 11 S.665.
5. at p.668.
6. See also similarly, Walker v. Home (1827) 6 S.204. See however joint alimentary fund - L. Ruthven v. Fulford & Sons 1909 S.C.951, infra, pp. 240-241.
7. Bell's Prins. Sec.61.

without charging the others, leaving them to settle matters amongst themselves as best they might, as in any other case of joint and several liability. Whether the creditor would have chosen to sue, and do diligence upon, the wife, had such a course been open to him, would have been, of course, a matter of assessment for him in each case, but here is seen another example of the somewhat lop-sided justice, and strange sense of propriety and the fitness of things, which characterised legal and other attitudes to women in the nineteenth century.

Clearly, the use to which the loan was to be put - for the aliment of the family - weighed with the court: there was then, and remains today, a deep-rooted feeling that there is an obligation primarily (or solely) on the husband to provide what is necessary, and this feeling, which has always some enduring justification on biological and psychological grounds, had a much greater economic justification in the nineteenth century than it has today, when the married woman has ample opportunity at some point at least during her married life to contribute, if she and her husband both so desire, to the aliment of the family. Admittedly, these opportunities were not widely available, for reasons of the national economic situation, till the middle of the twentieth century, and could be said not to have been widely and fully utilised till the mid 1960's, when it became more common and acceptable for a bride to continue to work after marriage. It may be that the trend in the fourth quarter of the twentieth century, will be towards a greater and more permanent, or at least longer-term, source of female working power, though we may never return to the inter-war position when there was a pool of unmarried women who supplied an important part of the British work force, particularly /

particularly in the teaching and nursing professions[1]. The employment position nationally, is, however, something of an unknown factor.

Adjudication

Adjudication enables a creditor to attach the heritable estate of his debtor, "either in payment or in security of a debt, or in implement of an obligation to convey the subjects adjudged."[2]

In Graham Stewart's words[3], as a married woman could not grant a valid personal obligation, adjudication could not proceed on a bill, bond or other personal obligation granted by her, "An adjudication cannot proceed on a personal obligation by a wife; and although an heritable bond by a wife is a good security to affect her estate, an adjudication cannot be led on it: for that diligence, where it proceeds on an heritable bond, rests on the personal obligation, which is null when granted by a married woman[4]." In certain cases, where the wife's personal obligation was valid, adjudication could /

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1. These changes may require changes in legal duty within marriage. In particular, the limited nature of the wife's obligation to aliment the husband (M.W.P. (Sc.) Act, 1920, s.4) may require to be altered and full reciprocity of obligation to aliment imposed. See Sc. Law Commission Memo. No.22 (Aliment and Financial Provision) 2.12 - 2.13. and commentary thereon in Memorandum by Faculty of Law, University of Glasgow, pp.3-6.
2. Graham Stewart, p.578, where the author notes that since sequestration was made equivalent to decree of adjudication by the Bankruptcy (Sc.) Act, 1856, s.107 (19 & 20 Vict. c.79) ("and when the sequestration is dated within a year and a day of any effectual adjudication, the estate shall be disposed of under the sequestration according to the provisions of this Act"), the remedy has been resorted to less frequently. (The Act of 1856 was repealed in its entirety by the Bankruptcy (Sc.) Act, 1913).
3. p.595, citing Menzies v. Gillespie 1761, M.5974 and Bell, Comm. I.776.
4. Bell, ibid. and see footnote 3 to that text.

could competently follow but it was thought wise, nevertheless, first to constitute the debt against the married woman[1].

Decree of adjudication will attach "all subordinate rights competent to the debtor relating to the principal subject" where, in addition to the description of the subjects adjudged, the words, "and all right and interest therein" are used[2]. The decision in Calder v. Steele[3] is, therefore, at odds with this rule. An adjudication had taken place of lands apparently belonging to a husband with all his right, title and interest therein. When it transpired that the lands belonged to the wife, it was decided that the adjudication did not attach the husband's jus mariti in the rents. Graham Stewart[4], narrating the case, takes the view that the ratio seems to have been that the jus mariti will not be attached, unless it is expressly adjudged, but he notices that this is contrary /

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1. At p.396, when considering the exceptions to the general rule that a married woman could not grant a bill, (absence of husband and engagement in trade; estate from which the jus mariti and jus administrationis had been excluded; separate estate and obligation in rem versum), the author says, "But in every case it is safer to proceed by action that it may be shown that the bill falls under one of the exceptions to the rule."
(At p.396, he adds, "The personal obligation of a married woman is not intrinsically null, but only ope exceptionis; and as there are various grounds on which the exception can be elided, the negative prescription will cut off the right to challenge its validity, so that an adjudication led thereupon will be unchallengeable after the expiry of forty years.")
2. Graham Stewart, p.590, and authorities there cited.
3. 19 November, 1818, F.C.
4. p.591.

contrary to the case, previously mentioned, of Menzies v. Gillespie's Creditors[1].

Arrestment And Poinding

Wearing apparel is not poindable[2] - and in such might have resided much of a woman's wealth - nor may joint property (of moment today, especially in view of the prevalence of joint bank accounts) be arrested for the debt of one of the joint owners, but the fact that "another person has a personal claim to a share in the value of the articles will not exempt those articles from a poinding."[3]

Summary Diligence

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1. 1761, M.5974 (to the effect that an "adjudication of a wife's lands proceeding on a personal obligation contained in an heritable bond granted by her and her husband, is null, so far as it adjudges the lands; but is effectual to carry the husband's interest in the rents." (marginal note to report)).
2. "So far as not extravagant for the position of the debtor." Graham Stewart, p.345, and cases there cited (footnote 11).
3. ibid. p.346. Cf. Learmont v. Darlington (1849) 11 D.884. See the case of Fleming v. Twaddle (1828) 7 S.92, where it was held incompetent for the creditor of an individual to poind property alleged to belong to the debtor jointly with another party. "...at all events, the charger's plea rests on this being joint property and it is clear that she cannot poind it for the debt of an individual" per L.Gillies at p.96. See also Byng & Anr. (Lucas's Trs.) v. Campbell & Scott (1894) 21 R.1096 per L.Kinnear at p.1104 - "At the time the arrestments were used the moveable plant and machinery in question were not the property of the common debtor, but were the joint property of the common debtor and the arrestee; and therefore what is proposed is to carry off and sell as for the debt of the common debtor property which is not his exclusive property at all, but is the joint property of himself and of his tenant. That appears to me to be plainly, and on the face of it, quite untenable." and per L.O.Kincairney (opinion reported pp.1098-1101: at pp.1098-99) - "I do not think that it can be asserted as an abstract and general proposition that it is competent for the creditor of one of two joint owners of moveable property /

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property to arrest the subjects of that joint property, or even the interests of his debtor in that property, and to bring it to sale by means of a furthcoming. It is true that it has been held competent to arrest shares in a joint stock company - Sinclair v. Staples, Jan. 27, 1860, 22 D.600. But in that case the shares of the common debtor could be brought to a sale without affecting the interests of the other shareholders." Mention was made of Fleming v. Twaddle and the opinion was that, in that case, it was incompetent to poind joint property; "and it must, I think, be equally incompetent to arrest it and follow out the arrestment by a furthcoming and sale." However, the provisions of the M.W.P. (Sc.) Act, 1881 (see Chapter 2) must be borne in mind. s1(3):- except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband. s1(4):- Any money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. However, in L. Ruthven v. Fulford & Sons 1909 S.C.951 where the income of an alimentary fund held in trust was destined to a husband and wife "during their joint lives upon their joint receipt" it was decided that the fund was indivisible. Hence, the whole fund could be arrested for an alimentary debt incurred by the husband Lord Ruthven. (The sum was in respect of clothing for himself and his family). Per L.P. Dunedin at 954 - "Now, it was said that being joint, we ought to recall the arrestment, at least as regards one-half. I am afraid I cannot take that view. It seems to me that when an alimentary fund is destined jointly to two people who are spouses, and who are living together, there is no severance of the fund into two moieties, one of which is taken by each; but it is a joint fund which either of the spouses may burden by means of proper alimentary debts, and other alimentary debts of a proper character must just come in pari passu the one with the other. Accordingly, I do not think that the idea of it being a proper debt of the husband's alone really arises. To a certain extent some of these furnishings may have been for the benefit of the family. It is not the father who clothes the children more than the /

As far as diligence on bills and notes is concerned, diligence may proceed at the instance of the payee or his order, subject to the long-settled principle that, in general, the title of the person protesting the bill must appear ex facie of the bill[1]. Thus, if a bill or note is payable to bearer, or is blank indorsed, there is no difficulty about the holder's title, but if "it be indorsed specially, the person in whose name the bill is protested must be ex facie the indorsee - The chain of indorsations must present a series of names terminating in the holder[2]."

Therefore, notes Graham Stewart, if a husband acquired iure mariti a bill payable to his wife or order, he could not protest it in his own name, to the effect of using summary diligence. It would seem, he writes, from the opinion of one of the judges in Smith v. Selby[3] a case upon this point, that, had the husband been able to produce to the notary evidence of his right to the bill, and a suitable note to this effect had been inserted in the instrument of protest, the diligence would have been good, but the author's advice is that it would be better not to rely on this view, since the statutes limit the exercise of summary diligence to the drawer, payee or indorsee, and his advice is to have the debt constituted in the ordinary way /

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the mother in a family in circumstances similar to this; they both clothe them out of the alimentary fund. Accordingly, I cannot see any reason for interfering with the arrestments upon that point; ..." But see Learmont v. Darlington supra. (furniture forming part of the communio bonorum during the marriage was found poindable in respect of a debt of a son, after the death of the husband, the furniture having remained in the widow's possession and in respect of which she had undoubtedly an interest. Division had not then taken place, and (per L. Medwyn at p.837) "She has merely a personal claim for her share. She has not an interest in every one article of furniture.")

1. Act, 1681, c.20: Graham Stewart, p.386.
2. Graham Stewart, ibid.
3. (1829) 7 S.885.

way, by action, where the holder was not ex facie the payee in the bill.

Where a bill was granted to a married woman, it was advisable once more, he says,[1] to state the concurrence of the husband, although it was "sufficient to extend the instrument of protest in name of the wife", "But the charge should be by her with consent of her husband." As noted, a charge at her own instance would be suspended, although the husband could then appear and give his concurrence.

Alimentary Provisions

Returning to Sandilands v. Mercer[2], and alimentary provisions, it was, and probably is, thought, legally and popularly, that maintenance of the household is the duty of the husband.

As a result of this, if a wife had been given an alimentary provision by a third party[3], or if such a provision had been constituted over her own property by antenuptial contract[4], it could not be attached for debts in respect of family maintenance[5].

The provisions of the Act of 1881 did not apply in the case of marriages before the Act, as has been seen, where the husband, before the passing of the Act, had made by irrevocable deed a reasonable provision for his wife in the event of her surviving him. In other pre-Act marriages, the jus mariti was excluded from acquirenda. Thus, in the case of Ferguson's Trs. v. Willis, Nelson & Co.,[6] an example, previously noted, of the way in which the /

1. Graham Stewart, p.388.
2. (1833) 11 S.665. Supra, pp. 235-237.
3. West-Nisbet v. Moriston, 1627, M.10368.
4. Sandilands, above.
5. See Graham Stewart, p.98, fn.2: contrast Scottish Law Commission, Memo.No.22, Proposition 2: reciprocal duty of aliment by spouses.
6. (1883) 11 R.261 (Chapter 1, pp.89 et seq.)

the law might operate to work iniquity where married women were concerned, stock-in-trade originally belonging to the wife and transferred to the husband jure mariti, but employed by her in a business carried on in her own name, was attachable by the husband's creditors[1].

The position was that if the husband himself made the provision during the marriage, and the jus mariti was not excluded by deed or by statute, his creditors /

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1. See also Morrison v. Tawse's Exec. (1888) 16 R.247 in which the wife's earnings were immixed with the husband's, and she carried on the business of a washerwoman in the matrimonial home, placing her own and her husband's earnings in a common purse for household expenses, and what was saved therefrom in deposit-receipts, repayable "to either of them and to the survivor". It was held (diss. L. Young) that, on the predecease of the husband, half of the deposited sums belonged to the widow in her own right, by virtue of the M.W.P.(Sc.) Act, 1877, s.3.
Per L.Young at p.254:- "I think the intention of the M.W.P.Act was to prevent an ill-doing husband from interfering with the earnings of a well-doing industrious wife and taking them for his own purposes, as experience shewed had been often done. But the parties whose affairs are here in question I think shewed by their conduct that they were not acting on the footing of the wife carrying on a separate business and earning a separate estate protected from her husband. The case of a wife living in family with her husband, and earning money by charing or serving in a shop, or the like, is not prima facie a case for the application of the statute, unless, as was not the case here, the parties so act as to shew they intend such a case." (See Chapter 1, pp.84 et seq.) "Here there was a common fund, made up of what the spouses earned and what the husband succeeded to. This money was put in bank, in the joint names indeed, but under a destination which, according to the law of Scotland, would make the husband the proprietor .... The husband supplied the house accommodation which they enjoyed together, and bore the expenses of the establishment, and was liable for every farthing of the debts of the household, and when the wife is put to shew that she has a claim for £175 she fails."

creditors would be able to attach it to the full extent: if the jus mariti had been excluded, it would not have been attachable at all. On the middle case, if the provision had emanated from a third party or the husband had endowed his wife therewith before marriage, and in each case the provision was declared to be alimentary but the jus mariti was not excluded, it would have been attachable by his creditors only so far as it exceeded a reasonable provision[1]. Since the jus mariti is now unknown, and no subsisting marriages can have taken place before 18th July, 1861, such alimentary provisions may be attached only by the wife's creditors, and by them only if and in so far as the provisions exceed what may be thought reasonable.

There is no doubt that the footnote mentioned[2] regarding debts for the maintenance of the family is a little confusing, in that an alimentary provision given by a third party or constituted by antenuptial deed over the wife's property is said not to have been attachable for such a debt, and yet it might be thought that, by reason of the very nature of an alimentary provision, in many cases it would be used in respect of just such a debt. It would seem that the creditors of the wife may always attach such a provision to the extent to which it is unreasonable! in general, however, the fund, though intended for the support and maintenance of the party in whose favour it was made, is not available to meet household debts. Till present times, at least, the wife has been well protected, in theory, from responsibilities of that nature. The purpose of such a provision is of course the setting apart of a fund for the special use of the party favoured, and "is from its nature personal /

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1. Graham Stewart, pp.97-98.
2. p.98, fn.2. (p.242)

personal to him or her and not assignable nor attachable by creditors. Such provisions are said inhaerere ossibus[1]." Though infrequently encountered, the potentialities of an arrangement of this kind are not inconsiderable and should not be overlooked. There is an exception to the rule that no-one can create an alimentary provision in favour of himself in that "a woman in contemplation of marriage may convey her property acquisita et acquirenda by antenuptial marriage-contract to trustees so as to retain the enjoyment thereof, and may yet exclude the diligence of her creditors by declaring the provisions in her own favour alimentary[2]." The aim, of course, was to keep the estate out of the hands of the husband's creditors, but on the husband's death it was thought that "the alimentary character of the wife's provision would cease" although the trust might be kept up "for other matrimonial purposes[3]."

On the whole, therefore, the classic definition of "alimentary", often found in deeds - "not arrestable nor assignable nor subject to her debts or deeds or the diligence of her creditors" - might be optimistic, since, besides questions of exorbitant provision, the alimentary fund is, it seems, attachable for the alimentary debt[4].

What /

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1. Graham Stewart, p.93.
2. ibid. p.94 and cases there cited.
3. See footnote 1, p.94.
4. L.Ruthven v. Fulford and Sons 1909 S.C. 951. Per L.McLaren at p.954 - "The order" (of preference on an alimentary fund) "is that the alimentary fund is to be drawn on, in the first place, for the current alimentary debts; secondly, for arrears of alimentary debts; and thirdly (though I do not think the point has ever arisen), if there is any balance over I suppose that it would go to the ordinary creditors." (Presumably this reflects the view (Graham Stewart, p.103) that "If any excess remains after satisfying the alimentary creditors, this shows that to that extent the fund was not alimentary, as it was not required for maintenance".) Thus, in L. McLaren's /

What, then, is an alimentary debt? Graham Stewart points out that it is not to be confused with "sums decerned for aliment" (Debtors (Scotland) Act, 1880), for which imprisonment is still competent upon failure to pay.[1] "An alimentary debt is a debt for the necessaries of life" (food, clothing, lodging), determined in the light of the rank and circumstances of the debtor[2]. The author then[3] notes that, although, strictly speaking, an alimentary creditor is "one who has either actually furnished articles, falling under the description of aliment, or is vested with the right of parties who have done so,"[4] a party who has advanced money in order that another is able to pay such an alimentary debt, and to satisfy an alimentary creditor as /

McLaren's opinion, if there were no current alimentary creditors, past alimentary creditors might arrest, unless it was pleaded that a sum of ready money should be retained for the current expenses of the family: if so, that claim would perhaps "have taken precedence over all others". ("Family expenses"? see discussion above.) See also Monypenny v. E. of Buchan (1835) 13 S.1112, followed in Ruthven. There the decision concerns the ranking of alimentary creditors inter se and the identification of alimentary creditors. The court acquiesced in the interlocutor of L.O.Corehouse, to which he had added a note on ranking of alimentary creditors, beginning - "It is clear, that a fund declared by the donor to be alimentary is not attachable by creditors whose debts were contracted before the donation; unless, perhaps, it is of an unreasonable and exorbitant amount ..." (Contrast claims of prior alimentary creditors against the annuity of the current term).

1. 1880 Act, s.4: see also that Act concerning the sanction of imprisonment for non-payment of certain other debts (mostly to the Revenue or Local Authorities), as amended by Crown Proceedings Act, 1947, s.49.
2. Graham Stewart, p.103. See Monypenny v. E. of Buchan, supra. (the services of a gamekeeper and the purchase of an army commission for the annuitant's son were regarded as items of expenditure necessary for one enjoying the defender's style of life).
3. ibid.
4. per L.O.Fullerton in Waddell v. W.(1836) 15 S. 151 at p.153. (Note).

as above defined, and who has received in security an assignation of an alimentary fund, will, so long as the money has actually been applied in extinction of these debts, be regarded also as an alimentary creditor. If the money was not so used, the creditor, though entitled to the sum vis-à-vis the debtor, "could not compete with those who had actually furnished aliment".

"Although alimentary funds, salaries and pensions are not attachable for debt, it is held that the arrears of them may be attached[1]." Hence, such arrears may be arrested by ordinary creditors, "except so far as they are required to meet alimentary debts[2]." These funds may always, however, be arrested for alimentary debts, if the debts are contracted before, or during, the term to which the income attached applies[3]. It is therefore "no objection that the debt was incurred before the instalment of the alimentary fund which is arrested became due[4]."

It is noteworthy that if a wife saves money from an alimentary provision, its alimentary character is not altered in a question with the husband and his creditors. It is not open to them to attach such money. This is an interesting and useful point, in support of which Graham Stewart cites Lord Fraser's work on 'Husband and Wife[5]'.

Insurance /

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1. Bell, Comm. 1.127.
2. Graham Stewart, p.103.
3. As to ranking, see Monypenny and Ruthven, above: Graham Stewart, p.102.
4. Gloag and Henderson, Introduction to the Law of Scotland (7th edn.) p.704.
5. Fr. H.& W. 1, 769 - citing, in support, at p.699, Davidson v. D.(1867) 5 Macph.710. It is interesting that L.Fraser considered the Scots case of Drummond v. Rollock M.6152, 1 sup.349 (1634), giving savings from a housekeeping allowance to the husband, to be contrary to common sense and to the English equity decision of Brooke v. B. 25 Beav.342 ("Under the old law/

Insurance Policies

In terms of the Married Women's Policies of Assurance (Scotland) Act, 1880, s.1,[1] a married woman might effect a policy of assurance on her own life or the life of her husband for her separate use, and, if so expressed, the sum in the policy and all benefit thereof vested in her and was payable to her heirs, executors and assignees, "exclusive of the jus marital and right of administration." (separation of property only).

Where the policy is effected by a married man[2], it must be expressed on the face of it to be for the benefit of his wife and/or children, in order to secure the special advantages conferred by the Act. If so expressed, the policy becomes vested in her and/or them, and is no longer subject to the husband's control[3], nor is it liable to diligence by his creditors, except in the case of insolvency within two years of the date of the policy or in the case of fraud[4].[5]

By virtue of the trust created in these policies for wife and children, the sum in the policy was not regarded as part of the estate of the assured. At one time, that sum was exempt from aggregation for Estate Duty purposes, and this rendered the purchase of such a policy an attractive proposition.

However, this exemption was removed by the Finance /

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law of husband and wife a voluntary allowance made by a husband to his wife for her separate maintenance apart from himself was her separate estate") though in accordance with Messenger v. Clarke, 5 Ex.388: (see subsequently e.g. Maddinott v. M. [1949] 2 K.B.406, and contra M.W.P.Act, 1964. Preston v. P. 1950 S.C.253.)

1. 43 and 44 Vict. c.26. Chapter 1, pp.95-96, and 2, pp.210-219.
2. including a widower, for the benefit of his children - Kennedy's Trs. v. Sharpe (1895) 23 R.146.
3. The policy may be surrendered by the trustee with consent of the wife - Schumann v. Scottish Widows Fund (1886) 13 R.678.
4. S.2. Chapter 1, pp.96-97.
5. See now also Married Women's Policies of Assurance (Scotland) Amendment Act, (1980).

Finance Act, 1968, s.38(1). Section 38 was repealed by the Finance Act, 1969, schedule 21, but the provisions regarding the exemption of certain policies were retained by the 1969 Act, s.40(2)(c), with the result that those policies effected before 20/3/68, remained exempt, provided that the aggregate value of the policies (or value of the policy) did not exceed £25,000. If that limit was exceeded, relief was applied only to a fraction of the sum (i.e. £25,000 divided by the value, or aggregate values, of the policy(ies))[1] Policies effected after that date were not exempt from aggregation.

Capital Transfer Tax

Capital Transfer Tax was introduced by the Finance Act, 1975, s.19. It is a tax upon transfers of value, whether inter vivos (made after 26th March, 1974, as a "straight gift" or by means of a settlement), or on the occurrence of a death (after 12th March 1975). The abolition of Estate Duty is effected by s.49[2].

It has been seen that policies taken out before 1968 enjoyed certain benefits, and these have been continued by the 1975 Act, s.22(7). It would appear that, in the case of a pre-1968 policy, where the life assured has paid the premiums thereon by way of gift "before the repeal of Estate Duty and the life assured then dies within seven years of the payment(s), after the introduction of C.T.T. on death" (but before 12th March, 1983, when this relief shall cease), no C.T.T. will arise in respect of the proceeds of the policy[3]. The premiums and the sum in the policy are linked. This is explained by Pinson[4].

No /

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1. See Barry Pinson, Revenue Law (7th edn.) p.377.
2. See generally 'Capital Transfer Tax' John Coombes (1977), pp.12-16.
3. Ibid., p.141.
4. Revenue Law (7th edn.), pp.454 et seq.

No such relief from C.T.T. is given, it would seem, to inter vivos payments of premiums made after the introduction of C.T.T.[1] but "[F]requently of course premium payments made after that time by way of gift will be fully exempted under one of the C.T.T. exemptions, e.g. the annual exemption" (that is, of transfers not exceeding (at present) £3,000 by any one transfer/or in one tax year). Presumably, between strangers (in non-spouse cases), the sums in the policy will be a transfer of value on death, although, in such a case, it appears that if premiums are paid by the donee, the sum assured is not regarded as forming part of the transferor's (life assured's) estate on death[2].

As between spouses, however, there is no liability to C.T.T. on transfers inter vivos or on death[3] (of the predeceaser). Hence, premiums on such a policy, whatever be their date and the date of the policy, will attract no tax, nor will the proceeds of the policy, when ultimately payable, and it would seem that this will be the case whether the policy is one of life assurance simply, or a mortgage-linked endowment assurance, designed to enable the wife (usually) to pay off the debt to the Building Society on the occurrence of the death of the husband before the date of final discharge of the mortgage commitment, and often framed in the terms that it will mature at 25 years' date or on the earlier death of the /

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1. See 1975 Act, s.20 (Transfers and Chargeable Transfers. S.20(2) "... a transfer of value is any disposition made by a person ("the transferor") as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer.")
2. Coombes, pp.174-5.
3. See Finance Act, 1975, Schedule 6 (Exempt Transfers).

the husband[1]. A widower might also find difficulty in repaying the debt, but equivalent provisions in his favour appear to be rare. The solution might be for an assurance policy to be taken out on the life of the wife, to be kept up by either party, if it happened that a joint endowment policy was not acceptable to the insurance company. Such a policy would stand on common law in Scotland[2].

The exemption from C.T.T. in the case of married persons "is counterbalanced by the removal of the surviving spouse relief on the second death"[3], which latter /

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1. As to this type of policy, see the case of Chrystal's Trs. v. C. 1912 S.C.1003, where an "endowment bond", payable on the expiry of 20 years to Mr. Chrystal, or to his widow on his death within that time, was held to be a policy "for the benefit of his wife" in terms of the M.W.Policies of Assurance (Sc.) Act, 1880, s.2, and was payable therefore to the widow in preference to the creditors on the death of Mr. Chrystal within 20 years and on the sequestration of his estate. The Lord President (Dunedin), though he made no formal dissent, was less convinced of the point. "What struck me at first was that this policy was certainly prima facie not a policy for the benefit of the wife, but a policy for the benefit of the husband himself, because the first clause provides that if he lives to a certain age he will get a sum of money, and the provision in favour of the wife is only put in to meet the case of his not living to that age.
But I am sensible of the strength of the arguments which your Lordships have used. I feel also that the Act is an enabling statute, and the class of insurance which is here disclosed seems to be a very sensible one. It provides for the wife if the husband is taken away by an early death, and, on the other hand, if he lives long enough, it provides him with a considerable sum of money out of which he can make a provision for her after his death."
Today, when mortgage commitments are often in the names of both partners, and/or title to the house is in joint names, the purpose of the endowment policy, at least when linked to mortgage arrangements, is clearly for the benefit of the wife (as also for the husband), whether the sum, in the event, becomes payable at 25 years' date or at an earlier date.
2. Chapter 1, p.95.
3. Coombes, p.13.

latter relief operated to prevent a double passing for Estate Duty purposes of the same property, provided that certain conditions (pre-eminently that the survivor should not have been competent to dispose of the property) were fulfilled[1].

The result seems to be that the taking out of these policies carries no particular advantage or disadvantage for spouses from the point of view of tax-saving. The importance of the Married Women's Policies of Assurance (Scotland) Act, 1880, lies, therefore, it would appear, in the confirmation of insurable interest and in the provisions affecting creditors[2].

The taking out of such policies for the purpose of ensuring that sufficient resources will exist to meet tax liability remains valid, though now, since no liability will arise on the death of the predeceaser, "it will be advisable" (instead) "to take out a policy on the joint lives, payable on the death of the survivor, for tax on the estimated estate then passing"[3].

The Married Women's Property (Scotland) Act, 1881, s.1(3) provides that the wife's (now separate) moveable estate shall not be subject to arrestment or other diligence of the husband's creditors, if her moveable estate ("except such corporeal moveables as are usually possessed without a written or documentary title") is invested, placed, or secured in the name of the wife herself, or in such terms as clearly distinguish it from the estate of the husband[4].

The exception is important because considerable confusion /

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1. See e.g. Pinson, 7th edn. pp.437-439.
2. See Chapter 1, pp.95-97.
3. Coombes, pp.173-4.
4. See National Bank v. Cowan (1893) 21 R.4 in which it was decided that money averred by the wife to have belonged to her at marriage, had not been kept separate from her husband's property.

confusion surrounds matters of matrimonial property in a happy marriage (in England and Scotland)[1] and many and possibly valuable are the corporeal moveables "usually possessed without a written or documentary title". The provision, while most certainly fair, does enable a husband, when charged by Sheriff Officer, blithely to declare that all furniture and objects in the matrimonial home which are worth poinding and sale, belong to his wife[2].

If, however, the wife has lent or entrusted money or other estate to her husband, or if her property in some other way has become immixed with his funds, such property falls to be treated as an asset of the husband's estate in his bankruptcy, and the wife, in her claim, is postponed to the claims of onerous creditors[3].

Civil Imprisonment

Finally, the sanction of imprisonment (for civil debt) must be considered. It is well settled that certain categories were exempt therefrom, and these included "pupils, lunatics, married women during coverture, peers, widows of peers, and, during the sitting of Parliament and for forty days before and after, Members of the House of Commons ..."[4] "...Imprisonment is impossible against corporations or public companies or persons abroad."[5] To the rule that a married woman could not be imprisoned for debt, Graham Stewart notes several exceptions. Imprisonment /

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1. This arises mainly from the facts, not the law on the subject. Dr. Clive remarks at p.294. As to other systems, and inventories of property, see Chapter 6.
2. As to Creditors' rights under other systems - see Chapter 6.
3. M.W.P.(Sc.) Act, 1881, s.1(4). See generally Chapter 2 (Bankruptcy).
4. Graham Stewart, p.722.
5. ibid.

Imprisonment was competent on her obligation ad factum praestandum[1].

However, in some cases, a wife might contract a valid personal obligation, but imprisonment could not follow thereon. An example of this is that her personal obligation in rem versum will "warrant diligence against her separate estate, but not against her person", although after dissolution of the marriage she might be imprisoned[2].

Similarly, if she was living apart from her husband, and was pledging her own credit for necessaries, her non-payment provided a warrant for creditors using diligence upon her separate estate or upon her aliment[3]. Again, diligence might be used /

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1. See Ersk. 1.6.19, where, having stated the (former) rule that "she has nothing that can be truly called her own where matters are left to the disposition of the law", and consequently that her husband could recover the person of his wife from all who would withhold it from him, and that her person, while she was 'vestita viro' was free from all execution upon debts contracted by herself which by her coverture she became disabled to pay (Gordon 11 Jan. 1704 M.5787) continues, "At the same time the husband, who is not the proper debtor, is liable to personal diligence at the suit of her creditors so long as the marriage subsists. But notwithstanding this power in the husband, execution may be used against a wife's person, to compel her to the performance of facts which are in her own power, and cannot be validly performed but by herself; e.g. to enter the heirs of her vassals, to receive adjudgers in lands holden of herself, or to exhibit writings in her own custody, upon letters of diligence, Stair, b.i; t.4,§ 14."
2. Graham Stewart, pp.722-3, citing Gray v. Wylie (1840) 2 D.1205.
3. Graham Stewart, ibid., where he takes issue with Lord Fraser's view, and says that the authorities cited by him at 1.553 do not support his statement that, in these circumstances (of debts for necessaries), diligence might be done against a wife's person if the husband was abroad, and affirms that diligence against the person was allowed only where the wife had entered into trade.
Certainly, the cases cited appear to lack mention of /

used upon her estate, but not upon her person, where payment of damages arising *ex delicto* was sought[1]. As above, she might be imprisoned after the dissolution of the marriage.

Speaking of personal obligations of the wife, incurred during separation, where the husband had given his wife a sum for her separate maintenance, Erskine states that personal diligence could follow only after divorce, "since no wife can be subjected to personal diligence upon a civil cause, even after either legal or voluntary separation, till the marriage itself be dissolved by divorce"[2]. However, as a result of the Conjugal Rights (Scotland) Amendment Act, 1861, a wife holding a decree of separation /

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of pursuit to imprisonment, and one at least (Hay v. Corstorphin M.5956 (1663)) raised the issue of the absence of the husband for 20 years and his reputed death, and contains the answer, "That by the space of 15 years the defender was keeper of a house, and lodged boarders *proprio nomine*, there being diverse reports for the time of her husband's death, in which time the particulars libelled were furnished to her for the use and necessity of her family and boarders", the terms of which suggest perhaps at least some participation in "trade", on the part of the wife (widow).

1. because, in the well-known phrase (Ersk. 1.6.24), "marriage affords no indemnity to delinquents". Erskine does suggest, however, that her person, though not her estate, was "under the power of the law, so as she may be banished, imprisoned, or even punished capitally upon a criminal trial; ..." Those wishing to use diligence against her estate (except such heritable estate as was not subject to the *jus mariti*) required to await the conclusion of the marriage, but the case cited (Murray M.6079 (1724))seems to support the view that a civil decree (as opposed (perhaps) to a criminal decree) could not affect, during marriage, the person *or* the estate (except for estate exempt from the *jus mariti*) of the wife. This view is taken also by Fraser (1, 557-8). Possibly Erskine's statement *quoad* imprisonment may have been intended to relate only to criminal proceedings.
2. Ersk. 1.6.25.

separation or a protection order, and while living apart from her husband, might contract, sue, and be sued as if unmarried. Consequently, as a result of an obligation entered into by her in such a situation, she might be imprisoned. "Therefore a wife, under either of these decrees, may open a shop and trade; she may grant bills and transact all kinds of business, just as if she were unmarried; and of course diligence may be done against her person and her estate for payment of debts, incurred by her after the decree of separation and the order of protection[1]."

In the circumstances previously mentioned of the absence abroad, civil death or insanity of her husband, where a wife had entered into trade, diligence might be used on her person or her estate to enforce her business obligations and as from the coming into effect of the Married Women's Property (Scotland) Act, 1877, which endowed a wife with implied power to engage in business, the wife would be subject to the same sanctions as noted above, even though the husband was present[2].

"The wife's coverture affords no protection to her as to crimes; and both spouses, or either of them, may be tried as principals, or as actors, art and part .... A crime committed by the wife must be expiated by punishment endured by herself; never by the husband. Where the sentence condemns her to banishment, imprisonment, or corporal pains, it may be carried into effect against her during marriage".[3] It appears that, for non-payment of a fine, during the subsistence of the marriage, her person could not be attached, though she might be arrested as in meditatione fugae[4].

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1. Fr. 1, 553.
2. See generally Graham Stewart, pp.722-3, and authorities there cited.
3. Fr. 1, 557.
4. Ibid., 545.

The present day situation is that diligence against the person for civil debt, whatever the sex or status, is very rarely indeed found in practice[1]. The matter is governed by the Debtors (Scotland) Act 1880[2] ("An Act to abolish Imprisonment for Debt, and to provide for the better Punishment of Fraudulent Debtors in Scotland; and for other purposes."), which applies to Scotland only, and by the Crown Proceedings Act, 1947[3], of which ss.41-51 apply to Scotland.

By s.4 of the Act of 1880, it is provided that no person shall be apprehended or imprisoned on account of any civil debt except (1) taxes, fines or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed: and (2) sums decerned for aliment. Where imprisonment is competent thereunder, the period of imprisonment shall not exceed twelve months.

However, the Act warns that nothing in it contained "shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being in meditatione fugae, or under any decree or obligation ad factum praestandum.

S.49 of the Act of 1947 is concerned with the application to Scotland of s.26 of that Act, and it provides that s.26 shall have effect as if for subsection (2) was substituted the following:-
"(2) The exception in respect of taxes contained in section four of the Debtors (Scotland) Act, 1880 (43 and 44 Vict. c.34) from the enactment therein contained abolishing imprisonment for debt shall apply only in respect of death duties and purchase tax."

Thus, for Scotland, s.26 (Execution by the Crown) reads /

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1. See Chapter 4.
2. 43 and 44 Vict. c.34.
3. 10 and 11 Geo.6 cap.44.

reads as follows:-
s.26(1):- Subject to the provisions of this Act, any order made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in an action between subjects; and s.26(2) will be in the above terms.

In effect, therefore, the final sanction of imprisonment is competent only in cases of failure in payment of aliment, purchase tax[1] or death duties due, or failure to implement an obligation ad factum praestandum, and, in addition, apprehension may be made of any person against whom, as being in meditatione fugae, a warrant has been granted.

Although, since 1920[2], a wife has had a duty to aliment her husband if he is unable to maintain himself and if she has a separate estate, or separate income more than reasonably sufficient for her own maintenance[3], there cannot be many instances of translation of that duty into a decree against her, and fewer still - or none - of imprisonment of a wife /

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1. now replaced by Value Added Tax - see Finance Act, 1972, s.38.
2. M.W.P.(Sc.) Act, 1920, s.4.
3. Do the words "reasonably sufficient ..." qualify only "separate income", or also "separate estate"? It seems commonly to be assumed that the wife's obligation arises only if she has resources more than adequate for her own maintenance. In 1920, a wife's income was likely to be produced by her separate capital. Today, income is likely to be provided, or investment income to be augmented, by income from employment. In any case, the distinction made in the Act, by reason of such changes, and because the universal rule now is that of complete (at least notional) separation of property between spouses, is now inappropriate and unnecessary. The general meaning of the section is clear, and, in any particular instance, an award of aliment would not be made against a wife whose property situation generally did not merit it, and in respect of which the prospects of enforcement were poor. See generally Chapter 4. See Sc.Law Commission Memo.No.22 - Needs and Resources, 2.92 et seq..

wife for non-payment thereof, but in terms of the 1880 Act, s.4, she would seem equally to be liable potentially to that punishment. It is indicative of how deeply entrenched are attitudes in this sphere that the idea still at present seems bizarre. (In 1876, Lord Fraser wrote[1] "If a wife obtain decree against her husband, she may imprison him thereon; and if he escape from prison, she has a claim of damages against his keepers, by whose negligence he escaped ....

Holding a decree for aliment, she may arrest him in meditatione fugae; and in such circumstances, it would not be relevant to offer to take her abroad with him. She may inhibit him, and adjudge and arrest his property. But a wife cannot arrest upon a decree obtained for aliment, unless there be arrears, or unless the husband be vergens ad inopiam") As far as the parent/child relationship is concerned, it is to his father primarily (at present) that a legitimate child is entitled to look for aliment[2].

A married woman may now charge and be charged alone /

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1. 1, 578-9. Arrears of aliment cannot normally be recovered unless due under agreement or court decree. Lord Fraser expresses the view that, though decree had not been obtained, if the action had been raised, and the husband admitted that aliment was payable, "the wife may arrest him as in meditatione fugae." See now interim aliment pendente lite - Chapter 4, and Scottish Law Commission Memo. No.22. 2.176: see also Propn. 33 (abolition of distinction between actions for interim aliment and actions for permanent aliment), and Faculty response, 2.212, and Propn.55 (that interest should no longer run on arrears of aliment) - see Memo. No.22. 2.190-192.
2. Fr. P. & Ch. 100; Walker, Prins. (2nd ed.) p.315: as to illegitimate children see Walker, pp.323-325. See recommendation to assimilate position of illegitimate to legitimate children, and of the mother's liability to aliment to that of the father, and related subjects, contained in Sc.Law Commission Memo. No. 22. Propositions 6 and 14 and comments in response by Faculty of Law, University of Glasgow (see generally Chapter 4 - Aliment).

alone without the addition of her husband's name, since she is sui iuris.

In all other forms of diligence - arrestment, and subsequent furthcoming, poinding, and subsequent sale, adjudication, inhibition[1], poinding of the ground, maills and duties, sequestration for rent, and sequestration proper - the remedies available thereunder are open for use by or against a married woman in the same way as by or against any other person sui iuris. It is perfectly clear that husband and wife may stand to each other not only in the relation of landlord and tenant[2] but also in the general character of creditor and debtor, and may sue and be sued, for repayment accordingly[3]. Husband and wife may sue each other in contract, and in delict[4], and either may be found guilty of crime against the other. These rules are a result of a strict application of the theory of separation of property, and are justified according to that rationale.

An over-simple approach may be unfair to third party creditors, however, in view of the joint enjoyment of property which marriage entails, and the difficulties of proof of ownership, and the rights of such persons against property of spouses is a subject which has received detailed consideration in other systems[5].

The Spouses in Litigation

The husband's jus mariti encompassed any right of action in delict which the wife might have against any /

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1. See, in relation to praepositura, p.227 et seq, supra.
2. Millar v. M. 1940 S.C. 56.
3. Aitken v. A. 1954 S.L.T. (Sh.Ct.) 60. See Sheriff Bryden's discussion of the effect of the M.W.P. Acts on inter-spouse litigation. See further, infra, p.270 et seq.
4. Law Reform (Husband and Wife) Act, 1962, s.2.
5. See Chapter 6.

any third party. In the many arguments of intimacy of relationship and disruption of family harmony used against those who advocated that husband and wife should be able to sue each other in delict, the protagonists could have stated with truth that the basis and reason for the rule no longer obtained, since before 1881, a husband jure mariti took over all the wife's rights against anyone, and therefore she could not have any rights against him, because they would vest in him, and any right of action in delict or on any other ground available to the wife against the husband would be extinguished confusione, and that, in view of the wife's increasing independence in status and property, there should be freedom of litigation between them. Before that date, therefore, in the majority of cases, (that is, subject to the Act of 1861) even if she had right and (that which was denied her) title to sue, any money recoverable by the wife from the husband would become immediately the husband's property, and then it was impossible to break out of the encircling chains of the husband's protectiveness or self-interest. "In these circumstances the law would not give a right of action which could have no useful result"[1]. The converse was true also. In a /

1. Young v. Y. (1903) 5 F.330, per L.McLaren at p.331. Nevertheless, the court was unanimous in holding that a wife's action for damages against her husband for slander was incompetent. "It is one thing for the law to recognise the separate interests and to protect the wife in their enjoyment, but it is quite another thing to reverse the principles of the older law and to sustain a personal action by a wife against a husband, or by a husband against a wife, having no relation to the wife's separate property" per L.McLaren, ibid. Cf. Wynn-Parry, J., Curtis v. Wilcox [1948] 2 K.B.475, upon M.W.P.Act, 1882, s.12. There also a purely personal claim such as for damages for libel or slander or assault was used to exemplify the type of action outwith the ambit of s.12. At p.481, Wynn-Parry, J. expressed the view that the action must be for the protection or security /

a situation where all property of the wife was ceded to the husband on marriage, there was little point in suing her. She was indeed a woman of straw.

The married woman, as has been seen, remained subject to her husband's right of administration and curatorial power between 1881-1920, and therefore a pursuer was obliged to sue both the wife and her husband for his interest; on the other hand, in cases where the 1881 Act applied, a wife was able to sue in respect of delictual wrongdoing (by a third party, not by the husband) to herself[1] and any damages /

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security of the wife's property, though the limitation, he felt, lay in the purpose of the action rather than in the kind of property which might form the subject of the action, and at p.482, he said that the clause beginning, "except as aforesaid" was, in a sense, surplusage, but that the words (did) "serve to emphasise that the section constitutes an exception to the common law rule, which otherwise still applies and would still prevent a married woman from pursuing a purely personal claim against her husband..." (libel/slander/assault). An action in tort, in his opinion, was a thing in action and he took issue with the more limited interpretation of the use in the 1882 Act of "thing in action", adopted by McCardie, J. in Gotliffe v. Edelston [1930] 2 K.B.378 (see <u>infra</u>, p. 271 fn. 1), who considered that it did not include a wife's right to sue her husband for an ante-nuptial tort. The M.W.P.Act, 1882, s.24 states that the word "property" when used in the Act shall include a thing in action. Otto Kahn-Freund, "Inconsistencies and Injustices in the Law of Husband and Wife" (1952) 15 M.L.R.133, at p.142, fn.43, and pp.150-152, where Curtis and Gotliffe are discussed, prefers the decision in Curtis v. Wilcox. The husband's right to reduce a chose in action to possession was removed by the M.W.P.Act, 1882, ss.2 and 5 (Kahn-Freund, p.142). See generally on s.12, Kahn-Freund pp.142 <u>et seq</u>. See fn. 1 below.

1. i.e. as a result of the abolition of the <u>jus mariti</u>: M.W.P.(Sc.) Act, 1881, s.1(1). Sheriff Bryden in Aitken v. A. 1954 S.L.T.(Sh.Ct.)60 points out that there was no exactly similar Scottish equivalent to the English M.W.P.Act, 1882, s.12, which allowed to a wife freedom of litigation to protect her property... "but except as aforesaid no husband or wife shall be entitled to sue the other for a tort". Section 12 was by no means devoid of difficulty in the matter of its construction.

damages which she won she might keep as her own property[1], provided that her husband's concurrence in the action had been given.

Since 1920, however, a married woman may sue and be sued as an independent person. Any damages recovered by her are truly her property, and for any damages due by her she is not entitled to look to her husband, but must meet the claim herself (unless she has acted as servant or agent of her husband)[2].

Under the M.W.P.(Scotland) Act, 1920, the husband's curatorial power and right of administration were abolished, except (s.2) (as to curatorial power) where the wife is minor - that is, in context, between the ages of sixteen and eighteen: Age of Marriage Act 1929 and Age of Majority (Scotland) Act, 1969 - and ceases upon attainment by her of the age of eighteen[3]. It is difficult to imagine that the adult wife sui juris of a minor husband would be preferred, as his curator, to the husband's father in the rare situation where such a minor was not forisfamiliated[4]/

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1. D.M.Walker, The Law of Delict in Scotland, I, p.84; Smith v. Turnbull (1894) 2 S.L.T.354, where the action was allowed to proceed at the instance of the married woman alone, by virtue of the terms of her ante-nuptial marriage-contract which excluded the husband's jus mariti and jus administrationis and of the terms of the M.W.P.(Sc.) Act, 1881, s.3. (exclusion of the jus mariti from acquirenda heritable or moveable, and income thereof, post Act for those married before the Act). Moreover the husband took no notice of her request for his consent or later of her intimation to him of the action. The spouses were living apart, though not in terms of any formal agreement or decree.
2. See infra, p.264 et seq. Walker, Deliot, I,84.
3. Cf. pre-1920 discussion: Mullen v. March's Trs. 1920 2 S.L.T. 372. The jus administrationis was abolished by the Act of 1920. Whether the curatory of the husband in this exceptional case is of the nature of a paternal curatory or is a remnant of the marital curatory is a matter for conjecture. See Clive & Wilson, pp.247-50, and Chapter 1. As to the original distinction between these curatories, see Ersk.1.6.23.
4. See S.L.C. Consultative Memo. No. 54,6.1-6.4. A married male minor does not come under the curatory of his adult wife. The rule "clearly offends against the principle of sex equality".

forisfamiliated. The father is ipso jure curator, and it would seem that only the rights and liabilities of the wife's father would be removed by the marriage. If both spouses are minor, but not forisfamiliated, the curator of each would be the father (or mother[1]) of each[2].

In later life, in the case of incapacity, one spouse might be the best choice as curator bonis of the other[3].

DELICT

There are many authorities to the effect that neither spouse will be liable for the delictual actings of the other unless he or she is acting as the other's servant or agent[4]. Examples are Barr v. Neilsons[5], Murray v. Graham[6], Baillie v. Chalmers[7], Milne v. Smith[8], and there is the familiar statement, "Marriage affords no indemnity for delict, and a wife remains /

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1. Guardianship Act, 1973, s.10(1) et seq.
2. M.W.P. (Sc.) Act, 1920, s.2: wife's father shall remain her curator until her majority or until the commencement of the husband's curatory on the cessation of his incapacity and/or minority. See Clive and Wilson, ibid. And see S.L.C.Consultative Memo.No.54.
3. See however In re Langley's Settlement Trusts [1961] 3 All E.R.803, a case arising in the conflict of laws, where the English court disregarded the status (conferred by the Californian Court of the domicile) of a wife as guardian of her husband. The latter had been declared by that court to be "an incompetent" (physically, not mentally, incapax.). It may be that, if regard is had only to the disabling effects of a status, that status should be disregarded here as being penal in nature. See e.g. Worms v. De Valdor (1880) 49 L.J.Ch.261, and In re Selor's Trs. [1902] 1 Ch.488 (concerning the prodigal status in France), which have been the subject of criticism.
4. The most likely instance of this would be delictual conduct by the wife while acting as praeposita negotiis domesticis - See Clive & Wilson, p.266.
5. (1868) 6 Macph. 651.
6. (1724) M.6079.
7. (1790) M.6083.
8. (1892) 20 R.95.

remains liable in person for her crime, and liable pecuniarily if she has a separate estate, and in person after the dissolution of the marriage"[1].

In Thomson v. Duggie[2], it was held that a widow had incurred no personal liability for a wrong committed by her husband. A widow may, however, be sued in her capacity as executrix. There, a collision had occurred between two ships, and the master of one of them died not quite two years after the date of the accident. The owners of the other ship brought an Admiralty action in personam against the widow, claiming damages for loss allegedly resulting to them from the alleged fault and negligence of the deceased master. In the Procedure Roll, the widow's counsel contended that the action was incompetent as directed solely against the widow "and irrelevant in as much as the widow of a deceased person was not, as such, his legal representative". Pursuers' counsel alleged that the widow, or her solicitor, had failed to disclose the master's true representatives. The action was dismissed as incompetent, and per L.O.(Birnam) J. found the views- "In my judgment the widow of a deceased person is not, as such, his legal representative and liable to be sued for a wrong which her husband may have committed during his lifetime".

However, it is well to remember that one spouse, "if present at and joining approvingly in a wrong by the other to a third party" may be liable in conjunction with the other[3]. Otherwise, there is no joint and several liability between spouses in delict. A wife is liable to a third party for wrongdoing as if she were unmarried[4].

Professor /

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1. per L. Ardmillan in Barr v. Neilsons at pp.655-6, and reminiscent in terms of Ersk. 1.6.24.
2. 1949 S.L.T. (Notes) 53.
3. Walker, Delict, I.84 et seq.
4. Ibid. 89, citing Hook v. McCallum (1905) 7 F.528: Barr v. Neilsons, supra.

Professor Walker also highlights the extraordinary rule (not now in force), that where a defender was alleged to have caused the death of a child by his wrongful actings, the title to sue vested in the husband only[1].

The Law Reform (Damages and Solatium) (Scotland) Act, 1962[2], therefore, relieved a difficult situation. The Act, Professor Walker notes, was a result of some of the thoughts of the Law Reform Committee for Scotland[3], and it provides, by s.1(1) that "notwithstanding any rule of law, it shall not be a bar to any right of a mother to recover damages or solatium in respect of the death of her child that the father of that child is alive". Thus, in the case of a divorced or deserted wife, who is perhaps most likely to have had the care and companionship of the child in question, that person might sue "in her own right and for her own interest", although the author remarks that intimation of the action should no doubt be made, edictally, to the husband, and an opportunity given to him to be called as defender for his interest[4].

An obvious question is raised by the wording of the section: in the ordinary case, where the parents are cohabiting, and at one in desiring to initiate proceedings, does each have a separate title to sue, or is there joint title?[5] Professor Walker's /

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1. Ibid. 85-89, where the sorry tale is told.
2. 1962, c.42.
3. contained in its Tenth Report (1960) Cmnd.1103.
4. Walker, Delict, I, 89.
5. The common law position as to title is discussed in Walker, Delict, I, p.88, where the conclusion is reached that, on the basis that the decisions in Barrett v. N.B.Ry.(1899) 1 F.1139, Aitken v. Gourlay (1903) 5 F.585, and Laidlaw v. N.C.B. 1957 S.C.49 were erroneous (as a result partly of misunderatandings of previous cases), and following Elston, below, that parents each had a title, or a joint title, to sue for the death of the child; that before the 1981 Act, the wife's right was submerged jure mariti in the husband, but that thereafter they were entitled jointly to sue.

Walker's view is that, although a joint claim would not be incompetent, it is possibly preferable procedurally[1] to have separate claims with separate conclusions and separate claims for damages, these parts being conjoined in a single action; he notes that, if a joint award were not made, (i.e. not sought presumably), the awards to husband and wife "would still have to be regarded in relation to each other as parts of an interrelated family claim"[2].

Damages (Scotland) Act, 1976[3]

This Act came into effect on 13th May, 1976, and brings to fruition recommendations made by the Scottish Law Commission[4].

Henceforward, the matter of entitlement to sue, of relatives of a deceased person in respect of the death of the latter through wrongful actings by a third party is governed by statute, and not by the case of Eisten v. N.B.Ry.Co.[5], the principle of which has been "restated but modified" by the Act.

If the relative is "a member of the deceased's immediate family", a sum by way of compensation for loss of non-patrimonial benefit (without prejudice to any claim for loss of support under s.1(3)) may be awarded (s.1(4)). A change in the (generally) "entitled relatives" category has been brought about by the introduction of divorced spouses, collaterals, and ascendant and descendant relatives where the intervening generation(s) exists (exist). An award of /

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1. I, 89, citing Kelly v. Nuttall 1965 S.C.427.
2. Ibid., citing in comparison, Kelly v. Glasgow Corporation 1951 S.C. (H.L.)15. See now, in relation to this case, Damages (Sc.) Act, 1976,s.3.
3. 1976, c.13.
4. Memo No.17 - Damages for Injuries Causing Death, 1972, and Report on the Law Relating to Damages for Injuries Causing Death (Scot.Law Com.No.31,1973).
5. (1870) 8 Macph. 980.

of solatium for grief and suffering experienced by the relatives is replaced by the provisions of s.1(4) above (introducing what is to be known as a "loss of society award"). This award is available only to spouse, parent, child, or "accepted child" of the deceased.

The Act simplifies and clarifies the law concerning the inter-action of claims by the executor and by relatives (ss.2-5, infra, p.331 et seq). Where (s.5) damages are claimed by executor and by relative(s), they must be brought in one action, although a "connected person" (being "a person, not being a party to the action, who (apart from this section) would have a title, whether as the executor of the deceased or as a relative of his, to sue the same defender in another such action based on the relevant injuries, or, as the case may be, on the death" s.5(1)), may bring a separate action if the court is satisfied that he was ignorant of the first action or for other reasonable cause was unable to make application to be sisted as a pursuer. The (original) pursuer must notify all connected persons of whose existence he knows or could reasonably be aware, of the forthcoming litigation. On his failure to do so, the court, in its discretion, may dismiss the action.

This is a statutory reiteration and elaboration of the pre-existing common law rule that inter-related family claims should be viewed together[1].

The Act, by s.8, abolishes the right of assythment /

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1. Normally (see Delict I,103: if injured by the same wrong of the same defender and claiming on the same grounds, may join in one action; the same defender and the same circumstances do not justify one action) a multiplicity of pursuers (unrelated to each other) will sue independently, although the court may conjoin the actions, or sist them to await the determination of a "test case". However persons 'related' only by a common interest, in the protection of rights common to them all (as, e.g. riparian proprietors) may also sue together.

assythment (which had allowed a claim by relatives for damages for death caused by criminal wrong), and repeals, inter alia, the Law Reform (Damages and Solatium) (Scotland) Act, 1962. It is clear that the provisions of the new Act have overtaken those of 1962, and have made the specialised provisions of the latter unnecessary.

Where a spouse is pursuer in litigation against a third party, it can be seen that no restriction now exists against a married woman's title to sue, since the anomaly discussed was removed by the Act of 1962[1]. In circumstances where both spouses have suffered loss and damage through the delictual actings of a third party, in the same incident (as, for example, in a motor accident), each has separate title and interest to sue, and although one action only is brought, "there must be separate conclusions and separate averments of loss"[2]. Where the court awards damages to one spouse only, the other will have no claim therein[3].

However, if, as happened in the well known case of Finburgh v. Moss' Empires Ltd.[4], separate wrongs have been done to the spouses, a separate action must be brought by each. In that case, both husband and wife had brought an action for 'slander' in circumstances where, while they were attending a theatrical performance, certain statements had been made by an employee of the theatre owners to the effect that the wife was a notorious prostitute, that two weeks previously she had been thrown out for being drunk and disorderly, and that she must leave. The wife's averments were held relevant, but the husband was not successful (per Lord /

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1. and see now 1976 Act.
2. Walker, Delict, I, 89.
3. Ibid., citing Maxwell v. Young (1901) 3 F.638.
4. 1908 S.C.928.

Lord Ardwall, because the statements complained of did not constitute a slander on him, and, per Lords Stormonth-Darling and Low, because it was not relevantly averred that the statements, so far as they related to the husband, and not merely to the wife, were uttered by the defenders' servant in the course of his employment).

Litigation between Spouses

Possibly the most interesting aspect of the discussion of litigation is that concerned with the liabilities of husband and wife inter se, the liability of each to be sued by, and the right to sue, the other. The misgivings which have troubled Scots judges on this question have affected their English and American counterparts equally.

Although actions between husband and wife arising out of contracts between them became possible after the Act of 1920[1], the courts allowed no latitude to would-be pursuers on the question of the competence of such actions when grounded in delict. They adhered strictly to the common law rule that, since husband and wife were one person in law, neither might sue the other in delict and this attitude was thought to have as its justification public policy, although it is perhaps a little difficult to understand why such considerations did not prevent the courts from countenancing actions in contract. The twin reason for doubt about inter-spouse litigation was disruption of marital harmony: surely proceedings of any kind might produce discord? Indeed, in the "motor accident" cases which prompted great discussion[2], the existence of /

1. though not expressly provided for therein: see Horsburgh v. H. 1949 S.L.T.355, and judgment of Lord Birnam tracing the history of English and Scottish judicial thought on the matter.
2. See e.g. infra. See also e.g.McCurdy, Torts between Persons in Domestic Relation 1930 43 Harv.L.R.1030, at p.1043-44: article considered infra, at p. 284 et seq.

of the insurance company might have been thought to have softened the effect of liability. Where breach of contract was alleged, there would normally be no such intermediary.

In any event, the traditional view was clear and accepted, and included a prohibition on inter-spouse litigation founded upon delicts committed before marriage[1].

With some exceptions[2], there seems to have been acceptance /

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1. Cf. American expedient of postponing the marriage until the conclusion of the litigation, infra. In England, there seems to have been a certain dubiety about this point. The proposition (of non-litigiosity) is supported by the cases of Gotliffe v. Edelston [1930] 2 K.B.378, and Baylis v. Blackwell [1952] 1 K.B.154 (in which a husband was held not entitled to sue his wife in respect of an ante-nuptial tort committed by her against him), but not by that of Curtis v. Wilcox [1948] 2 K.B.475. See also generally Fr. H.& W. 1,577; Clive & Wilson, pp.358 et seq.; Young v. Y.(1903) 5 F.330; Phillips v. Barnet (1876) 1 Q.B.D.436; Walker, Delict 1,90, citing inter alia Harper v. H. 1929 S.C.220, Cameron v. Glasgow Corporation 1936 S.C.(H.L.) 26, Bruce v. Murray 1926 S.L.T. 236, and Young v. Rankin 1934 S.C.499.
2. See e.g. Young v. Rankin supra, in which an action in delict (or quasi-delict) by a minor son against his father was held competent, per L.Morison at pp.515-516:- (drawing an analogy with the wife's position and referring to the case of Harper v. H. 1929 S.C.220) "Harper's case followed the decisions of Phillips v. Barnet and Young v. Young, which both proceeded on the principle that, in the eye of the common law, the husband and wife are eadem persona. That principle has never been applied, and does not apply, to the case of a father and his minor son. I wish to add that, having been in charge of the Married Women's Property (Scotland) Act, 1920, during its unopposed passage through the House of Commons as a Bill, I understood its purpose was, inter alia, to end the application of that doctrine finally as between husband and wife. I humbly think that the principle of the statute, as regards all the civil rights of a married woman, is to place her in the same position as if she were unmarried .... I humbly think that since the passing of this Act, it is impossible to hold that the old doctrine of the common /

acceptance that it was not in accordance with the fitness of things that husband and wife should be able to sue each other in delict. After the decision in Horsburgh in 1949, "spouses could sue each other in any type of action except one based on delict"[1].

The doctrine of unity did not always work to the parties' disadvantage. Mention may be made of the English criminal case of Mawji v. The Queen[2], in which a charge of conspiracy failed on the ground that, since husband and wife were one, it was impossible for them to conspire together.

The rules relating to proceedings against a third party initiated by husband or wife separately or together /

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common law that the wife is eadem persona with the husband survives to any extent or for any purpose. I quite assent to the view that litigations between husband and wife are undesirable, and that is, of course, a very good reason why resort to the Law Courts should be avoided by the spouses. But I venture to doubt whether it promotes harmony in domestic relations that the wife alone is deprived of the benefit of a claim against the insurance company with which the husband has contracted, which is given to every other member of his household". In the earlier case of Murray supra, L.Morison had given an indication that he might be inclined to take this view (about the 1920 Act) in an appropriate case.
His Lordship was of the opinion that the point was not fully argued in Harper, and urged a reconsideration of the decision and "further elucidation" of the statute, which further elucidation, quoad delict, was not achieved until 1962.

1. Clive & Wilson, p.359.
2. [1957] A.C.126. "A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will": quoted by L.Somervell of Hanow at p.134, from "Pleading, Evidence and Practice in Criminal Cases", J.F.Archbold, 33 ed. p.22. See criticism of this rule: "Legal Unity of Husband and Wife", (1947) 10 M.L.R. 16 at pp.20-24.

together have been considered. It is interesting to note that, during the period when the fetter upon inter-spouse litigation in delict existed, it was still possible for one spouse to sue, and recover damages from, a third party, even though the other spouse had been guilty of contributory negligence in the incident[1]. Since his fellow wrongdoer could not have been sued and rendered liable, because of the cloak which marriage provided, the third party was in an unenviable position, and could not claim (or could not compel) a contribution from the spouse, with which to offset the amount which he was obliged to pay to the pursuer. Clearly this was a most unjust result .

In the American context, later considered, where the negligence in injuring the wife was the husband's, the wife could not sue her husband's employees and in this way circumvent the problem that an action against her husband was not competent, because the employers could be liable only if their employee was so liable. If the court were to sanction a wife's action against the employer, this would mean the sanction indirectly of that which it would not countenance directly[2]. In Scots law, it would seem that a wife cannot sue her husband's employers for incidental loss to her, arising out of a wrong to the husband, if the husband is alive and able to pursue the action, for all loss allowed according to the relevant rules of culpability and compensation in /

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1. Walker, Delict, I,90, and authorities there cited.

2. See McCurdy, ibid. p.1044, and discussion of the evolution of American thought upon inter-spouse litigation, infra. See contradiction (apparent, at least) of position above stated: Schubert v. S.Wagon Co. per C.J.Cardozo, 249 N.Y. 253 at 255; 164 N.E. 42 at 43 (1928) McCurdy, p.1049, infra. p. 284 et seq.

in delict. This appears to be merely a particular example of the general rule that one person has no title to pursue an action grounded upon a delictual wrong done to another[1]. However, there may be circumstances in which one spouse may establish and recover financial loss (though no award for solatium may be made) arising out of injury to the other[2], but doubt is cast on this by a recent example of a wife's unsuccessful attempt to sue the husband's employers for loss to herself. In the case of Collins v. South of Scotland Electricity Board[3], the wife averred that she had had to give up her employment in order to /

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1. See e.g. McLachlan v. Bell (1895) 23 R.126 (concerning alleged wrongful actings by a judicial factor upon a sequestrated estate, the claim having been made by the wife of the abnkrupt, and illustrating, incidentally, the general confusion found in matters of marital property: "I think the factor would not have been doing his duty if he had not taken possession of the whole articles which presumably were in the bankrupt's possession at the time. If in the performance of his duty he came to a locked door in the house, was he to take the bankrupt's word, or the bankrupt's wife's word, that that room contained property belonging exclusively to her? I think he would not have been doing his duty to the estate if he had remained satisfied with that declaration .... What is fatal to the pursuer's case is that the room, if it was in the possession of any one, was in possession of the husband. If anyone was injured, it was not the bankrupt's wife but the bankrupt." (per L.Adam, at p.128).
2. See discussions in Civil Remedies, D.M.Walker, "Awards to Relatives of Injured Persons", pp.926 et seq. and Clive and Wilson, pp.272 et seq., where the relevant authorities on this point are discussed (beginning McKay v. Hamlett 1963 S.C.282) i.e. claims by one spouse arising out of injury to the other, or by the injured spouse for loss or expense to him arising out of the effect which his injury had upon the earning capacity of his wife or the finances of the household. The conclusion is reached that although "There is much to be said for recognising the special nature of the marital relationship in this as in other areas of the law", any change now would require to be legislative. See Collins, above.
3. 1977 S.L.T. (Notes) 2.

to care for her husband who had been injured at work allegedly through the negligence of his employers. She claimed damages for the resultant loss of her wages, on the basis that such a loss was reasonably foreseeable by the defenders. Lord Grieve, having considered the authorities, dismissed the wife's claim as irrelevant (while remarking (at p.4) that "It may seem anomalous that a claim such as that put forward by the wife should be refused as irrelevant, whereas if the same sum had been claimed by the husband on the ground that he had to engage domestic assistance and pay for it because of his injuries, his claim would have been sent to proof. This case however is not pled that way ...")[1]. The reporter notes that the wife is thought to have entered a reclaiming motion. Lord Grieve's judgment contains comment on some of the relevant cases: it appears that he concludes that a distinction must be drawn between a claim for loss of support through death of (or injury to?) a spouse, and a claim for loss to the pursuer (non-injured spouse) arising by reason of the increased dependence upon him/her of the injured spouse. The latter his Lordship did not consider a good claim, and he regards Lord Cameron's judgment in McBay as an attempt "to give the husband's claim the colour of a claim for loss of support", when it was truly to be viewed as an independent claim for loss to the pursuer by reason of injury sustained by the pursuer's wife and not for loss "caused by the removal of support which he was entitled to receive". It seems likely, however, that Lord Cameron saw more clearly the de facto inter-relationship of the husband and wife duty of support /

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1. Clive and Wilson (p.272) doubt L.Cameron's obiter suggestion in McBay that a husband could recover the cost of a housekeeper made necessary by the death of the wife.

support. "The claim here is not one for loss of the right to claim support from the other spouse, but in respect of increased cost to which one spouse is put in performance of a current obligation of support to the other". (at p.287). Clive and Wilson[1] suggest that one reason for the reluctance of the courts to allow claims of this type is that the injured party himself could claim directly the cost of additional help in the home: in a situation of this kind, which must be common, presumably the method of securing a remedy would be for the spouses to draw up a contract for the remuneration of the wife for undertaking those extra duties. This would be a most unnatural course of action. A hypothetical loss, in Edgar v. Lord Advocate[2], was not recoverable. If the position is that members of the family may claim only upon the relative's death, but not in non-fatal injury, and that the injured party may claim only for actual but not hypothetical loss to himself (as through the cost of paid (third party?) domestic help) but not for loss to his wife, then compensation for loss to the 'family funds' consequent upon the accident is extremely difficult to obtain, and would appear to necessitate elaborate argument and unnaturally hard-headed and well-informed tactical behaviour. Lord Cameron recognised the true situation when he said[3], "Such a case as the present, however, is not founded on a claim for loss or destruction of the legal obligation of support, but in respect of pecuniary loss arising out of the fulfilment of that mutual and current obligation as between husband and wife". Perhaps it may be said that the apparent state of the law in this respect is a result of a blinkered view of family finances and a strict acceptance of the theory /

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1. p.273.
2. 1965 S.C.67.
3. In McBay, at p.288.

theory and consequences of separation of property. "... the real question for the law is the extent to which the special relationship of husband and wife should be recognised[1]". An argument may be made out for change, or at least clarification of the position; if this is so, it is unfortunate that use was not made of the legislative vehicle of the Damages (Scotland) Act, 1976, to promote discussion and to achieve such change, or clarification, as opinion dictated.

However, more modern authority (before the Law Reform (Husband and Wife) Act, 1962, which permits actions in delict between spouses) suggested that a spouse might recover damages from the other spouse's employer on the ground of vicarious liability for the second spouse's wrongdoing, as a result of which the first spouse had been injured: this must have seemed a double injustice to the third party, who (contrary to the usual case)[2] could not recover from the /

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1. Clive and Wilson, p.273.
2. Very little is said upon this point: if recovery from the husband were permitted, the result would have made a nonsense of the prohibition on inter-spouse litigation (cf.American view, supra). The discussion in Broom v. Morgan concerns the question, inter alia, whether the competence of suit against the employee is a prerequisite of vicarious liability in the employer (i.e. "true" vicarious liability or a liability of the master himself to see that the work was properly done - see per Singleton and Denning, L.J.J.). In Bruce v. Murray, Lord Morison did not commit himself on the point whether a joint wrongdoer could obtain a contribution from the husband. ("...I think the result of the Married Women's Property (Scotland) Act may have a bearing on the solution of this question if and when it arises,"), but, in any case, he felt that the pursuer's claim "she is entitled to enforce (it) in any lawful way irrespective of any obligations which arise among the delinquents inter se" (at p.238). See Cameron v. Glasgow Corporation 1935 S.C.533, where the First Division refused an order for the service of a third party notice on the husband; and in the House of Lords - 1936 S.C.(H.L.)26 - notice was refused by exercise of the court's discretion: see judgment of Lord Thankerton.

the husband and who, in a sense, was providing a remedy where otherwise none existed. The cases to some extent have the smack of policy decisions. Whether that was so or not, the trend of that line of authority might tend to suggest that the prohibition against litigation was based, not on the notion of unity, but on the undesirability of "straight" husband and wife forensic confrontation.

Relevant cases are Webb v. Inglis[1], Smith v. Moss[2], Broom v. Morgan[3] and Gormanley v. Evening Citizen Ltd.[4]. In Gormanley an action was raised by a woman against the employers of the driver of a motor van in which she had been injured while travelling therein. The driver was not allowed to carry unauthorised passengers. When the accident happened, she was unmarried, but subsequently she had married the driver. Following Webb v. Inglis, the action was held to be competent (contrast the usual position concerning actions, before 1962, for pre-nuptial delict), but the pursuer failed in that it was considered that the driver had been acting outwith the scope of his employment.

In Webb, in similar circumstances to Gormanley, and against the defender's argument that the pursuer's averments were irrelevant in that, since the pursuer could not sue her husband for damages in respect of injuries sustained by her as a result of his negligence, the defender could not be vicariously liable for such negligence, L.Wheatley, allowing a proof, said at pp.819 - "...It is undoubtedly the law of Scotland that a wife cannot sue her husband for damages in respect of injuries which she has sustained as a result of his negligence (cf. Harper v. Harper 1929 S.C.270, 1929 S.L.T.187). The ground of that decision was that at /

1. 1958 S.L.T. (Notes) 8.
2. [1940] 1 K.B.424.
3. [1953] 1 Q.B.597.
4. 1962 S.L.T. (Sh.Ct.)61.

at common law the relationship existing between husband and wife is of so intimate a character that it is against public policy that the one should have a right of action against the other as consequence of a wrong done. Where, however, the action is laid against a third party whose liability arises because of his vicarious responsibility for the other spouse's actions, different considerations seem to me to arise. In the latter case, the third party's liability springs from the legal principle qui facit per alium facit per se and he is deemed to be the perpetrator of the wrong albeit the actual injury was occasioned by the hand of another. In such circumstances it does not seem to me to matter whether the hand was the hand of the pursuer's husband or the hand of a stranger, because the wrong inflicted was a wrong which in the eyes of the law was done by the employer of the hand".

Reasoning of this type may or may not have been good: certainly it worked to the advantage of the spouses at the expense of the employer but, on the other hand, had the parties been strangers, the employer would have been liable (all other requirements being met) to the pursuer. The other approach would have strengthened an immunity otherwise unjustifiable (see below). A desire to help the wife appears to be identifiable, however, in the relevant cases.

Reference was made in Webb to the English cases of Broom, and Smith v. Moss. In Broom, per Singleton, L.J. the view is voiced (at p.607) that, "They" (the employers) "remain liable, and there is no reason either in law or in common sense why they should be given an immunity which springs, in the case of husband and wife, from the fiction that they are one, and from the desire that litigation between husband and wife shall not be encouraged". Lord Denning's opinion was that the husband's immunity was an immunity only /

only of suit but not from duty or liability. The latter was simply unenforceable by action.

Again, in Smith v. Moss, the plaintiff had received injuries while a passenger in a car owned by her mother-in-law, and driven by her husband, after all three had been at a party, and after the husband's mother had been driven home. The car owner had the free use of her son's garage, and she paid all the running expenses, road licence and insurance of the car, and allowed only her son to drive it. It was found that the collision, resulting in the wife's injuries, had been entirely the husband's fault.

It was held that at the time of the accident the husband was driving the car in the capacity of his mother's agent, and that thus the principle that there could be no tortious liability between spouses did not prevent her from recovering damages from her mother-in-law. No doubt the latter was adequately insured.

In terms of the Law Reform (Husband and Wife) Act, 1962[1], s.2, "... each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful or negligent act or omission, or for the prevention of a wrongful act, as if they were not married ...", but the court may dismiss any such proceedings brought during the subsistence of the action if it appears that "no substantial benefit would accrue to either party from the continuation thereof; and it shall be the duty of the court to consider at an early stage of the proceedings whether the power to dismiss the proceedings ... should or should not be exercised".

By s.3(3), it is provided that the words "parties to a marriage" includes persons who were parties to a marriage /

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1. 1962, c.48.

marriage which has subsequently been dissolved. Thus, it matters not whether the delict was committed before, or during the marriage, or after its dissolution, but power of litigation does not arise where the (otherwise) actionable conduct took place before the date of the Act[1]. Presumably there was never any controversy about the competence of litigation between divorced spouses if, by chance, they were involved in an incident, post-divorce, giving rise to proceedings. According to Clive and Wilson[2], there was no clear pre-1962 authority upon the question of litigation between divorced spouses where the actionable conduct had taken place during the marriage. Since the coming into force of the Act, "divorced spouses can sue each other as if they had not been married", but the authors note that the power of dismissal of the court can be exercised only where the proceedings are brought during the subsistence of the marriage. (Is this an echo of the domestic harmony rule?) "This raises the interesting possibility that a wife who has obtained a divorce for physical cruelty could sue her former husband for damages for assault"[3]. Clive and Wilson suggest also that there would appear to be no bar to inter-party litigation where the marriage had been declared null.

(For England, the Act repeals s.12 of the Married Women's Property Act, 1882, and makes a consequential deletion in the Law Reform (Married Women and Tortfeasors) Act, 1935).

It would seem, therefore, that it could happen that a widow as an individual might find that she wished to sue her husband's estate, or, as might be the case, herself as executrix, if she had been injured in /

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1. s.3(4).
2. p.359.
3. pp.359-60, and fn.22.

in an incident in which her husband had been wholly or partially to blame, and her husband had died as a result of the incident or had died afterwards. This would be a most unpleasant state of affairs, and, presumably, if the case arose at all, it would be in a situation where the widow was not favoured in her husband's will, and the estate greatly exceeded her rights in intestacy, should she contest the will. Presumably also, in such a case, she would not accept office as executrix, if indeed she had been named as such, which, in the circumstances imagined, might not be likely.

An example which occurred soon after the passing of the Act was the case of Bush v. Belling & Co.[1] in which, as a result of a road accident in 1960, husband and wife were suing the defenders, and counsel for the latter moved the court for an order for a third party notice upon the husband, who had been the driver of a car involved in the accident, with the aim that the husband might be rendered liable with the defenders, to his wife, if liability was found to exist.

Lord Walker refused the motion. Before the 1962 Act was passed, a wife could not have sued her husband in these circumstances. The difficulty of allowing the motion of course was that the husband might be rendered liable to his wife in reparation for an event which happened in 1960, before the advent of the Law Reform (Husband and Wife) Act.

It is most interesting to see that the defenders' counsel met the problem with the answer that the rationale behind the former rule was to guard against domestic disruption by the initiation by a wife of proceedings against her husband, or vice versa, but that here, the husband was being brought in, not by the /

1. 1963 S.L.T. (Notes) 69.

the wife's wish, but by the defenders' wish, and that thus there would be no affront to public policy[1].

Lord Walker's reaction was that "I am not satisfied that disturbance of the marriage relationship is the true or only ground on which the common law prohibited a wife from making her husband liable to her for reparation", and quoted Lord Anderson's suggestion[2] that the true reason was one of public policy operating against actions in contract or quasi-delict. The result of allowing such actions "would not be conducive to domestic peace or matrimonial felicity". However, L.Walker noted that "the public policy was not so far reaching as that": an action in contract had since been held competent[3].

L.P.Clyde, in Cameron v. Glasgow Corporation 1935, in which case also a third party notice was refused, had echoed the rule in the context of delict, and had cited Harper. Lord Walker noted that that particular passage had been quoted, when the case went to the House of Lords, by L.Thankerton who observed that Harper was binding in the Court of Session, and he was not swayed by the attempts of counsel to distinguish the case of Cameron from the case in dispute.

Thus, out of a transitional common law/statute difficulty, we find a good, short resumé of Scottish judicial opinion to set against the English and American counterparts.

When considering the sorry history of this branch of matrimonial law, which can be placed under the property aspect in the sense that the rule, be it pre or /

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1. at p.69.
2. in Harper v. H. at p.226.
3. Horsburgh v. H.

or post statute, affects the financial positions of the parties, beneficially or otherwise, and when considering the modern improvements thereon, curiosity is felt about the solutions found - or the rationalisations indulged in - for this problem by other systems of law, and it is perhaps encouraging to find the view expressed by McCurdy[1] that "Few topics in the law of persons and domestic relations, in view of modern economic, social and legislative changes, display in their treatment greater inconsistency and more unsatisfactory reasoning and present a more characteristic development in judicial reaction".

In the context of torts affecting husband and wives, McCurdy distinguishes those acts primarily affecting property, those primarily affecting the person, and those affecting both, and, on a time scale, those occurring before the marriage came into existence, or during its subsistence, and where the action was raised 'stante matrimonio', and those where the action was raised after the termination of the marriage.

At common law, it seems that a married woman had no capacity to sue or be sued in her own name. However, if "she had a substantive capacity, or was substantively the holder of a right" or owed a duty which she had not discharged, as a result of which an action was to be raised, the action had to be brought in the names of both husband and wife "and judgment was enforced in favor of the husband or against both husband and wife" (a state of things which appears unfair but which accorded, presumably, with the property situation of spouses)[2].

If she had what in Scots law would be called interest to sue, the matter became a chose in action of /

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1. 'Torts Between Persons in Domestic Relation' (1930) 43 Harvard L.R.1030. Wm. E. McCurdy.
2. See McCurdy pp.1031-33.

of the wife's, and, if the husband died before reducing it into possession, it remained to the wife.

If a married woman committed a tort during marriage, or contracted a debt before marriage, any action would be brought against the husband and wife and judgment could be enforced against the property of either, and hence against the husband, but, if the husband died before the judgment, the action remained against the wife alone. If the wife died before judgment, "a question of survival of causes of action" arose. The result was that "A combination of all these incidents made it impossible at common law for one spouse ever to be civilly liable to the other for an act which would be a tort if the "husband and wife" relation did not exist".

Now, McCurdy explains, where a tortious act by a future husband occurred before his marriage, and a cause of action arose in the future wife (a common situation and one which gave rise to many of the cases to be discussed) this cause of action would be able to be reduced into possession by the husband upon marriage, the union in one person of right and duty would extinguish the duty (substance) and in addition, the husband could not be both plaintiff and defendant (procedure). If the wife had been the wrongdoer, upon marriage, once again right and duty would be vested in one person, and extinguished confusione (and there would be the same procedural difficulty).

The practical remedy it might be thought would have been to postpone the marriage until the litigation had taken place, and all the consequences thereof settled.

On the other hand, during marriage, as regards property, there was only one instance in the author's opinion, in which a case could be made that a husband's act amounted to a tort in relation to his wife, and that /

that was "waste upon the wife's realty", other potentially tortious acts being negatived by the rights the husband acquired upon marriage over the property of his wife.

The problem of the fusion of right and duty in the same person also beset any proposed action relating to injury to the person, and, as far as pecuniary loss to the wife was concerned, the lack of necessity for any litigation was explained on the basis that the husband had not only a right to his wife's services and earnings but also a duty to support her.

After the death of one of the spouses, the technical difficulty of non-survival of causes of action for tort arose. The rarity of divorce at this stage rendered the problem in that context academic. Of course, no complete licence was accorded to husband and wife in their treatment of each other: some acts would provide grounds for divorce mensa et thoro, and some amounted to crime.

McCurdy notes that the so-called 'right' of a husband to chastise his wife moderately and deprive her of her liberty is long obsolete[1]. When the matter concerned the person of the spouse, the common law disregarded unity conception in cases of crimes by one spouse against the other.

Thus it can be seen that at common law, it was not difficult to explain and justify the rule on the grounds of substance or procedure, but as times changed, and inroads were made both on the substantive rules regarding marital property, and in procedure where the principals are each adult independent persons, whose autonomy might be regarded as not entirely /

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1. Regina v. Jackson [1891] 1 Q.B.671: Fulgham v. State 46 Ala. 143 (1871).

entirely extinguished by the marriage bond, it became necessary to look for another ground of justification, and McCurdy expressed dissatisfaction with the placing of too great a reliance on the notion of the merger of legal identity, since it was thought easily capable of being disregarded by the criminal law in suitable cases, as also in certain civil matters, and was not applied in the ecclesiastical courts. "At most, it is a useful phrase to sum up a result in certain cases". He concludes that the source of the common law treatment of husband and wife is a "mixture of the Bible and mediaeval metaphysics" to which had been added the Roman Law conception of the 'paterfamilias', affected in personal matters by the natural law conception of the family as an "informal unit of Government" headed by the husband, and in property matters, by the idea of feudalism[1].

Bryce[2], when describing a wife's position in the common law of England, concluded - "it is better not to attempt to explain the wife's position as the result of any one principle, but rather to regard it as a compromise between the three notions of absorption, of a sort of guardianship, and a kind of partnership of property in which the husband's voice normally prevails".

He wryly observes that the Roman lawyers were more truthful about the legal position of women ('In many points of our law the condition of the female sex is worse than that of the male') than was the notoriously optimistic Blackstone who concluded, somewhat unjustifiably - "even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England".

By /

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1. at p.1035.
2. Studies in History and Jurisprudence Vol.II, p.819.

By the eighteenth century, the more fortunate and also presumably the wealthier married woman in America might have separate estate through the device of a trust, and with the aid of equity. "The husband could even forego his right to his wife's services, and the proceeds thereof would constitute separate property." Any interference by the husband with his wife's equitable right might give rise to an action between them, but the doctrine of separate estate affected only "existing property so settled", and otherwise the effects of marriage on property and litigation remained unaffected.

The equity expedient, therefore, was not the full solution, and in the nineteenth century were passed the M.W.P.Acts, or Emancipation Acts, very similar in effect to their English and Scots couterparts, and providing that all property held as a separate estate, and all property, real or personal, owned at the time of the marriage by a woman married after the passing of the Act, and acquirenda real or personal acquired by any married woman during marriage after the passing of the Act should remain her sole and separate property free of the control of her husband, and not liable for his debts. Some endowed a married woman with contractual capacity, full or limited and power to transfer property. Some ensured that what she earned was her own and some dealt with wrongs committed by or against a married woman[1]. Although it was clear that the intent of the legislature was to clothe the wife with fuller rights and to deprive her husband of inconsistent common law rights, the Acts differed in the power which they granted to women to enforce these new-found rights[2].

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1. See McCurdy, pp.1036-37, from which this passage is taken.
2. This is described by McCurdy at p.1037.

In any event, it is true to say that a number of suits were entertained by the Courts, and among them actions for fraud, to recover rents, for trespass, ejectment, or detention of goods, for injunctions to keep the husband out of his wife's house, to put a stop to interference with property, and, in the states where there was freedom of contract between husband and wife, actions to enforce any such contract.

If a statute gave a married woman a right to her earnings, this was construed as being restricted to money earned outside the home, but there appear to have been occasions where a wife's employer was her husband, and she had an enforceable right against him for wages.

So far, there was no serious controversy, nor was there any noticeable difference from the Scottish pattern, but in the case of torts affecting the person, the true battle raged.

Mention has been made of the English case of Phillips v. Barnet[1]. A contemporary American case was that of Abbott v. Abbott. In Abbott, we are told, the court went further along the line of reasoning outlined by Blackburn, J. in Phillips v. Barnet, and the feeling was, that "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her ... As a last resort, if need be, she can prosecute at her husband's expense, a suit for divorce .... In this way, all matters would be settled in one suit as a finality ....

If the wife can sue the husband, he can sue her. If an assault was actionable, then would slander and libel /

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1. (1876) 1 Q.B.D.436.

libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits -. With divorces as common as they are now-a-days, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators - and this would add a new method by which estates could be plundered[1]".

It seems, therefore, that one of the objections raised to the bringing of proceedings after divorce upon the complaint of alleged assaults which occurred during marriage was that ample remedy could be found for the wife in criminal or divorce proceedings, both solutions which might be thought to provide hardly adequate comfort. (The judgment quoted appears first to recommend divorce, as a remedy of last resort (for tort) and then to hold it in disfavour, if the extra dimension of a recounting of tortious conduct during the marriage was to be allowed. In fact, since 1962, relatively few husband/wife actions in delict have taken place in Scotland)[2]. McCurdy cites other examples /

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1. Here once more is the expression of horror of inter-spouse defamation actions stante matrimonio.
2. Otto Kahn-Freund, in a note upon the 1962 Act ((1962) 25 M.L.R.695) remarks that this and similar U.S. legislation was prompted by the coming of the motor-car and of third party insurance. The discretionary power in the court to stay (or dismiss) an action would remove unsuitable cases while, being procedural and not substantive in nature, would not work injustice with regard to strangers to the marriage. Presumably, it was with the discretionary power in mind that he set the Act in its wider context. "It is one of those measures which are intended to mitigate the rigidity of the separation of property as between husband and wife established under the Law Reform (Married Woman and Tortfeasors) Act, 1935. Like the provisions of the Larceny Act, 1916, on thefts between husband and wife, this new statute is /

examples of similar reasoning, restrictive in its effects.

However, there were states in which a more enlightened view was taken. For example, in Connecticut in 1914, in the case of Brown v. B. it was held that under a Married Women's statute of that state, it was competent for a wife to seek damages from her husband for assault and battery, and for false imprisonment, and indeed this right was 'preserved' for a married woman (for, so it was argued, not 'gained') by a subtle argument that, "The right to contract with the husband and to sue him for breach of contract, and to sue for torts, is not given to the wife by the statute. These are rights which belonged to her before marriage, and, because of the new marriage status created by the statute, are not lost by the fact of marriage, as they were under the common-law status ..."

The decision in Brown was applied in the same court in 1925 to a case of negligence[1] and several other states thought similarly both in instances of "intentional aggression" and in car accident cases /

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is designed to make it impossible for spouses to assert property claims with regard to those assets which, though legally separate, are in fact enjoyed in common. This is good policy and in this respect the limitation of tort claims between the spouses must be welcomed". True property disputes (in England) he felt should be dealt with under S.17 of M.W.P.Act, 1882, and should not appear in the guise of an action in tort. This view might have seemed optimistic in 1962, yet the paucity of cases under the 1962 Act testify to its prescience. Spouses seem averse to attempt to obtain personal property advantage thereby; unless a clear benefit to both (as through insurance) appears to be a likely outcome such litigation does not appear to be favoured.

1. Bushnell v. B.

cases.

The crux of the matter seems to be that, while there was no objection to seeking the court's aid, while married, in the case of breach of marital duty (the path is open for a wife in most legal systems, it is thought, to seek decree for maintenance while not seeking divorce - in Scotland, of course, actions for adherence and aliment, separation and aliment, and interim aliment being competent[1]) or, while married, to seek to cease to be married, that is, to have the court dissolve the marriage, but the concept that, while married, husband and wife might sue each other for breach of a non-marital duty, as if they were strangers to each other, was one at which many courts - English, Scottish and American, no doubt in company with others - baulked for a long time, before recognising the practicalities of the situation, and permitting such actions, while perhaps providing safeguards, such as the exercise of judicial discretion against frivolous or unjustified actions[2]. The courts of New York were in the vanguard of more modern thinking: In Schultz v. S.[3], for example, it was said, "It is not regarded as discourteous to say that the ill treatment of the wife by the husband which consists in the violence of an assault and battery, is more destructive to conjugal union and tranquillity than the declaration of a right in the wife to maintain an action against her husband for an assault and battery upon her would be. It is not at all unlikely that it would operate as a restraint upon militant husbands disposed to indulge in such evidence of conjugal union and tranquillity ...."

Unfortunately these brave and sensible words were /

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1. See Chapter 4.
2. See e.g. Law Reform (Husband and Wife) Act, 1962, s.2(2).
3. 27 Hun.26 (N.Y.1882).

were to no avail, because the order was reversed in the Court of Appeals and this result was thought to have settled the law of New York in the matter.

A change of opinion began in 1927 in Allen v. A.[1] and then, in 1928, in the case of Schubert v. S.Wagon Co.[2] the Court of Appeals held that an action by the wife against the husband's employer for damages inflicted on her by her husband's negligent car driving would lie[3].

McCurdy's view is that there appeared to be, in New York, a policy against civil suits between husbands and wives for personal torts, which did not exist towards property suits.

It is interesting to see that the American Courts have experienced the same qualms as the British courts on this matter, and McCurdy is able to identify six principal reasons for the trend of judicial opinion[4] of which perhaps the overriding reason for the restriction or prohibition of such actions was the feeling that the granting of permission to pursue them would disrupt the harmony of the home, and drive a wedge between husband and wife.

In the case of assault, McCurdy remarks that there obviously is little domestic tranquillity left. In the case of car or other accidents, where the true defender may be an insurance company or an employer, the negotiation or pending litigation or negotiation may have no effect upon family happiness, peace and harmony. "Indeed, the strongest argument against such actions is not disruption of domestic tranquillity, but the danger of domestic collusion".

Further, when the marriage was terminated by death /

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1. 246 N.Y.571, 159 N.E.656 (1927).
2. 249 N.Y.253, 164 N.E. 42 (1928).
3. Cf. Broom v. Morgan [1953] 1 Q.B.597 and other cases referred to supra.
4. See pp.1050-54.

death or divorce, why should not an action have been allowed then, against the former spouse or the spouse's representatives?

While it could have been said that a private prosecution by one spouse against the other, or an action for separation or divorce or maintenance were more disturbing to domestic harmony than an action in delict, and yet of course the former were permitted, exception could be taken easily to that argument, because in those cases, there was no danger of disturbing family happiness, as it had been disrupted already. McCurdy suggests that the argument of those who aimed to uphold family unity was based upon a desire to guard against the possibility that there might abound cases arising out of trifling instances of negligence and small wrongs. It is certainly true that, in the absence of special rules as, for example, one placing the matter in the discretion of the court[1] there would be no check against ill-advised litigation in civil matters except perhaps the expense thereof and the solicitor's advice, while in criminal matters, where in a state or public prosecution, the prosecuting officer, or in Scotland, the Lord Advocate and the Crown Office, would tend to deflect undesirable or unnecessary cases, in a private prosecution. On the other hand, some other check would surely be needed - although, as has been said, by that stage, too much fear should not be felt for domestic harmony, which must have been somewhat upset by the alleged act, and the threat of proceedings. In Scotland, the consent of the Lord Advocate to a private prosecution should be obtained, or at least should be sought - for he has no right of veto, and upon complaint by the individual, the High Court of Justiciary may uphold the Lord Advocate's decision or direct him to /

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1. Cf. Scotland: Law Reform (Husband and Wife) Act, 1962, s.2(2).

to give his concurrence, or allow the individual to continue without his concurrence[1]. Where a Bill for Criminal Letters to authorise a private prosecution is presented, its author must at least have sought the concurrence of the Lord Advocate[2]. In view of the rarity of private prosecutions in Scotland, a comparison is artificial[3], and it may be that a domestic dispute would be dealt with more appropriately (now) by civil action. Although in private prosecution some special personal interest must be shown, (a wrong to the prosecutor must be alleged), yet at least according to L.J.Cl.MacDonald[4], the nature of the action /

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1. Cf. J. & P. Coats Ltd. v. Brown 1909 S.C.(J) 29.
2. See Robertson v. H.M.Adv. 1892, 3 White 230: 15 R (J) 1.
3. As to English rules concerning prosecutions between spouses, see infra.
4. In J. & P. Coats Ltd. at p.34, where the L.J.Cl. states that the High Court, in its consideration of the withholding by the L.Adv. of his consent to the prosecution, must ponder whether that refusal "may involve a wrong to the citizen complaining, and a failure of public justice". The 'right' to prosecute must not be used "for vindictive or malicious ends", and, in his opinion, the requirement of seeking the L.Adv.'s concurrence served as a check against such use or misuse. A recent example of attempted private prosecution is McBain v. Crichton 1961 J.C.25, in which an individual sought to prosecute a bookseller for the sale of books allegedly obscene and designed to corrupt the public morals. See generally "Criminal Procedure According to the Law of Scotland", Renton & Brown, 4th ed. 4-04-06 and 13-19-13-21. Cf. Glanville Williams, "The Legal Unity of Husband and Wife" (1947) 10 M.L.R. 16 at pp.25-26: "On the other hand, if the rule is that nobody in the world can prosecute one spouse for a crime committed against the other spouse, it becomes necessary to distinguish between crimes committed against the other spouse as such and crimes against other persons .... This involves a new judicial classification of crimes. For instance, it would be necessary to determine whether insulting behaviour directed against the other spouse in public, whereby a breach of the peace is likely ... is a crime specifically against the other spouse, or a crime against /

action is ad vindictam publicam.

In these questions, we are in the realm of public policy (and a vaguer aspect of it than usually encountered), which is a category thought in Scotland imprudent to extend. McCurdy remarks that there is nothing to show that there had been a significant rise in marital disruption or a noticeable flood of litigation in those states which permitted such actions. He quotes the dissenting opinion of Mr. J. Crownhart in Wick v. Wick[1] that "Courts may prophesy, but the practice often leads them to embarrassment - Every step taken to emancipate women from the rigorous restrictions of the common law has been met with dark forebodings on the part of the judiciary. But now that women have been put on a parity with men as to their personal and property rights, society survives, with none of the dark portends of the judicial prophets realized".

Possibly the most interesting part of Professor McCurdy's dissertation upon this subject is contained in his suggested solutions to the problem. Presumably similar reasoning must have been in the minds of many, before Scots law on the matter was changed.

First, the courts might disallow any civil action between husband and wife - but so many such actions were established and accepted (as in property) and some (consistorial) are so necessary, that it would be unthinkable to attempt to enforce such a rigid rule for the sake of logic and neatness.

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against other persons (e.g. the State, or the public at large) on account of the danger to the peace. If the latter view were taken, he asks, why should not the crime of libel be treated in the same way? "Surely the theory of the Criminal law is that all crimes affect the public at large, and if this be true it is impossible to divide up crimes in the way suggested".

1. 192 Wis.260, 264-5, 212 N.W.787, 789 (1927).

If the courts were to permit all property suits, but no personal tort actions, the injustice created would almost certainly outweigh the possible dangers; again, the restriction of personal tort actions to those which concerned substantial injuries and which were of a nature most unlikely to affect domestic relations would seem altogether too pragmatic a solution, unsatisfactory in its lack of principle[1], and furthermore, would surely require that a great discretion be placed in the hands of some person or judicial body. If a requirement was made that the court decide whether a prima facie case had been made out that the action qualified, who would adduce evidence that domestic harmony was likely to be unharmed? What would happen if husband and wife disagreed on that point? Would that perhaps in itself be evidence that the action should not proceed?

To allow all actions, whether personal or property, and to treat the parties as unmarried and unrelated, seemed to the author too broad, on the other hand, for he considered that "it is a matter of common knowledge that the conduct of husband and wife towards each other generally is different from that of strangers".

For example, since both are involved in a common enterprise, for common benefit, often with common control, "each should bear the risk which the other takes in the ordinary conduct of the domestic establishment".

His criticism therefore would be that "only those acts which are outside the scope of marital intercourse would constitute causes of action" and this would provide a more flexible test than that of harmony and substantial harm, yet one not quite so wide as total permission for all actions without allowing /

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1. "... such a view seems to be without logic in its place of chief application: liability insurance policies" McCurdy, p.1054.

allowing for the specialties of the marital relation. He considered that such a treatment would be analogous to that received from the courts in respect of a wife's services and earnings under the Married Women's Statutes.

However, this solution, so sensible at first sight, is followed by the example that, in that most important group of car accident cases, a wife would not have a right of action against her husband, for injuries sustained while travelling as a passenger in his car or in a car driven by him, but should she have been run down by him under such circumstances that a stranger might have been injured similarly, an action would lie. If this is a fair example of the test in action, then it is not sensible, and shows a similar lack of boldness of approach which was subject so far to the criticism of the author. Is it reasonable to construct a rule to the effect that a wife (or husband) impliedly acquiesces in negligence by the other partner, simply by reason of the marriage relationship? This is a far-reaching extension of the volenti principle. Since inter-spouse litigation in tort is now competent in Scotland, England? and in U.S.?, it might seem that such discussion is of no further use: the battle is won. Yet is a different system of property-owning in marriage emerges, will not a new system of rules, in many other spheres, including inter-spouse litigation, become necessary in its train?[1] After all, the partnership is not liable for delictual actings of a partner against a co-partner, although personal liability may arise[2]. A new embrace of the communio bonorum would carry with it many consequential changes and would demand consideration of its effects in all free aspects of marriage /

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1. See Chapter 7.
2. Partnership Act, 1890, s.10.

marriage.

By 1966, no great improvement appeared to have taken place. In "Litigation Between Husband and Wife"[1], the reasons for judicial dislike of inter-spouse suits is analysed, and, once again, loss of domestic harmony is a pre-eminent rationale. Another reason adduced was that the judicial forum was not the proper place for the resolution of problems affecting family matters; non-legal remedies (self-help, private and church agencies) may be unsatisfactory, however, should the rights of an individual, in other circumstances enforceable at law, be made to depend on his/her powers of persuasion (the traditional, imperfect, tool of women to achieve their wishes)? The two bases for this view the author identifies as being the 'privacy of personal relationship' and the 'complexity of resolution of dispute' arguments. "If this rationale is to be given any weight, it should at least be applied with selectivity". There is also the danger of collusive claims, an argument running "directly counter" to the disruption of domestic harmony theory. Again, to some risks, the spouses, by entering into the marriage may be said to be 'volenti'. However, as the author notes, there is little reason to suggest that the spouses on marriage accept that they may steal from one another, that there will be no remedy for intentional or negligent harm, "and outside of marriage there can of course be no irrevocable consent to sexual intercourse which will preclude a rape prosecution despite subsequent protestations". However, immunity from prosecution for theft, it transpires (Model Penal Code § 223.1.(4)) applies generally only where there has been an agreement to assume joint control of household goods. The /

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1. 1966 Harv. Law Rev. 79[2] pp.1650-1665 ("Notes").

The 'justification' least acceptable to the author was that the status of marriage dictates to the contracting parties many of the incidents thereof. Obviously that is true, (and must be true to some extent or all is chaos) but as to judicial inaction here, it is said that "at best the language of "status" provides a rhetoric behind which some other policy, such as domestic harmony, may be operative".

Robert Keeton[1] notes that one mode of reform (in America) is for a court to regard an issue as unsettled, and to treat it as "an issue of first impression" when next presented to the Court, and that in 1966, the court in Minnesota used this method of law reform in the context of parental and interspousal immunities.

In the particular case[2], the court refused to recognise a child's immunity from a suit by his parent(s) in respect of a car accident, but preferred to await a justiciable situation in the decision upon a parent's, and a spouse's, immunity from litigation. It seems, however, that "intrafamily liability" was one of the areas of reform of 1958-68 which prompted the author's book, and in the case of Briere v. B. 224 A.2d.588 (N.H.1966), for example, a child was permitted to sue his father. It seems strange that the parent/child lack of immunity in litigation was worthy of note in 1966. See Young v. Rankin 1954 per L.Morison - "That principle" (of eadem persona, far less the sometimes hidden doctrine of domestic harmony, the doctrine which must surely have been at the root of the American rule here) "has never been applied, and does not apply, to the case of a father and his minor son".

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1. "Venturing to do Justice" - Reforming Private Law. Robert E. Keeton, 1969.
2. Balts v. B. 273 Minn.419, 142 N.W. 2d.66 (1966).

In Patusco v. Prince Macaroni[1] a wife was held entitled to recover damages from the company, including damages for her medical expenses, despite the husband's marital duty to provide medical care, and despite his contributory negligence. The same or similar problems also exercised English writers. In 1947, Glanville L. Williams wrote an article entitled "The Legal Unity of Husband and Wife"[2].

He notes the usual Biblical Authority for the unity of husband and wife[3].

The important core of the article is the assessment of whether the concept of the unity of husband and wife is a principle in use, or of use, today. Is it useful, apt and appropriate or should it be disregarded, or expressly removed and replaced? In property matters, should it be confirmed?

The author finds, in the judgment of Hyde J. in Manby v. Scott[4], the following passage:-

"In the beginning when God created woman an helpmate for man, He said, "They twain shall be one flesh"; and thereupon our law says, that husband and wife are but one person in the law: presently after the Fall, the judgment of God upon woman was, "Thy desire shall be to thy husband, for thy will shall be subject to thy husband, and he shall rule over thee" (Gen.iii,16). Hereupon our law put the wife sub potestate viri, and says, quod ipsa potestatem sui non habeat, sed vir suus, and she is disabled to make any grant, contract, or bargain, without the allowance or consent of her husband". For Eve's power of persuasion modern woman has had to pay dearly.

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1. Mc.235 A.2d.465 (N.J.1967).
2. (1947) 10 M.L.R.16.
3. and follows it through the Dialogus de Scaccario to Bracton, Littleton and Coke, whence it "becomes part of the stock-in-trade of the common lawyers".
4. (1663) 1 Mod.124 at p.126.

It is a confusing notion, for, there was never "complete union of property rights". It seems that in England it was still possible for a wife to own real (freehold) property even though subject to certain rights pertaining to the husband. As in Scotland and the American states, the wife was not ignored in litigation, but was conjoined as a party to the action. In Glanville Williams' words, she was not reduced to the position in law of a dog.

It was, therefore, more true to say that "the main idea which governs the law of husband and wife (until the intervention of equity) is not that of an "unity of person", but that of the guardianship, the mund, the profitable guardianship, which the husband has over the wife and over her property"[1].

Of course, the influence of equity, and statutory changes did a great deal to eradicate any importance the notion of unity did possess, and the modern position became clear, namely, that in contract and property, a distinct legal personality was accorded to each spouse. However, Williams remarks that where, as often happens, one spouse (usually the wife) lives in a house owned by the other, it is difficult to view them in the relationship of landlord and tenant, since it is presumed that in most cases and given the requirement that the husband must provide for the wife suitable accommodation, that would not be their intention[2].

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1. Pollock & Maitland, 2nd ed. i.485.
2. citing Hall v. Michelmore (1901) 86 L.T.17, Bramwell v. B. [1942] 1 K.B.370: Pargeter v. P. [1946] 1 All E.R.570: see however Scottish case of Millar v. M. 1940 S.C.56 where a wife was held entitled to a warrant to eject from her house her husband in exercise of her powers as a landlord (following MacLure v. M. 1911 S.C.200) where per L.P.(Dunedin) at p.206 is found the following statement:- "Accordingly, I think - and I would say this with great confidence were it not for the eminence /

In this context, as in that of the question of property in corporeal moveables, difficulty is encountered with respect to intention in connection with a matter about which normally neither party would give a great deal of thought. Quoad ownership of the matrimonial home, in many cases, although the initial capital payment towards the house may have been contributed by both, if mortgage facilities have been utilised, the husband, as the spouse more likely to continue to earn, will be taken bound by the Building Society to make the monthly repayments, and will do so. Even if their liability to the Building Society is joint and several, as it probably will be and should be where the parties have become joint heritable proprietors in terms of the Disposition in their favour, it will usually be out of the husband's funds that the loan is repaid, while the wife's money, if she possesses, has saved, or is earning, money, may be utilised for different purposes, and, except in cases of divorce and separation, the question of the right of property in the house will not be of the slightest concern to either of them[1].

Notwithstanding those two great areas of potential conflict (contract and property) in which the law now displays a fairly even-handed attitude, Glanville /

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eminence of the learned Judges who long ago decided the case upon the other ground" (that is, the curatorial power of the husband: Colquhoun, M., Husband and Wife, Appx.No.5) "..that it is safer to rest the matter upon the more right of property and not to mix it up with that which, in my opinion, it has nothing to do, namely, the question of the inter-conjugal relations which are enforced by consistorial process. Of course, it follows for similar reasons that a wife could have the assistance of the Court in turning her husband out of a house which belonged to her".

1. for property rights on death, see Chapter 5(2). See proposals for property transfer orders on divorce: Sc.Law Commission, Memo. No.22, 3.20 et seq. and Faculty response.

Glanville Williams points to areas in English law where the fiction of unity might be said to have still some influence namely, "the law of evidence, crime, tort, conflict of laws, status, income tax and insurance". Two of these spheres at least now lost a good measure of their dependence upon unity[1].

The English common law rules of evidence, for obscure reasons, forbade spouses to give evidence on behalf of, or against, each other. (Perhaps, as suggested by Blackstone[2], the basis was that "nemo tenetur se ipsum accusare": "nemo in propria causa testis esse debet", but Williams writes that[3] the earliest authority on the question, Coke (Co.Lit.6b), while mentioning unity, favoured however the more practical reason that if the rule were not so, "it might be a cause of implacable discord and dissension between the husband and the wife, and a meane of great inconvenience". Thus, we find echoes of the previous discussion and we return again to the "marital /

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1. Conflict of Laws: see rule that a married woman may now acquire a domicile independent of that of her husband - Domicile and Matrimonial Proceedings Act, 1973, s.1.
   Taxation: it is now possible for married persons to elect that the wife's earnings shall be taxed separately. Finance Act, 1971, s.23. In other cases, assessment of all tax due is made on the husband, though Clive and Wilson note (p.379) that there is power to the Commissioners to seek payment from the wife if the husband fails timeously to pay, and also that repayments pertaining to the wife's income are the property of the wife (Re Cameron [1967] Ch.1). It seems that, in that case, for the purposes of collection, the income was to be regarded as the husband's (cf. Income Tax Act, 1952, s.354; now see I.C.T.A.1970, ss.37/38) but in his receipt (or receipt by his estate) of the sums, the husband acted as trustee for the wife, and his estate had no beneficial interest therein. Spouses may elect to be assessed separately to tax - Income and Corporation Taxes Act, 1970, s.38.
2. Comm.i.445.
3. at p.19.

"marital harmony" theory. A similar view, he points out, is seen in Lord Hardwicke's judgment in Barker v. Dixie[1] - "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families".)

Williams finds greater satisfaction in that explanation or in Wigmore's view that there is an element of repugnance in "condemning a man on the evidence of those who share the secrets of his domestic life"[2] than on the fiction of unity, though neither explains the absence of prohibition on parent/child testimony or (less inconsistent perhaps) the ability of the spouse to give evidence on behalf of the other.

At any rate, the disability, with two exceptions (based on policy, or "the repulsiveness of compelling evidence" not on any argument of unity) has been removed by statute. One of the exceptions would be pleasing to Wigmore. In recognition perhaps of the special qualities of the relationship, spouses will not be compelled to disclose communications between each other during marriage[3]. The other arises in criminal law.

Section 3 of the Evidence (Amendment) Act, 1853, was repealed by the Civil Evidence Act, 1968, s.16(3). In Shenton's case, it was decided that the privilege applied only while the marriage subsisted. It seems[4] that it was considered that the existence of section 3 did not influence the "candour of communication between husband and wife". The privilege remains, therefore, only in criminal proceedings[5], although there has been recommendation /

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1. (1735) Cas. & Hard.264.
2. Evid. 3rd ed. § 2227.
3. Williams, p.20, citing Evidence (Amendment) Act, 1853, s.3; Shenton v. Tyler [1939] Ch.620.
4. Cross on Evidence, 4th edn. 1974, pp.258-9.
5. Criminal Evidence Act, 1898, s.1(d) (repeal of which expressly excluded by 1968 Act).

recommendation of its repeal in that context also[1].

Spouses are competent and compellable witnesses in civil litigation, and, in criminal cases[2], a spouse is a competent witness for the defence (though not generally compellable) but will not usually be competent for the prosecution, although, in terms of certain statutes, he/she may be competent though not compellable[3]. In this sphere of law, too, the familiar arguments of unity and family harmony have been utilised. Cross, however, advocates[4] the carrying into effect of the proposals of the Report of the Criminal Law Revision Committee that a spouse should be a competent prosecution witness, where the two are not jointly charged, and compellable in cases of assault or violence towards that spouse or a member of the household; compellable for the spouse where they are not jointly charged: that a spouse, without the other's consent, should be a competent witness for a co-accused, and compellable where he/she would be compellable for the prosecution, and that divorced spouses should be competent and compellable as if the marriage had never taken place. The author then sets out the reasons for his support of these changes in English law. Admissions of one spouse "are not, as such, received against the other although an agency may be held to exist on the particular facts ..."[5]

The Position in Scots Law

In Scotland, it appears that privilege of inter-spouse /

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1. by Criminal Law Revision Committee. See Cross, p.259.
2. Cross, pp.147-149.
3. Cross, pp.154 et seq. Under the Evidence Act 1877 a spouse may be compellable as well as competent as he/she may be also in certain common law cases.
4. pp.161-2.
5. Ibid., p.453. See Scottish case of Jackson v. Glasgow Corporation 1956 S.C.354, where, in circumstances in which a wife was suing the owners of a bus involved in a motor accident, averments (in other proceedings) by the husband of his own negligence was not allowed.

spouse communications during marriage depends upon the statutes governing the competence of witnesses, not upon a "sacred principle of the common law"[1]. In criminal matters, the statute applicable is also the Criminal Evidence Act, 1898: This Act has been repealed by the Criminal Procedure (Scotland) Act, 1975, the relevant provisions being now ss.141, 143, 144 (Solemn Procedure) and ss.346-8 (Summary Procedure). In terms of s.141, the accused and his spouse shall be competent witnesses for the defence, though one spouse may not be compelled to disclose any communication made by the other during the marriage. In the case of a charge of bigamy, or of offence against a child or in certain cases mentioned in Schedule 4 to the Act, and in all cases where at common law the following procedure was competent, a spouse may be called as a witness for prosecution or defence without consent of the person charged (s.143). These provisions apply both in Solemn and Summary procedure. In civil causes, the question is governed by the Evidence (Scotland) Act, 1853, s.3, a section which is similar in terms and effect to the English provisions contained in the Evidence (Amendment) Act, 1853, s.3 of which was repealed in 1968 except in relation to criminal proceedings. (In the latter Act, the phrase used in s.1 (the general provision) is "competent and compellable" whereas the Scots Act (s.3) begins "It shall be competent to adduce and examine as a Witness..."; contra, as regards privilege of communication, in the English Act, only (not) "compellable" is found, though the Scottish provision contains the words (neither) "competent (n)or compellable"). Clive and Wilson, in construing s.3, take the view[2] that this section renders the spouse compellable /

1. The Law of Evidence in Scotland: A.G.Walker & N.M.L.Walker, p.379.
2. at p.364.

compellable as well as competent in civil actions. Section 3 excepts from its rule matters communicated by each to other during marriage, but it is clear that this does not apply to conduct of the spouses, and according to Walker and Walker[1], Dickson's view[2] that third parties cannot be examined about marital communications is of doubtful validity. "... a communication in presence of third parties can hardly be said to have been "confided by one of the spouses to the bosom of the other""[3].

Under the Bankruptcy (Scotland) Act, 1913, ss.86 and 87, a wife may be examined as a witness in her husband's bankruptcy[4].

It may be that the privilege of marital communication should, as in England, no longer apply[5].

As in England, a spouse is generally a competent witness for the defence, at the wish of the accused spouse (but not of the co-accused)[6], but is only exceptionally (under certain statutory provisions and common law grounds) a competent (statute) or competent and compellable (common law) witness for the prosecution[7].

Perhaps a more important facet of the subject from the point of view of this dissertation is the English rule which, as shown before, had its Scottish equivalent - namely, that husband and wife could not in normal circumstances be found guilty of theft of the other's property. Even at one stage removed - that /

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1. p.380.
2. Evidence (3rd ed.) § 1660. Clive & Wilson approve the view taken in Walker & Walker.
3. Walker & Walker, p.380.
4. See Chapter 2, pp.
5. See generally also Clive & Wilson, pp.364-66.
6. See proposals outlined above.
7. A detailed account is given by Clive & Wilson, pp. 360-364, where the present rules are criticised on the grounds of anomalies and inconsistencies, and on the view that, generally, the present law "goes too far in protecting the conjugal relationship".

that is, in the hands of a receiver of such "stolen" property - there could be no prosecution on the grounds of the English equivalent of reset. However, according to Hale, P.C.i.514 - "Yet trespass lies against (the receiver) for such taking, for it is a trespass, but in favorem vitae it shall not be adjudged a felony; and so I think the law to be notwithstanding the various opinions"[1].

It is noted that at common law, of course, the temptation would always be of the wife, since the husband had achieved his ends by legal means.

However, under the M.W.P.Act, 1888, s.12, re-enacted in the Larceny Act, 1916, s.36, inter-spouse prosecution became competent in England if brought while the parties were living apart, and concerning an act done while the spouses were living apart, or an act done by one spouse "when leaving or deserting or about to leave or desert" the other, and brought for the protection and security of property.

The rule that one spouse might not prosecute another, therefore, became subject to this exception of protection of property, and also to the exception that a prosecution might be brought for crimes involving personal injury[2]. A prosecution for libel thus would not lie, at least according to the case of R.V.Lord Mayor of London[3].

The Larceny Act, 1916, was repealed by the Theft Act, 1968, s.30 of which renders each spouse liable with regard to offences against the property of the other as if they were not married. Under s.30(2), a person may bring proceedings against his/her spouse "(whether under this Act or otherwise)" as if they were not married, and shall be a competent witness /

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1. See Williams, p.24.
2. Contrast U.S.A. struggle in this connection, discussed supra.
3. 1866 L.R. 16 Q.B.772.

witness for the prosecution at every stage of the proceedings. The proceedings must be instituted by or with the consent of the Director of Public Prosecutions unless the parties are living apart by reason of judicial decree or order or unless the accused is charged with committing the offence jointly with his wife or husband.

Where an action is brought by a third party against a married person for an alleged offence against the latter's spouse, or that spouse's property, the accused's spouse shall be competent for defence or prosecution, and whether the accused is charged solely or jointly. However, unless the spouse is compellable at common law, he/she will not be a compellable witness, and if evidence is given, marital communications need not be disclosed. Failure to give evidence "shall not be made the subject of any comment by the prosecution". (s.30(3))[1].

In January, 1947, when the article was published, it was not possible for one spouse to sue the other in tort and of course, as was found in the U.S.A. and in Scotland, the rule worked injustice. The decision in Weunhak v. Morgan[2] was the result of the /

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1. As to Scotland, see e.g. Harper v. Adair 1945 J.C.21 (the Criminal Law of Scotland: Gerald H. Gordon, p.439).
2. (1888) 20 Q.B.D.635, to the effect that inter-spouse communication could not amount to "publication" for defamation. Contrast Wenman v. Ash (1853) 13 C.B.836 (communication through a third party may amount to publication) and see Ralston v. R. [1930] 2 K.B.238 in which no action could lie in respect of a graveyard inscription instructed by the defendant husband and giving the (false) impression that the deceased was his wife. The incident was thought to be a just cause for complaint (the wife being alive, though separated from the husband) but the defendant, by invoking s.12 of the 1882 Act, (to the effect that this action was for tort and not for the protection and security of her separate property, was able to have the action dismissed.

the now familiar mixture of "legal unity and disruption of family relations" reasoning.

Even if these results are based on the unity doctrine, they are no longer support for the theory now that the rules relating to actions between spouses in tort and delict have been abolished. Williams set out to discover "whether the maxim" (that husband and wife are one person in law) "represents a living principle of law, from which new deductions may legitimately be drawn", and concludes (at 1947) that, while the fiction of conjugal unity could not be said "dogmatically" to be part, or not, of English law, it had been utilised in certain spheres, but in such a way as to serve the ends of "public policy, or at least humanitarianism". For that purpose it was perhaps beneficial, but in the author's opinion, it should be used "only to bolster up a decision arrived at on other grounds, and (it) is not in itself a satisfactory basis of decision"[1]. Almost certainly this would be the majority view thirty years later, when many of the instances which Williams invokes no longer apply, and the clear trend has been to eradicate such 'unity-based' rules, many of which are productive of odd and unfair results in the complexities[2] of modern life. Yet if there is a new communio[3], this area of law would require assessment once again: for example, where property is held in common, what rules shall govern inter-spouse litigation in tort? Are damages for personal injury to be "frozen" until the ultimate property calculation on death, divorce, or earlier "Boskillnad"[4], or are they to form part of a /

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1. Ibid., p.31.
2. Often financial: see prevalence of insurance "cover" of all kinds.
3. See Chapter 7.
4. or anticipatory termination provision (as Germany) or suit for separation of property (as France): see Chapter 6.

a separate, private estate allowed to each spouse over and above "family assets"? In the former case, if there is to be no such separate property, whence is to come the money to meet a successful claim for damages? Would such an award be regarded, quoad the pursuer recipient, as gratuitous acquirenda, no matter that its source was the funds of the other spouse? The assumption inherent in that question is that it would be competent for the defender spouse to hold such separate funds. If that were so, then there would appear to be no objection to a "gratuitous acquirenda" fund, excepted from the common assets, as is found in many community property régimes. Indeed, such might form the defender's funds out of which to make payment. What would be the effect on the rights of a third party to sue a married person where the alleged wrongdoing had been "committed" by that spouse only, or, having been sued by one spouse, to make a claim of contributory negligence against the other spouse? "... some very difficult problems might arise, as they do in most community systems, of the extent to which this community fund was available to the creditors of either spouse for separate debts"[1]. If no private resources at all were provided for in the general case, and if there had been no contracting-out of the general scheme (assuming such was competent), what purpose is contained in pursuit by a partner of partnership assets (cf. Partnership Act, 1890, s.10), unless a certain recognition is given at that point, or on dissolution of the partnership (community of property) of the merits of the case, and this recognition /

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1. The quotation is taken from a paper entitled "Family Property in Scotland", written by Professor M.C.Meston for the Family Property discussions of the Fifth Commonwealth Law Conference (Edinburgh, 1977). The context was a consideration of spouses' rights in a "joint" account.

recognition results in a property adjustment? Human fallibility and self-interest stand as spectres behind all community schemes[1].

In 1952, an article appeared[2] in the Modern Law Review by Otto Kahn-Freund, entitled "Inconsistencies and Injustices in the Law of Husband and Wife", and some of the author's thoughts on the subject were directed to the topic of spouses' liability in tort. Here is found a discussion of the English position to that date and of the shortcomings of the Law Reform (Married Women and Tortfeasors) Act, 1935. A further treatment is contained in "A Century of Family Law 1857-1957"[3]. Kahn-Freund, though always[4] keenly aware of defects in legal treatment of the family unit, writes[5] (of the pre-1962 position concerning inter-spouse liability in tort), "observe further how the magic of the "unity" rule enables husband and wife to appear either as one person or as two, according to their convenience and usually to the detriment of the third party ..." (the doctrine of "non-identification") ...and quotes Devlin, J. in the case of Drinkwater v. Kimber[6]: "in this branch of the law husband and wife can /

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1. See generally Chapter 7. In the South African community property régime, "the only full-blooded universal community system left in the Western World" (though see also Holland) no inter-spouse litigation is competent. Doubt exists as to whether the joint estate or separate funds (if any) is/are liable for damages due to a third party resulting from delictual actings by one spouse. (See Hahlo/Gibson, Chapter 6 (S.A.)). Where parties are married out of community, neither will be liable for the deliots of the other except in the case of a master/servant relationship, and inter-spouse actions in deliot may lie.
2. (1952) 15 M.L.R.133.
3. Eds. R.H.Graveson and F.R.Crane, Chapters 5-8.
4. See Josef Unger Memorial Lecture, 1971.
5. pp.147-8.
6. at [1951] 2 All E.R.713 at p.715; decision affirmed [1952] 1 All E.R.701.

can both eat their cake and have it". Is it fanciful to suggest, he asks, that legal "inconsistencies" are in most cases synonymous with "injustices"?" While advocating a disentanglement of the rules and a removal of the "anomalous inequality between the spouses which is laid down in section 12" (of the M.W.P. Act, 1882, repealed by the Act of 1962, except so far as relating to criminal proceedings), he too argues that care be taken not to destroy "those principles and provisions which seek to give effect to the unity of the household which is a fact and not a fiction"[1]. The insistence upon a clear view of reality is a characteristic of Professor Kahn Freund's thinking and can be traced to his suggestion in 1971 of the possible advantages of the adoption of the concept of "family assets".

Great changes have taken place in English law since Professor Kahn Freund's article was written. Quoad property remedies, section 17 of the 1882 Act was extended by the Matrimonial Causes (Property and Maintenance) Act, 1958, s.7, under which the court might deal with cases where the property which the applicant claimed was no longer in the respondent's possession, and in which the court might order an appropriate sum of money to be paid to the applicant, and in addition might order the husband or wife to pay compensation for improper use or detention of the other's property. These provisions were re-enacted in the Matrimonial Causes Act, 1965, ss.26-28[2].

In 1962, by virtue of the Law Reform (Husband and Wife) Act, actions in tort between spouses are competent provided that the court does not stay the action /

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1. p.154.
2. See, e.g., Bromley, Family Law, 5th edn. pp.440-442, and see generally Chapter 6 (England).

action, on the ground that (a) no substantial benefit would accrue to either party from the continuance of the proceedings or (b) that the question in issue could be more conveniently disposed of by an application under s.17 (of the M.W.P. Act, 1882)[1].

Hence, if the case is a suitable one, the court may exercise any powers which could be exercised under a s.17 application. In England, questions of property adjustment during marriage are referred to s.17. The Matrimonial Causes Act, 1973, ss.24 and 25 give wide powers to the court in the making of property orders ancillary to decrees of nullity, separation or divorce. "Why English law should provide the wife with a strong incentive to divorce her husband has not been satisfactorily explained, but the fact remains that until a comprehensive code of family property is introduced, the wife will usually do much better to have her property dispute dealt with ancillary to divorce than under section 17 of the Married Women's Property Act 1882 which governs property disputes during marriage"[2]. (Judicial attitudes towards the construction of and the ambit of judicial power imported by s.17 have varied)[3].

For torts which do not fall into that category, there is complete freedom of litigation between spouses[4], subject to the proviso which will eliminate actions based on spurious or trivial reasons (perhaps most likely in the field of defamation, which was the area which caused greatest concern to those antagonistic to change). The insurance position is thus /

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1. 1962 Act, s.1(1).
2. Cases and Materials on Family Law, Peter Seago and Alastair Bissett-Johnson, (1976), pp.221-2.
3. See e.g. Bothe v. Amos [1975] 2 All E.R.321 and authorities there discussed. See also "Confusion in English Family Property Law - Enlightenment from Australia?", Turner (1975) 38 M.L.R. 397 and Levin, "The Matrimonial Home - Another Round", (1972) 35 M.L.R. 547, and Chapter 6 (England).
4. See Bromley, p.440. 'Action for Damages in Tort'.

thus rationalised.

By s.3(3) of the 1962 Act, it is made clear that it is competent for a husband or wife whose marriage has been terminated judicially, to sue the other for a tort committed *stante matrimonio*. The Act draws no distinction between husband and wife in any matter, and, in the event of an action being stayed in exercise of the court's discretion, substantive liability in the wider context is not affected. Thus, where a wife has obtained full damages from a third party, the latter may sue the husband in a suitable case, whether or not litigation between the spouses would have been allowed. Cretney, commenting on the Act, writes[1] that it "was primarily intended to enable one spouse to obtain compensation from an insurance company for injuries caused by the other's negligent driving. Little advantage seems to have been taken of the facilities thus provided to litigate domestic disputes".

Inter-spouse actions in contract are well established: such actions in tort have received acceptance in England and Scotland only since 1962. In circumstances which would merit an action in delict or on a quasi-contractual basis such as recompense, or in contract, the injured spouse may choose the course which appears most advantageous. In suitable circumstances, and action of count, reckoning and payment would presumably be competent. In all property-based litigation, however, the difficulty is one of proof for there is an artificiality in applying to the married state rules designed to resolve disputes between strangers[2].

By /

1. Principles of Family Law (2nd edn.) p.293.

2. It was the conclusion of the Social Survey Division in their report on Matrimonial Property (Todd and Jones) (*infra*, Chapter 7) that "in the population as a whole many married couples do not have large financial /

By s.3 of the Law Reform (Married Women and Tortfeasors) Act, 1935, it was made clear that in England a husband was no longer to be liable for torts committed by his wife before or during marriage, or for ante-nuptial contracts, debts or obligations, although of course, as in Scotland, liability may arise by reason of vicarious liability or joint wrongdoing.

The Law of Engagement

In Scotland, it remains possible for a party previously betrothed to sue the other contracting party for "breach of promise of marriage", and, if successful, may expect to receive from the defender a sum in name of solatium for hurt feelings, reimbursement for any expenses justifiably incurred in contemplation of marriage, and also for loss of "financial advantages"[1] which he or she might have obtained on marriage.[2] The last-mentioned head of damage /

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financial reserves behind their every day expenditure", yet occasionally, spectacular family property disputes occur as, for example, a case (Wolifson v. Harrison, as yet unreported: The Glasgow Herald 29/7/77), which arose in the Court of Session, concerning diamond jewellery to the value of £24,000, pledged as security for a company loan. The pursuer alleged that the creditor, in breach of the contract of pledge, had made gifts of the jewellery to his wife and daughter. Again in 1975, a divorced wife sued her former husband for the sum of £33,580, on the ground that he had abstracted the money from her by means of asking her to sign blank cheques for small household bills. (Dennis v. D. The Glasgow Herald: 24/6/75) Mrs. Dennis had received, it was suggested, an allowance of £5,000 from a male third party, (averred by the plaintiff to have been her lover before her marriage, many years before) jewellery to the value of £80,000, and a house in Bermuda - in all, a benefit, during her married life, of, it was alleged, over £400,000. With this estimate, Mrs. Dennis disagreed. No report of the outcome appears to be traceable.

1. Walker, Prins.I, p.236.
2. S.L.C. Consultative Memo. No. 54 (2.1.-2.19) considered the subject of breach of promise of marriage and concluded that it is in need of reform, that such actions should be abolished, or at least restricted to damages for specified types of pecuniary loss, and sought views.

damage is perhaps somewhat less justifiable, not to say quantifiable, than the first two. When education, career opportunity and salaries for men and women are coming as near equality as may be possible of attainment[1], marriage should be regarded perhaps rather as a fortunate event than as a means to achieve wealth and status, but no doubt there will always be match-makers and fortune-hunters. "It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife"[2].

However /

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1. See e.g. Sex Disqualification (Removal) Act, 1919: Equal Pay Act, 1970: G.J.Mepham, Equal Opportunity and Equal Pay, (Institute of Personnel Management): Sex Discrimination Act, 1975, (s.53 of which established Equal Opportunities Commission).
2. Mrs. Bennet, Pride and Prejudice, Jane Austen. The benefit of marriage to a wealthy partner may yet be recognised by the courts. Thus, where a husband in poor health had become accustomed to a high standard of living by reason of his wife's financial position (her assets amounting to £78,000), this was reflected in the lump sum award of £10,000 made to him on divorce. (Calderbank [1975] 3 All E.R.333). This case was noted by G.A.MacDonald in a paper entitled 'Family Property Law in England and Wales', submitted to the 5th Commonwealth Law Conference (Family Property discussion). He remarks that the Act makes no distinction between the sexes here.
Per Scarman, L.J. (at p.338): "Basically the principle of the sections" (ss.21-25, Matrimonial Causes Act, 1973) "is that each spouse comes to the court on a basis of equality". At p.340: "...I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property on a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life. It does not follow that, because they come to the judgment seat on the basis of complete equality, justice requires an equal division of the assets. The proportion of the division is dependent on circumstances ...." Although the legal obligation to maintain was on the husband, by construction and to some extent by the back door ("obligations and responsibilities" - s.25(1)(b): all the circumstances of the case must be considered: not /

However, for solatium and outlays, it might have been thought that, by virtue of the rules of breach of contract[1] and with the object of 'restitutio in integrum' in view, such litigation should undoubtedly be competent. By the Law Reform (Miscellaneous Provisions) Act, 1970, breach of promise actions in England have been abolished. This Act "introduced a special code to deal with some of the proprietary problems which may arise from the termination of an engagement" (for example, that the (woman's) engagement ring is an absolute gift (though this is a presumption which may be rebutted) - in order that she may throw it away rather than return it, if "jilted" - thus changing the rule that she who unjustifiably breaks the agreement must return the ring: a distinction is drawn between engagement rings and other gifts, and even perhaps between the engagement ring and a ring given by fiancée to fiancé, as, for example, a signet ring, possibly to be regarded as a gift conditional on the occurrence of the marriage)[2]. Although damages for breach of promise are no longer competent in England, disputes which are property based may be brought under the aegis of s.17 (M.W.P.Act, 1882), by parties previously engaged to each other, provided that the litigation pertains to property in which either had an interest while the agreement subsisted, and that the action is brought within three years of its termination[3].

In Scotland, gifts made by third parties to the engaged /

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not only legal obligations are intended to be referred to in the provision), the husband's right to continuation within reason of a certain way of life (previously provided by the wife) was recognised.

1. though generally damages in contract are not recoverable for hurt feelings: Addis v. Gramophone Co.[1909] A.C.488.
2. See Cretney, pp. 279-283.
3. L.R. (Miscellaneous Provisions) Act, 1970, s.2(2). See Bromley, p.441.

engaged couple are to be returned if the marriage does not take place[1]. Gifts made by the parties themselves to each other may be recovered, if they were made in contemplation of marriage. Probably the most important instance is the matter of the return of the engagement ring(s), though perhaps the rules here are anomalous in that conduct appears to be relevant to the question.

The position seems to be that if the engagement is broken without justification, the party who terminated the engagement will lose right to the ring. Thus, if the man has broken the agreement, the woman may keep the ring, and if the woman has broken the agreement without due cause, she must return the ring. According to Jacobs v. Davis[2], the ring is given on implied condition that it will be returned if the engagement is broken.

However, if the woman is justified in her action, she may retain the ring and likewise if the man has legal justification for his conduct, he may recover the ring[3].

If the parties agreed to terminate the engagement, it /

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1. Stair, Institts., 1.7.7. This is an example of the condictio causa data causa non secuta. "...of which there are innumerable instances; as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore, or if it be dissolved within year and day, without a living child born, our custom makes all to return, as if there had been no marriage; of which formerly". (Stair ibid.) Whether restitution would now follow in the latter circumstances must surely be doubtful.
2. [1917] 2 K.B.532. (The ring) "still retains its character of a pledge or something to bind the bargain or contract to many, and it is given on the understanding that a party who breaks the contract must return it," per Shearman, J. at p.533.
3. Cohen v. Sollar [1926] 1 K.B. 536.

it is thought that the ring should be returned[1].

These rules have been superseded quoad English law by the Law Reform (Miscellaneous Provisions) Act, 1970, s.3(2), but would appear to remain good law in Scotland. The English provisions are that the donor (being a party to the engagement) of a gift of property made on condition (express or implied) that it shall be returned if the agreement is terminated, "shall not be prevented from recovering the property by reason only of his having terminated the agreement" (s.3(1)), and (s.3(2)), that the gift of the engagement ring shall be presumed to be an absolute gift, but this presumption may be rebutted by proving that the ring was given on condition, express or implied, that it should be returned if the marriage did not take place (for any reason).

As far as Scotland is concerned, outright gifts are not recoverable[2]. It used to be thought that the engagement ring should be regarded as an outright gift, but this view has changed[3], and it is considered as /

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1. See Savage v. McAllister (1952) 68 Sh.Ct.Rep.11.: Walker, Prins. pp.236-7: Clive and Wilson, pp.29-30, express greater doubt about the matter. They note that "[A]n engagement as such has no patrimonial effects. The normal rules of property law apply", and that, by reason of the condictio causa data causa non secuta, transfers of money or property from one to the other for the purposes of setting up the home, must be returned if the marriage does not take place, irrespective of fault or conduct.
   Wedding presents from third parties, upon break-up of the marriage, are dealt with in England in accordance with the donor's intention. Where the marriage does not take place, the gift is to be returned, it being presumed to be conditional on the occurrence of the marriage, but this presumption may be rebutted as, for example, if the present is for immediate use. See Bromley, p.18 and p.448.
2. Gold v. Hume (1950) 66 Sh.Ct.Rep.85.
3. S.L.C. (Memo.No.54) thought that there should be no special code of rules governing the property of engaged persons, but wondered whether or not an exception should be made in respect of the ring(3.6.); perhaps a rebuttable presumption that it was an unconditional gift?

as a gift made on condition that the marriage will take place, although of course parties may make their own arrangements as to this matter. Possibly the same view would prevail concerning the gift of a ring to the man, but the point does not seem to have been made clear[1].

Gifts

Donations between spouses were revocable by the donor, under common law, but by the M.W.P.(Sc.) Act, 1920, s.5, the opposite result was achieved, and such gifts are now irrevocable except that the creditors of a bankrupt spouse may revoke a gift if made within a year and a day of the bankruptcy[2]. In the event of dispute about the nature of the act, it must be shown that the circumstances were such that animus donandi was displayed, and that there was sufficient physical delivery to suggest strongly that a gift had been made[3]. It is possible that gifts of expediency (as, for example, a transfer of shares made in as part of a tax-saving scheme) might be difficult for the donor in time of marital dispute to show to be revocable[4].

Before /

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1. Cretney (p.280), describes the new English position in part by way of examples. He doubts whether fault has been rendered completely irrelevant in these questions. One manner of rebutting the presumption of absolute gift of the engagement ring would be, he notes, to show that it was a family heirloom. The South African rules concerning engagement gifts is outlined in Chapter 6 (S.A.).
2. Cf. similar provisions concerning policies of assurance, supra.
3. Walker, Prins.I, 261, citing Donald v. D. 1953 S.L.T. (Sh.Ct.) 69.
4. Nor are donations between strangers recoverable. However, delivery must be made and animus donandi established. Donations to mistresses would fall under this rule, it would seem. Such transfers may prove hard to recover, if subsequently alleged not /

Before 1920, therefore, a gratuitous alienation by a husband, "for love, favour and affection", was revocable by him. In Smith v. Smith[1], a husband was held entitled to prove that he had paid the consideration for the (heritable) property, although according to the disposition, it had been paid by his wife out of her own funds exclusive of the jus mariti. Since irrevocability became the rule, it is assumed that such a disposition would not be open to challenge, since prima facie the taking of title to property in the name of one who had not given consideration therefor amounts to a gift to that person[2].

Again, where, as so often happens nowadays, the title /

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not to be gifts. In Sandison v. Das (The Glasgow Herald: 27/6/75), the plaintiff failed to convince the court that he had loaned, not given, £400 to the defendant. A remaining sum of £900 had been given on the understanding that the mistress would repay the money on the sale of her house. She had not succeeded in selling the house, and, the defendant being unable otherwise to make repayment, and having 'not broken her side of any bargain', the plaintiff could recover nothing. (A mistress, equally is a stranger in law to the man with whom she cohabits, although occasionally voices are raised in favour of the establishment of rules to govern stable extra-marital relationships. (See Chapter 6 (Sweden) (cf. Memo No.22, Propn.25 and Faculty Response, pp.23-25 (assessment of needs of alimentary obligant to take account, in discretion of court, requirements of members of household de facto dependent on him). It is extremely interesting to read reports of acrimonious property wrangles between such persons, and to note that the words "partnership" and "partnership rights" are often employed by those who disdain the marriage certificate as an unnecessary piece of paper - in particular see termination of Ekland/Stewart association. The Daily Express 25/8/77).

1. 1917 2 S.L.T.219.
2. Walker, Prins. p.1471, and authorities there cited.

title is taken in the names of both spouses, and it is presumed that the consideration was contributed in equal proportions (though this may be far from true and indeed the principal contributory is likely to be the Building Society, the interest of the latter being protected by separate Standard Security), and the deposit was made by both parties equally or nearly so, but the husband makes the monthly repayments to the Building Society, and the security aspect of the transaction is linked with a policy on the husband's life, are there any circumstances in which those factors may be unravelled and weighted to determine the rights of the parties in respect of the house or its sale price?

If the title is taken in joint names of the spouses, they are deemed to be joint heritable proprietors, and, if there is a destination to the survivor, the survivor will have the benefit of accretion[1]. Professor Walker notes that the spouse who paid the price has been held entitled to evacuate by will the destination to his own pro indiviso share only[2]. The other share is presumably a donation to the other.

Accordingly, the conveyance must take care that the destination in the disposition is that intended by the spouses. It may be that they wish to own, not jointly, but in common. An owner in common may rid himself of his share, or burden it, and it will pass as he wishes by will, or according to the rules of intestacy. In this case, the result may be the granting of a disposition by a widow qua executrix, to /

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1. Walker, Prins.I, 261, citing Walker v. Galbraith (1895) 23 R.347.
2. Hay's Tr. v. Hay's Trs. 1951 S.C.329. There is much confusion of terminology in these questions - see Chapter 5. See English distinction between joint tenancy and tenancy in common, explained by Barnsley, infra, p.17.

to herself as an individual, of her husband's share of the house, a result which is of course less convenient than is the operation of accretion.

The question of ownership will generally only become of importance in case of dispute, and may well be settled extra-judicially by the parties' agents, especially in cases of non-judicial separation. It seems that, in practice, in that situation, the property would probably be sold and the proceeds divided, after payment of common debts. If the title was taken in the name only of one spouse, but the required amount of money was borrowed on security of both spouses, it may be that upon sale of the property, each would be entitled to a one-half share in the proceeds of sale[1]. It will often be the case however that the wife's security is not called upon (though her indirect contribution to the prosperity of the marriage be not denied), and it is undesirable that so great an advantage (or, in its absence, so much uncertainty) should result from an isolated preliminary precaution, adopted as a result of fortuitous good advice. It is interesting that in McDougall, L.O. (Birnam) was disinclined to follow the defender's argument that, although there was a joint obligation to pay, "substantially it was only the defender's credit that was relied upon by the lending society". (It was true, he said[2], that of the two parties only the defender was earning a salary. But it did not follow that the obligation of a married woman was valueless merely because in many cases she did not receive any wages for her domestic work). However it is by no means clear that nominal joint obligation would necessarily, or in every case, bring in its train an identifiable financial interest in the (probably /

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1. Walker, ibid., citing McDougall v. McD. 1947 S.N. 102.
2. at p.103.

(probably increasing) value of the house. Indeed, Professor Meston writes[1] that it is "fairly clear that in Scotland nothing other than direct cash contributions will give one spouse an interest in the other's house". She (for so it is likely to be) may be entitled only to have her money refunded, which is small consolation when investment in land and houses appears to be the only safe investment. Professor Meston suggests that the contrary decision in McDougall may be attributable to implied contract[2].

Where title is taken in one name only, it is possible to attempt to argue that the property was held in trust by him for the other or for both, but the averment must be proved by writ or oath[3].

The matter may be resolved at divorce, previously under the terms of the Succession (Scotland) Act, 1964, and now under the Divorce (Scotland) Act, 1976, but even here it cannot be said that a refined and predictable body of rules has been forged. Rather is there a blunt instrument at the court's disposal, and the absence of a power to order transfers of property - the present provisions being limited to the making of capital sum and/or periodical allowance awards - renders it blunter[4].

This /

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1. 'Family Property in Scotland', supra.
2. The position is extremely unsatisfactory, artificial, and unrealistic. See Chapter 5 and Chapter 7. An example of the difficulties encountered in explaining the law to the laymen is found in "Marriage, Divorce and the Family in Scotland", David Nichols (published by Scottish Association of Citizens Advice Bureaux), p.33, where the author sets out the law in as simple and sensible a manner as the rules allow. An explanation (addressed to laymen), which is very clear indeed, is provided by Professor D. G. Barnsley, in an Inaugural Lecture in the University of Leicester (1974), entitled, "His, Hers or Theirs? The Spouses' Rights in the Matrimonial Home" (Leicester University Press).
3. Weissenbruch v. W. 1961 S.C.340.
4. Such a power was advocated in Sc.L.Com.Memo No.22, Propn. /

This is a most difficult problem. As far as ownership stante matrimonio is concerned, the technicalities of English law tend to detract from its usefulness as guide and object of comparison[1]. A presumption of joint ownership is a solution which is hard to resist, whatever view is taken of the rules which should apply to other property of the spouses[2]. In England, there would appear to be enthusiasm for this change in the law, though a full-scale movement towards community of property - or even to a system of fixed rights on death, as found in Scotland - is not favoured[3]. In general, however, inspired by divorce reform in 1969, English law has achieved a more detailed, and, it is submitted, equitable approach in matters of 'family' property[4].

Entitlement /

Propn.98 (3.20 et seq) (and Faculty response - pp.50 et seq.); as envisaged it would be confined to transfers on divorce, not stante matrimonio.

1. But see Cretney, pp.239 et seq. and Barnsley, supra.

2. See discussion in Law Com.W.P.No.42, "Family Property Law", 26 October, 1971, 1.62 et seq. At 1.127, (in a passage outlining the field of choice as far as ownership of the matrimonial home was concerned), the Law Commission submit a provisional view that "a system of co-ownership would be a workable solution and that it would meet many of the objections to the present law". See Chapter 7. It has been suggested that a Bill introducing co-ownership of the matrimonial home (in England) will come forward. ("Family Property Law in England and Wales" G.A.MacDonald, supra.) See also discussion in Memo No.22 concerning property transfers (on divorce only, as yet) - 3.20 et seq. and Faculty response (see fn.1 above) See 3.21. The arguments in favour of power to order property transfers in Scotland are described by D.J.McNeil ("Marriage and Divorce in Scotland - Some Recent and Prospective Reforms" (Developments in Family Law)(Marriage and Divorce) 5th Commonwealth Law Conference, 1977) as incontrovertible. He noted the unfortunate synchronisation of the publication of Memo.No.22, and the passage through Parliament of the Divorce (Sc.) Bill, 1976.

3. MacDonald, supra.

4. Divorce Reform Act, 1969. Matrimonial Proceedings and Property Act, 1970, now Matrimonial Causes Act, 1973. See Soago and Bissett-Johnson, Chapters 5-7, and generally Chapter 6 (England).

Enticement, Rape and Loss of Consortium

The persuasion of one spouse by a third party to leave the matrimonial home may amount to the actionable wrong of enticement, giving rise to a claim for damages against the enticer, by the party whose spouse has been so persuaded[1]. In the same category (of actionable wrongs against domestic relations) was the action for damages against the paramour for adultery with the other spouse. While this remedy was competent (which no longer is the case[2]), it might take the form of a separate action, or be conjoined with an action of divorce, but Clive and Wilson note[3] that the wife's action of damages against 'the other woman' (presumably competent but of which there is no true example) had to be brought in a separate action. It may be that an action for damages by a husband against one who has committed rape of his wife[4] is still /

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1. See e.g. Adamson v. Gillibrand 1923 S.L.T.328. However, there does not appear to be any "recorded instance of damages in fact being awarded for enticement ..." (Sc.L.Com.No.42, infra, para.44). The Scottish Law Commission ibid. note the treatments of this right in various textbooks, mentioning the 'sceptical' approach taken in Clive & Wilson, pp. 280-281.
2. See Divorce (Sc.) Act, 1976, s.10, infra.
3. p.277. Actions for damages for adultery (combined with divorce actions) were thought by the Scottish Law Commission (ibid., para.10) to be very rare, and separate actions therefor now to be unknown.
4. S.10 in terms deals with damages for adultery. Neither the Act, nor its precursor, Sc.L.Com.Report No.42 was concerned expressly with damages for rape. On the other hand, the basis of both claims is the same (invasion of the husband's exclusive rights in this regard) Clive and Wilson (p.277), in a discussion of the actionability (as concerning the husband) of indecent assault of the wife (which they doubt (see contra Walker, Delict,II,719)) conclude, "[T]he notion of a husband's exclusive rights to his wife's body is not, it is submitted, one which should be extended". Moreover, in certain cases, the husband might have difficulty in establishing that rape, and not adultery, took place, and if he failed, his action would certainly be barred by s.10. Arguments /

still competent: it may be actionable that another has, by his fault, caused injury to the pursuer's spouse, the injury resulting in a loss of the amenities of the marriage - companionship, care, and, in England, though not in Scotland, loss or impairment of sexual relations[1].

It cannot be said that any of these actions which lie on the periphery of husband/wife property relations, are common[2]. They are reminders of a proprietorial cast of mind now unfashionable. Enticement is no longer an actionable wrong in England[3], and, by s.4 of the Law Reform (Miscellaneous Provisions) Act, 1970, damages for adultery are similarly no longer obtainable. In Scotland, the latter result has been achieved by the Divorce (Scotland) Act, 1976, s.10, which states that, though the court may still award the expenses of the action against /

Arguments for retention or abolition of the action of damages for adultery, and speculation as to the basis of the action, are discussed in Scot. Law Com. No.42, from which it can be seen those respects in which the considerations regarding rape differ from those concerning adultery. For example the "disruption of family relations", "loss of wife", (though that was not a prerequisite of the action) and (to a less extent) "public disgrace" arguments for retention of such a remedy are not so cogent, or inapplicable, with regard to rape.

1. See, in England, Best v. Samuel Fox & Co.Ltd. [1952] A.C.716. (Wife's action for loss or impairment of consortium refused); but consider Cutts v. Chumley [1967] 1 W.L.R. 742. (total loss of services).
2. See e.g. Clive and Wilson, pp.280-281.
3. Law Reform (Miscellaneous Provisions) Act, 1970, s.5. See prior recommendations for England as to abolition of actions of enticement and of damages for adultery (or the restriction of the latter to its availability in divorce or judicial separation actions only, and its extension to be competent against male and female defendants): Law Commission Report on Financial Provision in Matrimonial Proceedings (Law.Com.No.25) (Family Law) paras. 99-102.

against the paramour, or alleged paramour[1], the husband shall no longer have the right to cite the wife's paramour as co-defender in a divorce action, or to claim or obtain damages (including solatium) from him by way of reparation[2]. The provision overtakes and /

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1. Part III (Sc.L.Com.No.42) discusses the paramour's liability for the expenses of the divorce, and recommends that the husband should no longer be entitled to cite his wife's paramour as co-defender, but that if the paramour should enter the litigation as a party-minuter, he/she should be liable for expenses "only on the normal principles governing awards of expenses in civil litigation". It will be seen that the statutory result of these thoughts is s.10 of the 1976 Act. Hence, if a paramour successfully refutes a spouse's allegation of adultery, then, on the "practice" that expenses follow success, he/she (no differentiation of treatment between the sexes is apparent) may receive expenses against the pursuer. (See Annotations to Statute).
It is difficult not to sympathise with the view that retention of the right to sue the paramour as co-defender might have been retained, and extended to both spouses (on the view that, in modern circumstances, either spouse should be liable for the expenses of the action according to the merits of the case, and that the husband should not always be liable for expenses, "win or lose" (para.28, Sc.L.Com.No.42). On the other hand, the question was posed (by Dr. Clive, in his comments on Memo. No.18, which preceded the Report):- Why should not the defender spouse, if he/she considered that he/she had been seduced by the paramour, also have a claim against the paramour (or all the paramours) in respect of his/her/their liability for expenses? All in all, it is probably better that the change has taken place. A rationalisation of the question, and an assimilation to the position found in "ordinary" civil litigation regarding the award of expenses, is possibly the best solution. See infra.
Contrast the approaches adopted in Tait v. T.1959 S.C.364 and Campbell v. C. 1975 S.L.T.(Notes) 47: Sc.L.Com.No.42, para 28, citing these examples, inter alia, and also Memo No.22 para.2.110.
2. As to transitional difficulties, see Annotation to Statute, and see decision in McNaught v. M.1977 S.L.T.75 which seems to be in accordance with the suggestions made in the Annotation. Nothing is said about a wife's right (if such there be) to claim damages for adultery. It is not likely, however, that such would be recognised in view of the abolition of the husband's equivalent and certain right. It is also pointed out in the Annotations that the manner of expression of s.10 precludes any argument made /

and repeals s.7 of the Conjugal Rights (Scotland) Amendment Act, 1861. This provision was the result of the deliberations of the Scottish Law Commission, in a report[1] which recommended also that actions of enticement of a spouse be declared by statute to be incompetent (Recommendation 7). The commissioners note that, since Legal Aid is not available for such actions, there is official discouragement thereof, and they suggest that such actions (if, indeed competent) are counter-productive, and likely to engender bitterness and encourage spiteful litigation.

Actions Against Third Parties in Respect of a Death: Multiple claims

The Damages (Scotland) Act, 1976, has clarified the law here. Prior to its enactment, conflicts had arisen between the claims of relatives and the claim of the executor in respect of the death.

Where the deceased had not commenced proceedings before his death, it was not competent for the executor to raise an action for solatium, but he might claim for patrimonial loss to the estate, to the date of death. If an action had been raised by the deceased, the executor could continue it for the sums claimed (being in respect both of solatium and of patrimonial loss if both had been original heads of claim), being damages due for the period to the date of death. By virtue of s.2 of the 1976 Act, to the executor passes the deceased's claim under either or both heads, to the date of death only, whether or not the deceased himself had raised an action before his death. Any sums recovered fall into the estate, to be disposed of /

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made by a husband that he may sue the paramour in an independent reparation action.

1. Family Law - Report on Liability for Adultery and Enticement of a Spouse (Scot.Law Com. No.42 - 23.6.76).

of according to the terms of the will or the rules of intestate succession. The claim can cover ante-mortem loss only[1].

To be distinguished from such a claim, therefore, are the claims of surviving relatives. Section 4 states that the executor's claim (above) is not to be excluded by a relative's claim under s.1 or *vice versa*.

A prominent case on the point had been that of Darling v. Gray[2], which had decided that concurrent actions by a mother *qua* executrix of her son and *qua* relative for solatium and damages (in her own right) were incompetent. ("There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person")[3]. The decision was subsequently rationalised to the point (broadly[4]) of allowing an action by the executor for ante-mortem, and by the relatives for post-mortem loss only, and was overruled by the case of Dick v. Burgh of Falkirk[5], in which, in circumstances very similar to those of Darling, both claims were allowed.

This result is upheld by s.4, and amplified by s.5 (Provisions for avoidance of multiplicity of actions). The effect is that the executor shall have such right of action as had the deceased for loss and suffering to the date of death: relatives shall have the rights accorded to them by s.1 (that is to claim for loss of future support (s.1(3)), and, in the case of entitled relatives, to claim a "loss of society /

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1. Annotations to Statute: D. M. Walker.
2. (1892) 19 R. (H.L.) 31.
3. per L.Watson at p.32.
4. See generally, Walker, Prins. pp.1116-7.
5. 1976 S.L.T. 21.

society award" (s.1(4)).)[1]

There shall not be transmissible to the executor the right of the deceased to sue for solatium (under the rules previously applicable) or (now) a loss of society award in respect of the death of another (s.3).

The Expenses of Litigation

In a system of separate property, each spouse will be liable for the expenses of proceedings in which he/she is involved. However, if the action could be regarded as a 'necessary' or if the apparently non-participating spouse is the true source of the action and has the true interest therein, that other may be liable for the expenses thereof. These two cases seem unexceptionable; however, even after 1920, a husband may be regarded as particeps litis, and may incur liability thereby. This ground is by no means unremarkable, and the ambit of its scope is unclear[2].

Perhaps, however, since litigation is a luxury few can afford, the question of liability for expenses, in non-consistorial litigation, will rarely be a matter of matrimonial dispute. The initiator of proceedings may be well able to pay, or the spouses may reach informal agreement upon the allocation of liability, if the interests of both[3] are /

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1. "It is essential in an appropriate case that the executor's claim under s.2 and the relatives' claim under s.1 should be clearly distinguished in the pleadings and clearly be made referable to ante-mortem losses to the injured, now deceased, person himself, and to post-mortem losses to the relatives respectively". (Annotations to Statute).
2. See Clive & Wilson, pp.367-8, and generally pp.366-8. See p. 335, footnote 1.
3. a "family" interest, requiring "family" financial rules? See Chapter 1, and Otto Kahn-Freund "Matrimonial Property: Where Do We Go from Here?" Josef Unger Memorial Lecture Jan. 1971 ("family assets").

are affected. In computations for the purpose of Legal Aid, the disposable capital and income of the other spouse is relevant in non-consistorial but not in consistorial litigation. The matter of divorce expenses is possibly the most contentious aspect of this subject. Traditionally, probably for reasons which are a mixture of chivalry and a memory of the older property rules, these have often been met by the husband, whether pursuer or defender and whatever the merits of the situation. Times have changed, and, rightly, it is thought, there is at present a proposal[1] that the expenses of consistorial or other litigation when incurred by a person entitled to aliment "should not be treated as necessaries for the provision of which the alimentary obligant is liable", although where the spouses are living together and have no contrary interest in the subject matter of the litigation, the expenses of such litigation "should (as under the present law) be treated as necessaries ..."

It is clear that this is one of the areas in which there is a mood for reform[2]. Lord Cameron, in the case of Campbell v. Campbell[3], expressed this view /

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1. See Sc.Law Commission, Memo No.22, 2.110, Propn. 23 and Faculty response. See "Expenses in Divorce Cases: A Modern Reappraisal", Frank Bat. 1974 S.L.T. 45. In Australia (Family Law Act, 1975, s.117(1) and (2)), the general rule (which may be departed from by the Court in a particular case) is that each party to proceedings under the Act shall meet his own costs.
2. Cf. Divorce (Sc.) Act, 1976, s.10 (a husband shall no longer have a right to cite the paramour as a defender in an action of divorce) - see supra.
3. 1975 S.L.T. (Notes) 47, at p.48. Here, no expenses were awarded to or by either party in the exceptional circumstances of the case. The successful pursuer (the wife) was wholly legally aided, and it was thought that the husband would suffer great financial hardship if made liable for expenses as well as bearing the other financial adjustments /

view clearly: "In consistorial causes the general rule has been that the husband is liable for the expenses of his wife. This general rule is subject to modification at the discretion of the court in cases where the wife has 'separate estate' or where unsuccessful proceedings at her instance can be stigmatised as frivolous .... In the ordinary case it appears to me that there is no longer any justification for a blind adherence to a rule designed to meet social and economic conditions very different from those which obtain today .... I am strongly of opinion that the time is more than ripe for an authoritative reconsideration of the extent to which the application of this general rule is relevant to the circumstances in which married lives are conducted today, especially in cases where both parties are not only capable of earning but are actually doing so".[1]

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adjustments consequent upon divorce. As a result of brain damage in an accident, the husband had suffered a change of personality such as to ground an action of divorce for cruelty.

1. S.L.C. Consultative Memo. No. 54 (11.1-4) considers the husband's liability in certain circumstances for expenses incurred by the wife in litigation against third parties, if he actively participates in the litigation though not as dominus litis and though the expenses are not "necessaries" for which he is liable (11.1) and conclude provisionally (11.4) that, without prejudice to any liability of the husband's as (true) dominus litis or otherwise, there should be no special rule of liability in the husband/wife case simply becuase the husband has actively participated in the litigation.

THE PROPERTY OF MARRIED PERSONS ACCORDING TO THE LAW OF SCOTLAND

VOLUME II

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ALIMENT

A General Discussion

We turn now to consider one of the most important aspects of financial relations during the subsistence of a marriage, whether one of happy cohabitation or one where there has been a separation judicial or extra judicial, and that is the topic of aliment.

"The State takes a share in the cares of the lover, and prescribes the forms that are to bind him to his mistress. Nature, while she fits the sexes for each other, leaves it to polity or law, to regulate the mode of their connexion[1]".

At present, it is well established that, on the accepted basic assumption that 'stante matrimonio' there is a duty upon the husband to aliment his wife and to keep her from want[2] - subject to certain rules regarding the conduct of spouses, to be considered later - that duty is most commonly discharged by the husband's maintenance of his wife at bed and board or by his offer to do so, by his provision for her of a roof over her head, that roof being one of his choosing, and which, if reasonably suitable, judged according to the standard of life of the parties (a standard which, at least during cohabitation, appears still to be his to set), she may not refuse.

In normal circumstances, therefore, the husband must aliment his wife, a duty normally discharged "by maintaining her in family with him, or by providing a /

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1. Dr. Gilbert Stewart's View of Society in Europe as quoted by Peter Halkerston in "A Digest of the Marriage Law of Scotland".
2. this was a return demanded by justice in the days when the wife's estate upon marriage fell to the husband - 'The husband by marriage becoming proprietor of all the wife's personal estate and entitled to all the earnings from her labour, is bound to provide her in all the necessaries of life; and if this cannot be done in conjugal cohabitation, must be done in a state of separation Stair 1.4.10; Ersk. 1.6.19. Fr. I, 837.

a home and money during his necessary absence[1]".

Fraser[2] explains the husband's obligation thus: "The husband by the marriage becoming proprietor of all the wife's personal estate, and entitled to all the earnings from her labour, is bound to provide her in all the necessaries of life; and if this cannot be done in conjugal cohabitation, it must be done in a state of separation". Clearly, this rationale became outdated. It has been suggested that the obligation arises "less as a quid pro quo for the wife's performance of her marital obligations than as a consequence of the bond of marriage", but in view of the upheaval in sociological and employment patterns in recent years, (especially the advent of the true "marriage partnership" notion) this explanation appears vague and is not especially helpful or convincing. Nevertheless, a framework of rules with regard to the obligation to support is undoubtedly necessary to protect the child-bearing and (usually) rearing partner, or the economically weaker partner.

It can be seen clearly that thought and custom have changed considerably recently and particularly, it is submitted, since 1965. Greater opportunity, greater expectations, greater certainty in the matter of birth control, and, most important, more jobs and a climate of opinion in which it is increasingly acceptable for a married woman to work without raising accusations of "stealing" the posts otherwise available for single women who cannot look to a man (unless to a father) for financial aid as married women may do, under the present system[3], or otherwise available for men who owe a duty, under the present /

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1. Walker's Principles I,263.
2. I, 837.
3. See, however, recent suggestions that married women should leave the teaching profession in order to make available more posts for new entrants to the profession.

present system, to aliment their wives and families, and without raising doubts as to her husband's solvency, or ability to maintain her, have combined to create a situation of 'two-career' marriages, and, not only in Scotland and England but in other countries, including Russia, of falling birth rate[1]. At least in Britain it may be said that there has been a change in the pattern of early married life, in which it is perhaps no longer the normal course of conduct for a husband to provide his housebound wife with a "housekeeping allowance", the limits of which she must not overstep. It was against this background that the Scottish Law Commission, in 1976, produced its Memorandum No.22, "Aliment and Financial Provision", to which a response was prepared by the Faculty of Law, University of Glasgow, and submitted to the Commission.

The members of the Faculty Working Party were Miss E. M. M. Attwooll, Mr. Ian D. McGhee, Mrs. A. M. McLean, Mrs. E. E. Shapiro, Mrs. M. Stevenson, Mr. R. Sutherland, and the author of this thesis, who was responsible for the preparation of the initial response for discussion by the Working Party, and for the co-ordination of comments thereon.

Where/

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1. Recent population figures suggested a consistent annual decrease in the number of births in Scotland. The Annual Report of the Registrar-General for Scotland for 1973 shows that the number of live births in 1973 was 74,392, compared with 102,691 in 1963. 1963 may have been a 'boom' year, but nevertheless the 1973 figures represent the ninth annual decrease in the number of births. Again, the figures for Glasgow, for example, for 1976 reveal an increase in illegitimate births, but a decrease overall in births. However 1977-1980: the Scottish birthrate figure has increased steadily (while not approaching the sixties 'boom'). The Scottish Information Office predicts a continued steady rise to 76,000 in 1983. (Glasgow Herald, 30.7.81.)

Where appropriate, references are made in footnotes in this Chapter, Chapter 5, and Chapter 7 to relevant passages in the Faculty Memorandum.

Questions which may arise concerning the Matrimonial Home

In recent years, the Building Societies have noted a most marked tendency for mortgages to be taken out in the names of husband and wife (and often calculated on the basis of both salaries, or, on the basis of the husband's salary and a proportion of the wife's, on the view that the wife cannot be regarded as the most permanent of salary-earners) and the earlier formulation of the rules[1] which insist that a house must be provided by the husband and the choice thereof must be made (finally) by him seems inappropriate[2].

A discussion of the beneficial right to the matrimonial home is not often met with[3], and it is therefore interesting to see the arguments and the result, though somewhat inconclusive, of Cairns v. Halifax Building Society [4] in which the missives had been entered into in the name of the wife as the husband's /

1. Stair 1.4.8.
2. As a matter of interest, and possible significance, it now seems to be easier for a single woman without male backing to obtain a mortgage.
3. See, however, a fresh, interesting and timeous approach to this subject, and the broader subject of aliment generally, under the head of "Aliment and Financial Provision", Memorandum No.22, Scottish Law Commission, March, 1976, particularly at Part III, "Powers of the Court" (e.g. Property Transfer Orders). By courtesy of the Scottish Law Commission, the author has had sight of draft consultative Memorandum on Family Law, The Matrimonial Home, but the contents thereof are confidential at this date.
4. 1951 S.L.T. (Sh.Ct.) 67.

husband's agent, and the husband had paid part of the price, signing a loan agreement with the Building Society as to the repayment of the remainder.

Since these events took place before the introduction of the Standard Security, title to the property stood in the name of the Building Society, and there was a minute of agreement concerning repayment and reconveyance[1]. By this minute of agreement, the Building Society bound itself to reconvey the subjects to the husband and wife on payment of the final instalment, which was due in December, 1947, and was made by the husband pursuer. His wife had died in November, 1947. The question arose whether the true owner was the husband, or whether the representatives of the wife had any claim to the whole of the property or to part-ownership with him therein. This action was one by the husband seeking declarator that he was the true owner of the house.

The house was purchased in 1939 (for £650, £520 being advanced by the Building Society) and from 1940 to 1944 the parties lived there together. In 1944 the wife sought warrant to have the husband ejected, alleging that the whole beneficial right in the property lay in her since she had bought the subjects and had made the instalment repayments. Her husband had defended the action on the ground that, in entering missives, she had acted as his agent, and that the money to make the repayments had come from his bank account. The Sheriff assoilzied the defender (husband). "His judgment proceeded on the view that the pursuer, in the present action, had a right to occupy the house. In any event, while the obligation on the society contained in the minute of agreement stood, Mrs. Cairns' right could not be higher than joint /

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1. Cf. Clive & Wilson, p.307.

joint ownership. Certain passages in his note indicate that he considered that the pursuer had proved that Mrs. Cairns had acted as his agent. The judgment, however, clearly proceeds on the view that Mrs. Cairns had failed to establish that the whole beneficial right was in her. That is not the same thing as a decision that the whole beneficial right was in the pursuer, which is what he seeks in this action[1]".

In the action in question (1951) the husband pleaded res iudicata; his plea was repelled, since the previous action had not decided the question whether the whole beneficial right lay in the pursuer. (In so deciding, the Sheriff reversed the decision of the Sheriff Substitute who had found in favour of the pursuer and had recommended an amendment of the crave so as to ask for an order upon the Building Society to execute a disposition (taking the defenders as consenters) in his favour).

In the Sheriff-Substitute's opinion, we glean the information that the pursuer (husband) considered the contents of the bank account to be entirely his property while the defenders (the wife's representatives) maintained that it represented her savings, though opened in his name - a good practical example of the lack of clarity which often attends the ownership of the assets (especially moveable) of married persons and of the problems which such confusion presents to the court.

The pursuer also explained that he was ignorant of the terms in which the reconveyance was eventually to be made, believing it to be a conveyance, upon repayment, to him alone and not to him and to his wife /

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1. per Sheriff (Thomson) in 1951 S.L.T. (Sh.Ct.) 67 at p.70.

wife jointly (averring that he had signed the document without having had it read over and explained to him: for the consequences of such lack of care and ordinary prudence, in the absence of fraudulent misrepresentation or facility, he was presumably responsible).

On the other hand, the defenders' contention was that the pursuer had merely "signed the said documents as guarantor for his wife and was not in any way owner or part-owner of the house".

According to the pursuer, he had met the monthly repayments and all the rates and other outgoings of the property, whereas the defenders contended that their mother had paid all the Society repayments except the final one and all the outlays up to her death. The parties separated in 1944, about February when Mrs. Cairns left the house: the action for ejection was raised by her in December of that year.

The question of res iudicata is not relevant to the present discussion.

It is exceedingly disappointing that no ultimate conclusion on the question of the property in the house appears to have been reported. The Sheriff having decided that the former action had not determined whether the husband had sole beneficial right in the property (but merely that his wife had not) and had left open the question of joint ownership, the case was remitted to the Sheriff-Substitute. Expenses of the appeal were awarded to the successful appellant and the question of the other expenses left for the Sheriff Substitute's decision.

The case is most unusual and valuable in its detailed exposition of the practical problems which may arise and which are not easy of solution (or even which are not often resolved at all, judicially, or which /

which must be presumed to receive no judicial solution, because of the comparative scarcity of litigation upon the problem and perhaps also because the facts may be difficult to elicit with reasonable certainty). It would have been interesting to have had reported the terms of the disposition to the Building Society. In a straightforward disposition to husband and wife, where the missives have been taken in the name of one party only, it is usual to insert a clause in the disposition in their favour, taking that party's consent to the inclusion of the other party as a disponee (on the lines of ... "and with the consent and concurrence of X for all right, title and interest competent to him in terms of the missives of sale or otherwise ...") in case there is any subsequent doubt. Nor were the missives produced "and their actual terms do not appear from the averments of the parties so as to make it clear whether the missives constituted a contract for the sale of the house between the sellers and the pursuer's wife without any reference to her acting as pursuer's agent or mandatory or whether she specifically contracted as his agent or mandatory"[1]. Husband and wife together were "the second party" - to whom reconveyance was to be made - in the loan agreement.[2]

The question of housing may be one of the principal problems of the parties where the marriage tie remains, but where there is no longer cohabitation.

If the house is rented (whether privately or as local authority housing) the lease may well be in the husband's name and it would appear that he cannot transfer to his spouse a right to remain, upon his desertion /

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1. per Sheriff-Substitute (Reid) at p.68.
2. On the important point of destinations to husbands and wives jointly, see infra, pp.350-2 and supra, Chapter 3, pp.324-327. See also Chapter 5 (2).

desertion of the matrimonial home. See Temple v. Mitchell[1] a case of summary removing with somewhat harsh results, in which the wife alone defended the action on the ground that her husband had retained possession of the rented house by leaving her, their children, and their furniture in it. She had attempted to pay rent to the landlord but he had refused to receive it. Lord Mackintosh was in favour of following the English cases of Brown v. Draper[2] in which in a very similar case Lord Greene M.R. had said that the possession of the wife was to "be regarded as the possession of the husband and cannot be treated as unlawful so long as the husband has the right to claim the protection of the Acts", and Old Gate Estates v. Alexander[3], where the decision or the trend of judicial thought was in favour of the wife, although there had been in fact a resumption of cohabitation "at the time of the entry to the plaint", and so the husband was still to be regarded as a statutory tenant in possession and entitled to the protection of the Rent Restriction Acts.[4]

In the former case, the husband had not revoked the permission to the wife to remain in the house, although he did declare that he had no interest in the house, but in the latter the husband purported to withdraw that permission (before the subsequent resumption of cohabitation) and it was doubted by Bucknill, L.J., whether, in the absence of wrong conduct by the wife, such a revocation could have any legal effect. Somervell, L.J. pondered the effect of such a revocation had the husband removed the furniture (on the assumption, presumably, that it was his to remove and that he achieved that object), a /

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1. 1956 S.C.267.
2. [1944] K.B. 309.
3. [1950] 1 K.B. 311
4. But see now Mat.Homes (Fam.Prot.)(Sc.)Act, 1981, s.13, (ct. empowered to transfer tenancy from tenant spouse to other spouse, on application of latter, or in consistorial actions). The landlord shall be given an opportunity of being heard. (Not applicable where house 'goes with job', etc.)

a question unnecessary for the decision of the case and perhaps a little unsatisfactorily answered on the basis that "it might turn on the question whether the landlord accepted that position as a proper surrender". In the opinion of Denning, L.J. is found a firmer answer, viz. "... the wife, so long as she is behaving herself properly, has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to which to go"[1] "He is not entitled to turn her out, without an order of the court: see H. v. H. (1947) 63 T.L.R. 645. Even if she stays there against his will, she is lawfully there; and so long as she is lawfully there the house remains within the Rent Restriction Acts after he leaves, just as it does after he is dead. She can pay the rent and perform the obligations of the tenancy on his behalf, and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied."[2]

Lord Mackintosh felt these were not grounded on any peculiarity of English law but his view did not prevail and it was held that the husband having left with no intention of returning, he had not retained possession of the house, and that the wife had no common law or statutory title to defend the action - the protection of the Acts was not available to her. The house was a controlled tenancy under the Rent Restriction Acts. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s.15(1) conferred on a tenant "so long as he retains possession" a statutory /

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1. Cf. the Scottish case of MacLure v. M. 1911 S.C.200.
2. For a discussion of devolution, and bequest of tenancies under Scots law, see Chapter 5 - "Rights in property arising on death".

statutory tenancy, and the question of possession was a question of fact[1]. It seemed that the manner of his going and the fact that his wife, it appeared, had not seen or heard more of him, and the absence of support by him of her, would not allow any inference of retention of possession or intention to return, and that was the crux of the matter.

It might seem, therefore, that the following Scottish authorities might be at odds with Lord Denning's view that a wife "has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband"[2].

However, if Lord Denning's view be correct, then here is another example of an exception to a rigid adherence to a doctrine of strict separation of property (in English law)[3]. The existence of aliment (or alimony) itself is another example, as are the special provisions on death. All stem from the fact that although in theory husbands and wives are to be regarded as strangers to each other in property, it is difficult always to adhere to this and at the same time to achieve a humane and fair result, bearing in mind /

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1. Skinner v. Geary [1931] 2 K.B. 546: Menzies v. Mackay 1938 S.C.74.
2. See Memo.No.22. 3.23 et seq. Faculty Memo. pp.56-58. (transfers of tenancies on divorce).
3. Professor Clive (Clive & Wilson, Husband and Wife, p.311) traces the development in England of a "possession through wife" rule to dicta in National Provincial Bank Ltd. v. Ainsworth [1965] A.C.1175 (e.g. per L.Hodson, referring to Brown v. Draper and Old Gate Estates Ltd., and to Middleton v. Baldock [1950] 1 All E.R.708 at p.1227; and see per L.Wilberforce at p.1252).
   See now Matrimonial Homes Act, 1967, s.7 (power to transfer tenancy on divorce or nullity). Cretney (Principles of Family Law, 2nd edn., p.289) comments that this is not available to a widow, or in cases of separation or neglect to maintain and does not apply to local authority tenancies, but only to those falling within the ambit of the Rent Acts (citing in comparison, Thompson v. T. [1975] 2 W.L.R.868).

mind the interdependence of husband and wife, and the aims of family life.

In the matter of tenancies, however, Scots law does appear to take a stricter view. In Millar v. M.[1] a wife was held entitled to evict her husband, since in the question of housing, they stood to each other in the relation of landlord and tenant, and the matrimonial relationship and consequent obligations were not relevant[2].

In Labno v. L.[3] the husband attempted to have his wife ejected from the matrimonial home but the Sheriff-Substitute held that an action of ejection was incompetent, since his wife's possession had not been vicious or precarious.

In his appeal, the husband argued, presumably on the basis of the ratio in Millar, that "consistorial considerations were irrelevant to a question which was purely patrimonial", and a proof before answer was allowed, the court being of the opinion that the "circumstances of the wife's occupancy and possession" would determine the competency of the action[4].

Of course, the wife's conduct may be such as to justify the husband in turning her out of doors (and into other accommodation) without relieving him of the duty to aliment her[5] in which case one must suppose that if he were not willing voluntarily to support her, her remedy would be to sue for the so-called 'interim aliment' "so long as the defender shall refuse /

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1. 1940 S.C.56 (foll. MacLure v. M. 1911 S.C.200). See 1981 Act, s.1
2. See also McLeod v. McL. 1953 S.L.T. (Sh.Ct.) 31: Macpherson v. M. 1950 S.L.T. (Sh.Ct.) 24: Scott v. S. (1948) 64 Sh.Ct. Rep.119.
3. 1949 S.L.T. (Notes) 18, reported briefly as a note.
4. See also Donachie v. D. (1948) 64 Sh.Ct.Rep.120.
5. MacLure v. M. 1911 S.C.200.

refuse to receive and entertain her as his wife"[1].

If property is bought by the husband and placed, for whatever reason, in his wife's name, it would seem that the law presumes that an unconditional gift was intended[2] and of course donations between spouses are no longer revocable by the donor[3,4].

Professor Anton in his article, 'The Effect of Marriage Upon Property in Scots Law'[5] suggests that the case of McDougall v. McD.[6] may help to shed light on this subject in our law, although at the date of his article, no Scottish case he felt was on all fours with the English ones quoted.[7]

In McDougall, the missives were taken in the husband's name, but £70 of the purchase price was derived /

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1. Logan v. Wood M.8877 (1561); Gray v. Croall (1832), 11 S.185, Ferg. Cons. Law p.196; Balf. p.95) a case in which the pursuer sought aliment since her husband had turned her out of doors and in which he in turn alleged that she had committed adultery and that he had raised an action of divorce against her. He had a salary of £78 p.a. and offered aliment at the rate of 5/- per week. The pursuer sought £20 p.a. "as what she would be entitled to in the event of a judicial separation". The Court awarded £18.5/- p.a., being 1/- per day. The wife cited in support the case of Leslie & Brown's Supp. 880. However, this is one of the old "aliment only" cases discussed later (infra, p. 361) (See also Moffat v. M. 1 Mar.1804 not reported but stated Hume, Sess.Papers, Winter 1803-4, No.46, Adv.Lib.).
2. Newton v. N. 1923 S.C. 15 per L.Sands at p.26; Beveridge v. B. 1925 S.L.T. 234; R. v. R. 1925 S.L.T. (Sh.Ct.) 49.
3. M.W.P. (Sc.) Act, 1920, s.5.
4. For the English position, before the flood of new family law legislation (The Matrimonial Homes Act, 1967; Divorce Reform Act, 1969; The Matrimonial Proceedings and Property Act, 1970; and the consolidating Matrimonial Causes Act, 1973) see Rimmer v. R. [1953] 1 Q.B.63, Cobb v. C. [1955] 2 All E.R.696, Jones v. Maynard [1951] Ch.572.
5. 1956 M.L.R. 653.
6. 1947 S.N. 102.
7. It is essential to note, now, however, that the Matrimonial Homes (Family Protection) (Scotland) Act, 1981, (See Chapter 7) confers a statutory right of occupancy upon a spouse who is not the owner or the tenant of the matrimonial home.

derived from the wife's side of the family (from her mother) and the remainder was supplied by a Building Society.

It was a "life assurance linked" mortgage for which both spouses completed proposal forms, and the application for a loan was joint. Before the disposition had been granted and recorded, the husband had re-sold at a substantial profit and had appropriated the difference. The wife not unnaturally claimed repayment of the £70 which belonged to her mother and half of the net proceeds of the re-sale.

Lord Birnam sustained the wife's claim, since it was as clear as it could be that the intention had been to take the title in both names and to hold the property as their joint property (and in the circumstances, Professor Anton thought the decision easier than Rimmer)[1].

Professor Anton also notes the absence in our law of a provision analogous to the M.W.P. Act, 1882, S.17 or to the rule to be seen in operation in Bendall v. McWhirter[2]. He remarks rightly that this is a most important question because of the possibility of eviction but also because these days (even in 1956, but how much more so in the inflationary decade of the 1970's?) investment in heritage may prove to be the best of all investments and may represent more than ever before the spouses' principal and most valuable asset.

The precise terms used by the conveyancer of the destination to a husband and wife will be of importance[3].

Thus, /

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1. Cf. Cairns v. Halifax B.S. supra.
2. [1952] 2 Q.B. 466.
3. See Chapter 3, pp.324-327.

Thus, it seems that if, as is often the case, the destination is to "husband and wife equally between them and to the survivor of them", the registration of the deed confers on each a one-half pro indiviso share therein. Now, it may be that if the purchase price was made up truly of more or less equal contributions by the parties, that the destination is to be regarded as contractual and neither may revoke the destination to the other[1]: on the other hand, if the taking of title was purely an expedient arrangement and the funds were provided wholly by one spouse, Professor M.C.Meston[2] suggests that that spouse may have power to revoke the destination to the other, 'so far as it provides that his or her one-half of the property is to pass to the other spouse - that is, assuming a power to revoke - in which case it will be necessary for the purposes of the 1964 Act, s.36(2)[3] to discover whether the destination has or has not been evacuated. If not, it would still have been part of the estate for the purposes of Estate Duty (now of course repealed and replaced by Capital Transfer Tax: transfers between spouses do not attract Capital Transfer Tax, whether made on death or during the lifetime of the transferor and whether or not the spouses are cohabiting /

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1. Perrott's Trs. v. P. 1909 S.C.522.
2. "The Succession (Sc.) Act, 1964" 2nd edn. p.16.
3. which defines "estate", and includes within the definition estate over which the deceased had a power of appointment, subject to the provisos that (a) where any heritable property belonging to a deceased person at the date of his death (is) subject to a special destination in favour of any person, (the property) shall not be treated for the purposes of this Act as part of the estate of the deceased unless the destination is one which could competently be, and has in fact been, evacuated by the deceased by testamentary disposition or otherwise; and (b) heritable property over which the deceased had a power of appointment but which, by reason of his failure to exercise that power, falls to be exercised by another person shall not be treated as part of the estate of the deceased.

cohabiting - see "Pinson on Revenue Law", 10th edn., 19-02), but Professor Meston at p.16 suggests that the executor may not confirm to it. Presumably it must vest automatically in the survivor without need of a further disposition registered in favour of the survivor - for who would grant that deed? The executor could not do so, if the remaining half-share of heritage was not included in the confirmation. [1]

An interesting case upon special destinations is Walker's Exec. v. W.[2] in which, where a husband, in exchange for a loan of £500 (entirely his own money) lent to harbour trustees on the security of their harbour, took the assignation in the name of himself and his wife "equally between them and to the survivor of them" etc. and kept the assignation in a drawer accessible to both of them, it was decided that there had been no delivery of the deed, and that the sum represented by the assignation belonged to his estate. There had been no divestiture of the assignation.

However, after seeing to that destination, he had made a will conveying his whole estate to his executor that he might divide it among the relatives and give one-third of the whole estate to the widow. In addition to her share, the widow was entitled to the £500 of the assignation, because it was held that the special destination therein was not affected by the general disposition in the will.

Currie on Confirmation of Executors suggests[3] that the correct treatment of the property depends on whether the deceased retained control of the property or was divested during his lifetime in favour of the donee. If he did retain control and was /

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1. See generally Meston, pp.15-17.
2. (1879) 5 R.965.
3. "The Confirmation of Executors in Scotland". 7th edn. (A.E.McKne) pp.171/172.

was entitled to alter the destination, did he do so? Upon the question of entitlement to alter, the power may have been removed by delivery, or infeftment[1.2.3], or by the fact that the destination was truly contractual.

Upon the second question, the problem will arise usually where there has been a general will, and Currie states that the presumption is that a general conveyance or general clause of revocation in the will will not operate to revoke the special destination[4] whether the destination was earlier or later than the will.

If the destination remains good, it is "complete to the donees as titles without the aid of confirmation. They really do not pass to the executor as such, or at all"[5]. Thus, they should not be entered in the inventory proper, but annexed in the appropriate account.

The meeting of the mortgage repayments may still be undertaken most commonly by the husband[6] and thus it may be said that, whatever the form of the arrangement, the house is still being provided, in many or most cases, by him, but if a wife is also earning a salary - or indeed, even if she is not - a contribution (in money or in kind, in the sense of the provision by her of work otherwise perhaps requiring to be achieved by the payment of a wage to a domestic help) is nevertheless made by her. According /

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1. Evacuation of that party's own pro indiviso share is still possible after registration of the disposition - Hay's Tr. v. H.'s Trs. 1951 S.C.329.
2. but see Cameron's Trs. v. Cameron 1907 S.C.407, discussed, distinguished, and (per L.Shaw of Dunfermline) doubted in Carmichael v. C.'s Exx. 1920 S.C. (H.L.) 195.
3. Cf. also Clive and Wilson, pp.298-303.
4. Walker: Murray's Exrs. v. Geekie 1929 S.L.T.524: Perrett.
5. Currie, p.172.
6. there are a myriad ways of family budgeting: see "Matrimonial Property" by Todd and Jones H.M.S.O. 1972, discussed in Chapter 7.

According to Fraser, such an effort seems to have been expected of her at his day also - "A wife is bound to contribute her exertions to the family support, according to her husband's means".[1] Is it therefore right that she should risk the forfeiture of his support by reason of lack of enthusiasm for his choice of a suitable home?

Once again, we stray far from the reality of things here, since, in the majority of cases, in the spirit of equal partnership which exists in many marriages, the husband would no more think of the purchase of a house without his wife's approval than she would without his - in other words, neither will act without the other's knowledge and consent. Indeed, where a mortgage is taken out in joint names, the wife must be cognisant of and acquiescent in the transaction and its consequences. Nevertheless, it would appear to be a little unsatisfactory that a rule should remain which endows the husband's opinion with all, or final, power in the matter, when perhaps that should not be, and in the majority of cases is not, the true position.

However, if houses are coming increasingly into joint ownership, should there not be a rule of joint choice, not only in fact but in law? Moreover, if it becomes the case that the matrimonial home must be placed in joint names[2], is there not a strong argument for the abolition of this rule in the face of the recognition of equality - of status and of contribution - between spouses?

Of course, the rule stems from the duty of adherence. The wife must follow the husband, unless she has legal justification for not doing so, and so a modification of the rule might be more far-reaching than would be desirable /

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1. Fr. Husband and Wife, p.837.
2. See Chapter 7.

desirable. The conventional view, after all, that the location of the matrimonial home depends upon the location of the husband's business or the best place for the furtherance of and fostering of his career, has its basis in the thought that the prime responsibility for the family is the husband's, and so long as that remains true[1], there is a lack of fairness as well as a lack of dignity in squabbles as to priority of career. Suffice it to say at present that situations such as those revealed in the following cases, are not entirely satisfactory.

It may very well be that as long as the husband has the prior duty to provide the matrimonial home, he should have the prior right to determine its location and to choose it[2].

In Muir v. M.[3] in circumstances in which a divorce on the ground of desertion was granted, and from which it emerged that the husband had disappeared to Australia in order to evade criminal proceedings and had not communicated in a satisfactory manner to his wife his circumstances, although he had written three letters to her, the L.J.Clerk (Monorieff) found that he could not say "that it is the duty of a wife to go wherever her husband chooses. At all events, the husband must be in earnest when he asks her to join him, if he does so". L. Ormidale felt that the case was sufficiently peculiar in its facts as to make it unlikely that the judgment could form a precedent for other cases.

In MacLure v. M.[4] it was held that a husband, as tenant of the house - a hotel - was entitled to have his wife removed therefrom and interdicted from returning /

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1. See however, reciprocal duty to aliment suggested in Memo.No.22, 2.12, and Faculty Memo. pp.3-6.
2. Cf.Stair I, 4.8. But see Chapter 7. See also S.L.C.Memo No.54, 9.1-4.
3. (1879) 6 R.1353.
4. 1911 S.C.200 (foll. Colquhoun v. C. (1804) M. "H. & W." appx. No.3.)

returning, since she was of intemperate habits and upset the happiness and order of the household, on the strict understanding and condition that he would provide aliment for her. (Normally, refusal to receive a wife into the matrimonial home, if persisted in for two years[1], and if the wife's behaviour did not justify her husband's course of action, would constitute desertion). Although the Court in the earlier authority of Colquhoun seems to have proceeded on the basis of the husband's curatorial power to act in this way - as in MacLure does L. Johnston who favoured the view that the right was founded on the right of control by the husband, not on his right of property - L.P.Inglis preferred to rest his judgment on the basis of the husband's right of property (as tenant) in the hotel. In the words of L. Kinnear, the husband was entitled to protect his home and business from the disastrous intrusion made by his wife[2].

Lord Mackenzie also favoured the ground of patrimonial right to that of curatorial power and emphasised that, "since the passing of the M.W.P. Act, it is quite possible that the wife may be proprietrix, and she may desire to exercise the rights which the Court now hold the husband can put in force. The same ground upon which the husband may get a warrant to eject his wife will equally entitle the wife if the circumstances permit, to get the same warrant to eject her husband, with the accompanying interdict against his return".

This point was emphasised also by the L.P. who noted /

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1. See now Divorce (Sc.) Act, 1976, s.1(2)(c).
2. Referred to in this case was the old case of McIntyre v. McI. which is not reported, but cited at Hume's Session Papers, Summer 1820, No.26 of which L. Johnston remarked that there was a good précis in Sheriff Napier's judgment in Hislop v. H. Guthrie's Select Cases, p.209.
3. But see now 1981 Act, S.1.

noted that the decision in McIntyre was not so (that is, that a wife could have the assistance of the court in turning her husband out of a house which belonged to her), but that McIntyre was decided when the jus mariti was in full force, and accordingly that the husband "through his jus mariti had such a regulation of his wife's property that he could insist upon her quitting her own house. But now that the jus mariti no longer exists, I think that the result would be exactly the opposite".

Lord Johnston sounded the necessary warning note - "Further, the Court ought not to interfere if their action in preventing a public impropriety in one direction is to result in a shock to public decency in another. They must, I think, require assurance that if they intervene to remove the wife from her husband's house, her immediate wants will be provided for until she can have these regulated either by agreement or by a proper action for aliment".

Gloag and Henderson (citing this authority[1]) incline to the view that a spouse might exclude the other from his/her house "provided that he or she is willing to perform the conjugal duties" - but what exactly is meant thereby (apart from the duty of financial maintenance) is unclear, since it would seem rather that in certain circumstances the husband or wife, or both, is relieved of the duty to adhere.

While these authorities have touched upon the question of the matrimonial home and the spouses' rights and duties as to residence therein, the case of Young v. Y.[2] brings the problem into sharper focus.

In this (defended) action of divorce, brought by the husband on the ground of the wife's desertion, the /

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1. at p.606.
2. 1947 S.L.T. 5.

the circumstances were that shortly after their marriage in 1933, the husband, who was in the Army, was sent to India, where he remained till 1939. The wife did not accompany him because she averred that there was an agreement that it was necessary for her to remain in London to look after her invalid mother. The husband did not admit that there was such an arrangement and it was proved that he had written to his wife inviting her to come to India, and that his wife's reply had been a refusal on the grounds of the necessity to attend to her mother. After receiving the refusal, the husband wrote to say that he did not wish to force her and that she must do as she pleased.

The wife sent to her husband a certain amount of money over a considerable period to augment his pay and in 1939 the husband returned to London to live with his wife and her mother, thereafter lived at Aldershot until discharged, but was subsequently called up again upon the outbreak of war. A child was born in May, 1940.

L.O.Birnam, on these facts, held that the wife could not possibly have been in desertion in respect of the period 1933-39, since cohabitation was resumed in 1939, and in any event, the choice of residence had been, in the husband's own words, left to the wife.

On leave from France in 1940, the husband spent most of the time with his relations in Scotland before spending his last night with his wife, thus causing her keen annoyance. They spent a fortnight together in August, and in October (and subsequently by letter) he asked his wife to live with his father and sister in Falkirk, and upon her refusal to do so based the action of divorce for desertion.

Was the wife legally bound to accept her husband's plans /

plans as to what was to constitute the matrimonial home? The husband was not living in Falkirk, but at barracks in Glencorse and was liable to be sent overseas, and it appeared that from early in 1941, he was rarely to be seen at home, except on short leaves.

"In these circumstances I have difficulty in holding that the defender was bound to go to a strange place to live with strange people in a house where her husband was not to reside himself", said L.Birnam, and quoted the opinion of the L.J.Clerk in Muir, when he said, "I cannot say that it is the duty of a wife to go wherever her husband chooses".

"No doubt it is her duty to follow him wherever he has a home for her to go to, but that is a very different proposition from saying that she is bound to go to any place which he may appoint whether he himself is in residence there or not". (L.Birnam)

In any case (though it was not necessary for the decision) his Lordship noticed that the husband acquiesced very readily in the wife's refusal to come to Scotland, and although he threatened that he might be finished with her and would stop her allowance, he did not do so, and it seemed that he was not very anxious or even willing that she should change her mind.

However, the ground of his Lordship's decision was "that the offer made by the pursuer in 1940 was not one with which the defender was bound to comply under pain of being held to be in desertion". "The husband's right is to choose the place where the spouses are to live together. He has no right apart from this to say where his wife is to live"[1].

Again, in Hood v. H.[2], another example is found of /

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1. Clive & Wilson, p.176 (commenting upon the case of Young).
2. (1871), 9 Macph. 449.

of a husband having gone abroad - in this case, Canada - and having made his wife an offer to adhere in the form of asking her to come out to join him, in which the court did not consider it reasonable that the wife should do so, and would not entertain the offer as a basis for dismissing an action of aliment raised by the wife. "His offer is simply an offer to send his wife and children to a place where he is not now, and may never be again, where he has nothing of the nature of a home, and where he was merely working for weekly wages, so long as his employers were willing to keep him"[1].

In such extreme cases - and where an offer may smack of expediency and lack of bona fides - an answer may not be difficult to find, but the merits may be less clear-cut, and leaving aside the sometimes difficult and technical rules concerning offers to adhere (although of course they cannot be far distant from the discussion) priority in choice of home is truly a subject productive of problems when there are two careers within one family, and where there are no children, or grown-up and self-sufficient children only, and where the attitude of the husband and wife differ on the matter.

If the rule were that the wife had the choice of going with her husband and being supported in a home of his choice, located in a place to suit his requirements, or remaining behind and receiving periodic regular allowances from him, perhaps this would benefit the wife too greatly and would represent a measure of unfairness to husbands, who would then be required to aliment not only an adulterous or cruel wife but one who, while not in desertion strictly speaking, nevertheless refused to accompany him to those /

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1. per L.P. (Inglis) at p.454.

those places which his career dictated. As regards cruelty or adultery, the reason for his continuing obligation is that the remedy is in his own hands: he may obtain a decree of divorce. Under any such new formulation, non-compliance with a husband's reasonable plans could hardly be said to amount to desertion, if that was one of the choices legitimately open to the wife to take.

It is possible that the "two-year consent divorce" (Divorce (Sc.) Act, 1976, s.1(2)(d)) may provide a natural solution to this dilemma in cases where lack of co-operation is in truth indicative of marriage breakdown.[1] In other cases, matters will be arranged privately and amicably. The answer must lie, of course, in the criterion of 'reasonableness' and the rule, at present, would seem to be that a wife must comply with requests and plans, and accept new accommodation so long as it is not highly unsuitable. It may be that there is a trend towards taking more account of the wife's wishes and views, if reasonable.

Under our present law, the husband must aliment his wife if she is living apart with his consent or at his request (MacLure v. M.) but not if she is living apart without his consent or without legal justification for doing so. In the latter case, he also has the remedy of an action of divorce for desertion.

Though the duty of adherence may be owed, the Courts will not order spouses to resume cohabitation, or order one spouse to cease being unwilling to adhere, which would be an order undesirable, and impossible, to enforce. An action for permanent aliment alone (that is, without a conclusion also for adherence or separation)is nowadays unknown.

It was not always so, there being older cases where /

1. Cf. S.L.C. Consultative Memo. No. 54, 9.3.

where the matrimonial offence was proved in the action for aliment[1] and the result in practice was the same, but Lord Fraser comments, "in this neglect of form, principle is apt to be over-looked"[2]. A great deal of confusion surrounds the terminology used here. The Scottish Law Commission has recommended a clarification[3].

To return to the subject of accommodation, the case of Darroch v. D.[4] provides another interesting example of behaviour.

This case again was an action of divorce brought by the husband on the ground of the wife's desertion. One of the principal points of conflict was that desertion was averred, by the husband, to have commenced on 15th March 1943, at which date the wife, holding decree of adherence and aliment, refused to return to her husband and live with him in a furnished room, on the ground that the accommodation was inadequate.

The Sheriff Substitute refused to recall the previous decree of adherence and aliment. In turn, his interlocutor was recalled by the Sheriff-Principal and this decision was affirmed by the Second Division.

The L.O. (Keith) held that the effect of the interlocutors of the Sheriff-Principal and the Second Division could not be retrospective, and that therefore it could not be said that desertion began in May, 1944 (the /

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1. Mackellar v. M. (1838), 16 s.1149: Williamson v. W.(1860) 22 D.599: Mason v. M. 26 June 1839, F.C. cited by Fr. (I,840).
2. See generally L. Fraser's discussion of this subject - I, 840-843. And see also, on the subject of the roles of Sheriff Court and Court of Session historically in the provision of the remedy of aliment, Memo. No.22, Appendix A, para.10.
3. Sc.Law Com. Memo. No.22, Faculty Response.

4. 1947 S.C.110.

(the date of the Sheriff Principal's interlocutor). However, it was decided by the Second Division that the opposite was the case, and that the effects of the judgments (that the offer was reasonable and should be accepted) were retrospective. It was also held that the time-lag between the Sheriff-Substitute's interlocutor and the application to the Sheriff, did not necessarily interrupt the running of the period of desertion[1].

The accommodation consisted of a furnished room with use of kitchen and bathroom. The parties had previously lived with the defender's mother, in a bungalow, an arrangement which had not turned out well, and had resulted in the defender's mother ordering her son-in-law out of the house. (Notwithstanding these facts, the defender had succeeded in 1936 in obtaining decree of adherence and aliment).

The L.J.Clerk (Cooper) on reading the Sheriff-Substitute's note, was able to say that the case had caused him some difficulty and was in his opinion a narrow one. He felt that the husband's (standing) offer and the pronouncements thereon by the Sheriff Principal and Division ought to have been accepted by the wife, "and I do not understand why our decision should be subordinated to that of the Sheriff-Substitute whom we reversed".

According to Lord Mackay, the Substitute had not concurred in the wife's standard (which consisted of a desire for something comparable with "a modern bungalow with three apartments and kitchenette and bathroom") nor had he concurred in the wife's view that the proffered accommodation was "filthy". His Lordship felt the notion was absurd (and seemed to think /

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1. See per L.Mackay at pp.117/118.

think that the Substitute thought so too) that the wife of a soldier returning to civil life - or partly doing so - should aspire to the standard of housing to which her mother had attained.

The "bungalow" suggestion was withdrawn at the proof in accordance with the Sheriff's decision. His Lordship felt that proof must be allowed and he suspected that it would show that the wife had not changed her attitude from the beginning (which he paraphrased as "I will not adhere to you unless you offer me something better than that house and something as good as the bungalow of my mother"). If that was proved, Lord Mackay could not see why it should be "impossible" (L.Keith's word) to hold that desertion commenced in March, 1943, and why it had to be said that the desertion could not have begun before June 1945 (date of decision by Second Division). The action of divorce was brought on 7/5/46.

The height of unreasonableness, absurdity and unfairness can be seen in the case of Stewart v. S.[1] in which a husband brought an undefended action of divorce for desertion against his wife.

L. Kilbrandon regretfully felt himself obliged to grant divorce. The pursuer averred that, though he was willing and anxious that there should be a resumption of cohabitation, his wife refused to comply with his request.

"He has proved that" (i.e. willingness to resume cohabitation) "subject to this qualification - he insisted on making his home with his parents, his mother being in charge of the joint household". To that qualification the wife perhaps not surprisingly was unwilling to accede. There was no necessity for such a course of action. A local authority house had /

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1. 1959 S.L.T. (Notes) 70.

had been allotted to the husband, and his wife had herself purchased a house in Aberdeen. Both these offers of accommodation were refused by the husband.

It would thus appear that a wife may not unreasonably refuse her husband's offer of a home, but in like circumstances he may refuse her offer.

His Lordship concluded:-

"This attitude was completely unreasonable and utterly selfish, but I regret to say that by our law the husband is entitled to the whole say on the question of the location of the matrimonial home, even where that location is not dictated by a consideration, such as the location of the husband's employment, which is of joint interest to the spouses. Such, as I understand it, is not the law of England, where a more enlightened view of the rights and obligations of the partners in matrimony seems to prevail on this particular topic. However, I have to administer the law of Scotland. It may be that in this case, had she defended it, the wife could have discharged the onus of showing that the accommodation offered by the husband was utterly unsuitable, but that does not arise".

Thus, we have two good demonstrations of unreasonable behaviour - one by a husband, and one by a wife - and of their effect as the law stands now[1.2.3].

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1. Cf. Clive and Wilson, p.176: "Although the husband's right to choose the matrimonial home is not absolute he is still in a stronger legal position than the wife .... The husband's choice must be reasonable but it need not be more reasonable than, or even as reasonable as, the wife's." See S.L.C.Memo. No.54, 9.1-9.4 (reasonableness).
2. See suggested treatment of this problem: "Location of Matrimonial Home", Chapter 7.
3. With regard to the matrimonial home, there is now, of course, a new Act of considerable importance and complexity: the Matrimonial Homes (Family Protection) (Scotland) Act, 1981. See book of that name, D.I. Nichols and M.C. Meston. See also Chapter 7.

Importance of Willingness to Adhere and Related Topics

Until the Divorce (Scotland) Act, 1976, it could be said that the obligation upon a husband to aliment his wife did not extend to the situation where she lived apart from him without legal justification. This rule was referable to the principle previously noted that a husband performs all that is legally required of him by maintaining his wife at bed and board, and consequently if she, by her conduct, renders that situation impossible, then his duty towards her is at an end unless and until cohabitation is resumed or she at least shows herself willing to adhere whatever his feelings in the matter[1]. Section 7 of the 1976 Act has stood this rule upon its head.

A wife was not entitled to disdain aliment provided in such a way (by the provision of food, clothing, warmth and a roof), and to demand support instead in cash terms, but the new rule makes inroads upon this principle to some extent by providing that the court may grant decree for interim aliment[2] where the parties are living apart[3] and where the pursuer is unwilling to cohabit with the defender whether or not the pursuer has reasonable cause for not so cohabiting by virtue of the circumstances set forth in /

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1. "But unless she has left his house in consequence of his cruelty or adultery, or with his consent, he is not bound to aliment her while she is living apart from him". Walton, p.142: note the use of "his" house. A revolution in thought has taken place even since 1951.
2. Memo.No.22, 2.165/166 (Propn.33) recommends abolition of the present confusing distinction between 'interim' and 'permanent' aliment: Faculty Response, pp.37/38.
3. See Memo. Propn.39 (enforceable alimentary provision stante matrimonio): "... An offer by the defender to provide support in kind in the home should not be a defence to such an action if in fact it was the lack of adequate support which rendered the action necessary". Faculty Response, pp.41/42.

in s.1(2)(a) - (c)[1], but, where the pursuer does not have reasonable cause for not cohabiting, the court shall not grant decree if satisfied that the defender is willing to cohabit with the pursuer. Professor Clive[2] explains that since divorce was to become competent after the expiry of certain periods of separation, a provision of this kind, operating to allow a claim for aliment where neither spouse wishes to adhere to the other, is useful. On quantum, the Act (s.7(2)) states that, in decrees of separation and aliment, adherence and aliment, or interim aliment, the court shall have regard to the respective means of the parties and to all the circumstances of the case, (s.5(2)), and hence it seems to be clear (not so before [3]) that (Clive) "conduct is relevant in quantifying aliment in an action of separation and aliment"[3].

On the other hand, it is not true to say that cohabitation was always the test in this context, since, as has been seen in the case of MacLure, the duty would and will continue where the wife lives apart with her husband's consent and at his request, and, further, perhaps more surprising, the duty to maintain will subsist though the wife has been guilty of adultery[4] - or, indeed, of cruelty[5]. It does not appear that the 1976 Act, though making a certain discernible shift of emphasis in "conduct criteria for entitlement to aliment"[6], (willingness to adhere) has made any change with regard to the treatment /

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1. See Memo. 2.150 (Methods of fulfilling alimentary obligations): Faculty Response, p.34.
2. "The Divorce (Scotland) Act, 1976", E.M.Clive, p.25.
3. Clive, ibid. and cases there cited.
4. Milne v. M. (1901) 8 S.L.T.375, Harkness v. H. (1961) 77 Sh.Ct.Rep.165, Donnelly v. D. 1959 S.C.97.
5. Nisbet v. N. (1896) 4 S.L.T. 158.
6. See infra, p. 367 et seq.

treatment or significance in law of the (other) behaviour of the claimant.

An adulterous or cruel wife, therefore, is entitled to look to her husband for aliment so long as the marriage subsists, and the rationale behind this principle appears to be that, as the law of divorce stood before 1/1/77, the remedy lay in the husband's hands. He might bring an action of divorce on either of those grounds and thus rid himself of the financial liability of the marriage bond[1]. Until 1977, it could be said in broad terms that the duty to adhere was the counterpart of the duty to aliment[2]. Now, if the defender has given the pursuer no cause for the latter's non-adherence, and the defender is willing to cohabit, the court may not grant decree for aliment. Willingness of the pursuer to adhere remains relevant - but in an indirect manner - and the provision is more conservative than at first sight it appears, but the emphasis has changed. The section begins, "Without prejudice to its other powers to award aliment ...", which opening words may perhaps be said to cut down the ambit of its operation: presumably it is still the case that, until divorce, the husband owes a duty to aliment the wife if the latter, be her conduct, in the former terminology, 'guilty' or 'innocent', is willing to adhere (cf. Clive, "The Divorce (Scotland) Act, 1976", p.25: "[T]hese other powers include the power to award aliment in an action of separation and aliment, or adherence and aliment, or inan application for aliment pendente lite in an action for divorce, or in /

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1. See now Div.(Sc.) Act, 1976, s.1(2)(a)-(e).
2. See e.g. L.Guest's opinion in Jack v. J. 1962 S.C.24, at p.25, "...the husband's duty of support is correlative to the wife's willingness to adhere".

in an action of interim aliment where the pursuer has a relevant claim at common law, e.g. where he or she is willing to adhere") and her duty is still that laid down by the Act of 1920, s.4. The 1964 Act, s.6 remedied an undoubted defect: 1976 Act, s.7, may be a continuation of a train of thought.[1] The result is however that aliment may be due to the adulterous and/or cruel wife, though unwilling to adhere (provided that the other is not willing to adhere): a thorough and fundamental review of the relationship between conduct and entitlement to aliment is surely sorely needed[2].

Thus, it seems that while a husband must support an adulterous wife (willing (or not) to adhere) if he does not choose to divorce her or to provide support in kind by cohabitation, his wife, in an equivalent situation, would have justifiable grounds for non-adherence, entitling her to seek decree of divorce or separation or to attempt to obtain a consensual financial or other settlement, but in any event would be entitled to claim an alimentary allowance.

In other words, her adultery does not necessarily deprive her of her marital rights or at least of all of them (since her adultery is ample cause for her husband legitimately to refuse to adhere to her) or relieve her of her marital duties - all will depend upon the husband's inclination - but his adultery - depending upon the wife's inclination - will probably render mandatory one of his marital duties (of support) without any reciprocal marital rights, since his wife will be quite justified in refusing to adhere, if that is the course which she wishes to take[3].

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1. See infra, pp.373-4, and see Clive, ibid., pp.25/26, where is discussed the interaction of common law and statutory rules.
2. Cf. Memo.No.22, 2.120-125; Faculty Response, pp.25-31.
3. Cf. the interesting case of Taylor (1903), infra, pp. 382-3.

The latter situation (of the wife) is not criticised: the former (of the husband) is also logical, (though the effect of s.7 is surely to make the rule potentially harsher) yet it is not the case in every jurisdiction that a man who does not wish (or perhaps does not recognise) divorce need aliment an adulterous wife[1].

Of course, if a wife has a duty to aliment her husband in terms of the M.W.P. (Sc.) Act, 1920, s.4, she too in the above circumstances might be required to aliment an adulterous spouse.

L.J.Cl.Thomson's view in Donnelly[2] was that "On principle, ... so long as the marriage subsists, the obligation to aliment likewise subsists". It was long accepted, he said, that, if having grounds for divorce, a husband prefers the lesser remedy of separation, he must continue to aliment his wife during the resultant separation. Until he actually obtained decree of divorce, the obligation remained.

"The advantage of the view that, so long as the bond subsists, so does the obligation, is that everybody knows where they stand. There is no room for a debateable ground of charge and counter-charge, suspicion and uncertainty". The husband could obtain a divorce and so terminate the obligation to aliment.

Thus, until the marriage bond is severed by decree of divorce, the husband is liable to support his /

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1. See, for example, South Africa - Hahlo, The South African Law of Husband and Wife, p.110, fn.65, where Scots law (Donnelly) is contrasted with S.African, Rhodesian, and English Law. As to English law, see Cretney, pp.217/218 - no common law obligation to maintain if the wife has been guilty of adultery, cruelty, or is in desertion and has made no bona fide offer to return. By virtue of s.7, Scotland seems to have placed herself yet further out of step.
2. at p.101.

his wife though she be cruel or adulterous, (and this now without the proviso of willingness to adhere) or if she is living apart with his consent or at his request (MacLure).

The concept of cruelty itself has undergone much refinement over the years[1]. An interesting light is shed upon standards in this matter at the time of L. Fraser's Treatise. He cites as examples the following:- "The husband has the right and it is therefore not cruelty in the eye of the law, for him absolutely to forbid the wife's friends from visiting her in his house. In ordinary circumstances, this might be considered a harsh exercise of marital authority; but there may be causes to justify the prohibition, of the reasonableness of which a court cannot, and is not, called upon to judge; for though the wife may be very amiable, her connections may not be so"[2]. Again, he refers to Grotius (2.5.8) for authority to the effect that a wife may be confined by her husband to the house, or that at least he might "direct her movements in such a manner as to prevent her going to places, and engaging in pursuits, of which he disapproves".

If it transpires that a defender's offer to adhere is held to be genuine, and it is considered that the pursuer has unreasonably refused it, the latter party will be in desertion thenceforth[3]. Nowadays he or she is not entitled to refuse the offer, or to hedge it about with conditions, on the ground that the defender's friends are not to his /

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1. See A.M.McLean: 'The Evolution of the Doctrine of Matrimonial Cruelty': a note on Grant v. G. 1974 S.L.T. (Notes) 54. Jo. of the Law Society of Scotland Jan.1975 Vol.20 No.1.
2. Citing Cadboll v. C. 5 Sup.475 (1758); Waring v. W. 2 Hag. C.R.159; Neeld v. N. 4 Hag. E.C. R.268.
3. Darroch v. D. 1947 S.C.110.

his or her liking and that the defender must give them up - provided, of course, that there is no question of adulterous or immoral behaviour[1].

We are reminded by Fraser[2] that it is an essential or a prerequisite of a suit for aliment that the husband and wife be not cohabiting. "If she cohabit with him, an action for separate maintenance is absurd". This rule, therefore, will preclude the wife from claiming in court, during cohabitation, any fixed proportion, or reasonable sum, out of her husband's salary, and it is submitted that this is a defect in our present system[3].

If she has been deserted, her remedy is an action of adherence and aliment: if cruelly treated (according to modern standards and views and whether in mind, spirit or in body) then she must seek decree of separation and aliment. "But to institute an action for aliment directly and not as incidental to another action, is inconsistent with principle and the character of the conjugal relation"[4.5].

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1. Burnett v. B. 1950 S.C.1, (sequel to case reported 1955 S.C.183) in which there was involved a friendship with a person of the opposite sex from the defender, a friendship which, in a previous action for separation and aliment, had failed to provide the basis therefor, and upon which, in the instant action, the court found no grounds for suspicion. In the circumstances, the wife's offer to adhere was objectionable, either on the ground that it was not genuine (view of Sh.-Subs. as set form and approved by the L.P. (Clyde)) and/or on the ground that it could not be so qualified (decision of First Division).
2. at p.839.
3. Cf. Memo. No.22, propn.39 (2.182) and Faculty Response, pp.41/42.
4. Fr.I, 839, and see supra. pp. 360-361.
5. But see S.L.C.Consultative Memo.No.54,4.1-4.6 (consideration of the action of adherence). The Commission (4.4) saw no reason in future why a wife should not raise an action for aliment alone, and concluded provisionally (4.6) that it should not longer be competent to crave or conclude for, a decree of adherence. The proposal 'is not concerned with the concept of willingness to adhere' (or with freedom to raise an action for aliment) 'but simply with the competency of asking a court to grant a decree ordaining one spouse to adhere to the other'. The view was taken that the remedy was unnecessary and obsolete, and could be used for tactical reasons.

Great importance has been ascribed to the duty to adhere[1] and because of this, the courts will not enforce a contract for voluntary separation, although, as will be discussed later, the financial aspects thereof may be regarded as severable[2].

It cannot be pretended that the history and development of this subject has been as straightforward or satisfactory as an outline of the rules might first suggest. For example, until the Divorce (Sc.) Act, 1964, s.6, it was necessary for a wife, whose husband's conduct had given her justification for non-adherence though not perhaps for decree of divorce or separation, or who had deserted her, to aver her willingness to adhere to him. If she could not or would not do so, her position was that, while she was not regarded as being in desertion, she was not entitled to make a claim for aliment.

This artificial and punitive rule was remedied by s.6 which provides:- "Without prejudice to its other powers to award aliment, it shall be competent for the court in an action of interim aliment to grant decree of interim aliment where it is satisfied that the pursuer is with just cause living in separation from the defender by reason of the desertion or other conduct of the defender"[3].

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1. Cf. Macdonald v. M.'s Trs. (1863) 1 Macph. 1065 per L. Ardmillan - "Now, the separate residence of spouses is what the law does not favour, and a contract for separate residence the law will not enforce. Such voluntary separate residence may be terminated at any time, and, that being so, the deed making provision for such an arrangement is as revocable as the arrangement itself".
2. Hood v. H. (1871) 9 Macph.449: Bell v. B. Feb. 22, 1812, F.C.: Livingston v. Bogg 1666 M.6153.
3. see further, Clive & Wilson p.194, footnote 72 explaining the amelioration provided by s.6, and the problems which existed before as to the attitude of Court of Session and Sheriff Court to actions of aliment alone.

A good judicial expression of the law before 1964 is found in the Sheriff-Substitute's opinion in Barrow v. B.[1]. In Jack[2], L.J.Clerk (Thomson) remarked[3]:- "It is not unreasonable to suggest that, if the law is prepared to say that one spouse need not adhere because of the other's unconscionable conduct, the innocent spouse should be entitled to aliment, even though she cannot establish the grounds which the law requires for judicial separation. But it is not within our powers as a court of law to make such an innovation. Parliament, and Parliament alone, can do so".

Parliament provided the remedy[4], but that legislative provision itself, together with all other provisions of the 1964 Act, has been repealed by the Divorce (Scotland) Act, 1976[5].

The Divorce (Scotland) Act, 1976, s.7 provides that the court (being the Court of Session or the Sheriff Court) may grant decree for interim aliment if satisfied that the parties are not cohabiting, and that the pursuer is unwilling to cohabit with the defender whether or not the pursuer has reasonable cause for not so cohabiting by virtue of the circumstances set out in s.1(2)(a) - (c), but that, where the pursuer does not have reasonable cause for not cohabiting, the court shall not grant decree if satisfied that the defender is willing to cohabit with the pursuer.

This brings one step closer the position that conduct should not be a relevant consideration in financial /

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1. 1960 S.L.T. (Sh.Ct.) 18 at p.19.
2. 1962 S.C.24.
3. at p.31.
4. cf. Memo.No.22, 2.165/166.
5. see Clive, ibid., p.26. "The 1964 Act is repealed in its entirety. So it is necessary to provide afresh in s.7 ...."

financial questions arising during the marriage. It is interesting that the concept of 'willingness to adhere' (of the defender) remains of importance[1].

An action of interim aliment may be brought before the Sheriff as a summary cause if the amount claimed does not exceed the sum of £25 per week in respect of the pursuer, and £7.50 per week in respect of each child (if any) of the marriage. These amounts may be varied by order of the Lord Advocate, the power to be exercised by Statutory Instrument subject to annulment by resolution of either House[2].

An example of the post-1964 situation is found in the case of Barr v. B.[3] which provides authority for the proposition that a proper construction of the /

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1. Contrast Memo.No.22, 2.120 et seq. (Non-patrimonial conditions of liability). Propn. 27 advocated that "it should no longer be a condition of entitlement to aliment as between spouses that the claimant is willing to adhere or has reasonable cause for non-adherence". This was set as the basis for discussion, but it can be seen that the recommendation has been speedily answered by s.8, at least in part: the continuing importance of the defender's attitude therein affirmed takes away perhaps from the fundamentalist character of the change. At 2.125, the suggestion made was to dissociate considerations of conduct from questions of entitlement to aliment. The arguments in favour of and against conduct-linked criteria are well set forth at 2.120-125; in Faculty Response, pp.25-31, an alternative scheme, retaining the concept of willingness to adhere, and utilising a new concept of "gross contempt of the marriage" is put forward for consideration. There are, of course, two aspects of "conduct-linked criteria" - Willingness to adhere (of either or both), and the old notions of "fault", which at least in ss.1(2)(a)-(c) form the basis of the irretrievable breakdown ground of dissolution of marriage. See Clive "The Divorce (Sc.) Act, 1976", pp.25/26 for assessment of current position with regard to 'willingness to adhere' and 'reasonable cause for not cohabiting'.
2. s.8, 1976 Act.
3. 1968 S.L.T.37.

the statutory phrase - "by reason of the desertion or other conduct of the defender" - is that "other conduct" be read to mean conduct which, in the context of a divorce for desertion, would provide a defence of reasonable cause for non-adherence.

The action was one raised by the wife in which she sought a declarator that she was with just cause living in separation from her husband, and for interim aliment. Custody was not disputed nor was the pursuer's right to aliment for the child.

The crux of the question therefore was whether she had just cause for living in separation from her husband in terms of the 1964 Act, s.6, and in construing "other conduct", Sh. Forsyth remarked[1], "In my opinion, the "other conduct" cannot be restricted to a matrimonial offence, such as cruelty, adultery or sodomy. There already exists the remedy of separation and aliment when such an offence can be proved, and therefore there would be no need to introduce the provision contained in s.6". On the other hand, although in terms the crave was for "interim aliment", the old problem arose that it could continue indefinitely and become permanent aliment de facto[2], and the Sheriff was not disposed to dispense with full legal proof.

If the "other conduct" be not construed as being a matrimonial offence, then it would be conduct falling short of that, but sufficient to justify decree of separation, but if that were the case, where would the line be drawn? The Sheriff elected to follow L.Patrick's definition in Richardson v. R.[3] namely /

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1. at p.38.
2. See Memo.No.22, 2.165 et seq. and Propn. 33 (abolition of distinction between 'interim' and 'permanent' aliment) and Faculty Response, pp. 37/38, on this problem.
3. 1956 S.C. 394.

namely that conduct to excuse non-adherence, if not adultery, cruelty or sodomy "must be something grave and weighty and such that it would shock the conscience of reasonable men to require the offended spouse to live with the offender again".

The husband was willing to resume cohabitation: the wife was not willing to go back.

Applying that test to the case in hand, the Sheriff had no difficulty in finding the evidence of the husband more credible than that of the wife, and even if the latter's averments had been sufficiently vouched, they did not in themselves approach the 'grave and weighty' standard and the declarator and also consequently aliment were refused. Had the case arisen after 1st January, 1977, since it was held that the pursuer had not reasonable cause for not cohabiting, and since the defender was willing to resume cohabitation, the same decision would have been reached.

Clive and Wilson[1] point out that, in certain cases, wives may be incapable mentally of forming an intention to, or of entertaining willingness to, adhere, (through mental illness or disturbance) or physically cannot give effect to willingness (if, for example, the husband is incarcerated in a prison or other place of confinement) and that in these cases the husband must still aliment her.

Walton[2] makes clear that since a wife's claim for aliment ranks after claims against her husband by his (other) creditors, the husband "cannot resist an action for a lawful debt on the ground that he must maintain his wife". Similarly, it may be noticed, it is generally thought that a husband cannot /

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1. p.191 and cases there cited.
2. p.142.

cannot resist an action or a claim for aliment by his wife on the ground that he must maintain his mistress[1].

Although that may be so, and although there is no obligation in law for a man to support a paramour, the husband's obligation to support any children born of his mistress if he has fathered them (though not if he has not, even though they are living in family with him - although the circumstances may indicate that he has voluntarily adopted this responsibility[2]) remains exigible in law, and morally, and, because it is undoubtedly more expensive to maintain two establishments than one, and because the courts will not award a sum so high as to be unlikely to be recovered, however well merited such an award might be - and even if they did, or even if they awarded a moderate sum, there are great practical difficulties in the recovery of that sum since the unwilling husband may be elusive - it may be that cognisance is given in fact, albeit tacitly, to the second establishment[3.4].

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1. but see below.
2. See Memo.No.22, 2.52 et seq. (De facto family membership)(Propn.13 - liability to aliment an "accepted" child, having supported him for a period of not less than five years); Faculty Response, pp.14-16 where it was suggested that the five-year provision might be harsh, and that the proposed formulation might be improved by the insertion instead of a wider test, such as "for a substantial period".)
3. But see McCarrol v. McC. 1966 S.L.T. (Sh.Ct.) 45, and Hope v. H. (1956) 72 Sh.Ct.Rep.244, to the effect that a man's 'obligation' to another woman will not be taken into account in placing a monetary value on his obligation to his wife.
4. Upon this point, see Memo.No.22, Propn.25 (2.116), and Faculty Response, pp.22-25. In the Response, a 'tautening' of the terminology in which Propn.25 is couched, is suggested, as follows:-
"in assessing the needs of an alimentary obligant, the courts should have a discretion to take into account the requirements of a paramour with whom he or /

In McCarrol, in which a wife sought and received a decree of separation on the ground of her husband's adultery, she was awarded only a nominal sum in name of aliment, because she was receiving more from the National Assistance Board than the husband could be expected to pay. The circumstances were that the husband was supporting a mistress, and the case was appealed from the Sheriff-Substitute's decision. The Sheriff reversed the Substitute's ruling, on the basis that N.A.B. grants should be ignored and that no account should be taken of the fact that the husband was making payment to his mistress, since he owed her no duty of support. The Sheriff-Substitute (Jas.A.Forsyth, Q.C.) based his reasoning on the view that, since the husband (defender) earned £10.4.6d net per week, and his wife (pursuer) was in receipt of £8.3.6d per week from the State (being £7.5.6d from N.A.B., 18/- Family Allowance) "any award of aliment which I make will not benefit her by one penny, since the effect will simply be to reduce the allowance paid to her by the N.A.B." and "on no possible view could he afford to pay aliment in excess of £7.5.6d per week", or anything approaching it.

This, therefore, is an example of the second household's existence swaying a Judge's opinion as to /

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or she is cohabiting and whom he or she is supporting" - but the Working Party urged that the limits of the rule be clearly defined. Let the policy be well thought-out, because there is a clear danger of assimilating "the financial consequences of concubinage to those of marriage". Ultimately, this state of affairs may come about (and there is evidence that, in other jurisdictions, thought has been expended on the subject of 'rights in property arising from stable unions'), but it should not come about by inadvertence, without full discussion, by a side-track branching from the path marked 'Enforceability of Decrees for Aliment'.

to the correct amount of aliment. (In this case, besides supporting his mistress, the husband was also supporting an illegitimate child born of the paramour).

The Sheriff-Substitute added that, should the defender's circumstances improve, the pursuer had her remedy in that the court was open to her, and that the N.A.B. had their remedy in seeking reimbursement from the husband of some of the moneys paid.

The Sheriff, on appeal, awarded £2.5/- weekly to the pursuer and 25/- weekly for each of the children (as against the Substitute's grant of 10/- per week for the wife, and 1/- per week for each child). The Sheriff's opinion was that[1], "While I appreciate the apparent logic of the learned Sheriff-Substitute's approach to the matter, I am not satisfied that it is correct. Grants made by the National Assistance Board, if I understand the position correctly, are discretionary grants made by the Board .... No person has a legal right which can be enforced by the Courts to demand assistance from the Board. - It seems to me, therefore, that the proper approach to the question of aliment is inverted if the Court makes its award by reference to the discretionary grant which the wife may at a particular time be receiving from the National Assistance Board. It is only, I should have thought, when the Courts have already determined the legal claims of the parties one against the other, that it can then be possible for the National Assistance Board to apply its own discretion, subject to its own rules, to any application which either of them may make for assistance".

The Sheriff was influenced by two further considerations /

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1. at p.46.

considerations, namely, first, that the public funds grant and the private law award of aliment would be enmeshed in an interlocking relationship[1]. ("To include among the circumstances justifying a variation, a change in the rate of assistance granted by the National Assistance Board to one of the parties, would introduce into a sufficiently difficult task a quite unnecessary and unwarranted complication and would result in a vicious circle of adjustments to which there might be no final conclusion") and second, that "it appears to me to be contrary to public policy that the Courts should encourage the view that a husband is entitled to leave his wife and legitimate children to be maintained from public funds, and to devote his own resources to the maintenance of himself and of any woman with whom he cares to cohabit"[2].

Again, in the case next reported - Hawthorne v. H.[3] (adherence and aliment) - McCarrol was followed, in a case where the Sheriff Substitute had awarded aliment /

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1. at p.47.
2. This is a view which is likely to appeal to the majority: however, the principles of the law of aliment must be realistic. Moreover, it must be admitted that for many, subsistence is provided by the State, and not by persons from whom aliment is legally exigible.
   This state of affairs has prompted some to advocate the abolition of the private law of aliment. That was not a point of view adopted by the Working Party engaged in making the Faculty Response to Memo.No.22: see Part V thereof (Relationship between Public and Private Law) and Faculty Response, pp.82-84. "Our aim would be the limited one of rendering awards more readily enforceable. We feel that every effort should be made to ensure that the private law rules of aliment are as realistic and as effective as possible. State aid - although it should be automatic on proof of need - should be regarded as a secondary rather than primary means of support".
3. 1966 S.L.T. (Sh.Ct.) 47.

aliment, taking into account the sums paid by a husband for the support of his mistress and her two illegitimate children, and his own illegitimate child born of her.

It was emphasised on appeal that only the obligations of the husband exigible in law should be brought into consideration. (Sheriff Prin.Walker: Sheriff Substitute David Y. Abbey). The logic of the Sheriff is not to be faulted, but the attitude of the Substitute was perhaps more realistic.

In the earlier case of Hope (1956), an action of separation and aliment on the ground of adultery, the action was defended on the point of the amount of aliment claimed. The report is somewhat unsatisfactory as reported in Sc.L.Review and Sh.Ct.Reports, since all that appears to have been decided is that certain of the husband/defender's averments as to his maintenance of his illegitimate child and his mistress, and as to a house purchased by the husband for his wife, be included in the proof and not excluded from probation as the wife wished.

The Sh.Prin. adhered to his Substitute's interlocutor, and in a note added that in a consistorial action it was very unusual indeed to exclude from probation any averments having a possible bearing on the financial circumstances of either or both of the parties[1.2].

"I think these averments fairly read relate to the ascertainment of the means of the defender on the one hand and the benefits which the pursuer is presently enjoying on the other. Perhaps the only effective criticism which the pursuer's solicitor made /

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1. Expenses of appeal not allowed to the wife, and also on the question of expenses, see Liddell v. L. (sisted action of adherence/action of divorce) 1903 11 S.L.T. 488.
2. See also recently Love 1983 S.L.T.(Sh.Ct.)21: the court must take account of the defender's actual financial position (since he could not be said to have been extravagant), and sums granted were substantially lower than those sought (by the wife in separation and aliment).

made in presenting his appeal was with regard to the averment by the defender that he is "maintaining his paramour". I think his criticism of this averment was too narrow. It is trite law of course that the defender is under no legal obligation to maintain his paramour, and if I had thought that that was the sole meaning of this averment I should have excluded it from the proof, but I think that all that the defender means is that he is being put to expense in maintaining a separate home for himself and the illegitimate child and that this may involve his paying something to his paramour in the nature of wages as his housekeeper. I feel sure that in assessing the aliment in the end of the day the Sheriff-Substitute will not give effect to any obligation the defender is incurring in alimenting the paramour".

It must be hoped not, since one might imagine that the "housekeeper" loophole might prove altogether too useful.

On the other hand, whatever may be the views of Social Security Officers who, it is said, maintain a certain scrutiny of wives supported by the state to ensure that they are not receiving support also from a man other than the husband, it seems that such support MAY be taken into account by the Court when assessing the wife's needs, even though it may transpire that such support was of a transitory and impermanent nature and, as already pointed out, such a payment, from the man's point of view, would be purely ex gratia and not based on any duty in law.

In Taylor v. T.[1] in which the wife admitted, in an action for separation and aliment on the ground of cruelty, that she was living in adultery and had been doing so for some time, decree was granted and L.O. Pearson's /

1. 1903 11 S.L.T. 487.

Pearson's view upon the question whether her admission disentitled her from decree, was that her husband was "bound to aliment her so long as she is his wife, and unless decree of separation is granted he will have it in his power to condone her offence and offer her a home, thus putting an end to his liability to pay her aliment. Against this she is entitled to be protected, and the only way of securing that is to grant decree of separation. This does not involve any hardship on the husband, because, in the first place, the present state of affairs was brought about by him committing a matrimonial offence. And he has his remedy of divorce. The wife's conduct, however, must be taken into account in the question of fixing the amount of aliment[1]. I think the husband must pay her enough to keep her from absolute want, but not more; because anything further would enable her to contribute to her present guilty mode of life" - 17th December, 1903.

This seems an eminently sensible and reasonable approach[2].

Presumably, upon a change of circumstances - perhaps, upon the departure of the paramour - the wife could apply for a variation of aliment, on the basis of a great change in her needs and resources, in /

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1. emphasis added.
2. Clive, 'The Divorce (Scotland) Act, 1976', p.27 contrasts with the approach taken in Taylor that adopted in Malcolm v. M. 1976 S.L.T.(Sh.Ct.) 10. The Act (s.7(2)) states that in determining the amount of aliment regard shall be had to (s.5(2)) "the respective means of the parties ... and to all the circumstances of the case, including any settlement or other arrangements made for financial provision for any child of the marriage". (that is, to the criteria for the making, or not, of orders for financial provision on divorce). Professor Clive (p.25 and p.27) interprets "...all the circumstances of the case..."as allowing without doubt the assessment of conduct as a relevant factor in the quantification of aliment. Cf.Memo.No.22, 2.120-125: Faculty Response, pp.25-31. At p.31, the view was taken that, on balance, "conduct should not affect quantum of aliment".

in the same way as a husband may return to the court to aver a change in means.

The effect of the attitude of the courts is to disapprove such extra-marital activity whether on the part of the husband or the wife, and to endow that disapproval with certain legal consequences, the expense necessarily involved in the upkeep of the second household being ignored in calculation (at least in theory) where the husband is concerned, and of being taken into account in calculation where the wife is concerned. In that sense, a certain even-handed justice is obtained, but it does seem a little strange and anomalous that a man's contribution to his paramour may be taken into consideration in fixing the amount due to her by her husband, while the same sum will not be regarded in fixing the first man's aliment to his own wife. Perhaps it is the case that the result is not anomalous, but is sensible, but the absence of a clear rule or policy underlying this state of affairs, apart from a recourse to presently accepted standards of morality or equity, is a little unsatisfactory[1.2].

General Rules Pertaining to Entitlement to Aliment

In the case of a decree of adherence and aliment, the wife may look for support unless and until the husband intimates a desire for a resumption of cohabitation, in which case the offer must be made in /

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1. See also discussion of quantum of aliment, infra. p. 425 et seq.
2. The Scottish Law Commission in Memo.No.22 discuss this problem (2.116) (see Faculty Response (pp.22-25)) and also lay open for general discussion the broad question of the relationship which conduct should bear to entitlement to aliment (2.120-125). A tentative re-casting of the rules of entitlement (adherence: conduct: non-patrimonial conditions of liability) is suggested in Faculty Response pp.25-31.

in good faith[1] and must not be one made for the purpose simply of evading or postponing or complicating a wife's otherwise justifiable claim for aliment.

It appears[2] that, even if a husband has been served with a charge for payment or a warrant for imprisonment in respect of a decree for aliment, once he makes a genuine offer to adhere and consequently to provide aliment, that offer by him will entitle him to suspension of the charge or warrant[3] the reason being that the offer to adhere constitutes an offer to provide (though not necessarily to pay) aliment, and "the offer to adhere will terminate the obligation to pay aliment, even if the decree has not been recalled, unless the other spouse has just cause for non-adherence or holds a decree of separation and aliment"[4]. Obviously when the husband is in such dire straits, it may be that the genuineness of his desire to extricate himself therefrom may be undoubted, but of course a true desire to resume cohabitation on a reasonably permanent basis must be the test, and, in the nature of things, it would appear that he must be given the benefit of the doubt as that is the only way in which he may prove his good intentions.

Thus, in Macdonald's case, a charge for payment and warrant for imprisonment were suspended when the father offered to maintain his two illegitimate daughters. The offer appeared to be bona fide and therefore /

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1. for example, an offer to resume cohabitation, but coupled with a refusal to share the same bed is not, in Fraser's words (I,849 - and see generally authorities there cited) "an offer that the wife is bound to accept".
2. Clive and Wilson, p.203.
3. Macdonald v. Denoon 1929 S.C.172. Sc.L.Com.Memo. No.22 2.223 makes reference to this case in its consideration of the question whether the decree for aliment merely quantifies an existing obligation or creates a new obligation, 'the obligation to pay under the decree'.
4. Clive and Wilson, ibid.

therefore the complainer was not held to be a person wilfully refusing to pay aliment within the terms of the Civil Imprisonment (Scotland) Act, 1882, s.4.

This was an appeal from the decision of the Sheriff who had granted warrant for imprisonment. It was affirmed by L.Moncrieff that "when boys are 7 years of age and girls are 10 years of age, even in the case of children born out of wedlock, the father can in ordinary circumstances discharge his legal obligations of offering maintenance" (i.e. to take them into family with him) - see Corrie v. Adair (1860) 22 D.897; Ballantyne v. Malcolm (1803) Hume's Dec.424; Moncrieff v. Langlands (1900) 2 F.111. "The father had consistently made an offer of aliment in an alternative, but optional form".

After the opinion of the L.O. had been given, the mother of the children reclaimed, and the case was heard before the Second Division. The mother again was unsuccessful. There is an exception to the rule[1] that, after the ages specified, the father may discharge his duty to aliment in the most convenient and least burdensome way, and that is that the child shall not be taken away from its mother if that course of action would be detrimental to its health.

In the case of Brunt v. B.[2] on the other hand, the genuineness of the husband's alleged offer to adhere was not accepted by the Sheriff, and it was held that the "wilful failure to pay" of s.4 of the 1882 Act applied, although one week was allowed for possible settlement.

"...I cannot find in the letters or oral evidence any reasonable ground for holding that in May, 1953, the defender made to the pursuer (or was justified in thinking he had made to her)" - or presumably that she was /

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1. see per L.Ormidale in Denoon at p.179.
2. 1954 S.L.T. (Sh.Ct.) 74.

was unjustified in not taking seriously and testing out - "a bona fide offer of cohabitation"[1].

One may contrast with Brunt the case of Cassells v. C.[2] where the Sheriff was satisfied that offers of accommodation were made in bona fide. It is interesting that the Sheriff (Wood) stated that he felt himself strengthened in his opinion by the ex parte statement of the pursuer's solicitor to the effect that he did not consider that his client was willing to resume cohabitation and that the Sheriff considered that "it was only right and proper in the special circumstances of this case involving possibly imprisonment of an innocent party, that the Procurator in question assisted the court by putting factors before it that might be of relevance in coming to a decision". On his view of the evidence, the defender had made bona fide offers of accommodation to the pursuer, and the Sheriff affirmed that "there is legal authority to the effect that a bona fide offer of maintenance (that is accommodation) discharges any liability for a man to pay aliment to his wife, even if a decree to pay aliment, or a maintenance order, be in force against him"[3] and his Lordship made reference to Denoon and Brunt. Again, in Drummond v. D.[4] the husband was successful in bringing a suspension of diligence upon a decree of adherence and aliment since he had made genuine attempts to aliment his wife by showing himself willing to resume cohabitation with her and thus to provide for her within his own home. Per Sheriff (Garrett)[5]:- "Aliment in an action of adherence is thus conditional and is not really permanent. If parties resume cohabitation the decree is spent".

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1. per Sheriff Reid at p.75.
2. 1955 S.L.T. (Sh.Ct.) 41.
3. at p.43.
4. 1960 S.L.T. (Sh.Ct.) 49.
5. at p.50.

It will be noted that these cases pertain to situations in which the husband has deserted the wife or the wife has sought decree of adherence and aliment.

The 1976 Act has made changes in the remedy of judicial separation previously competent on proof of adultery, or cruelty (including habitual drunkenness). The matter is now governed by s.4, which states that sections I (irretrievable breakdown, and grounds upon which such shall be taken to be established: being s.1(2)(a)-(e) adultery, behaviour such that the pursuer cannot reasonably be expected to cohabit with the defender, wilful desertion without reasonable cause for a continuous period of two years, during which period there has been no cohabitation and no refusal by the pursuer of a genuine and reasonable offer to adhere, no cohabitation during a continuous period of two years accompanied by consent of the defender to decree of divorce (judicial separation), or during a continuous period of five years), 2 (encouragement of reconciliation) and II (appointment of curator ad litem where the defender in mentally ill) shall apply to actions for separation, or separation and aliment brought after the commencement of the Act (1/1/77). Professor Clive comments[1], "Seperation will become a pale reflection of divorce - divorce without permission to remarry and without the possibility of a capital sum". Hence, in theory, decree may be refused in the "five year" case if, in the opinion of the court, grant thereof would result in grave financial hardship to the defender. An action of divorce may follow upon an earlier decree of separation (s.3), but the latter's existence /

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1. "The Divorce (Scotland) Act, 1976", p.21. As to reconciliations, and condonation, and decrees of separation or adherence and aliment, see Clive and Wilson, pp.203/4. As to divorce, see Divorce (Scotland) Act, 1976, s.2.

existence does not necessarily guarantee the successful pursuit of the former. Besides many other considerations, consent to separation is not equivalent to consent to divorce.

Previously it could be said that where the only offence was desertion, refusal of a bona fide offer to adhere would terminate the desertion, but that where there were other offences, or conduct giving reasonable grounds for non-adherence, the "innocent" party would require to consider carefully his/her response, and a refusal would not necessarily prejudice, but might rather safeguard, his/her position[1.2].

This would appear to be good law still with regard to s.1(2)(a) and (b); s.1(2)(c) specifies its own terms (and see s.2(3) - possible three month reconciliation period after expiry of period of desertion); refusal of a bona fide offer to adhere during the two or five years' non-cohabitation (which must presumably have been at its inception consensual: indeed, the emphasis seems to be on de facto separation whatever the reason for the separation) is not treated directly, though, in accordance with s.2(4), no account shall be taken of any period or periods not exceeding six months in all, during which the parties cohabited, but equally, such periods shall not count towards the period of non-cohabitation required by the Act. With regard to (d) and (e), the mental element seems to be ignored: (which could have odd consequences): with regard to (c) (desertion), the relevant mental attitude seems to be that which obtains at the moment of parting (unless there be a subsequent offer to adhere, the nature /

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1. cf. Walker, Prins., 2nd ed., p.287.
2. As to reconciliation/condonation provisions, see now 1976 Act, s.2.

nature of which must be considered)[1]. Professor Clive[2], noting the areas in which the common law remains unchanged, comments that a consensual separation can be converted into desertion if one calls upon the other to adhere and the latter refuses (would this then "inject" a mental element into non-cohabitation, so as to result in the period of desertion running from the date of refusal?). "The same", he writes, "applies if the person holding a decree of separation departs from his or her rights under the decree and calls on the other to adhere".

It is clear that the Act raises many questions, and that the concept of desertion remains a highly complex one, potentially productive of strange results, but these matters are on the periphery of a property review.

Resumptions of Cohabitation

The effect of the discussion of the authorities and the merits by Clive and Wilson[3] is to tend to a preference for the view that resumptions of cohabitation, so long as genuine, should have the effect of discharging the first decree and rendering necessary a second decree, based on a new claim and new facts, to regulate the situation, if the cohabitation ceases once again.

That may be so, but it must be recognised that the task of the deserted wife in bringing up a family on a non-existent or paltry and grudgingly-given allowance from her husband is not an easy one, and, while in cases of separation and aliment, or divorce, at least a three-month trial period is provided for[4], and /

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1. cf. Clive, "The Divorce (Scotland) Act, 1976", pp.16 and 17.
2. at p.15.
3. at pp.203/4.
4. See now Div.(Sc.)Act, 1976, s.2 (s.2(2) adultery - three months; s.2(4) - six month provision, supra; s.2(3) period of cohabitation after expiry of period of desertion).

and thereafter it might be said with justice that the wife must take the consequences of her own condonation of her husband's behaviour, in cases of adherence and aliment, where the husband may take a temporary fancy to resume married life, he may as easily become disenchanted with it, and the necessity to apply once more to court for a decree with which to attempt to enforce her rights, makes the task no easier, and perhaps handicaps the wife unfairly in the race to track down and do diligence against a husband, who may be using his best endeavours to evade her.

The task of enforcing payment is one which it might be argued is not one to be subjected to the delays of the court process, when it has already undergone those delays, albeit possibly some years before. The subject of enforceability of decree is one which causes perhaps the greatest public dissatisfaction with the present system, and while the greatest problem involved - that of the disappearing husband - is one impossible of solution, it seems strange not to frame the rule in such a way as to ameliorate the pursuer's position in so far as it may be done. This may be an over-simple approach. Certainly a husband must be protected against a wife who may exploit an extract decree of unlimited validity. Contra, the weight of probability would appear to lie on the side of legitimate usefulness of the rule to the oft-deserted wife than on the side of abuse of a remedy, the essence of which would be the acceleration which it would permit of process of diligence at the instance of the wife against the husband, who, in these instances, must always have "a head start". It is competent in every case for either party to return to the court to seek a variation of decree, on the ground of change of circumstances.

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It seems, though, that, desirable or not, it is probably the case that, at present, a wife must return to the court for a renewal of her decree - that is, she must set out once more (new) facts which justify her crave for adherence and aliment or separation and aliment - in the same way that she or her husband must return to court to effect a variation in the amount of aliment judicially imposed, upon proof of change of circumstances.

Liability of Wife to Aliment Husband

Family Relationships

It is usually supposed that the equivalent duty of a wife to aliment her husband (and then only if she had ample means to do so - that is, separate estate or a separate income more than reasonably sufficient for her own maintenance - and her husband was indigent) was non-existent at common law[1] and was introduced by the M.W.P.(Sc.) Act, 1920, s.4.

In Fingzies, which David Murray[2] reads as being authority for the proposition that the wife, though not bound at common law to maintain her indigent husband, must contribute to the expenses of the household, and which is perhaps the most often-quoted case on this subject, the circumstances were that a married woman was sued by her husband's father for expenses incurred by him in alimenting the husband and providing him with medical care.

The husband had no means or estate and could not work because of illness. The father, in spending this money, was not acting in accordance with any agreement made between him and the wife.

It was held that the pursuer could not recover against /

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1. Fingzies v. F. (1890) 28 S.L.R.6
2. at p.

against his son's wife (even if she too were bound to aliment him - see opinion against this possible obligation in the report) because he had a duty arising out of natural law to aliment his son.

The father had removed his son from the matrimonial home at Leith to his own house in Kinross-shire, since medical advice was that the son should have rest and country air. There, he was nursed by his sister and the father paid the local doctor's bills. The father had waited two and a half months before demanding financial assistance from the wife.

It is significant that there appeared to have been no agreement about expenses between the father and daughter-in-law, nor did the pursuer aver that the wife wished, or proposed, or was even a party to the arrangement to remove the son from his home.

The financial circumstances of the parties were that the father was old and impecunious, and that the wife was possessed of a capital sum of £2,000 and was living comfortably in Leith.

L.Kyllachy concluded, therefore, that there was no question of her ability to pay or perhaps of the moral claim of the pursuer to be re-imbursed, nor as to the inadequacy of her tender of 5/- a week as a contribution - but was she legally liable to pay anything?

He considered that the father had a duty _super jure naturae_, unless it could be shown that the wife was liable for the aliment, and liable _primo loco_, and "that the circumstances were such as to exclude the presumption that aliment furnished _ex pietate paterna_ cannot found a claim against any third party". (By analogy, it might be said that Hedderwick's case (_infra_) goes almost so far as to say that aliment furnished _ex pietate conjugale_ may not be competent to /

to found a debt against the other spouse, but perhaps that goes too far).

"Esto that a wife who has separate estate is on some ground or other liable to support her indigent husband, I am not able to find sufficient grounds for holding that her liability is any other higher or more primary than the father's liability. She is certainly not liable super jure naturae. The relationship between husband and wife is one arising entirely out of contract, viz., the contract of marriage".

Today, marriage is often referred to as a partnership of equals. Furthermore, may there not be a natural law duty upon each spouse to aliment the other in time of need, regardless of the strict legal position either at common law or under the 1920 Act? If that is a true, or a reasonable assumption, might it not be strengthened by statutory enactment, thus providing an equality of duty between husbands and wives, which does not exist in law, though it may very well exist in practice? Where it does not exist in practice, it could be argued that the law should give a lead, and should provide a sanction for non-compliance (though sanctions in this area of legal regulation are notoriously unsatisfactory)[1].

To /

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1. Memo.No.22 has suggested that the parties should owe to each other a reciprocal duty to aliment (2.12: Proposition 2) and with this view in principle the Faculty (pp.3-6) was in agreement. "...the terms in which the re-statement of the duties to support are couched must be carefully considered". Reciprocity of obligation was welcomed where there were no children of the marriage: where there were children, it was argued that the husband's principal duty to aliment should be re-affirmed, and the wife's obligation should be one "to make a monetary contribution to the expenses of the household and to the support of her husband if and in so far as she /

To continue L. Kyllachy's opinion, we find, "and assuming it to be an implied incident of that contract that the wife if possessed of separate means shall be liable to aliment her indigent husband, I have not been furnished with any authority or any argument for the proposition that this liability is to be held as primary and comes before, for example, the liability of a son, or, as here, the liability of a father".

Even if this were otherwise, "it is I think settled that except in very special cases aliment furnished by a person subsidiare liable (e.g., a grandfather) cannot be recovered from a person primarily liable (e.g., a father), at all events until after a demand has been made for relief, and there has been a refusal or failure on the part of the person primarily liable to do what is requisite"[1].

This he felt was borne out by Fraser's views and authorities cited in Parent and Child, and that it was conclusive against the pursuer's case for the period at least before 22/4/89 (being the date at which the father made his demand).

His Lordship was not quite satisfied about the general conclusion which ought to be reached, although what had been said was sufficient for decision of the particular /

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she is reasonably able to do so". It is submitted that the principle of reciprocity is acceptable and desirable (and, it was noted, may not perhaps import equality of burden) but that a certain subtlety of draftsmanship will be required in order to achieve a just result. The obverse of this topic is the discussion of the extent to which a wife's non-financial contribution to the marriage should be reflected in property rights.

1. at p.7. cf. Memo.No.22, 2.67 and 2.75 (Propn.15) - "the alimentary obligation of a remoter relative should arise not only if the prior relative is unable, through lack of means, to provide support, but also if, and for so long as, the alimentary creditor finds it impossible or impracticable for any other reason to obtain aliment from the prior relative".

particular case. If the pursuer had been a stranger (perhaps the doctor?) and the wife had separate estate, would she be liable to pay?

The question, he noted, revealed an almost entire absence of authority, since any authority generally on the subject of the wife's liability seemed to concern her liability to contribute to the expenses of the household - for example, to her own aliment and that of the children of the marriage.

Therefore the question had to be considered open, and any liability he felt must rest on contract, - "that is to say, must rest on something implied by law in the contract of marriage"[1].

"Now, taking the contract of marriage as it stands, or rather as it stood, at common law, it was, it rather seems to me, impossible that any liability such as that suggested should attach to the wife. For at common law the wife's whole moveable estate passed upon marriage to her husband, and the fruits of her heritable estate were in the same position. She, therefore, apart from special paction, had nothing wherewith to aliment anybody, and if by special paction the spouses varied the legal incidents of their marriage, the variation required to be expressed, and only operated so far as expressed. Prior, therefore, to the recent Married Women's Property Act, I hold the suggested liability excluded by the very first principles of the marriage law, and if that was so and still is so at common law, I cannot hold that the Acts in question make any difference. For those Acts carefully express the consequences which are to follow from the changes which they introduce, and the imposition of any /

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1. ibid.

any new liability on the wife in the case of her husband's indigence is not one of them. The law therefore on that subject remains in my opinion as before".

The argument that, once equality in the respective estates of spouses was achieved, there must be reciprocity of obligation to aliment "appears to me to overlook two points, viz. - (1) That at common law the husband's position was altogether different from the wife's, he being not only the breadwinner and head of the family but having also the entire administration of the wife's estate as well as his own; and (2) that the obligation of parties being established on this footing, recent legislation cannot be held to have made any difference in respect that, as I have already stated, that legislation proceeds on the principle of expressing fully the alterations on the rights and obligations of the spouses which are to follow from the changes in the marriage law which it has introduced".

On the facts of the case, he would much have preferred to find for the pursuer, and since the question of expenses was in his discretion, he awarded none to either party[1].

Even after the 1920 Act, the wife's duty is not equally onerous. The duty is to support him if he cannot support himself and if it is the case that she can do so without suffering financial hardship herself: his to support her whatever his financial position, and, whatever hers under certain limitations in the form of judicial scrutiny and discretion as to the amount of aliment to be awarded to her in the light of /

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1. Authorities relied upon: Fr. H.& W. i.837; Stair, 1.8.2; Fr. Parent & Child pp.86, 99, 100: More's Notes to Stair vol.i. Note B. XXIV.

of her resources and her needs.

Of course nowadays, cases of wives being required judicially to pay aliment are more frequent, though still probably unusual except perhaps in the U.S.A.[1].

In Sweden, alimony payments by wives also appear to be becoming more common, but in England, although financial orders ancillary to decrees of divorce, nullity or separation can be made in favour of either party (since the passing of the Divorce Reform Act, 1969), "...because of economic facts ... orders are only rarely made against wives"[2].

Fraser's view, already noted, was that the wife was bound to contribute her exertions to the family support according to her husband's station. He considers that the question whether she was bound to go further and pay a share, from her independent means, of the expenses of the household, was not clear, although it was thought that that was a just rule and the legal consequence of recognising her right to hold separate estate[3].

It is most interesting to see, from the writings of Fergusson[4], that he did not exclude the possible competence of a suit by a husband against his wife for support (i.e. before 1920). He says, "There can be /

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1. For example, Sheila Graham (a successful American journalist) has said that all she received from her short marriage was an obligation to pay her ex-husband about £100 monthly for the rest of her life. Apparently there is in America a growing revulsion for the concept of alimony, (that is, post divorce or separation presumably) whether due by husband or wife, and the U.S.National Organisation for Women has suggested that, instead, a divorce insurance should be taken out to cover future support for wife (or husband even?) and children, should the marriage be unsuccessful.
2. Cretney, p.164.
3. Fr.I, 837/839 and cases there cited.
4. Consistorial Law, at p.174, cited by Fraser, above.

be no doubt that the right to alimony, unconnected with any other claim, forms a relevant ground for an action, when the conjugal society has not been interrupted, but means of subsistence to his wife, suitable to her station, have been refused by the husband, as administrator of the goods in communion. Were a case to occur in which the jus mariti of the husband had been effectually excluded by contract of marriage, or other deed, while he had no means of subsistence without recourse to the separate income or funds of the wife, there can be as little doubt in principle, that he might become the pursuer of a process of aliment"[1]. This intriguing passage raises two issues which are of interest - first, the potential entitlement of a husband to aliment from his wife, and second, a hint (only) that a claim of aliment stante matrimonio might be competent. The introduction of the latter remedy - which has been thought unknown to Scots law - is suggested by the Scottish Law Commission[2] and vigorously supported in the Faculty Response[3].

On this point, Fraser concedes that a duty of support by the wife might exist at least if the husband has no means or is unable to earn any because of illness and the wife has "abundance", and for this formulation, which obviously closely resembles the present statutory rule, he cites in support L.Braxfield and L.Eskgrove in the case of McLaine[4] /

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1. The author refers to "Appendix Note XXXVIII" of his text (which could not be found).
2. Propn. 39. 2.179 et seq.
3. pp.41/42. "It is our view that one of the most serious flaws in our rules of aliment is that, during cohabitation, a wife cannot enforce her husband's duty to support her at a reasonable level .... We feel that Proposition 39 represents an advance which is long overdue".
4. Hailes 1013.

McLaine, when the former declared, in the context of an indigent husband not entitled to courtesy, "I hold that an indigent husband must be provided for", and the latter concurred.

There remains for decision the question whether a wife was required, out of her own estate, to contribute towards the household expenses if her husband was quite able to pay for them all himself, or whether, if he was not able to compel her to make a contribution, it was simply the case that he could, when unemployed and needy, "claim aliment out of her abundance".

According to Green's Encyclopaedia[1] although the wife having separate estate must aliment her children, if her husband is incapable of doing so, yet no matter how small were the husband's means, if they were sufficient to supply the family needs, the wife was not liable to augment them[2] - and contribute to the household expenses. It was thought that "her position in this respect at common law is not affected by the Married Women's Property Act of 1920". In its comment upon the 1920 Act, s.4, the Encyclopaedia is perhaps a little misleading: "The measure of the wife's obligation towards her indigent husband is precisely the same as that of the husband towards his wife: ...".

L. Fraser, in an attempt to answer his own double question, looks to the writings of Pothier[3] and to the Code Civil[4] and concludes that the result of a study of both of which seems to suggest that more was demanded of a French than of a Scottish wife.

According /

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1. Sub.nom. "Aliment", p.300 (para.739).
2. Fingzies: The Encyclopaedia contrasts Walton (H.& W. (2nd edn.) 192) and Fraser (i.837).
3. Tr. de la Communauté sec.464.
4. Art.1448.

According to the Code, "La femme qui a obtenu la séparation de biens, doit contribuer, proportionnellement à ses facultés et à celles du mari, tant aux frais du ménage qu'à ceux d'éducation des enfants communs. Elle doit supporter entièrement ces frais s'il ne reste rien au mari". (There are decisions on this article to be found in "Les Codes Annotés" by Sirey, p.335).

In the view of Pothier (sec.454) - "Si la femme qui en conséquence d'une séparation contractuelle, jouit séparément de ses biens, refusait de contribuer aux charges du mariage, le mari pourrait la faire condamner à y contribuer. Le juge doit en ce cas régler la pension que cette femme doit payer à son mari avec qui elle demeure, à une somme, en égard à ses facultés et sa qualité; il doit pareillement régler la somme pour laquelle elle doit contribuer aux aliments et à l'éducation des enfants communs".

It seems therefore that a French wife who enjoyed separation of property, might be compelled to contribute something to the expenses of the marriage and the establishment, and, if her husband were indigent, the whole burden of support of him, of the children and of the household, might have to be met by her. It can be seen that the extract from Pothier is the more strongly worded, since the wife's obligation is set forth without reference to the husband's means, although the first sentence of Art.1448 is to the same effect, and demands a full responsibility for all outlays only when the husband has no funds[1].

Professor Anton[2] notes that there is no formula for the apportionment of household expenses where both partners /

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1. As to present position, see Chapter 6 (France).
2. 'Effect of Marriage Upon Property in Scots Law' 1956 M.L.R. 653.

partners are earning a salary (but refers the reader to Fr.i.837 which is the passage under discussion).

Fraser goes on to mention those cases in which the point has arisen indirectly. Thus, where the wife's income has for years been collected and administered by the husband, and used to pay certain family bills, it would seem that it is not competent for the wife or her executors to demand an accounting and payment of those sums, a result which leads him to the conclusion that it may be that "the wife lies under an obligation of rateable contribution". It may be however that such a result arises from considerations of acquiescence, personal bar and equity and upon a consideration of the facts of each case and may not support such a definitive conclusion, or substantive rule. (see Cuthill v. Burns). In Cuthill v. Burns[1] a wife had received certain money from her father exclusive of her husband's jus mariti, one portion being given in terms of her marriage-contract and the other her father obliged himself to have paid to her at his death. The husband conveyed to her the estate of Garvald, his heritable estate, reserving to himself the liferent. About one half of the wife's fortune was spent shortly after the marriage in meeting some of her husband's debts, and certain other sums were spent in improving the estate. In 1831, the wife succeeded to heritable estate of her brother, which yielded £2,832. After 1836, the finances of husband and wife were completely mixed up, apart from £520 deposited in the wife's name in a bank.

The husband died intestate in 1842, survived by his wife and a son, who subsequently died in 1848 intestate and unmarried.

The personal estate of the husband amounted to about £408 and there was a bank deposit account of £300 /

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1. (1862) 24 D.849.

£300 in name of the wife at that date together with a Deposit Receipt of £6,000, which was in the name of both spouses and the longest liver. There was a dispute between the husband's next of kin and the widow qua relict. The decision is interesting in the separation which it makes of funds, and the rules adopted to perform this task.

The deposit receipt for £6,000, and the deposit of £300 could be traced to have come from the wife's estate, from her side of the family, and were, therefore, hers.

On the other hand, the sum of £408 represented the husband's personal property and as such fell to the next of kin.

In addition, it was held that in circumstances where the wife's separate property had been used to pay her husband's debts, and in which on the other hand she had greatly benefited from the terms of the marriage-contract (the estate having been made over to her) it was not competent for her to revoke these payments as donations inter virum et uxorem (for revocation was then possible) but rather should they be regarded as in the nature of a "remuneratory grant", and therefore could not be revoked so as to form a claim on her husband's estate nor could certain other advances be set off against his estate. This is an interesting illustration, but perhaps should not be regarded as too strong an authority, since the point in support of which L. Fraser cites it is very indirectly decided, upon a certain degree of specialty of facts, a certain acquiescence by the wife in the expenditure of her money and even perhaps upon considerations of equity (which in this subject might - or may now - play a useful rôle).

It can be seen from a consideration of the judgment of L.Benholme that his Lordship, in effect, though not specifically in words, is refusing the wife's /

wife's plea on something very akin to personal bar: much of the decision is referable to the particular quality of the facts, and it cannot truly be said that a substantive rule emerges.

In a note to his interlocutor, the L.O. states, "But if it is necessary for the defender to claim the sum in the deposit-receipt, or any part of it on the footing of its being a donation in her favour, in addition to the provisions settled upon her by Mr. Burns in the marriage-contract, it is difficult to see how she can be permitted to accept of that donation as irrevocable by her husband's death, and at the same time to revoke a donation previously made by her to her husband, where both may fairly be regarded as remuneratory rights between husband and wife. In questions of this sort little inequalities cannot be weighed in nice scales, and no countenance can be given to a griping disposition between parties where the opposite qualities of justice and moderation should prevail"[1]. L. Benholme's opinion may not have coincided in every respect with the views of the L.O., but with that last sentiment he, and very many others, would surely concur. In fact, the sentence provides a well-worded aim: moderation and justice must not be lost sight of in the scramble for a modern code to reflect modern ideas. In particular, the post-1970 position of husbands must not be reduced to the circa 1830 position of wives with the result that marriage-contracts for the protection of the husbands' rights must be created.

Fraser also cites English authority (Gardner v. G. 28 L.J.Ch.p.904 and the opinion of Vice-Chan.Stuart) and also refers to Bright, Husband and Wife vol.ii. p.259. In such circumstances, the Vice-Chancellor's view /

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1. emphasis added.

view was "that the case was not one of gift to the husband, but it was one in which the husband, holding the money upon trust for the wife, or as she should direct, employed it for the most part in purposes for their common benefit; and the question was, whether, after all that had been done with the knowledge and assent of the wife, she was to recover the money from the husband's estate, just as if it had remained in his hands, without any act of hers, to put an end to the trust for her separate use?" After such assent to the utilisation of the money for business and family expenditure, it was impossible for the wife to claim it.

Thus, on reasoning based on acquiescence and personal bar or estoppel, perhaps, English law, while possibly not expressly stating a rule, would render a wife's acceptance of the use of her money for family welfare and the expenses of running the establishment, irrevocable[1], a result which at least provides some guidelines as to conduct and as to the English Courts' view of the justice of the matter, and it would seem that the Scottish Courts, in very similar circumstances (e.g. of Cuthill v. Burns) would not stray far from that path.

However, it cannot but be felt that Fraser has not squarely given an answer to the question which he set for himself, but has circumvented it, and strewn the trail with French, and English, examples. It may be that the paucity of Scots authority was such that he felt no responsible opinion could be ventured.

In the subsequent case of Adair v. A.[2] which was an action of separation by the wife against the husband, on the ground of cruelty, the husband sought interim /

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1. could it amount to, perhaps, an irrevocable gift, though neither Gardner nor Cuthill expressly makes any such suggestion?
2. 1924 S.C.798.

interim aliment, since he was unable to maintain himself, and she was well placed, financially. (She had the liferent of a trust fund which her husband estimated at £500 p.a., and she valued at £300 p.a., and she admitted that she had previously, for a limited time, helped her husband to the extent of 10/- per week). The L.O. granted that sum weekly as aliment to him, and this exercise of the discretion conferred upon him by the Act of 1920, s.4., to do so was not disturbed on appeal.

The terms of s.4. are as follows:- "In the event of a husband being unable to maintain himself his wife, if she shall have a separate estate or have a separate income more than reasonably sufficient for her own maintenance, shall be bound out of such separate estate to provide her husband with such maintenance as he would in similar circumstances be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance"[1].

A careless first reading would suggest that their duties are equivalent and reciprocal and equally onerous, but the duty of the wife is cut down by the wording of the first paragraph, namely, "if she shall have a separate estate or a separate income more than reasonably sufficient for her own maintenance ...".

Moreover, the husband's condition must be one in which he is 'unable to maintain himself'. It may be that the wife's duty does not extend to the husband who is merely shiftless and unwilling to maintain himself. Under the present system, shiftless and lazy wives are well protected, but equally there are many /

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1. 1920 Act, 10 & 11 Geo.V, c.64, s.4.

many for whom, through economic or other circumstances - that is, where the earnings of the husband cannot support the family, or where the husband is untraceable - the private law rules of aliment are of little help.

"Indigence" suggests perhaps physical or mental inability to maintain oneself, rather than mere indolence, and refusal or disinclination to maintain oneself[1].

In Hedderwick v. Morison[2] at the time of the marriage the husband had a salary of not more than £100 p.a. and the wife had inherited £1000 a little while before. Seven years later, the husband inherited about £4000-£5000 from his father, and in the same year granted a trust assignation, making over £1000 to trustees, directing them to pay the income of that sum to his wife during her life and on her death to pay the fee to the children of the marriage, the narrative clauses relating that "I have at various times received large sums of money from my wife"; "that it is right and proper that I should make some provision for her and my family".

In 1900, nine years after the marriage, the husband obtained decree of divorce against his wife and the trustees declined to continue the trust payment to her on the ground that she had forfeited by reason of the divorce the trust assignation provision which they said was a matrimonial provision.

The wife sought declarator that the trustees were bound to continue paying the income of the trust fund to her, during the course of which it was made clear that the greater part of her original £1000 had been spent by her on household expenditure during the marriage /

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1. "Indigent":- needy, poor. Concise Oxford Dictionary. (Root: egere, to be in need, destitute, be needy, poor: Cassell's Latin Dictionary).
2. (1901) 4 F.163; 9 S.L.T.255.

marriage.

The decision (which affirmed the judgment of the L.O.(Pearson)) was that this expenditure by her did not place her husband in the position of a debtor for those sums so expended, and that the liferent provision was "a proper matrimonial provision" which, by reason of her divorce, she had forfeited.

In this L. Young dissented, holding that the husband's conveyance to his wife through trustees of pecuniary benefit was "a restoration to the wife of her own estate" and that accordingly what she was claiming was her own property. He felt that this had been done in fulfilment of an honourable obligation which, while not attaining the character of a legal debt, was an onerous cause for the granting of the deed.

The aspect that the wife, initially at least, before the financial position of the parties became less disparate, was fulfilling a legal obligation of her own (that is, to augment the family finances while her husband's income was small) is not mentioned, although of course the husband's subsequent substantial enrichment would rob such an argument of some at least of its force. It is unfortunate that the issue was clouded by that latter factor.

Walton[1] commences his discussion of this topic by a reference to Erskine's words[2] that, "It is the duty of the husband as the head of the family to defray the expenses of the household, and to maintain and educate the children of the marriage", and upon the question of whether a wife endowed with separate estate must contribute to the expense of the household, he quotes Erskine[3] to the effect that, "If the wife has a subject /

1. p.223.
2. 1.6.56.
3. at 1.6.15.

subject exclusive of the husband's right, she must contribute proportionally towards the maintenance of their common children, and in default of the father she is simply liable".

While the mother's liability to aliment the children after the decease of their father is recognised[1] her liability while he is alive would appear to be postponed to his[2]. Father and mother of an illegitimate child are jointly liable for its support, and if one is not able to pay all, or the due share, the whole liability falls on the other[3]. Walton states[4] that "It is undoubted law that when the father is dead, the mother is bound to aliment the children of the marriage". However, it was his view that none of the authorities specifically states that her liability co-exists with that of her husband *stante matrimonio* and that the language is consistent with the view that her liability arises only after the husband's death and that therefore it might be said /

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1. Ersk. 1.6.56; Fairgrieves v. Henderson (1885) 13 R. 99; Whyte v. W. (1901) 3 F.937; Buchan v. B.1666, M.411; Macdonald v. M. (1846) 8 D.830.
2. See exposition of the present hierarchy of liability to aliment: Sc.L.Com.Memo.No.22, 2.68. There has been, however, an equalisation of the rights of father and mother as regards the position of tutor or curator, but no equivalent financial burden has been imposed (see Guardianship Act, 1973, particularly s.10). This point was noted by the Scottish Law Commission (2.74. "It is now recognised that parents of legitimate children have equal parental rights and we think that they should have equal parental duties") and a recommendation made that father and mother of a legitimate, as now of an illegitimate, child should be placed on the same rank of liability. At 2.76 (Propn.16), it is suggested that the liability to aliment of those in the same rank "should in principle be equal, but subject to modification in the light of their resources", which in all seems a most sensible approach. Imposition of equal parental duties with regard to aliment was welcomed by the Faculty Working Party (at pp.14/15).
3. Onsken's J.F.(1892.) 19.R.519.
4. at p.223.

said that a wife's responsibility would arise only if her husband was incapable of supporting the children (or perhaps had disappeared?) and that even then she would have a claim of relief against him.

On the more doubtful ground of a wife's liability to contribute to the household expenses where the husband is not indigent and she has separate estate, Walton , while acknowledging L.Fraser's view that such a liability is the legal consequence of recognising her right to hold separate property,[1] steers a middle course and suggests that there is no (legal) compulsion upon her to contribute, but that, if she does, her husband would not thereby be made her debtor[2].

At common law, he writes, she would have no funds of her own or else she would have funds supplied by a marriage-contract which deed would specify her liability also. Up to 1920, the M.W.P. legislation made no specific mention of contribution towards household expenditure, and the 1920 Act, s.4 made no mention of children or husbands with ample means.

An English wife must prevent her husband from becoming chargeable to the parish[3] and must maintain her children and grandchildren (s.21), although, according to Walton, probably only if her husband is incapable of doing so.

In sum, it was possible for Walton, writing as at 1/1/51, to conclude comfortably that at common law no such liability to contribute in money terms towards the maintenance of the household attached to a wife and /

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1. although Fraser felt that the position remained doubtful.
2. Hedderwick v. Morison (1901) 4 F.163 discussed above.
3. M.W.P.Act, 1882, s.20. cf. National Insurance Act, 1948 and Ministry of Social Security Act, 1966.

and that the English precedents (to the effect of the support due to descendants and to the husband if in dire straits) would be followed[1] where there had been no statutory amendments.

It is interesting to see that Walton, having reviewed the old, and the English, authorities[2] did not think it necessary or advisable or stimulating to insert for discussion even a query that perhaps the wife should in future share equal responsibility for the children and that there should be a mutual obligation of support between spouses.

The list of persons responsible for the aliment of the indigent is drawn up by Green's Encyclopaedia[3] as follows:- first, husband ("For the support of a married woman her husband is primarily liable"), and then in the case of indigent persons generally, descendants, including grandchildren, thereafter the father and in certain cases his representatives, and then the mother (as to the liability of whom the Encyclopaedia differs from Erskine's view (1.6.56) that all paternal ascendants must first be exhausted before the mother is called upon to aliment)[4].

Thereafter, the indigent person might look to his paternal grandfather[5], his paternal grandmother, paternal great grandfather, and mother, (presumably), and in default of all these, his maternal grandfather and mother, (presumably), and so on[6,7].

There /

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1. see e.g. Hodgens v. H.(1837) 4 C.& F.323: Coleman v. Birmingham Overseers 1851, 6 Q.B.D.615 cited by Walton, p.224.
2. Later English authorities and the recent great changes in English family law, culminating in the Matrimonial Causes Act, 1973 will be discussed later (Chapter 6 - England) when English law is specially considered.
3. (1926 edition) Sub Nom. 'Aliment', pp.287/8.
4. See authorities there cited.
5. Bell, (1890), 17 R.549.
6. Wilson 1825, 3 S.547; Fr.F.& Ch. 83.
7. See hierarchy of liability proposed in Memo.No.22 Proposition 14, and suggested amendments (insertions) made /

There is at present no liability in aliment between collaterals[1] and a brother, in that capacity, will have no liability to aliment a brother, but may be called upon if he has assumed the character of his father's representative[2]. The Scottish Law Commission recommended that no change be made in this rule[3]. So much the more strange is the 1976 provision.

After divorce, there may be liability upon a husband /

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made in Faculty Response p.16. There is discussed also in the Memo. and Response the questions of liability in aliment to and by de facto members of a family, and "other relations through marriage". The Memo. (Propn.10) proposed that there be no alimentary obligation between a person and the relatives (other than children) of his or her spouse; the Faculty Response (pp.10-12) advocated an alimentary obligation between children and parents-in-law (but not further): see in consequence amended hierarchy. A hierarchy of entitlement to aliment is set forth for consideration - Faculty Response, p.18; Memo.2.90 (Propn. 19).

1. Cf. Eisten v. N.B.Ry. (1870) 8 Macph. 980. However, the Damages (Scotland) Act, 1976, Sched. 1 has included collaterals and their issue, uncles and aunts and divorced spouses in the list of persons entitled to sue in respect of the death of an individual, for loss of support. Only immediate members of the deceased's family (parent, spouse, child, accepted child) may seek a "loss of society award" (formerly termed solatium). It seems strange that this distinction should exist, but perhaps it is a fairer rule in that it permits recognition to be given to loss of de facto support where such may have been given. Will the cases thereof be found to be infrequent? Contra, there are many other relationships - or non-relationships - in which support was given where no legal duty was owed, and the criterion for inclusion in the list (upon which title to sue depends) may appear arbitrary and inconsistent when contrasted with the test of 'legal duty to aliment' laid down in Eisten.

2. Mackintosh (1868) 7 Macph.67: Ersk. 1.6.58 - position of heir vis-à-vis his collaterals. Walker, Prins. I,319.
3. Propn. 11: Faculty Response, pp.12/13.

husband to support his children until the age of sixteen [1] and any sum awarded to the wife for that purpose[2] is termed "aliment"[3,4]. One cannot fail to be disappointed that Fergusson's suggestion that a husband might look to his wife for aliment did not receive further discussion. Perhaps, however, the true view must be that Fergusson intended his remark to go no further than the case he postulated, namely one in which the husband had no means of support, and had no access to his wife's funds. It would appear that at common law there may have been a duty for a wife with sufficient funds to aliment an indigent husband, and if that is the case, then the provision of 1920, heralded as the introduction of a wife's legal duty in this respect was no more than a statutory reiteration of the duty which arose at common law.

Be that as it may, it must be concluded that there is nothing to lead us to suppose that the duty was any more onerous than that imposed by statute (and may not in many cases have been awarded the dignity of the status of rule, but have been the result of equitable reasoning /

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1. Watson, 1695, 33 S.L.R.150.
2. Dunn v. Matthews (1842) 4 D.454: Conjugal Rights (Sc.) Amendment Act, 1861, S.6.
3. See Walton, pp.150/151. The tone of the discussion (1950) sounds oddly dated. Where divorce is competent by consent, or ostensibly without "fault", and where wives form a significant proportion of the working population, there may require to be a reconsideration not only of the subject of support between spouses and ex-spouses, but also a re-formulation of their respective duties to the children of the marriage. Thus, Memo. No.22 (2.74) recommends that, in the legitimate, as in the illegitimate relation, a child should be able to look for support to his mother equally with his father.
4. Cf. Memo.No.22, 2.173: proposal that, in Scots law, there should be use in statutory provisions concerning support of children of the term "aliment", rather than "maintenance".

reasoning[1] or on specialty of facts[2]. Fraser is found not to have answered the question which he set himself. There is no elaboration of precisely what is meant by the obligation "to contribute her exertions to the family support, according to her husband's station" nor is there a definition of the circumstances in which such an obligation may arise, except that, from the context, it can be seen not to signify pecuniary contribution - that is, where the husband is able financially to meet all the family commitments himself. A contribution in money Fraser does not appear to be prepared to affirm to be exigible, (though "[T]he point would be more easily solved, if the husband were without means, or from sickness unable to earn any, and the wife had abundance"[3].) but nevertheless the concept commends itself to him as being just and in keeping with the wife's increasing right to hold separate estate. Professor Clive has provided for Memorandum No.22, four appendices. Appendix A concerns 'The Development of the Law', and it is interesting that, at paragraph 8, he comments upon the doubt which surrounds the wife's pre-1920 duties with regard to aliment of the husband. He refers to the case of Fingzies[4] and also to Montgomery-Cuninghame v. Montgomery-Beaumont[5] and Ritchie v. Rennie[6].

If it was not a displeasing notion to Fraser, it is surprising that the law upon this matter remains as set down by the 1920 Act, S.4, when there is considered the great change in social conditions and thinking, and in the law pertaining to women, their earning power and /

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1. Cuthill v. Burns (1862) 24 D.849, supra pp. 402-404.
2. Hedderwick v. Morison (1901) 4 F.163; 9 S.L.T. 255, supra, pp. 407-408.
3. I, 837.
4. supra, pp. 392-397.
5. (1778) M.15526.
6. (1840) 13 Sc.Jur.73.

and property in the years since 1878.

However, in terms of the National Assistance Act, 1948, S.42[1] it was provided that a man should be liable to maintain his wife and children and that a woman should be liable to maintain her husband and children and that "children" should include illegitimate children where a woman was concerned and children the paternity of whom had been admitted or otherwise established where a man was concerned.

S.43 entitled the N.A.B. or the local authority to attempt to recoup the cost of maintenance from the person liable to maintain the assisted person, and the Court might order the defendant to pay such sum as it might consider appropriate (s.43(2)).

Under S.44(7), as far as orders for affiliation and aliment were concerned, the Board might use diligence, including civil imprisonment under the Civil Imprisonment (Scotland) Act, 1882, in the same way as might a wife, and that whether the decree had been taken in favour of the Board, the local authority or the mother.

National Assistance was superseded by Supplementary Benefit, and the Ministry of Social Security Act, 1966, contains (in s.23) similar provisions as to recovery of the non-contributory benefit provided by the Act, and reiterates (in S.22) the liability to support existing between spouses and towards children[2]. Imprisonment for a period not exceeding three months or a find not exceeding £100 or both, is provided by /

1. and see now Ministry of Social Security Act, 1966, ss.23 and 30.
2. Imprisonment is a competent sanction for persistent refusal or neglect by an individual to maintain himself or the person for whom he is responsible with the result that benefit is awarded to him or them and free board and lodging given in a reception centre.

by s.50(1)[1.2].

"Permanent" Aliment: "Interim" Aliment: Interim Aliment 'Pendente Lite'

The definitions of "interim" and "permanent" aliment are productive of great difficulty. It seems that one must treat "permanent" awards of aliment as being those pronounced after a decree of separation or adherence has been granted. (Donnelly 1959).

'Aliment' in a broad sense of course is the support, in cash and/or in kind, owed by husband to wife 'stante matrimonio', subject to the rules stated. Properly speaking, a periodical allowance granted to the wife for her own maintenance after decree of divorce is not "aliment", though an award so /

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1. For recovery in cases of misrepresentation or non-disclosure, see 1966 Act, s.26. See Secretary of State for Social Services v. Solly 1974 3 All E.R. 922; recovery allowed from executor of deceased claimant. 1948 Act, s.45.
2. See Memo No.22, Part V: Relationship between Public and Private Law. 5.7 (concerning 1966 Act, s.22)... "It is clear that the common law hierarchy of alimentary obligants is irrelevant; proceedings under section 23 or 24 are brought only against the liable relatives referred to in section 22. It is much less clear whether the common law of aliment is irrelevant in all other respects...". 5.8. "It is necessary to clarify the doubts in the present law on recovery from liable relatives of the cost of supplementary benefit. The best solution would undoubtedly be to harmonise the rules on liability under the public law and private law systems. Our proposals would go a long way in this direction...". In so far as there were areas (see e.g. conduct and willingness to adhere, grandparent/grandchild obligation to support) where Faculty wished to differ from the Memorandum, the Faculty Response notes (p.82) that "the harmony achieved with the rules of public law would be less than that which would follow the Memorandum's proposals."
See also Clive and Wilson, pp.390 et seq: "Marriage and Social Security" and (Professor Clive) Memo. No.22, Appendix A. 'Interaction of public and private law', paras. 18-21. (short historical survey to present day).

so made for the support of children thereafter is correctly so termed.

"Interim" aliment is that monetary support which is sought not in conjunction with a crave for separation or adherence, and is able to be distinguished from an award sought 'pendente lite', that is, an award made to endure until the result of present (or subsequent) litigation shall become clear.

Examples of interim aliment pendente lite are numerous[1].

It would obviously be inequitable and unjust that, pending litigation, a wife be required to cohabit with her husband for fear of being totally lacking in financial support; and thus by this remedy /

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1. Kellerhouse v. K. (1894) 6 F.1220 (interim aliment before proof refused where a wife had £1500 of her own money, exclusive of the jus mariti, in the bank: "I should have had no doubt if the woman had not money of her own; but having money of her own in the bank, she does not need money from her husband to enable her to pursue the action. I cannot take the amount of yearly income which the sum will yield as any rule. Money in bank is the very perfection of money for litigation. It is only necessity which justifies an interim award in such cases; and so there is no necessity here..." (per L. Kincairney, at p.1221). No doubt the principle, if not the sum, remains a good guide; Borthwick v. B. (1868) 10 D.1312; Hoey v. H. (1883) 11 R.25; Pirrie v. P. (1903) 10 S.L.T. 595; Robertson v. R. (1905) 13 S.L.T. 114; Johnson v. J. 1916, 2 S.L.T. 191; A.B. v. W.B. (nullity), 1909 1 S.L.T. 342; see Earle v. E. 1920 S.L.T. (Notes) 25, however - (aliment ad interim, for the duration of the (divorce) litigation, awarded at the rate of £25 per week, though the wife had gross assets of £15,000 (house £5,500) and investments valued at £9,500, producing an income of about £380 p.a.) which the defender argued was ample for her maintenance during that period. Lord Robertson rejected the argument that she should be required to spend her assets to maintain herself during a period to be terminated possibly by an award in her favour of a periodical allowance of £35 per week and a capital payment of £15,000. The defender, it seemed, was a man of means.

remedy she may gain maintenance for the period of the litigation.

However, as Walton demonstrates[1], if she was in employment and accustomed to work and to receive a salary sufficient for her needs, she might thereby disentitle herself from receiving aliment although a wife unused to work would not - at least at Walton's date[2], and still probably now - be required to seek employment. Professor Clive notes[3] that this is an award which "must be made in the dark, or at least in the half light, and for this reason it is accepted that the court must have a considerable measure of discretion".

'Aliment' to an indigent husband in terms of the M.W.P. (Sc.) Act, 1920, s.4, may mean 'interim aliment' pendente lite[4].

If a woman has no other means of support, it would be exceptional for a court to refuse her application. A prima facie case must be shown, but the older law was stricter and required semiplena probatio[5].

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1. at p.145 and cases there cited.
2. 1st edn: 1893: 3rd edn: 1951.
3. Clive and Wilson, p.212.
4. Adair v. A. 1924 S.C. 798.
5. Walton, p.146. C.& W., p.213, fn.65. L.P.Clyde in Adair, supra, at p.801, commented, perhaps somewhat confusingly, "The evidence required to warrant an interim allowance of aliment in a consistorial cause has been described as a semiplena probatio, and consists of such materials, submitted to the Court, as present a prima facie case." An example of averments considered insufficient was Alexander v. A. (1849) 12 D.117. Lord Sands, upon the central point - whether the wife's, and the husband's, obligation to each other in this matter were identical (in the matter of evidence at this stage), the former having been supplied by statute, (that is, the general obligation to aliment the indigent husband, and "There is nothing to exclude" the Act's "application to interim aliment;" per L.P. Clyde, at p.801) at p.802 remarked, "In regulating matters of interim arrangement during a process the Court must proceed upon a prima facie view of the facts, and I am of opinion that we must take this course in dealing with the wife's liability to the husband". A more detailed discussion /

It has been thought that the court will not grant interim aliment pendente lite until the husband has had an opportunity to state his defence[1], but Professor Clive takes the view[2] that application may be made at the earliest stage of the case, and "even before the defender has had an opportunity of lodging defences".

The grant of an award of interim aliment 'pendente lite' is entirely in the discretion of the Court[3] but Fraser[4] says that this is not an arbitrary but a judicial discretion, and quotes Sir J. Nicholl in Cooke v. C. 2 Phill. 40, as follows:- "Although alimony, that is, the allowance to be made to a wife for her maintenance, either during a matrimonial suit, or when she has proved herself entitled to a separate maintenance, - is said to be discretionary with the Court; but it is a judicial, not an arbitrary discretion which is to be exercised; and therefore it is clearly a subject of appeal". If a wife has a reasonable case at all, it is most unlikely that she will be refused.

However, not only must the pursuer show a prima facie case to justify the remedy she (or he) is /

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discussion (dealing separately with different types of action) is to be found in Clive & Wilson pp.213-217 and see Memo.No.22.

1. Walton, ibid., citing and outlining Pirrie v. P. (1903) 10 S.L.T. 598, and Johnson v. J. 1916, 2 S.L.T. 191.
2. Clive & Wilson, p.212, citing Fyffe v. F. 1954 S.C.1, (see L.Guthrie's opinion at pp.2/3) and Currie v. C. (1833) 12 S.171, and distinguishing Pirrie and Johnston on the ground that the wife had an income of her own. L. Guthrie in Fyffe maintained that this was a matter lying entirely in the discretion of the Court, and certainly circumstances can be envisaged (as those in Fyffe) in which such a discretion will be necessary, if the object of the award is not to be frustrated. See also Currie, at p.173.
3. Currie v. C. (1833) 12 S.171, Murison v. M. 1923 S.C.40.
4. H. & W. I, at p.848.

in seeking, she (or he) must also show prima facie proof of marriage[1].

The practice of allowing aliment ad interim to a wife is evidently of long history and was accepted by the Commissaries. Halkerston[2] quotes two older cases on the topic, namely, Lady Lennox against Lord Lovat[3] the report containing the statement, "During the dependence of the process of divorcement for impotency, although the suit was at the wife's instance, yet, in the meantime, the Lords found - She was to be aliomented at the husband's charges - 23rd March, 1579," and this though the husband offered to maintain her at home, presumably during the dependence of the action and, similarly, Logan against Wood[4].

It would appear that some at least of the confusion attendant on the subject of interim and "permanent" aliment stem from historical jurisdictional difficulties and differences between the Court of Session and the Sheriff Courts[5].

It may be said now that there are four types of aliment. The first is support given by the husband /

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1. E. & W., I, 846 (in a passage which appears, despite the generality of the opening words, to be concerned with interim aliment pendente lite: insufficient proof of marriage must always, after all, ultimately bar an award of aliment propor). See also Sc.Law Comm. Memo.No.22, 2.176, and Faculty Response, pp.39-41. For a discussion (referred to by Memo.) of entitlement ('Merits' and 'Marriage' aspects) to an award of Interim Aliment pendente lite in different types of matrimonial litigation, see Clive and Wilson, p.213 et seq.; See also Fraser, H.& W., I, 850-854.
2. "A Digest of the Marriage Law of Scotland" (1827).
3. 23rd March, 1579 (collected by Colville).
4. 26th March, 1561, Balfour 99, Mor.339. See also Earl of Eglinton against Lady Eglinton, July 14, 1610, Haddington, Dict.1413. Mor.6185.
5. This subject is amply explored in the major works: see, e.g. Clive & Wilson, pp.187-190; Fraser I, 840-846.

husband to the wife during marriage when no litigation is in prospect (or possibly also, monetary support given in terms of a contract of separation.) It may be given in kind by "keeping a roof over the wife's head", that is, by maintaining her in family with him at bed and board[1], or by sending her an allowance if they have separated voluntarily and made an extra-judicial arrangement therefor[2], or perhaps if they have been separated physically merely as a result of the husband's employment.

Second, and at the other end of the scale, there is the so-called "permanent" aliment, which is now regarded as being that granted after decree of separation or adherence has been pronounced[3] and is a misnomer, as has often been pointed out[4], since it is incompetent for the Court to fix aliment "in all time coming"[5] and such an award will constantly be subject to review, should either party be able to prove relevant material change of his own or the other party's financial circumstances.[6]

Some /

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1. or under another roof - cf. Hughes v. H. 1911 S.C.200, which, however, (per L. Kinnear at p.207) was "not a consistorial action". "A decree ordaining the wife not to molest the husband in his occupation of the hotel leaves absolutely open the question of fact whether the husband will perform his conjugal duties to her...", and, if not, the wife may bring an action of adherence per L.P.Dundas at pp.205/206.
2. revocable by agreement of the parties, or by genuine offer to adhere: infra, p. 467.
3. Donnelly v. D. 1959.
4. S.C. per L. Macklintosh in Donnelly at p.107.
5. Brunt 1958: Duncan v. Forbes (1678) 15 S.J.R. 371.
6. Charlotte v. C. 1919 S.C. 576: in Adair v. A. 1932 S.N. 47, a wife by a separation agreement had undertaken to pay her indigent husband 10/- per week, and the husband subsequently brought action against her concluding for payment of £2 /

Some difficulty is encountered here concerning the efficacy of these agreements, since the courts appear to display a somewhat ambivalent attitude, being pleased, on the one hand, to take as the approved figure of aliment that agreed between the parties in circumstances of the pronouncement of separation or adherence decrees in which (alimentary) aspect, the rule of "no decree without proof" is not adhered to[1], and yet regard with some distaste that /

£2 per week, but not calling upon his wife to adhere or entering any change in his own financial circumstances. L. Mackay held that the previous agreement was still binding, since it could only be revoked by the husband's conduct in showing himself willing to adhere, and that it was not for parties who had made their own arrangements and had no intention of resuming married life together to come to the court for the fixing of aliment, taking as the vehicle an action of payment of aliment without conclusions also for adherence. The Pursuer reclaimed and was allowed by the First Division to add an amendment to his pleadings, to the effect that he was willing to adhere to his wife. A proof of averments was allowed, but thereafter the action was settled, and the court gave effect to an arrangement of a payment of 30/- per week free of income tax to the husband "during the joint lives of the parties and until the parties should adhere to each other". Naturally the right to re-apply to the Court for a modification (up or down) on proof of change of circumstances was allowed to the parties.

1. Yet see (in the context of divorce and succession (Sc.) Act, 1964, s.26(2) (see now Div.(Sc.) Act, 1976, s.5(2)) Hoban v. H. 1975 S.L.T. (Notes) 4, per L. Avonside: "It is ... my opinion ... that no arrangement as to periodical allowance can bind the court since the order which the court may pronounce must depend on the court's view of the respective means of the parties and all the circumstances of the case". The court had a power and indeed a duty to award what it considered to be appropriate irrespective of any joint minute which might have been lodged by the parties, if during the proof it transpired that a greater or less sum than that agreed, would be suitable. At p.5, "...the joint minute is subject to examination by the court and the court is not bound by any joint minute between parties dealing with a matrimonial cause". A joint minute might be helpful, but it did not bind the court, nor did it prevent a party "from bringing to the notice of the court by minute of amendment facts which /

that abrogation of the normal married pattern envisaged by the law (namely, joint duty of adherence, perhaps heavier on the wife (as evidenced possibly by her duty to "follow"him) as a quid pro quo for her right to look to her husband for support: joint duty of aliment, much heavier on the husband and imposed on the wife in terms of M.W.P. (Sc.) Act, 1920, s.4), manifested by the voluntary extra-judicial separation settlement.

Such settlements, at least in their substantive if not their financial aspects, are normally outwith judicial ken, being a regulation of parties' affairs outside the law, a view resulting - perhaps fortunately and perhaps correctly[1] - in the discouragement of the use of courts of law as bargaining centres for spouses squabbling over money matters.

Third, and fourth, are interim aliment and interim /

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which should be in the knowledge of a judge who is charged with the duty of making proper financial provisions as between parties".

1. Yet, however, judicial power of award of aliment during cohabitation is urged in Memo. No. 22, 2.179 et seq and Propn. 39, welcomed in Faculty Response, pp.41-42, and urged in Chapters 4 and 7 hereof; could not such power be extended to include judicial review of the financial aspects of voluntary arrangements to live apart, while keeping the marriage nominally in being? This would be revolutionary, but perhaps realistic. It may be that the significance of the adherence rules is diminishing (cf. Div. (Sc.) Act, 1976, s.3), and even while the existing attitude prevails (as to which see Walker, Prins. I, 267) the courts may find an opportunity to pronounce on the (financial) merits: see Campbell v. C. 1923 S.L.T. 670. "The rate of aliment judicially awarded is always open to revision by the Court; and it would seem anomalous that there should be no escape from a contractually stipulated rate" (per L. Constable at p.671).

interim aliment pendente lite. The latter, as its name suggests, means, as has been noted, monetary support sought pending the result of litigation.

The former means aliment sought in an action where there is a conclusion for aliment but which does not conclude also for the remedies traditionally linked with it, namely adherence or separation. In other words, the distinction between 'permanent' and 'interim' aliment lies in the fact that in the former, a decision upon status has been made, whereas, in the latter, it has not[1]. The terminology is unsatisfactory. It should be noted that there does not appear to be any safeguard against a wife's enjoyment of 'interim' aliment for the rest of the parties' joint lives, while living apart from her husband, nor any compulsion on her to take steps to resolve the matrimonial dispute more satisfactorily or /

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1. See per L. Mackintosh in Donnelly, at pp.107/8; see also per L.J.-Cl.(Thomson):- "Any decree which is pronounced by a Court without deciding on status is necessarily of a temporary and interim character as it can last only till the competent court has decided the consistorial issue and with it the consequential issue of aliment. The courts have shown a very understandable reluctance to pronounce such "interim" decrees where they had no assurance that the decision of the consistorial issue was in the offing. The feeling of the Courts has been that unless they had some assurance that the consistorial issue was truly going to be tried, they were put into the unsatisfactory position of making what was in effect a permanent award under the guise of an interim one. I fully appreciate this difficulty. However, from the practical point of view, I do not see any satisfactory halfway house. Interim decrees pendente lite are easy but clearly "interim" cannot be so narrowly restricted. If the lis is not actually current I do not see any satisfactory way of putting pressure on a party to commence the lis." (p.102 and subsequent discussion).

or at least with more terminological, if not actual, finality.

There need be no tidying-up by subsequent pursuer - instigated litigation. It is certainly true that this potential cause of distress to the alimentary debtor (usually the husband) has been alleviated by the introduction of the unilateral or "with consent" divorce - (divorce (Scotland) Act, 1976, s.1(2)(d) and (e)) which means that litigation may be instituted by either party after a two-year or five-year separation. Nevertheless, it is paradoxical that neither "permanent" nor "interim" aliment mean what they say - "permanent" aliment may always be reviewed; "interim" aliment may prove to be the most permanent of all sources of support[1].

Quantification of a Claim for Aliment.
The Factors which are relevant

It does appear[2] that the courts, though hesitant /

1. This topic has aroused criticism: see Sc.L. Com. Memo. No.22, 2.164 et seq (Propn. 33) and Faculty Response, pp.37-38 and pp.29-31 (suggested re-enacting of rules upon entitlement to aliment). See also discussion in Donnelly, 1959.
2. See Walton, pp.151-2, and cases there cited; Clive and Wilson, p.196. Fraser, Husband & Wife I, 855 states that quantification is a matter for the judicial discretion of the court. "There has not been in Scotland any very scientific attempt to reduce this discretion to a rule, and the attempts made in England to do so do not appear to be very successful. It must be a proportion of the husband's income; but what proportion is in no way settled. Sometimes a half is given, sometimes a third, and sometimes a fifth or less". Various factors, he concludes, are worthy of consideration. These include the rank of parties, their residence, their health and age, the absence or presence of children and upon whom their support falls, the source of income, "as being from realised capital, or the uncertain returns from a trade or profession." The conduct of the husband should not be relevant. (see infra, p. 428).

hesitant to state a rule, have adhered fairly consistently to the practice of granting the proportion of one third of the husband's gross[1] income (or less, depending on the circumstances, but rarely more, unless (Walton) there were also children to be supported by the wife[2], or (Clive and Wilson) the size of the husband's income was such that the adoption of that fraction meant the award of a totally inadequate sum) as a suitable amount to be set aside over the year for the support of the wife (enforcement thereof being a different matter entirely) and though the older cases in their pecuniary awards are quite outdated, and though increasingly even very recent cases may be of detailed use for only a short time, obviously the fraction of the husband's income which is taken is the important part of the judgment, providing a guideline to enable interested parties to determine whether judicial attitudes remain largely the same or whether more is to be expected of women in the way of self-support[3].

At any rate, it appears clear that for a long time the aim has been to award the wife such sum as would maintain her at the same financial position as (he or) she would have been had the marriage continued[4] and enough to enable her with reasonable ease to support herself[5].

In the words of Walton[6], "It would not be right that she be reduced to a bare pittance, while her husband is living in affluence", but, on the other hand, he points out that the amount of or grounds /

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1. See Clive and Wilson, pp.197-8 (and pp.210-11).
2. See Sc. Law Com. Memo. No.22 2.105, and Propn. 22; Faculty Response, p.20.
3. Cf. Clive and Wilson, p.195.
4. Alexander v. A. 1957 S.L.T. 298 at 299.
5. Thomson v. T. 1951 S.L.T. (Sh.Ct.) 56.
6. at p.151.

grounds on which the amount of aliment is awarded, should not be regarded as an inducement to separation. "And as during cohabitation a wife follows the varying fortunes of her husband, so the law does not guarantee to a wife living apart that she shall be secured against the calamities which may befall him. She is still his wife, and has taken him "for better, for worse"".

It is fruitless and unproductive to award a sum greater than the husband can possibly pay[1], and the maintenance of two full-time households is a luxury few can afford.

On the other hand, even if the husband is not living with another woman, the calculation cannot proceed from the starting-point that a reasonably comfortable standard of life must be provided for him, and that resources to satisfy the wife's needs are to be not out of the remainder of his income.

It seems that in this area the art of the possible is more important than the adherence to the rules of a counsel of perfection, and it may be counter-productive to let moral judgments rule, for in pursuing that course the morally less blameworthy may not benefit[2].

Amount of aliment is a matter for the discretion of the court. No rule has emerged, and L. Fraser was not enthusiastic about English attempts to find a rule into which the discretion might be distilled .

He states that the object of aliment is to support the wife "reasonably and respectably", "not /

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1. Fr. 1.359.
2. See, upon the largest question here - that of support of presently illicit second households - Memo.No.22, Propn.25 and Faculty Response, pp.22-25.

"not to punish the husband for his brutal conduct or scandalous life"[1].

The grant of aliment is not intended as retribution for the behaviour of either party[2].

Nevertheless, it is possible[3], despite the absence of punitive intent in awards of aliment, that less may be given to a wife who has brought about the marital discord by her adultery or cruelty[4] than to an innocent wife turned out by her husband, although in the former case, the wife, if her husband does not choose to divorce her, is, as has been seen, quite entitled to look to her husband for support.

Conduct (on the wife's side) Fraser admits[5], might be taken into account, and perhaps especially, for example, that ancient sin of women, extravagance.

It /

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1. Fr. H.& W.,I, 855, where he criticises certain English cases. See a modern,and broader, discussion of conduct and its relevance to entitlement to aliment (rather than to the level of an award), Memo. No.22, Propn. 27 (willingness to adhere or reasonable cause for non-adherence no longer to be a condition of entitlement to aliment), and Faculty Response, pp.25-31. As to the relevance of conduct to quantification, see Memo.No.22, Propn. 48, and Faculty Response, pp.44-45.
2. Dowswell v. D. 1943 S.C.23.
3. Cf. Clive and Wilson p.199.
4. Taylor v. T. (1903) 11 S.L.T.487: Thomson v. T. 1966 S.L.T. (Notes) 49.
5. Fr. H. & W.,I,857 ..."Although it is not a legitimate ground for giving a large aliment to the wife, that the husband has been guilty of bad conduct to her, it is a fair ground for not giving her a large aliment, that she has been guilty of extravagance in incurring debt, which the husband has had to meet..." Thereafter, he adds that "It is a circumstance to be taken into consideration, as a ground for increasing the wife's allowance, that she brought a large fortune to the husband" (p.858). This sentiment, though fair - minded, demonstrates a century's changes, both in modes of action and of thought.

It might, in other words, be noted, be kinder to a husband to order him to grant to his wife an allowance, than to permit her to make full use of her power to pledge her husband's credit since he might still be liable for her bills, at least for 'necessaries', though she would no longer be '*praeposita rebus domesticis*'.

Amount Arrived At By Agreement

If the parties have themselves reached a conclusion about a sum acceptable to both, this will be given weight by the court, will usually be accepted, will save time and trouble, and may be revised and reviewed by the court in exactly the same way as if the sum had been computed judicially[1].

Amount Where There Is No Agreement Between Spouses

A number of older cases cited by Walton[2] support the view that about one third to one quarter of the husband's income is a suitable proposition to give to the wife. Lord McLaren in Scott *supra*[3] stated:- "So far as my own experience bears ... I am not aware of any case in /

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1. McKeddie v. McK. (1902) 9 S.L.T. 381; Thomson v. T. (1890) 17 R. 1091; Scott v. S. (1894) 21 R. 892; Murray v. M. (1954) 71 Sh.Ct.Rep.47 "... it is a well recognised principle that where there has already been a sum of aliment agreed on between the parties - the one party being willing to pay and the other party to accept a certain sum - that is a reliable measure of what is fair and equitable in the circumstances, and the Court will be slow to interfere with what the parties themselves have indicated as fair and reasonable" per Sheriff-Subs. Malcolm (Note) at p.50 (citing in support Thomson and Scott *supra*.)
2. at p.755.
3. at p.897, where L. McLaren concludes "Here the husband, who is a retired tradesman, has made a provision as large, if not larger, than the law would give to his widow, and I do not think we should increase it." That a comparison with entitlement on death was thought worthy of mention is interesting.

in which the Court has allowed the wife more than one-third of the income of the husband's estate in cases of judicial separation". He added that a case had been cited in which a small additional amount was allowed where a child had been born after the separation, and that, on the other hand, less than one-third would be awarded if the wife's "position in life" did not merit that proportion.

As has been noted, however , the courts have hesitated to commit themselves to a rule favouring a particular fraction, or acceptable range of award, and have insisted, it is thought rightly, on retention of a discretion. "...there is no fixed or rigid limit of legal liability. In practice the Courts have been in use to award aliment varying in amount from about one-fourth to about one-third of the husband's income, but they have been careful to insist that there is no definite rule or limit, that it is a question of circumstances in every case, and that the Court has a full discretion in the matter."[1] "... I do not think it conclusive to shew what proportion the amount of aliment proposed bears to the total income of the husband; I think it has also to be considered what is a sufficient sum to maintain a woman in the rank of life to which the wife belongs"[2].

According to Green's Encyclopaedia, it is, or was, unusual for more than one third to be given[3], and indeed, so far as can be ascertained, the present practice of solicitors accustomed to deal in this field is to draw up an initial writ with a crave seeking a sum which is approximately a /

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1. Murray, supra per Sheriff-Subs.Malcolm (Note) at p.48.
2. Thomson, supra per L.P.(Inglis), at p.1092.
3. voce 'Aliment', para.735 (p.298).

a third of what is thought to be the husband's income[1]. Salary alone may not give a true indication of the financial affairs and manner of life of the persons in question. Clive and Wilson note[2] that if capital has been drawn upon in order to maintain a certain standard of living, then this may be taken into account, as may a voluntary allowance which one partner receives[3].

Other Pertinent Factors

As was seen earlier in the Sheriff Court cases[4], whatever may be the practical arguments, the entitlement to aliment and the obligation to pay it are first fixed, and thereafter it is on that basis that the applicability of our modern system of government support or at least those parts of it which have "need" as the criterion, will be judged.

Thus, supplementary benefit receivable by a wife is not taken into consideration in the fixing of aliment, but the family allowance, which Clive and Wilson note[5] is not related to need, will be considered /

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1. that is, gross income (Clive and Wilson, pp.197-8): alimentary payments, made under binding arrangement or court decree, will be taxable in the hands of the payee (Clive and Wilson, pp.210-11).
2. C.& W., p.196: Memo.No.22, 2.115.
3. though not "mere charitable support" (ibid., p.197): see Memo.No.22, 2.114. Treatment of both matters (encroachment on capital and significance of voluntary allowances) the Scottish Law Commission recommended be left to the discretion of the Court. (Faculty Response (in agreement), p.22).
4. cf McCarrol 1966 S.L.T.(Sh.Ct.)45, and Hawthorne 1966 S.L.T. (Sh.Ct.)47, discussed supra, p.378 et seq.: and see also Purdom v. P., 1934 S.L.T. 315, per L. Mackay at p.316.
5. p.197. See Memo.No.22, 2.98 (and the obverse - effect of social security payments received by alimentary debtor: 2.113).

considered. De facto charitable support or support from children will not rid a husband of an obligation which primarily belongs to him[1].

According /

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1. C.& W., ibid. Memo. No.22, 2.99. Equally, alimentary payments are not intended to be sufficiently ample, for example, to support the wife's mother (see Thomson v. T. (1890), 17 R. 1091, per L.P.Inglis at p.1092). A husband is not obliged to support his wife's relations, unless the obligation of the wife to her relations could be said to be an ante-nuptial debt (which obligation has been so regarded: "No doubt it is not an obligation of contract but a natural obligation, but it is not the less on that account an antenuptial debt of the wife. It existed though it was not prestable" per L.P. (Inglis), in McAllan, infra, at p.864: with regard to a wife's contractual obligations post marriage, the M.W.P.(Sc.)Act, 1920, s.3(1) states that the husband "shall not be liable in respect of any contract she may enter into or obligation she may incur on her own behalf") and the husband could be said to be lucratus by the marriage - McAllan v. Alexander (1883) 15 R.863: see generally terms of M.W.P.(Sc.) Act, 1877, s.4 (supra pp.82-83) (husband's liability for wife's ante-nuptial debts limited to "the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage ..."), and C.& W., pp.265-66. Prior to the 1877 Act, a husband could be liable generally, on the ground that this obligation was a debt of the wife - (Reid v. Moir (1866) 4 Macph.1060. "The foundation of her husband's liability is this: By reason of her marriage the wife's person is entirely sunk, and her moveable estate is transferred by assignation to her husband, so that his and her estate, during the subsistence of the marriage, form one moveable estate under the control and management of the husband. The legitimate consequence of this is, that every personal obligation of the wife is, along with her estate, transferred to the husband, and becomes his debt.... Every contingent and future, though not prestable, debt of the wife at marriage is transferred thereby against the husband, and this is the principle which must rule the decision of the present case" (per L.J.-Clerk (Inglis) at pp.1063-64. L.Shand in the later case of Foulis v. Fairbairn (1887) 14 R.1088, (which followed Moir), (alone) voiced a doubt (at p.1090) to the effect that, "Although in the general case a /

According to Fraser[1], less will be given to the wife where the income is drawn from a "precarious" business, than where the income is drawn from realised estate.

Nothing further will be said about amount of aliment[2] and factors relevant to quantification. Reference is made generally to Clive and Wilson, "The Law of Husband and Wife in Scotland"[3], and to Memorandum No.22 and Faculty Response.

Proof of Means

It will sometimes be difficult to ascertain the exact state of the parties' finances, and sometimes the wife has only the haziest idea, or is in a state of complete ignorance, about her husband's earnings. It may well be even more difficult where the parties stand at the higher end of the income scale, since disclosure may involve the revelation of confidential matters, particularly if the husband is, for example, a partner in a professional firm or perhaps it may be the case (which Fraser regards as justification for a smaller award (supra.) that profits fluctuate /

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a husband when he marries incurs liability for his wife's debts. I think that in a case like the present there is room for saying that that general principle does not apply.") See also Memo.No.22, 2.45 et seq., (suggesting that no obligation between a person and the relatives (other than children) of his/her spouse, be introduced (Propn. 10) - contrast approach taken in Faculty Response, pp.10-12) and footnote 73, and hierarchies of liability (2.67 et seq.(Propn.14) and Faculty Response, p.16) and of entitlement (2.90: Faculty Response, pp.18/19) and generally, supra, pp.411-12.

1. H.& W., 1, 856, and cases there cited. Again, this has an archaic ring perhaps. The most common source of aliment today must be wages or salary.
2. except with regard to the subject of "Weight to be Given to Wife's Personal Resources or Earning Power", infra.
3. Chapter 8, "Aliment".

fluctuate greatly, and figures for several years may require to be scrutinised in order to obtain a reasonably clear and accurate picture.

Clive and Wilson[1] note that in an extremely complex case, (where perhaps there is not a high degree of co-operation from parties, one might think), the Court may grant a commission and diligence, but would in the general case refrain from taking such a course.

In some cases it is found that the husband has an earnest desire that matters be settled judicially, and not in a lawyer's office or between lawyers' offices, or less formally still in a dispute between the marriage partners, conducted perhaps not too amicably and amid a web of rumour and possible exaggeration both as to what is earned by the husband, and what is wished by the wife.

Moreover, in an undefended case the husband's non-appearance and unwillingness to defend, even on quantum will mean that the court must do the best it can, on the basis of limited and one-sided information, the subsequent enforcement history being a guide to its success. This subject has attracted the attention of the Scottish Law Commission[2].

Under the terms of the Conjugal Rights (Sc.) Amendment Act, 1861, s.15[3], an award of aliment may be made without proof provided the action is /

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1. at p.198.
2. See Memo. No.22, 2.209-11 and Faculty Response, pp.47-49.
3. The Act refers to "Actions of Aliment" which in terms of s.15, are to be dealt with by the L.O., with the proviso that, whether I.H. or O.H. causes, they shall be regarded as summary causes and decree may be pronounced without proof, where no appearance is entered for the defender.

is undefended or no relevant defence is stated[1] but there can be no award of aliment in a defended action in which the pursuer is unsuccessful in proving her case[2].

However, if the parties lodge a joint minute, the court may interpone its authority thereto, thereby giving judicial sanction to the parties' arrangement, where the pursuer abandons her conclusion for separation or adherence, and there will be no further investigation of the defender's conduct[3] but, although most convenient, the procedure seems a little irregular - does it not amount to a new genus of aliment, one which is not interim nor interim pendente lite, and yet is, while being "permanent" in so far as any award is or can be permanent, not permanent in the sense of being pronounced together with a decree of separation or adherence?

Possibly the explanation is that it is analogous with a voluntary contract of separation with financial provisions in respect of which the court will enforce and give effect to the financial but not to the other (separation) provisions.

Level of Aliment 'Stante Matrimonio'

When the subject of the level of aliment during cohabitation is considered, it is found[4] that the husband "may be compellit to sustene his wife in meat, claithis, and uther necessaris, effeirand to hir estait and tocher resavit with her" /

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1. Walton, p.143, citing Wood v. W. 1882, 19 S.L.R. 631; Milne v. M. 1901, 8 S.L.T. 375.
2. Walton, ibid.
3. Walton, ibid., citing Christie v. C. 1919 S.C. 576.
4. Balf. Practicks p.95. Of the husband and wife, c.XI. (citing ? Mart.1561, Dame Jeane Hamiltoun contra Hew Erle of Eglingtoun, 1 t.c.1282).

her" but Fraser[1] states "Aliment can be claimed by a wife only on the footing of separation from her husband."

At least within certain limits, or above a certain limit (below which the wife may complain, perhaps, of cruelty) the husband's judgment and standards were (and it seems, are) supreme, although it is always recognised that certain extraordinary expenditure[2] may require to be met by him.

A husband's obligation, as has been noted, is fulfilled if he provides for his wife a roof, and a reasonable amount and standard of food and clothing: he is not obliged to provide a separate roof for her, except where a decree of judicial separation (and aliment) has been pronounced[3] although, if her conduct merits it, he may choose to do so[4].

Clive and Wilson[5] highlight the difficulties which a wife may experience in enforcing her rights in this respect, for if aliment stante matrimonio is lacking, neither the remedy of the action of separation and aliment nor adherence and aliment will fit the facts, her praepositurn may be cancelled - and . . . although her husband will remain liable for necessaries supplied to her, nevertheless if she has been formally inhibited, or if local shopkeepers have been warned, her position is a degrading one: Professor Clive points out that she cannot obtain supplementary benefit since, as she is cohabiting with her /

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1. H.& W., I, 839. "If she cohabit with him, an action for separate maintenance is absurd..... ..... to institute an action for aliment directly, and not as incidental to another action, is inconsistent with principle and the character of the conjugal relation."
2. such as medical expenses - Kinfauns v. K. M.5882 (1711); as to the wife's obligation to aliment see Adair 1924 S.C.798.
3. Bankt. 1, 5, 74; Erskt. 1, 6, 19
4. Maclure v. M. 1911 S.C.200.
5. p.195.

her husband, their resources will be aggregated ("and shall be treated as the husband's")[1] and remarks that it would appear that an extension of the availability of the remedy of interim aliment used with caution would be desirable. Although in theory and in its wording the action for interim aliment could supply a possible remedy ("so long as the defender shall refuse to receive and entertain her as his wife") Professor Clive points out that historically it has not been so used.

During cohabitation, the wife may claim only for necessaries, and it is the husband who, at least in past years, has been the judge of life style[2]. That is the theoretical position. The duty /

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1. Ministry of Social Security Act, 1966, Sch.2, para.3(1).
2. See Green's Encyclopaedia, vocc "Aliment" p.296, para.730, citing Fraser "The wife's claim during the cohabitation is only for necessaries, and the husband is the sole judge as to the style in which they shall live", Fr., H.& W. I, 674, where L. Fraser draws a distinction between a husband's sole right to judge that which is fitting, during cohabitation, and the court's right to decide those expenses which are reasonable, where the partners live separate, and the wife is pledging her husband's credit. (cf. Oretney, infra, p.216 (concerning wilful neglect to provide reasonable maintenance (M.C.A.1973, s.27; Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s.1(1)(b)), and stating that conduct must be considered against the background of the husband's common law liability to maintain (see previous standard of life which he maintained, though the wife was entitled to benefit from an improvement in the husband's fortunes post-separation): "This reflects the position at common law: prior to separation the standard of living is entirely a matter for the husband; after separation it is a question of what is reasonable in all the circumstances." Even while cohabitation subsists, however, the court may be called upon, in /

duty /

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in the case of a disputed bill, to adjudicate upon the suitability to her husband's situation, of a wife's purchases. See Clive and Wilson, pp.255/256 (praepositura), and cases cited, and pp.264/265 (pledge of husband's credit for necessaries) and cases cited, and Fr. I, 613, where, at fn.(d), L. Fraser cites the case of Waithman and Another v. Wakefield 1807, 1 Camp. 121, and quotes L. Ellenborough's comment that "however low a man's circumstances may be, if he allow his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, the loss must fall upon him who connived at the deception ..." However a warning is found in the rubric, to the effect that if a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious enquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which those enquiries would have shown him to be responsible. Lord Ellenborough suggests that it is the duty of a tradesman to make enquiries before trusting a married woman who is a stranger to him. There may be little time, today, for "cautious enquiries", which, in any case, for reasons of alleged discrimination (for the protagonists of sexual equality will be quite out of sympathy with the philosophy which the praepositura and 'pledge of husband's credit for necessaries' principles embody) as well as of privacy, would be resented greatly.

These principles are quite unsuited to modern conditions, and it is a source of wonder that they are still part of our law. (cf. Clive and Wilson, p.262) (As to England, the wife's agency of necessity was abolished by Matrimonial Proceedings and Property Act, 1970, s.41. A "common household agency" (to pledge the husband's credit for necessaries for the household), as opposed to the broader ambit (food, clothing, medical, legal and other expenses) of the agency of necessity, remains, according to "Family Law", Judge Brian Grant, 3rd edn. (1977) (Jennifer Levin) p.24. See also "Principles of Family Law", S.M.Cretney, 2nd edn. (1976), p.215, fn. 33, and p.216, fn.36, and generally pp.214-216).

See recommendations for change contained in Chapter 7.

duty of husband and wife to aliment the other has been studied[1]. Occasionally today, more frequently than in the past, it may be found that it is the wife's salary which alone, or principally, supports the household, and surely then, in practice, she "who pays the piper calls the tune".[2] The difficulty lies in the ascertainment /

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1. Supra.
It must be remembered that in Scotland, a cohabiting wife (only) has an agent's authority as praeposita rebus domesticis to pledge her husband's credit: there is also for all wives (except, it seems, those who are cohabiting - see below), entitled to but deprived of adequate aliment, an entitlement to pledge the husband's credit. Clive and Wilson stress (p.254 (and fn. 80), and p.263) that the liability of the husband in each case rests upon a different conceptual ground (agency/ostensible authority, or recompense /unjust enrichment respectively). The result, of course, will be similar, if, on either ground, the tradesman succeeds. (Is the tradesman entitled to assume that the wife in the capacity of praeposita has authority to bind the husband in the contract in question? Has the tradesman in effect fulfilled the husband's obligation to aliment the wife? Clive and Wilson, p.254, p.263). It seems clear that the former principle pertains only to the cohabiting wife (Clive and Wilson, p.260), and although, even under the present law, where there is no provision for the making of a monetary award during cohabitation, it is not impossible to imagine that an attempt might be made to argue, on behalf of an inadequately supported wife (or husband - see below) in family with her husband (wife), that she (he), lacking a fair aliment, was entitled to pledge her husband's (his wife's) credit for necessaries, it would appear that the right arises only where the spouses live apart (cf. Walker, Prins., 2nd ed., pp.258-9). The latter principle may apply, it seems, to a husband (Clive and Wilson, p.265), but the praepositus rebus domesticis, though he may well exist, seems to be a role-exchanger not yet known to the law. On the "housekeeper" reasoning which lies at the root of the praeposita rules (which may be extended to include daughter, or any other housekeeper - Clive & Wilson, p.253), there seems no reason why the principle should not be extended to include the husband or male housekeeper. The principle of agency is not restricted. Yet for the long-term, it is to be hoped, joint household of man and wife, perhaps in any case a new principle is desirable.
2. cf. Clive and Wilson, pp.192/3.

ascertainment of the rights of the non-economically active partner, usually the wife, in the salary of the other during cohabitation. The introduction of a remedy of an award of aliment able to be sought though the parties cohabit is strongly urged[1].

Arrears

It is not competent in an action which seeks an award of aliment, unlike other actions concluding for the payment of money, to arrest moneys on the dependence of the action (since the debt is a future one), unless it seems clear that the husband is not acting in bona fide and is engaged in disposing of his funds with the aim of defrauding his wife, or unless he is vergens ad inopiam or in meditatione fugae[2,3].

Moreover /

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1. Such a proposal has been made by the Scottish Law Commission: Memo No.22, Propn. 39 (that "a spouse should be able to obtain and enforce a decree for aliment for himself or herself, and any children entitled to aliment from the other spouse, notwithstanding that the spouses are cohabiting. An offer by the defender to provide support in kind in the home should not be a defence to such an action if in fact it was the lack of adequate support which rendered the action necessary". See Faculty Response, pp.41-42.
2. Walton, pp.154/5; J. Graham Stewart, 'Law of Diligence', p.20 and cases there cited: Anderson v. A. (1848) 11 D.718. (itinerant juggler: the recent history of the husband was sufficient "to justify the use of this somewhat extraordinary, but, I think, very beneficial diligence ....the probability is very great that in a short time he will be protected from the reach of diligence by the Atlantic, or some such non-conducting body..." But I "wish not to be held as maintaining that the more migratory nature of his pursuits, which must necessarily take him occasionally beyond our jurisdiction, would of itself authorise this diligence". per L. Jeffrey, at pp.121-22. Moreover, in such a case (L.P.Boyle, at p.121) "there is not the usual presumption that his object in leaving the country is to evade diligence", but in this example, the husband moved about, not only from town to town but from country to country, "so that his /

Moreover, arrears (in the sense which may be a misuse of language, of general contributions to maintenance, unpaid, yet due under the general law but not under specific agreement or court decree) are not able to be claimed[1]. If a deserted wife, for example, has achieved by herself and by her own efforts, an adequate maintenance, if she has in fact supported herself, then her husband's legal obligation to have supported her during the course of that period, does not constitute a debt in her hands. Past debts for necessaries may be exigible from the husband, under the principles set out above, and the correct procedure is for the creditor to sue the husband and not for him to induce the wife to sue for arrears of aliment[2]. In practice, however, if the wife is able to pay, she is likely to do so in the face of the creditor's demands, and in /

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his wife cannot depend for a single day on his being within her reach". The wife's diligence was held to be competent, and warranted.)

3. See Symington v. S. (1875) 3 R.205, per L.P. Inglis at p.207:- "I think that a lady who is separated from her husband, as she does not thereby cease to be his wife, must still follow his fortunes; and if he should by unforeseen occurrences fall into poverty, that is the misfortune of the whole family. I should be very slow to hold that, because a wife is separated from her husband, she is entitled to have her aliment secured, so as to give her a preference for life over all her husband's creditors. That would be a very anomalous consequence of diligence used upon the decreedance of an action of this kind. But still more anomalous consequences would follow if the arrestment was to cover future aliment ...."

The attitude revealed here towards priority of creditor/wife claims is interesting.

1. Walton, p.755.
2. Walton, ibid.

in this way, unless and even if the bills be remitted immediately to the husband, there is a danger that she will build up a history of self-support. It is certainly not incumbent on a wife to spend all her earnings to support herself, thereby relieving her husband of his obligation[1]. This problem did not pass unnoticed in Memorandum No.22[2]. The Scottish Law Commission suggested for consideration (Proposition 44) a change in the rule to the effect of substituting a broad judicial discretion ("that the courts should be given power to backdate awards of aliment i.e. to award aliment for a period which has already elapsed".) Faculty responded cautiously, putting forward the view that while the court should not be precluded from backdating an award, it must have a discretion to refuse to do so, or to make a smaller award than that sought[3]. It is well settled that arrears due under a court decree or extra-judicial agreement between the parties - both being capable of quantification - may be recovered[4]. In the case of arrears due under a court decree, "the normal methods of diligence, including poinding of goods and arrestment of wages, are available"[5]. Where the case concerns sums due under agreement, sought /

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1. See, however, the court's view of a suitable reward for a wife who continued to receive aliment while, unknown to her husband, being in employment: Boswell v. B. 1943 S.C.23.
2. See 2.190-192.
3. Faculty Response, pp.42-43.
4. Fletcher v. Young and Fletcher 1936 S.L.T. 572: Hood v. H. (1871) 9 Macph.449: Both cases were made more complicated by efforts by the husband to adhere.
5. Clive and Wilson, p.207.

sought to be translated into court decree for enforcement, is there any reason why there should not be arrestment on the dependence?[1]

Variations of Awards and Agreements

> "An award of aliment is not absolute or unchangeable".

It will always be competent for parties to return to the court for a variation, provided that the change of circumstances is truly a material one[2].

Although in consistorial cases, the rule is "no decree without proof" (thus requiring proof of the averments in an undefended action for divorce[3]) this does not affect matters pertaining to aliment (unless disputed, presumably) and it is certainly competent for the parties to agree on a figure themselves and to have it set out in terms of a joint minute[4].

Among legitimate considerations which might have the effect of increasing aliment would be such /

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1. The conclusion does not then relate only to "a prospective obligation" or "contingent debt". (A Treatise on the Law of Diligence, J.Graham Stewart, p.20): see also W.J.Lewis, Sheriff Court Practice, "Arrestment on Dependence" - p.100.
2. Cf. Lang v. L. (1868) 7 Macph. 24. As to procedure, see Clive & Wilson, p.200.
3. Now in undefended divorce actions, affidavit evidence may be tendered, by virtue of a change effected by Act of Sederunt, coming into effect on 25th April, 1978. For the general guidance of Members of the Faculty of Advocates and of the Law Society of Scotland, Notes upon this new procedure have been prepared by the Dean of the Faculty of Advocates, and the President of the Law Society of Scotland ("Affidavit Evidence in Undefended Divorce Actions" - 11th April, 1978). See Chapter 5.
4. See Clive and Wilson, p.204.

such factors as the subsequent birth of the husband's child[1], the combined effect of increased earning capacity and increasing costs of education[2], and, today perhaps especially, the general increase in the cost of living, and principally among those factors which might have the opposite effect is the circumstance of the husband falling upon hard times.[3]

In the latter case, it might be that the wife should have the same proportion of the new lower income as of the higher one[4] but, as was pointed out in Purdom supra, the smaller the means the larger might be the proportion which the wife should receive.

In Lang supra, L.Cowan[5] remarked that although there was a right to apply for variation, "we are not to be understood as sanctioning yearly applications to the Court. The change in the husband's circumstances must be material before we will alter the amount of aliment now given". A foreseen change of circumstances, which has been taken into account, will not be a good ground for variation: a hope unrealised may be[6].

When the amount of aliment has been fixed at first instance, that, in most cases, will be the end of the matter (in that particular litigation) since parties receive no encouragement to appeal, upon that ground, and even if an appeal on that factor alone or on that and upon the substantive decree /

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1. Hay v. H. 1882, 9 R.667: contrast Scott v. S. (1894) 21 R.853 where the birth was contemplated at the date of the original agreement.
2. Rowat v. R. 1904, 12 S.L.T. 449.
3. Purdom v. P. 1934 S.L.T. 315: Brotherston v. B. 1938 S.L.T. (Sh.Ct.) 39.
4. Beaton v. B. 1951 S.L.T. (Sh.Ct.) 102.
5. at p.25.
6. See further, Clive and Wilson, pp.200-202.

decree, is allowed, the quantification of aliment favoured by the judge of first instance will rarely be disturbed, as long as it is reasonable and did not proceed upon a wrong foundation in law, or omitted to take into account some material factor[1].

Weight to be Given to Wife's Personal Resources or Earning Power

One factor not yet mentioned and one which does appear, at least in theory (and in some examples) to have an effect upon the amount of the award, is that of the wife's own personal resources, her earning power and the history of her career. Although it was commented that, "Most women are capable of earning subsistence by their own labour, if compelled to do so; in the lower classes by menial service, in the higher by tuition or similar pursuits", L. Fraser[2] notes that if there has been "no antecedent practice in such labour by the wife," the court will not press her into service. He refers to an American authority[3] to the effect that the husband did not have "the right to say that she should earn what she could by her labour, and he would only be answerable for the difference between her earnings and the amount of the expense necessary for her support. Such is not the law of husband and wife. The husband must support the wife himself or pay those who do support her in a reasonable manner". On the other hand, if she is supported quite adequately by her own separate estate, she may not legitimately claim aliment[4]. In /

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1. cf. Clive and Wilson, p.206.
2. F. & W., I, 860.
3. Cunningham v. Irwin 7 Serg. and Rawle 247.
4. Dick (1864) 26 D.1464; McFarlane (1944) 6 D. 1220 and 10 D.962, cited by Fraser, I, 860 : Graham v. G. (1827) 6 S.254.

In the present circumstances, could this bear the addition, "or by her own earnings, ordinarily and in accordance with past custom, received"? If so, then the argument concerns the presence or absence of a duty to enter again or for the first time suitable or unsuitable employment, and it is submitted that age, health and legitimate expectations of, and conceptions of, the married state at the date of marriage may be factors which persuade that at least in a particular case such a duty does not exist. Equally, in the future, there will be few married women to whom paid employment is unknown[1], (and few women to whom marriage is unknown).

In Dowswell supra, there are to be found observations to the effect that there is no rule that a wife acquiring or earning money must expend the whole of such money on her maintenance to the relief of her husband's obligation under a decree for aliment; on the other hand, in Thacker[2] Lord Anderson[3] remarked, "I should add, however, that in my judgment this is not a case where I should have advised an award of any aliment at all. I think /

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1. It may be said that judicial opinions must be imbued with the spirit of the age in which they are expressed. The conditions and thinking even of the 1930's are now remote from us, and habits and expectations have changed greatly. Cf. Murray v. M. (1934) 51 Sh.Ct.Rep.47, per Sheriff-Subs. Malcolm, at p.49, "If she is in that station in life in which work of some kind would be expected of her she must contribute her reasonable quota ...." Statistics compiled to assess the European situation suggest that the percentage of adult women (status not specified) in employment is 49% (W.Germany) 50% (France) 63% (Denmark) and 71% (Sweden).
2. Thacker v. T. 1928 S.L.T. 248.
3. at p.249.

think the proof discloses that the pursuer is earning a handsome income, quite sufficient to support herself, and at the present time her husband is not in a much better - if, indeed, in any better - position than she is. Accordingly, I think quite clearly that this is not a case where aliment should be awarded at all_____".

Even though the wife is in employment, it is likely, in present circumstances, that the husband who owes a duty, in general terms, to aliment his wife[1], will be called upon at least to augment her income[2.3].

Difficulties in Enforcement of a Decree

Even if the wife holds extract decree for payment of an amount of aliment which is reasonable in all the circumstances, this may prove to be extremely difficult to enforce.

Civil imprisonment remains competent for non-payment of "sums decerned for aliment"[4]. In terms /

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1. The question is, of course, whether earning capacity should affect both entitlement and quantification, or only the latter or (unlikely) neither.
2. cf. Sidney v. S. (1865) 4 S.& T.178.
3. Reference is made on this subject generally to Memo.No.22, 2.95 et seq (judicial discretion advocated): Faculty Response, pp.19/20 (in agreement).
4. Debtors (Sc.) Act, 1880, s.4; Civil Imprisonment (Sc.) Act, 1882, s.4. As to "sum or sums decerned for aliment", see Tevendale v. Duncan (1883) 10 R. 852. "I think the true meaning is that the sums must be decerned for with a view to be applied, when they are got, in alimenting the party in whose favour the decree is given .... Aliment is a very comprehensive word .... A human being is not alimented by being supplied with food only. He requires to be provided with shelter and clothing, and such things as are required as absolutely necessary to sustain human life. The house proprietor supplies shelter, the tailor supplies clothing - without which the human being could not, at least in this climate, be alimented - the butcher and baker supply food. In another sense /

terms of the Civil Imprisonment (Scotland) Act, 1882, s.4, a Sheriff may commit to prison for a period not exceeding six weeks, or until payment of the sum(s) of aliment and expenses of process decerned for, or such instalment(s) thereof as the Sheriff may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any such sums for which decree has been pronounced against him by a competent court. Failure to pay "shall be presumed to have been wilful until the contrary is proved by the debtor"[1], but a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff that the debtor has not, since the commencement of the action in which the decree for aliment was pronounced, possessed or been able to earn /

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sense than that which I have attempted to give, they, if sued for the price of these necessaries of life, are suing for aliment. If the expression merely means that the sums must be due in respect of a debt contracted for aliment, say a hotel bill, extending over it may be a term of months, the amount decerned for would be sums for aliment. But I think it is impossible to say that in excepting a decree for sums for aliment from the general law, an exception enacted for considerations of policy, sums of that kind were intended to be included in the exception. There is no reason why the general law should not apply to such decrees". (per L. Young, at p.854). The decree must be used in the present aliment of some living human being, it appears. See also Glenday v. Johnston (1905) 8 F.24 (per L.P.(Dunedin) at p.29: L.McLaren at p.30 summarised the judgment in Tevendale as "where aliment has been furnished by a person who is not the primary obligant, the claim for relief is not an alimentary claim".).

1. Civil Imprisonment (Sc.) Act, 1882, s.4 (proviso (3)).

earn the means to pay the sum due, or such instalment thereof as the Sheriff shall consider reasonable. A warrant of imprisonment may be granted of new, subject to the same provisions and conditions, against the same person in respect of failure to pay the same sum(s), or instalment(s) thereof, or any sums afterwards accruing due under the decree, or instalment(s) thereof, at intervals of not less than six months[1], and the imprisonment shall not operate to any extent as a satisfaction or extinction of the debt, or interfere with the creditor's other rights and remedies for its recovery[2]. The creditor shall not be liable to aliment the debtor during the incarceration of the latter[3]. However, for reasons which appear to rest upon principles of statutory interpretation, the creditor must pay for the expenses involved in seeking this diligence[4] (that is, for seeking Sheriff's warrant to imprison: expenses of process incurred prior thereto will form part it is suggested of the debt[5]). The Sheriff's authority to commit to prison is necessary[6].

Certainly the final sanction of imprisonment is a useful one if the debtor's whereabouts are known, but it is of no use whatever if the husband is nowhere to be found, as is commonly the case. In /

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1. s.4, proviso (4).
2. s.4, proviso (5).
3. s.4, proviso (6).
4. Reference may be made to the case of Wilson v. W. (1936) 52 Sh.Ct.Rep.200, and the earlier cases of Strain v. S. (1887) and McLeod v. Layes (1883), 4 Sh.Ct.Rep.125 and 127 respectively, per Sh.Prin. (Berry) at p.127, and per Sh.Lees at pp.128-129.
5. by inference of s.4.
6. See the words of L.Young in Tevendale, supra, at pp.853-854, upon the function of the judges of the Court of Session in this sphere. Prior to these Acts, for civil imprisonment, a warrant from the Supreme Court was necessary, and the expenses thereof could be recovered by separate action. See note by Sh.Mair to Strain, infra, and contrast text and fn.4 above.

In that situation, or where the husband removes frequently from address to address, or where he seems incapable of making regular payment, the wife may have no choice but to rely on State payments alone[1].

As far as the movement of a defender within the U.K. and abroad is concerned, the Maintenance Orders Act, 1950 and Maintenance Orders (Reciprocal Enforcement) Act, 1972, may be of help. Under Part II of the 1950 Act, orders may be registered and are enforceable thereafter in England or Northern Ireland.

In addition to these troubles, the wife may have to contend with competition from the husband's creditors.

She herself, upon pronouncement of a decree while her husband is solvent, becomes a creditor[2] and her claim may compete successfully with theirs, as in Macgregor's Trs. v. Macgregor[3] in which a heritable security held by a wife and granted to her while the husband was solvent, to meet his obligation in terms of a decree arbitral (pertaining to a contract of separation) was upheld against them[4].

Lord Fraser remarks[5] that the wife who has obtained no decree for aliment has no claim for aliment /

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1. The wife is not always deserving of sympathy. It is not unknown for the availability of State funds to prompt a husband's temporary disappearance, with the wife's connivance or acquiescence.
2. Fr. I, 864/5, citing Lockhart or Thompson v. Sharp 13 Nov. 1828, F.C.
3. 22 Jan. 1820, F.C. (cited and narrated by L. Fraser, ibid.).
4. See generally upon the subject of the rights of wife and of creditor, Chapter 2.
5. I, 863.

aliment against her husband's creditors, and cites the old case of Turnbull[1], to the effect that she has only herself to blame if she is sufficiently ill-advised or reckless to marry a shiftless man - "if she has made an ill bargain, she takes him for better and for worse, and has none to blame but herself, and all that can be said in this case is, caveat emptor. If he have an opulent fortune, she has the benefit of it;[2] if he fall in straits, she must run the risk and hazard with him, and bear patiently these accidents of providence"[3].

Before decree can be obtained, however, notice of the action must be served on the husband, and the wife may be met constantly with the "gone away" and "closed against delivery" responses of the inventive, energetic, ingenious and nomadic non-payer. However, if personal service on the defender is not possible, service may be made by the Sheriff Officer leaving the copy writ and schedule of citation with a member of the defender's household (termed "a servant"[4]) to be given to the defender /

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1. Turnbull v. T., M. 5899 (1709).
2. perhaps - but cf. supra.
3. The rights of wife and of creditor are discussed in Chapters 2 and 7. The priority of claim is a difficult question (See discussion, Memo. No. 22, 2.118 pointing out that "superfluity" on the part of the alimentary debtor is a prerequisite of a successful claim for aliment: the merits or justice of this admitted priority of "other creditors" is not discussed, and a more detailed treatment of the subject is remitted to the Scottish Law Commission's consideration of the law of bankruptcy). No comments were made by Faculty.
   Today, there is, of course, the support afforded by the Welfare State - see infra.
4. So characterised simply by receipt of the documents: Sheriff Court Practice, J. Dove Wilson, p.112 (citing A. v B. (1834) 12 S. 347).

defender, in the presence of a witness, or, if no reply at all is received, after giving six audible knocks, by the Sheriff Officer fixing the writ and schedule to the door, or in the keyhole, in the presence of a witness[1]. Edictal citation will be competent if the defender is outwith Scotland: edictal citation, and citation at the defender's last known residence, may be the best course of action if it is not clear whether the defender is outwith Scotland or not[2]. Edictal citation is competent also if the defender "has left his usual residence for forty days and his present address is unknown", "as the only method of convening the defender"[3].

Once extract decree has been obtained, it will be placed in the hands of Sheriff Officers for the purpose of enforcement. Thereafter the debtor will be charged, and then, failing payment or otherwise satisfactory arrangement, there will be a poinding and sale by warrant of his non-essential goods and furniture. It is possible also to inhibit the debtor from dealing with his heritable property, by use of the diligence of adjudication, but frequently he owns no heritable property. Where the debtor has a bank account, the details of which are known, arrestment may be made of moneys therein. There is also a more expensive 'floating' arrestment which may be used in respect of several banks where it is possible that the debtor /

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1. Act 1540, c.75. Dobie, Law and Practice of The Sheriff Courts in Scotland, p.124. The ultimate usefulness if obtained of decree so initiated, might be small. International co-operation and modern statutes are necessary to help the alimentary creditor here. Consider Maintenance Orders (Reciprocal Enforcement) Act, 1972 and C.& W., p.231 et seq. See infra.
2. Dobie, p.120: W.J.Lewis, Sheriff Court Practice, p.94.
3. Dobie, p.120.

debtor has an account, and which 'filters' down and may locate and arrest that account.

Sale of the debtor's possessions is likely to be an inappropriate diligence in the case of a continuing debt such as is contained in an extract decree for payments in name of aliment. Arrestment of income is more satisfactory and since the Wages Arrestment Limitation (Scotland) Act, 1870[1] does not apply to a decree for aliment, arrestment /

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1. by virtue of s.4 thereof, C.& W., p.207, fn.11 and see Professor Clive's general discussion of the difficulties of enforcement of claims for aliment, pp.207-209.
Cf., for England, the Attachment of Earnings Act, 1971, which authorises the making (to secure payments under a maintenance order) of an order by the High Court, the County Court, or the Magistrates' Court, addressed to the debtor's employer and requiring him to make periodical deductions from the debtor's earnings, and (s.6(5)) specifying the normal deduction rate, and the 'protected earnings rate' (being the rate below which, "having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced"). Application may be made by debtor or creditor under the maintenance order, but, if by the latter, fifteen days must have elapsed since the making of the maintenance order and the debtor must have failed to make one or more payments thereunder, (s.3(2) and (3)) and the court shall not make the order if it appears to it that the debtor's failure to make payments in accordance with the maintenance order is not due to his "wilful refusal or culpable neglect". (s.3(5)). Some attempt to frustrate evasion is made by s.24 which requires the debtor to notify the court in writing within seven days if and when he changes employment and a new employer aware of the existence of an attachment order must also notify the court. Little more, or less, could be done. Clearly these provisions are simple to ignore. See generally, 'Law and Practice in Matrimonial Causes', Passingham, pp.259-261: Bromley's Family Law (5th ed.), pp.521-524, where mention is made of the Finer Report's view that this Act in practice has been a disappointment. In many cases, of course, the search is undertaken by the state (see supra, pp.416-417).

arrestment may be made up to the amount on the face of the decree. Clearly details of the husband's employment must be known, as must the day of the week on which he is paid, since arrestment may only be made "for each term's aliment as it falls due"[1]. "For all that is due and bygone the diligence is competent, but for future debts I think we cannot lay it down too distinctly that the diligence is incompetent unless the debtor is vergens ad inopiam, or there be other circumstances of a parallel kind"[2].

As far as the movement of an alimentary debtor within the U.K. and abroad is concerned, reference should be made to the Maintenance Orders Act, 1950, and also to the Maintenance Orders (Reciprocal Enforcement) Act, 1972, which (by Part I) permits the enforcement in a 'reciprocating country' (s.1) of a maintenance order granted in the U.K. and gives jurisdiction to a Sheriff to make a provisional maintenance order (but not a decree of separation, or adherence, and aliment or an order containing a crave for the custody of a child[3]) if the defender, to the best information or belief of the pursuer, is residing in a reciprocating country, if the pursuer resides within the Sheriffdom, and if the Sheriff would not otherwise have jurisdiction in that action[4]. In such an action, "it shall not be necessary for the pursuer to obtain a warrant for the /

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1. Fr., citing Symington v. S. (1875) 3 R.205, in which case at p.207 L.P.Inglis explains the business inconvenience and 'anomalous consequences' which would attend a general power of the wife to use arrestments in respect of future aliment. The wife's entitlement might be life-long: "I do not think that a creditor can, by arresting money in the hands of his debtor's debtor, convert him into a trustee for his interest".
2. Symington, per L.P. Inglis, ibid.
3. 1972 Act, s.4(2).
4. s.4(1).

forthe citation of any person, and the action may commence and proceed without such citation"[1]. Maintenance orders made in reciprocating countries may be registered and enforced in the U.K.[2]. Variation and revocation of reciprocating country decrees is also competent[3].

Part II is concerned with reciprocal enforcement of claims for maintenance between the U.K. and 'convention countries' (s.25), and Part III with U.K. arrangements with other countries[4].

One power, or remedy, notably lacking in the wife's armoury is that, while cohabitation subsists, she cannot compel her husband to pay her a reasonable allowance[5]. Failure to maintain at a reasonable level, where the husband has resources to do so, the wife's situation being such (for her obligation to support herself and the household generally is not clear[6]) that this caused her distress and embarrassment might perhaps amount to cruelty (unreasonable behaviour). Fraser[7] states that it would be cruelty for a husband during cohabitation to starve his wife, and today a parsimonious attitude such as to affect the wife's public standing and private calm might amount to /

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1. s.4(4)(a).
2. ss.6-8. See Killen.
3. s.9.
4. The purpose and effect of the Act's provisions are well explained by Professor Clive (C.& M. p.231 et seq.: see also the explanation of the intra-U.K. position (1950 Act), pp.226-231.)
5. See supra, pp. 436-440.
6. Supra.
7. 1. 839 (2nd ed., 1876). Lord Fraser appeared to envisage no circumstances in which the existing remedies would not provide a sufficient answer for the situation. "If she cohabit with him, an action for separate maintenance is absurd". See supra, p.436.

to mental cruelty[1], but in any event the remedy of separation and aliment is by no means necessarily appropriate or desired by the parties. The position with regard to enforcement of decrees therefore is highly unsatisfactory[2].

Some[3] argue that the state should act as detective, and provider of funds if its detective work fail. Thus, it might be that a state-provided allowance specifically intended for wives who are entitled to receive aliment in cash amounts, but who, for practical reasons, cannot obtain aliment - that is, an additional remedy to those available at present to the needy individual or family unit[4] - would solve some of the problems. The entitlement thereto /

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1. On the other hand, women themselves by their demands have made it more reasonable for the attitude to be taken that, if at all possible, they should enter paid employment and support themselves and the household as a matter of duty and personal wish rather than as a matter of complaint or desire for luxuries but this may be predominantly a middle-class attitude, and in lower income groups it has always been, (and perhaps increasingly in the middle classes it has now become) a matter of necessity. An entitlement to a fixed proportion of the husband's income, if desired, is thought to be a change which married women of all classes and in all situations but for reasons varying according to the class and situation, would welcome. It might be a vital right for wife and children, or it might be balm to self-esteem, or it might afford opportunity for wives to save (a recent survey has shown that the average married woman has savings in her own name of no more than £12), but it is suggested that for any of these reasons the introduction of such a right would be desirable. See Memo. No.22, 2.179 et seq., Propn.39 and Faculty Response, pp.41-42. Cf. C.& W., p.193, where Professor Clive advocates the use, with caution, of a power to award aliment to a cohabiting wife. Cf. supra, pp.436-440.
2. See Clive and Wilson, p.209, and suggestions there outlined.
3. For example, the "Gingerbread" Pressure Group.
4. See Clive and Wilson, p.390 et seq.: "Marriage and Social Security".

thereto would subsist so long as the recipient[1]. remained entitled to aliment under the private law rules of aliment above set out. Would this be a flat-rate payment (a certain amount for every (entitled) wife, and so much for each child, perhaps depending on age) or would it involve a means-test? The choice might be made in the light of a decision upon the nature of the remedy. If the payment were thought to be an underpinning by the State of a private law right, rather than a public law remedy, then perhaps the wife should be entitled to payment from the State (for example, through the administrative machinery provided by the Post Office) of such sum weekly as appeared on the face of the extract decree. This would constitute an immensely increased burden on the tax-payer (especially since there would be no safeguard to ensure that the decree continued to reflect the circumstances of the recipient: this would provide a good example of aliment permanent in nature if not in name), and for this, and other (moral) reasons, would be unlikely to receive general approbation. Such a remedy would alleviate hardship in many worthy cases, however: the award would commence as soon as extract was issued, and registered with the Post Office or Department of Social Security, in cases where the husband's whereabouts were unknown and in other cases could be called upon if the husband proved to be elusive, and a bad payer. In every case, the alimentary creditor would be required to raise with the help in most cases, it is envisaged, of Legal Aid the appropriate action in order to establish /

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1. male or female (M.W.P.Act, 1920, s.4 - and see proposals for reciprocity of obligation: Memo. No.22, Propn.2: Faculty Response, pp.3-6)

establish and quantify the obligation[1]. Such a system might be unsatisfactory in that husbands would be strengthened in their resolve to avoid making any alimentary payments, however small - whether for reasons of greed, irresponsibility, or a mistaken, or disproportionate, moral obligation to a second wife and family[2] - and even those who would pay, at some inconvenience or hardship to themselves, would be discouraged from doing so. Knowledge that the obligation would be taken over by a public body once registration of the extract decree was made by the wife, inevitably would affect attitudes. The praiseworthy aim would be that from the costs involved in searching for the husband, and from the long-term effect of failure in that search, the wife would be protected, but the side-effects would be difficult to circumvent. Moreover, perhaps too high a premium would be placed upon compliance with the private law rules (that is, in effect, upon the presence or absence of willingness to adhere)[3]. Would the consensually separated be able to register the contract of separation, if its financial terms were not being implemented? There seems /

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1. Contrast here Finer Committee Report (Report of the Departmental Committee on One-Parent Families, Cmnd.5629 (1974), an outline of the proposals of which is contained in Memo.No.22, Part V, and in detail at 5.12. (the "administrative order" system, to be operated by the Supplementary Benefits Commission).
2. What should be the legal position? (At present, of course, the husband has a duty to aliment illegitimate children, a duty which he and the mother share - see Walker, Princ.I.,523.). See discussion as to paramour, Memo.No.22, Propn. 29, and Faculty Response, pp.22-25: as to hierarchy of entitlement, 2.88 et seq. and Propn.19, Faculty Response, pp.18-19.
3. Cf. Faculty Response, "Non-patrimonial conditions of liability", pp.25-31.

seems no reason, in principle, why this should not be done[1].

A scheme such as this[2] would be a disincentive to discharge of a duty owed. Ultimately it might result in the abandonment of private law rules and remedies in favour of a public law regime[3]. Although in many cases at present, maintenance is provided by the State, it is felt that the private law obligation to aliment should remain and be primary[4]. The relationship of public and private law here, and the remedies available under each are subjects of great importance and public interest[5], but a lengthy and detailed study of public law possibilities is not yet thought to be a suitable or necessary exercise in the context of a private law discussion of the property of married persons. That which is attempted to be described[6] and for which certain suggestions for improvement are tentatively made[7], is essentially a Private Law System /

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1. Walker, Prins.I, 267.
2. Another possibility would be a system of "marriage insurance", similar to that applicable to motor vehicles. This, too, might be unacceptable, and, though compulsory, those most likely to be able consistently to contribute might be those least likely to benefit, and they would resent the burden placed upon them of financing the casualties of a perhaps hasty and ill-judged marriage, over the termination of which they have no control. A purely 'personal' or 'individual' marriage insurance might be insufficiently ample to fund a marital breakdown for any length of time. Unless compulsory, it would not achieve its end; if compulsory, it might give offence to many, both in its restriction of freedom and its pessimistic outlook. Moreover, although evidence of the taking out of such a policy could be insisted upon at celebration of the marriage, the payment of premiums thereafter could not be guaranteed.
3. Cf. Memo. No.22, 2.1 - 2.9.
4. Cf. Memo. No.22, Propn.1: Faculty Response, p.3 and p.84.
5. Memo.No.22, Part V, and Faculty Response, pp.82-84.
6. Chapters 1-5.
7. Chapter 7.

System of Property, if system it be.

Termination of an Award of Aliment

An award of aliment will come to an end if the marriage to which it relates is dissolved by divorce[1], or by death.

It is the case, however, that, upon the death of one spouse, the survivor, if insufficiently provided for (according to 'the rank and position of the parties'[2]), is entitled, it being "consonant with equity"[3], to aliment out of the estate, and this claim is a claim of debt and exigible during the lifetime of the survivor. The survivor is not on a par with other creditors, though, and "has no right to permanent aliment till all the debts be paid"[4].

Under the old rules of succession, the estate of the husband might be distributed in such a way at his death that there was no terce, and the jus relictae represented only a small sum[5]. Equally, (for the husband's claim was/is also competent, if "indigent"[6]), "[A]t common law a husband had no jus relicti, and his right to courtesy was conditional on the birth of a living child"[7]. Clearly, in view of the subsequent recognition of a spouse's right in the estate of the deceased spouse[8], the claim would /

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1. See generally Chapter 5, Financial Provision on Divorce.
2. Fr., H. & W., II, 971.
3. Walton, p.267.
4. Fr. II, 971.
5. as explained by Fr.II, 969-970. The abolition of terce and courtesy (by Succession (Sc.) Act, 1964, s.10(1)) gives greater freedom to test and consequent incidence of complaint.
6. Fr.II, 969: Walton, p.268.
7. Walton, p.267.
8. See e.g. M.W.P.Act, 1881, s.6 (jus relicti); Intestate Husband's Estate (Sc.) Acts, 1911-1959; Law Reform (Misc.Provs.)(Sc.) Act, 1940, s.5.

would be found to be appropriate in fewer cases, and today, in cases of intestacy[1], it must be almost unknown: prior and legal rights will exhaust a small estate, and will usually ensure adequate provision in a larger estate[2]. In cases of testacy, where /

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1. Succ. (Sc.) Act, 1964, Parts I and II; Succ. (Sc.) Act, 1973, s.1;

2. As to the prior right to the house, the surviving spouse must have been 'ordinarily resident' there at the date of the deceased's death (1964 Act, s. 8(4)), though the deceased need not have been resident there (M.C.Meston, 'The Succession (Scotland) Act, 1964', p.29). This proviso applies also to the right to the furniture and plenishings (s.8(3)). Financial provision (s.9) is able to be claimed by "the surviving spouse" whatever the domestic arrangements (except that a decree of judicial separation obtained by a wife prevents a husband from claiming on her death intestate any rights of succession in estate acquired by the wife after separation (Conjugal Rights (Sc.) Amendment Act, 1861, s.6: see Chapter 1, p.77 and Chapter 5(2)). Professor Meston (p.22) notes that the disqualification falls if the spouses resume cohabitation. As to mournings and (temporary - as it transpires) aliment on death, Walton asserts (p.269, citing the cases of MacCallum v. MacLean, 1923 S.L.T. (Sh.Ct.) 117, and Morrison v. M.'s Trs. 1930 S.L.T. (Sh.Ct.) 37) that the wife is entitled thereto, "even though she has been living apart from or in desertion of her husband". It seems strange that the rules of aliment on death do not correspond with those in operation in life. However, the cases which Walton cites pertain to temporary aliment (see infra, p. 465) and mournings, respectively, and not to that ("continuing" - C.& W., p.694 et seq.) aliment which might be seen (in so far, if at all, as it is found today) as a substitute for a right of succession so termed, a right or palliative to offset the stringent results of a spouse's considerable freedom of testation, the type of right which may be said perhaps to be a recognition of some common financial right and interest of spouses in their joint venture. Professor Clive (C.& W., p.693) declares roundly that MacCallum's decision seems wrong. He takes the view that the right to temporary aliment (till payment of the provisions, legal or conventional) rests on the argument that the family till that date is deemed to remain in being, whereas in such a case (of the wife's desertion) that is not so, nor in life did the husband owe a duty to aliment the /

where now only jus relictae (i) remains as a spouse's claim against the other's will, and where clever management can arrange an estate in such a way as does not favour the surviving spouse[1], a claim for aliment could arise and be useful.

The Scottish Law Commission comment[2], "... aliment on death fulfils the function of a safety net underlying the law of legal rights", state their impression[3] that such claims are not frequently found in practice, but suggest[4] that the right to aliment on death should remain. If, however, "there is a consensus favouring their abolition"[5], "a statute dealing with aliment would provide an appropriate vehicle". If retention were favoured, then the right should be examined in the context /

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the claimant. If, on the other hand (see infra, p. 464) the object of the award was to maintain the husband's establishment, and was so used wherever the home of the wife and whatever her circumstances, a reason for the grant of the award could be seen, but that was not a prerequisite of a successful claim for such aliment (Walton, p.269), although (Walton, ibid.) the fact that the widow "did not keep up the house will affect the amount". Sheriff Wark in MacCallum (see infra p. 465 fn.3) opined that it was not necessary to have resort to the fiction "that for the purpose of aliment the husband's existence is regarded as continuing for six months after his death (Fraser, Husband and Wife, II.965)"; the status of wife of the deceased at his death sufficed.

1. Cf. Memo.No.22, 4.18. "Under the present law ... a man can readily defeat his family's claims to legal rights by investing in heritable property and dying testate".
2. Memo.No.22, 4.2 (and see generally, on this subject, Part IV thereof - Aliment on Death of Liable Relative).
3. 4.17.
4. Propn. 99 (4.18).
5. 4.3.

context of a review of family property law[1]. Faculty[2] favoured retention until such time as a full-scale consideration of "family property" can be undertaken[3].

Lord Fraser suggests[4] that one third or one quarter of the income to which the heir has succeeded might be a correct award, if this provided a reasonable aliment - but if not, "then she would get the half, or, if necessary, the whole". The court may award such sum as it considers to be reasonable aliment in the circumstances of the case, and, according to Walton[5], may encroach upon capital if the income is insufficient to provide reasonable aliment. A contingent claim of the widow cannot be allowed to delay distribution of the estate[6].

It may be that the wife has barred herself from claiming aliment by reason of having accepted some provision in an antenuptial marriage-contract, though /

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1. 4.3.
2. pp.81-82 (in agreement with Propn. 99).
3. It is understood that such a review by the Scottish Law Commission is in train.
4. II, 971.
5. p.267, citing the case of Anderson v. Grant (1899) 1 F.484.
6. Howard's Executor v. Howard's Curator Bonis (1894) 21 R.787. In this case, though, there were special circumstances. The widow was of unsound mind and living in an asylum. It was suggested that the next of kin's portion of the estate should be retained until it was known whether it would be required for the widow's maintenance. "What is said is that on the arrival of an event which may never occur, the capital of that part of the estate which belongs to the next of kin shall be utilised for the widow's maintenance, and that it shall be kept up by the first party, and not paid to the next of kin, until it shall be seen whether that conditional event will ever occur. I do not think that we can give effect to that proposition". per L.Adam at p.788.

though "if the renunciation of the right to aliment be made by postnuptial contract, the wife may reject the inadequate conventional provision, and resort to her legal claim for aliment"[1].

Fraser[2] states that it is doubtful whether the aliment can be claimed if the widow re-marries. In this question can be seen perhaps the conflict between the name of the right and that which ("stake in the matrimonial assets") has been conjectured[3] to be at least partly its purpose. The terms of the decree may limit the award to such time as the recipient remains in viduity. If not, and the widow re-marries a man who is able 'adequately' to maintain her, many would argue that 'aliment' from the estate of the first should cease[4]. Even if she marry a pauper, the same view might be taken, on the "for better, for worse" argument. If, however, the award is seen as a recognition of the wife's contribution to the marriage, otherwise recognised not at all, the considerations would be different. If the second husband die, leaving her in poor circumstances (with or without an aliment from his estate), could the first aliment revive[5]? All must depend on the purpose of the award, and there seems to be no indication of a common /

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1. Fr.II, 970-971.
2. II, 970.
3. p. 461, fn. 2.
4. Cf. the case of a periodical allowance (divorce) and subsequent re-marriage: Succ. (Sc.) Act, 1964, s.26(5): Div. (Sc.) Act, 1976, s.5(5).
5. Cf. question posed by Professor Meston, 'The Succession (Scotland) Act, 1964', 2nd edition, pp.104-105.

common view, or any view, upon the point[1].

The widow is entitled also to aliment till the first term after the husband's death, unless the estate be "manifestly insolvent"[2] - that is, "to the first term at which her provisions, legal or conventional, are payable", and the amount (of aliment) being calculated with reference to the husband's position and estate, and not according to "the amount of her provisions"[3]. The basis of the entitlement appears to have been to enable the widow to continue to keep up her husband's establishment. Walton[4] notes that the fact that the /

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1. It might be said that at present, Scottish 'matrimonial property law' consists of a bundle of rights, only loosely related to each other, and not linked at all to any identifiable - or, at least, express - principle. After the M.W.P.(Sc.) Act, 1920 set the seal upon the earlier reforms, there appears to have been an aversion to the discussion of what should be the philosophy underlying married persons' property rights, despite fundamental (Succ. (Sc.) Act, 1964) reforms, and interesting though perhaps ineffectual (M.W.P.Act, 1964) amendments.
2. Walton, p.269. See also generally Clive and Wilson, pp.692-694 (especially with regard to the (MacCallum, supra, 1923: Barlass v. B's Trs. 1916 S.C.741) (six months) period for which such temporary aliment has in modern instances been awarded).
3. Walton, ibid. Clive and Wilson, p.693. ("The amount will be governed by the standard of living formerly enjoyed as a wife, rather than the income to be enjoyed as a widow" and "will be affected by the widow's own means and position."). Hence presumably support in the interim from her own family might deny her right to this temporary aliment out of the estate. (Cf. Clive & Wilson, ibid., and see text, re support by husband's representatives). See again MacCallum (six month aliment given, though wife had been in desertion of her husband for three and a half years (or, in the averments of the pursuer, had been put out of the house and never re-admitted): "I think it clear that the widow has a right to aliment if at the date of her husband's death she was still his wife" (nor had the husband acquired a right to divorce her: period of desertion required then four years) per Sh. Wark, at p.118).
4. p.269. (Palmer v. Sinclair, June 27, 1811, F.C.)

the widow broke up that establishment[1] and returned to her parental home did not thereby disentitle herself from receiving aliment ("But the fact that she did not keep up the house will affect the amount[2]), but that, on the other hand, aliment will not be due, if the house was kept up for the widow in the interim period by the husband's representatives. Such a claim, it seems, may now be made by the (indigent) husband[3].

The widow's claim under this head is to be regarded therefore as a charge on the estate, not "a mere payment to account", but rather "akin to a debt, although it cannot prevail against the claims of creditors"[4]. It is believed that in practice today, a claim for temporary aliment is rarely encountered and the usual procedure, if the widow is in any financial hardship, is to make an advance to her, a payment to account of her ultimate entitlement[5]. In a competition with creditors, reasonable /

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1. This is a branch of the law in which the authorities are old; nevertheless, even as late as 1951 (Walton, 3rd ed.), the term, "the husband's establishment" (rather than "the matrimonial home") would sound much less strange than it does now, so rapid has been social change.
2. Walton, ibid.
3. on the basis of M.W.P.(Sc.) Act, 1920, s.4: see Meston, p.25, C.& W. p.694. See also Memo. No. 22, 4.16 where it is pointed out that the 1920 Act, s.4 makes no express provision in respect of the (indigent) husband's right to aliment after his wife's death. 'Permanent' or 'continuing' (C.& W., p.694) aliment is certainly available to the indigent husband - Fr.II, 969.
4. C.& W., p.692, and authorities there cited.
5. Mention is made of the claim of temporary aliment in Memo. No.22 (at 4.7). With regard generally to claims of aliment on death, Propn. 99 suggests that, despite the rarity of these claims, they be retained unless or until modifications to the law of legal rights are made, and render them otiose. The existence of the right to claim performs a safety net function still (4.18) (Faculty Response in agreement - p.81).

reasonable mournings will be allowed to the widow[1].

If the husband is paying aliment in terms of a decree, and then makes a bona fide offer to adhere[2] and this offer is turned down by the wife, he may obtain a recall of the aliment decree (under the same procedure as an application for variation) which is severable from the separation aspect of the decree. The latter is not subject to recall at the husband's instance [3] though by resumption of cohabitation the decree may lapse. Where decree of adherence and aliment is held, a bona fide offer to adhere will be an immediate and effective answer to the claim for aliment[4.5].

A contract of voluntary separation (which will usually contain financial provisions) will be revocable by agreement of the parties, or may be brought to an end if there is a genuine offer to adhere by one party, who calls upon the other to do the same[6].

If it is considered, as surely it must be, that /

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1. Fr.,II, 967-8.
   Clive and Wilson, pp.691-2.
   The Scottish Law Commission (Memo.No.22, 4.19) state "There are few 20th century cases on this topic and it seems likely that changes in social customs have made the widow's right to an allowance" (for reasonable mournings) "something of an anachronism", and suggest accordingly (Propn. 100, with which Faculty was in agreement) that the right, together with any similar rights enjoyed by other relatives, be abolished, "unless there is an unexpected demand for its retention".
2. see Darroch v. D. 1947 S.C. 110.
3. See Strain v. S. (1890) 17 R.297, and discussion therein.
4. Coyle v. C. 1950 S.L.T. (Notes) 22.
5. See now Divorce (Sc.) Act, 1976, s.7 (supra, p.373).
6. Fr., H. & W., II, 913: C.& W., p.407 et seq.
   See the circumstances in Fletcher v. Young 1936 S.L.T. 572. Walton, p.144. Arthur v. Gourley (1769) 2 Pat. 184 and Hood v. H. (1871) 9 Macph. 449.

that the present rule of Scots law as regards the property of married persons is that of separation of property[1], and that, without a code to regularise it[2], the spouses' proprietary relations are governed by the rules which govern the proprietary relations of strangers, this Chapter - the right to receive, and the duty to provide, aliment - and the next - rights and duties in relation to the division of property upon the dissolution of the union by divorce or death - demonstrate exceptions thereto, or at least particular and specialised effects which marriage creates upon the property of those persons who choose to take upon themselves the status of married person, and who are not, or have not been, strangers to each other.

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1. Cf. Sc. Law Com. Memo. No.41, 'Family Law', 'Occupancy Rights in the Matrimonial Home and Domestic Violence' (1978), C.11 and 7.3 et seq: Memorandum dated 25th November, 1977 by the Council of the Law Society of Scotland to the Scottish Courts Administration, on the Draft Convention on Matrimonial Property (Hague Conference October 1976 - Final Act), paragraph 3.
2. See Anton, 'The Effect of Marriage Upon Property in Scots Law', (1956) 19 M.L.R. 653.

CHAPTER 5

PROPERTY RIGHTS UPON DIVORCE AND DEATH

1. DIVORCE

2. DEATH

Property Rights upon Divorce before 1964

According to Professor Meston[1], the pre-1964 divorce law, as it affected the property of the spouses, in its treatment of the fact of divorce as equivalent to the fact of death, may have reflected the old view that there existed a community of property between the spouses. As we shall see in Chapter 6 of this discussion, this older allegiance to the notion of community accords with the views of Louisiana lawyers and legislature, for in that jurisdiction, upon dissolution of the matrimonial régime, whether it be contractual or legal (that is, supplied by the law in the absence of private agreement) and in whatever manner the dissolution occurred, each spouse or the survivor, as the case might be, is entitled to participate to some extent in the community of gains.[2]

Under the older Scots law, the 'guilty' spouse, upon divorce, lost his or her legal rights in the estate of the other, which would otherwise have accrued to him or her upon the death of his or her partner - or upon divorce in which he or she was the 'innocent' party - and the 'innocent' spouse was placed in the position of being able to claim his or her legal rights as if the 'guilty' spouse were dead. In this respect divorce operated as death. Where both spouses had been guilty of matrimonial offences, and there had been, perhaps, successful cross-actions, the fact of divorce was considered, in theory at any rate, not to have any bearing upon property to the effect of bestowing a benefit on either party. The proposition /

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1. "The Succession (Scotland) Act, 1964", M.C.Meston, 2nd ed., p.98.
2. See Chapter 6 (Louisiana).

proposition that each spouse had forfeited all rights arising out of the marriage was high-sounding, but not entirely practical nor indeed entirely in accordance with the idea of a "share-out" of jointly owned goods upon cessation, for any reason, of the purpose of the jointly-owned fund - even if that notion was still entertained seriously. The fiction was that both spouses had died at the date of decree of divorce.[1]

The reason advanced by Professor Meston[2] for the content of the pre-1964 divorce rules is that the theoretical basis of them lay, not in the concept of punishment espoused by the unreformed Church and persisting after the Reformation, but in the fact that, in 1560, it was still possible to hold the opinion that a community of property existed between the spouses.

There is an interesting discussion of the "communio bonorum", in the case of Fraser v. Walker, in which, upon pronouncement of decree divorcing each from the other, property questions were reserved, and the wife then sued her former husband for half of the goods in communion as they stood at the date of decree of divorce. Her claim was refused, upon the ground that the spouses had forfeited all rights arising out of the marriage.

One wonders in such cases how the assets were divided (if they were divided at all) after such a glib, unsatisfactory, incomplete and possibly unfair "solution"?

Originally, the wife had sought her conventional provisions /

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1. See generally Fraser v. Walker (1872) 10 Macph. 837).
2. Meston, ibid., p.98.

provisions in terms of a post-nuptial marriage-contract, and then, guarding against the possibility of failure in that claim, added an action which concluded for terce and ius relictae. Thereafter, for ius relictae, was substituted the phrase "one-half of the goods in communion" as belonging to the parties at the date of decree of divorce. In money terms, she estimated terce at one-third of the annual value (which she averred was £250 p.a.) of her former husband's heritage, and claimed her right to the goods in communion as amounting to one half of her husband's moveable fund of £10,000, since the society of the marriage had been dissolved. The defender contended that the pursuer had not brought anything "to the common purse by acquisition or otherwise during the subsistence of the marriage", and that she had no claim for ius relictae, terce, or under any other head.

In reclaiming against the decision of the Lord Ordinary, the pursuer cited the successful argument of the pursuer in Thomson v. Donald's Executor[1]. Her counsel did not insist in the claim for conventional provisions, and the decision of the case turned upon her right, if such it be, to her legal provisions upon divorce.

It is clear from the Lord Ordinary's note that he felt that, in a case of misconduct by both parties leading to divorce, "To hold ... that an exact count and reckoning should take place so that each of the guilty parties may be dealt with as they stood when the marriage was entered into, is plainly an inadmissible course, incapable of extrication, and inconsistent /

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1. (1871) 9 Macph. 1069.

inconsistent alike with authority and principle."[1] Nor did his Lordship feel that a solution could turn on priority in guilt. His conclusion was that the aid of the law with reference to their patrimonial rights should not be given to either. His Lordship felt that this denial was quite fair. Both parties were losing a potential right to property (the wife was losing a potential right to terce and _jus relictae_) and the husband was losing an actual and a potential right (to that property brought to him, or, one supposes, properly speaking (otherwise) _to be_ brought to him, _jure mariti_, and to the right of courtesy) and he explained away possible unfairness in relation to the state of actual property belonging to each at the date of divorce (that is, that the wife might have little or no heritage or moveables nor prospect of acquiring such, while the husband might possess both in large measure, that the wife might be left destitute and the husband be left in the exclusive enjoyment of the goods (already) in communion, and the whole of his heritage, freed alike from terce and _jus relictae_) by the extremely doubtful rationalisation that in another case, the position might well be reversed, and the husband be rendered destitute.

Upon the claim for half of the goods in communion, his Lordship quoted Lord Curriehill in Muirhead v. Muirhead's Factor,[2] as follows:- "we must guard against being misled by the manner in which the expression "communio bonorum" is occasionally made use /

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1. On the other hand, where views on property were antagonistic to community, and views on misconduct disapproving, one might have thought _restitutio in integrum_ a suitable solution. However, the law would not lend its aid to effect this.
2. (1867) 6 Macph. 95 at p.99.

use of, from which an idea appears to have arisen that these words denote a fund forming a kind of partnership capital, of which the husband is merely the administrator for behoof of his wife and children, as well as himself. Unquestionably, the wife and children have ultimate interests of very great importance in the effects belonging[1] to the head of the family, but during the marriage he is absolute proprietor of the whole moveable estate, with unlimited powers of administration. It is not until his death that any division of the property takes place, and that which then forms the subject of division is his executry estate, one-third of which belongs to the widow jure relicte. On that basis (that until death and under the old law before the rush of M.W.P. legislation, the goods in "communion" belonged to the husband) his Lordship considered that Lord Mure's decision in Thomson v. Donald's Executor[2] must be in error. (Lord Mure, noting the dearth of authority, had concluded that where the husband also was an offending party, there seemed no good reason to apply the rule which would obtain where only the wife was guilty, thereby allowing the husband to continue administration of the wife's share of the goods in communion and to draw the rents of her heritage. He thought that the fair rule was that neither should be allowed to claim any right or interest in the estate of the other, a view in harmony with the decision in the later case of Fraser v. Walker, but differing from it in that his Lordship not only stated the rule, but endeavoured to give effect to it. As to heritage, each should take full possession of his/her own properties. There was more difficulty as to the goods in communion, since, "although they are property /

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1. emphasis added.
2. (1671) 9 Macph. 1069.

property in which the spouses have a common interest, and the wife takes absolute possession of the half when a marriage is dissolved, the right of administration during the marriage, which belongs to the husband alone, is of so exclusive a nature as to be almost equivalent to a right of property in him, in as much as the whole goods may be expended and disposed of by him, or attached by his creditors for debt. A husband's right of administration, however, is in this respect not more absolute than it is in regard to the rents of the wife's heritable estate, which belong exclusively to the husband during the marriage, and his right to which may be attached by his creditors by adjudication. And as this right so to deal with each depends solely upon the jus mariti which comes to an end by the dissolution of the marriage, it appears to the Lord Ordinary that there is no sufficient ground for holding that the husband should be allowed to retain the wife's share of the goods in communion any more than he would have been to retain the rents of her heritable estate in a case where, as here, the marriage has been dissolved in consequence of the guilty conduct of both"[1]. This solution surely would be more likely than the other to find favour today).

This, then, is a very slender, insubstantial and unfair communion, unworthy of the name, and deserving of the cynicism with which it has often been treated. Lord Kinloch stated in the Inner House decision,[2] that, upon investigation, it became obvious that no such thing as a proper partnership or society in marriage existed. "Emphatically the reverse has been /

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1. Note to Interlocutor, reported ibid. at p.1074.
2. Fraser v. Walker (1872) 10 Macph. 837 at p.847. "... we must not be led astray by a mere phrase, but must carefully inquire into what the phrase has truly signified."

been again and again held." During the marriage, the husband was not merely administrator, but 'dominus' of all moveable estate belonging to both parties. "The wife is destitute of any right. The whole belongs to the husband. To call any part of the effects the wife's own during the subsistence of the marriage is a legal solecism." 'Communio bonorum' in the law of Scotland meant one, the right of ius relictae, and, two, the rights of succession of a predeceasing wife's legal representatives to one half of the moveable estate upon the later death of the husband, a right removed by the Intestate Moveable Succession Act, 1855 (itself repealed in full by the Succession (Scotland) Act, 1964, s.34).

At any rate, even had there existed such a communion as the wife envisaged, the Lord Ordinary did not approve the wife's claim for one half. If she alone had been the guilty party, she would have had no claim to half, on the allegation that it had been hers all along. Should it matter that in this case not only she, but also her husband, was guilty? (By the same token, had the goods physically been within the possession and control of the wife, the husband's claim to one half would have required to have been met by the same response, since his wife's guilt did not entitle him, as a guilty party also, to claim one half. The theory was that the remedy must be denied to both, and a 'blinkered' view was taken of the practical consequences. The important point, of course, was that the balance of power lay the other way). The Lord Ordinary felt that where there had been mutual misconduct, the claims of neither, as against the other, ought to be sustained. Neither party was awarded expenses.

According to Lord President (Inglis)[1] there would /

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1. at p.842.

would have been no difficulty or novelty had the divorce not been one in which decrees of divorce had been pronounced simultaneously against both spouses in one judgment on the grounds of the adultery of both spouses. In Stair, i.4,20 are found these words -

"Marriage dissolved by divorce, either upon wilful non-adherence (or wilful desertion), or adultery, the party injurer loseth all benefit accruing through the marriage (as is expressly provided by the foresaid Act of Parliament, 1573, c.55, concerning non-adherence), but the party injured hath the same benefit as by the spouse's natural death." If a wife were the innocent party, then she would be entitled either to her conventional provisions or if there were no conventional provisions to legal provisions of terce and '<u>ius relictae</u>.'[1]

The argument of counsel for the wife was that upon dissolution of the partnership, the goods of the partnership had to be divided among the former partners, on the basis of the doctrine of the '<u>communio bonorum</u>'. Unfortunately, for our purposes, the Lord President did not "think it necessary, in giving judgment in this case, to trace with any minute and jealous accuracy the extent to which that doctrine has been adopted in our law."[2] He merely noted that in practice it meant that the survivor wife is entitled to one third or one half, depending on the presence or absence of children, of the husband's moveable estate, or of his free executry, '<u>jure relictae</u>'. He concluded that, if the wife's claim succeeded /

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1. It would appear that, if there <u>were</u> conventional provisions, the innocent party would take both conventional and legal provisions: Walkon, p.230; C. & W., p.540.
2. p.843.

succeeded, she would be taking benefit from the marriage and its dissolution, since the goods in communion were in fact her husband's personal estate, and such benefit was not available to the guilty party in a divorce action. (She was the guilty party only in her husband's action, of course). The claims of the divorcing were extinguished by the acquisition of the status of the divorced. This was true of both spouses, but fell harder on the wife. The Lord President[1] noted the novelty of the question: initially the wife had sought conventional provisions arising from a postnuptial contract, as if the husband had died. Thereafter she sought in the alternative for her legal provisions of terce and jus relictae, confining her argument mainly to the latter, probably because the husband had little heritable property. In Donald, Lord Mure had pronounced in favour of such a claim. Lord Cromidale in this case had taken the opposite view. "We are called upon to consider the question for the first time."

A great weakness in the wife's case was that it did not appear that before marriage she had had any great fortune, and she had brought little, if anything, to the stock of the marriage. "Her claim now is for her share of the property and funds said to belong to both spouses during the marriage, but not said to have been previously her own, or to have been brought by her into the mutual stock. This claim resolves into a demand for some right and interest arising to her as a wife in respect of the marriage. Such a claim on the part of a wife divorced for adultery is not well founded."[2] It takes an enlightened age to apportion /

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1. p.842.
2. per L. Ardmillan at p.844.

apportion property, not only without reference to conduct, but also without reference to contribution.

The property aspects of the decree of divorce, as the grounds of divorce widened (to include cruelty, desertion, and sodomy and bestiality), was assimilated, in every case except that of divorce for incurable insanity, to that which obtained upon grant of decree of divorce on the ground of adultery.[1]

Before 1964, the innocent wife might claim _ius relictae_ and terce: the innocent husband might claim courtesy only, since by the M.W.P. (Sc.) Act, 1881, s.6, which introduced into the law the _ius relicti_ right for a surviving husband equivalent to the common law _ius relictae_ right for surviving wives, the right was made exigible only in the case of death, not divorce.[2] The innocent party, whether husband or wife, could claim also any conventional provision which would have been exigible had the death of the guilty party occurred. The other forfeited (his) marriage contract rights.[3] Decree did not have the effect of bringing into operation marriage-contract provisions in favour of "surviving children".[4]

An odd effect which divorce had upon a wife but not a husband guilty of adultery where the paramour was named and where she "married" (for such marriages strictly were null) or openly cohabited with the paramour was a restriction upon her ability to alienate her heritage to any person ("husband" or second family) in prejudice of the issue of the marriage /

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1. Divorce (Scotland) Act, 1938, s.2(1).
2. See Eddington v. Robertson (1895) 22 R.430.
3. See Walton, p.230 and cases there cited.
4. See Dawson v. Smart (1903) 5F.(H.L.)24; sequel, Gavin's Trs. v. Walker's Trs. (1907) 15 S.L.T. 681.

marriage which had been dissolved by that divorce, or, if there was no such issue, then of her (other) lawful heirs. This was enacted by the Act 1592, c.11 "Agents adulterearis", an Act repealed in full by the Succession (Sc.) Act, 1964, s.34.[1]

Walton notes[2] that if a right had vested in a guilty spouse before decree of divorce (for example, an unpaid sum which had vested in the husband jure mariti quanto matrimonio - Ferguson v. Jack's Exrs.,[3] the fact of divorce would not prevent him from claiming it.

Where the guilty spouse was bankrupt at the date of decree, the innocent spouse could not rank for legal rights, or for any provision in the nature of a jure mariti, but could rank for conventional provisions, if they were such as to give the spouse a jus mariti.[4]

Property Rights Upon Divorce after 1964

The new provisions were contained in the Succession (Scotland) Act, 1964, Part I (ss.25-27), and now are to be found, without substantial alteration, in the Divorce (Scotland) Act, 1976, ss. 5 and 6.[5]

"In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that the marriage has broken down irretrievably."[6] The /

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1. See Walton, p.232. C. & W. p.95.
2. pp.231/2.
3. (1877) 4 R.393.
4. Walton, p.231, citing Bell, Comm. 5th ed. 1.634; Fraser II, 1285.
5. See generally and in greater detail M.C.Norton, 'The Succession (Sc.) Act, 1964' 2nd ed. 1969 Chapter 10; Clive and Wilson, Husband and Wife, Chapters 20 and 22.
6. Divorce (Sc.) Act, 1976, s.1(1).

The Divorce (Scotland) Act, 1976, s.1 "contains the whole statute law on the grounds of divorce in any action for divorce commenced after January 1, 1977",[1] and s.5 permits either party to the marriage to apply to the court for an order of payment of periodical allowance and/or payment of capital sum and/or variation of the terms of any settlement made in contemplation of or during the marriage so far as taking effect on or after the termination of the marriage. Previously divorce granted on the ground of incurable insanity had been treated as a special case[2] but this is no longer so. Such circumstances would fall under the head of s.1(2)(b) (behaviour such that pursuer cannot reasonably be expected to cohabit with the defender, whether the behaviour arise from mental abnormality or not, and whether the behaviour has been active or passive) and the court's discretion in the matter of property regulation, given by s.5, is wide.[3] The Act does not apply to dissolution of marriage on the ground of /

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1. "The Divorce (Scotland) Act, 1976", E. M. Clive General Note upon s.1 (p.10).
2. See e.g. C. & W. pp.561-2. The court might make such order, if any, as it thought fit, having regard to the respective means of the parties, of a capital sum or periodical allowance to be made by either to or for behoof of the other or of any children. Professor Clive notes that the Act did not expressly empower the court to award both.
3. The matter had been regulated by the Divorce (Scotland) Act, 1938, ss.2 and 3, as amended by the Divorce (Scotland) Act, 1964, s.7. In the case of incurable insanity divorce only, it seemed that the remedies provided by the Succession (Sc.) Act, 1964, namely, awards of capital sum and periodical allowance, were alternative and mutually exclusive (Meston, p.100) Divorce (Sc.) Act, 1964, s.7 - court order of payment by either marriage partner or his/her executors of a capital sum or periodical allowance for behoof of the other partner or of any children of the marriage.

of presumed death,[1] nor, of course, to cases of nullity of marriage.

The Succession (Scotland) Act, 1964 gave form to a considerable change of attitude with regard both to rights of succession[2] and to property rules on divorce. In terms of s.26(1)(a), the pursuer might apply to the court for order of payment of a capital sum and/or of a periodical allowance, and, under s.26(1)(b), either party might apply to the court for an order varying those terms of any ante-nuptial or post-nuptial settlement which were to take effect upon the termination of the marriage.

The 1964 Act (s.26(2)) directed the court, in its treatment of applications under s.26(1)(a) or (b), to have regard to "the respective means of the parties to the marriage and to all the circumstances of the case..." The courts have been disinclined to state in specific terms the proportion of the payer's assets which might be thought to be a suitable starting-point for discussion in the general case. Lord Hunter[3] took the view that the pre-existing law could not be taken as a basis for holding as a general principle that either one third (defender's argument) or one half (pursuer's suggestion, at one stage of his argument) of the (defender's) assets should constitute the capital sum award. "There does not appear to me to be any escape from the view that in the end of the day each case must be decided on its own circumstances."[4] In the result, however, a capital /

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1. See Presumption of Life Limitation (Sc.) Act, 1977 (Chapter 7).
2. Infra.
3. Galloway v. G. 1965 S.L.T. (Notes) 92 at p.93.
4. Ibid.

capital sum representing a proportion between one third and one half of the husband's assets was made over to the wife, together with an award of weekly aliment for the child. The parties had agreed that a capital payment was appropriate. It was emphasised by Lord Hunter that the defender's primary financial obligations were the pursuer and the child of the marriage and that, in his view, one of the objects of the new provisions of the 1964 Act was to make the enforcement of the first of these a reality. "If, as seems likely, the defender finds it difficult to support two households the remedy lies in his own hands."[1]

In Robertson v. Robertson[2] where the defender, a bookmaker, had assets of £21,000, Lord Johnston awarded a capital sum of £7,000 and a periodical payment of £1,200 p.a. to the pursuer. Here, capital and income were closely linked, as would be the case with a publican's business, or in any situation where "the defender's capital is largely tied up in his business premises and ... any substantial call on his capital would require to be met by the sale of the business premises or by a loan with a consequent reduction in his income."[3] The traditional view was taken, namely, that the (innocent) pursuer has a right to retain, after divorce, the standard of life permitted and provided by the marriage. "The periodical payment, the interest on the capital sum and her own earnings or potential earnings will enable her to enjoy a standard of living comparable to that which the defender enjoys and /

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1. Ibid.
2. 1967 S.L.T. (Notes) 78.
3. Ibid., per L. Johnston at p.79; and cf. Nicol v. N. 1969 S.L.T. (Notes) 67.

and which she enjoyed when they resided together."[1] The standard of living had been relatively high; the husband had spent freely on his wife and on himself.

Extract decree in this case was suspended in respect of £2,000 until three months had elapsed from date of decree and in respect of the remaining £5,000 until twelve months from that date.

In an undefended case, the pursuer's averments as to income and standard of living, which the defender has not troubled to contradict, will usually form the basis of the judicial assessment "and diligence for the recovery of documents will normally be refused"[2], but where there is obscurity or evasion or where the action is defended, a commission and diligence may be allowed.[3] It may be that some documents will be subjected to the commission and diligence, and some will not.[4]

Where recourse has been had to capital in order to maintain a certain standard of living, this factor should be taken into account.[5] A full and accurate picture of the financial circumstances of the marriage is sought. Lord Kissen in Hogg[6] took the view that the terms of s.26(2) were very wide, and that he could have regard to the circumstances which led to the marriage. The wife had induced the defender to marry /

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1. p.79. L.Johnston agreed with L.Hunter that there could be no fixed formula in the exercise of the judicial discretion conferred by s.26; each case must be decided on its own circumstances.
2. Meston, p.102. (citing Gould v. G. 1956 S.L.T. 131).
3. Douglas v. D. 1966 S.L.T. (Notes) 43.
4. Galloway v. G. 1947 S.C.330; Alexander v. A. 1957 S.L.T. 298.
5. 1957 S.L.T. 298. See reasoning and detailed arithmetic of L. Wheatley.
6. 1967 S.L.T. (Notes) 91.

marry her through false allegations of pregnancy by him, and the marriage had lasted only eight days (that is, until discovery by the husband of the deceit). She concluded for a capital sum payment of £2,000 (her husband's assets at proof being £4,500) and for a periodical allowance of £6 per week. An allowance was refused but a capital sum award of £250 was made. In other circumstances he would have awarded a sum of £1,500. "The court must, in my view, have regard to the fact that the defender did not have what the law regards as "reasonable cause" for leaving the pursuer. That is the factor which has influenced me in deciding to award a capital sum to her." However, the pursuer had used deception and "She was, to a large extent, the authoress of the desertion and of her own present position as a deserted wife." Many would feel that the husband had some cause for leaving, but the law held that it did not amount to reasonable cause, and therefore "I am afraid that I must, in all the circumstances, allow her to profit from her own initial fraud on the defender but I think that the profit must be small"[1].

In terms of s.26(1)(b), either party might apply to the court for an order to vary the terms of any settlement made in contemplation of or during the marriage, so far as taking effect on or after the termination of the marriage and again (s.26(2)), where application was made under s.26(1)(a) or (b) the court is directed to make such order, if any, as it thinks fit, having regard to the respective means /

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1. at p.92. See C. & W. p.498. See also Hastings v. H., 1941 S.L.T. 323.

means of the parties to the marriage and to all the circumstances of the case, including any settlement or other arrangements made for financial provision for any children of the marriage. The same factors applied to the decision to award or not to award after the date of divorce upon a change in the circumstances of either party a periodical allowance where prior application had been withdrawn or refused, or where none had been made (s.26(3)).

On a change of circumstances, either party, or his or her executor, might apply to the court to vary or recall an order under s.26(2) or (3). Professor Keeton points out[1] that "the financial question is normally expected to be settled at the time of the divorce". Hence there must be change in the circumstances of either of the parties before the matter of a periodical allowance can be raised again, and "[o]nce a decree of divorce has been granted, it is no longer possible for application to be made for payment" (or alteration, presumably, by inference of s.26(3) and (4))[2] "of a capital sum by the defender to the pursuer". Clive and Wilson remark[3] that this seems unfortunate, since it prevents the ex-wife from participating in sums accruing to the ex-husband on retirement or death (e.g. insurance or pension moneys payment towards which may have been made during the marriage) and also prevents use of the capital "in the way envisaged by the Mackintosh Committee - that is, as a /

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1. p.103.
2. It seems that there could not be variation of a capital sum award, unless perhaps by way of action under s.27 (anti-avoidance). See C. & W., p.567 ("there is no power to vary an order for payment of a capital sum on divorce") and see per L.J.-C. (Grant), Johnstone v. J., 1967 S.C. 143 at pp.148/9, quoted infra, p. 491.
3. p.584.

a means of surmounting the difficulties in enforcing an order for a periodical allowance".

Any order for payment of a periodical allowance[1] should cease to have effect on the remarriage or death of the pursuer, except in relation to any arrears due under it on the date of such event (s.26(5)). Where the payer predeceased the payee, the latter might look for payment to the payer's executor. It is possible that this change in circumstances might justify an application under s.26(4) for variation or recall, made by the payee or by the executors of the deceased payer. And see Clive and Wilson, p.545 ("insurance or pension funds falling into her ex-husband's estate on his death"). (Since, in terms of s.26(5), an order for a periodical allowance should cease upon the death or re-marriage of the pursuer, the reference to executor in s.26(4) must be to the executor of the defender: see Meston, p.104).

"The direction that the Court is to take into account the respective means of the parties indicates that the Court may make an award if the husband can afford it even if the wife could live without it".[2]

The possibility of re-marriage is relevant[3].

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1. that is, between spouses (Meston, p.104); children's rights would be unaffected. As to possibility of revival, see pp.104-105.
2. Cartwright v. C. 1965 S.L.T. (Notes) 59, per L. Migdale at p. 59.
3. See C. & W., pp.557/8. In England, the distasteful practice of assessment of a widow's chances of re-marriage was abolished by L.R. (Miscell.Provs.) Act, 1971, s.4(1) and (2). Cf. C. & W., p.548: "'Circumstances' must be limited to relevant circumstances. It would not normally include, for example, the pursuer's appearance or charm."

In Nicol[1] the wife sought a capital sum award of £1000 and £6 per week as a periodical allowance. Judicial attention was paid to the fact that the husband's business as a publican had been built up by the joint efforts of the spouses. The wife received a capital sum award of £1000 and a periodical allowance of £4 per week. Today there is probably considerable general support for the view that a court should take account of non-financial contribution to family well-being or to the prosperity of a family business.[2] In Nicol, more might have been awarded to the wife (that is, one half (£2,700) of the value of the business) had not Lord Fraser been satisfied that the making of such an award would have compelled the defender to sell the business which would not have been in the interests of the spouses or the children. The amount of the wife's award was determined by the amount Lord Fraser thought the husband could raise by loan.[3]

The court in its calculations looks to gross earnings.[4]

Not only means, and needs, but also conduct is seen to be a relevant consideration in the cases which followed the Act. In Turner[5] a capital sum was awarded but no periodical allowance. Lord Thomson considered that the wife's lack of consideration/

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1. 1969 S.L.T. (Notes) 67.
2. See discussion infra (post 1976) and cf. specific English provision: Matrimonial Causes Act, 1973, s.25(1).
3. cf. generally Robertson v. R. 1967 S.L.T. (Notes) 78, and Patterson v. P. 1966 S.L.T. (Notes) 20.
4. Gray v. G. 1968 S.L.T. 254. See C. & W., p.550.
5. 1973 S.L.T. (Notes) 2; see also Hogg, supra, and Thomson v. T. 1966 S.L.T. (Notes) 49 (cross-actions of divorce, both of which were successful: the allowance otherwise due to the wife was halved (L. Kissen).).

consideration, petulance and "extravagance of character" had contributed to the breakdown of the marriage. However, in Gray[1], the Lord Ordinary made no deduction in respect of the wife's isolated act of adultery and this point, among others, was upheld on appeal. "The statute does not contemplate that the Court will penalise either of the spouses on the ground that they have committed adultery or any other matrimonial offence. The Lord Ordinary undoubtedly took what the wife had done into account and properly did so, as it was a circumstance within the meaning of the subsection, but he made it plain that in the circumstances of this case he did not consider that there was any reason for making any deduction in respect of it. He was manifestly entitled in the light of the discretion conferred upon him by the statute to take that view". (L.P. (Clyde))[2].

As in the case of awards of aliment, appeals on quantum are not looked on with favour. In Gray, supra, Lord Cameron stated that " T he determination of the amount of any award of periodical payment or of a capital sum is again essentially a matter for the discretion of the Lord Ordinary, as indeed is the issue of whether or not any order is to be made at all."[3] The Lord Ordinary's award was not open to attack "merely on the grounds that it errs either on the side of excess or of niggardliness." It would be otherwise if it could be shown that the Lord Ordinary had misdirected himself in law or had failed /

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1. 1968 S.C.185, 1968 S.L.T.254. The case came before L.O. (Hunter) and on appeal before the First Division. The report narrates both decisions.
2. 1968 S.L.T. at p.257.
3. 1968 S.L.T. at p.260.

failed to take into account what was relevant or had taken into account irrelevant or improper considerations or (Lord Guthrie) had reached a manifestly inequitable result.[1.2.]

Where the parties have reached agreement as to the terms of a settlement, this usually will be accepted by the court although of course it need not be accepted.[3.4]

Anti-Avoidance /

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1. See Clive & Wilson, p.557, where relevant passages of the judgments are set out.
2. And see recent case of McRae v. McRae 1979 S.L.T. (Notes) 45, in which the court rejected the husband's argument that the capital sum award of £6,000 was "manifestly inequitable". His total capital amounted to £11,000. L.P.Clyde's views in Gray were cited, as were L.Guthrie's tests (that is, that interference was justified only if the L.O. had misdirected himself in law, or had failed to take into account a relevant and material factor, or had reached a result which was manifestly inequitable). It had been suggested for the husband that a "normal" award would be in the range of one third/one half of the payer's capital unless there were special circumstances and that the court should approve that approach and should indicate in some way the weight to be given to various special circumstances which might justify an award outside that range. It was stated that it was not for the (appeal) court "to seek so to set limits to, or otherwise to fetter, the wide discretion given by statute to the judge of first instance."
   In this case, the award amounted to the payment to the wife of two-thirds of the difference between her capital and that of her husband. Cf. approach advocated in Chapter 7.
3. C. & W., p.556.
4. See recent case of Dunbar v. D. 1977 S.L.T.169, cited by Professor Clive in "Financial Provision on Divorce", E.M. Clive 1979 S.L.T.165, in which three years after an award of periodical allowance on divorce had been made to the wife, the parties agreed to have the entitlement commuted to a sum of £2,000 in discharge. Subsequently the wife attempted to reduce the agreement as incompetent but failed. "This case dealt with the discharge of an existing right to a periodical allowance already awarded but the same principles would apply to a discharge of /

Anti-avoidance

In terms of s.27, where application had been made for a capital sum and/or periodical allowance award, or for periodical allowance after divorce, or for variation or recall of a periodical allowance, the pursuer might, at any time before the expiration of one year from the disposal of such application, apply to the Court of Session for an order reducing or varying any settlement or disposition of property belonging to the defender made by him in favour of any third party at any time after the date occurring three years before the making of the principal application (that is, a s.26(1)(a) or s.26(3) or s.26(4) application) or interdicting the defender from making any such settlement or disposition, or transferring out of the jurisdiction of the court, or otherwise dealing with, any property belonging to the defender. The court might make such order (s.27(2)) if it was shown to its satisfaction that the settlement or disposition was made or was about to be made, or that the property was about to be transferred or otherwise dealt with, primarily for the purpose of defeating, wholly or partly, any claim which the pursuer had made or might make under s.26(1)(a) or s.26(3) or (4).[1]

Third /

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of claims for financial provision granted before a divorce" notes Professor Cliva at p.169 and makes mention of Hinton v. H. [1979] 1 All E.R.79, in which it was held that the court in England can embody in a final award, not subject to variation, an agreement reached between the parties. See, on this subject, Memo. No.22 and Faculty Response.

1. See generally Johnstone v. J. 1967 S.C.142, in which a wife, having concluded for a capital sum award under s.26(1)(a), sought interdict under s.27(1)(b) against her husband's dealing with a sum of money which, she averred, he had received as damages. The Lord Ordinary (Milligan) refused her application for interdict, on the basis that it /

third parties were protected. Such an order should not prejudice the rights (if any) in that property of any person who had in good faith acquired it or any of it from the defender for value[1]/

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it was premature, since she had not yet established her right to a capital sum. On appeal, it was held that a s.27(1)(b) application was competent at any time after a s.26 application had been made, and until the expiry of one year after the disposal of the s.26 application. Interim interdict was granted.
Fur L.J.-C. (Grant) at pp.748/749: " .. an application for payment of a capital sum must be disposed of when decree of divorce is pronounced. It cannot be varied or recalled after the date of that decree, nor is there any provision for the making or granting of such an application after that date. That being so, section 27, although covering ex facie, and indeed explicitly, applications for the payment of capital sums, would, on the defender's argument, be virtually useless as a protection for any person making such an application. So far as interdict is concerned, the defender would be unfettered in the disposal of his assets before decree of divorce, and after divorce it would be too late for interdict to have any effect on what had already been disposed of ..... The appropriate sequence, to my mind, would be (a) the establishing of grounds of divorce, (b) the continuation of the cause in order to deal with the reduction application, and (c) an interlocutor dealing simultaneously with divorce, reduction and payment. If, of course, the pursuer fails to clear the first fence, she never reaches the second or third". The averments in the minute disclosed a clear prima facie case for preserving the status quo. The situation at the end of the day might be different. Meantime, on the balance of convenience, interim interdict should be granted.
S.27(1)(b) concerned interdict: s.27(1)(a) concerned reduction or variation of any settlement or disposition of property belonging to the defender made by him in favour of any third party at any time before the date occurring three years before the making of the application under s.26(1)(a) or (2) or (4).
This case concerned s.27(1)(b), but it was thought (see in particular per L. Stenhouse at pp.750/751) that the same reasoning must apply to s.27(1)(a) applications.

1. cf. Leslie [1983] I C.L.625: wife failed to show that purchasers of former mat. home, alleged to be friends of husband, were other than purchasers of good faith and for value (1976 Act, S.6.). (Reduction of disposition refused.)

value, or who derived title to the property or any of it from any person who had done so. (s.27(2) proviso).

The Act presupposed a traditional approach to the ownership of property (that is, separate ownership). The pursuer might declare not only that the defender was acting in the manner described, but also that (he) was disposing of property in the ownership of the pursuer or the ownership of which was not clear. No opportunity was given for the airing of disputes except within the context of a s.27 complaint concluding for a s.27 remedy.[1] The Act laid upon the pursuer the responsibility of timeous detection of potentially damaging actings. However, the provisions did supply the machinery which a party might use to prevent the occurrence, or frustrate the effect, of deals, anticipated or past, in fraud of (his) claim under s.26(1)(a) or s.26(3) or (4), and they formed the basis of the most recent provisions (Divorce (Scotland) Act, 1976, s.6) concerning this subject. The court's powers are extended, though, in that it may order reduction or variation of settlements, or interdict, if it is shown to the court's satisfaction that the actings were carried out "wholly or partly for the purpose of defeating in whole or in part any claim ..."[2].

Property /

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1. Contrast England: M.W.P.Act, 1882, s.17 and Matrimonial Proceedings and Property Act, 1970, s.37. Of course, there are in the Scots law of contract, quasi-contract and property some rules remedies and means of redress but often they seem only incidentally applicable to husband and wife. See generally C. & W., p.289 et seq.
2. Professor Meston (p.106) remarked, "It may prove to be difficult to establish that a given transaction was primarily intended for this purpose. A great deal will depend on how easily the court will be satisfied of the existence of this primary intention". On the other hand, gifts made to a bona fide donee might be attacked, but if the donee acted in good faith (and even more tellingly one would think if it /

Property Rights upon Divorce after 1976

The Divorce (Scotland) Act, 1976 came into effect on 1st January, 1977[1] and in section 1(1) enacted that "the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions ... that the marriage has broken down irretrievably". "In fact what the court has to consider is whether one of five "facts" has been established. If so it must grant divorce...: if not it must refuse divorce, no matter how irretrievably broken down the marriage appears to be."[2] The five "facts" are (a) adultery; (b) behaviour at any time such that the pursuer cannot reasonably be expected to cohabit with the defender (whether the behaviour has or has not resulted from mental abnormality and whether the behaviour has been active or passive); (c) wilful desertion without reasonable cause for a continuous period of two years; (d) non-cohabitation for a continuous period of two years immediately preceding the bringing of the action, the defender consenting to decree; (e) non-cohabitation during a continuous period of five years immediately preceding the bringing of the action.[3]

"Notwithstanding that irretrievable breakdown of /

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it appeared that the donor acted in good faith) "the circumstances may be such as to suggest that the transfer was not primarily for the purpose of defeating claims." (Meston, ibid.).

1. with the exception of s.8 (Amendment of Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act, 1963), which came into effect on 1st September, 1976.
2. "The Divorce (Scotland) Act, 1976", E.M.Clive, p.10. (Chapter 3: The Act annotated).
3. s.1(2)(a) - (e).

of a marriage has been established in an action for divorce by reason of subsection (2)(e) of this section, the court shall not be bound to grant decree in that action if in the opinion of the court the grant of decree would result in grave financial hardship to the defender.

For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit."[1]

The provisions of greatest importance for the purposes of this discussion are sections 5 (Orders for financial provision) and 6 (Orders relating to settlements and other dealings).

In terms of s.5, either party[2] to the marriage, in an action for divorce, may apply to the court, at any time before grant of decree, for any one or more of the following orders - (a) an order for payment to him or for his benefit of a periodical allowance; (b) an order for payment to him or for his benefit of a capital sum; (c) an order varying the terms of any settlement made in contemplation of or during marriage so far as taking effect on or after the termination of the marriage.

"Payment by" shall include a reference to payment out of any estate belonging to that party or held for his benefit.

The court on granting decree shall make with respect to the application such order, if any, as it thinks fit, "having regard to the respective means of the parties to the marriage, and to all the circumstances of the case, including any settlement /

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1. S.1(5).
2. emphasis added.

settlement or other arrangements made for financial provision for any child of the marriage."[1.2]

Where an application for payment of a periodical allowance has been withdrawn or refused, or where no such application has been made, either party[3] to the marriage may apply to the court for such order after the date of grant of decree if since that date there has been a change in the circumstances of either of the parties to the marriage; and the court shall make with respect to that application such order, if any, as it thinks fit, having regard to the factors mentioned above.[4]

Further, any order for periodical allowance may, on application by or on behalf of either party to the marriage (or his executor) on a change of circumstances, be varied or recalled by a subsequent order.[5] It will be noted that the subsection refers only to orders for payment of a periodical allowance. "A capital sum can neither be applied for, nor varied, after the granting of decree of divorce."[6]

On the death of the payer, the order shall continue to operate against (his) estate, subject to the above-mentioned provision concerning variation. On the death or re-marriage of the payee, the order shall cease to have effect except in relation to arrears due under it on the date of re-marriage or death.[7]

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1. S.5(2).
2. Any reference to a settlement shall be construed as including a settlement by way of a policy of assurance to which the Married Women's Policies of Assurance (Scotland) Act, 1880, s.2 applies: s.5(7). (re-enacting Succession (Sc.) Act, 1964, s.26(7)).
3. emphasis added.
4. S.5(3).
5. S.5(4).
6. "The Divorce (Scotland) Act, 1976", E.M.Clive, p.23.
7. S.5(5). The wording seeks to clarify, rather than to alter, the law. (Clive, p.23) "There is no provision for it to revive on the dissolution of the payee's second marriage but, on principle, it would do so, and with retrospective effect, were the second marriage declared void ab initio" (Clive, ibid.) And see Meston, pp.104-105.

It can be seen that, in Professor Clive's words, "minimal amendments to the law on financial provision on divorce" have been made.[1] Clearly, now that, ostensibly, the notion of 'matrimonial offence' has been removed and that of 'irretrievable breakdown of the marriage' substituted, it would be wrong to allow to continue the rule that only the pursuer in a divorce action might apply for financial provision. However, s.5(6) provides that the pursuer, in a s.1(2)(d) or (e) divorce (that is, in the cases of divorce following two year or five year non cohabitation), has a duty to inform the defender of his right to apply for (a) financial provision and (b) an order providing for the custody, maintenance and education of any child of the marriage. These categories of divorce contain no hint of moral blame, and Professor Clive[2] remarks that " T his subsection reveals once more the Act's hypocrisy in providing that there is only one ground of divorce .... In relation to adultery, intolerable behaviour and desertion the pursuer will not be bound to inform the defender of these rights. This is a clear differentiation between fault and non-fault divorce." He notes that the court is given no guidance about the objectives of an order for financial provision nor is there mention of specific factors to be taken into account, apart from the means of the parties and arrangements made for financial provision for any child of the marriage, and refers to 'the more fundamental review of the law' made in Scottish Law Commission's Memorandum No.22 (Aliment and Financial Provision) /

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1. "The Divorce (Scotland) Act, 1976", E.M.Clive, p.22.
2. Ibid., p.23

Provision)(1976)[1]. Conduct of either, or both, party(ies), therefore, remains a relevant consideration.

The anti-avoidance provisions are contained in S.6, which re-enacts the provisions of S.27 of the 1964 Act, with the important amendment, already noted, that the court's powers to act arise if the settlement or disposition made, or to be made, was effected "wholly or partly" (as opposed to the Succession (Scotland) Act's "primarily") for the purpose of defeating in whole or in part any claim for financial provision which has been made or which might be made. This is an easier test to satisfy, and the court's armoury therefore is strengthened and made more useful to the aggrieved pursuer.[2] Application may be made where there has been a claim under S.5 for financial provision[3] or where there has been brought by either party to the marriage an action for separation and aliment, adherence and aliment or interim aliment, or where there has been "an application for variation of an award of aliment (other than an interim award) in such an action which has been made by the party of the marriage who has brought that action"[4]: hence, "the court's anti-avoidance powers are extended ... to actions for separation /

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1. as to which, see Chapter 4, and Glasgow University Law Faculty Response to Memorandum.
2. However, Professor Clive (Financial Provision on Divorce 1979 S.L.T. 165) notes that "any settlement or disposition of property" has been held not to include gifts of money (Maclean v. M. 1976 S.L.T. 86) which opens "a great loophole in the anti-avoidance provisions" (p.169) and refers (p.171) to the Scottish Law Commission's (Memo. No.22) suggestion to close it.
3. that is, under s.5(1)(a) or (b), or s.5(3) or (4).
4. s.6(1)(c).

separation and aliment, actions for adherence and aliment, actions for interim aliment between spouses, and applications for variation of aliment in such actions."[1]

Again, S.7 makes changes in the rules governing the law of aliment. It shall be competent for the court to grant decree for interim aliment[2] if it is satisfied that the parties are not cohabiting with one another, and that the pursuer is unwilling to cohabit with the defender whether or not the pursuer has reasonable cause for not so cohabiting by virtue of the circumstances set out in S.1(2)(a)(b) or (c) of the 1976 Act[3]. However, the court shall not grant decree, in circumstances where the pursuer does not have reasonable cause for not cohabiting, if it is satisfied that the defender is willing to cohabit with the pursuer.

This alleviates problems caused by the earlier requirement that, to obtain aliment, a spouse must be willing to adhere.[4]

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1. Clive, ibid., p.24.
2. Professor Clive points out that the provision does not apply to applications for aliment pendente lite in an action for divorce, or to actions of separation and aliment, or to actions of adherence and aliment: it applies to actions for interim aliment. "Nor does it affect actions by third parties. Thus a shopkeeper who has supplied a wife with necessaries will still not be able to recover from the husband if she is unwilling, without reasonable cause, to adhere. The subsection, in short, does not affect the right to aliment: it merely extends one particular remedy." Clive, ibid., p.25. And see also generally "Anomalies in Aliment", Alistair D. Mathie, 1980 S.L.T.61.
3. that is, for reasons of adultery; unreasonable behaviour; desertion.
4. See generally, Chapter 4.

The court is directed, in determining the amount of aliment, if any, to be awarded in a decree of separation and aliment, adherence and aliment or interim aliment, to have regard to the factors mentioned in S.5(2).[1] The same test, such as it is, is to be applied in actions for separation as in actions for divorce, and conduct, therefore, is not excluded as a relevant consideration.

It may be thought that the Scottish rules upon financial provision are skeletal. There is no power to order transfer of property, no detailed direction to the court as to the factors to be deemed relevant to the making of an award or the weight to be given to each factor.[2]

How has the Court of Session interpreted these meagre guidelines?

Joseph Thomson[3] notes that Lord Brand in Cowie v. Cowie[4] took the very conservative view that the granting to either party of a right to apply for financial provision was intended to help defenders in s.1(2)(e) cases principally, and perhaps also defenders in s.1(2)(d) cases. Even if defenders in other cases were entitled to apply, "their matrimonial misconduct will be a relevant factor in assessing the amount of financial provision."[5]

This lead was not followed in the principal point, and it has been accepted that defenders in cases which previously would have been regarded as fault /

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1. S.7(2).
2. "Fettered" discretions, however, are not necessarily desirable; consider Faculty Response to S.L.C. Memo. No.41 (Fac. Resp. pp.2, and 18/19).
3. 'Financial Provision on Divorce. Some Recent Cases' Joseph M. Thomson, 1979 S.L.T.137.
4. 1977 S.L.T. (Notes) 147.
5. Thomson, ibid., p.137.

fault cases in which the defender was the offender may apply for provision: however, the defender's conduct has been held to be a relevant factor in assessing the size of award, although judges have differed in the degree of importance which they have ascribed to it. It may be that where the failure of the marriage has been brought about largely by the actings or attitude of one party, he/she - and a woman is more likely to be affected here - is not entitled to expect (her) standard of living to be as high as it would have been had the marriage continued.[1]

Thomson cites the case of Clark[2] as an illustration of how much easier would be the task of the court and how much more satisfactory the result if the court had more flexible powers. There it seems likely that Lord Stott refused to order the sale of the husband's farm in order to provide the wife with a capital sum with which to buy a boarding house because to do so would be unfair to the husband rather than because the wife had committed adultery. "... a more just solution might have been achieved if the court had the power to settle the property in such a way that the wife would have had a share of the capital if the farm was ever sold."[3]

Thomson advocates that since the theory is that the commission of a matrimonial offence is a symptom, not a cause, of the irretrievable breakdown of a marriage, no account should be taken of parties' misconduct in matters of financial provision - or, at least, that conduct should be irrelevant where it appears that both spouses are equally to blame for the /

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1. See MacRae v. MacRae 1977 S.L.T. (Notes) 72 (L.O.Dunpark), cited and explained by Thomson at p.138.
2. 1978 S.L.T. (Notes) 45.
3. Thomson, ibid, p.138.

the failure of the marriage. In the present author's opinion, one party may often be found to be more deep in guilt than the other, whatever may be laid down as the philosophy of the nation's divorce laws, and, given the present rule of separate property and the property remedies presently available, it is unreasonable to expect the courts to ignore conduct.[1] It is suggested that one merit of the scheme of concurrent compensation put forward in Chapter 7 is its equalisation during marriage of opportunities to prosper and its aimed-for simplification of property division and settlement at divorce.

In fact, as Thomson records, the Court of Session has refused to discount conduct.[2]

It is suggested in Thomson's article that the Court of Session is conservative in its attitude towards the subject of outside employment for wives. He concedes that this attitude may be justified where the wife is late middle age when retirement in any case would be in view, and notes that the court has taken a different view where the wife has been the "guilty" party. Thomson argues that it should be made as easy as possible for all divorced wives, "guilty" and "innocent" to return to single life. "The courts at present frustrate this purpose in the case of "guilty" wives by not giving them sufficient financial help because of their "misconduct". On the other hand, because they refuse to make financial provision /

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1. See Memo. No.22, Aliment and Financial Provision 373 - 76: Faculty Response, p.50 et seq and p.68. A distinction there was drawn between capital sum awards (conduct in principle not relevant) and awards of periodical allowance (conduct perhaps relevant to a limited extent) (pp.52-55). Faculty (p.25) favoured retention of the relevance of conduct in questions of aliment.
2. McKay v. McK. 1978 S.L.T. (Notes) 36; Craig v. C. 1978 S.L.T. (Notes) 61. Thomson, p.140.

provision for "innocent" wives on the basis that it is prima facie desirable" (sic: surely "undesirable"?) "that they return to the labour market, these women remain financially dependant on their former husbands; and so the misguided attempt not to "punish" them by expecting them to seek employment, in fact prevents the "clean break" between the spouses which is probably the most desirable course of action for their long-term welfare."[1] This is persuasive. Times change, and although the country's economic condition has often in the past dictated the size of the percentage of married women in outside employment, it seems likely that in the future it will be the norm for most women, married or unmarried, to spend a considerable portion of their adult life in paid work. There appears to be a fairly strong lobby of divorced men anxious to bring about the abolition of maintenance awards. In an individual case, a man may decide consciously to refuse or evade payment when, say, two years have elapsed since decree. Families are smaller. Divorce is easier and more frequently encountered. The principle of sex equality is perverted and the consequences should be accepted. Realpredity of the obligation to aliment is urged in Faculty Response to Memorandum No.22. The middle class woman will work, while her mother did not, and it seems that sometimes this will lead to the greater happiness and fulfilment of both spouses and sometimes it will not. Circumstances will have compelled women less fortunate in material terms to work in any case. Thomson's attitude is a modern one, and the reader might not agree entirely with it, but it is probably true that the aim in divorce should be a "clean break" and that awards of continuing allowance /

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1. Thomson, ibid., p.142.

allowance should be discouraged.[1]

In conclusion, Thomson advocates the removal of conduct as a relevant consideration, at least in cases where both spouses have been at fault or where the marriage has been dead for many years. The courts should strive "to recognise in financial terms the spouses' positive contributions to the marriage over the years"[2] and to "help them to readjust to living as single persons"[3]. In his opinion, " T he full-scale reform of aliment and financial provision envisaged by the Scottish Law Commission cannot ... come too soon."[4]

Professor Clive too notes that conduct and fault may remain "very relevant to financial provision."[5] and remarks, "For my part, I think that there is too much reference to conduct in recent cases".[6] If we think that the innocent party should be able to claim damages from the other, so be it - but if we do not, "we should also reject a situation in which judges have a discretion to penalise misconduct under the cloak of financial provision." He cites two "short marriage" cases[7] in which he thinks the wife was treated /

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1. Another strong argument in favour of reduction of the incidence of such awards is, of course, the difficulty encountered in enforcing them.
2. Thomson stresses the importance of the non-fault theoretical basis of the law: conduct of a positive nature, though, it seems he would not exclude from the list of relevant considerations. In the present writer's view, it should be possible to limit the relevance of all such factors to the question of award or not of periodical allowance: see Chapter 7.
3. Thomson, Ibid., p.143.
4. Ibid.
5. "Financial Provision on Divorce", a talk given on 27/1/79 to the Scottish Young Lawyers Association's seminar on "marital breakdown", reported at 1979 S.L.T. 165.
6. Ibid., p.166.

7. Fraser v. F. 1976 S.L.T. (Notes) 69; Downie v. D. 1977 S.L.T. (Notes) 22.

treated in an unduly favourable manner and comments upon the absence of statutory guidance to the courts as to the purpose of financial provision.

Where the house stands in joint names, the court will "look back beyond the title" and will consider both past contribution and future need. Where the husband has been the principal contributor, but the wife and children need the house, it may be possible for the wife to buy out the husband but if the money cannot be found, one solution Professor Clive notes would be to postpone sale until the youngest child reaches maturity. This can be done in England, but not, as yet, in Scotland, although the Scottish Law Commission has urged the introduction of such a power.[1]

Professor Clive, in his review of cases and proposals, while acknowledging as just in many cases, the claim of the homemaker to financial recognition of (her) efforts, wonders whether there is not something 'false and unrealistic' in this approach. "In most marriages the parties are not providing services to each other for remuneration: they are pooling their resources in a common endeavour".[2] He cites the case of Hedley[3], in which a periodical allowance was ordered as remuneration for the wife's services as a wife, and indeed that is a strange conception. On the other hand, as far as capital re-arrangement is concerned, surely it is manifestly clear that, unless our matrimonial property law is changed[4], the homemaker must be entitled to participate at dissolution in the earner's prosperity. That is a /

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1. Scot.Law.Com.No.82, Aliment and Financial Provision Family Response.
2. Clive, ibid., p.168.
3. 1977 S.L.T. (Notes) 72.
4. In the manner, for example, suggested in Chapter 7 infra.

a prosperity to which (she) has contributed[1].
Perhaps matrimonial misconduct <u>should</u> be largely irrelevant but conduct in a more general sense (contribution in kind) should be taken into account[2].

<u>Expenses</u>.

In /

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1. Cf. recent case of P. (reported Glasgow Herald 14/11/80) in which the Family Division of the High Court made the largest ever divorce settlement in an English divorce action. The husband had amassed a fortune of £2.4m. The wife was awarded a sum of £700,000. At marriage, the parties had no funds, but the wife worked in order to allow her husband to give up his employment and start a business. The business prospered, but there were no luxuries at home. It was a case of deferred pleasure in which the marriage broke down at the time the pleasure could be expected to begin. The marriage had lasted for 23 years. The husband remarried and was living in luxury. He offered a settlement of £350,000, but Elobank, J. made an order of double that sum. "This wife has made a substantial contribution by working until 1963 and giving her husband the freedom to leave employment and start in business." Part of the husband's fortune was drawn from hotel interests. It may not be entirely fanciful to draw a general philosophical comparison with that famous conflict case pertaining to the French Code (in its provisions with regard to community of property), namely De Nicols v. Curlier [1900] A.C.21. It must be said that wives who never "work" (that is, outside the home) also contribute greatly to the husband's prosperity by keeping the home and rearing the children, and thus permitting the partner to make his way outside. The fact that that has been traditional in the middle classes, and that it is likely to continue, though perhaps less enthusiastically and with more numerous exceptions than before, does not make the 'contribution' argument less valid. Often the more successful is the husband in worldly terms, the greater is the domestic burden on the wife.
2. Cf. Professor Clive's comments at p.171.

In Craigie v. Craigie[1], the First Division having been asked by Lord Dunpark to give a ruling upon the question whether expenses ought to be awarded against a husband defender in an undefended action of divorce founded upon five years' non-cohabitation. Should there be a new general rule of practice to govern such cases (subject to the overriding discretion of the court)? The First Division thought that there should be such a rule, but took care first to record its view that, in these instances, where divorce is obtainable merely on proof of the central fact of five years' non-cohabitation, conduct should not be relevant in the general case to the question of entitlement to expenses. There were two situations to be considered. First, in the case of the legally-aided wife seeking divorce on this ground but seeking no financial provision, the normal rule (subject to the overriding discretion of the court, which discretion however, it was envisaged, would have little scope for exercise) would be to make no award of expenses to the pursuer[2]. Second, in the case where the legally-aided wife seeks divorce on this ground but seeks also financial provision, the general rule should be the same, but it /

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1. 1979 S.L.T. (Notes) 60.
2. "In such a case, as a wife is no longer entitled to claim the expenses of litigation against her husband as being "necessaries" for which the husband is liable and as the element of "matrimonial offence" is necessarily absent, the right to decree of divorce accruing to either party by the efflux of time alone, in the interests of simplicity of procedure and of reduction of the overall cost of the action as well as of discouraging the presentation and prosecution of defences directed solely to the conclusion for expenses the normal rule of practice should be to make no award of expenses in favour of the pursuer" (p.61).

it was thought that cases might arise in which the court might, exceptionally, award expenses to the pursuer "upon a consideration of the means of the parties and the whole circumstances of the case as these have been disclosed in evidence which was relevant to the claim for a financial provision."[1]

Opinion expressly was reserved upon the question of extending the rule to divorces brought under s.1(2)(a)(b)(c) and (d). However in undefended cases brought under s.1(2)(d) (two year separation with consent to divorce) where the wife is legally-aided, judges might consider whether the new rule should be applied. (The court had agreed with the view taken by Lord Fraser in Nelson v. Nelson[2] that the presence or absence of legal aid for the wife should be a relevant factor: where the wife is legally-aided, the general position should be that the award of expenses is a matter within the discretion of the court after consideration of all the circumstances. On the other hand, where the wife pursuer or defender is not legally-aided, the court intended "to cast no doubt upon the applicability of the old general rule of practice"[3] which, based upon the husband's obligation to maintain his wife, extended to provide her with funds, if she had no separate estate, for necessary litigation, including divorce litigation).[4]

Enforcement of Financial Awards

Much of what has been said in Chapter 4 about the difficulties of enforcing an award of aliment applies equally to the enforcement of awards of periodical /

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1. p.61.
2. 1969 S.L.T. 323.
3. p.61.
4. p.60.

periodical allowance.

Since the Succession (Scotland) Act, 1964 did not amend the Civil Imprisonment (Scotland) Act, 1882 so as to extend the sanction of civil imprisonment beyond the case of failure in the common law duty to aliment, civil imprisonment is not an available sanction, in Professor Clive's submission[1], but, in any event, it is by no means a satisfactory or commonly used remedy.

There is machinery for reciprocal enforcement of maintenance orders within the United Kingdom and abroad (in reciprocating countries).[2] Section 26(6) of the 1964 Act extended the application of Section 16 of the Maintenance Orders Act, 1950, to financial awards made upon divorce, but Professor Clive notes that it is less clear whether the 1972 Act applies to such awards.[3]

One of the main problems (to some extent relieved by the reciprocal enforcement legislation) is that ex-spouses themselves are responsible for enforcement, and this can be a costly and disgusting business.[4] Perhaps the court should be responsible for the pursuit /

1. H. & V., p.562.
2. Maintenance Orders Act, 1950; Maintenance Orders (Reciprocal Enforcement) Act, 1972. See Killon v. Killon (unreported, Glasgow Sheriff Court, 27th September, 1977; recorded by Alison A. McKean, in full Case-Note, "Recipe for Reciprocity" 1980 (25) J.L.S.S.240 (1972 Act, s.7: recovery of aliment by a wife resident in Canada from a husband resident in Scotland. Killon was the 'first defended case of its kind to be decided after proof in the Scottish Courts', and Sheriff Macphail's approach to the case, and judgment, and Mrs. McKean's explanatory comment and record are most informative.
3. H. & V., p.562 and p.295. (Now reported 1981 S.L.T.(Sh.Ct.)77.)
4. Equally, enrolment on the dependence of the action is rarely competent, and the arrestment, if allowed, cannot catch 'earnings', as widely defined: Ibid., pp.563-4.

pursuit of an unwilling payer.[1] The position of many single parents is an unenviable one.[2] It is probable that 'marriage insurance', (All Risks?) on the lines of car insurance, though effective if enforceable and enforced, would be unacceptable for ideological and financial reasons.

Procedure

About 9,000 divorces are dealt with each year by the Court of Session.

By Act of Sederunt coming into effect on 25th April, 1978,[3] affidavit evidence may be tendered in /

1. Ibid., p.564.
2. Finer Report on Single Parent Families (1974): 'Gingerbread' Pressure Group.
3. A/S (Rules of Court Amendment No.1) (Consistorial Causes) 1978: Edinburgh, 25 January 1978. See 1978 S.L.T. 55. This is in substitution for Rule of Court 168. The new procedure applies to divorce (and separation and aliment) cases where no defences have been lodged, and may apply to an action which proceeds at any stage as undefended. It is not to be applied if it appears to the Court that the defender suffers from mental disorder. Evidence, in a suitable case, therefore, will be admissible if in the form of an affidavit. Parole evidence will not be required. Affirmation includes affirmation and statutory or other declaration. An affidavit shall be treated as admissible if it is emitted before a N.P. or any other competent authority. Proof will be by submission of such affidavits unless the court directs otherwise.
In actions where children under 16 years are involved - for whose custody, maintenance and education the court has jurisdiction to make provision - evidence with regard to the welfare of the children shall be given by affidavit, unless the court thinks otherwise, but at least one of the affidavits must be emitted by someone other than either of the parties to the action. Counsel by written minute may move for decree, giving specification of relevant documents.

in undefended actions. Notes upon the new procedure (for guidance only) were produced by the Dean of the Faculty of Advocates and the President of the Law Society of Scotland (11th April, 1978) and included recommendations that evidence with regard to financial conclusions must be full, since supplementary questions may no longer be put at the proof, that a pursuer must give reasons for deciding not to seek a capital allowance or a periodical allowance or aliment for the child(ren) or expenses, and that a further affidavit must be sworn if there is later a material change of circumstances. Where conclusions are opposed, the new procedure is not suitable, but if successful negotiations subsequently take place, the result may be embodied in a Joint Minute which may then be lodged.

Clearly the aim is the more expeditious handling of litigation in simpler cases. Some, however, would go further and would contemplate "do-it-yourself" divorces in certain undefended cases[1], a possibility open in some cases to spouses in England. The Faculty of Advocates, in a recent memorandum (November, 1980) supports this course, but considers that it would affect only about one quarter of cases. The hope is expressed that it be extended to other types of case. The Faculty does not support the Law Society's proposal to remove the necessity for evidence in undefended actions. It goes on to attack the idea of conferring upon the Sheriff Court jurisdiction to hear divorce actions, taking the view that the consequences of such an action have not been studied fully. In particular, the Faculty feels that, when all aspects are /

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1. Cowie Committee, Cowie Divorce Procedure: from 11.1.83., Rules of Court provide a simplified divorce procedure (form of application for divorce) where there are no problems concerning children or financial provision. A/S. (Rules of Court Amendment No. 6) (Simplified Divorce Procedure) 1982 (No. 1679).

are considered, it would not be cheaper for the individual and for the State to allow Sheriff Court divorce.[1]

Professor W. A. Wilson, in a pithy article upon the findings of the Royal Commission on Legal Services,[2] remarks, "The recommendation that the Sheriff Court should have exclusive jurisdiction as a court of first instance in divorce matters will cause little surprise. If society has decided that divorce is to be a matter of little importance then it follows that divorce should go to the lower court. More controversial is the idea that every divorce action, defender or undefended where children under 16 are involved should be referred to a reporter to the children's panel for a report on custody arrangements. The costs of this will probably take up a large part of the savings to the legal aid fund effected by taking divorce from the Court of Session. There is a rather blithe approach to the public interest in divorce; it is suggested that not only should corroboration be abolished in divorce actions but evidence as well; the pursuer should merely complete a form and sign a declaration as to its truth."

Recent Cases on Financial Provision

An opportunity to consider the relevance of conduct in the matter of award of financial provision was afforded by the case of Nelson v. Nelson.[3] Divorce was sought by the wife on the ground of five years' non-cohabitation, and she claimed capital sum and periodical allowance. The husband resisted the /

1. But see Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Bill: divorce to the Sheriff Courts.
2. The Report of the Royal Commission on Legal Services. An academic view. W.A.Wilson. 1980 S.L.T. 165 (at p.166).
3. 1979 S.L.T. (Notes 82.

the claims for financial provision on the ground that the wife's conduct had brought about the failure of the marriage. The wife responded by making similar allegations against the husband.

Lord McDonald granted decree of divorce, but refused to give financial provision, taking the stance that there was authority[1] to support the view that the wide terms of s.5(2) may require the court to consider the question of blame even in divorces brought upon this ground, and that in the instant case, it appeared to him that the major blame for the breakdown of the marriage must lie with the wife.

Since the separation (1966) the wife had supported herself. There was one daughter of the marriage, alimented by the father until she attained the age of seventeen. The wife had visited the erstwhile matrimonial home and had removed articles which she said belonged to her or had come from her family. The period of cohabitation had been seven years.

Shortly before the separation, the husband had obtained a building society loan and had bought the house, in which he still resided. The wife had made no contribution to the purchase.

The husband was a fisherman and had become the skipper of a fishing vessel in which he was part-owner. In having it overhauled, he and his co-owners had incurred substantial debts. "In the event of a sale of the vessel at present the pursuer could not expect to do better than clear his share of the indebtedness."[2]

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1. Craig v. C. 1978 S.L.T. (Notes) 61; Forbes v. F. 1978 S.L.T. (Notes) 80, (cited in judgment).
2. p.83.

An interesting feature of the case is that it provides an example of "gratuitous acquirenda"[1] (inheritance of share of flat, the share being valued at £6,500) and of increased (independent) prosperity after separation. The house was valued at £20,000, the husband had a Rover car worth £5,000 and his savings in bank (£300 at separation) had increased to £3,000. No contribution, direct or indirect, had been made by the wife.

Lord McDonald placed importance upon the length of separation[2], and the absence of financial claim by the wife during the period of separation. The wife, it appeared, was capable of maintaining herself. She was largely responsible for the failure of the marriage ("if that is relevant"[3]), and she had contributed nothing to the husband's prosperity. No financial award was made. It is submitted with respect that this was indeed the just course. As his Lordship pointed out, the parties had for long lived independent lives. There was no financial need for the link of marriage to be continued after divorce by means of a periodical allowance, and for the wife to seek a share in her husband's /

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1. and that occurring, moreover, after separation.
2. while noting (Forbes v. F. 1978 S.L.T. (Notes)80) that " T here may be cases where it is proper to make a financial award notwithstanding that a marriage has been long since dead". (p.85).
3. p.83. In view of the persuasiveness of the other factors, it would not seem to have been necessary to place great weight (or any weight?) upon conduct, although certainly that factor in the instant case confirms the opinion that the wife received her due reward: even so, should it be regarded as relevant? It forms part of the picture, (see per L.Murray, in Lambert, infra who however in the result took no account of blame in fixing periodical allowance) and is one of "all" the circumstances - but see Memo No.22, and Faculty Response and new and general property suggestion, Chapter 7.

husband's prosperity by means of the award of a capital sum was a nonsense. Hers was a greedy and unjustifiable attitude. The parties were strangers to each other in property matters, as in all other matters. Any property readjustment which she thought necessary it appeared that she had carried out at her own hand after the separation.

Following Craigie, supra, the legally-aided pursuer was not awarded expenses. "The pursuer, who is an assisted person, made it inevitable that the case would be defended by the extravagant nature of her financial claims. The defender, who is not in receipt of legal aid, must have been put to great expense to defend the action and I see no reason to add to this burden by finding him liable in the pursuer's expenses."[1]

Another case of divorce brought on the ground of five years' non-cohabitation was that of Nolan v. Nolan[2], in which the husband was the pursuer. The wife did not defend on the merits but on the ground provided by s.1(5) of the 1976 Act, namely, that the grant of divorce would result in grave financial hardship to the wife. If divorce were granted, she sought a capital sum of £5,000 and a periodical allowance of £125 per month.

The husband was employed by the Post Office at a salary of £4216.76 per annum, with an entitlement at the age of sixty to a pension (index-linked) estimated by the parties at £2,765 per annum and a lump sum of £7,000. He was fifty one. He had no capital at the time of the divorce.

The wife was fifty-three, and was in part-time employment as an auxiliary nurse earning £1714.45 per /

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1. p.83.
2. 1979 S.L.T. 293.

per annum. Her husband voluntarily paid her £57 per month. If she were married to her husband at the date of his death, she would be entitled to a Post Office pension (index-linked) of about two-fifths of the pension payable to the husband, and of course to the widow's state pension, and she would be able to claim legal rights in any lump sum paid by the Post Office to the husband. She claimed that divorce should not be pronounced because the loss of these rights would result in grave financial hardship to her.

Lord Cowie, commenting that this appeared to be the first case of its kind in Scotland, took the view that the terms of s.1(5) empowered the court to have regard to the future effect of the award of decree, as well as to the circumstances existing at the date of the litigation. He felt too that the loss of the contingent rights would amount to grave financial hardship[1]. This point was not 'seriously disputed' by the pursuer who had made certain specific suggestions designed to alleviate the hardship. In other circumstances, therefore, he would have refused decree; since he was not convinced that the proposals adequately off-set the financial hardship attendant upon divorce, but yet did not wish to be unreasonable to the pursuer, who was willing to try to lessen that hardship, Lord Cowie continued the case in order to give the husband the opportunity to advance further proposals, which would require to be 'substantially greater' than those proposed.[2]

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1. and compared the English approach in relation to similar provisions in the Matrimonial Causes Act 1973: Le Marchant v. Le Marchant 1977 1 W.L.R.559.
2. though it was not for the court to suggest what would be acceptable and sufficient proposals to be made by the pursuer in order to obtain divorce. However, the court, once satisfied that decree can be granted, may take the proposals into account in deciding "what, if any, other payment should be made /

(The husband had suggested that he would take out a policy of insurance for £3,000 payable after the expiry of ten years, the proceeds to be remitted to the defender. (It was calculated that the value of this, with bonuses, would be £4,425). Even on the basis that there need be no 'pound for pound' compensation, and taking into account the fact that the defender might predecease the pursuer, Lord Cowie considered that the proposals were not sufficiently ample. The sum if invested would not produce much income and would be unlikely to be inflation-proof.)

A note to the case states that the action later was abandoned by the pursuer. This seems a sad result.

It would appear that the potential loss of private pension rights and succession rights must be regarded very seriously: surely the loss of the widow's state pension is a loss common to all divorcing and divorced wives? A system of concurrent compensation of gains would render the loss of succession rights less significant. The value of the index-linked private pension payable to the wife if she became her husband's widow - and one must suppose that it is likely, but not certain, that she would outlive her husband - would have been about £1100 per annum, and the husband's first suggestion could not match that. The report does not narrate the circumstances of the marriage (duration, contribution to prosperity in cash and kind) but must it not be accepted that the financial benefits /

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made by him by way of periodical allowance. It seems unlikely that a payment of a capital sum would be appropriate in the present circumstances." (p.294).

benefits of marriage cannot always be relied on by parties? Would not a combination of insurance arrangement and periodical allowance have provided a compromise answer, and surely compromise in many cases and taking all interests into account is the best which can be achieved? In any event, the outcome is profoundly disturbing. If an answer cannot be found, our present property rules in operation during marriage and on its termination must be lacking in flexibility and imagination, and inadequate to meet present needs.

In Gray v. Gray[1], a divorce brought upon the ground of the husband's behaviour, the wife concluded for a capital sum of £20,000 and a periodical allowance of £45 per week. The husband resisted both claims. The case was taken before Lord Murray.

The marriage had lasted for seventeen years until separation in 1973, although it had long been unhappy. The husband had an unlicensed grocer shop in which the wife had worked full-time for two years until the birth of the first child. Thereafter she worked part-time in it. She received no 'specific remuneration' for her work. She had no bank account and her housekeeping allowance at first was £4.50 per week, and latterly £7 per week. Much of the family's food came from, or through, the shop. The wife complained that her living-in mother-in law (who lived with them until about 1967) 'ran the house'. About 1968-69, the wife began a bed-and-breakfast business in the family home, and used the income to make improvements to the house, which was solely owned by the husband. About 1971, the husband bought a much larger house, and the bed-and-breakfast business continued on a larger scale, being run by the wife, daughter, and a waitress. Income again was used to make improvements to the house.

In 1973, because of ill health attributable to living /

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1. 1979 S.L.T. (Notes) 94.

living with the defender, and on medical advice, the wife left the husband. "I consider it improbable that the pursuer could resume married life without the same stresses and strains emerging again".[1]

A capital sum of £5,000 and a periodical allowance of £15 were awarded. The husband had been in the habit of paying the pursuer £11 per week and was willing to continue to make this payment provided he was able financially to do so. His income came in the main from the bed-and-breakfast business, which he ran on his own, and there was in addition rent from a building in the grounds of the house. It was agreed that the house had a value of £41,000.

Since in order to raise a sum of £20,000, the house (the source of income) would require to be sold, and since at 63, it would be hard for the defender to find employment, "payment of a capital sum and a periodical allowance are necessarily interconnected."[2] Had the matter of a capital payment not been raised, Lord Murray would have thought a periodical allowance of about £18 per week appropriate, but " T he pursuer's case - placed the major emphasis on a capital payment".[3]

A main strand in the pursuer's argument was that the business was not viable. Expert evidence was called on both sides, and Lord Murray preferred the view that the business, though under-capitalised, was capable of providing a "modest livelihood". Had he been persuaded that the business was insolvent, "there would have been much force in the pursuer's contention /

1. p.95.
2. p.95.
3. Ibid.

contention that Redwood Lodge should be sold as soon as possible and the proceeds equitably divided between the pursuer and the defender."[1] (Free proceeds of sale were estimated to be between £30,000 and £32,000).

If the business were regarded as insolvent, 'there would be some attraction' in giving the pursuer half the free proceeds of sale. "It was her enterprise and initiative which created the business in the first place; though admittedly it was run in property owned entirely by the defender. Income from the business was used by the pursuer to improve the facilities and the parties' home. The defender himself at one time recognised this, for he testified that in 1973 it had been his intention to transfer the title of the property into the joint names /

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1. p.96. What proportions would have been an 'equitable' division in the circumstances? The husband was the sole proprietor of the house in Kenneth Street, Inverness and then of the larger house in Culduthel Road. Financial arrangements for purchase are not recorded: their absence suggests perhaps that the purchases were funded by the husband (and loan repayments to building society and to the defender's brother-in-law made by him). On the other hand, the wife had made the contribution of wife and mother and had also worked unpaid in the shop, and had run the bed-and-breakfast business for four or five years. See main text, supra.
At p.96, Lord Murray, having looked at the facts, began his consideration of the matter of the award by saying, "I cannot, I think, approach the question of a capital payment in a marriage which has broken down on the same basis as a business partnership whose partners have fallen out. Section 5(2) of the Divorce (Scotland) Act 1976, requires me to have 'regard to the respective means of the parties to the marriage and to all the circumstances of the case ____'".

names of the parties. He did not proceed with this intention, he said, only because the pursuer left him."[1]

At this point Lord Murray made a telling observation. A solution naturally suggesting itself would be to have the title taken in joint names, under condition that the pursuer did not prevent the defender from continuing the business 'while it remained viable and under his exclusive control'. To this possible arrangement, Lord Murray would have given serious consideration. "But I can find nothing in the Divorce (Scotland) Act, 1976 which would empower me to make such an order."[2]

To require sale of the property would deprive the defender of his livelihood and the pursuer of any reasonable chance of receiving a periodical allowance. "It appears to me that, in the circumstances of this case, a capital payment would be appropriate if it were not so large as to jeopardise the very existence of the defender's business and yet were large enough to meet the pursuer's /

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1. p.96. Frequently it appears that the taking of title in joint names is not an issue of major significance in parties' minds. It is by no means unacceptable to the title-holder, but action is postponed e.g. until purchase of the next house. See Todd and Jones Survey, Chapter 7.
2. p.96. Since the defender was only two years away from retiring age, would the prohibition on sale then cease (whatever the financial arrangements made by the defender (if any) for his retirement?)? It might be reasonable for the wife to wish to have her capital payment, yet reasonable for the husband to continue his business, the business being of a type in which 'retirement age' is perhaps not especially significant.

pursuer's reasonable aspirations".[1]

The wife's aims in seeking a capital payment were the reasonable ones, in Lord Murray's opinion, of improving the home she provided for the two younger children, and of ensuring that both had the fullest educational opportunities. The husband testified that he had set aside a capital sum of £1,300 for the daughter who was about to enter further education, intended for her when she attained 18, but now to be available to her earlier. A similar sum had been given by him to the eldest child.

By means of assuming a partner, the husband thought that he could meet a capital award of £5000 without having to sell the business - "though he himself thought that none should be made". Lord Murray thought this reasonable and awarded a capital sum of £5000 and a periodical allowance of £15 per week. (By the time of proof both of the younger children, who lived with the wife, were over 16 years of age).

"....I think that the capital payment should be the largest consistent with the continuation of the defender's bed-and-breakfast business and his ability to make a reasonable periodical allowance to the pursuer."[2] Great care and thought was given, and the very best and fairest solution possible in the circumstances reached, yet had the statutory guidance, so general and yet so restricting, been more flexible, the area within which the solution might have sought would have been wider. On these facts, the wife then might have benefited more than the husband from such new statutory provision.

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1. p.96.
2. p.97.

There occurred, in Jackson v. Jackson,[1] a claim by the wife defender for a capital sum of £10,000 and a periodical allowance of £25 per week. The latter conclusion was abandoned. The ground of divorce was the irretrievable breakdown of the marriage by reason of the wife's desertion, and the husband sought custody of the two children.

The parties had lived together for ten years (with short separations) after the marriage (which had taken place in 1965), until the defender's final departure. The wife did not dispute the substance of the case, nor the arrangement that the children should remain with the pursuer. A capital sum of £6,000 was awarded.

The unusual and tragic feature of the case was that the wife had suffered a cerebral haemorrhage at the time of the birth of the elder child, and continued to suffer a very severe disability as a result. Lord Brand found that the wife's conduct and incapacity for some time as a housewife were attributable to her disability, and suggested that while the husband may not have been as sympathetic and helpful as he might have been, it certainly had not been proved that there was anything "positively reprehensible" in his conduct. Counsel for the husband accepted in principle that some capital award should be made to the wife.

The husband's assets were found to be about £7,000 cash, a car worth less than £500 and a house worth £16,000 subject to a bond of £4,000. Lord Brand took the total value 'in round figures' to be £20,000. The wife was taken to have no assets.

Lord /

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1. 1980 S.L.T. (Notes) 17.

Lord Brand was strongly of the opinion that the award which he should make should not have the effect of compelling the sale of the house, and the loan upon the security of the house could not be increased.

The wife's accommodation in a local authority flat seemed suitable in general terms, but, on the other hand, a little capital would enable her to buy furniture, and domestic equipment to make life easier for her in view of her disability. Taking into account the defender's assets and the pursuer's lack of them, Lord Brand thought it reasonable to order payment of a capital sum of £6,000.

Clearly it would have been quite wrong to order sale of the house which was the home for the husband and children. Equally, the wife, who had been the victim of a tragic accident, required money. It is not revealed whether the wife was able to be in employment or whence her weekly income came. It is interesting, though, that it was thought right to give to the wife such a large proportion (three quarters) of the husband's free cash assets. He, of course, would have the opportunity to begin again to save, while she would be unlikely perhaps to be able to save, and such an award must be made 'once for all' - and before the money disappears for other uses. The case was unusual.

Depressive illness was the cause of breakdown of marriage in the case of McMann v. McMann.[1] There had been fourteen years of marriage before this occurred. In 1976, seventeen years after the marriage, the wife defender, who had had psychiatric treatment to no avail, left the pursuer.

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1. 1980 S.L.T. (Notes) 20.

Six months afterwards, the husband met another woman, and she and her son came to live with him in his house in August 1978. The pursuer paid the rent, and the paramour paid for her own food and for food for her son. The husband estimated his weekly free income after payment of tax and expenses to be about £32. His opinion was that his wife could work, and he said that the son of the marriage (the only child), and his wife, were living with the defender. The son's evidence was that he paid one half of his mother's rent and rates, that his pay as a Scaffolder varied between £49 and £107 per week, and that his mother was suffering from depression and was not working.

A curator ad litem had been appointed to the wife and he sought an award of periodical allowance. This was the only point at issue between the parties.

Lord Allanbridge made an award of £20 per week. He found no fault in the husband but equally held that the wife could not be blamed for her conduct. There had been fourteen years of reasonably happy marriage. Taking into account the respective financial positions of the parties, the husband's gross weekly wage of £91.80 and the wife's continuing depression and the fact that she was not working, Lord Allanbridge found £20 per week to be reasonable. This is a fairly large 'slice' of the alleged amount of free income and it is noteworthy that his Lordship, as is customary, directed his attention to, and based his judgment on, the payer's gross income.

A discussion of factors relevant in the making of an order for financial provision is provided also in the case of Hyslop v. Hyslop.[1] There, there had been /

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1. 1980 S.L.T. (Notes) 21.

been cohabitation for sixteen years, until 1977, when the wife left the husband, taking with her the three children of the marriage. She sought divorce on the ground of her husband's behaviour, and claimed a capital sum award of £20,000. She asked for custody of the youngest child, a girl aged seven, and for aliment for the child of £12 per week. The eldest child (male) was seventeen; the husband asked for custody of the second child, a boy of fifteen, and of the daughter. After the separation, both boys said that they wished to live with the husband, and the pursuer agreed to this. The daughter remained with the wife.

Lord McDonald granted divorce, and gave custody of the boy of fifteen to the father, and of the girl to the mother, with aliment at an agreed sum of £10 per week. The subject of the capital sum then had to be considered. The only substantial asset of the husband was his house, valued at £38,000. His car he required for business purposes (and the wife had use of a car), and Lord McDonald accepted that an attempt to sell his yacht "produced no practical result" and said that "in any event the elder son of the marriage uses the yacht, according to the evidence, and gains pleasure from it"[1], a statement indicative of a moderate and sensible approach to the question of division of property. The mortgage over the house had been paid off. Evidence of income (£3,677) for the year 1978-79 was produced, although there was a suggestion that his income for that year had been lower than in the two previous years. The wife's income (from the sale of paintings) was about £500 p.a., but she was being supported by a man with whom she was living and whose income per annum was about £6,000. They /

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1. p.22.

They wished to buy a larger house, considering their existing house[1] too small, especially if custody of the daughter was given to the wife, and could fund the purchase by the sale of their existing house and the taking out of a slightly higher mortgage[2]. "This would, in effect, meet the cost of the new house but it is the contention of the pursuer that she is entitled to a capital sum which she would use in connection with the acquisition of the new house. The basis upon which the pursuer claims to be entitled to a capital sum is that she, for a period of some 16 years, ran the family home, brought up the children, and although she has contributed nothing financially to the one remaining asset of any value which the defender has she claims that her service over these years is entitled to some recognition. I would not take issue with that but it is necessary to be realistic and to consider what is an appropriate sum which could be reasonably afforded by the defender on the information available to the court."[3] The wife had agreed that she did not wish an order to be made which necessitated the sale of the defender's house, so depriving the sons of a home. The husband's income was not large and in effect he had three children to maintain. "It is only possible to approach a matter of this nature in a broad fashion and I have come to be of the view that an appropriate figure /

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1. the title to which stood, presumably, in the name of the man.
2. repayments to be made by the man? In whose name(s) would the title stand? Would the parties marry? Each new scene presents issues of (matrimonial) property.
3. per L. McDonald at p.22. The acknowledgment in principle of the value of contribution in kind is noteworthy.

figure for a capital sum would be the sum of £7,000."[1] (being approximately twice the defender's known income). Extract decree so far as pertaining to the capital sum was superseded to 31st March, 1981. (case heard 23rd November, 1979).

This seems a fair and sensible result. Even had the house stood in joint names, in view of the fact that the sons were not yet fully adult (the elder son having entered further education), postponement of sale would have been desirable.

On the other hand, as the law stands, many questions are left unanswered. "Almost inevitably, after the grounds of dissatisfaction with the husband have been explored, the question is asked "What about my furniture?" While we have made some progress .... the law in Scotland has not really moved far enough, and certainly not as far as the law in other countries. It is all very well to say to a wife client that she can claim a capital sum; it is not a capital sum she wants; it is her share of the actual furniture. A decree for a capital sum may not only be worthless if the husband has no funds, but is almost certainly likely to be for an amount insufficient to replace the items in the matrimonial home. This option is not in any event available in separation actions."[2]

In Whitehouse v. Whitehouse,[3] the case was brought under s.1(2)(a) (irretrievable breakdown: adultery), but Lord Wylie found that the husband defender's /

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1. Ibid.
2. "Furniture and Contents in the Matrimonial Home", Alistair D. Mathie. 1980 S.L.T. 45. Mr. Mathie's view is that wives (and perhaps some husbands) are in need of legal protection with regard to the contents of the matrimonial home.
3. 1980 S.L.T. (Notes) 48.

defender's adultery had nothing to do with the breakdown of the marriage. This was a marriage of short duration (1975-1977, with a nine months break in cohabitation). The only child of the marriage was born six weeks after the wedding.

The wife disliked living in Edinburgh, where the matrimonial home was located[1], and in 1976 she left her husband, as she admitted, for no good reason. The Edinburgh house, the title to which, on legal advice, stood in joint names, was sold and the £xxx proceeds of £1,300 divided between the parties. The husband then regularly visited the wife and child and it seemed that he paid her £5 per week for the child. The parties became reconciled in November, 1976, "on the only basis acceptable to the pursuer, namely in Glasgow."[2] The husband obtained employment in Cockbridge, and using his share of the proceeds of the former house as down payment, he bought a house in Glasgow, "which is the capital asset out of which the pursuer seeks a capital payment. The defender accordingly gave up a great deal in order to resume cohabitation with his wife and child, on the only terms which she would consider."[3] The reconciliation was short-lived, and in February, 1977 the wife again left. A request by the husband for her return, valuing also the /

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1. This is a difficult subject. See Chapter 4 (Aliment) and Chapter 7. How much say has the wife in the location of the home? The wife preferred Glasgow. Lord Doyle said, "I do not doubt that she was unhappy, but the matrimonial home, which had been purchased by the defender some time after the marriage, was in Edinburgh and the defender was employed there" (p.46). As it happened, though, the inter-action of feelings, which must frequently be more important than any rule of law (which, in any case, if extant, is now much weakened) resulted in the wife having her way. The husband bought a house in Glasgow. See S.L.C.Memo.No.54, 9.1-9.4.
2. p.48.
3. Ibid.

the matter of access, was not acted upon. It seems that the marriage failed because the pursuer could not decide whether she really was in love with the defender. The adultery was proved to have occurred in February, 1978.

Lord Wylie awarded a periodical allowance of £10 per week, but gave no capital sum. There was disagreement about the value of the house. Lord Wylie proceeded on the basis that the value of the house at the time of proof was £7,700, that it would be difficult at that time to sell, and that the property was not good security from a building society point of view. All in all, after deduction of the loan, the defender's capital was assessed at £2,350, linked entirely to the heritable property.

Few would disagree with his Lordship's view that this was not a case justifying the award of a capital sum. The husband bought the house in his sole name to save the marriage, and used money which had been his share of the former home. Presumably the second home stood in his name alone; and anyway, in such a situation, what would be an equitable division of proceeds (or would division be equitable?) where title stood in joint names?

Counsel for the husband urged that no award of periodical allowance be made. The effective cause of the breakdown was the wife's desertion. The wife was young (25) and able to work part-time. She admitted that she had made no effort to find employment. Her total income per week was £19 (being made up of an interim order of £5 per week for the child, and £10 for herself, from the husband, and child allowance (£4). The defender's gross income was /

was £75 per week. He did not dispute the amount sued for under the head of aliment for the child and was willing to meet child-minding expenses, if the wife took up employment. Lord Wylie took the view that, had not the wife responsibility for a child, he would have made no award of periodical allowance, and that certainly would have been in sympathy with modern thinking upon the financial repercussions of short marriages, where the (former) wife is young and able to work. The presence of a child makes a great difference, and in view of that, an award was made of £8 per week in name of aliment to the child, and the interim allowance to the wife of £10 per week was confirmed.

Another five years' non-cohabitation case was Lambert v. Lambert[1]. In this case the wife did not defend on the merits, but sought custody, aliment and periodical allowance. In turn, the husband did not dispute the custody question nor argue that aliment should not be paid to the son nor periodical allowance to the wife. His argument rested on quantum, and in particular he said that the amount of periodical allowance should reflect not only the means and circumstances of the parties, but the defender's responsibility for the failure of the marriage.

There had been cohabitation for fifteen years, terminating in 1966. Lord Murray assessed the husband's income per annum at £13,500, and the wife's income per annum at £1,800. He awarded decree of divorce to the husband, and gave custody, aliment (for the son under the age of 16) and periodical allowance to the wife.

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1. 1980 S.L.T. (Notes) 77.

It was suggested by the defender that the 'proportion' approach be used - that is, that the wife be awarded a periodical allowance of between one-third and one-quarter of the parties' gross incomes. Lord Murray, while accepting that "in some cases this sort of calculation may give a rough-and-ready guide which offers a more rational starting point than an arbitrary guess,[1] I am not convinced that it is the correct approach to take when the parties have been living apart for 14 years and the parties' married life lasted only five years."[2] Instead, he felt that the actual support received from the pursuer by the defender over the years since separation and her present (and probable future) needs should be considered.

The wife alone had taken responsibility for the upbringing of the children (though the husband had supported his wife and family since separation) and thereby was precluded from entering full-time employment or training. Hence, it was right to take account of the wife's age, the needs of her household, the likelihood that the sons would continue to depend on her for some time, and her prospects for future employment.

Upon s.5(2), Lord Murray observed that first "it must be approached on the basis that a matrimonial offence is no longer a ground of divorce. Secondly, there is no mention in the provision of the parties' conduct. If conduct comes into the reckoning at all, it must do so under the guise of 'all the circumstances' of the case!"[3] In the normal case (that is, of s.1(2)(d) and (e) divorces) he felt that parties' conduct would /

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1. It is interesting how frequently this cautious attitude to the proportion approach manifests itself.
2. p.77. This is an important feature. Lord Murray refers to the case of McLean v. McLean 1979 S.L.T. (Notes) 82. See supra.
3. p.78.

would have little or no relevance to the award of periodical allowance but " P lainly, nonetheless, the party resisting payment - must have every opportunity of stating the ground of objection to the award or to the amount of the award."[1]

A study of the history of the pleadings tended to suggest that arguments and counter arguments about conduct had entered the dispute almost 'by the way'. However, counsel for the pursuer contended that certain authorities[2] entitled the court to make a discount in the financial provision to be made to a spouse who had materially contributed to the breakdown of the marriage, and that in this case, the wife's conduct being wholly or mainly the cause of the breakdown, no larger allowance than that which the pursuer had offered should be ordered. Counsel for the wife argued that, at least in a s.1 (2)(e) case, there was no 'proper foundation in law' for modifying the award on the basis of contribution to marriage failure, but if there was such foundation, it should not be by the blunt instrument of reducing the award in direct propostion to the proportion of blame for breakdown.

Having viewed the evidence, Lord Murray placed the blame for failure of the marriage upon the defender as to 75%, and upon the pursuer as to 25%. I seems most unfortunate that in a s.1(2)(e) case the parties rendered it necessary for this to be put into words.

His Lordship then considered the cases of McKay and Craig.

In /

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1. Ibid.
2. Counsel for both parties invited adjudication upon complaints about conduct, citing Macrae v. M. 1977 S.L.T. (Notes) 72; McKay v. McK. 1978 S.L.T. (Notes) 36 and Craig v. C. 1978 S.L.T. (Notes) 61.

In McKay (cruelty), conduct was 'obviously central'. In the cross-actions, Lord Brand awarded divorce to both parties, and gave to the wife (equally responsible for the failure of the marriage) a capital payment of half the size which would have been ordered had the husband been wholly responsible for the breakdown. Again, in Craig, where neither party was more to blame than the other, Lord Brand again halved the size of the award, this time of periodical allowance, which would have been given had the husband been solely responsible for the breakdown.

Counsel for the husband asked not that the award be reduced in the proportion of the wife's blame, but that it be reduced to the amount which the husband had offered. However, although unusual cases might be found in which by reason of conduct some equitable reduction might be made[1], " After careful consideration - I find myself unable to discover any ground of principle or logic in the foregoing cases on which to found a general rule that an award of a periodical allowance should be reduced in proportion to the degree of matrimonial fault which can be attributed to the applicant. It would, indeed, be somewhat startling if this were a necessary result of the consequential financial provisions of an Act of Parliament intended to sweep away the concept of the matrimonial offence."[2] If they did have that meaning, Lord Murray found himself unable to follow the cases of McKay and Craig. He had assessed the allowance for the wife at £200 per month, and would not reduce it.

There /

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1. in Lord Murray's example (at p.78), where a young wife had deserted her husband after a few weeks of marriage, and then sought a periodical allowance when her husband later wished a divorce under s.1(2)(e).
2. p.79.

There is here, therefore, a clear renunciation of the relevance of conduct in the generality of s.1(2)(d) and (e) divorces[1], at least quoad periodical allowance: it must be remembered also that the parties had lived apart for many years. In McLean supra, again a case where many years had elapsed between factual separation and decree of divorce, Lord McDonald made no financial award at all, a decision with which it might be said a majority would agree, but he did not commit himself upon the relevance of conduct, a factor which, however, in that case (husband's material prosperity having grown after separation) did not figure largely.

Disclosure of Income and Capital

It may happen that the 'spouse of substance' is reluctant to disclose the details of his financial position, and in these circumstances the other spouse may ask for commission and diligence to recover relevant documents.

Commission and diligence was granted in the recent case of Savage v. Savage,[2] which was heard before Lord Murray. The action of divorce (irretrievable breakdown: adultery) was contested both on the merits and on the financial aspect. She sought a periodical allowance of £200 per month, and a capital sum of £110,000. There was a marked difference between the defender's assessment of the pursuer's income (£15,000 p.a.) and realised capital (£330,000) and the pursuer's averments (£13,500; £301,000).

Lord /

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1. Although the matrimonial offence is no more, presumably the key to the differentiation between non-cohabitation and other cases is that (mis)conduct may be less important, or at least not so recent, in the former situation.
2. 1981 S.L.T. (Notes) 17.

Lord Murray referred to the cases of Douglas[1] and Gould,[2] in which it had been stressed that a specification of documents in undefended cases would be justified or necessary only in the rarest cases. In Douglas, the First Division gave three guidelines in the matter of allowing specifications in defended divorce actions. These were 1. that the means of the party were substantial and the question of finance of considerable importance. 2. that the party of substance has not frankly disclosed essential details of his assets or income "of which he is aware but of which the other party cannot have any accurate knowledge or where the other party has reasonable grounds for inferring that some of the assets or income are not being disclosed". 3. that a specification will not normally be allowed before the closed record stage.

In the circumstances of this case, Lord Murray thought that the defender would go to proof on the ground that the pursuer had understated his income and assets and that that 'seems to me to be the same ground as the second leg of condition (2)'.[3] Therefore, since conditions 1. and 3. were satisfied also, the case fell within Douglas. Failing agreed figures, recovery of documents before the proof was desirable, the hope being that "it may close the gap between the parties' averments of income and assets and so restrict the areas of controversy."[4.5]

What /

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1. 1966 S.L.T. (Notes) 43.
2. 1966 S.L.T. 130.
3. p.18.
4. Ibid.
5. Cf. Sc.L. Com. Memo. No.22 (Aliment and Financial Provision): ascertainment of party's means, 3.101 (divorce) (Fac. Resp. p.76) and 2.209 - 2.11 (aliment) (Fac. Resp. pp.47-49).

What emerges from a review of cases is a realisation of the infinite variety of circumstances (and financial circumstances in particular) and of the individuality of each instance. Great care is taken to adjust the award to meet the needs and reasonable wishes of the parties, to take into account the needs of children (especially to minimise disruption), and to be aware, without specific mention of this aspect, of the current state of opinion upon such matters as the employment of married women. Principles of basic justice[1] are needed.

Thus, in a case recently reported in the press,[2] the husband of a hardworking wife was ordered to make her a capital sum payment of £25,000, even though the sale of his (amusement arcade) business might be required in order to meet the obligation. Divorce was granted on the grounds of the husband's behaviour, and the husband defended only on the financial claim. The marriage had subsisted for thirty years. There were five children. At the date of divorce, the husband's assets were about £77,000 and the wife's amounted to about £3,000. The wife had been saving and hardworking. At divorce, she was in employment. Her savings she had given to her now adult children. The husband offered a payment of £10,000, and said that a larger award would necessitate sale of the business. While stating that there were cases where the court was unwilling /

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1. See e.g. McLean, supra, where the self-supporting wife was allowed no part of the husband's post-separation prosperity, and Whitehouse, where the wife who had received half share of the proceeds of sale of the first home, was allowed no financial stake in the second, bought by the husband with his share. The marriage had been short, the wife was young, and she had contributed nothing in money, and little in kind, to the second home.
2. Lawrence, Glasgow Herald 5/2/81.

unwilling to force sale in order to provide funds, Lord Allanbridge emphasised that he must take into account the wife's position. She could not come to the court for a further award.

It is heartening that the court in such a forthright way has shown that the contribution made by the wife and mother is entitled to recognition, at marriage breakdown, in the form of a substantial award in a suitable case. Payment in three instalments was agreed between the parties. A determined attempt is made to use to the best advantage possibly small resources. As Professor Clive notes[1], though, the cases, individual and special in themselves, are the more so when one considers that these are the cases where before the litigation no agreement could be reached. Such litigation is not "procedurally typical, in that they tend to be cases where financial provision is disputed to the end". Other cases are not "financially typical, in that they tend to be cases where there is more property than usual to argue about."

Nevertheless, the impression gained is of a difficult task carefully done. There is perhaps the beginning of "back-peddling" on the relevance of conduct. Occasionally there is frustration in that the broad yet curiously restricting and skeletal Scots law provision (s.5(2)) by its lack of elaboration upon means (and, less frequently, purpose) prevents the judge from making a more detailed or long term and perhaps more subtle and suitable /

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1. "Financial Provision on Divorce", E.M.Clive. 1979 S.L.T. 165.

suitable arrangement.[1] The approach of the Act is basic, but the question must be asked whether in the majority of cases, better arrangements could be made if more elaborate statutory guidance and wider statutory authority were given. Limited resources are limited resources. It is submitted that free clean (financial and other) break should be made where possible.

Authority to postpone sale of the home while retaining for the non-resident ex-spouse a financial interest therein would be a welcome innovation.[2] In general, wider scope to act in relation to the home /

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1. The opinion has been expressed that the financial issue has become in many cases the overriding one, affecting the parties' attitude towards the principal matter, which is the formal termination of the marriage, and that sometimes insufficient consideration is given to the needs and rights of (the husband) who is usually the payer (especially in view of the fact that, while there may be a return to court to have an award of aliment reviewed, the size of the capital sum is fixed at decree) as opposed to the needs and rights of (the wife) who is usually the recipient. "Divorce: the cases that do our law little credit", George Watt. The Glasgow Herald 9/2/81. The author admits that this is a statement to which the facts of an individual case can make retort. Certainly there is a groundswell of opinion among payers against lengthy financial commitment to the payee. The Campaign for Justice in Divorce wishes to see support by both parents of the children until the latter are at least 16 and would favour support by husband of wife for a limited period (perhaps three years) at the end of which the wife should have made the transition to independent person. The combination of the factors of shorter marriages and better-trained women may make this more realistic and feasible than once it was, and in some cases such an approach would indeed be justified but it is submitted that the discretion of the court to make the most just arrangement possible should not be fettered.
2. See e.g. per L. Murray, in Gray, supra.

home would be useful.[1] The court in England[2] may choose to grant secured or unsecured periodical payments. In the former case, the payer is ordered to set aside a fund to meet payments should (he) fail to make them in the normal way. This, though obviously suited to the case of the relatively wealthy payer, may extend to other cases, the matrimonial home being used as security. Every effort should be made to render periodical allowance awards enforceable in as many cases as possible. Sums awarded should be realistic and perhaps there should be a view upon cut-off point. In many, but not all cases, a young (former) wife should not be encouraged to expect to be supported until death or re-marriage, but rather until the family has grown up.[3]

Property transfer orders are another possibility, but although these might be useful in individual instances, they are not advocated here as a general solution, because it is felt that they represent a negative approach to the subject of matrimonial property as a whole. Rather is a specific and detailed approach to divorce settlements recommended, linked to a pre-existing and pervading property system. Each party during marriage would have the opportunity to amass property (or, alternatively, at or during marriage separation of property would have been effected) and as a general rule, on divorce, unless "special considerations /

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1. For example, to require the title to be taken in joint names. Joint ownership of the home is urged as the norm, however, in Chapter 7.
2. Matrimonial Causes Act, 1973, s.23(1). See "Principles of Family Law", 3rd edn. S. M. Cretney, pp.276-278.
3. Cf. Cretney, p.279: limited time orders.

considerations" were present, the property of each, some of which no doubt having been in joint use, would return to the owner. While continuing income support might be necessary, the compensatory lump sum, in concept and in many settlements in practice, would become inappropriate.[1]

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1. Chapter 7, "The New Remedies", Divorce.

II DEATH

A. Property Rights upon Death before 1964

Intestate Succession

For many years before the passing of the Succession (Scotland) Act, 1964, the Scots law of intestate succession had been regarded with disfavour, both within and outside Scotland.[1] Scots Law "was one of the very last countries in the world to abolish the special rules of succession to land."[2]

Feudalism continued to exert an influence, and this was manifested in the preference for male succession, and undivided succession, and in the differentiation between heritage and moveables, the former being considered of infinitely greater importance. A complex system of rules existed to achieve these ends. The result in many cases was hardship for the widow,[3] especially when she was of a class not primarily catered for by this branch of the law. In the landed classes, there was often a Dower House for the mother of the heir-at-law. However, in terms of the Intestate Husband's Estate (Scotland) Acts, 1911-1959, a surviving spouse acquired indefeasible rights to a portion of the deceased's estate (rising ultimately to £5,000 in a suitable case), whether the deceased died intestate or only partially so, but only if he left no lawful issue. /

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1. See "The Succession (Scotland) Act, 1964", Michael Meston, 2nd ed., pp.8-10, where the author describes the attempts to reform it, beginning in 1924 and culminating, not before time, in the 1964 Act. See also "Short Commentary on the Law of Scotland", T.B.Smith, p.401.
2. Meston, ibid., p.13.
3. At p.403, Professor T.B.Smith relates that Professor Farquhar MacRitchie supplied him with a diagram illustrating the order of succession in intestacy up to the eighteenth person: no mention was made of the wife and mother.

issue.

Professor Meston[1] reiterates an important statement of intent contained in the Mackintosh Committee Report on the Law of Succession in Scotland (1950): "we have throughout kept in view the principle that when a man dies without a will the law should try to provide so far as possible for the distribution of his estate in the manner he would most likely have given effect to himself if he had made a will." The truth of the matter was that, before 1964, the intestate often would have been astonished and appalled by the mode of distribution of his estate insisted upon by the law.

The Rights of Spouses upon Intestacy

Legal Rights

Legal rights were exigible before 1964 and remain exigible (although terce and courtesy have been abolished). They arise in intestacy and may arise in testacy, and may be claimed after payment of the deceased's debts, but before payment or satisfaction of legacies or bequests to other persons.

Writers on the subject[2] are anxious to stress that legal rights are not truly rights of succession nor are they truly debts. They have a special place in the order of things. There is a neat sentence culled /

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1. Ibid., p.12.
2. e.g. Walton ("A Handbook of Husband and Wife According to the Law of Scotland", 3rd edn., p.251): the widow "does not take her terce in the character of a creditor, a disponee or an heir. Her right flows from the law, entirely independent of her husband's volition." In Buntine v. B.'s Trs. (1891) 21 R.714, L.P.Robertson at p.720 took the view, however, that the widow "claims not in right of her husband but against her husband, and as his creditor."

culled from the case of Naismith v. Boyes[1]: the wife and children are heirs in competition with creditors,[2] and creditors in competition with heirs. Hence, terce and courtesy were known as the "legal liferents", and were the only examples of that concept.

The legal rights were terce and courtesy, and were and are ius relictae, ius relicti[3] and legitim.

Legal rights were, and are, inalienable in the sense that they arise automatically if no testamentary provision is made for the distribution of an estate: equally they may arise if the party in right of them would prefer them to the alternative offered by a will. It is not in the power of the testator to exclude their operation, but it is in his power so to organise his estate that the ambit of their operation is small, in that the portion of property over which they operate is small in proportion to the whole estate. It was, and is, possible for spouses to agree, by ante-nuptial marriage-contract, that neither shall be able to claim legal rights or to reject their own contractual scheme in favour of that provided by the law for circumstances where no testamentary provision had been made, or where that which had been made did not please the survivor. In a system in which, though marriage may be a contract whatever else it may be, the terms of that contract are dictated largely by the law, such freedom to cut oneself off from /

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1. (1899) 1 F.(H.L.) 79, per L. Watson at pp.81-82.
2. The widow might not compete with any ordinary creditor of the husband, whether her right of terce arose on death or on divorce. The rule as to death was contained in the Conveyancing (Scotland) Act, 1924, s.21(4)(c), and as to divorce was contained in the 1924 Act, s.21(5).
3. introduced by M.W.P. (Sc.) Act, 1881, s.6.

from the protection or dictates of the law, is remarkable.[1] Discharge postnuptially by spouses of their legal rights in the estates of each other would appear to be competent on analogy with Lord Reid's reasoning, in Callander, as an alteration of an ante-nuptial provision (that legal rights would be exigible) or in the parties' first settlement, being post-nuptial, although the cases and textwriters appear to deal with this subject in the context of the ante-nuptial contract.[2] Implied discharge would be constituted by the acceptance of a wife during her husband's lifetime of a liferent of his estate (which, presumably, she might do by agreeing to those terms in a marriage-contract (postnuptial)): in such circumstances, a wife is not generally held entitled to the fee of a certain portion of the moveable property, which will help to provide the liferent income, in re relictae. Most remarkable, was the permission granted by the law to prospective spouses, by ante-nuptial /

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1. There was, and is, room for a change of mind, it seems. See per L. Reid in Callander v. C.'s Exec. 1972 S.L.T. 209 at p.210:-
"This exclusion of legal rights originates from contract. Normally parties who make a contract are free to rescind any of its provisions by a subsequent contract and I can see no reason why spouses who have excluded legal rights should not if they choose subsequently restore those rights. The exclusion is of no direct benefit to any but the spouses themselves". (In this case, the bringing to an end of the marriage settlement trust was held not to indicate an intention by the parties that legal rights should revive nor did they revive by operation of law.)
2. But see Walton p.242, where he states that jus relictae may be discharged by a wife by post-nuptial deed - "stante matrimonio, in a separate deed, a mutual settlement, or any other writing."-and authorities there cited (e.g. Smart v. S.'s Trs. 1926 S.C.392; implied discharge of jus relictae through postnuptial acceptance of liferent.)

nuptial (but not post-nuptial) contract, to exclude the claim to legal rights (legitim) of any children they might have. Such action is no longer competent, by virtue of the Succession (Scotland) Act, 1964, s.12.

1. TERCE

Before 1964, the surviving husband or wife (but not children) enjoyed legal rights in heritage. These were named terce in the case of widows, and courtesy in the case of widowers. They were not rights of property, except in the narrow sense that the holder had a right of property in a liferent, and over the moneys provided thereby but were rights of an income nature, of liferent, provided by the law.

By the 1964 Act, s.10(1), these 'legal liferents' are abolished, in respect of all estates of persons dying on or after 10th September, 1964, the date of commencement of the Act.[1]

Walton[2] remarks that the right of terce is, or was, analogous to the English "dower" and that other names for the liferent were "tierce partie", or "tertia pars", from which it is easy to see how the name "terce" evolved.

Green's Encyclopaedia[3] states that the right is said to be founded on "the obligation incumbent on a landed proprietor to make reasonable provision for /

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1. See also Schedule 2(4) (effect upon other enactments) to the effect that references to courtesy or terce in any other enactment shall be of no effect, and s.33(1), that references to terce or courtesy in any deed taking effect after the commencement of the Act shall be of no effect.
2. at p.250.
3. voce 'Terce'; citing Fraser, H. & W. II 1079 et seq; McLaren, Wills and Succession, vol.i.89 (from which the Encyclopaedia takes its quotation); Craig, ii, 22.25.

for his widow suitable to his circumstances and condition in life."

The right was to the liferent of one third of the husband's heritable property as ascertained at the date of his death. Property subsequently acquired did not become part of the fund potentially available for legal rights.[1]

A liferent of one third of the husband's heritage might not amount to a great deal, and, in view of the restrictions upon the types of heritage from which it was exigible, might be of little value to the widow.

It mattered not how the husband had come by the heritage (whether by succession, gift or purchase). However, it was well established that terce was not due from certain heritable items, notably and perhaps most important from the widow's viewpoint, the mansion-house. In the absence of testamentary provision in her favour, she had no claim to succeed to the house itself and it was natural perhaps that she was not permitted /

1. See Lindsay's Trs. v. L. 1931 S.C.586. The stringency of the rule was lessened by the Conveyancing (Sc.) Act, 1924, s.21(4)(a) which enacted that heritage held by the deceased spouse on a personal title capable of being completed by infeftment or by being recorded in the appropriate Division of the General Register of Sasines would qualify, as would heritable estate held in trust for behoof of the deceased spouse. The Conveyancing Amendment (Sc.) Act, 1938, s.5 added the words, "or to which he had a personal right capable of enforcement by adjudication in implement or otherwise". These provisions applied both to terce and courtesy.
The strange result of the previous rule had been that where the husband had sold property and had granted a conveyance, but the purchaser had not become infeft at the date of the seller's death, the seller's widow was entitled to terce out of the lands sold.

permitted to make any claim under the head of terce to one third of some notional rent, while the heir and his family were in occupation. Neither, however, was she entitled to one third of an actual rent if a tenant was living there.[1]

"Mansion-house" was defined with exactitude, and certain houses might not qualify, but if there happened to be two such houses, then although Walton reports that the point was not definitely decided[2], it was possible that the widow might be successful in a claim for a terce of the inferior house of the two.

There was no room for private bargain where the subjects out of which terce and courtesy were exigible were concerned. A conventional liferent, said Lord Trayner in Constable,[3] "may confer greater or lesser rights according to the construction put upon the deed conferring the liferent, in view of what is expressed to be or held to have been the intention of the granter. But what is covered by a legal liferent is defined by the law itself."

Consequently, a town house or country house lacking estate was not "a mansion-house", and never could be, and it is clear that terce was exigible therefrom.[4]

Terce /

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1. See generally, Constable's Trs. v. C. (1904) 6 F. 826, particularly per L. Trayner at p.828: "The mansion-house is the heir's, and he may occupy it to the exclusion of all others. If he is pleased to let it for the occupation of another, which is a matter entirely in his option, he exercises a privilege proper to himself, from the exercise of which no claim arises to the widow." Moncreif v. Tenants of Newton (1667) M.15844: Ersk.II,9.48: Walton, H. & W. p.251: Mead v. Swinton, M.15,873 (1796).
2. See also Fr.ii.1097.
3. at.p.828.
4. Fr.ii.1085 and 1097.

Terce was not due from superiorities, feu-duties or casualties, nor, generally, from teinds. Since the essential nature of the right of terce was alimentary, uncertain benefits were thought inappropriate sources. Mineral rights were excluded.

It can be seen from the tone of the (detailed) writings on the subject that their authors contemplated a social structure fundamentally different from that which now obtains.

The nub of the matter was that "Heritage which cannot be feudalized, or which gives no infeftment in fee, affords no terce. Therefore all leases[1], personal bonds bearing interest, or secluding executors, teinds not separated from the stock, and liferents, produce no terce; and being heritable, the widow receives no share of them as jus relictae. In like manner, the husband's right of courtesy being a liferent, his widow of a second marriage would have no terce from a right which dies with himself. "Usufructuarius", says Craig, "alium usufructuarium facere non possit.""[2] The amendment by the 1924 and 1938 Conveyancing Actw did not depart greatly from that principle.

Shootings, fishings and servitude rights were terceable, as was that chameleon, the heritable security. Heritable securities, though made moveable in /

1. that is, where the husband was lessee: obviously, where the husband was the landlord, the rents, as the fruits of land in which the husband was infeft, were terceable. The widow's right arose at the death of her husband. This meant that she could claim one third of the rents which fell due at the first term after his death: Belschier v. Moffat (1779) M.15, 863. See Ersk.ii.9.49.
2. Fr., H. & W., ii.1090.

in the succession of the creditor,[1] in questions between husband and wife remained heritable and transmissible, entitling the widow to one third of the income or interest thereof.[2]

Lesser Terce

If a man died infeft in lands over which the widow of his predecessor in title had a right of terce, then his own widow would be entitled only to 2/9 of the income of that heritage (being ⅓ of ⅔, the latter figure representing the wealth of the land less the widow's right) during the lifetime of the first widow. Upon the death of the latter, the second widow's terce would cease to be "lesser terce", and would become a full terce of the lands.

2. COURTESY

The right to courtesy depended on virility, fertility and the predecease and infeftment of the wife.

The translation of Reg. Maj. ii.50 §1, found in Hodge v. Fraser[3] is quoted by Walton[4] and will be repeated here:

"When one man receives with his wife lands, in name of marriage, and begets upon her one heir, son or daughter, heard cryand, within four walls of the house, and the wife happen to decease, the lands and heritage which pertained to the wife shall remain and be possessed by the husband, induring his lifetime."

The introduction suggests that the right was exigible out of the property brought in name of dowry or tocher by the future wife, to the marriage, but by /

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1. Titles to Land Consolidation (Sc.) Act, 1868, s.17.
2. Fr. ii. 1087.
3. 1740 M.3119.
4. at p. 262.

by 1964, of course, and for long prior to that date, the right was exigible out of any heritage in which the wife was infeft at her death. (By virtue of the Conveyancing (Sc.) Act, 1874, s.37, it was no longer a requirement, as a result of the abolition of the distinction between fees of heritage and fees of conquest, that the wife should have succeeded to the lands, in order that the right to courtesy should arise. Lands obtained by her by purchase could equally form part of the courtesy lands)[1]. The right consisted of a liferent of her whole heritable estate so held (unlike the right of terce, which was merely to one third of the deceased husband's terceable heritage) but it depended also upon the husband's having fathered a child of the marriage, which child had been born alive and had been heard to cry[2], though it might, immediately or some time thereafter, have predeceased both its parents. In other words, the requirement was that it should have been, at some point and for however short a time, the wife's heir.

It mattered not that the child had been born illegitimate, and had been legitimated per subsequens matrimonium[3] although a marriage between the claimant and the deceased must have occurred at some date, because the former took the courtesy in the capacity of husband and father.

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1. See Walker v. W.'s Trs. 1917 S.C.46, mentioned in Laydon v. L. 1922 S.L.T. (Sh.Ct.) 129, infra.

2. This requirement was imperative: no other evidence of life sufficed - Roberton v. Moderator of General Assembly (1833) 11 s.297 - although obviously if the child was healthy, any extraordinary placidity or silence at birth (or, as Walton says, deaf muteness in the child) would long since have ceased to have any relevance to the matter.

3. Crawfurd's Trs. v. Hart (1802) M.12, 698: see Fr. H. & W. ii.1121.

As to the requirement of infeftment, the amending provisions of the 1924 (s.21(4)(a)) and 1938 (s.5) Acts upon this question, in relation to terce, applied also in the case of courtesy.

One important point was that the begetting of a live child did not guarantee the husband's right to courtesy (sometimes called curiality or 'Curialitas') if he survived his wife. The wife might have had a son by a former marriage[1] who would be her heir, and if he was alive at his mother's death - thus precluding the claim of any son of the second or subsequent husband, to be heir - the claim of the second or subsequent husband would fail, since courtesy descended to him in his role or character of father of the heir, not husband of the deceased proprietrix[2.3]

Many /

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1. NOTE: per Fr. H. & W. ii,1122, that if the wife had had daughters by both the first and the second marriage, all the daughters would succeed as heirs - portioners, and the husband "would be entitled to the courtesy of that portion of the property which his own daughters succeed to." Similarly, the husband would have right to courtesy if he had fathered the heir (his wife's only son), no matter how many daughters by a previous or by his own marriage, she had had.
2. Darleith v. Campbell 1702, M.3113.
3. Since divorce, though available, of course, in Scotland, was rarely found, it can be assumed that the factor which terminated the previous marriage (of which the heir was born) was the death of the husband in most cases, and thus there could be no possibility of two claimants of terce. Even if the former husband had survived (see divorce example) he could not have claimed since he would not meet the requirement of being the husband of the deceased (at her death) which is not explicitly required, but no former husband could truly be regarded as the deceased's 'husband' especially if he had been followed by one, or more, subsequent consort(s). Had the dissolution of the prior union, allowing the wife to contract a second marriage, been brought about by divorce, the father of the heir might be alive /

Many of the comments pertaining to terce are valid also in the case of courtesy, though there are some significant differences.

The Acts 1491, c.23 and 1535, c.15, which required caution if there was a risk of mismanagement of the liferented estate applied equally to those in right of courtesy as to those in right of terce[1]. In view of the fact that the husband had ⅔ rds of the income to mismanage, it might be thought that the risk was potentially greater in his case.[2]

Exactly the same provisions applied to courtesy as /

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alive at the date of death of his former wife, but the situation would arise purely in which neither of the consorts could claim terce, since the former qualified as father but not as husband, and the latter qualified as husband of the deceased but not as father of the heir. There could be one claimant or none, therefore; there could never be two. In the absence of a claimant, presumably, the fee of the heritage out of which terce might have been exigible would simply have devolved according to the terms of the will or the rules of intestate succession, as always would have been the case, and the income of heritage which would have fallen to a suitably qualified claimant in name of terce, would devolve similarly, though, in case of intestacy or partial intestacy in which it formed part of the intestate estate, it merely would be dealt with as free intestate estate and could never be attached jure relicti, since otherwise the rules as to entitlement to courtesy would be a mockery and moreover such a result would be a quite unjustifiable, for that date, assimilation in treatment of heritage to moveables. There are matters of conjecture, however, in the absence of authority.

1. Ralston v. Leitch, 1803, Dune's Decis. 299.
2. It is interesting to read the discussion by Lord Fraser (II.1120) upon the reasons adduced by various writers for the husband's liferent being of the whole, not of one-third of the income of the heritable estate.

as to terce in the matter of redemption of courtesy by a proprietor or security holder, the provisions being the Conveyancing (Sc.) Act, 1924, s.21(3)(d) and (e).

In the case of courtesy, there was no need of service or declarator (i.e. terce after 1924) to secure to the husband his right. It arose automatically if the prerequisites were present.[1] The reason adduced by Fraser[2] for this was that terce was a more complicated right "requiring the partition of a certain subject", and hence requiring "some judicial acts to perfect it; whereas the courtesy, needing no partition, is completely vested ipso jure upon the wife's death, without any service, kenning, declarator or other legal form."

Clinton v. Trefusis[3] provides authority for the proposition that lands held burgage, and feu-duties, were liable to courtesy. They were not liable to terce. As with terce, the income from feudal casualties was excluded. (To claim a casualty of a superiority, the claimant would have required to have been infeft as superior in that superiority, a requirement which a liferenter, husband or wife, obviously could not fulfil[4]). Where feu-duties were concerned, it was sometimes doubted, from the point of view of their non-availability for the widow's terce, whether the rule could always be adhered to in a situation where feu-duties formed a substantial part of the husband's estate. Fraser, at ii.1099, cites 1 Bell's Com.58, where Professor Bell had wondered whether the rule would hold "in the case of whole cities feued out; as Greenock or Paisley /

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1. Ersk. ii, 9.52.
2. ii.1124.
3. (1869) 8 Macph. 370.
4. See Fr. ii. 1123, in the case of courtesy, and Fr. ii. 1099, in the case of terce.

Paisley," but the former states that Nisbett's case had effectively answered that query in the affirmative.[1] An entail excluding the courtesy of husbands would bar a husband equally as it would bar the widow's terce.[2] Under the Titles to Land Consolidation (Sc.) Act, 1868, s.117, heritable bonds, made moveable in the creditor's succession, were subject to courtesy as they were to terce.

The husband was liable[3] for the real debts of the wife, and for the interest only[4] on her personal debts quantum lucratus by the courtesy, and in so far as debts pertained to that part of the estate to which his courtesy did not extend, he had a right of relief against the executor (those parts of the estate being primarily liable for the debts): the widow was liable only for such debts as pertained to the subjects of terce. The husband's liability was, therefore, perhaps properly, heavier than the wife's.[5] The difference lay in the fact that the wife's right sub nomine terce was merely to the income of one third of her husband's lands. The husband "enjoys the whole of the wife's property titulo lucrativo," and was considered "her temporary representative."[6] Fraser says (1126) "If it were not for this rule, the wife's estate might be run out before it devolved on her heir, by the growing interest on personal debts during the husband's life; and as this was the evil intended to be remedied, the liability of the husband has been confined to the interest only of /

1. Nisbett v. N.'s Trs. (1835) 13 s.517.
2. Clinton v. Trefusis (1869) 8 Macph. 370.
3. Monteith v. Her Nearest of Kin 1717, M.3117.
4. pace Bell, Prins. §1607 Com.i.p.72, criticised by Fraser. Bell advanced the view that the husband was liable also for the principal of the personal debts.
5. See Fr.ii.1126: Walton, 265.
6. Fr.ii,1126.

of such personal debts."

Certainly, the courtesy did tend in many instances "to take up where the jus mariti left off",[1] since a husband was entitled, during his wife's lifetime, to the enjoyment of his wife's moveable property including the fruits of heritage, and the administration of her heritage by the ius administrationis, and, after her death if he survived her, to the fruits of her heritable property, and, in addition, jure relicti, to a certain proportion of her moveable property. He was well provided for, and, moreover[2] by the ius mariti during his wife's lifetime, and by the right of courtesy after her death, he was entitled to the enjoyment of his wife's honours and titles, and all that that might entail, including a seat in Parliament and in the Privy Council.[3]

It was thought by Walton[4] that the abolition of the jus mariti by the M.W.P. (Sc.) Act, 1881, and of the ius administrationis by the M.W.P. (Sc.) Act, 1920, did not affect the right to courtesy, which would be exigible out of the whole estate even though, during the marriage, whether by agreement or later by operation of statute, the husband would have had no marital rights over the estate of his wife during her lifetime. If courtesy was considered to be the true equivalent of terce, and not a species of ius mariti taking effect after the wife's death on the income of her heritable property, then it might be thought that Walton's view is to be preferred, because, after all, the widow entitled to terce had no inter vivos right in her husband's estate. The text /

1. cf. Bell's Com.I,59.
2. see The Herries Peerage Claim 1848, 3 Macq.585.
3. see Walton, p.265.
4. Ibid; L. Fraser otherwise and more doubtful ii. 1120, 1127 and 1219, where he makes mention of the case of Elgin v. Fergusson 26 Jan. 1827, 5 s.253.

text of Green's Encyclopaedia[1] suggests probable agreement with Walton.

As in the case of a tercer, a party in right of courtesy could not compete therefor with an ordinary creditor of the deceased spouse.[2]

3. Ius Relictae, Ius Relicti and Legitim

In terms of the Succession (Sc.) Act, 1964, s.1(1)(b), property, in the case of the estates of those persons dying on or after 10th September, 1964, the date of commencement of the Act, shall devolve according to the provisions of the Act (s.1(1)(a)), and according to "any enactment on rule of law in force immediately before the commencement of this Act which is not inconsistent with these provisions" [of the Act] "and which, apart from this section, would apply to that person's moveable intestate estate, if any;"

Thus, although terce and courtesy have passed into history, by virtue of 1964 Act, s.10(1), and the rules concerning them might be said to be of academic interest only, the remaining legal rights of ius relictae (widow), ius relicti (widower) and legitim (children) continue in force. That which is said about them at this point, therefore, is relevant to the situation after 1964: the difference lies in the priority given to them in the division of the intestate estate. These three legal rights, after 1964, are calculated out of the net moveable estate after satisfaction of any claims to the "prior rights" of the surviving spouse, introduced by ss.8 and 9 of the 1964 Act. (1964 Act, s.10(2)). Prior rights /

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1. 'Courtesy'.
2. Conveyancing (Sc.) Act, 1924, s.21(4)(b) and (c) (death) and s.21(5) (divorce)).

rights in intestacy are a novelty in the law, the only parallel being the monetary provision allowed to a surviving spouse by the Intestate Husband's Estate (Scotland) Acts, 1911 - 1959.

The situation before 1964, however, and, with modifications, the situation which applies after 1964, was/is as follows.

A. Ius Relictae

The right of the widow to a certain proportion of her husband's moveable estate upon his death is a long-established one, which entitled her to one-half thereof, if the husband was notssurvived by children, of that or any previous marriage, and to one-third thereof if he was survived by such children. Entitled children[1] were entitled, in that case, to ½ of the net moveable estate in name of legitim, and the remaining ½ was named "dead's part."[2] The present position is that the right is to one-third, whether the children are legitimate or illegitimate[3] or adopted[4]. Further, since there is now[5] representation in legitim (previously there had been representation of deceased children by their issue in the making of claims to "dead's part", out of their deceased grandparent's estate the remaining one-third share, being the remaining free estate) the right is also cut down to one-third, by the presence of legitimate, but not illegitimate issue of predeceasing legitimate or illegitimate children of the deceased. Among claimants /

1. see text below.
2. Alternatively, if there was no surviving spouse, the children were entitled to ½ of the net moveable estate as legitim, and the remaining ½ fell to "dead's part".
3. by L.R.(Miscellaneous Provisions)(Sc.) Act, 1968, which added a new s.10A to the 1964 Act.
4. 1964 Act, s.23(1).
5. by 1964 Act, s.11.

claimants of the first generation descendants of the deceased, therefore, it can be said that the only qualification is that they shall be children of the deceased, natural or adopted. It matters not whether they are children of the deceased and the widow, but children (or remoter issue) of the widow alone cannot qualify for legitim.

It can be seen that, in either case, one-half or one-third of the moveable estate remains, apparently, unallocated. In fact, this portion is allotted to, and known as, "dead's part". It passes into the general intestate estate, and is disposed of according to the general rules of intestate succession, which, before 1964, would be the common-law rules of intestate moveable succession, and, after 1964, would be the rules of the system set forth in the 1964 Act, s.2. It might, and may, be that dead's part would, or will, devolve according to the terms of the deceased's will, if the remaining two-thirds of the moveable estate had been undisposed of by the testator and hence had fallen into intestacy, or if intestacy had been brought about through the rejection of the remainder of the will and the election to take legal rights. It was, and is, the case that the testator has freedom to test, (without fear of subsequent rejection and overturning of his wishes by disgruntled legatees,) over his heritage and the half or third portion of his moveables, which is dead's part.

Thus, 'dead's part' lives up to its name. Claimants of legal rights in lieu of testamentary provisions which do not please them may claim only legal rights, which, by definition, exclude dead's part.

Interest -- of varying rate, and subject to taxation -- is due upon the amount of the legal rights from /

from death till payment. Exceptionally, it may not be due if the estate has earned no interest.[1]

Only the wife who takes the character of widow upon her husband's death may claim *jus relictae*. A former wife has no title thereto.

One historical point of great interest is that, until the coming into force of the Intestate Moveable Succession (Sc.) Act, 1855, s.6, it was competent for the executors of a predeceasing wife to claim *jus relictae* upon the subsequent death of the husband.

Professor T. B. Smith[2] cites the relatively recent case of Walker v. Orr's Trustees[3] in which an odd situation arose. The testator was survived by his widow and his three daughters. By trust disposition and settlement, an arrangement had been made that the income of the estate was to form a liferent for the widow under deduction of £700 p.a. to each daughter, and after the death of the widow, the income was to be divided among the daughters, the fee to be disposed of by them according to the will of each, or, failing such direction, to the heirs *in mobilibus* of each, according to the law of Scotland. These provisions to the daughters were declared to be in full of all legal rights competent to them, and to be subject to forfeiture in the case of any who elected to take legal rights. During the period of their mother's viduity, the daughters each accepted the income of £700 p.a., but upon the widow's death, the daughters alleged that they had made no election, and that they were entitled to claim legitim, allowing the testamentary provisions in their favour to fall into intestacy. Out of that intestate estate, if such it be held to be, the /

1. McIntyre v. M.'s Trs. (1865) 3 Macph. 1074.
2. Short Commentary on the Law of Scotland.
3. 1958 S.L.T. 63.

the widow's executors claimed jus relictae.

A proof before answer was allowed upon the first question, the onus being on the daughters to show that no election by them had been made; if all three daughters were able to make out that case, then their father's provisions for them would fall into intestacy and they were entitled to legitim out of the intestate estate, and the widow's executors would succeed in their claim. Upon the third question, relating to the widow, L. Strachan said,[1] "I find this question to be a somewhat narrow one but I have come to the opinion that on principle the executors of the widow would be entitled to claim jus relictae out of any part of the estate which may fall into intestacy, even although that intestacy may emerge only after the death of the widow. The jus relictae vested on the death of the testator but its enforcement was limited by the principle of approbate and reprobate. That meant that having elected to accept her conventional provisions under the settlement the widow could not claim any part of the estate which by the settlement was given to others. The right remained dormant in her, however, and if any portion of the estate had during her lifetime become undisposed of by the settlement she could have claimed jus relictae out of that portion. That situation would have fallen exactly under Naismith v. Keyes."[2]

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1. at p. 67. (Walker v. Orr's Trs.1958 S.L.T. 63.)
2. In which, where a similar clause had stated that a testamentary provision was to be in full of legal rights, the true construction was held to be that, while the widow could not take legal rights which conflicted, or were inconsistent or incompatible with, the terms of the settlement, yet if there was any estate undisposed of by the settlement or otherwise falling into intestacy, legal rights could be exacted therefrom.

"I think it follows that her right was still vested in her at her death and I see no reason why it should not transmit to her executors like any other jus crediti. If, for example, all the pursuers should be found entitled to claim and should claim legitim the whole residue will fall into intestacy. That is estate which belonged to the testator at the time of his death and which has all along been subject to the widow's jus relictae the moment that it became undisposed of by the settlement."

The case is reported further in the same volume at p.220, which reveals that the pursuers were successful in showing that they were entitled to claim legitim, provided that they accounted for the conventional provisions which they had each received. (£100 p.a. during the 13 years of their mother's viduity).

The question is, therefore, whether the ratio of Naismith and of Walker is or is not consistent with the provisions of the 1964 Act. To answer it would involve a consideration of the post-1964 rules upon partial intestacy, and this will be postponed till the consideration thereof.[1]

The estate is valued as at the date of death[2], and many writers have pointed out that the widow is not entitled[3] to claim any particular part of the estate in satisfaction of ius relictae. She is entitled merely to ⅓ or ½ thereof, as the case may be, whatever that fraction may comprise. In Cameron, the widow had claimed specifically ⅓ of a holding of certain named shares in a particular Company (Sociedad Exploradora de Tierra del Fuego) in satisfaction of her legal rights, but it was held that the shares should /

1. See also C. & W. pp.707-710.
2. McMurray (1852) 14 D. 1048.
3. Cameron's Trs. v. Maclean 1917 S.C. 416.

should be valued at the date of death of the testator, added to the remainder of his moveable estate, and the division made accordingly. The difficulty had arisen because the widow, in electing to take legal rights instead of testamentary provisions, had rendered it not possible for the estate to pay in full all the legacies bequeathed by the testator, and an abatement was necessary. Their Lordships were quite clear as to the nature of jus relictae:

> per L. Mackenzie[1]:- "I think there is no distinction between a right to jus relictae and a right to legitim; each is of the nature of a debt; and no authority was cited to us which supports the proposition that the widow has any jus in re."
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> and per L. Dundas[2]:- "Speaking generally, I take it that jus relictae is the legal right of a widow, vesting ipso jure by her survivance of her husband, to a share - one-third where, as here, there are children - of his free moveable estate as at the date of his death. It is not a right of property but a debt. The widow claims not as an heir but as a creditor. (Inglis v. I. 7 Macph. 435.) Where a deficiency in the testamentary estate results from a widow's election, the order of preference, as regards liability to abatement, is - 1st, specific legacies; 2ndly, general legacies; and lastly, the residue. (see McLaren on Wills and Succ., Vol. I 588). I cannot accept the argument put forward by Mr. Maconochie to the effect that a widow is entitled to demand one-third of the moveables specifically."

Support for this view is to be found in Stewart v. Keiller /

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1. at p.419. Cameron's Trs. v. MacLean 1917 S.C. 416.
2. at pp. 418-419.

Keiller & Sons (1902) 4 F.657, and Tait's Trs. v. Lees (1886) 13 R.1104.

The unsuccessful argument of Mr. Macconochie for the widow (the second party) in the special case, is interesting, nevertheless. His attempt to distinguish on the basis of ius relictae from that of legitim - on the notion that legitim, it was established, was purely a claim of debt, and "in its nature a right of succession," whereas ius relictae was a right of property in a share of the husband's estate "vested in the wife during the husband's life, subject, it was true, to his administration and control, and [it] emerged to her free of control on his death", and that, therefore "At his death the widow accordingly was the actual owner of a half or a third, as the case might be, of the ipsa corpora constituting the estate" - failed, but any comments on the theory, or theoretical basis, of legal rights, is welcome. In this instance, though perhaps for reasons of expediency in the case, counsel argued that, while legitim had its origins in Roman Law, ius relictae sprang from Germany, "and from the theory of a communion of goods between husband and wife."

This idea arises in a number of situations requiring explanation (and, it must be admitted, in places where more obvious or concrete rationalisations or answers are lacking.) Walton says[1], "The language of the older writers and decisions is coloured by the antiquated theory of a "communio bonorum" of which the husband was the administrator," from which sentiment it can perhaps be deduced that he had no high opinion of the usefulness of such a notion to-day. He, too, insists that jus relictae is a claim of debt, and quotes /

1. at p. 237.

quotes L. Watson in Naismith v. Hayes[1] - "The legal claims of widow and children are not, strictly speaking, rights of succession, and they infer no representation."[2] "They are in the nature of debts which attach to the free succession after the claims of onerous creditors have been satisfied." Thus, Walton says,[3] if the estate is insolvent at the date of the husband's death, there can be no jus relictae.[4]

Of course, there may be cases where it will be unobjectionable, or convenient, to give to the widow specific shares in certain companies, or certain particular items of property, if she so wishes. Again, it may be more sensible in times of economic and/or Stock Market depression, for the widow (and any other beneficiaries) to receive shares rather than money, and the wishes of the beneficiaries would naturally be consulted. Such a case was Millar v. M.'s Trs.[5] in which Lord Hunter made a survey of relevant authority, and /

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1. (1899) 1 F. (H.L.) 79 at p.87.
2. That is until 1964, when by s.11 of the 1964 Act, representation was permitted, but obviously, by reason of the nature of jus relicti(ae), only in legitim.
3. p.297.
4. See generally "The Effect of Marriage upon Property in Scots Law" A.E.Anton (1956) M.L.R. 653, during the course of which it is suggested that, in the rules of property law which obtain between husband and wife, traces can be found of a community system. Professor Meston ("The Succession (Scotland) Act, 1964" 2nd ed., p.20) remarks "There have been various arguments as to the true theoretical nature and as to the origin of legal rights in Scotland. Attempts have been made to classify them as debts due by the estate or as rights of succession in the estate. They may be the attenuated remnants of a system of community of property in Scotland." Further discussion was not appropriate in the context. See also Chapter 7 supra; and Chapter 7 infra: 'The Communio Bonorum - a short note', and 'Towards a New Communio'.
5. 1914 1 S.L.T. 444.

and in which he entertained the proposition[1] that "A widow's right to one-third of the goods in communion - is a right of property. It is a right she has during her husband's lifetime, though her right to the administration of it is suspended, and he has the absolute control and disposal of the common fund. But the moment the breath is out of his body his administration ceases and her proprietary right emerges, free of control, and may be made effectual through her husband's executors or representatives.", but would seem, at the end of his interlocutor, to have preferred the other view, as being "most consonant with the decisions and the present state of our law, which does not recognise communion in goods between a husband and wife. I think it clear from the decision in Gaib's Trs. that if a man has left a special legacy to anyone his widow can make no claim to any portion of the legacy if her jus relictae can be satisfied out of the general estate. So if a moveable subject be not susceptible of division I think that the widow's claim is for payment of a portion of the value thereof and not to a pro indiviso conveyance."[2]

The case of Miller's Trs. was mentioned in Cameron,[3] where Lord Cowan's opinion above was said to be, as Lord Kinnaimey had suggested in Keiller,[4] merely expressive of a desire to distinguish the right from a right of succession.

Stair's opinion[5] - though out of step with the latter thinking, which has been accepted as correct - was /

1. emanating from, and expressed in the words of, Lord Cowan in McIntyre v. M.'s Trs. (1865) 3 Macph. 1074, at p. 1075.
2. at p. 416.
3. Cameron's Trs. v. Maclean 1917 S.C. 416.
4. Stewart v. Keiller & Sons (1902) 4 F.637.
5. III, 17.24.

was that "if the defunct be married there was thereby a communion of goods betwixt the defunct and the other spouse, which, being dissolved by death, the survivor may withdraw their share, which share is estimated by the condition of the family at that time." Erskine[1] seems to treat legitim and ius relictae in the same way. The Conveyancing (Sc.) Act, 1924, s.22(1) assimilated the rules by which are determined which parts of an estate are subject to legitim to those which determine which parts of an estate are subject to ius relictae.

In Millar, the balance of convenience was to award the shares to the widow. No prejudice would be done thereby to the trust estate. It is now generally accepted that the decision in Cameron is correct.

Ius Relictae vests at the date of death of the husband in the estate possessed by him and subject to ius relictae at that date.[2] The widow's title, however, depends upon confirmation.[3]

Despite protests at the time of the passing of the 1964 Act, and afterwards[4], Parliament insisted on the retention of the differentiation between heritage and moveables for the purposes of legal rights, although, of course, one of the main aims of the legislation was to assimilate the treatment of and devolution of heritable and moveable property. Thus, nothing heritable, or in the nature of, or pertaining to, heritage, or rights having a tract of future time, is /

1. III IX.19
2. Wilson's Trs.v.Glasgow Royal Infirmary 1917 S.C.527.
3. See 1964 Act, s.14, and Part III of the Act generally for the present position concerning the administration of an estate.
4. See Reston, p.51.

is subject to legal rights (terce and courtesy having been abolished by s.10(1)), unless there have been fraudulent alienations.

The relevant estate to which jus relictae may attach includes all moveable estate possessed by the husband at his death, and certain estate, such as a gratuity, payable thereafter.[1]

However, in the somewhat unusual circumstances of Findlay's Trustees v. Findlay's Trustees[2], it was decided that, where a testator had a liferent in his father's estate, with power of disposal of the fee, that right should not be taken into account in computing the widow's jus relictae, because the value thereof did not arise until the testator's death, and, in any case, if the trust disposition and settlement disposing of the fee were to be taken into account, the destination there disclosed was inconsistent with a claim for jus relictae. The widow's trustees had claimed that the power of disposal had a certain patrimonial value, a suggestion which L. Honeyman was inclined to accept, although at p.497, he said, "Any such asset must necessarily have become part of the executry, not during his life but as coincident with or immediately following on his death," but the question also turned upon the relatively simpler rules of approbate and reprobate. "It is not open, in my view, to those representing the widow to claim that the will operates in their favour by introducing this estate into the executry, and at the same time to defeat the operation of the will by claiming against the will and not under it."

Per Lord Fleming[3], it was explained, "According to /

1. Beveridge v. E.'s Exx. 1933 S.C. 160.
2. 1941 S.C. 492.
3. at p. 498.

to the authorities, the holder of such a power is entitled to use it for his own personal benefit and may contract during his lifetime to exercise it in favour of a particular person. He may realise the power by contracting in consideration of a money payment to exercise it in a specified manner, and, if that is done, the sum realised, if forming part of his estate at the date of his death, would be subject to his widow's legal rights.

The deceased did not realise the power or convert it into money during his lifetime, and his estate at the date of his death did not comprise any share of his father's estate or anything that could be said to represent the value of the power."

L.P.Normand distinguished the present case from that of Beveridge, in which it was quite clearly the statutory intent that a certain sum should form part of the deceased's estate, whereas, "I cannot hold that in this case the testator intended to make subject to a claim for jus relictae a portion of his father's estate over which he had the power of disposal." It was true that the testator "directed his executors to treat it as part of his executory estate, but that could only be for the purposes which he himself defined in his settlement, and not for other purposes extraneous to or inconsistent with his testamentary intentions." It is, of course, a well-recognised principle of our law that it is not competent with one hand to take a benefit under a will, and with the other to reject that same document.

Clive and Wilson[1] take exception to what they regard as loose thinking on the subject, and state that the true construction of Beveridge and similar cases /

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1. at p.703.

cases is that it is possible for a statute or deed to provide that a payment shall be made to trustees, and that the latter shall distribute that payment to those entitled to it. "Legal rights are merely an identifying and quantifying factor. The relict takes a share because he or she is entitled to it under the statute or deed in question. It is a mistake to cite such cases as authority for the proposition that jus relictae extends to augmentations of the deceased's estate after his death ... there is nothing in these "augmentation" cases inconsistent with the general principle that the relict's right affects only property owned by the deceased spouse at death."

Insurance policies which have been kept up by the regular payment of premiums are part of the moveable estate subject to legal rights (now, since 1964 Act, s.10(2), after satisfaction of prior rights (intestate succession))[1].

It would seem[2] that a partner's posthumous share of his firm's profits, payable to his executor, do NOT form part of the relevant moveable estate of the deceased subject to legal rights.

The position with regard to Bonds

This is perhaps the only matter in this area which requires particular attention.

It has been noted that heritable securities, while regarded as moveable generally in the creditor's succession /

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1. Chalmers' Trs. (1882) 9 R.743: Muirhead v. M.'s Factor (1867) 6 Macph. 15 (which contains interesting judicial comment upon the (loose) use by the institutional writers of the phrase "goods in communion") see e.g. per L. Curriehill at pp. 99 and per L. Deas at p.101.
2. Walker, Prins.II, pp.1745 - 46, citing Adamson's Trs. v. A.'s Exrs. (1891) 18 R.1133.

succession, were deemed to be heritable for the purposes of legal rights, and hence in the estate of the creditor husband or wife, were terceable or subject to courtesy[1]. Since terce and courtesy have been abolished (by 1964 Act, s.10(1)), there are no longer any legal rights exigible out of heritage, and these investments (e.g. bonds and dispositions in security) escape all claims to legal rights. Professor Meston is rightly incensed by the "chameleon-like" nature of these rights, and a persuasive passage advocating the removal from the law of this practice of allowing certain rights to possess the characteristics both of heritage and moveables depending on the circumstances, is to be found at pp.46-47. (Certainly, if the heritable/moveable distinction is to be retained to a limited extent in the sphere of succession, it is confusing to meet with rights of a 'hermaphrodite' nature.) He notes that under S.117 of the 1868 Act, it used to be possible for the creditor in right of the bonds to make them heritable by the device of excluding executors, but that is not now possible[2], and therefore they must be held to be moveable except quoad fiscum and quoad legal rights. There is no choice.

While heritable bonds must be regarded as heritable inter conjuges, personal bonds, on the other hand, though in their general nature moveable, can become heritable by the exclusion of executors (the Act, 1661, c.32 not having been repealed as at first proposed), and if that were done, legal rights could be excluded therefrom[3].

The situation, moreover, leaves room for doubt among /

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1. Titles to Land Consolidation (Sc.) Act, 1868, s.117, as amended by 1964 Act, s.34 and Sched. 3, which in effect placed ground annuals in the same category.
2. see Meston, p.47.
3. See Walker, Principles, II 1161-63, and 1167. 1304.

among commentators. Professor Walker[1] states that it is not clear from the 1964 Act, whether jus relicti(ae) is excluded from heritable securities which are deemed moveable in the creditor's succession, but which are definitely excluded from account in computing legitim.

Debts

Debts (not only debts deemed to be allowable deductions by the Inland Revenue, but other debts also) are to be deducted from the fund available, before jus relictae ((1) and/or legitim) is calculated. These include government duties, and general personal and business debts, and may also include the cost incurred by any of the widow's children in alimenting her[2].

Among debts there are distinctions. Preferential debts include the widow's aliment and mournings, funeral expenses, expenses of obtaining confirmation, and, an out of date notion in many cases perhaps, servants' wages. Then come secured debts and then unsecured debts. Professor Walker points out that a solicitor's fee is not preferable to the widow's claim for legal rights though he has the due remedy of retention for debts[3].

Under the Estate Duty System, the allowable debts were first deducted in order that the figure on which Estate Duty was to be assessed emerged. The also of the estate available for division would then be reduced by the payment of duty, and even thereafter, debts not allowed by the Inland Revenue were deducted. Thus, debts constituted the first charge upon the estate /

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1. Feins. II, p.1746.
2. Mack v. W. (1898) 1 F.199.
3. Feins. II, p. 2029 (citing Mitchell v. Mackenzy (1905) 8 F.198).

estate, and it was only after satisfaction of them, that claims, of any other nature, upon the estate could arise.[1]

Exclusion, Renunciation, Discharge and Defeat of Ius Relictae

Ius Relictae is lost after the expiry of the long negative prescription (if it has not been lost before that date)[2] which will normally run from the date of death of the spouse but exceptionally[3] may run from the date at which the estate fell into intestacy, if it was only upon the occurrence of that eventuality that the claim(s) for legal rights arose.

Alternatively, the right may be lost by the renunciation thereof by a spouse (and indeed by each spouse, or either of them, as in this, as in so many other respects ius relictae and ius relicti are identical) in terms of a marriage-contract. In order that /

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1. See 1964 Act, s.36 (interpretation section), which defines "net estate" and "net intestate estate" as "so much of an estate or an intestate estate as remains after provision for the satisfaction of estate duty and other liabilities of the estate having priority over" legal rights, prior rights and rights of succession. "Other liabilities of the estate" ranking prior to those rights are not defined, but rights of succession are postponed to legal rights and prior rights (s.1(2)), legal rights are postponed to prior rights (s.10(2)), and prior rights (ss.8 and 9) are declared to be exigible out of the "intestate estate". The monetary right is, by s.9 (6)(a), postponed to the right under s.8 to house and furniture: it is exigible from an "intestate estate" specially defined in s.9(6)(a) as "so much of the net intestate estate as remains after the satisfaction of any claims under the last foregoing section;" This remains the case, although the system now is that of Capital Transfer Tax, under which no tax is payable on the passing from deceased to surviving spouse.
2. Campbell's Trs. v. C.'s Trs. 1950 S.C.48.
3. Mill's Trs. v. M.'s Trs. 1965 S.C.384.

that the discharge may operate, it must be very clear in its terms[1]; moreover, it is suggested by Walton[2] that if the wife has made a very bad bargain, and the provision which she has accepted in lieu of her legal rights is wholly inadequate, she would be entitled to an additional aliment if the estate could afford it.[3]

Green's Encyclopaedia[4] suggests that Cooper's case[5] would tend to discourage the plea of enorm lesion where a minor wife accepted a provision which, it transpired, was small in comparison with the eventual size of her husband's movable estate .

In the same work, it is said that post-nuptial discharges would be subject to revocation as being donations inter virum et uxorem if granted gratuitously or for grossly insufficient consideration, but of course, by the M.W.P. (Sc.) Act, 1920 s.5, such donations /

1. In Elliot's v. Duncan 1895, 1 S.L.T.355, a husband benefited from this rule; an exclusion of marital rights (imported exclusion of jus mariti together with the provision of a liferent for the husband on his surviving the dissolution of the marriage) in an ante-nuptial marriage contract was held not to affect jus relicti, the latter right having come into being after the execution of the contract, by virtue of the M.W.P.(Sc.) Act, 1881, s.6. "I do not see how there can be an implied discharge of a right which did not exist at the time the contract was entered into, and which was not contemplated;" per L.Kyllachy at p.359.
2. See p.267.
3. This is comparable to the continuing aliment competent where the husband, by legitimate and clever means has arranged his estate in such a way as to leave his wife with a provision quite insufficient. See Chapter 4 (Aliment). They both would seem to be equitable remedies, and may be regarded by some as the same remedy, or variants of the same remedy, rather than as different but similar remedies.
4. v. "Ius Relictae(1)", p.258.
5. (1868) 12 D.473, 19 D. (H.L.) 21.

donations between husband and wife have been made irrevocable.

Such discharges were, and are, quite competent, although they have become increasingly less common as marriage-contracts have become less common. Nevertheless, the point arose in the House of Lords in the recent case of Callander v. Callander's Executors[1].

A dispute had arisen concerning an ante-nuptial marriage-contract entered into in 1916, by which the future wife discharged her right to ius relictae, and the claims to legitim of future children also were discharged in advance by the parents as was possible - though criticised[2] - before the Succession (Sc.) Act, 1964, s.12.

In 1953, the parents and their two major sons entered into a deed of appointment, renunciation and discharge registered in the Books of Council and Session, with the aim of annulling the trust which had been brought into being by the marriage-contract, and of restoring to the fee of the husband the investments which in 1916 he had directed to be held for himself and his wife in liferent (under the terms of the 1916 deed, by which also the wife had renounced any claim which she might have to ius relictae, and the parties discharged the claims to legitim of any future children.) The trust funds became the absolute property of the husband at 1954, therefore. These thereafter were to be disposed of to any children of the marriage as the husband might think fit. On the death of the husband in 1967 (his wife having predeceased him), one of the sons claimed /

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1. 1972 S.L.T. 209. See also Galloway's Trs. v. G. 1943 S.C.339.
2. e.g. by T.B.Smith in 1962 "Short Commentary" p.394.

claimed legitim, averring that by reason of the deed of appointment, renunciation and discharge (bringing the marriage settlement to an end) his right thereto had revived.

The decision of the House of Lords (Ls. Reid, Morris of Borth-y-Gest, Diplock, Salmon and Viscount Dilhorne) reversed the First Division's interlocutor, holding that, upon the construction of the deed of 1953 (registered 1954) it disclosed no intent on the part of the parents that legal rights should revive, neither did the cessation of the trust arrangements mean that by operation of law, the legal rights came into being again. Thus, the son's claim to legitim failed.

If there has been a valid inter vivos discharge of a spouse's right to ius relictae (i), the result will be that her/his presence will be disregarded[1] in the division of the estate, which, in consequence, will be deemed to be entirely dead's part if there are no children, or, if there are children, will be composed of two parts, one part being legitim (or bairn's part) and the other dead's part. If the estate is disposed of by will, it can be seen that, by this method, a childless spouse could achieve the same measure of testamentary freedom as is possessed by an unmarried person, a factor which could become significant if, under a new property regime, a new awareness of the uses of marriage-contracts became prevalent. On the other hand, if intestacy has resulted, it would become a matter of construction of the contract whether the spouse(s) had each "signed away" not only their legal rights, but also the new prior rights provided by the 1964 Act. It will be remembered /

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1. Hog v. H. (1791) M.8193.

remembered that s.13 of that Act supplies a helpful presumption which, however, is limited in its application to testate succession, and to the traditional legal rights, and would not be of more than analogous assistance in the example cited.

If legal rights are claimed, and are exigible from the estate in the circumstances of the case, they are a charge first upon residue: if that is insufficient, then general legacies abate rateably to provide the amount required: special legacies will be the last to abate.[1]

According to Walton[2] where, after her husband's death, a widow decides to take the testamentary provisions and not to take legal rights, the children's legitim (of ⅓, not ½ share) will be paid out of the whole moveable fund, without taking account of the widow's provision; thereafter, the widow's provision will be paid, the husband's executor taking what would have been given as _jus relictae_, and employing it to satisfy the widow's claim. In other words, there will still be a tripartite division.[3]

Such a discharge was and is open to challenge on the ground of minority and lesion[4] or essential error resulting in absence of consensus[5]. Moreover, an election between legal and conventional provisions, which election has been made by a minor under curatory without /

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1. Gait's Trs. v. Lees (1895) 13 R.1104.
2. p.245, citing Fr. H. & W., 11.1070, where the matter is fully explained.
3. See Fr. 1070, where part of L.Curriehill's opinion in Campbell's Trs. v. C. (1852) 24 D.1321, is quoted, and see also _infra_. where the scale of division of estate, where the widow's and the children's wishes to take legal rights or rights under the will, diverge, is discussed.
4. Cooper v. Cooper (1888) 15 R. (H.L.) 21.
5. Wyllie v. W.'s Exx. 1925 S.L.T. 572.

without the curator's consent, is revocable during the lifetime of the minor[1]. A Curator Bonis may be appointed to exercise the right of election on behalf of the ward[2].

An alternative to express discharge is implied discharge, by which, in accepting a conventional provision which is inconsistent with a claim also for legal rights, the entitlement to the latter may be lost. There may be the clearest indication that such forfeiture was to be the result of acceptance, or that consequence may merely be implied[3] and it is a question of construction whether the two provisions are mutually exclusive. It may be that a spouse is entitled to both[4].

Where /

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1. see Lawson v. Cook 1928 S.L.T. 411.
2. see Skinner's C.B. (1903) 5.F.914.
3. see Buntine v. B.'s Trs. (1894) 21 R.714. Darling's Exec. v. D. (1869) 41 Sc.Jur.545. Murray's Trs. v. M. (1901) 3 F.820.
4. cf 1964 Act, s.13 presumption with regard to legal and testamentary provisions. If a spouse is dissatisfied with the terms of the predeceaser's will, and if the marriage-contract has not expressly discharged his/her claims to legal rights, then the question is one of construction of the marriage-contract, not of construction of a "testamentary disposition" (defined in s.36 of the 1964 Act as including any deed taking effect on the death of the deceased whereby any part of his estate is disposed of or under which a succession thereto arises) and so it would appear that s.13 cannot apply, unless a very liberal interpretation of the interpretation section is favoured. The seas of doubt are wide. To what extent must a marriage-contract smack of a testamentary arrangement before it can be said to be a testamentary disposition or a mutual will? On the whole, it is possibly sounder to adopt a literal approach and to say that the construction here is not guided by statutory rules. If the two rights are not inconsistent, the survivor may well be entitled to claim legal rights (Murray's Trs. V. M. (1888) 18 S.L.R.690) if he/she has been excluded from the benefit of the will or is dissatisfied with the benefits thereof.

Where the conventional provision offers a liferent of the whole estate, it is an almost overwhelming presumption, though not a fixed rule, that this was held out in lieu of legal rights[1.2]

Again, the surviving spouse, after the death of the predeceaser, may be called upon to elect between testamentary provisions and legal rights. As has been stated, the doctrine of election, or of 'approbate and reprobate', forbids a party from, at the same time, taking benefit under, and impugning, a will. (see 1964 Act, s.13). The result of s.13 is that, where the testator has not declared that both benefits shall accrue to the widow, the choice by her of one of those benefits effectively excludes all claim to the other, except that legal rights may still be claimed out of any estate which has fallen into intestacy (unless the widow, in full knowledge of her rights, has by a discharge expressly renounced her legal rights in ALL the estate: even if she does renounce legal rights, she ought to reserve her right to any estate falling subsequently into intestacy - Dawson's Trs. v. D. (1896) 23 R.1006: Melville's Trs. v. M. 1964 S.C.105) since in that case the underlying theory that the testator's intention must be accepted in toto or not at all, and must not be flouted by two inconsistent claims, is not infringed[3]. That is so, of course, only /

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1. consider Edward v. Cheyne (1888) 15 R. (H.L.) 33, Murray's Trs., Riddel v. Dalton 1781, M.6457, Smart v. S. 1926 S.C.392, and Caithness' Trs. v. C. (1877) 4 R.937.
2. A full and thought-provoking discussion and analysis of the consequences of the leading case of Naismith v. Boyes ((1899) 1 F.(H.L.) 79), upon the effect of a widow's acceptance of a testamentary liferent is to be found in C. & W., pp.708-710.
3. see Professor Walker's exposition of this point at Prins.II p.1798: Naismith v. Boyes (1899) 1 F.(H.L.) 79; Perrie v. Mander's Trs. 1954 S.C.430: Walker v. Orr's Trs. 1958 S.L.T.63 and 220: Buntine v. B.'s Trs. (1891) 21 R.714, per L.McLaren at p.721; Hannah's Trs. v. H. 1924 S.C.494; Moon's Trs. V. M. (1899) 2 F. 201; McGregor's Trs. v. Kimbell 1911 S.C.1196.

only if the testator had NOT made contrary provisions in the event of any estate falling into intestacy.

Similarly, the widow may be entitled to benefits accruing, but not forming part of the deceased's estate, such as moneys due to her in terms of an insurance policy or pension scheme[1] which will fall to her in addition to the estate to which she will become entitled by reason of her choice to take legal rights or the provisions of the will, or both, if the circumstances permit her to do so.

Where there are several testamentary writings, they will be read as a whole, and if in some of the writings but not in others, provisions are made in lieu of legal rights, the widow must elect whether to take the provisions or to take legal rights. The widow is on the wrong side of a rule that the two deeds should be read as one[2].

Acceptance of a testamentary provision and consequent renunciation of a claim to legal rights (if in the circumstances the latter is a consequence of the former)(as guided now by the rule of s.13) may be express, or implied from actings, or from silence and inaction[3] although if no interests are likely to be harmed, the decision, if it must be made, may be postponed.[4] Indeed, a claim to legal rights might be excluded by other means than by the claim to testamentary provisions instead. Clive and Wilson[5] note that delay combined with the implication that the party in right thereof has abandoned legal rights will /

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1. see Craigie's Trs. v. C. (1904) 6 F.343.
2. see Stewart v. Stephen (1832) 11 S.139.
3. see Robinson v. R.'s Trs. 1934 S.L.T. 183, and the case, previously mentioned, of Pringle's Executrices (1870) 8 Macph. 622.
4. Watson's Trs. v. W. 1910 S.C.975: Robinson: McFadyen v. McF.'s Trs. (1882) 10 R.285.
5. p.711.

will be sufficient, and cite in support Robson v. Bywater (1870) 8 Macph.757, although delay short of 20 years in duration merely, in Walton's words, "is not a bar, but only throws on the party against whom it is pleaded the duty of explaining his inaction"[1]. At the least, therefore, it would appear that the effect of delay would throw the onus of proof upon the parties potentially in right to show that they had not chosen testamentary (and perhaps by analogy conventional?) provisions rather than legal rights. At any rate, as far as testamentary provisions and legal rights are concerned, the matter is regulated now by S.13.

Alienation of Subjects

This is undoubtedly the safest method for a husband or wife to employ, provided he or she carries it out according to the rules, to ensure that the survivor of them has as meagre a provision as possible after the predeceaser's death.

There never has been any inhibition upon the squandering by a person, or a spouse (provided he remains able to fulfil his obligation to aliment his wife and family, if that obligation in the circumstances remains due), of his own resources, nor against excessive inter vivos generosity to other persons - see Allan v. Stark[2] in which a husband conveyed the bulk of his heritage and moveables to his sister, who kept house for him, after his wife had left him. The wife, upon the death of her husband, claimed that the various /

1. Walton, p.244, citing Pringle's Executrices: Seath v. Taylor (1848) 10 D.377; Mackenzie v. M.'s Trs. (1873) 11 Macph.681; Gourlay v. Wright (1864) 2 Macph.1284. See also Walker v. Orr's Trs. 1958 S.L.T. 63 and 220.
2. (1901) 8 S.L.T.468.

various transactions which resulted in ownership passing to her sister-in-law, were simulate and that she was entitled to legal rights out of those gifts. The defender averred that the transactions were made in good faith, and were irrevocable. The question of law whether a man was entitled so to deprive his widow of her legal rights was decided by Lord Kincainey, after consideration of various authorities (p.468/9) in the affirmative (..."it must be regarded as now settled law that the power of a husband to alienate his moveable estate by an inter vivos deed, which wholly divests him of all power over the property disponed, and all benefit from it, is absolute and unqualified, and cannot be regarded as made in fraudem of the rights of his wife merely because it reduces her jus relictae or deprives her of it altogether. A man cannot be held to act fraudulently who does openly what he has a right to do."). He considered that Bell's words (Prin. 15, 63,) relating to legitim, applied equally to ius relictae (and, one must presume, after 1881, to ius relicti too), viz:- "legitim is diminished by every deed of the father inter vivos and in liege poustie disposing of his moveable funds, provided it be not fraudulently contrived in order to disappoint the children without touching the father's own rights during his life." (See also Fr. H. & W., ii, 1010, whose discussion the point Lord Kincainy felt to be "really conclusive and as dispensing with any further statement of the law.")

It will be noted that the fraud consisted not in the disappointment of the children, but in the absence of complete divestiture of the property during the father's lifetime. The rule that the deed must totally and irrevocably divest the granter, and that it must be made "in good faith" was held also to be satisfied in this /

this case. "The thing to be proved is extremely unusual and improbable - that a man in the prime of life should voluntarily strip himself of nearly the whole of his estate - and it certainly requires to be established by satisfactory and convincing evidence. But the proof is all one way - and it is perhaps all that was to be expected. There is not a word of proof that there was any secret understanding or any reservation, or that the deed of gift was not in reality what it bears to be."

There was very little parole evidence, and the "chief part of the proof is the writ of Allan" (the husband). The case highlights the predicament of proof in which the aggrieved widow would find herself should her husband choose this drastic course of action so to disinherit her. "On the one side of that question" (that is, whether the documents truly expressed the testator's intention) "are the deeds themselves and the evidence of Stark. On the other side there is not a syllable of evidence to suggest any simulation or reservation or secret understanding. There is nothing but the inherent improbability of the alleged transaction, and the suspicion and surmises which that necessarily and legitimately raises." His Lordship felt that neither the sister-in-law nor the husband's law agent were being less than truthful in their evidence, "and on the whole I have come to the conclusion that I have no warrant for adding on mere conjectural grounds any qualification to the deed of gift and must sustain it as made in bona fides, and as absolute and irrevocable." Thus, the evidence of the deed itself together with the credibility factor, defeated the wife's allegations.

Conjecture as to the husband's intentions, therefore, will /

will not be of any avail, in the absence of proof that his actions were insufficient to achieve his intentions. As long as the husband does not falter in his resolve, and puts his property entirely from him, he may legitimately achieve the object of disinheriting his wife, which object is thus, strangely (for the provisions of the law are generally in favour of the participation by the surviving spouse in the estate of the predeceaser) itself endowed with legitimacy, and is one which he (or she) can declare quite openly. L. Kincairney's sentence may be repeated - "A man cannot be held to act fraudulently who does openly what he has a right to do." However, he must not stay his hand:- "The real question is not what was done in form, but what was intended in substance; the mere form must yield to the actual purpose."[1]

At present, however, although it is true to say that a spouse must not stay his hand in alienating property if he wishes to defeat his wife's rights therein, it is nevertheless possible for him to enjoy the liferent while ensuring that the fee was destined to some third party, thus achieving, expressly or by implication, the object of removing his wife's ius relictae therein.[2] Such exercises do run the risk of reduction on the ground of what might be called incomplete alienation. (See per L. Eldon in Lashley v. Hog (quoted by Walton at p.241):- "The receipt of the profits during the life of the person is evidence of the ownership of that person in the subject matter which produces the profits."). Moreover /

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1. per L.J.Cl.Monorieff in Buchanan (1876) 3 R.556, at 559, quoted in Green's Encycl. v. "Legitim", vol.8, p.28.
2. Collie v. Pirie's Trs. (1851) 13 D.506: Scott v. S. 1930 S.C. 903.

Moreover, Clive and Wilson make mention[1] of the case of Hutton's Trs. v. H.'s Trs.[2] which suggests that, not only does the "liferent exception " exist, but also that a deed need not be irrevocable, but perhaps need only be revocable but unrevoked at the granter's death, in order effectively to exclude the rights of the family in the property which is the subject thereof - "a startling loophole in the law". Scots law may provide a bar to capricious disinheritance, by mortis causa deed, but, at present, at least, it allows remarkable freedom inter vivos.

B. Ius Relicti

Ius Relictae is a common law right of long standing; Ius Relicti, the equivalent right of widowers, is statutory, having been introduced by M.W.P. (Sc.) Act, 1881 (44 and 45 Vict.c.21) s.6 - and is said[3] to be "co-equal and co-extensive" with ius relictae.[4]

Indeed, the two rights are subject to the same rules and conditions, and what has been said (in A) above with regard to ius relictae applies equally to ius relicti. The same principles apply, mutatis multandis. Clive and Wilson, for the sake of neater terminology have adopted the comprehensive term "relict's right", to describe both rights.

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1. p.715; and see generally "Attempts to defeat relict's right", pp.714-716. See also Walton, "Deeds in Fraud of Ius Relictae", pp.239-241.
2. 1916 S.C.860.
3. Walton, p.236.
4. s.6 gave a corresponding share or interest to a widower in his wife's moveable estate if she died domiciled in Scotland as had existed for the widow in her husband's moveable estate, "subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge or satisfaction thereof, as the case may be."

The widower, therefore, is entitled to one-half or one-third, as the case may be, of his wife's moveable estate upon her death, and, of importance formerly though not now, this right arose whether the marriage had taken place before or after the Act and whether the wife's moveable estate had been acquired before or after the Act.[1] Professor T.B. Smith comments that in his view the granting to a husband of this indefeasible right in his wife's estate was a corollary of the removal, by the same Act, of his ius mariti in her estate inter vivos. Similarly, by 2.7, the right of children to legitim, exigible at common law in their father's estate, was extended by the statute to their mother's estate. Moreover, where the ius mariti had been excluded, before the coming into operation of the Act, by ante-nuptial marriage-contract, the husband, it was held, was still entitled to the appropriate fraction (⅓ or ½) of the wife's moveable property, provided that it was her property at her death.[2] One difference between the two rights, which has been noted in another context, is that, before 1964, while a claim to ius relictae arose upon the grant of a divorce to an 'innocent' wife, a claim to ius relicti by a pursuer husband did not. (Green's Encyclopaedia v. 'Ius Relictae Ius Relicti', p.258, considers that this result was not intended by the legislature at the time of the passing of the 1881 Act.)

Contracting-Out, by Marriage Contract, of Legal Rights

Contracting-out of ius relicti by means of marriage-contract provision appears to be sanctioned by /

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1. See Patersons v. Poe (1883) 10 R. (H.L.) 73.
2. Fotheringham (1889) 16 R.873: Simons' Trs. (1890) 18 R.135.

by M.M.P. (Sc.) Act, 1861, s.8[1].

In Buntine, Lord Nolsran said[2]:- "It appears to me that in the event which has happened Mrs. B.'s moveable estate is destined to her heirs in mobilibus, and as this destination is contained in an antenuptial contract to which the husband is a consenting party, Mr. B. cannot claim his jus relicti consistently with his antenuptial obligation. The Married Women's Property Act, 1881, reserves entire the effect of marriage-contracts, and independently of that provision I should have assumed that marriage-contract obligations were not intended to be rescinded by the Act of Parliament."

Where rights of succession are matters of contract between the parties to the marriage, we come very close to the device of the survivorship destination in heritage owned by both spouses, and, indeed to the phenomenon of the mutual will.

It will be usual for the terms of a marriage-contract to make clear the exact powers of the spouses in /

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1. See Buntine v. B.'s Trs. (1891) 21 R.714, in which, though the fact that the marriage occurred before the 1881 Act did NOT exclude the husband's claim to jus relicti, his claim thereto was refused, because the claim was inconsistent with the terms of the marriage-contract. Section 8 says that the right provided by the Act "shall not affect any contracts made or to be made between married persons before or during marriage", and the effect of the section in that case is set out most clearly by the L.P. (Robertson) at p.720. In the circumstances, the wife was entitled to rely on her succession in intestacy being governed by the terms of her marriage-contract. Could her husband have impugned the will if she had died testate, he having previously agreed to the terms of the contract? The Lord President thought not.
2. at p.722. See also per L. Kinnear, at pp.722/3. And see Murray's Trs. v. M. (1901) 3 F.820.

in relation to the property which is the subject thereof. The difficulty is that the marriage-contract terms, if sufficiently comprehensive, may avoid the creation of an intestacy if there be no will, since certain of the terms thereof may be testamentary in character, and thus may exclude the operation of prior rights also. The terms may also exclude, expressly or by implication, ius relictae and ius relicti. Thus, if that is a conclusion correctly argued, the spouses must be cautious in the drafting of the contract, especially in its quasi-testamentary terms. Children are protected, since by s.12 of the 1964 Act, their right to legitim cannot be excluded except by their own acceptance of the exclusion.

Obviously, the earlier discussion of the topic of election between legal rights and conventional provisions, and legal rights and testamentary provisions - especially if conventional provisions may, on occasion, be regarded as testamentary in nature, to the extent of allowing the presumption provided by s.13 of the 1964 Act to operate - is pertinent here.

Can the parties, by marriage-contract, create what are in effect new creatures unknown to the law - indefeasible testamentary settlements? Their Lordships, in Buntine, came to the following conclusion[1]:-

"If the settled estate remains the property of the settlor because there is no contract to dispose of it otherwise, it will be subject to all the claims which by the operation of law affect such property; but if one spouse has engaged by contract that the other shall have the absolute disposal of his or her estate in a certain event, it is irreconcilable with the /

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1. at p.830.

the contract, that the former should carry off half of the estate to the disappointment of the will of the other."

This comes very near the position that there may be a species of will (sub.nom. "marriage-contract") the provisions of which are indefeasible. This conclusion stems from the unobjectionable thought that parties may exclude the operation of the legal rights of ius relicti and ius relictae in exchange for a consideration with which they both profess to be satisfied. Perhaps it is as well that the full potential of marriage-contracts is rarely explored: if, however, they come back into vogue, their potential advantages would quickly be discovered, and would be put to the test in litigation. Thus, if radical changes are to be made in the rules governing matrimonial property, the role of marriage-contracts, as a means of contracting-out of provisions otherwise applicable, will require examination.[1]

C. Legitim

Legitim ("legitima portio", bairn's part of gear)[2] is the right of a child, or children, to ½ or ⅓, as the case may be, of his deceased parent's moveable estate. His right will always be to ½ of the free moveable estate of his surviving parent, unless the latter has remarried. It has never been the case that children have had a right of any description in their parents' heritage.

While there had always been representation of a predeceasing child's right to dead's part (q.v.), until the 1964 Act, s.11, there was no such representation /

1. See generally Chapter 7.
2. See, generally, Ersk.III, 9.22.

representation in legitim, though, if a child survived his parent but died before making an election between testamentary provisions and legal rights, his executors might make that election on his behalf. One of the changes effected by the Succession Act in the matter of legal rights, however, is that by s.11(1) representation now operates in legitim.

Legitim also can be discharged prospectively by the child who would otherwise be entitled thereto in the same way as a spouse may discharge his/her ius relicti(ae), but, since the 1964 Act, s.12, that end may no longer be achie ed ante-nuptially by the prospective parents' wishes alone.

The onus is upon illegitimate children to present themselves and to claim legitim, not upon the executor to seek them out, which would be an impossible and embarrassing task. (L.R.(Miscell. Provs.)(Sc.) Act, 1968, s.7). The distribution of the estate may go ahead: the illegitimate person is not barred from attempting to prove his claim to legitim, and thereafter from recovering property from those persons in possession of it. Under s.11 of the 1968 Act, a decree against a party in proceedings for affiliation and aliment will be sufficient to prove the claimant's case, unless there is strong evidence to rebut the court's findings, and, of course, it may be that the executor will accept less in the way of proof. Similarly, the 1964 Act, s.24(2) throws the onus of claiming legitim upon an adopted person, rather than throwing upon the executor the onus of finding the party so entitled.[1]

While /

1. See generally 1964 Act, s.4, 5 and 6, 10A and 11, with regard to illegitimate children, and Part IV, 1964 Act, s.23 and 24, with regard to adopted children.

While the policy of the Act was, among other matters, the equalisation of the rights of adopted children with those of natural children (1964 Act, s.23(1)), the attitude towards the illegitimate was not quite so generous. As between parent/child and child/parent succession, illegitimacy is, by virtue of the 1964 Act, s.4(1) and (2), an irrelevance, but, as has been noted, there is no representation in the illegitimate relationship (s.4(4), 5 and 11) whereas the benefit of representation is open to adopted children (s.23(1): "For all purposes relating to - (a) the succession of a deceased person (whether testate or intestate), -..an adopted person shall be treated as the child of the adopter and not as the child of any other person." Adopted children, by implication therefore rather than by explicit provision, are to be regarded as having the right of representation, since they are to be treated as the lawful issue of the adopting parents, which means that they qualify as "issue" in terms of the interpretation section (s.36(1)) which in turn means that the provisions of s.5 and s.11 extend to them.)

An illegitimate child, now but not formerly (new s.10A of 1964 Act) is entitled to legitim and to participate in the distribution of dead's part. A posthumous child, according to the old case of Jervey[1] is entitled to legitim[2]. The cost of the birth of a posthumous child MAY be held to be a legitimate debt of the estate of the father[3].

Legitim may be claimed from the estate of each parent /

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1. 1762, M.8170.
2. but cf. Elliott v. Joicey 1935 S.C. (H.L.) 57, and see Meston, p.21 The Succession Act is not specific on this point.
3. Ersk. I, 6.41.

parent, on the death of each[1] but is postponed, where there is intestacy or partial intestacy, to the surviving spouse's prior rights[2]; the traditional legal rights of ius relictae and ius relicti are also to be taken from the estate after satisfaction of prior rights, but of course the claimant is the same person in each case. As with the relict's right, the child(ren) may not claim any particular item or part of the estate for the satisfaction of legitim.

If the amount available for legitim is insufficient to supply the children's needs, the free estate may be called upon to make up the deficiency[3] and so legitim and the relict's right are treated in the same way in this respect.

D. Dead's Part

This category comprises ⅓ or ½, or the whole as the case may be, of the net (i.e. after debts paid) moveable estate, depending upon whether the deceased has died survived by widow and children, or either, or neither. In intestacy, it forms that part of the estate which does not comprise a section of the fund from which statutory prior rights, and legal rights, will be drawn. It has been seen that discharges of legal rights by a spouse after the death of the other spouse fall to dead's part, as do discharges of legitim by /

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1. Another aspect of the equal-handed attitude which produced the 1881 Act is that, before it came into operation, only the father's estate was held to be the fund subject to legitim. This was altered to include the estates of both parents, by s.7. Prior to the 1881 Act, of course, most of the wife's estate would have passed iure mariti, to the husband.
2. 1964 Act, s.10(2).
3. Walker, Prins.II, 1903, citing Urquhart's Exrs. v. Abbott (1899) 1 F.1149.

by children after the death of the parent.[1] Inter vivos discharges by a spouse will mean that his/her share does not vest in him/her, that his/her existence will be ignored, and the whole estate will be dead's part, if there are no children. If there are children, there will be a bipartite division of the estate and thus the spouse's renunciation will have the effect of carrying half of his/her putative share to the legitim fund, and half to dead's part, benefiting both. See Clive & Wilson, pp.705-707.

In testacy, dead's part is the only part of the estate which cannot be sought for the satisfaction of legal rights.

Hence, it is the only part of the estate (with the exception of heritage) over which a testator has complete freedom to test, and in respect of which he can feel confident that his wishes, as expressed testamentarily, will be entirely, or as nearly as possible, observed.

It used to be that the executor had an interest in dead's part, but it is provided by The Intestate Moveable Succession (Sc.) Act, 1855 (18 and 19 Vict. c.23), s.8, that:- "So much of an Act of the Parliament of Scotland passed in the Year One thousand six hundred and seventeen, and intituled Anent Executors, as allows Executors nominate to retain to their own Use a Third of the Dead's Part in accounting for the Moveable Estate of the Deceased, is hereby repealed, and Executors nominate shall, as such, have no Right to any Part of the Said Estate."

The order in intestacy of succession to dead's part is now contained in the Succession (Sc.) Act, 1964, s.2. The order of succession in testacy to dead's part is entirely the testator's concern.

Pre /

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1. Fisher v. Dixon (1840) 2 D.1121.

Pre-1964 Statutory Prior Rights

Intestate Husband's Estate (Sc.) Acts, 1911-1959

The concept that it was right for a spouse to have certain indefeasible rights in the intestate estate, which ranked first on the net estate (after the claims of ordinary creditors) before any claims to legal rights, was recognised first in the Intestate Husband's Estate (Sc.) Act, 1911[1], by s.1 of which the widow of a man who died childless[2], domiciled in Scotland and intestate became entitled to his whole estate in terms of the Act if the estate did not exceed £500. Where his estate exceeded that sum, she was entitled to £500 thereof, with interest at 4% from the date of the husband's death to the date of payment, the burden of payment being laid upon the heritable and moveable parts of the estate according to the proportionate value each part bore to the whole. She retained her right to terce and ius relictae out of the balance remaining, and for the purposes of those legal rights and the legitim of any children, the balance remaining was deemed to be the whole intestate estate.

From the interesting English case of Re Heath[3] it appears from this decision that the material date for ascertainment of the value of the husband's estate, for the purpose of determining whether it was below, or whether it exceeded, £500, was the date of his death. Thus, a right which appeared to be /

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1. 1 and 2 Geo.V, c.10.
2. note: it was necessary that the deceased should leave no lawful issue - Grant v. Munro 1916 1 S.L.T. 338; Professor Walker Prins.II, 1895, comments that, in spite of the subsequent passing of the Legitimacy Act, 1926, the presence of illegitimate issue did not prejudice the widow's claim, and cites the case of Osman v. Campbell 1946 S.C.204.
3. [1907] 2 Ch.270.

be of little value at that date, but which subsequently became of much greater worth, did NOT have the retrospective effect of changing the estate from a "below-£500" estate to an "above-£500" estate. If the estate, valued at date of death, had been less than £500, it was the widow's good fortune that an item of that estate had become worth a great deal more than its original estimated value, and had raised the value of the whole estate to much more than £500.

Provisions for the valuation of the net moveable estate are contained in s.6, and for the valuation of the heritable estate in s.5. The latter provision was repealed by the Intestate Husband's Estate (Sc.) Act, 1919, s.5[1] and the provisions of the 1919 Act thereafter governed that matter.

The Act of 1919 laid down the procedure by which the widow was to realise the rights provided for her by the 1911 Act. Briefly, this involved application to the Sheriff of the country in which her husband had died domiciled or in Edinburgh Sheriff Court if there was any doubt upon that point: by the Conveyancing Amendment (Sc.) Act, 1938, s.10[2] any person deriving right from a widow might make use of the 1919 Act procedure, by presenting a summary application to the Sheriff - and the Law Reform (Miscellaneous Provisions) (Sc.) Act, 1940[3], extended the benefit of these provisions to husbands (though no difference was made in the title of the amending Act of 1959) and to cases of partial intestacy. (by ss.5(1) and 5(2) respectively.)

It remained necessary in all cases that the deceased /

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1. 9 Geo.V.c.9.
2. 1 and 2 Geo. VI, c.24.
3. 3 and 4 Geo. VI, c.42.

deceased spouse should have died leaving no lawful issue. Where there was a partial intestacy, the provisions of the previous Acts applied to that part of the estate which had fallen into intestacy, but there were special provisions to take account of benefit to a spouse in the form of a legacy bequeathed to him or her by the deceased.

By s.5(2)(9), it was provided that where the survivor received a legacy from the deceased's estate, he/she was entitled only to such sum, if any, as remained after deducting from £500 the amount or value of such legacy. According to the pre-existing rules, of course, the survivor would not be entitled to more than £500, even if the intestate part of the estate exceeded that sum. If the intestate part, however, was £200, and the legacy was £50, it seems unlikely that the Parliamentary intention was that the survivor should have £450, since that amount, in the example envisaged, was not available. Presumably, the intention was that the legacy be deducted from the sum of £500, or from the value of the intestate section of the estate, whichever was the less.

By s.5(2)(b), a provision concerning the deduction of debts, expenses, liabilities or charges was to be construed as a provision relating to the deduction of such proportion thereof as was properly chargeable against that (intestate) part of the estate.

It was clear from the terms of the 1911 Act (s.1 of which read, "The heritable and moveable estate of every man who shall die intestate, domiciled in Scotland, after the passing of the Act, leaving a widow but no lawful issue, shall, in all cases where the net value of such heritable and moveable estate, taken together, shall not exceed five hundred pounds, belong /

belong to his widow absolutely and exclusively") that if the whole net value of the estate was £500 or less, the widow's claim to the heritage comprised therein would triumph over the claim of the party who would otherwise, according to the rules of intestate heritable succession, have been the heir-at-law. There was of course the requirement of intestacy (or, after 1940, partial intestacy), and presumably part of the purpose of the necessity that the deceased should have died without lawful issue was that the eldest son should not be ousted from the heritage which was regarded as rightfully his, rather than rightfully his mother's. Where the estate exceeded £500, the heir-at-law and the representatives of the moveable estate were to bear, according to s.3 of the 1911 Act, the £500 entitlement of the widow in proportion to the net values which the heritable and moveable estate bore to the whole. In that case, the widow was entitled, it would seem, only to the cash surrogatum.

Could she insist upon the transfer to her of a house valued at £200, if to do so would be to place an unequal or disproportionate share of the burden of satisfaction of the widow's statutory right upon the heir-at-law, who might himself not be satisfied with a cash payment of the required amount to achieve an equalisation, from the heirs <u>in mobilibus</u>? (If he were willing to sell the house, the answer would seem to be that the widow purchase it from him at the price of £200, being part of her £500 cash entitlement contributed rateably by the heir-at-law and the heirs <u>in mobilibus</u>.) It seems unlikely that, in terms of the 1911 Act, she would be able to insist upon transfer to her of the house.

The Intestate Husband's Estate (Sc.) Act, 1959, raised /

raised the financial limit of entitlement from £500 to £5,000, which would often result in the widow taking the whole estate, including the matrimonial home, provided of course that the deceased left no lawful issue. (The Hankinson Committee recommended that if an intestate was survived by a spouse and issue, the surviving spouse should take the furniture and plenishings absolutely, and should also have a preferential claim to £1,000 free of death duties. If there were no children, the surviving spouse should have a preferential claim to £5,000 free of death duties. Legal rights would then be ascribed from the remainder of the estate, and presumably what was then undisposed of would devolve according to the rules of heritable and moveable intestate succession.)

It is interesting, from a sociological viewpoint, that, in discussing the pre-1964 law, it is assumed so frequently that the matrimonial home will be in the husband's power of bequest, or that the title thereto will stand in his name, and hence form part of his estate on intestacy. Latterly, it has become much more common for the title to heritage to be taken in the joint names of husband and wife with a destination "to the survivor". The consideration of this phenomenon (and whether it should become a standard practice or whether such a rule is unjustifiably dictatorial, leaving no room for individual discretion and decision), and of its significance in terms of the parties' contractual and testamentary freedom thereafter is crucial to any modern discussion of our rules of matrimonial property, and must be taken into account in the promulgation of any changes in our present system[1].

These statutory prior rights, like their successors of /

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1. See infra, and see generally Chapter 7.

of the 1964 Act, did not prevail against a will, whereas legal rights did and do prevail against a will, if those in right of them so wish. The prior rights of the 1964 Act are more extensive, but apply, as did their predecessors, only in intestacy or partial intestacy. The new rights arise whether or not there is surviving issue, legitimate or illegitimate. The new prior rights also rank before claims to legal rights. (1964 Act, s.10(2)).

In the case of deaths occurring on or after 10th September, 1964, the above-mentioned statutory prior rights have been superseded by the new prior rights contained in the Succession (Sc.) Act, 1964, s.8 and 9. By s.9(5) of the 1964 Act, the rights conferred on the surviving spouse by the Acts 1911-1959, are no longer exigible.

Mutual Wills

The mutual will is a document of a (principally) testamentary nature made by two or more persons with the aim of governing the succession to their separate estates[1] usually to the survivor of them, or to the survivor and others, or upon similar, perhaps more complex lines. They were competent before 1964, and are competent still, but examples are usually of early date, since it may be said that they have proved their troublesome qualities.

It is obvious that the scope for error, and/or doubt as to intention, increases with every co-testator.

One of the principal difficulties is the question whether the deed, once executed, can be revoked by all or any of the co-testators. The answer depends largely on the nature of the deed. If, in essence, it /

1. Cf. Craich's Trs. v. Mackie (1870) 8 Macph.878.

it represents two or more separate wills, which for convenience have been incorporated into one deed, then each testator retains for himself that important quality or characteristic of the power to vest - the power to revoke. In that case, each may revoke the bequest of his own will, without taking account of the intervening death(s) of the other(s), except that, if there has been intervening death(s), and if that (those) death(s) has carried property to the testator first mentioned, he may dispose of that property also under a scheme completely different perhaps from that which he originally contemplated[1].

If, however, the deed has a certain contractual character, then the co-testators may lose the power to give effect to a change of mind, a power which normally is pure testamentia, because a third party mentioned in the will is destined to take, perhaps, the fee of the estate (or joint estates) upon the death of the survivor of the co-testators, or to take a portion of the estate as a legacy bequeathed to him by the predeceasing co-testator to take effect upon the death of the surviving co-testator, has acquired a jus quaesitum tertio thereunder. In that case, neither or none of the co-testators has power to revoke[2]. Lorrie's Exec. v. Hall 1915 S.C.1159 (particularly per L.P.Dunedin at p.1161): "There are certain general presumptions that can always be appealed to in determining this point. For example it is presumed that provisions in favour of the other party to the settlement are contractual; it is also presumed that provisions in favour of the issue of the marriage between /

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1. U.F.Church v. Black 1909 S.C.25; Gardoch's Trs. v. G.'s Exrs. 1917 S.C.404. See Walker Prins., II, 1961.
2. eg., e.g. Bathie v. Keir's Exec. 1930 S.C. 645; Johnstone's Trs. v. J.'s Trs. (1907) 15 S.L.T. 382.

between the parties are contractual. On the other hand it is presumed that, where the objects of the testator's bounty are other than the parties to the deed or the children of the marriage between these parties, the provisions are testamentary. It is also presumed that persons want freedom with regard to the disposal of their own property, whatever may happen with regard to the property got from the other party. All these presumptions, however, must yield to indications in the deed that something else was intended." His Lordship referred to McLaren,Wills i. p.423, U.F.Church of Scotland v. Black, and Corrance's Trs. v. Glen, per L. Kyllachy. In the case of Hanlon's Exec. v. Baird 1945 S.L.T. 304, the presumption that provisions in favour of spouse and children were contractual was overcome by the terms of the deed in question, which carried the estate to the survivor as an outright gift, entitling the surviving wife to make a valid will excluding the child from all benefit thereof.

These few sentences represent a simplistic general statement. A great deal will depend upon the construction of the particular will, and these deeds are notorious for their complexity and difficulty of interpretation. It can be said that there is a presumption in favour of freedom, and hence of revocability, but that is a broad and may be a misleading statement; it applies with especial force during the joint lives of the co-testators[1], and upon the death of one, to provisions in favour of third parties as opposed to those in favour of spouse and/or children. In the more skilfully drawn mutual wills, the important question of revocability (by whom and in what circumstances /

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1. See the case of Saxby v. S.'s Execs. 1952 S.C. 352, where the co-testators were husband and wife. Revocation quoad her own property by the wife stante matrimonio was held competent and in accordance with the non-contractual nature of the mutual will.

circumstances and when) would be dealt with exhaustively. (See L.P. Dunedin's comments in U.F. Church of Scotland v. Black 1909 S.C.25 at p.31, upon the drafting of the clause of reservation of power to revoke: "I do not say that it is a bungled clause, but ....".)

On the other hand, if a question of power to revoke arises during the lifetime of the spouses, the presumption is the other way and is to the effect that, stante matrimonio, the document is testamentary in nature, not contractual, and that either spouse is free to revoke the prior mutual will so far as it concerns his/her own property, by means of a subsequent independent will. This point is illustrated in the case of Saxby v. S. 1952 S.C. 352, which concerned a South African mutual will.

L.P.Cooper at p.354 noted the difference between this question and that which more commonly arises, and which has been discussed in the three cases previously studied, in all of which, whatever the result of the construction of the terms of the particular deed, the general presumption of contractuality where provisions in favour of the surviving spouse and children were concerned, was upheld.

His Lordship said, "We are not concerned in this case with the all too familiar question whether the survivor of two persons who have executed a mutual will is or is not free to execute a settlement innovating upon the terms of the mutual settlement. The question before us might have been raised in the lifetime of both the spouses, and in essence that question is whether in 1913 these two parties, by entering into the South African will, each precluded himself or herself from ever making a further testamentary disposition of his or her own estate without the consent of the other." He /

He thought it significant that the point did not appear to have been raised before, despite "the extreme fertility of the mutual will in producing litigation" and commented, "It is well to recall that, after the death of the predeceaser of two persons who have executed a mutual will, matters are no longer entire, the fact of the death having itself introduced an element of irrevocability. And if, as usually happens, the survivor has benefited under the mutual will, powerful equitable considerations may come into play to prevent the survivor from going back on a bargain - cf. Stone v. Hoskins 1905 P.194. While both parties are still alive, no such point arises."

Thus, the conjugal relationship has no effect upon inter vivos, stante matrimonio capacity to revoke; it is only after the death of the predeceaser, that the presumption in favour of the contractual and irrevocable quality of provisions in favour of the survivor and the issue arises.

It is clear that the device of the mutual will could hold a key place in a matrimonial scheme, generally or in an individual case, although in the main its grave disadvantages have meant that it has been shunned as a means of regulating matters concerning matrimonial property.

It seems that, in contrast with the bias towards revocability where a non-family settlement is being discussed, the court may lean more towards the view that the provisions for spouse and children are irrevocable. If that view were adhered to in the majority of those cases, then, the mutual will and the marriage-contract, some of the provisions of which are to take effect on death, approach each other, and come very close.

It /

It is hoped that mutual testamentary settlements will not enjoy a revival of popularity. Their nuisance value in the past has been notorious, and has quite outweighed any possibly advantages which they might possess. Although at first sight they might present an attractive appearance for those reformers, be they in Parliament or individuals within their own marriage, who wish to regulate matters of matrimonial property in greater detail, the cases cited are a tiny proportion of those wills which have been found fruitful of litigation, and it is thought that few practitioners would recommend their use.

Much the same end is achieved with more clarity and less opportunity for problems to arise, by the contemporaneous making of seperate wills in similar terms by husband and wife, and this is the practice most commonly adopted at present by the happily married - although it is true that sometimes these wills do not take account of other destinations of property by the same persons, with testamentary effect, such as a survivorship destination in the disposition of the matrimonial home[1]. Despite the existence of prior and legal rights, those anxious to disinherit their spouses will find a way to minimise the amount to which the survivor succeeds.

In the future, however, there may be radical reforms upon the subject of joint title to the matrimonial home, and to some at least of the matrimonial assets, and the result may be, as between spouses, a restricted power to test and perhaps even a restricted power of alienation of "family property" inter vivos. Accordingly, wills by husbands and wives may take a different form, but it is hoped that they /

1. see infra.

they will not revert to the device of the mutual will. The latter, in fact, might lose any doubtful utility which it possesses at present, as a consequence of greater control and regulation of "family property".

B. After 1964

Intestate Succession

Introductory

The Succession (Sc.) Act, 1964 came into effect on 10th September, 1964, to regulate the succession to the estates of those persons dying intestate after the commencement of the Act.[1]

Generally speaking, one of the main aims and achievements thereof was the assimilation of the rules governing the treatment, by the rules of (intestate) succession, of heritable and moveable property, though some of the differences in treatment remain. Another was the equalisation of treatment of the sexes. Apart from the special entitlement to prior and legal rights, a new system of intestate succession was introduced by s.2, to dead's part (or "intestate estate" therein defined), which adopted the principle, applicable previously only in relation to the intestate succession to moveables, that the succession opened to all the members of a particular class, regardless of sex or age, and, further, a new extension of a principle barely before accepted, that relations through the mother were to be recognised as having an equal claim, in /

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1. The provisions of the Act touch testate succession at certain points in addition to certain miscellaneous matters. It has been seen (Chapter 5(1)) that it introduced important changes in the law governing the financial consequences on divorce. (1964 Act, Part V - s.25-27: see now Divorce (Sc.) Act, 1976.

in an appropriate case, with those who were related to the deceased through the father.

For example, those of the half-blood uterine were equated as claimants with those of the half-blood consanguinean in a succession, but members of either, and both, category(ies) are ousted by the presence of collaterals of the full blood[1].

The new Family Provisions

The Act extended the idea of the system of prior rights of a surviving spouse, which had been introduced by the Intestate Husband's Estate (Sc.) Act, 1911-1959 (the operation of which was excluded thereafter by the 1964 Act, s.9(5)), but which had applied only where the deceased died without issue, retained the system of legal rights while abolishing the legal liferents of terce and courtesy, and altered and clarified the order of those entitled to succeed to dead's part, which part of the estate should thenceforward consist not only of moveables but also of heritage undisposed of under the claim to the prior right to the house.

These provisions apply in cases of intestacy and of partial intestacy (s.36(1)), but they do not ever apply to testate succession. A will cannot be set aside by an aggrieved spouse with the aim of taking prior rights in lieu of the provisions thereof. Only out of the 'intestate estate' (such as is undisposed of by testamentary disposition - s.36(1)) are prior rights exigible. Thus, in total intestacy, the ascertainment of available funds is not complicated: in partial intestacy, the prior rights are exigible from that part of the estate for which the testator has /

1. 1964 Act, s.3.

has neglected to make provision, or where his provisions have become of no effect through the predecease of legatee(s) or other circumstances, (e.g. failure of a legacy from uncertainty) and the matter may be complicated by the necessity, imposed by the proviso to s.9(1)[1] to deduct from the surviving spouse's prior right entitlement to cash, the amount of any unrenounced legacy(ies) bequeathed to the surviving spouse in terms of the will of the deceased spouse.

The Act improves greatly the position of the surviving spouse[2] - but not where the survivor has killed the predeceaser. In the case of Smith, Petitioner,[3] the widow had been convicted in Northern Ireland of culpably killing her husband, and had been sentenced to 18 months' imprisonment, suspended for two years. The sentence suggested that some strong mitigating factor must have been present, but the Sheriff (Neil Macvicar, Q.C.) agreed with English reasoning concerning 'sentimental speculation' as to the motives of one justly convicted: "I am of opinion that the rule is absolute in cases where there has been a conviction for murder, manslaughter or culpable homicide."[4] Accordingly, the widow might not succeed to any part of the estate and therefore had no claim to be appointed executrix-dative, and this resting not upon any particular authority in Scotland (though there are many clear English cases) but rather on the general principle ex turpi causa non oritur actio, on considerations of public policy, equity and morality.

I. /

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1. see infra.
2. sometimes subject to qualification (e.g. in the case of s.8 - house and furnishing) that the survivor (though not necessarily the deceased) was ordinarily resident in the house at the date of death of the intestate.
3. 1979 S.L.T. (Sh.Ct.) 35.
4. at p.36.

I Prior Rights

A. The House

The new system supersedes the system in operation under the 1911-1959 Acts, and secures for the surviving spouse, under s.8(1), a right to the ownership or tenancy of any (one) house of which the deceased spouse was, at the time of his death, the owner or the tenant, and in which the surviving spouse (but not necessarily the deceased spouse, who perhaps might have been resident in a hospital or geriatric home, or who might have been living apart from the other by reason of separation, judicial or non-judicial[1]) had been ordinarily resident at the time of the deceased's death. (s.8(4)).

It is imperative for the operation of the right that the deceased shall have died intestate, or, if partially intestate, that the dwellinghouse forms part of the intestate estate. In the same way, the other prior rights (to the furniture and plenishings - s.8(3) - and to the monetary sum - s.9) are exigible only out of the intestate estate.

The right to the house is a most welcome innovation in the law. Though there is still ample opportunity for wives to be deprived of the matrimonial home through the title being held *stante matrimonio* in the husband's name alone, and then disposed of by testamentary disposition by him (or through alienation of heritage *inter vivos* by the husband, although it is true that the husband's obligation to aliment (q.v. Chapter 4) his wife will normally secure for her a roof of some sort over her head and one whether owned or rented /

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1. but as to *acquirenda* of wives holding decree of judicial separation, see Conjugal Rights (Sc.) Amendment Act, 1861, s.6: supra. See also S.L.C. Consultative Memo. No. 54, 5.1-5.5.

rented, reasonably in keeping with their standard of life), the provisions contained in s.8 at least ensure that the surviving wife will retain her home where, the title not standing in her name, her husband has not been sufficiently far-sighted to make a will and where otherwise, but for the 1964 Act, the house would have passed to a son, or a brother or some other male relation.[1] The strong disinclination to make a will remains, but there is a growing trend towards 'joint' ownership of the matrimonial home by husband and wife[2].

Prior rights are for the deceased's surviving spouse only, and not for his issue also, and they are exigible only out of the deceased's intestate estate, which is defined by s.36(1) as "so much of his estate as is undisposed of by testamentary disposition."

In addition, there is an upper monetary limit upon the right to the dwellinghouse. When the Act came into force, that upper limit was set at £15,000, but, such as has been the rate of inflation in the housing and other markets, that, by the Succession (Sc.) Act, 1973, s.1(1)(9), the limit was raised to £30,000 in the case of the estates of all persons dying on or after 23/5/73, and further increases may be made by order of the Secretary of State.[3] It is important that the figure should be kept abreast of inflation, although it is true that the owners of heritage (and/or moveables) of considerable value are wont to ensure for many reasons that they do not die intestate.

If /

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1. The right is subject to provisos - s.8(2)(a) or (b) - as afterwards described.
2. see consideration of whether 'joint' ownership is the true nature of this arrangement, and the consequences thereof infra.
3. From 1.8.81. the sums are (Prior Rights of Surviving Spouse) (Sc.) Order, 1981 (No.806):- S.8(1)(a) and (b)(house) - £50,000; S.8.(3)(a) and (b)(furniture) - £10,000; S.9.(1)(a) (cash) - £15,000 and S.9 (1)(b)(cash) - £25,000. All limits now variable by S.1. subject to negative resolution (L.R.(M.P.)(Sc.) Act, 1980, S.4.)

If the value of the house exceeds £50,000, the surviving spouse of the intestate is entitled to the sum of £50,000 - s.8(1)(b). Even if the value does not exceed that sum, the surviving spouse is not in every case entitled to the transfer of the house itself. He/she may be required to accept a sum equivalent to its value if the circumstances correspond with any of those set out by s.8(2).

These exceptions arise where (s.8(2)(9)) "the dwelling house forms part only of the subjects comprised in one tenancy or lease under which the intestate was the tenant"[1]; and (s.8(2)(b)) where "the dwelling house forms the whole or part of subjects an interest in which is comprised in the intestate estate and which were used by the intestate for carrying on a trade, profession or occupation, and the value of the estate as a whole would be likely to be substantially diminished if the dwelling house were disposed of otherwise than with the assets of the trade, profession, or occupation" (the aim being to secure the most advantageous disposal possible of the assets of the estate: the most common examples would be those of the doctor's/dentist's/veterinary surgeon's house-cum-surgery, or the farmhouse, though in the latter case, only if the widow was unwilling or unable to continue farming the land, presumably. Succession to agricultural land is a separate and highly complex subject, however, which cannot be treated /

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1. and where accordingly, "the landlord could not reasonably be required to grant a separate lease of that flat to the surviving spouse", Meston, p.31. The provision does not apply to the tenancy of one flat in a block, the remaining flats of which are leased to others, still less to the ownership of one flat in a block. Meston, ibid. In any case, s.8(2)(a) is concerned with tenancies only.

treated here[1]. In any of these cases, though, if the whole household and business unit was tenanted, Professor /

1. See 1964 Act, s.20(1) and (2), s.15, and Sched. 2; Heaton, pp.88-89;
Paton and Cameron, The Law of Landlord and Tenant in Scotland, 1st edn., Chapter XI, "Succession", passim (upon the general rules of succession to leases) and Chapter XVIII, "The Agricultural Holdings Acts" at pp.356-359, "Succession to Lease" (having reference to the agricultural lease.)
By the substituted s.20(1) of the Agricultural Holdings (Sc.) Act, 1949 (effected by 1964 Act, Sched.2, para.19), the tenant may bequeath his lease to his son-in-law or daughter-in-law, or to any person who would be entitled to succeed to the estate on intestacy under the 1964 Act, a class which would include the surviving spouse, and the authors note that the widow was accepted as a suitable successor in the case of Irving v. Church of Scotland General Trustees (1960) 48 R.C.L.R.16. In the case envisaged, however, the deceased would have died leaving the interest under the lease undisposed of, and that would result in a reference to s.16(2) of the 1964 Act, which permits an executor, in that situation or where a bequest had been refused by the legatee, or where a bequest is declared null and void in terms of s.20 of the 1949 Act, or s.16 of the Crofters Holdings (Sc.) Act, 1886, or becomes null and void under s.10 of the Crofters' (Sc.) Act, 1955, and notwithstanding a prohibition, express or implied, of assignation of the interest, to transfer it to any person entitled to succeed to the intestate estate, or to claim the legal or prior rights of a surviving spouse out of the estate, but not to any other person except with the permission of the Crofters' Commission (lease of a croft under 1955 Act) or the landlord (other leases.)
Cf. tenant's power to bequeath his interest in the face of implied, not express, prohibition against assignation, (s.29(1), discussed infra, and the agricultural specialties, (s.29(2)).
There would seem to be little difference between the persons to whom the tenant under the 1949 Act might legitimately bequeath his lease, and those to whom the executor, without requiring the consent of the landlord, might transfer it, the only difference apparently being the extension of the class, in the former case, to include the son-in-law and the daughter-in-law.

Professor Meston (p.31) points out that the surviving spouse's right would be denied under s.8(2)(a) also.) If either exception applies, the surviving spouse will receive the value of the interest in the property if that value does not exceed £50,000: if it does exceed £50,000, then that figure £50,000) is given.[1]

Further, if the estate comprises two or more interests in qualifying dwelling houses, the surviving spouse has six months from the date of death of the intestate in which to elect which house he/she wishes. For more than one house to qualify, the survivor would require to show "ordinary residence" in both or more, and would normally choose the more valuable house which, as Professor Meston says[2], could be sold in order to purchase a more convenient one.

"Relevant interest" in a dwelling house is defined by s.8(6)(d) as "The interest therein of an owner, or the interest therein of a tenant, subject in either case to any heritable debt secured over the interest; and for the purposes of this definition "tenant" means a tenant under a tenancy or lease (whether of the dwelling house alone or of the dwelling house together with other subjects) which is not a tenancy to which the Rent (Sc.) Act, 1971 applies."[3]

Professor /

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1. See Meston, pp.91 and 94 upon the heritable, or moveable, nature, of the monetary substitute. This is an important point, though the E.D.complications it brings in train are now obsolete, since the advent of C.T.T. (on estates of those dying on or after 13th March, 1975)(and i.v.gifts made after 26th March, 1974) E.D. system was repealed with effect from 13th March, 1975. Even before that in respect of deaths occurring after 12th November 1974, certain basic principles of C.T. began to have application.
2. p.30.
3. According to Professor Meston, (pp.29/30) the exception with regard to the Rent Act was inserted in order that that complicated branch of the law be not further complicated, and also because the surviving spouse /

Professor Meston's conclusion (at 1969, when the limit was £15,000 and at p.29) was that "In most cases, therefore, a surviving spouse will be enabled to continue to live undisturbed in the house in which he or she was ordinarily resident before the deceased's death."

b. The Furniture and Plenishings

By s.8(3), the Act provides for the surviving spouse a right to the furniture and plenishings (belonging to the deceased, that is, not subject to a hire-purchase arrangement, although goods on credit sale would be included (those terms becoming outmoded upon the coming into full effect of the Consumer Credit Act, 1974, and, further, comprised in the intestate estate (not bequeathed to third parties)) to a value of £8,000 (Succession (No.) Act, 1973), previously £3,000,[1] and contained in any one dwelling house in which the survivor was ordinarily resident at the date of the deceased's death. The furniture and plenishings must /

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spouse is normally favoured by the statutory treatment of rights of succession to tenancies (under the Rent Act legislation.)
(e.g. The Rent (Sc.) Act, 1971, (19 and 20 Eliz.2 c.28) Schedule 1, paragraph 2, states that "if the original tenant was a man who died leaving a widow who was residing with him at his death then, after his death, the widow shall be the statutory tenant so long as she retains possession of the dwelling-house without being entitled to do so under a contractual tenancy." Thus, it is with contractual tenancies that the 1964 Act is concerned.

The 1971 Act concerns protected and statutory tenancies, regulated tenancies and controlled tenancies, including (s.8) the power (of the Secretary of State) to convert a controlled tenancy into a regulated tenancy.)
See Paton and Cameron, "The Law of Landlord and Tenant in Scotland", pp.177-180; pp.594-599.

1. Now £10,000.

must form part of the deceased's intestate estate, but the dwellinghouse containing them need not - s.8(3).[1]

If the value thereof exceeds £10,000, then the survivor may choose items to that value. The proviso to s.8(3) could be criticised on the ground that, on first reading, it creates a wrong impression of what would appear to be its meaning. Its true purport seems to be that the surviving spouse is entitled to the furniture and plenishing of only ONE house, but that it does not matter whether the preferred contents pertain to the house which he/she has elected under the proviso to s.8(1) (if there is more than one house) or to a second or subsequent house. Again, the choice of the survivor to take contents from one house or the other(s) must be made within six months of the date of death of the deceased.

Even if the house containing the furniture in question does not itself form part of the intestate estate, or if the survivor is, for some other reason before explained, not entitled to the house, he/she remains entitled to the furniture and plenishing up to the stated value. (s.8(3)). It would seem to be a requirement, (from a comparison of the terms of s.8(4) and the words "a dwelling house to which this section applies" (s.8(3))) that the survivor be ordinarily resident in the house containing the furniture at the date of the deceased's death. Upon the question, "From which house must the furniture be taken?", the Parliamentary draftsmanship is infelicitous. After the verb "elect", in s.(3) proviso there follows "for the /

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1. For definition for the purposes of the Act of "Furniture and plenishings", see s.8(6), and see discussion Meston, pp.52-53: the definition is not exhaustive, and "includes" the items specified.

the purposes of this subsection" (that is, for the purposes of election of furniture, not for the purposes of election between or among two or more qualifying dwelling houses) and it must be assumed that the choice of furniture, limited to one - though any - house was intended, though the rule might have been set out much more clearly. Even when that is made clear, the reason for the rule is not obvious. If one of the aims of the legislature was to effect a more humane treatment of widows, then a bolder step to that end would have been to have allowed the widow an untrammelled choice. If the worth of all the furniture in both or all the houses were less than £10,000, she will take all, and if the worth was substantially more, the children may not be unduly prejudiced, or indeed prejudiced at all, by their parent's free choice of the items which, after all, the parents and not the children, chose and amassed. On the other hand, it is true that any family enmity is apt to be seen openly at times of division of an estate, that many of the additional items of another house may fall to the widow jure relictae, and that the instances of intestacies occurring containing two or more houses with together, far less in each of them, furniture the value of which is in excess of, or even approaches, £10,000, are rare. The present rule, therefore, aids convenience, saves time, and, perhaps most significant, preserves the moveable estate of the other house(s) for legal rights and dead's part (or "intestate estate" as defined in s.1(2) of the Act.)

It is obvious that the survivor is to make a choice of the property of the deceased. Part or even all of the contents of any or all of the qualifying houses may be the property of the survivor, but this is a statement easier to say than to establish. It /

It is often hard to prove matters of ownership where the furnishing of a house is concerned. It was clearly preferable from an Estate Duty point of view for a spouse to show that the contents are his/her property, than to succeed to them qua claimant to prior rights under s.8(3), but in the estates of those persons dying on or after 13th March, 1975, Capital Transfer Tax has replaced Estate Duty, and there is no duty " passing between husband and wife.

There is nothing (apart from the obligation to provide accommodation for his wife so long as she is willing to adhere) to stop the alienation, by a husband in right of heritable property, of that property and its contents inter vivos, (provided, again, that sufficient is left, in money and other items, to discharge his duty inter vivos and stante matrimonio, to aliment) thus effectively removing his wife's prior rights therein, and leaving the other moveables (apart from the cash entitlement of s.9, which remains exigible by wife and/or children) to be distributed according to the rules of legal rights, by which his wife would receive one half or one third thereof, and the remainder would devolve according to s.2, and in that she would have no rights unless the deceased was not survived by issue or parents and/or collaterals. If the alienation was gratuitous, there would be no monetary consideration to swell the moveable fund.

Alternatively, he might convert much of his estate into heritable property, and die testate, having bequeathed his heritage elsewhere.

The widow's hope, if the amount carried by jus relictae was small, would reside in a claim for continuing aliment, which claim would appear to be competent /

competent in intestacy, as in testacy. The claim is an equitable one[1], and the qualification is that the widow shall have received little, or nothing, out of the deceased's estate, under any head.

An inpenetrable system would result in an intolerable loss of freedom of action and freedom of testation. Perhaps the only acceptable course is that which specifies which property is alienable inter vivos or mortis causa at the whim of either spouse, and which is not, but rather is subject to a pre-ordained statutory destination. The 1964 Act system of prior rights effects part of this purpose, but the rights provided by s.8 and s.9 apply only in cases of intestacy, or, in partial intestacy, over the intestate part of the estate. The older rights of jus relicti(ae) and legitim are stronger, in that they may be claimed against the terms of a will, and prevail over them, in addition to being exigible in intestacy.

S.8(5) provides for the settlement by arbitration of disputes concerning the value of an interest as owner or tenant in a dwellinghouse or the value of any furniture or plenishings.

6. The Cash Entitlement

There is a further prior right to which the surviving spouse of an intestate is entitled, namely, the right under s.9 to the sum of £25,000[2] if the deceased was not survived by legitimate issue, however remote and including adopted children, or by an illegitimate child or by the issue of a predeceasing, illegitimate /

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1. Clive & Wilson, p.695.
2. formerly £8,000 (Succession (Sc.) Act, 1973), and originally £5,000; the sum was increased to £16,000 by the Prior Rights of Surviving Spouse (Scotland) Order 1977 (s.I 1977 No.2110). Now £25,000 or £15,000 by reason of Prior Rights of Surviving Spouse (Sc.) Order, 1981 (No.806). S.L. 1977 No. 2110 revoked.

illegitimate child, or to £15,000 if the deceased was survived by any such person(s), with interest at 7%[1] upon that sum from the date of the deceased's death until payment. The extension to favour illegitimate children by inclusion was made by the L.R. (Miscell.Provs.)(Sc.) Act, 1968, s.3 and Sched.1, in the estates of those persons dying on or after November 25, 1968, but the illegitimate issue of the legitimate or illegitimate child of the deceased, as has been stated, cannot represent his parent in the right to legitim, or in the right to succeed to the intestate estate under s.2, nor can his presence operate to cut down the surviving spouse's monetary right to £15,000 (s.9(1)(a) as amended) in a case where there are no living children, legitimate or illegitimate, of the deceased, nor affect the result in any way if there is surviving issue (s.9(1)(a) and 9(1)(b), when read in conjunction with the definition of "issue" contained in s.36(1).). Although the presence of children or issue, as defined, of the deceased, will restrict the surviving spouse's cash entitlement, the benefit to the children or issue is indirect, since they themselves have no similar entitlement to £25,000 or £15,000 depending on the presence or absence of a surviving spouse. (Contrast the principle which operates in the case of entitlement to the legal rights of ius relicti(ae) and legitim.) The estate may not be able to satisfy even the restricted claim, however, and the spouse will take all, by virtue of s.9(2), with the result that no estate will remain, upon which the children's rights could operate. The size of the estate available for legal rights, however (and eventually the size of the intestate estate, to which they will have the first claim in terms of s.2(1)(a)) will be swollen by the extent of the surviving spouse's /

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1. The rate of interest on prior rights was increased from 4% to 7%, from 1.8.81., by Interest on Prior Rights (Sc.) Order, 1981, (No. 805).

spouse's reduction to £15,000, or to the sum which is applicable at the time. The right of representation by the illegitimate was not thought necessary or desirable, it being considered that the rights of succession extended to them by the 1964 Act, and particularly by the 1968 Act, in the estates of their parents (at first remove, as it were, from the deceased) were sufficient. The surviving spouse's right is in addition to any assets received by him or her under the headings A and/or B previously mentioned.

If the deceased has been survived by such children or issue, the right of the surviving spouse is to £15,000 - s.9(1)(a) and (b).

In s.9(1) also, provision is made for partial intestacy. If the survivor has had bequeathed to him or her by the deceased a legacy, the amount of that legacy is to be deducted from the sum which the spouse would have received otherwise, in terms of s.9(1)(a) or (b). Alternatively, it is competent for the spouse to renounce the legacy. It is difficult to see what advantage there would be in taking this course, unless the legacy was not a cash sum but was perhaps a shareholding in a company which the spouse did not wish to retain and yet one which could not readily be sold in view of the state of the stock market at the relevant time, and which was likely to decrease in value from the worth which it held at the date of death, at which point (s.9(6)(b)), its worth would be ascertained for the purposes of deduction from the prior right to the monetary sum. Legacies of a qualifying dwellinghouse or to the furniture and plenishings are ignored, with the result that the spouse may receive his/her sum of £25,000 or £15,000 (under the qualification that the estate is sufficiently large to provide the entitlement, and also under the qualification that there are no other legacies of a type /

type to be taken into account in the computation), and, in an appropriate case, the house and furnishings, the first-mentioned right being exigible under the system of prior rights (s.9), and the latter rights by virtue of prior rights or by virtue of the terms of the deceased's testamentary disposition, disposing only partially with his estate.

By means of the rules laid down in s.9(1), the amount to which the spouse is entitled is readily calculated. If it exceeds the intestate estate, then the survivor is entitled to the whole intestate estate (by s.9(2)), and that is an important point to be noted.

Thus, where there is a partial intestacy, the prior rights, it must be stressed again, are exigible only out of the intestate estate and cannot encroach upon the testate part thereof in order to make up the figure of £25,000 or £15,000. There is no outright entitlement to that sum. The full figure will be granted only if it can be met out of the intestate estate. If the whole intestate estate is not consumed by the satisfaction, or partial, attempted satisfaction, of the claim, the sum due is borne rateably by the heritable and moveable parts of the estate. (s.9(3)). In a case of partial intestacy, it would be possible for a spouse to claim prior rights out of the intestate estate, and then to claim legal rights out of the testate part of the estate, if he/she was dissatisfied with the testamentary provisions.

In each case, the entitlement to the prior right, (whether A, B, or C) is said to be exigible "out of the intestate estate."

By s.1(2), references to an intestate estate are declared to be construed, for the purposes of Part I of the Act, as references to "so much of the net intestate estate as remains after the satisfaction of those /

those rights," "those rights" being legal rights and prior rights. If it were not for the provision contained in s.9(6)(a) that, for the purposes of s.9, "the expression "intestate estate" means so much of the net intestate estate as remains after the satisfaction of any claims under the last foregoing section", the situation with regard to the priority of the prior rights inter se would be confusing. As it is, the chronological order of the setting-out of the prior rights would appear to correspond with the order of priority in satisfaction of the rights. Hence, the right to the dwellinghouse and furniture[1] must first be satisfied, if possible and appropriate according to the rules, out of the (intestate) estate. In other words, the house cannot be sold in order to provide the estate with sufficient funds to satisfy the monetary right under s.9. In any case, the question would probably not arise, since the recipient would be the same person in all cases, and it would be open to him or her thereafter to realise the price of the house and/or the furniture, if cash was preferred. It is only after the claims to house and furniture have been dealt with that the amount available to meet the claim under s.9 can be seen. The most important aids to comfort and continuity are the house and contents, and it is right that attention should first be addressed to these. The uses to which /

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1. (note: as mentioned, the right to the furniture will arise if the furniture falls into the intestate estate, whether or not the dwelling house in which it is situated is a 'qualifying' dwelling house under s.8(1) and (4) or whether, though being a 'qualifying' dwelling house, is not the dwelling house chosen by the surviving spouse to satisfy his claim under s.8(1); on the other hand, all the furniture chosen or taken must come from one dwelling house alone. (s.8(3))

which they are then put are entirely for the decision of the surviving spouse.

The result of the statutorily-imposed scheme of devolution of property on intestacy may be a greater generosity to the widow than she might receive under her husband's will, in which he is entitled to dispose as he wishes of his heritable property and one-third or one-half[1] as the case may be, of his moveable estate. However, it is the husband's choice whether he dies testate or intestate - though, possibly he may not realise fully the effects upon the division of his estate of his death intestate. On the other hand, perhaps even that freedom may be taken away, because, as Clive & Wilson note[2] a wife may be able to create an intestacy (and thus open up her entitlement to prior rights, which are generous) by renouncing her husband's testamentary provision for her, provided that there is no destination-over to a third party. If there were a destination-over, the intestacy (desired by the wife) would not result.

In Kerr, a husband by his will left his whole estate of £1120 (which was entirely moveable in character) to his wife. He made no destination-over to another party. Since there was a child of an earlier marriage, and presumably, though not ostensibly, because of the danger of reduction of the size of the estate by a claim for legitim (which claim was made), the widow renounced her testamentary provisions and averred that her husband had thereby died intestate, and that she was entitled to prior rights under the 1964 Act, the effect of the satisfaction of which would have /

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1. or even the whole, if there have been inter vivos discharges of legal rights by the wife and children. See C. & W. pp.705-707; Fisher v. Dixon (1840) 2 D.1121.
2. p.701, citing Kerr, Petr. 1968 S.L.T. (Sh.Ct.) 61; article (1965) to J.L.S. 4 (McDonald).

have been to exhaust the estate. Upon the construction of s.36(1) - that "intestate estate" means so much of the estate of an intestate as is undisposed of by testamentary disposition - she succeeded, and was held entitled to prior rights.

The widow averred that, by rejecting the will, she had made it inoperable, and that intestacy was the inevitable result.

The Sheriff Substitute (W.J.Hayden) referred with favour to Professor McDonald's article cited above, and also to Professor Henton's doubts on the subject, agreed with counsel for the widow that, "it is, after all, not the widow who has created the intestacy, but the testator, by failing to provide for the event which has happened", and concluded that she was entitled to prior rights and to the office of executor in terms of s.9(4), which extends that right to a surviving spouse taking the whole of the intestate estate under s.9(2) (that is, after satisfaction of the rights to the dwellinghouse and/or furniture, if either or both was applicable, and if the remainder of the estate did not then exceed £8,000 or £4,000 as was the case in this instance.)

His reasoning was that, although the normal meaning of "an intestate" "is one who has died without leaving a will", s.36(1) of the 1964 Act introduces the notion of "a person who has died leaving" (estate) "undisposed of by testamentary disposition", and while, on a broad view the husband had not "died" leaving estate undisposed of, the result which had occurred was that estate was undisposed of, and in a sense the deceased's action or inaction in making no provision for the occurrence of the event which happened was the cause of the estate becoming "undisposed of".

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The Sheriff Principal was of the same opinion, and refused the appeal.

He rejected the argument that "Mrs. Kerr was entitled to reject the benefits of the will, but nothing which she did after her husband's death could affect the fact that his will had disposed of his estate." Alternatively, and with no greater success, it was argued that, even if the widow's action plunged the estate into intestacy, her rejection could operate only upon that part of the estate which did not vest in the daughter a morte in name of legitim.

Sheriff A. G. Walker said, at p.63, "In my opinion, the question of whether or not a deceased's estate has been left undisposed of by testamentary disposition cannot usually be decided by reference to the terms of the disposition alone. The whole circumstances following upon the death must usually be looked at. A complete failure of beneficiaries, for example, may prevent the estate being disposed of under the deed, and the results of decisions made after the death by those beneficiaries who are entitled to claim legal rights may have similar results. The effect of the definition of "intestate" in s.36(1) of the 1964 Act is, in my opinion, that there is intestacy when there is no will at all, and also when there is a will which becomes wholly or partly inoperable."

He considered also that the Act itself (cf. proviso to s.9(1) and s.9(6)(b)) "contemplates the possibility that the benefits under a testamentary disposition may be renounced, and that, when renounced, they will form part of the deceased's intestate estate out of which the prior rights of the surviving spouse will be payable."

Sheriff Walker also pointed out, though legitim vests a morte, that right which vested might or might not be valueless. Although legal rights in the main (except for the abolition of terce and courtesy) remain much /

much the same as they were before 1964, there is one great difference, which the Sheriff emphasised - that they are postponed to the new prior rights.

"... a child is entitled by way of legitim only to so much of the net moveable estate as remains after the widow's prior rights have been satisfied...".

The prior rights which existed before 1964 depended for their operation on the fact that the deceased had died without lawful issue. (Intestate Husband's Estate (Scotland) Acts, 1911 to 1959[1]).

It would appear that a testator will yet be safe to favour, by testamentary provision, whom he wishes, if /

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1. Nowhere in the course of the four statutes comprised under that head is the word "issue" defined: however, the question came for judicial consideration in the case of Grant v. Munro 1916 1 S.L.T.338, in which the deceased had left grandchildren, but no children. Agents for both parties were in agreement that the term "issue" was not a term of art in Scotland.
The Sheriff (Substitute: Campbell) concluded after perusal of authority, that the word should not be construed so as to include grandchildren.
The interlocutor was recalled by the Sheriff (Principal: Mackintosh) who stated, at p.342, "There has been a long series of cases ....which settle conclusively that, according to the ordinary use of language, the words "issue" or "lawful issue" in their ordinary and primary sense mean descendants of whatever degree. I am therefore bound to hold that the question whether a man who has died leaving grandchildren can be said to have died without leaving issue is not really open, and that the widow's claim in this case must fail, unless she can shew that the word as used in the present context signifies something different from its ordinary wide meaning."
The Sheriff also noted that, in the Intestate Moveable Succession (Sc.) Act, 1855 (18 & 19 Vict.c.23), the word "children" was used to indicate immediate descendants and the word "issue" to denote descendants of any degree. Cf. Walker Prins.II, p.1806, description of legatees, and authorities cited at footnote 5.
(However, contrast permission to represent in legitim which is of relatively recent date: Succession (Sc.) Act, 1964, s.11. Representation in dead's part was competent /

if he ensures that that part of his estate over which he is entirely free to dispose is bequeathed to one who will receive no benefit from renouncing the provision with a view to "scooping the pool" by creating an intestacy, within the ratio of Kerr, by claiming prior rights and taking in consequence the whole estate perhaps. In other words, a bequest to a party other than his wife (and, other than his children, to guard against complications if he has not been quite scrupulous in dividing his estate into that part which is liable to be taken in name of legal rights, and that part over which he has freedom to test) should be safe, and should result in the carrying into effect of his intentions. Of course, it is unlikely that bequests in favour of his spouse and children would be entertained by him, in any case, if he is anxious to leave to his family as little as possible of his estate. If, on the other hand, he wishes to prefer his children to his wife within the framework of the law, he must use great care and thought. If he wishes to prefer his wife to his children, and his estate is moderate, he might dispense with elaborate schemes, and die intestate.

II Legal Rights after 1964

Claims to legal rights arise in intestacy (after satisfaction of prior rights - 1964 Act, s.10(2)), partial intestacy (if anything remains after satisfaction of prior rights out of the intestate part of the estate - cf. s.9(2)) and in testacy, where the terms of the will in /

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competent in terms of the Intestate Moveable Succession (Sc.) Act, 1855, s.1, quoad the deceased's collaterals and descendants, but not quoad ascendants and their collaterals.
In Munro's case the grandchildren received benefit from the decision in that they became entitled thereby to claim dead's part (not legitim) from their grandfather's estate, which, but for the decision, would have fallen to the widow in its entirety.

in their favour are rejected by the widow(er) and/or the children, or where the testator has made no provision for them or him or her.

It has been seen that renunciation of a provision in her own favour by a widow may result, provided that there is no destination-over which operates to prevent the occurrence of intestacy, in the grant to her of prior rights and possibly the consequent exhaustion of the estate, leaving the children's claim to legitim (and of course her own claim to ius relictae, though that would not matter in the circumstances) valueless[1].

Another aspect of the case of Kerr is this: if the children reject testamentary provisions (having no destination-over) in their favour, that which they, or some of them, have rejected will fall into intestacy and devolve under the head of legitim, without complication, provided, presumably, that the widow is satisfied with her provision. If she, noting the children's attitude to the will, also rejects her testamentary provision (which again lacks a destination-over), a partial or total intestacy will have been created within the terms of s.36(1) and within the ratio of Kerr. If the estate is small or moderate in value, the children, by their attitude, so enthusiastically adopted by the widow, may have both deprived themselves of testamentary rights, and made much less their share of the estate in name of legal rights, since the widow, by virtue of her entitlement to prior rights, may take the whole (intestate) estate under that claim. However, unless the will made mention only of the wife and children, there would remain some portion of testate estate, which could be /

1. Kerr Petr. 1968 S.L.T. (Sh.Ct.) 61.

be sought by both spouse and children for legal rights[1], but the amount available for division might be very small. The claims of other legatees except those to whom heritage had been bequeathed, might be excluded. If, on the other hand, only the wife and children were mentioned in the will , or other legatees had predeceased, and a total intestacy resulted, the children might by their action 'sign away' both their testamentary and their legal rights. However, in that case, it is difficult to envisage a situation in which the widow and children would be at one in the rejection of its terms. It is more likely that one, or the other, would be sufficiently dissatisfied with the terms of the will to wish the intervention of external control in the division of the estate.

The point which then arises is - if the widow retains her provisions in the will, but the children reject their provisions in favour of legitim, the value of their testamentary provisions falls into intestacy: can the widow claim any balance remaining after satisfaction of legitim under the head of the prior right granted to her by s.9? (Any entitlement would be the monetary prior right under s.9, since the children are unlikely to let slip into intestacy - and thus into the hands of the widow - any legacy of house or furnishings.). The example is theoretical, since there is unlikely to be any balance remaining, if the children have made a decision based on correct arithmetical calculations.

Where the widow's "engineered" prior right entitlement stems from rejection of her own testamentary provisions alone, or in conjunction with rejection by the /

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1. cf. discussion (C.& W. pp.708-710) of the case of Naismith v. Boyes (1899) 1 F.(H.L.) 79.

the children (whose mistake that is), s.13 does not rule in explicit terms that testamentary provisions and prior rights are incompatible, yet possession of both might be thought inconsistent (cf.s.1(1)(b))with the prior and co-existing common law. However much it may be stressed that the prior rights of ss.8 and 9 are exigible out of the intestate estate, it has been seen that the interpretation section (36) permits, by its definition, 'intestate estate' to apply to the intestate part of an estate which is partially testate and partially intestate.

It remains noteworthy, therefore, that while it used to be stated with confidence that, on the one hand, a widow could impugn the will in order to obtain legal rights, and, on the other, that prior rights are exigible out of the intestate estate only - and no connection was seen between the two statements - these rules must now be read subject to the ratio of Kerr, and the definition of "an intestate" contained in s.36(1). The effect of rejection of testamentary provisions in favour of legal rights may be, incidentally or with that intent, an entitlement to prior rights. In a suitable case, it would appear competent for a widow to "engineer" an intestacy, which was never intended by the deceased to occur although he may have displayed insufficient foresight in his will, and this produces an interesting refinement upon the nature of testamentary freedom or lack of it.

The old rights of ius relictae, ius relicti and legitim remain. Among the principal changes is the introduction of representation in legitim (s.11(1) and (2)). A representative may now be required to collate if he or his parent whom he represents received /

received from the deceased any advance which is subject to collation (s.11(3)).

Further, by the new s.10A[1] the right to legitim has been extended to the illegitimate. The presence of an illegitimate child or his "issue" (defined in s.36(1) as "lawful issue however remote", thus excluding illegitimate issue, and ensuring here, as elsewhere in the Act, that the illegitimate may receive benefit from the estates of their parents, but not in the estates of remoter ascendants) renders the division of an intestate estate tripartite (after satisfaction of prior rights) if the deceased left a surviving spouse but no surviving legitimate child - s.11(4). The rights of the former are equated, of course, with those of the latter - s.10A (that is, the presence of a legitimate child neither excludes the illegitimate nor makes the division four-fold). The general extension by the 1964 Act, s.23(1)[2] of equivalent rights of succession in the estates of the adoptive parents as always pertained to a legitimate child in the estates of his natural parents, ensured that there was no doubt as to the adopted child's right to legitim. The adopted person lost all rights in the estates of his natural parents[3].

Legitim can no longer be discharged by ante-nuptial marriage-contract (s.12). It can be discharged postnuptially only with the consent of the child which will /

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1. introduced by the L.R.(Miscell.Provs.)(Sc.) Act, 1968, s.2: see also generally 1964 Act, s.4 as amended by 1968 Act, s.1.
2. see also L.R. (Miscell.Provs.)(Sc.) Act, 1966, s.5.
3. apart from certain transitional provisions - L.R. (Miscell.Provs.)(Sc.) Act, 1966, s.5. ("For all purposes relating to - (a) the succession to a deceased person (whether testate or intestate), and (b) the disposal of property by virtue of any inter vivos deed, an adopted person shall be treated as the child of the adopter and not as the child of any other person" 1964 Act, s.23(1).).

will occur inter vivos by his acceptance of alternative provision or mortis causa by election to take testamentary provisions instead.

There is no representation in prior rights, nor in ius relicti(ae) nor in succession to the free estate where the deceased would have succeeded under s.2(1)(d) or (e) as parent or spouse of the intestate (s.5(1)).

The method of distribution of the legitim fund where there is representation is described in s.11(2). The division is per capita if all those entitled to participate in the division are related in the same degree to the deceased. If they are not, the division is per stirpes, with the result, for example, that a sole surviving child of the deceased would take half of the intestate estate available for division if his deceased brothers and sisters had left issue, and the latter would take the other half share equally among them. (s.11(2)(a) and (b)). These are the rules governing representation in legitim. The similar provisions of s.5 and 6 govern the rules of representation with regard to the remaining intestate estate dealt with in Part I of the Act.

In other respects, the rules governing ius relicti, ius relictae and legitim are the same as they were formerly. The greatest substantive difference is that those rules do not operate now until the prior rights of the surviving spouse have been satisfied. The latter rule (subject to the ratio of Kerr) does not apply in testacy, with the result that, in that sphere and in this respect, matters have not changed greatly, apart from the improvement in the position of the illegitimate child.

Generally, the criterion date for ascertainment of the existence of relations entitled to claim, of valuation /

valuation of the estate subject to legal rights (subject to certain exceptions), of vesting of legal rights and the commencement date for the payment of interest (the rate of which, upon legal rights, is normally the rate earned by the estate, though settled at 4% by the 1964 Act in the case of the monetary right under s.9 - see s.9(1)(b)) is the date of death of the deceased. Meston[1] notes that interest is not payable on the prior right to house and furnishings, nor on "the value of the rights of succession to the free estate", and[2] that "The rate of interest" (upon the ascertained amount of the legal rights) "is flexible, taking account both of prevailing rates and of the interest actually earned by the estate in this period."

Though s.13 has removed doubts upon the construction of deeds, with regard to choices between legal and testamentary rights, those in right of the testamentary provisions may not wish to accept those provisions, and remain free to reject them. This is the untouched cornerstone of entitlement to legal rights.

Renunciation by a spouse of legal rights after the testator's death does not alter the tripartite nature of the division of the estate, or its bipartite nature, whichever would have been the case had there been no renunciation. The division is the same, but the renounced ius relictae(i) goes to augment dead's part, as do the shares of legitim of any children who renounce them[3]: inter vivos renunciations in the case of children go to augment the shares of those children who do not renounce, and, in the case of renunciations by the spouse, render the division after the death of the /

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1. p.115.
2. at p.43.
3. Fisher v. Dixon (1840) 2 D.1121.

the predeceasing spouse bipartite, that is, a division between legitim and dead's part. The spouse who has discharged his/her right inter vivos is treated as dead, or as never having existed.

III The Disposal of Dead's Part After 1964

If the right of the surviving spouse to claim statutory prior rights (whether before or after 1964) and to claim legal rights are regarded as claims or quasi-debts upon the estate[1] rather than as rights of succession in the estate of the predeceasing spouse, then it can be said[2] that, "At common law, the relict had no rights of intestate succession as such."

She could not participate qua widow in the division of dead's part, though it is possible she might be able to do so qua cousin of the deceased.

Dead's part-(that is, in its intestate connotation, rather than in its meaning as that part of the estate over which the testator has complete freedom to test and may have tested) being the free intestate estate, after satisfaction of pre-1964 prior rights, and of legal rights, and now, after 1964, having the name and meaning of "intestate estate" as defined in s.1(2) of the 1964 Act - consists of the heritable and moveable estate of the deceased after satisfaction of those (post 1964) prior rights and of legal rights. Before 1964, only moveable estate fell into this category. Now all estate not required to satisfy those rights of spouse and children (and thus perhaps including a second dwelling house which would not fall to the surviving spouse under s.8, and any other heritable rights not disposed of by will, there being no longer any legal rights/

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1. Naismith v. Boyes (1899) 1F.(H.L.) 79.
2. per Clive & Wilson, p.716.

rights exigible out of heritage) is so classified (see s.1(1) - assimilation of heritage to moveables), and devolves according to the rules set out in Part I of the 1964 Act (being ss.1-7) and any otherwise pertinent "enactment or rule of law in force immediately before the commencement of this Act which is not inconsistent with those provisions."[1]

Professor Walker comments that, the existence of heirs-at-law being inconsistent with the new scheme of things, the need for rules concerning collation inter haeredes disappears, "though the doctrine has not been abolished."[2]

The statutory table of those entitled to succeed to the free intestate estate does not differ greatly in its order of priority from the common law rules governing identity of, and order of, the heirs in mobilibus, with one notable exception. For the first time, the surviving spouse, qua spouse, enters the list of those having a right to succeed. Basically, the scheme retains a preference first for descendants, then for collaterals, and then for ascendants. Failing all possible heirs, the free intestate estate or "intestate estate" or dead's part - which might, in that case be the whole net intestate estate, on the hypothesis that there were no claimants to prior and/or legal rights - falls to the Crown as ultimus haeres.[3]

As before, each category is exhausted before the next category is considered, but there is an exception to this rule. Where persons of the class of the deceased's collaterals and either or both of the deceased's parents survive, half of the free intestate estate falls to the "collaterals" category, and half to the /

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1. s.1(1)(b).
2. Walker, Prins.II, 1757.
3. 1964 Act, s.7

the parents, in each case to be divided equally between or among the members of that class - s.2(1)(b).

In detail, the order is:-

s.2(1)(a):- children, whether legitimate or illegitimate (s.4(1) of 1964 Act, not originally a provision of that Act, but substituted by the L.R. (Miscell.Provs.)(Sc.) Act, 1968, s.1, and having effect in the succession to the estates of those persons dying on or after November 25, 1968), and thus born of any or no marriage (or legitimated children) of the deceased; if there is any one person, or more, in this category, he/she or they shall take the whole 'intestate estate', as defined.

In each category, the succession is open to representatives of any member of that category, who has predeceased, in accordance with s.5(1) and s.6(1).

(b):- parent(s) and collaterals, if both are present, shall have the 'intestate estate' divided equally between the two classes, provided that there has been no answer from (a).

(c):- collaterals, in the absence of children under (a), and subject to (b) above, shall take the whole 'intestate estate'.

(d):- the parent(s) of the deceased shall take the whole 'intestate estate', if there is no answer from (a), (b) or (c).

It can be seen that the inclusion of parent(s) in class (b) is a re-affirmation of the previous statutory (Intestate Movable Succ.(Sc.) Acts, 1855 and 1919) improvement in their position. Their common law position was inferior to that of collaterals, in accordance with the general policy that, if possible, the /

the estate should not ascend.

(e):- where the classes (a) - (d) are empty, the surviving spouse of the deceased shall have right to the whole 'intestate estate'.

It is interesting that the right of the spouse to succeed should be postponed to that of the parent(s). Despite changing views, the principle that the estate should remain "on its own side of the family, whence it came", whether that be the male or the female side, obviously prevailed over the principle that the estate should ascend only if no other path was open. Of course, in many estates, the table of succession to the 'intestate estate' will be irrelevant, because the spouse (and children) will have taken the whole estate in satisfaction of prior (and perhaps also of legal) rights; if the estate is sufficiently large to permit the provisions of s.2 to operate, many may have considered that the surviving spouse would have received ample provision out of the estate.

(f):- failing members of all previous categories, uncles and aunts of the deceased (whether maternal or paternal) form a class, and shall take between or among them, the whole 'intestate estate'.

(g):- similarly, failing all others, the surviving grandparents of the deceased (whether maternal or paternal) form a class, and shall take, between or among them, the whole 'intestate estate'.

(h):- failing all prior-ranking claims under (a) - (g), the collaterals of any grandparent (maternal or paternal) take, between or among them, the whole 'intestate estate'.

(i) /

(i):- "where an intestate is not survived by any prior relative, the ancestors of the intestate (being remoter than grandparents) generation by generation successively, without distinction between the paternal and maternal lines, shall have right to the whole of the intestate estate; so however that, failing ancestors of any generation, the brothers and sisters of any of those ancestors shall have right thereto before ancestors of the next more remote generation".

No vestiges remain of prejudice against the maternal relations.

PARTIAL INTESTACY

Reference is made to "The Succession (Scotland) Act, 1964" M.C. Meston[1] where is set out clearly the effect upon the survivor's prior rights, of a legacy or legacies specified in the imperfect or incomplete testamentary document.

It has been noted already that the monetary prior right may be claimed by the survivor under deduction of any legacy (or the whole right may be claimed if the legacy is declined) (Proviso to s.9(1)), but that the survivor, in making such deduction, need not take account of a legacy of furniture or of an interest in a qualifying dwelling house. The important point is that it is not only in total, but also in partial, intestacy that the spouse's prior rights may arise, and that, unless the will of the deceased had disposed of his house and furniture to a third party, his widow would not lose her prior right to those items of his estate /

1. pp.27-28 and 36-37.

estate. Had the testator so disposed of them, however, the widow may make no complaint, since, by s.10, legal rights are exigible no longer out of heritage, and prior rights are exigible only out of that part of the estate "undisposed of by testamentary disposition"[1]. Great power is placed in the hands of the titular owner of the matrimonial home and, to a lesser extent (because of the availability of a claim of legal rights exigible out of the moveable estate) the titular owner of the contents thereof. This is the area most in need of reform.

Professor Reston remarks that if, as is possible, the survivor has been ordinarily resident in more than one dwelling house, the value of the bequest to him or her of those houses and the furniture therein need not be deducted from the survivor's claim to the monetary right to £15,000 or £25,000, as the case may be. This seems remarkable. By an astute disposition of property and a cunning combination of testacy and intestacy, a husband and father could benefit greatly his wife to the prejudice of his children, who might find that there was little or nothing upon which their rights to legitim, and under s.8(1)(a), could operate. The right to legitim cannot operate to cut down a bequest to the widow, or to any other person, of heritable property, and, on the other hand, the creation of intestacy by the election to take legal rights may merely increase the fund available to their mother in name of prior rights even where she may require to deduct something in view of legacies bequeathed to her.[2] Unless the estate is large, the better course might be to accept any testamentary provision in their favour.

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1. s.8, s.9, and interpretation of "intestate estate" as found in s.36(1).
2. Cf. Kerr Petr. and discussion thereof, supra. See also Reston, pp.36-37.

The author goes on to say (p.37) that the definition of "legacy" contained in s.9(6)(b) (i.e. that it "includes any payment or benefit to which a surviving spouse becomes entitled by virtue of any testamentary disposition") is very wide, and would embrace more than what is normally thought of as a "legacy", including perhaps marriage-contract provisions taking effect on death (another aspect of the query "When and at what point does a disposition, or a destination, of heritage, or a transfer of property become a testamentary disposition in nature if not in form?") and, most important and significant, that part of a special destination in a disposition of heritage which will benefit the wife after the husband's death[1].

Professor Norton considers that the value of that legacy (valued as at the date of death of the deceased - s.9(6)(b)) might require to be deducted from the monetary right.

SUMMARY

One of the most noteworthy consequences of the Act is that the widow - who may be a second wife, perhaps, and not related to the children of her husband except by the step-relationship - may fare better, in her husband's intestacy, than do the children, unless the husband had no qualifying interest in heritage and the furniture belonged to the widow, and may fare better, in intestacy (or even in partial intestacy) than she might where her husband left a will, bequeathing all to her, and thus leaving the course open to the children to challenge the will, a proceeding probably to their benefit, and certainly to their benefit if the estate contains little or no heritage /

1. see infra, pp. 643-668.

heritage.

In the latter case, of course, the widow also may renounce the will, after due consideration with her solicitor upon the question whether the value of her prior and legal rights will exceed the value of the estate remaining after the children's claims to legitim have been satisfied.[1]

The Parliamentary refusal to assimilate heritage to moveables in respect of legal rights, while endowing with approval that assimilation in general in s.1, has meant that care must be taken to ensure that the burden of satisfaction of prior rights (house, furniture and money) must tax (if only notionally) the moveable and heritable parts of the estate in the proportion which they bear to the whole[2] in order that the (moveable) estate available for legal rights is an accurate reflection of the (moveable) proportion of the whole estate left by the deceased. After satisfaction of prior and legal rights, heritage and moveables are treated as one estate, and devolve without distinction being made between them. Moreover, from an administrative point of view, all property, heritable and moveable, vests now in the executor, by virtue of confirmation for administration and disposal, by s.14 of the 1964 Act.

If no distinction at all were to remain between heritable and moveable property in the context of succession, a problem might arise upon the rejection by the widow of the terms of the will. Iure relictae, she would be entitled to claim one third or one half of /

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1. See generally Meston, pp.38-39 and examples there cited.
2. except where the right itself, such as that under s.8 to the dwelling house, is to an item manifestly heritable: treatment of money surrogatum, Meston, p.29.

of the whole estate, including the house. Particularly if the division was tripartite, and unless the estate were very large, an amicable decision upon the practicalities of the division might not be reached, and it might be necessary for the house to be sold and the proceeds divided with the other moveable assets. Apart from the possible undesirability of this, the repercussions of such a seemingly harmless rationalisation would be enormouse, because the freedom of testation over heritage and the device of accumulation of heritage in order to defeat legal rights would disappear (perhaps not a bad result but one which would deserve detailed Parliamentary consideration and legislative treatment in its own right) except to the extent that heritage might be said perhaps to constitute the whole, or part, of the dead's part of the estate. The Mackintosh Committee, for that reason (encroachment on freedom to test) and for others (for example, splitting-up of farms through sale in the absence of agreement, a superabundance of heirs) rejected complete assimilation of heritage to moveables.

THE EFFECT OF A DECREE OF JUDICIAL SEPARATION UPON THE SUCCESSION TO PROPERTY

While it is trite to say that nothing contained in this Part will apply to those who were at one time spouses, but who had been divorced by the date of death of the predeceaser (although it has been noted that claims for temporary aliment will, and for continuing aliment may, be competent by the surviving spouse) and also to say that the 1964 rules of succession in intestacy and partial intestacy will apply only to those spouses who have been cohabiting up to the date of death of the predeceaser, or who have separated consensually or judicially (though the circumstances of /

of the latter cases may have a bearing upon the requirement of s.8(4) as to the ordinary residence by the survivor in a dwelling house in which the predeceaser has a relevant interest[1], and in these cases also that property which is his and that which is hers will be more clearly defined), there is a speciality to be noted in the case of those judicially separated.

Mention has been made of the device of the "protection order" available to married women under the Conjugal Rights (Sc.) Amendment Act, 1861, s.1[2]. This order is obsolete now, the necessity for it no longer existing in view of the changes in matrimonial property law, and the broad separation of the property of spouses which now obtains, but the 1861 Act which created the device also provided (in s.6) that a woman who had obtained a decree of separation a mensa et thoro, or a protection order (s.5), should have complete power of disposal over all property acquired thereafter, and, in addition, that upon her death intestate, such acquirenda should pass to her own (heirs and) representatives as if her husband had predeceased her.

There are many limitations upon the scope of the rule.

In the first place, the provision affects acquirenda only, and does not extend to the whole of the wife's estate. In the second place, since the Act of 1861 in its /

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1. The fact of separate habitation or the reason for it, however, is not relevent as long as the survivor was ordinarily resident in the dwelling house in which the deceased had a qualifying interest, at the date of death of the deceased. The residence there of the survivor is the important point - the presence, or absence, for whatever reason, of the predeceaser is not taken into account. (cf. s.8(6)(d) and s.8(4)).
2. See Chapter 1, S.L.C. Memo. No. 54, 5.1-5.5. 5.5: provisional conclusion that it should no longer be competent for a deserted wife to apply for a protection order. No specific mention of any change to be made to the succession aspect (s.5. - protection order; s.6. - decree of separation).

its terms confined its effect to decree obtained by the wife, it does not regulate the acquirenda of husbands holding decree of judicial separation, nor is there any other similar statutory provision to govern their case. Further, in order that the provision may operate, the wife must have died intestate. If she does not, and the husband objects to the terms of the will, he may renounce the will and claim ius relicti out of the whole of the wife's moveable estate. Ius relicti is a right which was not part of the law in 1861, but the Married Women's Property (Scotland) Act, 1881, which introduced it, did not restrict (or enlarge) its operation in this case, nor did the Act of 1964.[1] Intestacy remains a prerequisite for the operation of the provision of the 1861 Act. Leaving aside questions of policy, the particularity of the rule of the 1861 Act, s.6 renders it unsatisfactory.[2]

In other respects, and in circumstances which are not /

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1. The Act of 1964, in its final form, made no specific reference to the Act of 1861. See, however, discussion infra, of the curious results of the inter action of the two Acts in this matter of the succession to the acquirenda of a judicially separated spouse.
2. See criticisms, C. & W., pp.690/691; see also article by Dr. Clive 1964 J.R.266-271 (a commentary upon the first edition of Professor Meston's 'The Succession (Scotland) Act, 1964') The rule of English law is contained in the Matrimonial Causes Act, 1973, s.18(2)(that if while a decree of judicial separation is in force and the separation is continuing either of the parties dies intestate as respects all or any of his or her real or personal property, the property as respects which he or she died intestate shall devolve as if the other party to the marriage had then been dead). Cretney Principles of Family Law, 3rd edn. p.172 notes that this rule does not prevent a spouse applying to the court as spouse for reasonable provision under the Inheritance (Provision for Family and Dependants) Act 1975 (1978). Judicial separation in any event is a remedy the popularity of which is declining.

not those specified by the Conjugal Rights Act, the fact that spouses have been separated by judicial decree has no direct effect upon the rules which govern the succession to their property. As with those who have separated consensually, the survivor's prior right to the house under s.8 may be barred by reason of lack of "ordinary residence" there, but that is an example of mere specialty of circumstance, not of a substantively different body of law in use to govern the parties' succession.

Special Destinations: The Joint or Common Ownership of the Matrimonial Home, and the Consequences Thereof

This subject is central to any discussion of matrimonial property, and for one very important reason: the matrimonial home is the most permanent, and valuable asset of the spouses, in terms of money and of health, comfort and happiness. Any system which leaves rights in relation to this item of property vague and inequitable is incomplete and lacking in an essential point, however well it may deal with questions of the ownership and rights over corporeal moveables in the house, or parties' earnings, or their rights against each other in consistorial or other litigation. Special destinations relate to heritable property, the Act's provisions concerning them relate to heritable property, and, in the vast majority of cases, the only heritable property which the spouses own is the matrimonial home.

It may be said with confidence that heritable property, jointly owned or owned in common, is always productive of greater difficulty and problems than property owned by a sole proprietor. Even where the owners are not related to each other, or are not spouses (that is, have no inter-relating ties and duties, and inter-dependence, beyond that arising out of the joint or common ownership of heritable property) problems may arise /

arise, particularly with regard to the sale of property. Half of an undivided house is not a saleable proposition.[1]

A statement of the rule, oversimplified perhaps, is that joint owners of property do not have each a separate interest in that property, but share the one item 'pro indiviso'. Neither can sell the property inter vivos nor dispose of it mortis causa by testamentary disposition. The share of the predeceaser accresces to the survivor. Only by joint decision and consent may the property be sold. Fortunately, the majority of examples, with one important possible exception, of this type of ownership of property are to be found among parties, such as trustees of a club or association, who have no personal interest in the property in question.

The proprietors of property held in common, on the other hand, have greater freedom of action. Each holds a pro indiviso share, but over that he has unhampered ability to deal. Accordingly, he may sell his fraction of the property (if he can find a buyer willing to take it; the latter may do so with a view to investment, rather than personal occupation) and dispose of it by will. Moreover, it is of the essence of the concept of property held in common that, if the property has not been divided, (that is, notionally not physically) any proprietor is entitled to demand that it shall be so divided. Once division is made, he will own a pro indiviso share, which he may sell, or burden, as he wishes. If this is impracticable, then there will be a sale of the whole property, and the co-proprietors will share the proceeds in their respective proportions. ("Common interest" in property is distinct from this. An example would be the interest of riparian proprietors in a river running through the land of each.) Under the Presumption of Life Limitation (Sc.) Act, 1891, s.4, there was provision to /

1. though see Steele v. Caldwell 1979 S.L.T.228, infra.

to allow property held in common to be sold if one of the co-proprietors has disappeared. The Act of 1891 was repealed in its entirety by the Presumption of Death (Sc.) Act, 1977. The later Act contains no exactly equivalent provision, but perhaps the point is covered by s.2(2)(b), which empowers the court, in granting decree, to determine any question relating to any interest in property which arises as a consequence of the death of the missing person.

The essence of the difference between the two types of ownership is, that, while, in both cases, the item of estate is an undivided whole (at least in the first instance in the case of common property) in the case of joint property, all proprietors share the one title to the whole, whereas in the case of common property, "each owner has his own separate title to a fraction of the undivided whole."[1] In neither case is the property physically divided (so that it is possible in both instances to say that they hold it pro indiviso), but in the former case both possession and right of property are undivided, whereas in the latter, though physical possession, may be undivided or may, by agreement or by action of division, become divided, the right of property will be divided, thus each proprietor will have right to a certain fraction of the lands, though no right to any "identifiable" part until division[2]. (Walker, Prins.II pp.1300-01).

Professor /

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1. Walker's Principles, II.1300.
2. Possibly it is this ability of one phrase - pro indiviso - to comprehend two meanings, the one simple, general and superficial, and the other technical and when used in that sense, being intended to carry certain consequences, which has resulted in confusion. It is commonly said that spouses, in the situation envisaged, hold "joint, pro indiviso shares", a phrase which is confusing without further explanation or definition. The following is an extract from "Latin Maxims and Phrases", 3rd ed., by John Trayner (1883), at p.469:-

"Pro Indiviso": in an undivided manner; in common.

Professor Walker[1] remarks upon the confusion of terminology found in earlier authorities, and makes reference to the case of Mags. of Banff v. Ruthin Castle, Ltd.[2]

In that case, L.J.Clerk (Cooper) at p.67/68 says:- "The difficulty of this subject is partly a terminological one, due to the differing senses in which the word "joint" and its approximate synonyms can be, and have been, employed. A similar perplexity has been introduced by the same cause into the law of obligations. (Gloag on Contract, 2nd ed., p.199; Coats v. Union Bank of Scotland "(1929 S.C.(H.L.)114))"; and into the law of succession (McLaren on Wills (3rd ed.) vol.I, p.633). In the law of property, the case of Schaw v. Black "(16 R.336)" affords an instance in which Lord Kinnear describes as a "joint owner" a person whom Lord Shand describes as a "pro indiviso proprietor" and an "owner in common."

I have found no more exact summary of the law than that contained in Gloag and Henderson's Law of Scotland, 3rd ed., pp.489-90, and with these learned authors I use the term "joint" to describe the class of right typified by the ownership of co-trustees, and the term "common" to describe that typified by the ownership of two or more persons in whom the right to a single subject has come to be vested, and each of whom is entitled by his separate act to dispose of his separate share."

Now, it will be seen (Hay's Tr. v. H.'s Trs. 1951 S.C.329; Perrett's Trs. v. P. 1909 S.C.522) that, unless a contractual element is present in the case, where a title is taken in the name of both spouses, the tendency is /

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1. Prins. II p.1260, fnote 1.
2. 1944 S.C.36.

is to consider that, while the "donee" spouse takes a pro indiviso indefeasible share in the property upon registration of the deed yet may perhaps not evacuate the destination of that share to the surviving spouse, the "donor" spouse may freely alter the destination. The latter power is a function of ownership in common of a pro indiviso share; the former disability resembles that of a joint, not a pro indiviso holder in common.

The confusion is lamentable; possibly the term pro indiviso should be dropped from the language, and reference made simply to "joint" or "common" property, the meanings and consequences of each being clearly defined.

Moreover, in this context, husbands and wives are almost universally spoken of as "joint owners", whereas their powers with regard to the property - unless a contractual arrangement is established - smack rather of common property. The category of spouses is absent from L. Cooper's exposition (at pp.68-69) of joint property:-

"So far as has been traced, there is no instance of a joint right in the strict sense having been held to exist except in persons who were inter-related by virtue of some trust, contractual or quasi-contractual bond "(which would explain "Perrett")" - partnership or membership of an unincorporated association being common examples - and it seems to me that such an independent relationship is the indispensable basis of every joint right. The distinctive feature of the right of such joint proprietors is the jus accrescendi, which excludes the possibility of separate shares in the several joint owners, and still more emphatically excludes the possibility of severance of the tie, except, of course, by dissolution of the relationship on which the joint ownership rests. Finally, the considerations of public policy, which in cases of common ownership justify the rule that nemo in communione invitus detineri potest, have no application to the entirely different situation created /

created by joint ownership."

Another source of confusion is that, in dispositions to husband and wife, frequently a destination is taken to the survivor with the result that, unless either party competently evacuates the destination[1] by the terms of the deed rather than by the rules of joint property, an event similar in effect to the operation of a jus accrescendi arises.

Thus, where husband and wife together hold property, it is frequently found that they are spoken of as "joint fiars", having pro indiviso shares in the property in question. At first sight, at least, it would seem that a confusing hybrid type of title to property results. The term "joint fiar" is used, and, on the death of the predeceaser, that half share (the usual fraction in this case) pertaining to him or her accresces to the survivor in the manner of joint property. (A pro indiviso share of property held in common, in the absence of any special destination not evacuated, will devolve according to the rules of intestacy or the will of the deceased owner.).

Yet, on the other hand, it is envisaged, apparently, that either may be able, in certain circumstances (though not in Perrett below), to evacuate the destination by testamentary disposition, which is a power characteristic of the holding of property in common.

In Perrett's Trs. v. P.[2] property was taken in the names of both spouses in circumstances in which each paid one-half of the purchase price, and the title was taken in favour of them jointly and to the survivor /

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1. (Hay;) 1964 Act, s.18(2) and s.36(2).
2. 1909 S.C.522.

survivor, and to the heirs of the survivor, and their assignees whomsoever. In that situation (of equal monetary contribution) it was held that s subsequent testamentary settlement could not evacuate the destination.

At p.528, per L. Kinnear is found the sentiment - "I take it to be perfectly well settled law that when a right is taken to two persons jointly, and the survivor and heirs of the survivor, the two disponees are joint fiars during their lives, but upon the death of the first deceaser the survivor has the entire fee to the exclusion of the heirs of the predeceaser. The law is so laid down in every one of our institutional writers, and is supported by the authorities, and the rule applies to joint fiars who are husband and wife in exactly the same way as to other persons." In Walker v. Galbraith[1], the point is also clarified by L. McLaren's assertion at p.350, that, "In my opinion the assignation gave equal rights to the husband and wife, the subject being vested in them jointly, with benefit of survivorship." These comments envisage orthodox joint property, it seems.

In Walker, the spouses had acted jointly and with consent of both in executing a mutual settlement which was held to have evacuated a pre-existing destination in an assignation of a long lease of heritage. They had acted in the manner required of joint owners of property, which, indeed, they were considered to be. Lord McLaren felt that, in such a situation, the question whether revocation had taken place was subject to substantially the same rules as the question whether there had been revocation of a previously-created specific bequest by a later general settlement, and was a /

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1. (1896) 23 R.347.

a matter referable simply to the intention of the parties.

In the context of joint property, intention is certainly relevant, but the intention would require to be an expression of the joint wills of both parties before it could be carried into effect in any matter, whether revocation of a special destination or any other, affecting the property of which the parties were joint proprietors. (Since that is the rule with regard to joint owners: the ascertainment of intention is not enough, though it happens that it will suffice, if the intentions are consistent with each other, but that is only so because that is the substance of the rule.)

Although there is talk of "joint liens", there are also views that a one-half pro indiviso share of the property is carried to each party automatically upon the registration of the disposition[1]. Admittedly the provisions of the Succession Act (s.15(2) and proviso (a) to s.35(2)) concerning the effect of non-evacuation and evacuation of special destinations (not the circumstances in which evacuation is competent) quoad the vesting of the property in the executor does not concern specifically this problem of the type of property-holding undertaken by husband and wife by the very common direction to their solicitor that they wish the property to be 'in joint names', but the rules therein contained nevertheless will be applied to that situation.

The topic is much confused,[2] and those consequences which can be discovered to flow from the right of property in these cases partake too liberally from both /

1. May's Tr. v. M.'s Trs. 1991 S.C.329.
2. And now see 1981 Act, S.19: where a spouse brings an action for division and sale of a mat. home owned in common, the court, having regard to factors such as conduct, need and suitable alternative accommodation, may refuse decree, postpone decree, or grant decree subject to conditions.

both sources for a clear conclusion to emerge.

In the normal circumstance (which is becoming almost standard practice), in which a title is taken in "joint" names of husband and wife, each will have a pro indiviso share in the property, a share which becomes immediately defined (and therefore resembles a right of common property) because the title to the property is taken "equally between them," thus giving each a one-half share[1] pro indiviso therein. The usual dispositive clause in this case is, "To X. and Y. equally between them and to the survivor of them and to their respective assignees and disponees and to the executors of the survivor whomsoever," a destination which itself suggests the ability of each to dispone or assign independently of the other, yet contains, in addition, (presumably if that power is not exercised) a special destination to the survivor. In turn, this brings into application the sections of the 1964 Act which pertain to special destinations. However, in certain circumstances (where there is a contractual element - Perrett) mortis causa disposal of a share in the property to a third party, in contradiction of the destination in the disposition may be held incompetent. Inter vivos alienation of a share must, by reason of its nature, be rare - but if the spouses could not reach agreement, would a division and sale, as found in the case of owners in common, but not so in the case of joint owners, take place to resolve the difficulty? If they truly are joint owners, joint consent to the sale would be needed. Where one party was obstinate, an impasse would be reached.

Ownership of a pro indiviso share, on the other hand, suggests the ability to sell or burden as the (common) /

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1. Hay's Tr. v. Hay's Trs. 1951 S.C.329: See generally 'Law of Husband and Wife in Scotland': C. & W. Chapter 10. "Property, Historical" and particularly pp.299, 301, 306 - 308.

(common) owner wishes. Once again, the unsatisfactory and self-contradictory nature of "joint pro indiviso owner" or "joint fiars" who, it transpires, hold "pro indiviso" shares, becomes apparent. If the "joint" destination was a gift to the wife, (not a contractual arrangement) then it is irrevocable but it would appear that the husband/donor may change his mind to the extent of the destination of his share to the survivor - Hay's Tr. V. Hay's Trs. 1951 S.C.329: contrast Steele v. Caldwell 1979 S.L.T.228, infra. If he can do so mortis causa, alienation inter vivos would also seem competent either by disposition of his half share, or insistence upon division and sale (a function of common, not joint ownership).

One of the difficulties which may arise some years after a title has been taken in names of both spouses concerns the construction of a will which takes no account of the special destination. To clarify matters, a most welcome presumption was inserted in the Succession Act, in s.30, to the effect that where a testamentary disposition is executed after the commencement of that Act, it shall not have the result of avacuating a special destination (always assuming that the destination was such that it could competently be evacuated in that way - a proviso which itself leaves many questions unanswered) "unless it contains a specific reference to the destination and a declared intention on the part of the testator to evacuate it."[1]

It is clear, therefore, that, to be effective, a purported revocation must first be competent in the circumstances (if incompetent, no amount of purported revocations in the clearest of terms can evacuate the destination /

1. See generally Gloag and Henderson, Introduction to the Law of Scotland 8th edn. (1980) p.662.

destination) and second be express. Not unless both requirements are fulfilled can a subsequent revocation or evacuation overrule a special destination in a disposition or other deed previously executed.

The second requirement is clear: in what circumstances may the first requirement be fulfilled? Presumably, if the title is taken in common, and each spouse, or other co-proprietor, has a one-half pro indiviso share in the property, each, by reason of the existence of the holding of property in common, may dispose of it by will, to the exclusion of the other. Where the title to a valuable house is taken by husband and wife equally in order to guard against the possibility that otherwise the owner might predecease intestate, leaving a house the value of which exceeded £50,000 or the current limit at the time and that the house, as a consequence, might require to be sold - if, for some reason, the spouses considered that there would be an advantage in intestacy in the circumstances of their case - a certain trust between the parties would be necessary, for it would be competent for either to dispose inter vivos[1] or(?) mortis causa to another recipient his or her share therein.

The housing right under s.8 arises, of course, only in cases of intestacy, or, in partial testacy, where the house is comprised in that part with regard to which the deceased died intestate. However, it may be that a husband might die intestate, but possessed of heritage containing a special destination (not revoked) in favour of someone other than his wife or "his executors and representatives whomsoever", and in that case the heritage would not be treated as part of his intestate /

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1. Steele v. Caldwell (1979) suggests that if the parties are owners in common, only testamentary disposal of a party's share is prohibited. It will be otherwise if there is a 'contractual' element - Perrett's Trs. But in the 'normal' case of ownership in common, between strangers, disposal of one's share by will is competent (and in Hay's Trs. the predeceasing wife's settlement of her share was upheld).

intestate estate (s.36(2)(a)), but might vest in the executor for the sole purpose of being conveyed to the person entitled to it in terms of the destination, if the executor had been confirmed thereto (s.18(2)). The unrevoked destination would reveal its innately testamentary nature. Such cases would be rare, but might occur. A similar provision exists to aid conveyance of the title to entailed property (of which, according to Professor Meston, there are still 1,000 examples in Scotland) to the heir of entail next entitled. (s.18(1)).

To the discussion of the spouses' powers of disposal must be added the factors of "Who provided the money for the purchase of the house?", "Were the contributions of each approximately equal?" or, in these modern days, "Is the contribution of the husband in payment of capital and continuing payment of income towards mortgage repayments roughly comparable or greater in worth than the contribution of the wife in maintaining the running of the house, bringing up the children, and preventing the cost of domestic help from burdening the family budget?" (It has been estimated recently that the value of the housewife's weekly work in the home is £71). "Is it greater than the wife's contribution in bringing in money from part-time employment in addition to performance of the tasks mentioned?"

Alternatively, though the wife might have made no contribution in money and the concept of contribution in kind was judicially discounted, "Was the half share in the house a gift from the husband to the wife, which must be regarded as irrevocable in terms of the M.W.P. (Sc.) Act, 1920, s.5?" "If so, can the gift be proved to have been made?" "Did the husband, in instructing his /

his solicitor to take the dispositive clause in names of both spouses, understand the significance of one half shares pro indiviso, and did he act animo donandi?" "If he did not, perhaps nevertheless a contribution in kind should be recognised?" "Did the couple have any special, perhaps tacit, agreement as to what was to happen in the event of separation or divorce? Did they, indeed, have any agreement concerning their powers to dispose of their shares by testamentary disposition?" "How can the existence of one half pro indiviso shares, suggesting ownership in common, be reconciled with the special destination, "and to the survivor", which would appear to cut down that ownership to a species of joint ownership, importing no ability to divert the destination to anyone other than the survivor of the joint owners? How can the terms of the disposition be reconciled with the terms of subsequent testamentary settlements, by one or both parties, if they are contradictory, even with the help of s.30, which, after all, does not define the circumstances in which the first of its requirements for the operation of the proviso (competency of the evacuation of the destination) may be satisfied?"

At present[1] it would appear that, if the husband financed the whole purchase, his claim to repent (or to deny the significance of) his generous extension of title to his wife can hardly be denied, if there are no special circumstances in the case, but the recanting can be effective only quoad the destination to his own one-half "pro indiviso" share. In Hay's Trs., the moneys to fund the purchase of heritage had been provided by the wife, though the narrative of the disposition bore that the price had been paid by both spouses. The predeceasing wife's settlement of her estate, including her one half pro indiviso share in the property, was upheld, but it was stated that, her husband being infeft in /

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1. Hay's Tr. v. H.'s Trs. 1951 S.C.329.

in his share, she could not alter the destination therein.

The judicial comments are illuminating: per L.P.Cooper (at p.333):- "A destination of the type here in question serves a double purpose - first, to vest the heritable subjects in the disponees for certain rights and interests, and, second, to operate as a quasi-testamentary direction, although of course, strictly speaking, a destination in a disposition is not a writing of a testamentary nature at all..... I have.....had "(no)" doubt whatever that, on the recording of this disposition in July 1955, Mr. May became an absolute fee-simple proprietor infeft in a half pro indiviso share of the subjects, and that nothing that Mrs. May could thereafter do, whether by inter vivos or mortis causa deed, could possibly affect a subject which was thereafter part of the property of her husband."

The argument that Mrs. May might have been unable to evacuate the destination over quoad her own share depended upon the existence of a contractual ("Perrett") element in the case, which, since the disclosure that the wife, not both spouses, had financed the purchase, was lacking. L. Cooper felt, though with hesitation and with a plea for judicial review of the subject in a suitable case cited, that extrinsic evidence could be admitted to contradict the terms of the document. Cf. Fr.II, 925, infra. p.660,fn.1.His lordship also pointed out that modern use of a device originally intended to overcome the prohibition which used to prevail "against wills of heritage" was more likely to be productive of litigation than of advantage to the parties.

Lord Keith commented that it might be that the husband, the donee, had he predeceased, would not have been /

been able to evacuate the destination of his own share "so as to disappoint his wife of the whole property if she had survived him." Reference was made to the case of Brown's Trustee v. B. 1943 S.C.488, but a decision on that point was not necessary for the case under consideration. "The husband was infeft at the date of the recording of the disposition in one-half of the property, and he held that half with all the rights of a pro indiviso proprietor save in so far as he might be barred from evacuating the destination-over in the event of his predeceasing his wife." (p.335). When the financing of buying and maintaining a house is so complex and intermingled, and complicated by the concept of contribution in kind, what are to be the defining characteristics of a donee? And see p. 658-9,fn. 5, infra.

In Perrett's Trs. v. P. 1909 S.C.522, evacuation was not permitted in a case where each spouse had made an equal contribution, in money terms, to the purchase of the house. L.P.Dunedin, at p.528 said, "(This aspect of the case concerns)" ....heritable property, the destination of which was taken to the two spouses jointly and the survivor of them and the heirs of the survivor, and to the purchase of which each spouse contributed one-half. I think that was a contractual arrangement - where each took the chance of getting the half of the other, and accordingly I think that the property stands upon its own destination and is not carried, and could not be carried, by any testament whatsoever. The moment that disposition was mutually delivered, as it was by the mere fact of taking the destination as between these two people, I do not think this destination could have been altered except by joint consent of the spouses."[1]

Professor /

1. See also Walker v. Galbraith (1896) 23 R.347.

Professor Walker[1] states that the matter is one of intention, and that certain extraneous factors may be taken into account[2].

It is interesting that Professor Walker stresses the contractual element which is seen in Forrett, and in Chalmer's Trs. v. Thomson's Exr.[3,4] a concept which might be capable of extension to suit modern views of marital property and responsibilities. At the date of Forrett, of course, the contractual element would be found simply in the equal monetary contribution, and the result would be that neither party to the contract, in the absence of contractual provisions to the contrary, would have power to revoke the destination. The same result could be applied to a wider concept of the factors which constituted the contract between the parties.

As has been suggested, there might also be a question of, or an allegation of, gift by husband to wife. It might be thought that, if the intention to donate and fact of donation could be proved (perhaps a difficult task), the husband had made the wife a present by purchasing the property entirely out of his own resources[5], while instructing his solicitor to take the title /

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1. Prins.II, p.1992.
2. See the cases there cited by the author, including Forrett, Murray's Execrs. v. Geekie 1929 S.C.633, Bryden's C.B. v. B.'s Trs. (1898) 25 R.708, Glendonwyn v. Gordon (1873) 11 Macph.(H.L.)33, Minto's Trs. v. M. (1898) 1 F.62, Morrison's Trs. v. M. (1905) 7 F.810.
3. 1923 S.C.271.
4. and he cites in addition Renouf's Trs. v. Raining 1919 S.C.497, Taylor's Execrs. v. Brunton 1939 S.C.444, and Shand's Trs. v. S.'s Trs. 1966 S.L.T.306.
5. Can the resources of one spouse ever be entirely his own or her own? That which one party is able to buy or own (without selling to pay bills) or save is dependent upon the contribution, in cash or kind, of the other party. Even that which is bequeathed by a third person solely to one spouse, remains unsold or intact by virtue of the general state of the family budget for which both spouses are responsible. A bequest may require more than 'house room'. If, for example, it is a car, it will make demands upon resources, which /

title thereto in the names of both, and that any subsequent testamentary or other settlement made by him and purporting to revoke the destination (or ignoring the existence of the destination) would contravene the rule, introduced by the M.W.P. (Sc.) Act, 1920, s.5, that donations inter virum et uxorem are irrevocable, except when made within one year and one day of the sequestration of the donor[1]. However, where the arrangement at the time of purchase was not stated to be that of donation quoad the wife, there would be the problem of proving animus donandi in the alleged donor against a presumption (admittedly not strong in the husband/wife situation[2]) which favours a construction other than donation but then again, in all cases in which the name of the wife was not inserted in /

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which may ostensibly be the husband's but may in truth be the family's. However, under our present system, the object would belong undoubtedly to the legatee spouse.
Is there not a folly - and perhaps an unreality and an injustice - in a system of matrimonial property which is based to a certain extent (though not wholly - see aliment and rights on death) on separation of property? Is it possible that a (limited) communio bonorum might be fairer? (Chapter 7.).

1. The case of Hay's Tr. v. H.'s Trs. 1951 S.C.329 would tend to refute this argument. The gift of one half share was held to be irrevocable, but the donor did not thereby lose her freedom to alter the destination to her own remaining one half share. Such a result accords with the general principle that disposal at will (and testamentary changes of mind) are of the essence of ownership, and any less power would greatly have detracted from a donor's right of property in his/her own share. Despite the terms of the destination, it would seem that we do not find here an all-embracing gift, and throwing together of fortunes, but rather a more restricted one than the destination suggests. It would be otherwise if the relationship were contractual - Perrett's Trs. v. P. 1909 S.C.522.
2. C. & W., pp.290-291.

in the disposition, but a new disposition was later drawn up, the granter of the disposition would require to explain the animus, if not donandi, which lay behind the time-worn phrase, "in consideration of the love, favour and affection which I have for and bear towards XY, my wife[1]", and, indeed, if her name was inserted in the first disposition, but she was not mentioned in the missives of purchase, another explanatory note (though not so fulsome) must have been inserted in the formal disposition which becomes the substitute for the missives, as the contract between seller and purchaser.

Pre-1964 authorities and rules concerning the effect of later general settlements on prior special destinations of property are to be found in the Principles II, 1991 et seq.. The general presumption was against subsequent revocation, unless the later deed was markedly at odds with the earlier destination, or unless the granter, expressly or by very clear implication, declared his intention to evacuate the former provision. A general clause, usually placed at the end of a will, to the effect that the testator "hereby revokes all wills and testamentary writings hitherto executed by him", would not normally be held to have evacuated a special destination in some other deed[2]. Obviously if the general settlement preceded the special destination, the latter could not be displaced[3].

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1. (cf. C. & W., p.292 where they quote Fraser, II, 925 ...."The recitals in deeds between husband and wife go for very little...") The truth behind the words may be laid bare. See generally Fr.II, 916 et seq.(Chap.V) upon Donations Inter Virum et Uxorem. At p.925, he states that just such a deed for "love and favour" is not conclusive against proof of its being an onerous deed", and cites the cases of Chisholm v. Lady Mac M.6137 (1669) and Countess of Oxonford v. the Viscount M.6126 (1664). Fraser notes that it is wise to keep evidence of onerosity. (Fr.II, 929). However, it would appear that the onus is upon him wishing to prove onerosity in an ostensibly gratuitous deed.
2. Murray's Exors. v. Geekie 1929 S.C.633.
3. see generally, Walker, Principles II, p.1854.

In view of these doubts, the provision of s.30 is all the more welcome, though Professor Walker points out that in its terms it does not distinguish between those destinations created by the testator and those created by a third party, which presumably the testator was able to evacuate. In the latter situation, he states the opposite presumption applied, in the general case, with the effect of favouring evacuation by general settlement, and it would appear therefore that, in the absence of statutory direction, that rule must still apply.

However, the situation can be envisaged in which a prosperous future father-in-law, when arranging the provision which his daughter was to have on marriage might make a gift to his future son-in-law of heritage, or the money to buy it, and insist as a condition of the gift that, though the title would be taken in the name of the future husband alone, on his death it was to fall to the future wife (presumably a special destination would be inserted in the deed, rather than reliance placed simply on the proven written conditions of gift) if she survived him, or, alternatively, that the title should be taken in both names with the usual survivorship clause. In earlier times, this might have been done at the same time as such ante-nuptial agreement as might be convenient might be made regarding the *jus mariti* and/or the *jus administrationis*, if the date was before 1920. It is difficult to see upon what basis the husband could later found in order to revoke the destination[1].

It is worthy of note that the Principles[2] appear not to favour the continued use of special destinations. At /

1. cf. Brown's Tr. v. D. 1943 S.C.433.
2. II, 1994: see also Hay's Tr. v. H.'s Trs. 1951 S.C.329 per L.P.Cooper at p.334.

At p.1991, it is explained that their popularity owed much to the early impossibility of conveying heritage by will. The destination achieved the same end, though the deed in which it was embodied, was not regarded as a deed of testamentary character.

If the arrangement by which the property is held is considered to be that of joint property, in its pure form, there can be no question of either party having the power to evacuate the destination. The whole property will become the survivor's on the death of the predeceaser, vesting, it is thought, without need of confirmation [1] as it will if it is thought that the deceased DID have power to revoke the destination, but did not exercise the power.

Difficulty arises if the usual "husband and wife" clause in a disposition is regarded as evincing evidence that the property is held in common, or by some peculiar, hybrid type of holding which takes some of the characteristics of each. Certainly s.30 provides guidance and help, but it is suggested that the section 'begs the question' whether, or in what circumstances, revocation may be made. This is a lamentable lack.

The latest case has shed light upon the subject in its purely legal aspect, but the result in a broader policy aspect, may be thought not to be satisfactory.

In Steel v. Caldwell[2], the spouses cohabited in a house the title to which was taken, in 1967, in name of the husband and wife and the survivor of them and the executors and assignees whomsoever of the survivor. The widow pursuer averred that she had provided almost all of the purchase price. The husband at first paid the premiums on an endowment policy on his /

1. Meston, p.83, where the author discusses the need for, and functions of, s.18(2) and 36(2)(a).
2. 1979 S.L.T. 228.

his life but the wife when the husband once fell behind with payments, took responsibility for payments (out of her own wages), and the endowment policy was put in her name. In 1972, the husband put the wife out of the house, and in 1973 purported to dispone his share of the house to a third party. The disposition was recorded. The wife did not consent to the disposition, and indeed was ignorant of it. She wished to return to the house and she considered it probable that she would survive her husband.

The third party (first defender) advertised the house for sale in August 1974, and it was purchased in good faith by the second and third defenders, who then occupied the house. The disposition in their favour was recorded in December, 1974.

Upon the death of the husband in 1976, the wife sought reduction of the later dispositions, on the ground that the destination limited each proprietor not only in testamentary, but also in inter vivos dispositions of the subjects.

That argument failed; it was held that the survivorship clause could affect only a testamentary disposition.

The first defender argued that Ferguson did not apply. He contended that the parties' ownership was not joint, but common[1]. Further, the rule in Ferguson applied only to testamentary deeds. However, if each party had not an unfettered power to dispose, each had the power to dispose for value.

Alternatively, the key to Ferguson was the contractual nature of the destination there agreed upon /

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1. an important point which seems to have been accepted by L.Allanbridge and by Counsel for the pursuer: see p.233.

upon. Here, although the wife had borne the financial burden, the arrangement with the building society was such that the husband had the sole revocationary interest.

Moreover, since the purchasers acted in good faith, they were entitled to the security of the records.

Counsel for the pursuer argued that Forrester's entitle was not so limited to testamentary dispositions; and on the 'contract' argument replied that the proper test was to ascertain who had supplied the purchase price. This was an unusual case of purchase not of a whole house but of a one half pro indiviso share subject to a survivorship destination as narrated in the disposition, and ought to have placed the purchasers upon inquiry.

It is hard not to sympathise with the wife. Lord Allanbridge held Forrester's Trs. to be so limited to testamentary dispositions, upon an examination of the authorities, and "in conformity with the legal concept of a pro indiviso share in property, that when two persons have jointly contributed to the purchase of heritable property and taken the title to it in their joint names with a special destination to the survivor, the only restriction on disposal of their respective shares is that neither can dispose of his or her share by mortis causa deed."[1] Here the parties each took a one half pro indiviso share (as owners in common, presumably) and no authority, including Forrester, infringed the full exercise of their inter vivos powers as opposed to their testamentary powers[2,3]. A comparison was drawn with mutual wills (q.v. supra), Lord Allanbridge considering that the contract there is /

1. p.232.
2. p.231.
3. Such facts now must be read against the background of the 1981 Act. See Nichols and Meston, Chapter 6, Protection of Occupancy Rights against Dealings.

is to leave the estate to the other party, whatever the estate may consist of at death, and not to freeze the property at the date of making the will and covenanting not to deal with it. His Lordship noted that L.P.Cooper in Hay's Trs. considered that the contractual element in Perrett had something of the quality of a mutual will. This was helpful. "It demonstrates that whilst the survivorship destination where mutual cannot be altered or evacuated by testamentary deed, it cannot have the effect of freezing the assets of each party and preventing them from dealing freely with their own pro indiviso shares by inter vivos deed during their respective lives."[1] Obiter, Lord Allanbridge thought gifts too would be unexceptionable, so long as not testamentary gifts.[2]

The 'sole reversionary interest' argument did not attract him, although he would have allowed proof before answer. If the wife had made substantial contributions, it could well be argued that she should have the protection of Perrett, had it been held to apply to inter vivos deeds.

Proof /

1. p.232.
2. p.232. The quotation given above (p.664) continues, "....by mortis causa deed. Each person, however, has a pro indiviso share which he or she can dispose of inter vivos, by gift or for value, and that share is always subject to the claims of the owner's creditors. Such a conclusion is consistent with the ratio of Perrett's Trs., which in my view clearly only applies to attempts by one of the pro indiviso owners to evacuate the survivorship destination by mortis causa deed and thus defeat the right of the other to take the deceased's share" (support drawn from Ersk.Inst.III, viii.35, and Bell's Comms. i,62). But the view as to gifts was not necessary for the disposal of the present case.

Proof before answer would also have been allowed upon the question whether the circumstances should have placed the defender purchasers on inquiry.

The rules of contribution, intention, contract, gift - if indeed they can be termed rules when they are merely guides, and perhaps outdated ones - are insufficiently precise, and it is to be hoped that, in the review of the ownership of heritable property by spouses (or at least of the ownership of the matrimonial home, if not the ownership of heritage owned as an investment and bought out of funds, of either spouse, not qualifying as "family funds" or "family property", yet to be defined) the meaning and effect of special destinations, their influence and the power to evacuate them, will be clearly set out. It is submitted[1] that both partners should be owners of the matrimonial home and that the insertion into the law of a special chapter[2] upon their rights of occupation and disposal (and upon the rights too of tenant spouses) is warranted.

To return to the administrative consequences of special destinations (though the administrative effects touch the substantive effects at certain points), s.18(2) empowers the executor to confirm to the subject-matter to which the destination relates in order to transfer it to the party entitled to it in terms of the destination, if in fact the granting of title to the substitute is necessary. The necessity for s.18(2) lies in the provision of s.36(2)(a), that heritable property belonging to the deceased and subject to a special destination which has not been evacuated by him (always provided that evacuation was competent in the circumstances) shall not be treated as part of the deceased's estate. If the deceased was entitled to /

1. Chapter 7.
2. See now, of course, 1981 Act.

to revoke the destination (see discussion), and did do so, the property concerned would form part of his estate. Thus, unless the deceased had evacuated the destination, and had acted competently in doing so, the executor could not confirm to the heritage, and, as in certain circumstances, some form of conveyance or grant of title to the substitute is necessary, s.18(2) solves this problem by providing the required (limited) authority to the executor to act in this regard. The section, in its words, "(if such conveyance is necessary)", recognises that in certain cases the intervention of the executor may not be required (and may even be inappropriate and ineffective.)

The nub of the matter is the manner in which the substitute under the usual survivorship clause ('to X. and Y. equally between them and to the survivor of them') is affected by these provisions. It would appear[1] that the one half pro indiviso share of the predeceaser in such circumstances vests automatically, without need of further conveyance, in the survivor.

Such automatic vesting is extremely neat, and means that the minimum of expense is involved. The survivor, when he/she comes to sell the property, will simply narrate the circumstances in the new disposition, by which he/she became sole proprietor.

If, on the other hand, the destination is other than one of simple survivorship, s.18(4) ensures that the docket procedure specified by s.15(2) (and Schedule 1) shall apply, and ensures also that the protection afforded by s.17 to persons acquiring title from the executor /

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1. See Meston, p.83, where he states that his opinion has changed from that which he held in the first edition of "The Succession (Scotland) Act, 1964", and see his reference to A.J.McDonald (1965) 10 J.L.S.73.

executor or from a person deriving title directly from the executor extends to cover the case, by stating that the provisions of those sections (15 and 17) shall apply to property which has vested in the executor by virtue of s.18(1) and/or (2).

PROVISIONS TESTAMENTARY IN NATURE IF NOT IN FORM

The provisions of a marriage-contract may be at least partially testamentary in nature, and the rights of parties in matters of succession, as in other matters, may be referable to the terms thereof. It remains possible for spouses by such a contract to renounce in advance their rights under common law and statute, although they can no longer ante-nuptially disinherit possible future children[1]. Upon this aspect of rights of succession, attention is directed to Principles of the Law of Scotland: D.M.Walker[2].

It is strange that a marriage-contract provision in lieu of other rights of succession is treated as a debt[3] whereas prior and legal rights and other rights of succession in intestacy under s.2 of the 1964 Act are postponed to other (commercial) debts[4]. Legal rights /

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1. 1964 Act, s.12.
2. Prins.II, 1994 et seq.
3. Walker's Prins.II 2029 where is cited the case of Countess Galloway v. Stewart (1903) 11 S.L.T. 188.
4. See earlier discussion upon the status of legal rights as debts or hybrid intermediate claims, and the view that their nature is rather of a debt or a claim (albeit postponed) than of a right of succession: statutory prior rights and rights under s.2, however, apply only in the case of intestacy or quoad the intestate part of a partially intestate estate, and s.2 rights at least are said to be exigible out of the net intestate estate which means, the estate remaining after satisfaction of "estate duty and other liabilities of the estate having priority over legal rights, the prior rights of a surviving spouse and rights of succession" (s.36(1)), although s.8 and s.9 make reference only to "intestate estate." S.9(6)(a), however, cuts down the definition, so /

rights, being exigible as well in testacy as in intestacy, are preferred to bequests or legacies, and thus acquire their intermediate position.

It has been seen that special destinations in dispositions of heritage may have testamentary effect, if not revoked or not competently revoked.

Temporary Aliment

Among related topics is the subject of the entitlement of the widow to temporary aliment after the husband's death[1].

It is a humanitarian rule, available at common law and preserved by the 1964 Act, s.37(1)(c), allowing the executors to offer reasonable financial help to the widow within the six-month period immediately following upon her husband's death, though all the other (commercial) debts due by the estate may not be ascertained.

In earlier days, when income and wealth more commonly than nowadays stemmed from the land, the temporary aliment was payable till the next term of Whitsunday or Martinmas after the death, but, as Clive and Wilson comment, these dates now have less significance /

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so far as it affects the monetary prior right under s.9, to net intestate estate. As far as s.8 is concerned, there is guidance in that, by s.14(3), it is stated that any rule requiring any particular part of an estate to bear any particular debt of the deceased shall remain, and there is a similar provision concerning the liability of heritage to meet that part of the Estate Duty (obsolete) referable to it (s.19(3)): prior rights, legal rights, and rights of succession under s.2 rank inter se as described in the Act and above.

1. Barlass v. B.'s Trs. 1916 S.C.741, 1916 2 S.L.T. 23. Ersk. I, 6,41. Chapter 4, Clive and Wilson, pp.692-694.

significance for the widow, and the aliment, if paid, will be paid most probably for a six-month period after the husband's death. Thereafter the executors will be more certain of the exact size of the free estate, all debts and claims supposedly having been tendered, and are entitled to make payments out of the estate.

It would seem that an indigent husband, whose circumstances would qualify him for aliment under M.W.P. (Sc.) Act, 1920, s.4 would also be entitled to this temporary relief out of the estate of the deceased spouse.

Additional Help for the Widow

So much has been said about the unfairness of the present system of property-holding, and the possibility of the manipulation of the rules of testate and intestate succession that it is well to remember that a widow who has been the victim of her husband's cunning in arranging his financial affairs so as to leave her inadequately provided for, or as poorly provided for as he could by his actions and words dictate, has yet an equitable remedy against the executors or against the ultimate recipients of her husband's generosity. She may claim from him or them a continuing aliment. This will be treated as a debt of the estate for which the capital of the estate may be liable[1].

The size of the award will be what is reasonable "in the circumstances", and its duration will be usually that of the lifetime of the widow, or for as long as she is in need of the award. Clive and Wilson note that /

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1. See generally Anderson v. Grant (1899) 1 F.484; Howard's Exec. v. H.'s C.B. (1894) 21 R.787; Young v. Y.'s Trs. (1906) 14 S.L.T.123; Clive and Wilson pp.694-696; Chapter 4.

that, unless there is a specific renunciation in advance of the award, by the widow, neither acceptance of inadequate testamentary provisions nor the rejection of poor (or non-existent) testamentary provisions in favour of perhaps less than adequate legal rights, will preclude a claim for continuing aliment.

This possibility softens the potentially harsh effect of the property-owning husband's investment in heritage, and disposal of it by will to others than his wife, or of his making other legitimate but uncharitable use of the present law of succession. It can do nothing to aid the wife, whose husband has made valid inter vivos alienations of property to friends, with the result that his estate at death is no reflection of his wealth at mid-marriage. No concept except that of inter vivos, rather than mortis causa, rights in the estate of the other spouse could ameliorate that situation. A man may well be poorer at his death than throughout his life, whether by accident or design, and, if the latter, whether by strategy to defeat his wife's claims or in the belief, honestly held, that only the poor die rich. Unless new rules as to rights of disposal of "family property" and "non-family property" are formulated, a man cannot be prevented from doing what he wishes with his own property during his life.

The largest question, though, is this: is there any logical or equitable basis for the expectation of a wife or husband that she/he will take a certain "indefeasible" share in the estate of the predeceaser, if the parties by their own wish have not made suitable testamentary provision for each other, and if there is on death or (better) during life a fair division of property, either according to revised rules of ownership /

ownership, altered in the light of changed ideas of the rights of the parties and of the value of their contributions to the family prosperity, or according to a more "rough and ready", "fifty-fifty" division, which should be capable of allowing the weaker economic party, the widow, to maintain herself through the prudent investment of property which, instead of "devolving" upon her, rather "crystallises" at the dissolution of marriage (by death or divorce) into her own separate property, from being "family property", in a similar manner to that in which a floating charge, when company winding-up proceedings are commenced, "crystallises". Perhaps that is all which, in cases of testacy where the marriage has been 'in community', the survivor should receive.[1]

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1. i.e. ex communione, rather than ex successione. And see discussion of different situations - 'Succession', Chapter 7.

THE PROPERTY OF MARRIED PERSONS

ACCORDING TO THE LAW OF SCOTLAND

VOLUME III

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INTERNATIONAL COMPARISON

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Preliminary Comment

Although defects in the law may be identified by a general study of the Scots rules now in operation, the subject of matrimonial property is one which is proving to be of interest and controversy in other legal systems, and a review of rules and attitudes found in other countries, whose experience may be relevant in that the social structure which they serve is similar, meeting like aspirations and comparable problems, may be instructive. 'An Excursus on the Bantu Customary Union', though valuable indeed in its context[1], is of less interest to the British student. It may be that a new concept of family property will be of greater use[2] than a careful engrafting of new rules in places where the old fabric of our 'system' of matrimonial property is shown to be threadbare or defective.

Hence it is proposed to make a short study of relevant property provisions in the laws of South Africa, Louisiana, France, the Scandinavian Countries, and England. In Chapter 7 will be found a brief comment on the new rules in operation in Australia and New Zealand[3]. With the exception of that part of the discussion pertaining to the law of England, in respect of which primary sources are also available, reliance has been placed upon secondary sources, which may not reflect the latest position /

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1. The South African Law of Husband and Wife, H.R. Hahlo (3rd edn.1969), Chapter 2, 'Marriage and the Non-European: With an Excursus on the Bantu Customary Union'.
2. See infra Chapter 7: and cf. Sc.Law Comm.Memo. No. 41 (April 1978) "Occupancy Rights in the Matrimonial Home and Domestic Violence", Part VII, which is concerned with rights of possession (not yet ownership: see Family Property Memorandum yet to be circulated) in respect of furniture, plenishings and other household moveables.
3. And see also "Belgian Choices", Chapter 7.

position. The explanation is offered that the purpose of the review is the gathering of ideas, and not the systematic treatment of the relevant rules of a legal system in the degree of detail which has been accorded to the law of Scotland.

SOUTH AFRICA

Authorities Cited

"The South African Law of Husband and Wife", H.R. Hahlo (3rd edn. 1969) ("Hahlo"). (4th edition published 1975; account has been taken of changes, but page references are to 3rd edition except where otherwise mentioned).
"Wille's Principles of South African Law", J.T.R. Gibson (6th edn. 1970): Chapter XII, "Married Persons" ("Gibson").
"Maasdorp's Institutes of South African Law", Volume 1. (The Law of Persons) (9th edn. (C.G.Hall), 1968) ("Maasdorp").

It is well-known that South African law belongs to that civilian family of legal systems linked by a common Roman foundation. Also a family member is the law of Scotland[1], though it has been subject to common law influences, and the law of Louisiana, next to be considered. As far as South Africa is concerned, remarks will be confined to the law as it affects the white population.

In his 'Survey, Historical and Comparative',[2] Professor Hahlo reminds his readers that the first Dutch settlers came to the Cape in the latter half of the seventeenth century, and that naturally the law which they brought with them reflected the law of /

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1. See D.M. Walker, the Scottish Legal System (4th edn.), p.69.
2. Chapter 1, pp.5/6.

of Holland at that date. Marriage had been 'secularized', a universal community of property regime was in operation, divorce a vinculo on the ground of adultery or of malicious desertion was recognised, and the obligation represented by betrothal could be enforced specifically. Subsequently, the remedy for breach thereof was reduced to a claim for damages. The Union of South Africa was established in 1910, and resulted in much statutory amendment of the common law and of Acts passed before the Union. There appears to have been a movement towards uniformity between provinces[1]. In 1935, two further grounds of divorce were introduced, namely, incurable insanity for a period of seven years, and imprisonment for a period of five years "after a declaration of habitual criminality"[2].

Most interesting, from the point of view of this discussion, is the Matrimonial Affairs Act, No.37, 1953, which seems to have been the result of twentieth century rejection of earlier notions, not so much, as Hahlo says[3], of the idea of community of property, as of the husband's excessive marital power. This realisation came noticeably later than its Scots and English counterparts, and was prompted largely by the /

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1. See, e.g., the changes made in the matrimonial law of Natal, described by Professor Hahlo at p.11. ("In accordance with the official policy of gradually eliminating statutory differences between Natal and the other provinces...").
2. The Divorce Laws Amendment Act, No.32, 1935. The grounds of divorce continue to be based "squarely on guilt and not on marriage breakdown, on fault and not on failure." (Hahlo, 4th edn. p.362). In the 4th edn., at pp.22-27, the author considers the 'guilt' and the 'breakdown' approaches, and does not appear to be opposed to the latter. Many South African divorces are undefended and "an undefended divorce almost invariably is a divorce by consent, active or passive." (4th edn., p.24).
3. p.9.

the conclusions, published in 1949, of the Women's Legal Disabilities Commission, which included among its members Mrs. Bertha Solomon, M.P.[1].

Hahlo[2] describes the effect of the Act of 1953 thus:-

"While retaining community of property and profit and loss, and the marital power, the Matrimonial Affairs Act confers upon the wife a modicum of independent legal capacity, with a corresponding diminution in the marital power of the husband". This does not sound notably 'liberal' or egalitarian, and indeed, as Hahlo subsequently describes it, it appears to display no very bold reforming zeal. The result[3] of the Act, as amended in 1962 and 1966, is that a married women in South Africa (if subject to the general law and not to the provisions of her own marriage-contract) has control over her own earnings and savings, and may operate alone a building society savings account or bank account. Her own heritage ("immoveable property") brought by her to the marriage, or acquired by gift, inheritance or purchase out of her own money, is safe from "alienation and hypothecation by the husband". Upon divorce, a court is empowered to make in favour of the innocent spouse a maintenance order against the guilty spouse.

Upon this sketchy framework (the whole of course is dealt with fully throughout Professor Hahlo's book), the foreigner looks askance. The very brevity of Professor Hahlo's space summary raises suspicion. Many questions are not answered, or even postulated there, and indeed, later in the discussion is found the /

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1. Professor Hahlo refers the reader to Mrs. Solomon's autobiography, "Time Remembered" (1963) upon her struggle for women's rights.
2. p.10.
3. Hahlo, ibid. See also Maasdorp, pp.31-33.

the sentence:- "There is no question of legal equality between husband and wife in South African law".[1]

Hahlo comments[2] "South Africa's community of property and profit and loss may well be the only full-blooded universal community system left in the Western world". (In the 4th edition, "South Africa is one of the last bastions of the orthodox community of property and profit and loss." (p.15)). That may be so. Perhaps, however, the extraordinary prevalence and popularity in South Africa of the marriage-contract reflects views upon the suitability for modern conditions of the substantive common-law rules[3]. Hahlo divides matrimonial property regimes in existence today into three categories:- systems of complete separation[4], traditional community property /

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1. p.11, and then, "The husband remains legally the head of the family. Nor has South Africa so far been considering any major reforms in its matrimonial property regime." (p.11)(1969). Hahlo notes that South Africa is trailing behind overseas developments, but remarks (fn.48, when commenting on the German and French attitude towards the legal equality of husband and wife), "Complete equality is, of course, a chimera". From the 4th edn. (1975), the sentence quoted in the text is excised.
2. p.11.
3. Contrast Louisiana, infra. Hahlo notes that marriage-contracts are popular in Quebec, which has a community of moveables and acquests, and argues (p.12, fn.51) that to some extent tradition must affect parties' behaviour with regard to marriage-contracts. Certainly tradition, and example, and fashion within a certain circle or socio-economic group, is likely to have a bearing on conduct, whatever the content of the law which is being 'avoided'.
4. In some cases (e.g. England, Australia, New Zealand) there might be said to be a new subdivision: "complete separation with (considerable) judicial discretion". See subsequent discussion. Hahlo discusses the merits of the various systems at pp.13-16.

property systems (universal or partial), and "deferred community" or participation systems.

He is accurate when he states that a universal community régime "takes the idea of partnership of husband and wife to its logical conclusion in the economic sphere", but adds a phrase which might be thought to be out of place in a modern discussion, when, in noting the common resort of the middle and upper classes to the marriage-contract, he says that community of property and profit and loss is not popular in South Africa, despite "its obvious advantages from the wife's point of view if the marriage is financially a success".[1] The idle, money-seeking wife is almost as familiar a character as her male counterpart, the Victorian fortune-hunter, but perhaps both are more difficult now to find. The aim must surely be to find a system of matrimonial property which will deal as fairly as possible with the average husband and wife.

Hahlo explains the general rejection by the wealthy South African of the common law on the basis that, if the husband does not prosper, "his financial ruin will be hers". Second, the wife's position at common law with regard to the management of the property is humiliatingly weak[2]. The husband, equally, whether for reasons of conscience or self or business protection or a mixture of these reasons, prefers /

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1. p.12. (a clause withdrawn from the 4th edn.). And see infra. (elements in a breach of promise claim).
2. The South African marriage partnership in community appears to resemble the Scots communio bonorum (Chapter 1): Hahlo comments "As far as she "(the wife)" is concerned the partnership, in the words of Mr. Justice Oliver Wendell Holmes, 'begins only at its end'."

prefers to exclude the operation of community.[1] The result is that the principle of separation of property[2] exists in South Africa, in the subsidiary or underlying 'system' of matrimonial property law chosen by so many.

Relevant Substantive Rules of South African Matrimonial Law in Greater Detail

Property Consequences Arising From Engagement (Espousal)

In South African law, damages may be obtained for /

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1. It seems that 35% of all marriages contracted in South Africa are 'out of community'. Hahlo, p.283, fn.1, noting that as antenuptial contracts are rare among the Bantu and poorer Whites, "it is fair to conclude that among the middle and upper classes marriage out of community is the rule rather than the exception" In the 4th edition, he substitutes a sentence to the effect that about half of the 41,000 white marriages of 1972 were with ante-nuptial contract. In an interesting footnote (4th edn., p.20, fn.105a), Hahlo concludes after a brief consideration of the Nordic Countries (little contracting-out of the regime provided), West Germany (similar), France (where the optional regime of community of gains is not popular) and Quebec (where the percentage of persons preferring to contract out of the standard modern (1970) community of gains system is high but falling) that "It would seem that unless it is entirely out of tune with prevailing sentiment whatever a country offers as the legal regime will be accepted by the mass of the population without query." This seems equally true of England (where the population must absorb a massive judicial discretion and interference) and of Scotland (where silence seems to be the rule).
2. Though in a more satisfactory form, perhaps, as springing from marriage-contracts which presumably are made or altered to suit parties' requirements and circumstances, and the provisions of which are specific. Contrast Clive and Wilson, p.289, upon the Scottish position: "The present law is easy to state but difficult to apply".

for breach of promise of marriage[1]. By consent of both parties, the contract of engagement may be brought to an end. It will terminate also, of course, on the death of either party. A more elaborate body of rules than exists in Scots Law[2], concerning the validity of causes for withdrawal from the engagement, and the law of engagement generally including the resolution of property disputes arising therefrom[3], appears to have been developed. Relevant factors may pertain not only to consent, or conduct, but also to 'any other valid reason'[4].

Damages may be awarded against the defendant (though Hahlo states that the courts are not anxious to make awards against women or minors) if it can be shown that the latter has unjustifiably repudiated the contract or by 'improper' conduct has caused the plaintiff to revile.

An award may be made under the head of *injuria* as well as for actual pecuniary loss. There is considerable judicial discretion as to quantum. Since damages may be given for wounded feelings, the action is seen as "a composite one, comprising both delictual /

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1. As to the position in England (such actions are no longer competent but rules to resolve property disputes exist: see infra.

2. Perhaps this is a false impression. There is no reason to suppose that Scots law would look an answer, however extraordinary the circumstances or the arguments. It is interesting that Professor Clive concludes his treatment of the subject (C.& W. pp. 24-26) by referring to a general guide formulated by Professor Hahlo.

3. Contrast Clive (C.& W. p.29 "An engagement as such has no patrimonial effects. The normal rules of property law apply".) In fact, the Scots and South African rules seem similar. See Hahlo, pp.56-58, C. & W. pp.29-30, Walker, Princ. I., pp.256-257.

4. See generally Hahlo, pp.46-50.

delictual and contractual elements."[1] The successful plaintiff is entitled to be reimbursed in respect of any expenditure reasonably incurred in contemplation of the marriage, and for "the loss of the pecuniary advantages of the promised marriage and the prejudice to the plaintiff's future life and prospects of marriage".[2] Hahlo remarks that while the loss of a marriage to a wealthy man is a factor to be taken into account, matters should not be taken to extremes, and she who has been 'jilted' by a millionaire cannot claim one-half of his estate, or whatever would have fallen to her by marriage-settlement. She is not entitled to claim that she be placed in the same position as she would have enjoyed had the marriage taken place. Recompense for effort used in vain, reimbursement of money spent, and restitution of goods are acceptable claims still, it is thought, but modern thinking tends to dismiss as outmoded and inappropriate, or despise, or leave out of account, marriage /

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1. Hahlo, p.52, ascribing to English law an influence here. In Scotland, the award may also contain an element in respect of solatium for hurt feelings (Walker, Prins. I, 236) and though perhaps commonly regarded in Scotland as an action in contract, Professor Clive (C. & W. p.23) notes that the action "has delictual elements", although nominally for breach of a contract. In South Africa, the modern view seems to be that breach of promise per se does not amount to injuria. "Loss of face" in these circumstances is not a contemporary notion.
2. p.53.

marriage-inspired 'expectations' of a financial nature[1].

The measure of damages ex delicto depends upon the hurt to the plaintiff, 'the social position of the parties', 'and the general behaviour of the defendant' which may be such as to mitigate or increase the award.

Damages for seduction will be competent if the defendant, after making a promise to marry the plaintiff, has seduced her[2].

Damages for breach of promise will not be recoverable if the plaintiff, expressly or by implication, waives the right to them, nor may they be recovered from a married man if his marital status was known to the plaintiff[3]. Damages (for monetary loss only) may be awarded (if otherwise justified) against a deceased defendant's representatives[4]. The plaintiff must prove the engagement and generally, though not always, must provide corroboration. In certain cases/

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1. Such considerations are by no means unknown in Scots law, however (see for example Stroyan v. McWhirter (1907) 9 S.L.T. 242) but the cases tend to be early twentieth century, or older. Indeed, as Professor Clive points out (C. & W. p.21), the action for breach of promise is now rare in Scotland.
2. Cf. old Scots irregular marriage by promise subsequente copula. This form of irregular marriage, together with that of marriage by declaration de praesenti, was abolished by Marriage (Scotland) Act, 1939, s.5. Marriage in Scotland may still be constituted by cohabitation with habit and repute. See generally as to seduction (in an English/Scottish conflict case) Soutar v. Peters 1912 1 S.L.T. 111.
3. Cf. English public policy cases of Speirs v. Hunt 1908 1 K.B.720, Wilson v. Carnley 1908 1 K.B. 729: contrast Shaw v. S. 1954 2 Q.B. 429.
4. An action against the defender's executor (but probably not by the pursuer's executor) seems competent in Scotland: Walker, Prins. I, 235, and authorities there cited.

cases (one of these being an award of damages for seduction) the sanction of civil imprisonment for non-payment of debt remains competent in South Africa[1], but it may not be used to enforce an award of damages for breach of promise[2]. There is a three year prescription of actions for breach of promise[3].

Return of Gifts

Hahlo divides engagement gifts into three categories. The first comprises arrhae sponsalitiae, given on the condition or faith that the marriage will take place. Usually the engagement ring, and very often the ring only, falls into this category.

The second comprises gifts of value intended to benefit the donee throughout his/her married life "___ examples are a house, a farm, furniture, family jewellery, a life insurance policy. Any permanent gift of value given during the engagement is presumed to have been made in anticipation of marriage".[4]

The third class contains "out-and-out gifts of small value", such as are normally exchanged between engaged persons.

If the engagement is terminated 'unlawfully' by one party, all gifts must be returned, with the exception of gifts of the third category, which have been 'consumed, alienated or lost.' However the innocent /

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1. See Scottish position: Debtors (Scotland) Act, 1880 (civil imprisonment abolished, except for taxes, fines, rates, sums decerned for aliment) Civil Imprisonment Act, 1882 (imprisonment for failure to pay alimentary debts abolished, but special provisions made in respect of wilful failure to pay sums decerned for aliment) As to aliment, see Chapter 4.
2. The Civil Imprisonment Restriction Act, No. 21 of 1942, s.4: Hahlo p.56, fn. 11.
3. Prescription Act, No. 18 of 1943. (Hahlo, p.56).
4. Hahlo, p.56.

innocent party, while being able to recover gifts made by him/her, may retain gifts received, and set the value of them against "her damages" (a notional sum if there is no litigation?), unless possibly the object in question is an arrha, the value of which greatly exceeds the damages to which the innocent party is entitled and provided that the defendant makes full compensation in damages for the breach[1]. The set-off process, though convenient, might be thought inconsistent with the nature and purpose of gifts made in anticipation of marriage (but not of arrhae, which appears to be that such gifts embody a condition that they will be "forfeited to the donee if the donor breaks his promise"[2]) but the rule seems to rest on the view that "the fiancé who unlawfully puts an end to the espousals cannot rely on the non-fulfilment of the condition"[3]. Professor Hahlo seems to suggest that a more appropriate course would be the return of gifts made in anticipation of marriage, and subsequent payment of suitable damages (following the 'valuable arrha' rule (Pothier, Traité du mariage, para. 43) above).

It is possible that the engagement ring may be regarded as a gift in anticipation of marriage rather than an arrha[4]. Professor Hahlo does not appear in terms to deal with rights in the ring[5], but by inference of the text it would appear to be forfeited to the donee on the unlawful termination of the engagement by the donor, though subject it seems to the set-off procedure. How is the 'forfeit' nature of the arrha to be reconciled with the suggestion that /

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1. Hahlo, p.57.
2. p.56.
3. p.57.
4. p.56, fn. 13.
5. What will be the rule in the event of termination by mutual consent, or of unlawful termination by the fiancée?

that an arrha, the value of which is greatly in excess of the damages due, should be returned and damages accepted? What is to happen in the cases, which surely must be many, in which a judicial assessment of damages was not sought and therefore is not available?

In the absence of evidence of intention to the contrary, that is, "that an engagement and marriage will follow in due course", pre-engagement gifts are irrecoverable[1].

As to gifts made to the engaged couple by third parties on the faith of the marriage, the same rule as is found in Scotland (and attributable to the same principle, namely condictio causa data causa non secuta) applies, with the result that such may be recovered from the donees if the marriage does not take place[2].

Hahlo concludes his discussion by remarking that, unless a contrary intention appears, engagement gifts are not presumed to be returnable on termination of the marriage. "Once the marriage has taken place, engagement gifts lose their special character and become subject to the ordinary rules governing property of the donee"[3]. These "ordinary rules", and the question whether, in marriages subject to the common law, engagement gifts are placed under the head of joint estate, will now be studied.

The South African System of Community of Property and of Profit and Loss

If /

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1. Hahlo, p.58, and authorities there cited.
2. As to Scotland, see Stair, 1.7.7.
3. p.58.

If the South African system is perhaps "the only full-blooded universal community system left in the Western world"[1], it merits study:

Community commences at the celebration of marriage except in certain circumstances, and is presumed to rule, unless the contrary is shown. Community is universal. It is community of property and of profits and loss. It matters not that financial contribution has not been equal. Each partner owns one half of the joint estate. "Where everything is owned and owed in common, there is no room for debts or rights of property."[2] This gives an attractive impression of clarity and fairness, which may be an accurate, or a superficial, reflection of the true state of affairs.

It follows that in general no inter-spouse litigation is competent, for each is the other (except that, as Hahlo notes, the wife is the junior partner[3]), and all[4] is held in common.

What is the legal nature of the Community?

Professor Hahlo rejects the early view that the joint estate is a separate persona[5]. Neither does the notion that stante matrimonio, the property in the fund is in the husband, the wife's right merely arising /

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1. Hahlo, p.11, noting that "Seen in the global context, the South African law of husband and wife is, for better or worse, trailing behind developments overseas".
2. Hahlo, p.210.
3. and the husband the head and administrator (p.209)
4. with the exception of certain assets, which remain the separate property of each and in respect of which it is as if the spouses had been married out of community.
5. p.212.

arising on dissolution of the marriage[1], find favour with him. He says that both in the Netherlands and in South Africa the community is "a species of condominium". Assets are 'owned' in equal undivided shares, but these shares are "indissolubly tied up. Neither spouse can by act inter vivos dispose of his or her share in the joint estate, though either spouse may do so by will or other act mortis causa"[2].

It is quite clear that the husband is administrator. A simple example of the operation of the system is that if the husband makes to a third party, stante matrimonio, a donation, "he diminishes his own estate by /

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1. Kahlo quotes Mr. Justice Van den Heever, in Oberholzer v. C. 1947 (3) S.A. 294 (C) at 297, "during the subsistence of the marriage ... the wife's ownership is in a state of suspense. It is only a conceptual kind of ownership or quasi-ownership ... which becomes kinetic only upon dissolution of the marriage ...", disagreeing with the statement if it was intended to convey the meaning that the wife's interest was only one of expectancy, the husband alone owning the community property while the marriage subsists. (Cf. Lord Kinloch's devastating assessment of the Scots communio bonorum in the case of Fraser v. Walker (1872) 10 Macph. 837 at pp. 847-8 (See supra, p.71 et seq.):- "It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution, and that, so far from a communio bonorum giving rise to the rights emerging at dissolution, it was the existence of these rights" (that is, the right of the surviving partner to one half of the moveable estate jure relictae, and the right of the predeceasing wife to transmit that one half share to her representatives or their right to make such a claim after her death (p.71) (with the passing of the Intestate Moveable Succession Act, 1855)) "which brought the phrase communio bonorum into use. At all events, nothing else was ever legally comprehended under that name except the two rights referred to".) See also pp.73/74 supra.
2. Kahlo, p.219 ("subject to the possibility of a degree of hoedel-scheidding") Cf. the incidents of "common", rather than "joint" property in Scots law.

by half of the value of the donation, and his wife's by the other half".[1]

Which subjects fall into Community?

Without need of transfer or delivery, all property and rights owned by each at marriage, and thereafter acquired, moveable or immoveable, corporeal or incorporeal, fall into the community. Heritable estate situated abroad also is included, though if the lex situs requires transfer into both names before recognising that the property is owned by both, the partner in whom the title stands must ensure that the required transfer is effected.[2] Otherwise, it does /

1. Hahlo, ibid.
2. On occasion, a conflict case presents such rules "in the round". One such is the case of Black v. B's trustees 1950 S.L.T. (Notes) 32. There, a Scotswoman, after marriage, executed a trust-settlement conveying to trustees heritable and moveable estate belonging to or acquired by her. Later, the wife having succeeded to a share in a farm in Scotland, the husband brought action in the Court of Session seeking to have the deed set aside on the ground that it was null and void as contravening the law of the Transvaal, admittedly the matrimonial domicile at the date when the settlement was executed. The wife concurred in the action, which was defended by the trustees.
By the law of Transvaal, a marriage lawfully contracted and not preceded by ante-nuptial contract, carried into a universal partnership under the sole administration of the husband, all moveables wherever situated and heritage in the Transvaal, belonging to either or acquired by either after marriage.
Lord Mackintosh held that the trust ought to be reduced in so far as it conveyed or purported to convey heritable property situated in the Transvaal, and moveable property wherever situated. The remaining provisions should be left valid and standing. His Lordship felt that it was for the lex situs at the date of execution of the trust-deed (1945) to determine whether the wife had capacity to convey heritage to trustees, and Scots law placed no obstacle in her way.
Had the law of Transvaal carried into community all heritage anywhere, would the result have been the same? Capacity to grant deeds affecting heritage is referred to the lex situs, but is the reference to /

does not matter in which name the immoveable property stands. Indeed, heritage acquired during marriage stands in the husband's name, while property brought to /

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to the lex situs in its narrow sense, or to the lex situs including its conflict rules? Is there room for renvoi? As to questions of matrimonial property, (a complex and to some extent uncertain area of international private law) where no property regime has been chosen, Scots law refers property questions to the husband's domicile (or now the matrimonial domicile - what if none?) (A.E. Anton, Private International Law, pp.458-460) or, if a regime expressly or by implication of law has been chosen, to the proper law of the settlement (Anton, p.451). Yet in matters of immoveable property (Anton, p.460 et seq) - if only for reasons of effectiveness - the lex situs is dominant and the South African rule stated in the text seems to recognise this. Moreover, Mr. Anton (at p.395) points out that Married Womens Property (Scotland) Act, 1920, s.7, provides that a husband domiciled abroad shall have no right of administration of his wife's heritage in Scotland. Since at that date a wife's domicile followed her husband, the provision seems to apply now, though neither is domiciled in Scotland - Clive & Wilson, p.282, fn.98 and 99. Hence, no matter what the South African provision, a married woman's capacity to deal with Scots heritage appears to depend on the substantive (that is, internal, as authorised by conflict) rules of Scots law (though see Mr. Anton's moderate tone at p.461, to the effect that the lex situs should play an "important" though not necessarily a "dominating" role here - decision as to what interests may be created and how assigned and terminated, adjudication among creditors, effects of real diligence). Mr. Anton at p.464 himself considers this question, in relation to this case, and suggests that perhaps, in a case where both spouses are fully aware of and have acquiesced in, the foreign rules, the latter should operate, and particular rules (though not, it is submitted those of South Africa where, in community, heritage falls into the joint estate) might conceivably deprive the wife not only of capacity but also of her right of ownership, so that a question of property anterior to that of capacity would arise. And see Clive & Wilson p.356. See also deference to the Transvaal lex situs: Bank of Africa Ltd. v. Cohen 1909 2 Ch.129.

to the marriage by either partner usually will remain in that partner's name. In all cases, the heritage will form part of the joint estate[1].

"The salary which the husband earns; the shares and shirts which he purchases; the earnings of the wife and the jewels which she inherits from her mother; the tainted gains of gambling, fraud, theft or prostitution: all alike fall into the common estate. Nor does it make any difference whether the acquisition is made in name of the husband, of the wife or of both spouses jointly".[2] The essence of the community is that, during its subsistence, all the assets of the spouses (except those mentioned below) are "tied-up".

Exceptions include subjects given to either spouse by a third party, accompanied by a provision that they shall not fall into the community, and in addition, perhaps, that they shall not fall under the marital power (which they would, if the marital power had not been excluded expressly). However, the income or fruits of the excluded property will fall into community.

Similarly, property excluded from the joint estate by ante-nuptial contract will not fall into the joint estate, though such exclusion is a practice now /

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1. Such a rule (even to the extent of 'joint matrimonial home' only, as opposed to all property or all immoveable property) would remove many difficulties with which our present law (see e.g. Chapter 4, p.339 et seq and Chapter 5, p.643 et seq) or proposed reforms (cf. Memo No.41, 1.14) has or would have to contend.
2. Hahlo, p.215. (Upon the interesting subject of delictual liability of third parties (damages awarded falling into the joint estate) or of a third party and injured party's spouse, see Hahlo, pp.215-217 4th edn., pp.221-224).

now rare, if the parties intend to be married in community.

"Husband's betrothal and wedding gifts to wife" are a possible, but by no means certain, exception, and, even if they form an exception,[1] Wahlo thinks that the rights of creditors are not affected. Among other exceptions are rights of a highly personal or limited interest nature;[2] certain life policies, and certain other benefits, costs awarded against the husband in matrimonial proceedings where the marriage continues, and inalienable property which one spouse but not the other (perhaps for reasons of nationality) is capable of owning.

Community of assets must be accompanied by community of debts[3]. Any purported exclusion, or provision to the contrary in a marriage-contract is ineffective as against creditors. This includes ante-nuptial debts of both spouses, which form a charge on the joint estate. Post-nuptial debts likewise form such a charge, although criminal penalties and fines must, it is generally thought, be met out of the guilty spouse's separate estate (if any) or out of his/her share of the community, unless the joint estate received benefit from the crime, or the husband had been convicted of an offence concerning the administration of the joint estate[4]. Similarly /

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1. Following old Roman-Dutch custom - morgengave, donatio propter nuptias; cf. Chapter 1, p.20, fn.2.
2. There is in Swedish law also a category of personal (separate) property.
3. Wahlo, p.229 et seq. See also Gibson, p.101-102: "Community Property", "Community Liabilities".
4. " may, by exceeding the bounds of moderation while defending estate assets against attack" (Wahlo, p.229) (clearly an offence peculiar to a system of community).

Similarly, damages in delict are considered to be due only by the spouse responsible, but this is not a point free from doubt, and it may be that the whole joint estate is liable[1].

Termination of Community

The community is terminated by the dissolution of marriage by divorce or death, or by annulment of a voidable marriage, or upon the making of an order of boedelscheiding (separation of property, perhaps temporary).

On death[2], the shares in the joint estate "crystallise". Debts referable to the joint estate are deducted therefrom and the remainder of the estate is divided between the surviving spouse and the heirs of the predeceaser. Collation may take place, if appropriate, between survivor and heir (usually child), before division, if the child has received from his parents during the marriage, an advance (for example, to set him up in business).

In theory, the system is excellent in its simplicity /

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1. This is not Hahlo's view (argued at length at pp.225-234. In the 4th edn., however (at p.238), there appears to be a change of view: Hahlo suggests that the likely outcome will be that, during the subsistence of the marriage, the joint estate will be liable in full for a delict committed by either spouse, but that if the liability is not met, during that time, it must be satisfied by the guilty spouse alone after the dissolution of the marriage). In most cases, however, damages due ex delicto to one spouse (even of a personal nature (e.g. for defamation), though in terms of the Matrimonial Affairs Act, 1953, damages due to the wife for personal injuries of a physical nature are placed outwith the husband's control) seem to fall into community.
2. See generally Hahlo, p.237 et seq.

simplicity, and possibly in practice, it presents no more problems than would normally be encountered in the winding-up of a predeceasing spouse's estate in a system of separation of property. The survivor must make an inventory of all joint estate. Debts properly chargeable, between the spouses, as against one of them[1], if paid out of the joint estate by the executor, must be credited and debited accordingly. If a redistribution of immoveables is necessitated in the reckoning, it seems that the executor may transfer them directly to the parties entitled thereto.

The whole appears somewhat similar to a Scots Scheme of Division for the ultimate beneficiaries of a trust, or a complex estate. It appears also that the rights of the heirs may be postponed until the death of the surviving spouse "if the spouses have massed the estate, conferring upon the survivor a fiduciary, usufructuary or other limited interest therein, and the survivor has adiated"[2]. (acquiesced? adopted? accepted?)

It used to be that a widow, in a special ceremony at the funeral, or by formal declaration within a reasonable time after the death, could renounce all benefit and all liability under the community, but this, in Kahlo's opinion, is probably obsolete[3]. Also possible, but now rare, is the practice of continuing the community, as between survivor and children, after the death of the predeceasing spouse. This might be done by operation of /

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1. that is, to be met out of his/her share of the community, not out of the joint estate before division.
2. Kahlo, p.242.
3. Op.cit., p.248. Cf. Louisiana practice, infra, This option does not appear to be available to husbands (possibly a necessary disadvantage of being captain of the ship).

of law[1] or by ante-nuptial contract, by mutual will, or by will of the predeceaser, "adiated" (acquiesced in? concurred in?) by the survivor. Perhaps the nearest equivalent[2] would be a will made in Scotland by each spouse (separately) providing that the estate shall be held by the survivor in liferent, and that the fee shall go to the children. It seems that this type of will is common in South Africa, as it also is in Scotland, but in South Africa, the object is achieved by massing the joint estate by mutual will. Mutual wills are competent, but thoroughly unpopular with the practitioner and the public, in Scotland. See Chapter 5, p.598 et seq. In South Africa, the courts in such circumstances and where there is doubt in interpretation prefer to find massing, usufruct or a fideicommissum, than to find continued community.

It has been seen that spouses may dispose of their shares in the joint estate by will[3]. The disponer must not purport to dispone more than his prospective entitlement however: the surviving spouse has right to one half of the joint estate (net)[4]. There are no legal rights exigible against the /

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1. "penal" continued community (sharing of profits, but surviving spouse alone bearing losses) where the survivor had failed to comply with the law, by not having made a division of the joint estate for the benefit of the parties' minor children.
2. In South Africa as in Scotland: "Continued community has practically vanished from the South African scene". Hahlo, p.251 (4th edn. p.256: "Continued community is not obsolete in one law" (as evidenced by a number of "community continued by will" cases, including one of 1973, namely Ex parte Jagger 1973 (2) S.A. 721 (N)) "but it is hardly, if ever, established by antenuptial contract"). See generally as to its operation, Hahlo, pp.250-251.
3. See Hahlo's description (p.213) of the incidents of this matrimonial-type of condominium.
4. Hahlo, p.237. (but not now to one half of each of the assets of the joint estate). During administration of the estate, the survivor may perhaps dispose of his/her share in the net balance of the joint estate (see pp. 237/238).

the will, nor is there the underlying protection of a right to claim aliment out of the estate[1]. Systems containing such remedies and safeguards might be said perhaps to be sympathetic to 'joint venture' and community notions at the end rather than during the course of the marriage - a final, not a continuing, compensation[2]. If a spouse dies intestate, the survivor will succeed to the estate of the predeceased in addition to half share of the joint estate (not) in lieu terms of the Succession Act 1934 as amended 1968[3].

At the date of dissolution, property grievances may be put forward, and redress made in suitable cases[4]. This is probably a necessary "catch-all" occasion when steps may be taken to mitigate any harsh effects brought about by the community rules, and to meet the needs of the individual case in so far as that is possible or compatible with the notion of a community system. However, "Unlike the courts of the Roman-Dutch period, our courts are most reluctant to allow rights of recourse on dissolution of the marriage."[5]

Financial Effects of Separation and Divorce

The plaintiff seeking decree of judicial separation must show that further cohabitation with the defendant would be intolerable or dangerous, and that this situation was brought about by the defendant's unlawful conduct. The conduct 'required' is linked to /

1. Op.cit., p. 325.
2. See Chapter 7, infra : suggested system of "Separation of Property With Concurrent Compensation of Gains".
3. Hahlo, p. 323.
4. "Rights of recourse between the spouses": Hahlo, pp.249-250.
5. Hahlo, p.249, fn.95a.

to the system of matrimonial offence, matrimonial offences being adultery, malicious desertion and, more often utilised in this context, cruelty or neglect[1].

Apart from certain detailed consequences, decree of separation eo ipso does not affect property rights. The ante-nuptial contract still regulates the position, or the community continues, and, although the plaintiff usually will seek a change, the initiative lies on him. Where the marriage is in community, the plaintiff may seek boedelscheiding, which suspends, but does not terminate, the community. In this case[2], community will revive upon resumption of married life. If married out of community, the plaintiff may seek to be relieved of "future benefits" due by him/her under the contract, but not of past benefits, and in that case cannot insist on performance by the other spouse of duties exigible from him/her under the contract[3]. Otherwise, if there was an ante-nuptial contract, the decree has no automatic effect thereon. Subject to court order (and, presumably, to the terms of the contract) each spouse is entitled to his own separate property.

The /

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1. See examples cited, Hahlo, pp.327/8.
2. As was seen above, boedelscheiding may be granted also during cohabitation, upon proof of waste or maladministration of the joint estate by the husband. Insanity of the husband does not found the remedy, nor, by itself, (that is, presumably, not followed by judicial separation and plea for boedelscheiding) the husband's desertion and living in adultery (Hahlo, p.158). The effect of the remedy of boedelscheiding is normally to dissolve the community, but in its character as a remedy linked to that of judicial separation, it merely suspends the community. (Hahlo, p.334).
3. Hahlo, p.336.

The guilty husband may be ordered to pay maintenance, provided that the prospective recipient shows that she requires support, "having regard to her means .... and ability to work."[1] The award tends to be larger on separation than on divorce.[2] The proportion of one-third of combined incomes is mentioned, but, as in Scotland[3], that figure cannot be taken to be a definite rule or to have received definite approval. Gibson[4] states that "if the guilty husband has no means, the court may order the wife, in lieu of alimony, to retain the property she brought into the community even if such property constitutes the whole estate." Extra-judicial separation is effective on satisfaction of certain requirements. Thus,[5] the terms of a separation agreement have no effect as regards creditors, except perhaps on creditors aware of the fact of separation and its terms[6] but will bind the parties thereto, provided that the terms do not amount /

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1. Kahlo, p.337. This is based on the view that the husband's liability to maintain his wife continues in these circumstances. A guilty wife is not entitled to maintenance, but, if married in community, must not be deprived of the benefit of the property arrangement, and may have restored to her, by court order, the property which she brought to the marriage or have paid to her half of the income of the joint estate. She may be required to maintain her husband (although there is no instance) on the general basis of support due to an indigent husband. (though cf. American, where it is believed that it is now by no means unknown for wives to pay alimony after divorce).
2. because, in principle, the duty to support ceases on divorce, but continues on separation (Kahlo, p.337) (but not, it seems (p.340), unless the husband (or breadwinner) is the guilty party). Where the wife is the guilty party, and the marriage is in community, the court may order that the wife's property contribution to the marriage be restored to her, or that the husband pay her half of the income of the joint estate (Kahlo, *ibid*).
3. Cf. Chapter 4.
4. p.136.
5. Gibson, p.137.
6. Kahlo, p.350.

amount to an inter-spouse donation,[1] that they do not (purport to) effect a change of status, and that, at the time of execution of the agreement, a court would have been justified in granting judicial separation.[2] If all the requirements justifying award of decree of judicial separation are present, an extrajudicial deed of separation may be converted into a judicial decree of separation[3].

Divorce

The successful plaintiff is entitled to ask for an "order for forfeiture of benefits". If he claims such /

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1. that is, (Hahlo, p.351: see generally Chapter 25, "Private Separation") (since the act cannot be a true donation, having been made for the purpose of separation, and not animo donandi - "out of sheer liberality) that neither of the spouses "receives substantially more than he or she would have received had a judicial decree of separation been made".
2. The provinces of the Cape and the Transvaal differ here, the latter not insisting that circumstances justifying judicial separation be present. See Hahlo, p.348, and p.354. However, although Professor Hahlo prefers on principle the Cape approach, surely the presence or absence of justa causa would be difficult to ascertain, if the spouses were opposed to divorce and chose never to convert the deed into decree of judicial separation. It appears that, in dispute, in practice, there is not a great difference in approach. If, however, dispute does not arise, who is to adjudicate upon justa causa? Attribution of legal consequences to voluntary separation (without specified reasons therefor) is becoming common (Divorce (Scotland) Act, 1976, s.1(2)(d) and (e) and in South Africa , but in Scotland also there is an ambivalent judicial attitude to contracts to live apart (See Chapter 4, Walker, Prins.I,267. Financial provisions after separation will be enforceable: an agreement to live apart will not).
3. Hahlo, p.355.

such an order, the court may not refuse to grant it. Under this order, the defendant will lose all past and future financial benefits derived from the marriage, and this whether the marriage was in or out of community[1]. (Forfeiture of future, not past, benefits may be ordered in judicial separation).

It is competent for spouses to agree upon financial arrangements and to have these incorporated in the decree of divorce. With regard to separation, parties may agree upon maintenance and/or property rights and have their agreement included in decree. Where a voluntary becomes a judicial separation (as above) the financial property and custody arrangements will be repeated in decree, if they are such as the court would deem suitable had it been called upon in the first instance to regulate these matters[2]. If no property agreement is made, the position is as follows.

Where the marriage is in community, the plaintiff may choose to seek an order of division of the joint estate or an order of forfeiture of benefits. It seems the court may refuse neither. If no specific order is made, the decree of divorce operates as an order for division,[3] and the net joint estate is divided between the parties. If there is no agreement upon division, a liquidator is appointed to /

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1. This does not apply to divorces granted on the grounds of incurable insanity - Cf. Divorce (Scotland) Act, 1938, s.2(2); (however, see now Divorce (Scotland) Act, 1976, s.1(2)(b); it appears that, given the more flexible approach to orders for financial provision (s.5:-" .... either party to the marriage may, at any time prior to decree being granted, apply to the court for any one or more of the following orders ...."), special provision for insanity cases has been rendered unnecessary.)
2. Hahlo, ibid. (p.355).
3. Hahlo, p.428.

to effect the division, normally by public sale.

In effect, the order for forfeiture is carried out in conjunction with a division of the joint estate, with the result, as Professor Hahlo points out[1], that there may be still an equal division, if the guilty spouse has contributed more than the innocent spouse, since the guilty spouse then forfeits nothing. (The guilty, but not the innocent, spouse must forfeit benefits derived from the marriage). (A normal division of joint property pays no regard to contribution, which is the beauty of the scheme, and solves the problem of arguments as to criteria to be adopted in the assessment of contributions in cash and kind[2], and would answer grievances (at least of the 'non-earning spouse', the property being joint) if no such assessment were attempted[3]). An element of mathematical calculation will be involved, therefore, in advising the plaintiff[4]. However, the court retains a discretion as to the amount which the guilty spouse must forfeit, or may order a particular res to be forfeited to the plaintiff[5]. Here, too, a liquidator may be appointed.

Where the marriage is out of community, in the absence of a forfeiture order sought and (necessarily) granted, each spouse takes his/her own separate estate including any provisions due to him/her under the ante-nuptial contract. If a forfeiture order exists, the defendant must restore all benefits received and property given (to the defendant by the plaintiff), and forfeits benefits and property yet to /

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1. p.430.
2. Cf. English, Australian and New Zealand Systems, Chapter 6 infra and Chapter 7.
3. Cf. Scottish System, Chapter 5(1).
4. See Gibson, p.130.
5. Hahlo, p.430

to come to him/her in terms of the marriage-contract[1]. According to Hahlo, the converse applies, and the defendant may recover any property made over by defendant to plaintiff in the ante-nuptial contract. "In the result, if there have been reciprocal settlements, the plaintiff recovers the excess in value of his settlements over those made in his favour by the defendant. This is in accordance with the rule of modern law that the defendant may not be penalized beyond the actual financial benefits which he has derived from the marriage."[2]

Although divorce is held to put an end to "the reciprocal duty of support" which existed during marriage, there is provision in the Matrimonial Affairs Act, 1953, for the court to make a maintenance order against the guilty spouse in favour of the innocent spouse. Such an order may be varied, rescinded or suspended on good cause shown[3]. The diligence of the former wife in augmenting her income is not in itself good cause for variation, nor is the plea by the husband that his commitments in respect of a new wife and family render him less able to pay the order in respect of the first marriage. Attitudes (as softened by experience and practical considerations) seem similar to those found in Scotland. "As a rule, the courts are not very sympathetic /

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1. Gibson notes that the injured party may claim also the return of any pre-marriage or 'during marriage' (presumably allowable) gifts made to the defendant.
2. p.435 (4th edn., p.440). The plaintiff, by choosing a forfeiture order, elects restitutio in integrum. Contrast effect of a forfeiture order on a marriage in community, supra , which does not seem to be in accordance with the second sentence of the quotation here, but perhaps the explanation lies in the generally different approach to property, marriage and division.
3. s.10. See Gibson, p.131.

sympathetic to the case of the second wife. Their attitude is that the husband must not feather his second nest at the expense of his first wife and family. However, as often as not, the courts have in practice no choice but to effect some reduction. Not many men can provide adequately for two families."[1]

If not previously terminated in terms of the order, the obligation to pay maintenance ceases upon the death or remarriage of the payee. It is possible that the payer's representatives after his death may be under obligation to continue payment, especially where the court order was based upon an agreement between parties, in terms not expressly denying that point, but also in the absence of such agreement (the Act being silent on the matter), although Hahlo points out the extraordinary consequence that a divorced wife (a wife who has divorced) is then in a better position than a widow, for in South Africa a right of aliment out of the estate is (otherwise) unknown.[2]

There is no judicial power to make an equitable arrangement with regard to the use and occupation of the matrimonial home after divorce; if marriage is out of community, it will revert to the spouse in whose name the lease or title stands, and if the marriage is in community, and the home is part of the joint estate, then it is dealt with in accordance with the rules governing division of joint estate on divorce. While the marriage subsists, each spouse has a right of occupation, and pending the outcome of the divorce action, the court may by order regulate /

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1. Hahlo, p.446.
2. Hahlo, p.447 (and 323)

regulate the occupation of the home[1].

The Property Consequences of Death[2]

Where the marriage is in community, the community, except in certain circumstances,[3] is dissolved by death. Ante-nuptial debts, not paid during the subsistence of the marriage (during marriage a due charge on the joint estate, to be paid by the husband as administrator, whatever their origin and by either partner incurred[4])must be paid, the payer being entitled to claim half the price of the debt from the other spouse's estate, though the former incurred the debt[5]. For debts incurred stante matrimonio, the husband or his estate is fully liable to creditors, (though the husband has a right of recourse against the wife) and the wife or her estate may be sued only to the extent of a one-half share[6], and not at all (except as regards debts incurred by her with consent of /

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1. Hahlo (4th edn.) p.455.
2. See Gibson, pp.121-123. See also Hahlo, Chapter 15 ("Termination of the Community").
3. infra ("pacta successoria")
4. Hahlo, p.223.
5. Hahlo (pp.246-7) explains that this is a somewhat controversial point and that, although it may be that such debts, at termination, truly revert to the spouse who incurred them, in practice and without bad feeling, they are met out of the joint estate, as they would have been if paid before termination. In such circumstances, however, the 'external' aspect is that the creditor may claim only from the party who incurred the debt. (Gibson, p.121).
6. Upon the husband's death, his estate is liable for the debt and only if it is insufficient to satisfy the debt can the widow be sued for her half share. (Gibson, ibid.). In fact, in modern times, claims must be lodged against the joint estate and are paid by the executor; only if the husband is the survivor can the survivor be sued personally. By inference of the text, it is normal to lodge the claim with the executor.

of her husband or as a trader[1]) if she elects to renounce on her husband's death her interest in the community. On the assumption that the joint estate is solvent (if it is not, it should be surrendered by the executor, or he may "realize and distribute it as if he were the trustee in an insolvent estate, subject to the right of the creditors to sequestrate the estate"[2]), the balance is divided between surviving spouse and "successors" of deceased. The latter category varies in composition according to whether the deceased died testate or intestate.

If the predeceaser died intestate, half of his estate (that is, one quarter of the joint estate) falls to his heirs on intestacy, "the surviving spouse receiving a preferent share which varies according as the deceased leaves descendants or not".[3]

If he died testate (leaving a will, without other deeds of a testamentary nature, such as a marriage-contract with testamentary provisions or a mutual will), the will will rule. If he has purported to dispose of his wife's share in the joint estate, or part thereof, the survivor must decide whether to insist on retention of her own property or to take her benefit under the will. Matters may be complicated by the provisions of a mutual /

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1. If she has pledged her own credit (as a public trader, for example), she may be sued in full, and then she may have recourse against the husband. The starting-point is that "As a rule, postnuptial debts bind both spouses personally and have to be paid out of the joint estate" (Hahlo, p.244).
2. Gibson, p.122.
3. Gibson, ibid.

mutual will which may provide for boedelhoudersschap, a continuing community between surviving spouse and children, but Gibson remarks that this intention must be made very clear "for the whole scheme of the administration of estates in South Africa is against that idea".[1]

Where marriage was out of community, the estates of survivor and predeceasser remain separate in property, and in liability for debts. Since, as noted, there is joint and several liability for household debts, but the wife in the general case has recourse against her husband in respect of such debts, a widow obliged to pay such a debt has recourse against her husband's estate therefor.[2] Any unfulfilled provisions in the marriage-contract (benefiting deceased's estate or survivor) may be enforced.

Thereafter, the estate is divided, as the case may be, according to the rules of intestacy, "the surviving spouse obtaining a preferent share",[3] or in accordance with the terms of the sole will, mutual will, or testamentary marriage-contract provisions. Gibson does not indicate the extent of testamentary freedom, but does not suggest that it is fettered in any way at all, even on the English model. The text is silent on the matter at that point.

Subsequently,[4] after noting the gradual abolition in /

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1. Gibson, p.123. Hahlo also (pp.250-251) (and see also supra) notes the rarity of continuing community.
2. Gibson, p.123.
3. Gibson, ibid.
4. At p.275 (Chapter XXIV: Succession) See also Hahlo, p.323 "There is no legitimate portion or widow's share in our law, guaranteeing the surviving spouse against disinheritance".

in the South African provinces of the Roman notion of legitima portio, and making the proviso that a disinherited child (but not a widow?[1]) has a claim for support, superior to those of beneficiaries under the will for their provisions, he states that in South Africa "there is today complete freedom of testamentary disposition."

Property Rights Arising From, and During, Marriage

Certain rules in respect of marriage in South Africa are variable by the parties, and certain rules are non-variable[2].

The category of "invariable consequences" contains rules /

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1. In intestacy, the widow seems well provided. In community, in intestacy, she appears to 'sweep the board' (as occurs in Scotland in smaller intestate estates: Succession (Scotland) Act, 1964, as amended) In community, even where her husband's will is unfavourable, she is assured of a better division than the wife living under the systems of separation which are both brusque and unstructured. Out of community (a 'structured' separation of property system) perhaps the philosophy is that she had every opportunity and help to arrange matters as she wished. These thoughts tend to underline the view that the legal rights and discretionary awards systems of Scotland and England are a belated equalisation attempt, and that their purpose could be effected with greater neatness and certainty. In many ways, the candid "joint division (take out what is put in, with help to the non-earner) or specific detailed thoughtful individual arrangement" approach is preferable to the blunt, haphazard effects of separation, ameliorated piecemeal by many pieces of modern legislation, linked to no system but that of judicial discretion and good intention. See Australia, New Zealand, England.
2. Hahlo, Part III ("The Legal Consequences of Marriage").

rules which would be expected, namely, the automatic change of status of the parties upon marriage and the incidents flowing therefrom (such as prohibition of marriage with another person during the subsistence of the first marriage), the status of children born during or before the marriage, and, more controversially, the privilege of the husband to have "the decisive say in all matters concerning the common life of the spouses".[1] This is a power which the spouses cannot exclude by antenuptial contract, and by virtue of which the husband has the right to decide where the matrimonial home is to be, and to set the style of life[2]. It will be recalled that before the abolition of the jus administrationis by the Married Womens Property (Scotland) Act, 1920, only the curatorial power was subject to exclusion by parties' contract, and the overriding status of the husband as head of the family was not subject to such exclusion[3]. So it seems to be still in South Africa, but the husband's power must be exercised reasonably. Indeed, its exercise is confined by the remedies which the law gives to the wife if the husband is extravagant (he may be "interdicted as a prodigal") or mean (allowing her /

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1. Op.cit., p.105.
2. Lord Fraser would recognise these powers, as due to the Scots caput et princeps familiae, and indeed, in Scots law, they still exist, though it seems rather by acceptance than by proud proclamation. As to standard of life, see Chapter 4 , and as to matrimonial home, Chapter 4, pp.353-364 (and Chapter 7, "Location of Matrimonial Home"): cf. Scottish Law Commission Memo No. 41, 0.18. and S.L.C.Memo.No.54, 9.1-9.4.
3. Cf. supra, p.55.

her to sue him for support[1] or perhaps founding an action of judicial separation), but the honest admission of the existence of the power (without criticism) reflects an older view of the roles of the sexes than is currently fashionable in Britain and Europe[2]. Elsewhere, in another connection, Hahlo says that "there cannot be easily two captains on the bridge"[3], an opinion which may be true, but it /

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1. It is not clear whether such an action is competent during cohabitation (not competent in Scotland - see Chapter 4). The inference of the sentence (p.105) is that such an action is competent, although (p.111), whether the marriage is in or out of community, an undertaking by the husband to pay to the wife a fixed weekly or monthly sum as a housekeeping allowance is apparently unenforceable. While the wife's "primary duty is to perform her traditional role in managing the household and looking after the children of the marriage" (p.111), she may be called upon to support the household if the husband is unable to do so. The detailed rules (pp.112/113) seem to be to the effect that where the husband is indigent, and the marriage is in community, the husband may look to the wife's earnings and savings (exempt from his control by the Matrimonial Affairs Act, 1953, s.3) for support, and can enforce this claim against the wife. The wife married out of community possibly owes also the duty to help the needy husband to maintain himself and the household, though the clear common law obligation has been muddied by the introduction of a statutory right to be reimbursed by him in respect of household debts paid by her. The obligation of the working wife married out of community (and in a situation where both partners are working - that is, presumably, where the husband is not indigent) to contribute is unclear, but if it exists, it seems to be unenforceable (pp.112-113) See Scottish position, Chapter 4
2. Differences may lie in manner of expression (and perhaps attitude) rather than substance.

   The principle of sexual equality is impinging increasingly on family law reform, however: cf. Scottish Law Commission, Memo. No.41, 0.9, 0.10.
3. p.13 (4th edn.(p.17) "... as it is not considered desirable to have two captains on the bridge...".)

at least perhaps there should be different watches, or a division of responsibilities, and in some legal systems, indeed, there has been a wholehearted attempt to make workable a "two captains" regime[1].

There flows from marriage "consortium omnis vitae". "Spouses are under a duty to live together, to afford each other the marital privileges, and to be faithful to each other; the husband is obliged to provide his wife with a home, and the wife, to live in it".[2] It can be seen that this view of marriage is in sympathy with the Scots concept of marriage, and (in general and at present) the duty of adherence and aliment.

In South Africa, there is a duty on each to support the other[3], a duty depending on circumstances but falling more often upon the husband than upon the wife and the "support" to be afforded will include all things reasonably to be regarded as necessities of life, and perhaps luxuries, for the wife, and the costs of litigation brought by or against her, including, at least in Hahlo's opinion, non-consistorial litigation[4], and must be related to the parties' standard of living. The manner of providing support is a matter for the husband's discretion. "As long as he does not choose a method that is humiliating or otherwise unreasonable, the wife has no cause for complaint"[5]. It may be that the wife owes a duty to account to her husband for the management of the housekeeping allowance[6]. If the /

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1. See, e.g. French and Dutch rules, infra.
2. Hahlo, p.105.
3. See, for Scotland, M.W.P. (Sc.) Act, 1920, s.4, Chapter 4, and Memo. No.22, 2.12 (Propn.2), Faculty Response, pp.4-6.
4. p.108, fn.96.
5. p.109. See also Gibson, pp.97-98.
6. As to wife's "agency of necessity" and presumed general authority in respect of necessities, see Maasdorp, pp.39/40, and Hahlo, p.110 (infra). The position seems similar to that which applies at present in Scotland.

the husband provides such an allowance, and if the marriage is out of community, savings belong to the husband, unless he is shown to have given the savings, expressly or by implication, to her. If there is community, savings belong to the joint estate.

Though the title to the matrimonial home stand in name of the husband, he cannot eject the wife without providing another roof over her head. Different thinking prevails from the "strangers" approach which applies in Scotland[1], and which is now the subject of criticism[2]. Rather are "the merits of the matrimonial dispute relevant[3]. However, the husband qua administrator if married in community and qua owner if married out of community (though the wife may be owner of the house) may 'alienate or hypothecate' the home without the wife's knowledge or /

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1. See MacLure v M. 1911 S.C.200 and Millar v. M. 1940 S.C.56. However, as was pointed out in MacLure, the patrimonial (or, in that case, lease) aspect of the question was to be distinguished from the matrimonial, or aliment, aspect. Hence, the wife could legitimately complain if it proved that (by virtue of his alternative arrangements) the husband was not affording her adequate support. Moreover, where the marriage is out of community, apart from the matrimonial home rules "the husband has no better right to occupy his wife's property than any stranger, or vice versa." (Hahlo, p.285).
2. Scottish Law Commission, Memo. No.41, "Occupancy Rights in the Matrimonial Home and Domestic Violence", Propn.1: "a spouse who has no possessory rights in the matrimonial home (e.g. as owner or tenant) should be given a personal right to occupy the home enforceable against the spouse who has such possessory rights, and should no longer be treated by law as a mere precarious possessor". See now 1981 Act.
3. A phrase used in relation to the wife-owner's "right" to eject the husband. As Hahlo notes, there is no American-style "homestead legislation"

or consent. Such 'matrimonial' rights as there are in the home for the spouse in whose name the title or the lease does not stand, do not prevail against third parties[1].

With regard to inter-spouse litigation concerning money or property, spouses married out of community may sue each other in contract or delict, or with regard to property, or apply for the other's sequestration. In marriages in community, there is only one estate, but since the wife has her earnings and savings protected by the Matrimonial Affairs Act, 1953, s.2, she may sue in order to protect that property from the husband's interference (and he, as noted earlier, if in need, may sue to compel her to support him and the household out of that protected property). So too, she may sue if he will not support her out of the joint estate. As at 1975, spouses married in community could not sue each other in delict, (and see further infra).

While the marriage subsists, prescription is suspended.

There is one invariable consequence of marriage which is unknown in Scotland, and that is the prohibition of donations between spouses stante matrimonio (a prohibition stemming, according to Hahlo, from Roman Law, and with the aim, not so much of protecting creditors, but lest married persons be /

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1. Hahlo contrasts English Matrimonial Homes Act, 1967 (as now amended by the Domestic Violence and Matrimonial Proceedings Act, 1976). See infra.

be "kissed or cursed out of their money"[1]). The prohibition comes to an end only upon dissolution of the marriage by death or divorce, (not by judicial or voluntary separation) but donations mortis causa and divortii causa are competent[2], provided that in the latter case the divorce is imminent. A prohibited donation may become confirmed by the donor having died without changing his mind upon the matter, or by express confirmation in his will, and if so it receives validity retrospectively from the date on which it was made.[3]

Where there is an "in community" marriage, the general lack of separate property makes the giving of gifts difficult,[4] and it is in the many "out of community" marriages that the rule most often arises. The spouses may contract with each other, but may not make donations inter se. "The prohibition of donations between spouses extends to every transaction, whatever its form or character, by which one of the spouses, gratuitously and solely, or at least, mainly, out of motives of liberality, confers an economic benefit upon the other spouse, with the result that the giver becomes poorer and the receiver richer"[5]. This is a wide definition, and would comprehend many /

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1. Hahlo's chosen, English-inspired quotation, p.123. Cf. in Scotland, (except that the aim was to protect third parties rather than the donor spouse) judicial ratification of deeds made by wives, in favour of third parties (a safeguard to a third party who adopted the deeds, against the plea that the wife had executed it under fear of her husband, which plea could not then (on adoption) be stated, Fraser, Husband and Wife,I,819 et seq and supra, p.52 et seq.
2. Hahlo, p.129.
3. As to the circumstances in which this may, or may not, happen, see Hahlo, pp.143-6; Gibson, pp. 99-100.
4. but a purported severance of goods or renunciation of rights in the community would be a prohibited donation(Hahlo, p.124). (Only ante-nuptial marriage contracts are allowed since the abolition of the use of post-nuptial contracts in Natal in 1956. See infra).
5. Hahlo, p.124.

many actions and transactions, including releasing or taking over the other's debt, and abandonment of favourable rights under a marriage-contract. "Sales" between spouses where no price, or an illusory price, is paid, are prohibited donations, or the difference between the sale price and the true value is a prohibited donation. So also are arrangements which use the intermediary of a trustee to confer benefit on the other spouse.

It appears from the list of "Exceptions and quasi-exceptions"[1] that some degree of hair-splitting, careful definition and qualification, is employed in order to exclude a benefit from the category of donation. For example, the giving of a donation requires, it seems, the parting with an asset and so gratuitous work undertaken for the other is not a donation. Similarly, if the donor does not become poorer (as by donating a res aliena) and/or the donee does not become richer (as by giving the donation to charity or to help indigent relations) or even, it appears, where the fee of the gift, as it were, is to go to a child of the marriage on the death of the donee, a prohibited donation does not result[2]. Prenuptial gifts (unless delivered after marriage through no fault of a third party) are competent[3]. Marriage-settlements contained in antenuptial contracts (as being in consideration of marriage) are competent "irrespective of whether payment or delivery is made before or during marriage",[4] and though post-nuptial contracts are no longer permissible in any part of South Africa, it is possible that, stante matrimonio, one term of a marriage /

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1. Hahlo, p.126 et seq.
2. Op.cit., p.128.
3. Hahlo, p.128, and see supra
4. Hahlo, p.129.

marriage-contract might be substituted for another, provided that the substitute was of approximately equivalent value. If not, the difference would amount to a donation.

While a wife may not give her husband the benefit of a life policy, he may so benefit her[1].

Again, where gifts are made, not out of pure desire to give them, but as an equivalent or consideration for a gift made by the other party[2] or in remuneration of services rendered, they will be allowed, as they also will be if made for "business reasons", or where they were wedding anniversary or birthday presents,[3] or were of small amount (including the 'donation' made by the husband in allowing his wife to keep savings from the /

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1. Insurance Act, No.27 of 1943, ss.41-43 (cited by Hahlo, p.129). Cf. Scottish Law Commission Report on the Married Women's Policies of Assurance (Scotland) Act 1880 (Scot. Law. Com.No.52: Cmnd. 7245, July, 1978) which recommends that the 1880 Act be extended to policies effected by a woman for the benefit of her husband or children (and indeed to those by future spouses for future spouses and children - including illegitimate and adopted children). Now M.W.'s Pols.of Ass.(Sc.)Amend.Act,1980.
2. "Reciprocal donations are unassailable in so far as they are of approximately the same value". (Hahlo, p.131). (Reciprocal donations must be of approximately the same value" Hahlo, 4th edn. p.156)
3. "provided they do not exceed the bounds of moderation, having regard to the means and social standing of the parties". (Hahlo, p.132). At least such a rule would prevent in most cases the occurrence of problems concerning the intention underlying the gift of very valuable presents (for example, of jewellery) during marriage: cf. Chapter 1, pp.21-23 (the irrevocability and possible immunity from attachment by the donor's creditors of a paraphernal gift made stante matrimonio).

the housekeeping money and including also the use of furniture and cars, and, depending on the circumstances, the other spouse's house). "If it were otherwise, spouses would be encouraged to keep meticulous accounts of their mutual dealings, to the detriment of their relationship".[1] Even taking into account the numerous exceptions and qualifications, the prohibition seems at odds with the general conception of marriage and the behaviour of married persons. It has been seen that a monetary contribution of the working wife, married out of community, is not enforceable by action: neither can any contribution she makes be struck at as a prohibited donation.[2] (It is otherwise where, whether the marriage is in or out of community, the duty of support lies on the wife).

Likewise, a reasonable housekeeping allowance, and ornamental gifts, such as clothing and jewellery, made by the husband and "induced by regard for his own position rather than by sheer liberality"[3] ("Donation requires a donatory intent", the main, though not necessarily the sole, motive being liberality or 'disinterested benevolence'[4]), in order that she be dressed "in accordance with his standing"[5], are /

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1. Hahlo, p.133.
2. Op.cit., p.113. At p.124, Professor Hahlo suggests that the 'gift' to her husband by a wife married in community of her earnings or savings protected by the 1953 Act is not a prohibited donation, since (see p.188) the protected property remains community property (and can be attached for community debt). Moreover (p.112) the wife in that situation can be compelled to use such property for the support of the family.
3. Op.cit., p.132. (a phrase omitted from 4th edn.). (Cf. Chapter 1, p.28 (the implied purpose of pin-money).
4. Hahlo, p.130.
5. Cf. "pin-money", supra, Chapter 1, pp.27-28.

are not regarded as prohibited donations.

The general effect, between the spouses, of a prohibited donation is as follows:- the contract of donation is voidable, at the instance of the donor spouse, at any time, the onus lying upon the revoking spouse to show that a prohibited donation has taken place. However "the effect of the prohibition on the transfer delivery, cession or other act by which it" (the donation) "was carried out" may be that it is void or voidable, or valid but leaving the donor with a claim against the donee for the enrichment given to the donee. All depends on the 'juridical nature' of the act by which the donee was endowed with the benefit.[1]

With exceptions pertaining to life assurance policies,[2] prohibited donations have no effect upon the rights of the donor's creditors. "As a general rule, the creditors have the same rights against the donee spouse which the donor spouse would have had, had /

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1. Hahlo, p.135, and see generally, pp.135-141. Thus, if one spouse pays a debt which the other owes to a third party, the latter must regard the debt as discharged, but the first spouse may recover from the second spouse the amount paid.
2. See the special privileges accorded to life policies whether the marriage is in or out of community, Hahlo, Chapter 21, pp.310-314. "Whether the marriage is in or out of community, whether the marital power has been excluded or retained, the provisions of the Insurance Act, No.27 of 1943" (ss.39-45) "cut across the normal rules governing the proprietary rights and dispositions of spouses." (p.310). (See also p.195). As to life policies in Scottish "matrimonial property law", see pp. 210 et seq. and 248 et seq.

had he revoked the gifts."[1] Hence, this unusual and complex body of rules must be seen primarily as a property regulator (or a further buttress of the /

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1. Hahlo, p.141 (and see pp.141-143). These rules must be applicable only to "out of community" marriages. The nub of the matter seems to be that, if the donation is prohibited, (and if the antecedent act was a pure donation between spouses), the property in the gift does not pass, and hence a creditor of the donor may attach the subject of donation in the hands of the donee. If ownership has passed (as where the donation has consisted of money, used by the donee to purchase a res from a third party, which res is delivered to the donee by the third party - in which case the res becomes the donee's property (Hahlo, p.139)), the donee may not retain the res as against the donor spouse or his creditors, and a personal claim by the creditors lies against the donee for the gift or its value. Where the gift was of money, "the creditors may claim it from the donee, in so far as the latter is still enriched thereby". (Hahlo, pp.141-2). Moreover, if, where there has been no judicial separation, the donor spouse is sequestrated, the estate of both spouses vests in the trustee, who is entitled to retain such property acquired by the solvent donee from the donor, in respect of which the donee has no title valid against the creditors. Hence (see above) property in the gift may not have passed to the donee, or if property has passed, the donee may have no good title against the creditors. If, however, for example, the donee has paid out of separate estate a "substantial portion of the price", "the creditors are confined to a personal action against her for the sum donated, in so far as she is still enriched thereby." (Hahlo, p.142). Where the gift was of money, the estate may claim against the donee "in respect of the latter's enrichment". Contrast Scottish bankruptcy rules as they affect spouses, Chapter 2 (cruder and less detailed than found in many systems - cf. p.153, fn.4). In Scotland, donations between spouses are irrevocable (subject to the protection of creditors by the 'sequestration within a year and a day' rule: see p.110 (M.W.P. (Sc.) Act, 1920, s.5.), and although there is a presumption against donation, it operates less strongly as between husband and wife, where "gifts are not unlikely" (C.& W., p.291).

the principle of separation of property) affecting those who have chosen the principle of separation to govern the property consequences of their marriage.[1]

Rules Which May Be Excluded by Marriage-Contract

The marital power of the South African husband[2] consists of the family headship, already noted, the power over the wife's person, which includes representation of her in litigation, and, perhaps most important, the power over the wife's property. The power last-mentioned exists even if the marriage is out of community, unless there has been exclusion of this aspect of the marital power. (If the marriage is in community, the husband administers the joint estate). The power first-mentioned (of the paterfamilias) cannot be excluded by paction (being one of the "invariable consequences of marriage"), but the subsidiary or narrower powers over person and property may be completely excluded, "giving the wife the same position in law as if she were unmarried".[3]

Professor Hahlo comments[4] that "the marital power /

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1. though containing considerable significance and benefit for creditors. Unfettered inter-spouse donation may be a temptation for the parties and a share for outsiders. A detailed system of rules upon donation is surely a proper partner of a regime of separation of property. (See however outline of pre-1920 principles, C. & W. pp.333-337) when inter-spouse donations were revocable, revealing features not unlike those found in South African law).
2. Cf. Scots jus administrationis: Hahlo himself (p.147) likens it to the Roman law jus mariti.
3. p.148.
4. ibid.

power is not a necessary corollary of community of property", and that, though community of property be excluded, the marital power may be left in the husband. The important question for those of other legal systems to ask is - "Is it possible to have a system of community of property and of profit and loss without vesting a marital power in either partner?" "How are we to provide for two captains on the bridge in a manner which will ensure that the ship (owned by both in equal shares) is steered safely and efficiently, and upon a course determined by agreement?"

As to the power over her person, one most important consequence thereof remaining today is that the wife cannot enter into a contract without the husband's consent. On the other hand, if the contract is one of employment, and if the employer is willing to employ her without her husband's consent, a court would not be likely to interdict the employer from taking the wife into employment. Under the Matrimonial Affairs Act, 1953, the wife's earnings are safe from the husband. Thus, Hahlo concludes[1], as in the case of wives married out of community, the only "remedy" for the husband might lie in the possibility that if the employment was such as to involve neglect of the family, the wife's conduct might amount to a matrimonial offence[2].

The rights over property are far-reaching[3]. The husband, by virtue of his marital power, may enter into contracts pertaining to the joint estate (or the wife's separate estate, if community, but not the marital power, has been excluded). Without the /

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1. See p.149.
2. In the 4th edn. (pp.154/155), Hahlo appears to think this unlikely.
3. Gibson, pp.103-108: Hahlo, pp.150/151.

the wife's knowledge or consent, the husband may sell the property or burden it with debt, and in many instances the effects of these contracts, particularly those concerning heritable property, may continue after the dissolution of the marriage. To a great extent, the wife's power of decision stante matrimonio is merged or submerged in his.

It follows that a wife, whose husband enjoys the marital power, cannot contract generally, or sell or burden property, nor, without her husband's written consent, become inter alia a trustee in bankruptcy or a company director (though, having obtained his consent, she may act thereafter in such capacity without the need to obtain his consent for each transaction involved in the carrying out of her duties) nor is she competent to discharge debtors.

A contract purportedly entered into by the wife without the husband's consent is regarded in a similar manner to that of a defectively constituted contract in Scots law, with the difference that the other contracting party is bound until and unless the husband repudiates the contract. The contract is inchoate and awaits repudiation or ratification by the husband. There is not locus poenitentiae to both parties. If the husband fails expressly to take either course, his conduct may amount to tacit repudiation or ratification. The other party need not "wait for ever". It is possible for a wife after dissolution of marriage herself to ratify a contract which is personal to her or pertains to her separate estate. Ratification by the husband results in validation of the contract, the rights and liabilities thereunder arising to and by both parties ("the husband must fulfil the obligations which his wife undertook"). Repudiation means that "the contract falls away"[1]. If the husband's repudiation /

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1. See generally Hahlo, pp.152-153.

repudiation takes place after total or partial performance of the contract by the wife, the husband may recover the money paid or the object delivered, by condictio indebiti, and must restore to the third party any sum paid by him to the wife, "but only if and in so far as the joint estate or the wife's separate estate (if any) has been enriched thereby."[1] Probably the rule does not apply to due (community) debts resting owing paid by the wife, "without fraud or duress on the part of the creditor." Alienations by the wife without the husband's consent carries no property to the third party unless or until ratification by the husband of the purported contract, at which point the contract becomes "validated with retrospective effect".[2]

A wife's donatio mortis causa of a separate asset does not require her husband's consent, but ownership does not pass until her death[3]. Each spouse may test upon his/her share of the joint estate, or upon his/her separate assets, as the case may be. Community is dissolved by death[4].

On dissolution of the marriage by death or divorce, or upon the pronouncement of interdict[5] taking /

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1. Hahlo, p.153.
2. Hahlo, ibid.
3. Hahlo, p.152.
4. See in greater detail, infra
The husband's dealings with the joint estate, or with his wife's separate estate as her administrator may reverberate, however, after dissolution.
5. termed "boedelscheidding" if married in community, an interdict against his management of her separate estate thereafter, being available if married out of community but with marital power: where a regime provides a marital power, or a "one-captain" rule, it is common to find an "early dissolution" remedy if the captain proves reckless, incompetent or dishonest.

taking from the husband his power of administration of his wife's property, the marital power is terminated. Insolvency of the husband does not deprive him of his marital power. Insanity or prodigality[1] places his power in abeyance, but on *ipso* does not restore the wife to full power. The husband's curator will administer the joint estate or, if applicable, possibly the wife's separate estate, or she may apply to the court to have herself empowered to administer the joint or her separate estate, or apply to be appointed "curatrix of her husband's property and affairs (*curatrix bonis*) and even of his person".[2,3]

It is surprising that any wife should submit voluntarily to such a system, reminiscent of that in operation in Scotland before 1920, and the reader is reassured to find that Professor Hahlo has devoted Chapters 11 and 12 of his book to "Safeguards", common-law and statutory.

Lord Fraser considered that the husband's curatory of his wife was a curatory *nui generis*.[4] Hahlo is blunt. While stating that the curatory of a minor and that of a married woman subject to marital power are similar, he adds, "But whereas the guardianship of a minor serves the interests of the minor, the marital power serves primarily the /

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1. a status known also to the law of France(In re Selot's Tes. 1902 1 Ch.488; Worms v. De Valdor (1880) 49 L.J.Ch.261.) But not to the law of Scotland.
2. See Hahlo, p.194.
3. Cf. Californian curatory of an "incompetent": In re Langley 1932 Ch.541.
4. As to the curatory of the minor wife today and difficulties of interpretation of the 1920 Act, see *supra*, p.111. Professor Clive in his contributed chapter (9: Scottish Family Law) to "Independence and Devolution: The Legal Implications for Scotland" ed. John P. Grant (1976) advocates (Desired Reform 16 (p.166)) that an adult husband should no longer be regarded as curator of his minor wife. "The wife should be regarded as an independent adult". See also S.L.C.Consultative Memo.No.54,6.1-6.4.

the interests of the husband".[1]

One of the principal and most significant differences between the two is that the husband "is not liable in damages to his wife if he diminishes the joint estate by flagrant maladministration. Even if he deliberately destroys property forming part of the joint estate, she has no claim for damages against him".[2,3]

The common law restrictions on the husband's power will be noted briefly[4]: the husband cannot restrict the personal freedom of the wife (after dissolution of the marriage) by any contract which he enters into (as by a contract in restraint of trade to which he and his wife during marriage were subjected) unless she was a party to the agreement, nor may he make donations "in deliberate fraud of his wife or her heirs". She may ask the court for a separatio bonorum (boedelscheiding[5]) if the husband's behaviour is "bad, inefficient or prodigal"[6], if the parties were married in community, and for an interdict against his subsequent administration of her estate if the parties were married out of community but with marital power. The wife's contracts /

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1. Hahlo, p.155.
2. Hahlo, p.156, and authorities there cited.
3. but his conduct may justify a separatio bonorum, see below.
4. See in detail Hahlo, pp.156-159.
5. p.158. At p.165 in the 4th edn., Hahlo suggests that boedelscheiding as a remedy, unless linked with a decree of judicial separation, is infrequently resorted to, and is "on the road to obsolescence". As an alternative, "the husband's administration of the joint estate can be suspended and a curator appointed". The wife may be made curatrix.
6. "dishonest, foolish or spendthrift" are the words used in the 4th edn..

contracts are valid if the husband's power has been excluded, or if she acts with his consent, or if the contract in question benefits, but does not impose liabilities upon, her or the joint estate[1]. A third party, by whose "contract" with the wife the wife's estate or the joint estate has been enriched, may recover the enrichment (from the husband if the parties were married in community, from the wife if married out of community, but with marital power). Further, "if the husband knowingly accepts benefits under his wife's unauthorised contract, he must be taken to have ratified it."[2]

The wife's contracts for household necessaries will be upheld (whether the parties were married in or out of community). Such contracts bind both parties, and the wife's power cannot be excluded by pactum. In an interesting discussion of the legal basis of this rule, Rahlo favours the view that it is an incident of marriage arising 'as soon as a common household is established', rather than the English opinion that the power stems from implied agency[3]. In addition, where the wife carries /

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1. Cf. 19th century powers to contract of a Scots wife: supra, pp.68-70, "Contractual Capacity of Married Women".
2. Rahlo, p.160.
3. And see Gibson, p.98: "The right is not based on agency, but in binding her husband, the wife acts as his agent". Cf. Scottish mandatum.

   See Professor Rahlo's long and excellent discussion of the difficulties of this particular rule, pp. 162-178. Its continued existence in Scotland is not applauded by Professor Clive (see below). Its appearance in various guises in various legal systems does not render it more attractive. In England, the agency of necessity was abolished by the Matrimonial Proceedings and Property Act, 1970 s.41, but there remains a common household agency - see "Family Law", Judge Brian Grant 3rd ed. (Jennifer Levin), p.24.

Consider /

carries /

Consider Hahlo's query as to whether a subjective or an objective test should be applied to decide what are necessaries, and his eventual conclusion that each case should be decided on its own merits, although the fact that a household is well supplied with a particular commodity is a factor to be taken into account when deciding whether a purchase was reasonable. See also his distinction between the wife's power to pledge her husband's credit for household necessaries (which he says includes anything "reasonably required for the common household or its members") and those liabilities which fall under the head of the husband's duty to support, and which may extend to the provision of funds for objects unconnected with household management. In the first place, household "necessaries" may include luxuries, and may "have nothing to do with support". There is no necessary equivalence between 'support' and household management, although they will often be linked. A husband may fulfil his duty to support his wife by providing her with a good allowance, and yet if she "spends her allowance on non-necessaries, she may still bind his credit in respect of necessaries" (p.175). At p.166, Hahlo notes that in English law this is not so. (sentence omitted in 4th edn.) (continued at 1977 - Judge Grant's "Family Law", p.24). As to Scotland, see Professor Clive's persuasive opinion (O.& W. pp.253-254) that this is a matter of ostensible authority, and the private financial arrangements of the spouses can form no defence to a demand from a trader who, in the circumstances, was entitled to assume that the wife had authority. (It is interesting that Professor Clive refers to the South African position) Such a position, apart from being in accordance with the principles of the law of agency, is also in accordance with what might be termed a "matrimonial property policy", namely that third parties should not be obliged to enquire into domestic arrangements but may take situations at face value. She may enlist his aid to fund a litigation ('support') and yet she could not bind his credit therefor.
As in Scotland, if the wife's authority as manageress be revoked, she may still bind him in respect of necessities for herself and the children, and this is an occasion on which the 'power to bind' coincides with the 'duty of support'.
The wife's authority as manageress is terminated by dissolution of the marriage, by separation (by fault of the wife, though if consensual, the authority is co-extensive with the husband's duty in the circumstances to support his wife, a criterion which it is thought must surely cause uncertainty /

carries on openly a public trade or profession in her own name, she may make contracts and incur obligations in connection therewith.

A contract may be authorised by the court where the husband is absent or is incapable of acting /

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uncertainty among traders (existence of an adequate allowance in this case removes her power to bind his credit)) by order of the court (during marriage) if the wife proves to be a spendthrift, and (perhaps) by unilateral revocation by the husband at will, by notice to known traders. Hahlo himself sheds a clear light on the subject by arguing that if the parties are married out of community, the Matrimonial Affairs Act, 1953, s.3, renders them jointly and severally liable for debts for household necessaries supplied to the joint household, there being no provision allowing the husband to revoke the wife's authority (cf. Professor Clive's suggestion of a partnership approach to household debts instead of the outdated notion of the praepositura G. & W., (Scottish Family Law) p.262: also advocated by the same author in the chapter (Desired Reform 17, p.166) which he contributed to "Independence and Devolution: The Legal Implications for Scotland" ed. John P. Grant (1976) and where they are married in community, it would be contrary to authority and principle "without rhyme or reason" for a husband to be able to deprive his wife of that authority which is an incident of marriage, held of right, as is the husband's marital power which cannot be removed except for good reason and on court order. A husband's notice to tradesmen disclaiming liability should put them on their inquiry, nevertheless (p.174). Presumably this would only be so in circumstances in which the husband was no longer to be bound, the wife's authority having been revoked (Hahlo's examples being the wife's desertion or his provision of an adequate allowance (though see above) and not in any circumstances, or at will, or this would detract, surely, from Hahlo's earlier argument.

acting or is withholding his consent unreasonably[1]. This may be a specific or a general authorisation, and if the latter, it is clearly a far-reaching remedy - "thus virtually emancipating her".[2,3]

Marriage Contracts

Regard should be had to South African rules and practice in relation to marriage-contracts, exercises in conveyancing (referable of course to substantive rules based on history, experience and policy) which were never common in Scotland except among a small class, and are now believed to be very rare indeed.

Only ante-nuptial contracts are permitted. The most common use of the marriage contract is to contract out of the system of matrimonial property above described. No special form is required to render the contract valid as between or among (for strangers to the marriage relationship may be parties to the deed though this seems to be rare) the parties to it, but certain requirements must be fulfilled /

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1. In "one-captain" systems, this too is an aid to workability commonly found.

   And see remedies provided at an earlier stage of Scots Law: e.g. "Exclusion of Jus Mariti by reason of a Change in Status of Husband", p.43 et seq.

2. Hahlo, p.179. (but a less fundamental remedy, presumably, (and perhaps often used in non-contentious circumstances such as long-term absence?) than boedelscheiding or application to the court for authorisation to manage the estate if her husband becomes insane or is adjudged a prodigal.

3. As to statutory safeguards, see Chapter 12. Topics affected include protection of savings, earnings, certain categories of immoveable property, if married in community, and the wife's separate immoveable property if not, and certain insurance policies: a deserted wife may obtain a court order to deprive her husband of his power over property acquired by her during desertion on prima facie proof of desertion and acquisition of property. None of the protective, reforming statutes were of very recent date at 1969, apart from the Matrimonial Affairs Amendment Act, No.13 of 1966.

fulfilled in order that it may stand against strangers.

The terms of the contract may be as the parties dictate, so long as they are not illegal, immoral or contrary to public policy. Hence, parties may choose to have their property affairs regulated by the rules of another legal system: they may exclude the community rules completely or in part: they may wish community of property, but not of profit and loss or (perhaps more likely) vice versa, or they may wish community only in respect of certain assets. Is it significant that none of the permutations which Professor Hahlo[1] describes is that in which community /

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1. p.274. (At p.277, he writes "While exclusion of community, with retention of the marital power, is a recognized (though today rather rare) form of antenuptial contract, the opposite configuration - exclusion of the marital power, with retention of community - seems to be unknown.") The same is true of Gibson, pp.112-115. See also Maasdorp, pp.48-51, et seq. A variant suggested by Maasdorp is that, though it is said that exclusion of marital power is "generally accompanied by the exclusion of all community, as well of property as of profit and loss", it is sometimes the case that "community of property and profit and loss or of property alone being excluded", the marital power will not be excluded totally but will continue in a restricted form. Thus, "the wife's property will be secured to her "and the husband will not be permitted to alienate, mortgage, pledge "or in any other way" deal with it, "either absolutely or except with his wife's written consent." Neither the advantages of this half-way house, nor even the range of powers left to the husband, are clear.
Exclusion of marital power with retention of community is a possibility not specifically mentioned by Maasdorp: the significance or lack of it of the use of the word "generally" above can provide only speculation. The tenor of the writings seems to suggest that discussion has taken place rather upon the question whether the marital power has been excluded where community is excluded (which, it seems, it will not have been, in the absence of an express term of exclusion) than upon whether exclusion of marital power and community can happily, or competently, co-exist.
So /

community exists, but the marital power does not? Lack of comparative material on this point is disappointing.[1]

It /

So common is exclusion of "all three" - community of property, of profit and loss, and of marital power - that it seems that it has been held that an agreement to be married "by ante-nuptial contract" is to be construed as an intention to exclude those three elements. (Gibson, p.115, and authorities there cited).
Of the particular combination under discussion Hahlo (at p.277) as above noted, remarks that it "seems to be unknown". In fn. 31, he states that a universal partnership (societas omnium bonorum), with equal rights of administration (so long as the whole does not amount to a prohibited inter-spouse donation) would be competent, and notes that such systems are not uncommon in Europe. Contra, exclusion of community with retention of marital power (cf. speculation (Chapter 1) as to the possibility in Scotland of separation of property with contractually-chosen retention of jus administrationis) is recognised, but rare. Indeed at p.236 (4th edn.) Hahlo suggests that such a result is often the product of misunderstanding or defective draftsmanship.

1. See "Community Property: Symposium on Equal Rights." Introduction: Equal Rights for Women Versus the Civil Code. Mack E. Barham. Tulane Law Review, Vol. 48, No.3.April, 1974, pp.560-566. (See generally Louisiana, infra). During the course of his discussion, the author quotes Dr. Harriet Daggett ("Is Joint Control of Community Property Possible?" 10 Tul.Law Rev. 589 (1936) - "The community property idea in the judgment of the writer and in the minds of a great portion of civilized society, evidenced by the fact that they continue to live under it is, perhaps, the most perfect marital property system so far devised for intelligent and fair-minded men and women who regard the marital relation as a permanent partnership"), as being of the opinion that there could be joint control of the community property.
Barham's article was written against the background of the American 'Equal Rights (Women)' debate and is concerned with the constitutionality of the Louisianian selection of the husband as head and master of the community. He suggests "informed choice" of head of community, or as (in his opinion, less popular) options "joint, and joint and several, management" or hybrid community and separate "situations". Post-nuptial change or variation of regime /

It seems that Hahlo does not consider that a clause prohibiting the husband from changing the family home without the wife's consent (a 'head of the family' power) would be valid. The wife need not comply if the husband's actions are grossly unreasonable or were prompted by bad faith.[1] Clauses concerning contribution to the family budget may be competent (and will always be subject to variation by the court on change of circumstances[2]), but a clause purporting to exclude the wife's power to pledge her husband's credit for necessaries probably /

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regime should become acceptable. This, he felt, would result in the retention of the Louisianian system and community ideas, but in a form updated and modified in the light of current thinking. It is interesting that, for the first years at least, Harham considers that parties would choose the husband as managing partner.
See also Cynthia Shoss Wall, "Management of the Louisiana Community Property System: The Need for Reform" Tul.L.Rev. Vol.48.(No.3) (a contribution to the symposium mentioned above), p.591, where is proposed "a Modified Joint and Several Control Plan", involving equal powers of control and management of community property, and requiring joint consent in certain transactions, as, for example, those affecting the home or household goods, accompanied by full powers in each to manage separate property "under a modified joint control plan". Effective third party protection would be necessary.
It will be remembered that in South Africa the husband's power as head of the family cannot be denied (in law: no doubt in practice, it is sometimes denied, or shared).

1. Hahlo, p.275. (See a hint of change for Scotland: Memo.No.41, 6.21 et seq. (Faculty Response, pp.59 - 67 and schedule I) cf. American "homestead" legislation). See S.L.C.Memo. No. 54,9.1-9.4.
2. but generally a husband's (or wife's) promise to pay a weekly or monthly housekeeping allowance is unenforceable, being "futile" if the marriage is in community and presumed to be a domestic arrangement, and not a binding legal obligation if out of community (Hahlo, p.111). However, presumably if the requisite intention were present, it would be otherwise, as suggested here.

probably is not.

Hahlo thinks that community of profit and loss may be preferable to universal community. "Profit" includes earnings, from whatever source, of either spouse, property purchased stante matrimonio, and income of common and separate property arising during marriage. "Loss" includes household expenses, debts ('validly contracted' during marriage by either party), commercial losses, and expenses arising from the preservation and repair of common property. Property of each at marriage, and that which henceforth will be termed gratuitous acquirenda[1] remain separate, and repair costs in respect of separate property are to be met by the owner separately. There is no liability for the other's anteruptial debt or delict[2].

In /

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1. that is, acquisitions by either after marriage for which the recipient gave no consideration: as third party gifts, legacies, even luck or good fortune (unless perhaps joint property was used as entrance money, or stake for a game of chance - cf. Hoddinott v. H. 1949 2 K.B.406, diss. L. Denning at p.414 et seq.; and Chapter 7, "Gambling Gains".) See generally Chapter 7, "Family Assets".
2. See Hahlo, p.280. ("Old law"). (In universal community, anteruptial debts are charged on the joint estate, and although, in principle, each spouse is liable for his own delict, much confusion (Hahlo, p.226) surrounds the question. It seems that, if matters are left until after dissolution, the creditor may pursue only the delinquent spouse, and, if the damages were paid during marriage out of the joint estate, the other has a right of recourse (see supra) on dissolution against the delinquent.) However (p.279) "In South Africa ___ community of profit and loss only is not a living institution". If community is excluded, "all three" are excluded.

In older law,[1] a wife might choose on dissolution (or during marriage, if her husband became insolvent) to have restored to her what she had brought to the marriage or to share in the 'profit and loss' of the marriage, thus entitling her to 'hedge her bet', an excellent arrangement for one partner, but one unlikely to receive general approval among legal systems today.

In South Africa now, it seems that there is only one type of marriage contract in general use, and this excludes the community of property and profit and loss and marital power[2]. The details are regulated by marriage settlement. There is rarely any clause pertaining to succession[3]. There are normally no third parties to the contract, and "community of profit and loss with its several variants is never used"[4]. Sometimes, however, the marital power is retained. This natural standardisation of practice is interesting in itself[5]. Where many choices are present, parties prefer to be divested so far as is lawful of all aspects of community. As Professor Hahlo notes,[6] the "potentialities" are not fully exploited. ("However, much can be done by marriage settlements") The advantage is that the phrases " 'married by antenuptial contract' or 'married out of community' have acquired a precise, generally known meaning"[7], and of course this /

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1. See Hahlo, pp.279-80.
2. See generally Hahlo, p.281.
3. perhaps this is as well: cf. confusion created in Scotland by the mutual will, temporarily in use, now rare. (Chapter 5(2)).
4. Hahlo, p.281.
5. variation will be found perhaps in the details of marriage settlements.
6. Hahlo, ibid.
7. Hahlo, p.281.

this is important both to the parties themselves and to creditors.[1]

Exclusion of All the Variable Consequences of Marriage

This type of contract excludes community of property and profit and loss and the marital power. Each spouse retains his property separate and his separate liability for his own debts[2].

The wife acts as a femme adult. Yet, as Hahlo warns,[3] the expression "mutual legal independence" must be read with qualifications. The husband remains head of the family (a symbolic headship at times, perhaps, but one which is emphasised when official returns, such as a census, are made, and in other more important areas, such as choice of house and style of life) and owes the primary duty to support the wife and household. Inter-spouse donations are prohibited. Probably the legal position of the South African wife married out of community may be regarded as similar to that of her Scots or English counterpart: by reason of private, contractual terms, she is likely to have a much clearer notion of how she stands vis-a-vis her /

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1. In a large and complex society, some matters presumably must be left on a basis of trust. For example, it is believed that department stores will merely ask whether the customer was married 'in' or 'out of' community, and accept the answer. In the matter of 'non-household' debts, the truth of the answer could be important. Perhaps, however, in view of the elastic limits of the duty of support (p.103), far most items a husband can be rendered liable. See also supra.

2. see however liability for household debts, and those debts falling under the head of 'support', supra.

3. p.264.

her husband in property matters.

Each may contract in respect of his/her own property without reference to the other, and if one purports to alienate the other's property without the latter's consent, usually[1] the subject of the transfer may be recovered from the third party, and the spouse first-mentioned may be required to pay damages to the other.

There is no general liability for each other's debts. Hence, actions by creditors against the spouse whose debt it was not, must establish that that spouse acted as the other's agent in the transaction in question.[2] For debts for household necessaries, however, the spouses are liable jointly and severally to creditors, "although as between the spouses they have to be borne by the husband". Spouses married out of both forms of community and marital power may contract with each other, provided that in doing so they do not infringe the "donation" rules.[3]

Since there is a rebuttable presumption that the husband owns "everything in the common household", Hahlo suggests[4] that it is wise to have attached to the marriage contract a schedule, listing those items which the wife has brought to the marriage.

Despite the fact that the spouses have decided to be married out of community, and that post-nuptial marriage /

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1. recovery by rei vindicatio (not applicable to money and negotiable instruments, and subject to personal bar).
2. "However, since the spouses in fact benefit by each other's property and income, it has been held that the wife has an indirect pecuniary interest in her husband's contracts", and presumably vice versa: Hahlo, p.285.
3. See generally Hahlo, Chapter 19.
4. the praesumptio Muciana: Hahlo, p.285, fn. 15.

marriage contracts are not competent, still they may agree to go into partnership with each other, or acquire property "in joint ownership", or "pool all or part of their resources."[1] This is a state of affairs which may arise by inference of circumstances as well as expressly. If in this venture there has been approximate equality of contribution, 'equality will be presumed'.[2]

Where the spouses agree, in this way, by private paction, to hold property in joint names, the manner and date of division will be in accordance with the rules of co-ownership generally (as by parties' agreement), and will not be governed by the rules which affect joint estate in community.[3]

Inter-spouse litigation in delict is competent, and, in the absence of a master and servant relationship, importing liability, neither is liable for the other's delict. Action may lie between the spouses in contract, or under any other head. A wife has full power to sue, and liability to be sued.[4]

Where community is excluded, but marital power is not,[5] each retains his/her own estate, and the wife's estate cannot be attached by the husband's creditors, but the husband administers the wife's estate /

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1. Hahlo, p.286.
2. though Hahlo notes (p.256, fn.26) that English and American courts are more kindly disposed to the 'equality' approach. It might well be imagined that S.A. courts, operating a system which is specific and detailed, would be impatient of individualistic deviations redolent of misunderstanding and vagueness, and lacking proof, with which Scots and English courts are familiar, and in respect of which the English answer has been a widening of judicial discretion.
3. Hahlo, p.287.
4. See Hahlo, p.288.
5. See generally, Hahlo, pp.288/9.

estate, the wife being entitled to much the same[1] remedies as would have been available, had she been married in community. The usual statutory 'out of community' rule of joint and several liability concerning household necessaries applies. Inter-spouse litigation is competent, but the wife, in non-consistorial litigation, must apply to the court for appointment of a curator ad litem or for venia agendi. Upon the question whether the spouses may contract with each other Professor Hahlo does not commit himself.[2]

Marriage Settlements

It appears that marriage settlements (which resemble gifts, but are not struck at as prohibited donations) come into being by virtue of stipulation therefor in antenuptial contract, and that they are not confined to use in marriages out of community. In the case of marriages 'in' community, the spouses may agree that a certain sum, or item of property shall be deducted from the joint estate and made over to one spouse before division takes place or that, at the beginning of the marriage, a certain asset may be held by one partner outside the community. The parties therefore, whether married 'in' or 'out' of[3] community /

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1. For example, an interdict is available, to prohibit his further administration of her property (cf., 'in community', boedelscheiding).
2. p.290. See further on the subject, pp.161-2. The text differs little in the 4th edn.
3. Cf. joint property example supra, and partnership ventures. Presumably such partnerships would be required to have some business or profit motive, not only to qualify as a partnership (at least according to Scots law: (Partnership Act, 1890): cf. "Property-owning is not a trade. Mere realisation of capital assets is not a trade", Glasgow Heritable Trust Ltd. v. Commissioners of Inland Revenue 1954 S.C. 266, per L.P. Cooper at p.284.) but also to forestall those who, post-nuptially, would have their property affairs treated as 'in' community. Yet is there any limit on the number /

community appear to enjoy considerable freedom to tailor the rules to suit their circumstances. However, at least as regards "in" community variations, Hahlo remarks,[1] "In modern practice none of these things is ever done."

Where the spouses choose to be married out of community, the precise regulation of what is to be the separate property of each may be contained in the terms of a marriage settlement. Since marriage settlements are "gifts in consideration of marriage"[2] (and marriage has been said to be the highest consideration known to the law[3]) their provisions do not amount to prohibited donations. By making use with forethought of this exception or indulgence or right, therefore, the inequalities and harshness of a system of separation may be ameliorated, if wished. Gifts may be conditional upon the occurrence of an event (for example, the birth of a child or widowhood[4]) or /

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number or type (e.g. matrimonial home) of properties which may be held jointly? The answer perhaps is that what would result would be 'joint property', not 'matrimonial joint property' in its treatment and division (see above) and so such postnuptial attempted circumventions would fail in their purpose.

1. p.290, fn.56.
2. p.290.
3. cf. Walton's discussion, 'Husband and Wife', p. 178 and preceding pages. (Donations inter virum et uxorem before the 1920 Act).
4. This, it seems, is an old form of settlement, and was termed donarie: as to the confusion surrounding the words "dowry", "dower", see Chapter 1, pp. 18 and 19, fn.3. A widow who received no "dowrie" at the church door was entitled under a statute of Alexander II (cap.22, sec.5) to a provision ("for hir dowrie", interpreted at fn. 3 as 'for her Dos' (English meaning) or 'for her dower and presumably meaning 'instead of' or 'in lieu of' or 'belatedly') of a third of her husband's lands.

or may be subject to the condition that the item shall revert to the husband on the predecease (or the predecease without issue) of the wife.[1]

Unless a power of revocation of a marriage settlement is reserved by the promisor, the settlement becomes irrevocable at marriage, and is enforceable according to its terms. The promisee spouse must also have carried out his/her duties under the settlement and must not have failed to carry out any of the 'fundamental obligations of marriage' (though consensual separation will not in Hahlo's opinion be categorised as such failure[2]) in order to be entitled to claim his/her provision, but if the provisions of the settlement are not carried out stante matrimonio, they may be enforced on dissolution of the marriage (unless the will of the promisor bequeaths to the promisee that which would have been due under the marriage settlement, in which case the contractual claim is extinguished.)

A third person may become a party to an antenuptial contract, and make an enforceable (and irrevocable, unless an express right of revocation is reserved) promise to confer benefit(s) on one or both spouses.

An interesting safeguard is Hahlo's suggestion that "The husband, it is submitted, may not defeat his wife's expectancy of a settlement under an antenuptial /

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1. See generally "Marriage Settlements", Hahlo, pp.290-293.
2. In judicial separation or divorce, an order of forfeiture of benefits may be made (see supra) which will relieve the promisor if the order is made against the other spouse.

antenuptial contract by fraudulent donations to third parties".[1]

Insolvency[2]

On the insolvency of one of the parties to a marriage out of community, the estates of both spouses vest in the "Master", and subsequently on the appointment of a trustee, in the trustee in bankruptcy, and the estate of the solvent spouse is then restored to him/her provided that the latter can establish that the property is truly his/her separate property[3]. An inventory of the items brought to the marriage by the solvent spouse is *prima facie* proof that that spouse owned those items immediately before the marriage.

Hahlo[4] discusses the ever-present problem of wife/creditor competition (with particular regard to marriage settlements). It appears that, if the husband before his sequestration has not fulfilled his (antenuptial settlement) obligations to his wife, she cannot claim them in competition with her husband's "other" creditors, but if he has fulfilled such obligations, the property transferred vests, with the solvent spouse's other estate, in the Master, and then in the trustee in bankruptcy, but must be released by the latter if the settlement falls under the terms of the Insolvency Act, 1936, s.21(2)(b). However /

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1. p.292. This is one of the most difficult of problems in matrimonial property law: How are innocent third parties to be safeguarded? (Cf. e.g. provisions of an anti-avoidance nature relating to pre-divorce alienations: Div.(Sc.) Act, 1976, s.6, and generally Chapter 7).
2. See Hahlo, pp.293-298.
3. See also *supra*.
4. p.295.

However, the settlement might subsequently[1] be set aside as a "disposition without value" if made more than two years before sequestration but at a time (a matter to be proved by the trustee) when the insolvent's liabilities exceeded his assets, or made within that two year period, the insolvent being unable to show that at the time in question his assets exceeded his liabilities[2].

If struck at as a disposition without value liable to be set aside (and set aside), the solvent spouse can have no claim therefor in competition with the insolvent spouse's 'other' creditors[3].

For claims of a general nature arising between spouses, the solvent spouse's claim is neither preferred nor postponed to the claims of 'other' creditors[4].

Pacta Successoria

The existence of pacta successoria (clauses regulating the succession to the estate of each or both) are exceptions to the general unenforceability of "agreements relating to the inheritance of a living person"[5]. Such arrangements can be varied only /

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1. that is, the property must be restored (albeit perhaps pending determination of the question whether the transaction was a disposition without value) if it is established that the property was acquired in terms of a marriage settlement. The trustee may protect the interests of creditors by seeking interdict to restrain the solvent spouse from disposing of the subjects in the interim, but only if he can provide a prima facie case that the antenuptial contract was made mala fide and that, immediately after the settlement the insolvent settlor's liabilities exceeded his assets. (Hahlo, p.295).
2. Ss. 26 and 27. See Hahlo, p.296. Cf. Married Women's Property (Scotland) Act, 1920, s.5 and generally Chapter 2.
3. s.26(2). Hahlo, ibid.
4. As to Scotland, See Chapter 2.
5. Hahlo, p.299.

only by mutual will of the parties. Indeed, they resemble the Scottish mutual will, and perhaps they are as complex and unattractive, for Kahlo remarks upon the rarity of their use.[1]

Variation and Cancellation of Antenuptial Contracts

The rule is that, when spouses make the decision to be married 'in' or 'out of' community, they cannot thereafter change their minds, nor can they alter the detailed terms of the marriage settlement, although substitution of an alternative item as a datio in solutum will be acceptable, provided that the alternative is of comparable value and is not struck at, therefore, as a prohibited donation.[2]

Cancellation or variation may be effected only by permission of the court or by last or mutual will.[3] Cancellation will be permitted if it can be shown that the antenuptial agreement was not a true reflection of the agreement of the parties,[4] or generally 'for good cause' ("cogent reasons") shown. Creditors' rights must be protected, and, in the case of amendment to reflect true agreement, the rights of existing creditors (under the non-amended contract) are unbouched. Similarly, if third party rights exist under an antenuptial contract and are affected by the proposed variation, the consent of the /

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1. Op.cit., p.300. Cf. also supra (Kahlo, pp.290-291) (general disappearance of continued community except in the nearest equivalent of massing of joint estate by mutual will or adiation by survivor of will of predeceasser) (See also "Massing in Mutual Wills", Gibson, pp.295-297).
2. See Kahlo, pp.301/302.
3. See generally Kahlo, Chapter 20.
4. The court is guided by the same principles as those having regard to which it may be persuaded to allow registration postnuptially of an antenuptial contract (see Kahlo, pp.261-275).

the third party must be obtained before variation is made. Variation has been allowed under this head (by permission of the court) where an obligation under a marriage settlement has become impossible, or where the circumstances of the parties have changed. Despite some judicial denial of the existence of judicial power to allow alteration for good cause (as by the Court of the Orange Free State) Hahlo considers[1] that the practice has become established, and is desirable.

Variation may be effected also by "last will" of the parties[2]. Here, the clauses of a testamentary nature in the antenuptial contract or settlement must be studied. If the clause is truly contractual - pactum successorium - revocation or alteration is possible only by mutual will, but if it is "testamentary in character, having found its way into the contract, as it were, by accident",[3] either spouse may revoke or alter it by his/her own "last will"[4].

Summary

A study of South African law and practice concerning marital property is illuminating, and provides examples of community and separation systems, and of those systems in operation side by side in the same jurisdiction. The popularity of the use of the marriage-contract to exclude community rules may be a significant indication of the regard with which these rules are held by the more fortunate members of that society (though whether as to the concept of community or /

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1. p.306.
2. Op.cit., pp.306-309.
3. p.306.
4. Cf. the problems (in Scotland) of mutual wills (Chapter 5(2)), and also destinations in titles to heritage

or as to the marital power or as to both, is not clear), while the theory and application of marriage contract and marriage settlement rules is very helpful indeed.

LOUISIANA

Sources

"Updating Louisiana's Community of Gains", Robert A. Pascal, Professor of Law, Louisiana State University. Tul.L.Rev. 1974-75 Vol.49, 555 (cited "Pascal").
"Matrimonial Property: A Comparative Study of Law and Social Change", Mary Ann Glendon, Professor of Law, Boston College Law School. Tul.L.Rev. 1974-75 Vol. 49, 21. (cited "Glendon", and referred to throughout this comparative Chapter, being an article concerned not with the law of Louisiana, but with the rules of other systems).
"Judicial Dissolution of the Marital Community in Louisiana", Wayne J. Lee, Tul.L.Rev. 1974-75, Vol.49 167.
"Community Property: Symposium on Equal Rights" - papers there delivered: Tul.L.Rev. 1973-74. Vol.48, 560 et seq.

It appears that, in Louisiana, there are opinions that, in matrimonial property matters, discussion is desirable and 'updating' of the existing system may be imminent.

Pascal chooses to use the expression "matrimonial regimes" (instead of "conjugal association" used in the Louisiana Covil Code), defining them as "those plans of order between husband and wife particularizing the manner in which they shall share (if at all) and control their assets and liabilities"[1]. There is complete freedom to contract out of the Louisiana system /

1. p.555.

system within the basic framework of public order and decency. "Thus, spouses must be deemed to have contracted tacitly the community of gains to the extent they have not contracted expressly against it"[1]. The theory, therefore, resembles that of South Africa, but the practice does not, for in Louisiana the majority choose to live under community.

In addition to its general authority (with regard to marriages in community) the Civil Code (1870)[2] seems to cut down contractual freedom to a certain extent in the matter of 'dowry' (Arts. 2337-81), 'paraphernalia' (non-dotal separate property of the wife where the regime chosen contains an element of community by way of dowry or otherwise) (Arts. 2385-91), and the separation of property by marriage contract. The Code specifies also the property consequences of separation a mensa et thoro and of the wife's acquisition of a judgment bringing to an end the conventional regime.

Not all debts incurred stante matrimonio are community debts: those incurred "by or in the interest of one spouse alone" are exigible from the separate property of that spouse. In sum, "the community of gains emerges as a marriage contract under which the spouses agree that certain of the revenues of each spouse, the products of their labor and industry and certain of their acquisitions shall form a special mass within the patrimony of the husband and subject to his control"[3]. Debts incurred by the husband during the subsistence of the marriage for community purposes are dischargeable therefrom. On dissolution, the wife is entitled to one half of that special mass if she will accept full personal liability for one half /

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1. p.556.
2. cf. Spanish origins (P., p.559).
3. p.561.

half of the community debts, "or if she will accept liability for those debts under benefit of inventory"[1].

The community of gains is not a partnership (Art. 2807).

During the community, the creditors of the husband (whether 'separate' or 'community') may enforce their debts against the husband's patrimony, which includes, by virtue of the community of gains, both 'community' and 'husband's separate' assets; the creditors of the wife (of necessity, in view of the manner of management of the community, her 'separate' creditors) may attach her patrimony, which, until dissolution of the community, consists only of her separate property.

Professor Pascal, having made these points clear, stands back from the system, and wonders whether "modern women remain sufficiently attuned to the ancient wisdom to permit the community of gains to remain the "legal" matrimonial regime without alteration of its basic structure".[2.3]

To /

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1. p.561, (and see infra)
2. p.562.
3. Contrast "Louisana Wives: Law Reform to Their Rescue". Judith T. Younger (Dean of College of Law, Syracuse University and at the date of her article, Professor of Law and Associate Dean, Rolstra University School of Law) - Community Property Symposium, infra - in which the author highlights aspects of Louisiana law which in her opinion are deficient, outdated and distasteful. (e.g. at p.975 - "Plainly the Code, after casting the husband in the role of financial provider and the wife in the role of dependent, shores up the husband's economic position by endowing him with superior powers over family assets. To the wife in her lesser status it gives a few economic protections. In terms of net impact, these do not put her on a par with her husband. In applying the Code the courts widen the gap".) Certainly judicial attitudes can be startling in their frankness. In the context of a discussion of the extent of the wife's duty to follow the husband, Younger quotes as recent a case as Powell v. P. (1963)(152 So.2d 609 (La.App.2d Cit.1963)) as follows:- "the husband has an absolute right to tell /

To support his view, Pascal states that the wife who does not contribute in money to the marriage, nevertheless under the basic Louisianian system has recognised her efforts "as wife, mother and principal attendant to the family's cultural needs, social life, and its obligations in kind for works of mercy and societal concern".[1] Younger suggests[2] that the Louisianian /

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tell his wife if she may work ... and any time a man can't refuse to allow his wife to work in a cocktail lounge, I think the institution of marriage is destined for the rocks." It appeared that the onus of proving the justifiability of the fact of her working was held to lie on the wife. No doubt the case was selected for its usefulness in the author's argument, and perhaps the nature of the work (as lowering status or even injurious to the husband's reputation) may have had an effect. There is no means of knowing whether such an attitude is prevalent among the Louisianian judiciary. It is not thought that there are any recent examples of such bluntness in Scotland (though see the judicial attitudes of the last century revealed in Chapter 1:

e.g. Sharp v. Hannah (1892)7 Sh.Ct.Rep.10 noted in Memo. No.41, 2.16) and in Scotland certain of the incidents of headship (choice of house, perhaps) remain). Would even the South African marital power, in its first, compulsory aspect, encompass such a right?

Perhaps both commentators are over-loyal to their sex.

1. For many years during this century, this has been the traditional role of the middle and upper class wife. Increasingly, at least among the middle class, that role has shrunk, or has been taken on in addition to full or part-time employment. To that extent, note must be taken of a suggestion that separation of property is that most in tune with trends. "When the decline of housewife-marriage is combined with the idea of marriage as a union which endures until affections erode, it is separation of assets, not deferred community, which will draw the spotlight". "Matrimonial Property: A Comparative Study of Law and Social Change" Mary Ann Glendon, Professor of Law, Boston College Law School, Tulane Law Rev.Vol. 49, No.1 (November 1974).
On the other hand, true community of property, rather than much-heralded separation, would have been of greater benefit to British wives of the Victorian and Edwardian eras.
Still, there is a clamour for recognition of contribution in kind - see England (infra); cf. Australia (Family Law Act, 1975: quantification of maintenance /

Louisianian judiciary's view of the Louisiana wife is that of "a witless dependent".

The system of community of gains safeguards the wife's capital at marriage, and her acquisitions, by donation or bequest thereafter, while permitting her a sure claim in her husband's subsequent prosperity, and a limited liability in his misfortune[1]. Usually the husband has the greater, or more prolonged, opportunity for career advancement and he must contribute "to the general family fund" gains arising therefrom, as must the wife if she is in paid employment.

The principal sources of dissatisfaction lie in the inability after marriage to change the terms of the regime, and in the "historic, basic concept that the community of gains, during its existence, is part of the husband's patrimony alone".

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maintenance: s.75 provides a list of specific (and exclusive) factors to be taken into account by the court, including
"(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;"
"(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;"
See also evidence of an open-minded attitude in
"(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;"
and "(l) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;"
The New Zealand Matrimonial Property Act, 1976 in s.18 defines "a contribution to the marriage partnership" as conduct falling within "all or any" of eight categories thereafter listed. See generally Chapter 7.

2. p.576 (as Ibsen's Torvald of Nora).

1. She has a choice - see infra.

The latter problem is the more important. In Louisiana, certain acts affecting the community assets (mainly immoveable assets) require the consent of the wife, but in other matters, the administration is within the husband's discretion, and there is no area of management of community assets in which the wife is competent to act alone.

In Professor Pascal's opinion, the options, if change is desired, are, first, full power of each spouse stante matrimonio to administer the community assets (and full power of all types of creditor to attach for all types of debt, community as well as separate assets[1]) or, second, a requirement of joint action /

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1. Pascal, basing his opinion on his view of human nature, is not in favour of this, but reports that the systems in use in Arizona, California, Idaho and Washington are approaching this position (by legislation dated 1972-1975). Younger enlarges upon this: in California, either spouse may be manager of the community; in Arizona, there is equal management and control and power to bind the community, to be exercised separately except in certain cases which require joint action; in Texas, each has sole management of the community property which he or she would have owned if single, unless the spouses 'mix' this, in which case there is joint management and control and over the remainder of the property there is joint control; in New Mexico, there must be joint action in respect of heritable property, but each has power over community personal property (except for commercial community personal property in respect of which there is a presumption in favour of the husband's administration); in Washington, either may control community, as they control separate, property, but under certain restrictions in the form of a rule that certain transactions are incompetent without the other's consent. See also Cynthia Shoss Wall, Community Property Symposium, p.595 et seq. Upon divorce, in Louisiana, and California, there is equal division, regardless of fault or need: in Arizona, Idaho, Nevada, New Mexico, Texas and Washington (the other community states) the aim of "doing justice in the circumstances" is relevant in division.(Glendon, p.67, fn.144).

action or consent in every act concerning the community assets (giving, if joint action were prescribed, power to the creditors to enforce their debts out of community or separate estate and, if consent only was required, power to enforce their debts out of community estate or the separate assets of the 'initiating' but not of the 'consenting' spouse)[1] or, third, to leave "one captain on the bridge" as at present, but to allow parties before marriage to designate that captain, and to alter their decision on that aspect after marriage (If permission to choose the captain was given, but probably not if permission to change the captain also was given, Pascal suggests that renunciation of the community by the "uncontrolling" spouse could be allowed). This he considers 'the worst of all possible plans' both from the point of view of third parties dealing with the spouses and from that of the spouses with regard to each other.

Pascal's own solution is to allow to each spouse full administrative control over those community assets acquired by him during community, and sole liability for community debts incurred during that period, but upon dissolution of the community, to give to each spouse the choice of accepting or renouncing a one-half share of the community assets and liabilities acquired and incurred by the other. Such a solution would accord with Louisiana thinking at least: it is not a feature common in other systems[2].

The /

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1. In neither case would renunciation of the community of gains be allowed.
2. It is no longer found in France. It seems it may still be found in Sweden, by means of a pre-Bodelning marriage settlement, if such is regarded as binding on the parties. See also Holland; cf. S.A. "order for forfeiture of benefits."

The solution of joint action or action with consent he feels is too cumbersome though co-operation might be necessary and tolerable in transactions of great importance.

Younger advocates for Louisiana joint management of community property (the husband to lose his status as "head and master") and separate management of separate estate, and the income thereof.

Pascal rightly stresses that the spouses "should present as simple a legal posture as possible in the presence of third parties", and that the aim should always be for security and validity of transaction. "Being married must not be made an occasion for inconveniencing third persons in their normal dealings with husband and wives in daily life". In his own favoured scheme, "the spouses", as far as the public was concerned, "would appear as if single persons, each having his own patrimony". The scheme has attractions, but as its creator himself admits, it does not allow the "houseperson" great control over the salary earner's salary. This is an important objection, for most females are 'housepeople' at some point in their lives, although fewer spend all their lives in that category.[1]

A right to some fixed proportion of the salary earner's income Professor Pascal considers should be provided by the substantive law, and not by the terms of a private marriage-contract. He suggests that a rule be formulated in terms of which, if one spouse was found to earn less than perhaps 20%[2] of the joint combined /

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1. Cf. proposal to make actions for aliment during cohabitation of spouses competent in Scotland. Scottish Law Commission Memo.No.22, Propn.39. See generally proposals for change in Scotland, Chapter 7.
2. threshold to be fixed to suit the customs and aspirations of a particular society.

combined incomes of the spouses, he/she should be entitled to demand of the other the balance necessary to make up that proportion.[1]

In general, Pascal is opposed to post-nuptial alteration of the property effects of a Louisiana marriage.

There are other sources of discontent within the system. At present, there is a presumption in favour of the classification of objects as community assets until the contrary is proved. Pascal urges the substitution of a decision based upon a preponderance of evidence failing agreement by the parties.[2] There is a general prohibition of litigation between spouses. There is inequality in that a wife's earnings do not enter community, whereas a husband's earnings must do so. Pascal would welcome also greater protection for wives "against inter vivos acts of the husband to the prejudice of her interest in the community of gains", and this to be provided not so much by the requirement of consent (cumbrousness) as in the granting to the aggrieved spouse of the right immediately to sue the other spouse or a mala fide third party. Other difficulties arise with regard to "the commingling of assets."[3]

In Louisiana, although each spouse must provide the /

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1. This bears some similarity to the changes advocated in Chapter 7 for Scotland: "Separation of Property with Concurrent Compensation of Gains".
2. Cf. approach of other systems, e.g. definition of matrimonial property (specific and apparently exclusive): the Matrimonial Property Act, 1976 (New Zealand), or definition of 'Family Assets' or 'household chattels' - see per L. Diplock in Pettitt v. P. 1969 2 All E.R. 385, at p.410, and Professor Otto Kahn - Freund's criterion of family use (see Chapter 7). And see definition of "family assets" for the purpose of new proposed scheme for Scotland - Chapter 7.
3. see infra

the other with "basic support and assistance",[1] the husband carries a greater burden, and, to a standard in keeping with his ability, must furnish his wife with "all the conveniences of life".[2] Similarly, each parent must aliment his/her children in accordance with his/her means. (It does not appear that the principal obligation lies on the father). These duties of support are exigible only on proof of need by the obligee, but there can be no contracting-out of them.

A certain freedom is allowed to spouses to regulate these matters (as to manner of implementation) for themselves by marriage contract.

If the wife brings to the marriage a dowry, the revenues thereof "constitute her contribution to the marriage expenses"[3]. If she brings no dowry, then she must contribute to the expenses in accordance with her income, but even if her income is greater than her husband's, she need not contribute to the extent of more than 50% of her income. When computing the income of the spouses, that arising from community assets is deemed to be the husband's. Only after separation of property will the law expect the wife to bear all the expenses of the marriage if need be, Professor Pascal points out[4], and he criticises the 50% rule: in the absence of contrary provision, why should not the spouses be expected to contribute to the household expenses "in proportion to their respective total incomes from both separate and community sources"? Pascal considers that the spouses' duties /

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1. Louisiana Civil Code, 1870, Art.119.
2. Art. 120.
3. Art. 2389. "She need contribute no more under matrimonial regimes law. The husband then must bear all expenses beyond the revenues of the dowry". Pascal, p.583.
4. Art. 2435. p.584.

duties to each other in this matter should be equally onerous.[1] Joint and several liability should exist only for ordinary family expenses, but not for other marriage expenses for which the contracting spouse alone should be liable, quoad third parties.

In conclusion Professor Pascal outlines what he feels should be the nature of a matrimonial regime. It should provide regulation by law of matters in respect of which the spouses have failed to make, or have chosen not to make, their own arrangements[2], and it should be in harmony with views currently held. It must satisfy both the 'sharing' and the 'individualist' aspirations of married persons. Marriage he considers is a state in which (or after which, as it transpires) a sharing of gains is appropriate, and this sharing ought to take place at the dissolution of the common life, as long as the spouse "without revenue", for reasons of human dignity, is provided "with a minimum, to be under his own control, from the income of the other". These are important points, well-expressed: the system of 'Separation of Property with Concurrent Compensation of Gains' put forward in Chapter 7 for Scotland is in sympathy with them to some extent, but the central feature of that system, as can be seen from the title given to it, is that, within a system of separation, with its advantages of clarity, independence of action, and protection of third parties, compensation to the non-owning, non-earning or economically weaker spouse is made continuously throughout the marriage.

A useful review of the substantive matrimonial property rules of Louisiana with regard to division is /

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1. or that the rights and obligations of each should be 'equalized at the greater obligation' (p.584).
2. There is here, therefore, a willingness to allow self-regulation.

is to be found in an article, "Judicial Dissolution of the Marital Community in Louisiana" by Wayne J. Lee[1].

"Marriage in the Louisiana legal system carries with it the creation of a community property regime, with the husband appointed by law as the head and master".[2]

The community is one of property and/or liabilities acquired and/or incurred during the marriage. The interesting feature here is that, although contracting-out is competent, use is rarely made of this facility[3]. As in South Africa, there can be no post-nuptial contracting-out (unless the parties were not married in Louisiana, in which case one year's grace for decision is allowed[4]).

Dissolution of the community takes place upon the occurrence of any of the following events: death, divorce, separation a mensa et thoro, or upon a successful action by the wife for separation of property[5]. However, upon dissolution, the wife (or her heirs) must choose one of three courses of action.

She may accept the community unconditionally (thus taking half of the assets of the community, but at the same time undertaking responsibility in her separate estate for half of the debts of the community, should the community fund be insufficient to satisfy them), she may renounce the community (thus renouncing all interest in the community estate, but being judged a creditor for the value of her separate dotal and extradotal effects) or she may accept the community, "with benefit of inventory" (by so doing, protecting herself /

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1. Tul.L.Rev. 1974-75, Vol.49. 167.
2. Art. 2404.
3. contrast South Africa; cf. France.
4. Art. 2329.
5. a familiar device in community systems - cf. South Africa, France, Sweden.

herself from personal liability if the community estate is found to be insolvent, yet preserving her right to share in the net community assets, if any assets remain after payment of debts.).

Upon dissolution of the community, the parties "become co-owners in indivision", and the next step is the "Partition", voluntary or judicial. The voluntary partition (division of interests) is permissible where there is agreement and where all parties concerned are of age and present, and judicial partition is used where there is disagreement or where there are minor, or absent, co-owners. The latter method, it appears, is long and complex, and attempts are made by practitioners to avoid its use.

Article 1289 of the Civil Code states:- "No one can be compelled to hold property with another, unless the contract has been agreed upon; anyone has a right to demand the division of a thing held in common, by the action of partition." Loo comments that "The right to partition arises from the state of undivided co-ownership, and is imprescriptible as long as the property is held in common."[1] It seems, though /

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1. citing Art.1304. Surely this must be read subject to the rules concerning the circumstances in which dissolution occurs, since otherwise the prohibition of post-nuptial matrimonial property alteration would not be observed in every particular? (The dissolution rules make no mention of an action by the husband for separation of property: perhaps such would never be in his interests.) In this area, 'matrimonial' property rules and property rules meet. Cf. in Scotland, common property (each being able to alienate his/her share and to demand division and sale) and joint property (the property being vested in both or all, accrescing to the survivor(s), and not justifying an action of division and sale "except on dissolution of the legal relationship on which it is based". (Howe, No.44, 6.60, fn.1, and see 6.58). Cf. Gloag and Henderson (7th ed.) (though the passage is thought to be too widely drawn by the Scottish law /

though, that the parties may agree that there will be no partition for a certain time.

Before dissolution, the husband's powers of administration of the property are so great as to resemble ownership thereof. The wife's proprietorial rights therein are thus 'imperfect' or suspended, yet nevertheless this is not an example of a deferred community system such as found in Sweden and Germany, but a true community, such as those in existence in South Africa and France, and to which the Scottish communio bonorum aspired.

The theory of partition is that, once it is made, the items of property are regarded as having been always the exclusive property of the owner, but difficulties arise because, if the rules of administration stante matrimonio and during community have been observed, third parties have acquired rights by virtue of transactions entered into with the co-owner spouse authorised to act, and these rights are upheld. This is unsatisfactory in logic, and yet, as Lee comments, no other rule could prevail, if during community one spouse is to be vested with powers of administration. Perhaps then the former notion should be criticised, although if it be held that rights in community 'crystallise' at dissolution, having been 'floating' before, would this resemble too closely ideas of deferred /

Law Commission, Memo.No.41, 6.61, fn.3.):- "No one is bound to remain indefinitely associated with another or others in the ownership of common property. Any one of the proprietors may, even against the wish of the others, insist on a division of the property. This right to have the property divided is a necessary incident of common property, and it is in law impossible to create common property and at the same time to exclude this right" (sentence criticised).

deferred community? Contra, would it not be likened to Scottish 'joint property'?

With regard to moveable property, the action of partition "may now" (since the Code of Civil Procedure 1960) "be brought as an incident to the action dissolving the community or as a separate action in that parish" (presumably only after dissolution in the first action has been granted). Where there is immoveable property, the action of partition of (all) the community property may be brought in the "Venue" where the immoveable property or any of it is situated. The conflict problems, if any, arising are not discussed, beyond a statement which indicates Lee's recognition of the interest of the lex situs in the matter.

Where an action for partition is raised, the judge should "pronounce ... in a summary manner."[1] which means that he should attend to the request for partition as quickly as possible and giving it preference over ordinary litigation. If partition is judicial, it is usual (though not necessary, unless the court so directs) for a public inventory, or at least a descriptive list, to be drawn up, itemising and valuing all community property.[2]

The inventory forms the basis of the final partition/

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1. p.170. It seems that attack at any point may be competent.
2. The inventory is compiled by a notary appointed by the court, or by more than one (one in each parish in which the community has property). It is a public document only in the sense that, upon request, the notary must make available a copy to the person requesting it: a published list of the material wealth of a marriage would hardly be civilised. Lee notes that neither the Civil Code nor the Code of Civil Procedure specify the notary's powers to search out community assets held by an "uncooperative spouse". For details, see Lee, an interesting example of an inventory system in operation.

partition, but is not conclusive. Lee notes that "this inconclusive nature can create problems". Nevertheless, much credence is given to the inventory and certainly frivolous attack would lengthen a lengthy procedure. Lee suggests that parties be allowed a certain time in which to "traverse" (attack) the inventory, after which the inventory could be challenged only on fraud, but he does not describe precisely the rules presently in operation. Surely the "inconclusive nature" must mean that attack may be made on certain grounds? If not, the notary takes on the mantle of a judge. Yet a final line must be drawn somewhere.[1] The answer lies probably in the rules concerning onus of proof, outlined below.

Then follows the accounting. In the partition, account must be taken of debts owed by the community to husband or wife.

The separate estate of each spouse is itemised. There are three classes of property, therefore: the husband's separate property, the wife's separate property and community property. The position about onus of proof is that there is a presumption that all property possessed by the spouses at the time of dissolution of the community is community property. Hence the burden of proving that an item is separate property lies on the party so averring.[2] "Gratuitous acquirenda" are held not to be community assets, nor is property brought to the marriage by the parties, or property acquired during the marriage by use of such property.[3]

The next stage is to satisfy the claims made by /

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1. See Lee, pp.172/173.
2. Art. 2405. (1870).
3. Lee, p.174; this is a less full-blooded system of community than found in South Africa, therefore - and perhaps for that reason more acceptable to the majority?

by husband or wife for reimbursement from the community of money advanced to it or used for its benefit. There may be problems of proof, the wife-creditor, in view of her lack of administrative control, enjoying an advantage here in that she need show only that she had separate funds which were delivered to the husband "or expended for the benefit of the community". There is a presumption that the funds benefited the community, rebuttable by the husband. There is no such beneficial presumption in respect of the husband's separate funds. The husband must show that his funds were used to enhance the value of the community, and also "that the community was still enjoying the benefit at the time of its dissolution".[1] Where the benefit has been the other way - by community to either spouse - "the other spouse, not the community, has a claim for half of the increase in value of the benefited separate estate[2]", there being no need to reimburse the community, "since only one spouse has suffered any detriment"[3].

As is usual in community systems where the husband is the captain on the bridge, the law allows to the wife a measure of protection of her interests. In addition to the action for separation of property already mentioned, there is the possibility of taking out an injunction against the husband's alienation of or encumbrance of community property[4] (a remedy now /

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1. Lee, ibid.
2. Art. 2408.
3. Lee, p.175. As to discussion of principle of "Retroactivity" see Lee, pp.175-177.
4. This remedy appears to be linked to or ancillary to actions for separation or divorce. Consider Sc.L.C.Memo.No.44 (suggestions to protect non-owning spouse in the matrimonial home) which at 6.21 et seq.is concerned to devise rules preventing alienation or burdening of the matrimonial home without consent of the non-owner ("the non-owner's veto /

now extended to husbands by Code of Civil Procedure, 1960), and it seems to be competent also for the wife to take out an injunction against third parties, although this would not be of right but only on proof of possible great loss.

Where an injunction would be ineffective, or inappropriate and undesirable, the writ of sequestration may be of use. This attaches property, moveable and immovable, over which the defendant has power to dispose but "of which the plaintiff claims "the ownership or right to possession."" The defendant (thereby) is divested also of the physical control over the property. Where the asset is a business, though, or of similar nature, the defendant can "bond out" the asset, or have it administered by the Sheriff if security is provided by a third party.

The usefulness of this device is restricted (greatly, it may be thought) by the fact that the wife, until the community is dissolved, has no title to apply for it. There are further restrictions upon the husband's transactions in relation to community property in the period commencing with the initiation of the action for separation or divorce.[1]

Obligation to account

It seems that the husband must account for his intromissions with the community property only as from the date of filing of the suit for divorce or separation /

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vote"). In response, the Faculty of Law, University of Glasgow suggested the use of the existing device of inhibition (in a new form) linked to a new Matrimonial Property Register. (i.e. registration of a "matrimonial home notice" in the "Matrimonial Property Register"). See now 1981 Act.

1. Cf. Scottish anti-evasion provisions in a system of separation: Div.(Sc.) Act, 1976, s.6.

separation. "Obviously, many husbands are aware of the imminence of a possible suit for divorce or separation and can use their control to their own advantage."[1]

However, in voluntary partitions, where the wife suspects fraud, the Louisiana courts have imposed a fiduciary duty on the husband (to set forth all matters which are relevant) and Lee suggests that this might be extended with profit to the case "where the wife can show controversial transactions at a time when the husband had reason to know of the imminency of a suit for separation or divorce." Surely, though, the opportunity for 'manipulation' and self-interested action exists for the manager of the property, throughout the marriage? Presumably, as in other systems (for example, France), it is for such conduct that the remedy of separation of property exists.

Division

When the inventories have been made up, and accounted for by the spouses, "the notary divides the remaining assets equally, this division providing the basis for the notary's suggestion for the distribution of the community effects. The suggested partition will be 'homologated'[2] unless any or all of the objections of either or both parties are sustained (by the court?) in which case the notary's partition will be adjusted accordingly.

Physical division of assets is favoured by the Code /

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1. p.183. Yet Lee favours some protection for the administrator, and sees a certain merit in the rule (which allows challenges in respect of actions before that date, only on the ground of fraud.)

2. not defined, but meaning, presumably, approved by parties (and by the court, in judicial partition?)

Code, but if this is inappropriate, there may be sale and division. Partition may be partly in kind and partly by "licitation" (general adjustment or equalisation by payment of money). This is a matter within the discretion and for the discretion of the court.

If sale is decided upon, it takes place in the form of public auction, following publication of prescribed advertisements. There seems to be no general requirement that there be a reserve price. The spouses themselves may bid, and if a spouse who is owner of a one half share in the item is successful in the bid, he would pay to the other one half of the auction price.

Community creditors, even if unsecured, are preferred to separate creditors.[1] Even if the community /

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1. Lee, p.186. This may be so, but Pascal states that the Code nowhere provides for the ranking inter se of "community" and "separate" creditors, since creditors are not directly affected by the matrimonial regime of the spouses in question. If separate creditors, they may look to that spouse's whole property, as that property is defined by the matrimonial regime. The matrimonial regime affects them only indirectly (see Pascal, pp.556-557). It affects only the spouses directly. And see Pascal's spirited clarion call (Ultima Verba, pp.586-587): "Marriage and the marriage regime of the spouses should have the very least possible effect on the actual and potential patrimonial relations between the spouses as individual persons and the general public. As much as possible, a matrimonial regime should not change the mode in which the spouses and third persons deal with each other. The regime, as much as possible, should have its effects only between the spouses themselves. As to the world, the spouses should be as if unmarried. Although the author has not departed so far from tradition in his recommendations, it might be well to consider whether third persons should ever have to stop to consider the married or single state of the persons with whom they are dealing, much less their matrimonial regimes. The matrimonial regime should be a matter of private order in the strictest sense." And at p.584: "For the sake of an orderly legal science, the effects of contracts must be kept between the parties."

community assets are exhausted, the creditors still have a personal claim against the husband, and against the wife, if she has accepted the community unconditionally.[1]

Rescission of Partition

A partition (voluntary or judicial) may be rescinded on the grounds of error, lesion, violence or fraud. These are less likely to occur where partition has been judicial. If the error is merely one of inadvertence or omission, matters can be remedied by amendment or supplemental partition. The 'lesion' must be "of more than one fourth part of the value of the property" before it will found rescission,[2] and the remedy may not be available in judicial partitions.[3]

An action to rescind a partition prescribes in five years.

Clearly, this is a system acceptable and workable in Louisiana[4], but in Scotland, unused to inventories and accounting and partition, something less complex might be thought to be the wish of the majority (if change is desired) and in this respect the system advocated in Chapter 7 would contain advantages in that, compensation having taken place during marriage, division at termination would be more straightforward[5]: each /

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1. Lee, p.187. See supra
2. Art.1398.
3. See provision that no set price need be reached in auction.
4. Lee at p.188 outlines his proposals for reform. The absence of advocacy of radical change suggests perhaps that his view is that either the system generally is well suited to Louisiana's needs (cf. Pascal: See Younger and Wall) or that it is so entrenched that amendment is likely to be more beneficial than revolution.
5. This is something of a generalisation. Not all couples would choose concurrent compensation of gains and there would still be three categories: Separate property of each and family assets. See Chapter 7. Inventories might be necessary.

each party would take his/her separate property and a one-half share of family assets.

FRANCE

Sources

The Modern French Law: Professor A.Colomer (Chapter IV of "Comparative Law of Matrimonial Property" ed. Albert Kiralfy (1972).
The Status of Women in France: Daniele Alexandre 20 American Journal of Comparative Law (1972).
La Communanté Conjugale Nouvelle: Rene Savatier.

At the beginning of the nineteenth century, financially and in other ways wives in France were at a greater disadvantage than their counterparts in Scotland.[1] Since then, there have been important changes, many of them of recent date.

When speaking of the French system of matrimonial property, it is the statutory system (community of moveables and acquests) to which reference is made. It has been said[2] that only 20% of French couples choose /

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1. Professor Glendon ("Matrimonial Property: A Comparative Study of Law and Social Change") describes the differences of approach which existed in 19th century France. The South favoured the dotal system based on Roman Law, and the North the community of moveables and acquests. The latter system was adopted by the Civil Code, 1804 to govern those cases not governed by private marriage-contract. See Tul.L.Rev. 1974-75 Vol.49, p.21. Under the dotal system "Ownership was determined by the marriage contract, which designated which property would be separate and which would constitute the dowry". With regard to the dowry, at p.27, the husband's limited powers of administration Professor Glendon likens to those of a common law trustee. On the other hand, the husband's consent was necessary for the wife's acts relating to her own estate.
2. since only approximately that percentage choose to make a marriage contract (Colomer, p.81).

choose not to have their financial affairs governed by the general law.

Originally, the common fund in France was neither a community of property and profit and loss ("full-blooded" on the South African model) nor yet merely a community of acquests. It resembled the former more than it did the latter, for the fund comprised, as well as moveable acquirenda, moveables brought by the spouses to the marriage. It included also immoveable property acquired for value during the marriage, but not heritage acquired gratuitously, nor heritage owned by each at marriage.

Management was in almost all respects for the husband: certain protective devices existed for the benefit of the wife. Division was (and is) made at dissolution of the community. Professor Colomer argues[1] that the system, as devised in 1804, "was an admirable piece of work because it was in almost complete harmony with the social, economic and intellectual conditions of France at that period.

But the structure has not stood the test of time...."

Reform commenced at the beginning of this century. By the law of July 13, 1907, the wife became manager of her own property acquired through her own separate employment[2]. After the passing of the laws of July 13, 1938 and September 22, 1942, the wife could contract without the husband's consent and authority. However, the husband as head of the community retained the administration and enjoyment of the separate property of the wife, on behalf of the community."[3] Thus, the wife's powers extended only over the reversionary interest /

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1. Colomer, p.82.
2. Cf. M.W.P. (Sc.) Act, 1877, S.3.
3. Colomer, p.82.

interest in her separate property, and third parties were found to be wary of contracting with a wife without the husband's consent.

Eventually, by the law of July 13, 1965, the French legislature decided upon a system of community of acquests alone in preference to a separate property system,[1] in order to meet the demand for reform.

The position now is that a more liberal or modern approach to the roles and rights of the spouses exists in the general law, and, in addition, there is freedom to the spouses to modify those rules still further to suit their own needs. Certain basic rules always apply.[2]

Since 1965, the wife may choose her occupation and undertake that employment without her husband's consent. The earnings she receives are her "reserved property" with which she may do as she pleases, and "reserved property" also will be any property which she acquires with those earnings.[3]

There never was any doubt about the husband's right to choose his own employment. The question which must be answered is: do his earnings become his separate property also, or must they go into the community fund, as must the earnings of the Louisiana husband?

The problem appears to be solved by reference to the /

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1. Colomer (p.83) notes that no-one thought of advocating the Dower System (cf. Glendon, p.764 fn. 1 above) then long in decline.
2. Arts. 214-220.
3. Wife's earned income amounts to biens reserves, over which she has power of administration, but, if the marriage is in community, she is subject to certain restrictions - concerning, for example, transfers of title, gifts "and even certain leases" See Alexandre, p.650.

the rules of contribution to the expenses of married life, rules which, as Professor Colomer says[1], have two aspects, the first governing the rights and liabilities of the spouses inter se, and the second governing the rights of third parties transacting with one or other or both of the spouses.

In the absence of private paction, contribution is demanded from each in accordance with the means of each,[2] but "the wife may supply her contribution by services in the home or unremunerated participation in her husband's occupation."[3] Professor Colomer's comment upon this point is that the Article "provides that account should be taken of her work at home or of her collaboration in her husband's work, as in both cases she most certainly saves her husband expense on staff."[4]

As is usual, though, the principal responsibility falls on the husband, and he must provide his wife with "the necessities of life", according to his situation. Colomer deduces from this[5] that the husband capable of supporting the household cannot demand from a non-salary earning wife a contribution from her separate capital, and that a marriage-contract could competently exonerate the wife but not the husband from making any contribution to these expenses. It would appear, however, that a contribution will be expected from a salary-earning wife, even though the husband be not indigent.[6]

With regard to third parties, Colomer relates[7] that, before 1965, suppliers could rest assured that in /

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1. p.86. (the problems of contribution and responsibility, respectively.
2. Art. 214.
3. Alexandre, p.651, making reference to Art. 214.
4. pp.86-87.
5. p.86.
6. Contrast M.W.P.(Sc.) Act, 1920, s.4.
7. p.87.

in every case of a debt incurred for household expenditure, they could sue the husband for the whole amount. This gave them in most cases sufficient remedy and safeguard, unless the husband was a man of straw.[1] On the matter of the welding of theory to facts here,[2] the French courts favoured the theory that the husband had impliedly authorised the wife to act for him, an implied authorisation which, by Article 220 of the law of September 22, 1942, was transformed into a legal power of the wife. Although under the theory of representation, the husband was liable, in certain situations, the wife also was liable in her separate estate. For example, under the system of separation of property, there was joint and several liability; arrestment of the reserved property of the wife ("even when they had treated with the husband in prison"[3]) was competent, and in the husband's insolvency, liability fell on the wife even if she had contributed already her due proportion of the household expenses.

According to Colomer[4], this position could not fail to provoke criticism, in that it upset the balance between the powers of the spouses and, paradoxically, "assured the creditor's better protection under the separation of property system than under the community system."

"The change" (of 1965) "is quite clear and of capital importance"[5]. The new Article 220 has put an /

1. as to which, see below, at last sentence of paragraph.
2. Colomer, p.87; Cf. Hahlo, p.163 (that the modern view regards this as a legal incident of marriage, rather than agency-based. It "flows from" the face of the establishment of a common household),
3. Colomer, p.87.
4. p.88.
5. Colomer, p.88.

an end to the wife's "domestic mandate". There is now joint and several liability in every case for debts of that nature[1], and each spouse has capacity to incur them. There is a proviso to the effect that joint and several liability will not arise in the case of "expenses which are obviously excessive having regard to the standard of living of the couple, the utility of the transaction and the bona fides of the other contractor".[2] Moreover, the contract of hire-purchase, to import full liability on both spouses, must be entered into with consent of both spouses.

Finally, on the subject of the improved status of married women, Colomer considers[3] the subject of the "Management of the money and moveables in the separate possession of each spouse". The new Articles relevant in this connection are Articles 221 and 222.

Article 221 provides that each spouse no matter which system of property applies is entitled to open a deposit or securities account without consent of the other, and will be deemed to have power to operate on it (which presumption is rebuttable)[4].

Article 222 states that a spouse who alone performs an act of administration for the use or disposal of a moveable article in his separate possession (money and securities in the personal account of one spouse being considered moveable property "privately possessed"[5]) is deemed to have authority /

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1. "actes menagers". See Alexandre, p.650.
2. Article 220, alinea 2: Colomer, ibid.
3. pp.88-90.
4. "The partner is not left without protection. The husband, for example, can object to a transaction which his wife proposes, provided that he can prove that it does not lie within her powers". Colomer, p.89.
5. Colomer, p.89.

authority so to act, in relation to bona fide third parties. The provision does not extend to moveables the nature of which suggests that they are the other spouse's property[1], or to household furniture[2]. The Articles can be seen to be in sympathy with each other. In many systems of matrimonial property, it might be said that the aim is autonomy within a framework of interdependence.[3]

The Statutory System of Matrimonial Property in France

Under the system in force in France (not amended by private agreement), which Colomer describes now as "a community system limited to after-acquired property",[4] each spouse has complete authority and control over the property possessed by him/her at marriage (that is, over his/her separate property). However, these rights are encumbered by duties or liabilities, falling on the husband as on the wife, unknown to systems of separation. The powers over separate property may be taken away by the court where the spouse finds that he/she "is, in a lasting fashion, unable to exercise free will"[5] or where the community or family fund is in danger through the mismanagement of his own property by the owner of it, as by squandering it or allowing it to perish. It can well be understood that, since the community fund benefits by savings from the income arising from separate property, such provisions are necessary.

Unless it is necessary to appoint a judicial administrator /

1. See Article 1404.
2. i.e. to such furniture as referred to in Article 215 (prohibition of unilateral disposal by one partner of "the rights which assure the family's lodging and furniture" - Colomer, p.85).
3. Cf. Chapter 7 - for Scotland, a System of "Separation of Property with Concurrent Compensation of Gains"?
4. p.90.
5. through incapacity?

administrator, "the dispossessed partner keeps the right to dispose of the bare reversion of his or her property, so that it is only the rights of administration and use which are transferred".[1] The plaintiff spouse must apply the revenue received to meet household expenses and the surplus for the community good.[2] The dispossessed spouse may apply for re-establishment in his rights, showing that the reasons for his original judicial dispossession no longer exist.[3]

Articles 1430-1432 are concerned with possible 'meddling' by one spouse in the administration of the other's property. The notion of mandate is used. In the absence of special mandate, use and administration are allowed, but alienation is not. Meddling in the face of objection by the other spouse will render the meddler liable for all the consequences of the meddling and "answerable for the whole income without limit".[4] If one spouse entrusts the other with the administration of his/her separate property (special mandate), the mandatary is not obliged to give an accounting for the income unless required to do so in terms of the special mandate. Where the law[5] presumes the mandate (as above, allowing administration and enjoyment, but not disposal) the mandatary "is answerable for the accrued revenues and also, for the last five years only, for those which he has expended fraudulently, or neglected to collect."[6] In the case of judicial dispossession, where one spouse is charged with the administration of the separate property of the other, the former is answerable for the conduct of his stewardship. The object of dispossession is, in Professor Colomer's words /

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1. Colomer, p.92.
2. Colomer, ibid.
3. Article 1429.
4. Article 1432.
5. Article 1432.
6. Colomer, p.92.

words, "to restore to the community the use of the separate property of the spouse when he or she does not make good use of his or her powers of ownership or is under a lasting incapacity of exercising them."[1]

Where the community fund is concerned, and where the wife is not a salary-earner, her consent is necessary for certain operations concerning the common fund, but in general the husband remains the head of the community. Where the wife is a salary-earner, her earnings form a reserved fund and she has "the same powers over her reserved property as the husband over the ordinary community property".[2] This means that the husband retains his superior powers in respect of a common fund decreasing in size. Professor Colomer reports[3] that, because of the inconvenience which it would entail, "co-management" (that is, a requirement of consent of both spouses for every transaction concerning the common fund - a true "two captain" system) was not suggested by the legislators of the law of July 13, 1965.

The wife's position, it seems,[4] has improved to the extent that the requirement of her consent to transactions has become the rule rather than the exception.

Generally, the husband has power to administer (management of property and collection of income); in /

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1. p.92.
2. op.cit., p.93. But the 'reserved property' falls within the community (Art.1401). There is therefore ordinary community property and reserved (community) property and truly separate property (non-acquests) (over which each spouse has full control).
3. e.g. with regard to Stock Exchange transactions - C., p.94.
4. C., ibid. Glendon notes that the husband, by the law of July 13, 1965, is liable for negligence ("fault") in management whereas in past years he was liable only for fraud.

in respect of "acts of disposal", his powers are much more limited. The husband retains the right (previously enjoyed) to dispose mortis causa of his full share of the community fund, and continues to be prohibited from making inter vivos gifts of community property without the wife's consent.

No longer (by reason of Article 1424) may he dispose of for onerous consideration, or encumber, community property without the wife's consent, where that community property is heritable.[1]

Transactions relating to "business concerns belonging to the community", and "non-negotiable partnership rights and chattels whose transfer is subject to registration" may not be undertaken by the husband alone. Neither spouse may dispose unilaterally of the matrimonial home or furniture.[2]

Apart from these exceptional cases, the husband retains the initiative and right of sole action. "The husband retains the right to sell freely company shares, credits and foundation shares, no less than chattels whose transfer is not subject to registration, that is, chattels other than vessels, boats and aircraft."[3] One problem which prevents further extension of a "two-captains rule" is the urgency of Stock Exchange transactions. If a useful investment is not to be lost, there is not time for lengthy (or even speedy) consultation between co-owners and prospective /

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1. Colomer concludes (p.95) that there is joint management of immoveable property.
2. Article 215. If one spouse purports to sell, the other has one year in which to bring an action to have the transaction reduced. It would be interesting to know how much prejudice or inconvenience this causes, in practice, to third parties.
3. Colomer, p.95. In other words "the principle .... remains that of free disposal by the husband of the common property."

prospective co-investors, it is argued. (Nevertheless, investment co-operation is not unknown in other spheres of life).

The husband's rights are conditional upon exercise of them without fraud, and it appears now that the wife can contest allegedly fraudulent transactions during the continuance of the community.[1]

Separation of property is competent if there has been such a degree of mismanagement as to "imperil" the interests of the non-managing partner. If the wife declines to take such a step, she may apply to be appointed head of the community in her husband's stead.[2]

Last /

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1. See explanation, Colomer pp.96/97.
2. Moreover, when a wife is appointed head of community in a suitable case, she becomes head in her own right, and not in the capacity of a representative or agent. Her powers over the community property are "in the background, as it were, in reserve", but they exist. (Colomer, p.98). Is it competent for the spouses by marriage-contract to agree that the wife and not the husband shall be principal administrator? (Not competent in South Africa). There can be an agreement to administer jointly (Art.1503 - "la clause de la main commune"), or each may invest the other with power to act for him/her (Art.1504 - "la clause de representation mutuelle") or they may adopt "la clause d'unite d'administration" (Art.1505) which gives to the husband the power of administration of his wife's separate property. (See generally Colomer, p.104 et seq. and below, at p.779 et seq). The former Article 1388 "forbade any attack on the acknowledged rights of the husband, as head of the community". (C.,p.108). Some points remain unclear. For example, (C., ibid.), can Article 1505 be adapted to make the wife administrator of her husband's separate property? Perhaps there is doubt about the point: yet if substitution of wife for husband where the latter is incompetent or ill (as well as if he is acting mala fide) is a notion able to be entertained, why should not the parties' wishes rule at the outset?

Last in the wife's new armoury is the weapon given to her "to enforce her partner's financial liability to her",[1] and this whether or not she has taken any of the protective measures above described. The husband is answerable for mismanagement. "It is clear that the idea that the husband is "lord and master of the community" has finally been abandoned; he retains his place as head of the community, but instead of exercising a right, he fulfils a function in the interests of both husband and wife."[2]

It seems that French law has established as refined a system of community property, principally under the management of one partner, as is possible while retaining that general notion. That is not to say that another version of community of property or limited community - such as a requirement of co-operation in transactions pertaining to all immoveable property, and to certain specified moveables - could not be adopted with profit in other systems.

The wife (whether or not substitute head of community) can bind the community fund for household debts,[3] and for the delicts of either the community will be liable.

However, with the exception of contracts for household needs and in respect of the education of the children, the wife's contracts do not bind the community, unless undertaken with the husband's consent. Under Article 217, though, either party may apply for the authorisation of the court for a transaction with regard to which the consent of the other spouse would normally /

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1. C.,p.97. ("at least at the dissolution of the community").
2. Op.cit., p.98
3. and (since 1965) not (and unlike the law of Scotland), under the head of "household agency" but in her own right.

normally be required, "if the latter is unable to act freely, or if his refusal is not justified by the interest of the family." Can this provision be construed in such a way as to permit the wife to seize the initiative and, under the wing of the Article, "push a transaction through" without her husband's consent and against his wishes? Professor Colomer[1] appears to think that this may be so - but what would be the sense in placing the wife's undoubted powers of management over the common fund behind a screen which can be drawn aside only in certain situations, if she can at any time invoke Article 217 to divert the course of her husband's management? Colomer says, "In these conditions" (meaning the existence of the wife's separate powers over the community) "and based on art.217, she must be able to obtain the judge's authorisation to carry out an act of disposal or administration which her husband has vetoed without any sound reason"[2]. If this means that, while the husband remains head of community, any sensible suggestion by the wife cannot be rejected out of hand by the husband without the wife having recourse, if she wishes, to Article 217, the result may be admirable on a criterion of equality, but is hardly satisfactory in the light of the notion of the husband's headship, which is then seen as a poor thing indeed.

There is the less bold interpretation that the Article simply means that, regardless of whether husband or wife is head of community, he/she cannot be hindered by unjustifiable veto of his/her actions by the passive partner, and may apply to the court for assistance (a remedy, therefore, perhaps more useful to /

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1. pp.99/100.
2. p.100.

to the husband), but Colomer favours the bolder approach, being of the opinion that the law of 1965 has reinforced earlier expert views themselves supported by decisions, that, with court authority, "the wife could perform an act of administration and even of disposal of the common property."[1]

Could it not be argued that, if a system of community is chosen, a system of co-operative action in all cases where not impractical is the most suitable companion?

This is highlighted by the discussion of the wife's powers over her reserved property, which are different yet again. A setting-out of the rules concerning the various types of property found in a French home would seem to be a desirable addition thereto.

The present position concerning earnings from separate occupation and property purchased therewith, is that each spouse may do as he/she wishes with that property, although, as has been seen, each owes a duty to make a suitable contribution towards the family budget. The property which the wife purchases out of her earnings or the savings therefrom is termed her reserved property, and she has the same rights over that property as the husband has over the ordinary common property. The liabilities as well as the privileges attach thereto: the husband has access to Article 217, and he can have set aside fraudulent actions by her.[2] The wife in the course of her managing reserved property may render that property liable in delict. The husband may seek a judicial separation of /

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1. C., p.99.
2. The community benefits from the savings from separate property: there is a link between the fortunes of the different categories. Presumably it is in this light that "fraud" must be interpreted. See supra.

of property. It is no longer competent for the wife to choose to renounce the community. She must participate in the partition, a state of affairs which prompts Professor Colomer to remark,[1] "At last, from now on, he is assured of his share of the reserved fund ..."

The wife is free to seek her own occupation, and debts arising therefrom attach to her reserved property only, unless the husband has become involved in that occupation, or "by entering a declaration in the commercial register, he deliberately gave his agreement to trading by his wife",[2] or had given expressly his agreement to the act performed by his wife.

Problems remained. These concerned, as ever, the difficulty of showing which items of property could properly be regarded as reserved property. The presumption of Article 1402 is that all property, moveable or immoveable, is a community acquest if not proved to be the separate property of either spouse. By Article 224, this is said to be the rule to be applied, not only vis-a-vis the husband, but vis-a-vis third parties. The burden of proof, therefore, lies upon the party who urges that property is separate or, according to Colomer, reserved.[3]

In England and Scotland, as the wife's powers increased, as greater became the benefits conferred on her by the Married Women's Property Acts, so did her liability increase. As the Frenchwoman's emancipation has advanced, what has happened to the safeguards in past years granted to her to offset the effect of her husband's powers?[4]

First /

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1. p.101.
2. Colomer, ibid.
3. This is the general position: see further, Colomer, pp.101-102.
4. C., p.102.

First, and perhaps most important, the wife and her representatives can no longer renounce the community.[1] This is proper in view of the wife's new powers over the community, and "is the end of the paradox by which a wife retained her reserved property whilst repudiating the community to whose debts she may have contributed."[2]

The husband too may now seek a judicial separation of property.

What Powers do the Spouses have to make their own property arrangements by marriage-contract?

Certain rules are fixed,[3] but beyond that framework, there is great freedom to regulate one's own affairs (ranging from modification and "individual tailoring" to adoption of a system of separation of property in so far as not contravening any of the fixed principles) and stante matrimonio "there is a certain amount of power to change marriage agreements."[4]

The spouses may adopt a system of joint management of community property, including reserved property. Joint and several liability results.[5] This is the decision to place two captains on the bridge. It has the advantage of simplicity (at least so far as spouses' rights and liabilities) and the disadvantage of cumbrousness. However, under this system, "acts of preservation of assets" may be made by either spouse. The /

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1. Contrast Louisiana, supra.
2. C., p.102. As to the "statutory mortgage", see C., p.103.
3. As Professor Colomer says (p.105), there is "a minimum of independence" (bank accounts: management of separate moveable property: separate occupations) and "a minimum of interdependence" (family home and furniture, household debts).
4. Contrast Louisiana (see Pascal, p.557) and South Africa.
5. "la clause de la main commune" - Art. 1503.

The presence of this effect proves to Colomer that the husband has been deprived of his headship of the community, or of what remained of it under the new statutory system. Neither in Louisiana nor in South Africa has such a step been permitted, and in Scotland in the nineteenth century, when it was clear that the jus mariti and jus administrationis might competently be excluded by marriage-contract, the status of the husband as paterfamilias remained secure, and this may still be so, although, except in the matter of choice of the family home, the point is unlikely to arise for decision. The tenor of Professor Colomer's writing seems be suggest that, in this system, the unilateral power of action having been taken from the husband, nothing remains of the residue of his status of head of the community.[1]

A 'halfway house' is "la clause de representation mutuelle".[2] Either may administer the common property (including the reserved property for under both "la main commune" and "representation mutuelle", the division of common property into ordinary and reserved (common) property, does not occur) but " A cts of disposal can only be performed with the common consent of the two spouses"[3] Again, the husband loses his pre-eminent /

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1. Contrast South Africa.
2. Art. 1504.
3. This seems a desirable proviso (see comments at C., p.103, as to whether it could be waived) for no two people display an identical attitude to the disposal of property. (Does this include the spending of capital? Presumably it must. Is the spending of income an act of administration? At pp.94/95, Colomer defines 'acts of administration' as those pertaining to the cultivation of the land, selling of crops and collection of income from the common property (functions which require clearly translation into modern (and urban) terms) (noting (p.95) that where the husband now cannot transfer common property without his wife's consent he cannot alone collect the capital arising from such transactions, a useful precaution /

pre-eminent role. This is a more flexible and convenient regime than 'la main commune', and it safeguards third parties, for they may look to the whole property, common and separate, provided that the antecedent 'act' was one of administration to satisfy debts incurred[1]. (Under the system of "la main commune", there is joint and several liability where the 'act' concerned a common asset and was carried out by common agreement[2]).

Despite all the reformist ideas and rules, it remains competent for the spouses to choose "la clause d'unite d'administration",[3] which gives to the husband power to administer his wife's separate property. The wife alone has power of disposal of her separate property, but, as in the old system, may dispose of, and secure her transactions only with, the rights of reversion of her separate property[4] (thus rendering herself to third parties not an attractive person with whom to do business) "except for the requirements of her occupation."[5]

These three clauses are put "at the disposal of the spouses".[6]

How then is a system of separation to be inserted into /

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precaution, especially during divorce proceedings) (cf. Scotland, Div. (Sc.) Act, 1976, s.6); the previous law stands unchanged as to disposal by way of gift and the law of 1965 was concerned with disposals for value (p.95 and see generally above).

1. "la main commune" does not differentiate between acts of administration and acts of disposal".
2. O., p.106.
3. Art. 1505.
4. In French law, "there exists a correlation between the life interest in the separate property and the powers of the husband". See Colomer, pp.107-108.
5. O., p.107.
6. The question of how far they may be extended or tampered with is discussed by Colomer at p.108.

into the French regimes?[1]

Spouses may opt for this system (though it seems that not many do: Colomer suggests that it does not accord with the French view of marriage and has never been "promoted", therefore, to be a general property system) though the prescribed rules remain.[2]

It is interesting to consider a French view of the Scandinavian middle way - "the system of participation in after-acquired property" - presented to the French people[3] as a system which "functions as a separate property /

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1. A separation system is not so much a system as not a system: paraphrase of Rene Savatier, le droit, l'amour, la liberte, quoted by Colomer at p.109.
2. e.g., as to household debts, the matrimonial home and furniture. Though these might be inserted with profit into the Scottish system of separation (and are advocated indeed in Chapter 7), there are other clauses which ring false in our ears - for example, Colomer says that Art. 219 (permitting either spouse to seek judicial authorisation to represent the other in the exercise of certain powers) may apply, and also Art. 220-1, which allows "the judge to decide, at the request of one of the spouses, that the other may no longer provisionally dispose independently of his property". These provisions seem suitable for a system which keeps its roots in community of property, and inappropriate for one in which, in theory at any rate, neither spouse has an interest in the property of the other.
3. introduced as an option by the law of July 13, 1965. The scope for private choice is wide, wider in a sense than that open to those whose personal law is English or Scots because they who have an unfettered choice, lack guidance and example and the encouragement given by the existence of other 'tailor-made' marriage-settlements, containing a chosen matrimonial property regime. Nevertheless, apathetic independence and a disregard of such matrimonial property rules as do exist seem to have characterised the attitude to the Scot to the financial aspects of his marriage. Folklore leads us to believe that the French are practical, hard-headed and money-conscious, and the matrimonial property rules do nothing to dispel the belief. Colomer (p.109) says that the French conception of marriage is the union of two people, combined with "at least some degree of association of material interests." It will be recalled, however, that only about 20% of French couples choose to make a marriage-contract.

property system, but is liquidated as a community system." The 'separateness' of all property, whether owned at marriage or acquired by any means thereafter, is secured in the clearest of terms by Art. 1569. Upon dissolution, "each of the spouses has the right to a share of half the net value of the after-acquired property belonging to the other, measured by the valuation both of the original fortune and the final fortune."[1] This "Franco-German regime", or French regime after the German style, remains only one of the options, as does the system of separation of property[2], attempts to introduce it as the general or standard system having been unsuccessful to date.

Upon divorce (statutory system of matrimonial property) there is equal participation in acquisitions and equal liability in debts (of the community). If the division of property, albeit equal, will leave the plaintiff ill-equipped financially, a pension of not more than one third of the defendant's income may be allowed to him/her. It is significant that in respect of maintenance after divorce, questions of right and wrong are relevant; aliment after separation may be granted without regard to conduct.[3]

On death, as on divorce, in France, a 'balance sheet' of common assets and liabilities is drawn up, and division is made. If the division is insufficient for the maintenance of the survivor, the latter may claim against the estate for maintenance. In intestacy, depending upon the presence or absence of prior ranking /

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1. but during marriage "the system operates as if the spouses had married under the separation of property system" - Art. 1569.
2. that is, "consensual systems".
3. See Glendon, pp.67/68 (Divorce in the case of M. et Mme. Meunier).

ranking relations, the widow may have in addition a right of property or of liferent in part of the deceased's estate. In testacy, the French spouse retains great freedom with the result that he may exclude any claim of the other spouse to his half share[1] in the community property, though it seems that he may not exclude the claims of his children. In sum, therefore, half of the community estate, at the least, will fall to the survivor (by reason of the laws governing community, not by reason of the laws governing testate succession). If the spouses have two children a spouse has freedom to dispose only of one-third[2] of his estate (that is of his separate property and half share of community).

A peculiarity or specialty of the French law of testate succession is that the husband, desirous of benefiting his wife, may, instead of bequeathing to her the whole of the fraction in respect of which the law allows him complete freedom of testation, give her the liferent of all his property, or the liferent of three-quarters thereof, and a right of property in the remainder. The children may have the liferent converted to an annuity, provided that they give sufficient security therefor, and that the property supplying the liferent is not the house of the survivor spouse or its furnishings. Glendon comments upon the departure to a certain extent from the French "traditional concern for heirs in the bloodline of the deceased",[3] though it is her view that the French widow's rights in respect of her husband's /

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1. Cf. the celebrated conflict case of De Nigols v. Curlier [1900] A.C.21. (moveables); [1900] 2 Ch. 410 (immoveables).
2. quotite disponible: Glendon, p.70 (pp.68-71).
3. G., ibid.; Cf. the Scottish Watershed: Succ. (Sc.) Act, 1964.

husband's half share of the community cannot be said to be as great as the American widow's rights in her husband's estate. Of course the difference lies in the fact that the (French) widow has "already received her half of the community" - that is, of the net community, after payment of community debts, and, in appropriate cases, after the community has borne the cost of necessary aliment for her, for a nine month period following the deceased's death. This is in addition, presumably, to the general claim against the estate for maintenance, earlier mentioned.

The French System of 'Participation in After-Acquired Property'

It has been seen that in France, the statutory system is one of community of acquests (certain features of which can be modified, by means of adoption of la clause de la main commune, de representation mutuelle, or d'unite d'administration), but that set out for spouses' choice if they prefer are two other systems, namely, that of separation of property and that of participation in after-acquired property. Spouses can create their own system, subject to the existence of certain rules of a compulsory character.

The Code of 1958 provided for Germany a matrimonial property regime of the type commonly known as "deferred community". As in France, subject to the limits imposed by mandatory rules, spouses may alter the statutory scheme to suit their needs. Moreover, in addition, the Code sets out two regimes, that of separation of property and that of universal community. Neither community of acquest nor community of moveables and acquests is any longer an option regulated by the Code, and each requires private agreement.

It can be seen that the approach adopted is remarkably similar, the common pattern consisting of principal (statutory) system, options the rules of which /

which are set out, and freedom for private agreement subject to compliance with certain compulsory rules. The statutory system of France is now no longer an "official" option in Germany, but the German statutory system (since the law of July 13, 1965) has become an "official" option in France.

Under the "French regime after the German Style", the 'separateness' of all property, whether owned at marriage or acquired by any means thereafter, is secured in the clearest of terms by Article 1569. Upon dissolution, "each of the spouses has the right to a share of half the net value of the after-acquired property belonging to the other, measured by the valuation both of the original fortune and the final fortune."[1]

Valuation is made of the property which each spouse possessed at marriage, and has acquired subsequently in its state at marriage or at date of acquisition, and at its value at date of dissolution. Liabilities are deducted. It may be that these extinguish the fund, in which case that spouse's 'fund' is ignored thereafter. In other cases, the remainder is accounted the original fund or fortune.

The final fund or fortune is the valuation of all property owned by each spouse at the date of dissolution (by death, divorce, judicial separation or "liquidation" brought about by mismanagement or misconduct by one spouse, or by confusion in affairs). To this sum is added "fictionally"[2] the value of all inter vivos gifts by the spouse, not consented to by the other spouse, together with "that which he may have /

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1. Art. 1569.
2. C., p.111.

have fraudulently transferred".[1] Valuation of property owned at dissolution is made in its state and at its value at the date of dissolution, and of gifts and fraudulent transfers in their state at the date of gift or transfer and at the value which they would have had at the date of dissolution. Undischarged debts are then deducted, and the remainder is that spouse's final fortune.

If the final fund exceeds the original fortune, "the difference represents the net remaining after-acquired property and provides ground for participation."[2] Where each spouse has after-acquired property, it appears that there is set-off between the parties and only the remainder provides "a basis for partition."[3]

The "creditor" spouse has then a claim to one half of the "debtor" spouse's surplus assets, and this as a general rule is a claim which is settled in cash, unless the spouses can reach agreement upon settlement in kind, or unless the debtor spouse can establish to the satisfaction of a judge that it would be very difficult to settle in money. Colomer explains[4] that it was thought not appropriate for the creditor to be able to demand any particular assets in satisfaction of his debt, for this is a system of participation in value, not of participation in a common fund (the theoretical basis being that there is no common fund), and that it would not be right if the /

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1. a mysterious phrase, Professor Colomer rightly remarks (p.111) that in these provisions one can see the recognition of the interest which each partner stante matrimonio has in the property of the other at dissolution, an interest which may exist in a system of separation (though see the Scottish rules of testate succession - Chapter 5(2)) but is not recognised (see the Scottish rules of intestate succession - Chapter 5(2)).
2. Colomer, p.111.
3. C., ibid.
4. ibid.

the creditor spouse could demand, for example, a family heirloom,[1] part of the original property of the other, a demand which he/she could not make under the system of community of acquests.

Professor Colomer's description[2] of the creditor's remedies where the debtor's assets are insufficient to satisfy his claim (which eventuality allows the creditor spouse to bring under review gifts and fraudulent transfers "beginning with the most recent transfer"), although in itself clear, does not explain in what way the remaining sum could be insufficient, for, however meagre, presumably it can be halved and if non-existent, there is no claim.[3] On the other hand, some account would have to be taken of objectionable transactions since otherwise the system would not soften greatly the harshness of the system of separation and absence of community fund[4]. It would appear that the creditor /

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1. C., p.111.
2. pp.111/112.
3. The answer is that the amount due "on paper" may not be able to be satisfied out of the debtor's assets physically present. In this aspect lies an essential difference between systems such as this and systems of separation. If there is no property out of which prior rights are exigible, what remedy can be given in Scots law?
4. for the system "functions as a separate property system, but is liquidated as a community system" (C.p.110) (Query - do not such systems only function at liquidation?) In the absence of special choice, the statutory system in France is not one of separation but one of community of acquests. However, after liquidation (able to be obtained on the occurrence of "exactly the same eventualities and conditions as those in which he can request separation of property under the community system" (C., p.112), "the spouses are naturally" (emphasis added) "governed by the separation of property system." (C., ibid.). See Chapter 7 - System of Separation with Concurrent Compensation of Gains.

creditor spouse cannot impugn transactions to which he consented. In addition, if the property in question was acquired by a bona fide third party for value, the transaction cannot be reviewed. It seems, therefore, that transactions with mala fide third parties, or gifts to third parties, can be reduced by the court.[1]

Is it true to say that the German and Scandinavian regimes are the systems of the future?

GERMANY

Sources

German Law: Professor E.D.Grane (Chapter V, Kiralfy). The German Civil Code: Ian S. Forrester, Simon L. Goren, Hans-Michael Ilgen. (as amended to January, 1975).

The system which obtained in Germany until the mid-twentieth century was one which resembled the Scottish and English nineteenth century systems before reform. In Germany, however, the wife in name remained owner of her heritage and moveables, but the administration thereof fell to the husband. Professor Grane notes[2] that a similar system is in operation still (1972) in Switzerland (which is not altogether surprising perhaps since women's suffrage is a novel concept to the Swiss) but that, on the other hand, Austria has used the "new" system of deferred community, though perhaps not by that name, since 1811.

Since the unification of Germany did not take place until 1871, the history of matrimonial property law before that date is characterised by the variety of /

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1. Only on dissolution by divorce can an echo of this be seen in Scots law - Div.(Sc.) Act, 1976, s.6.
2. p.117.

of different systems in operation in different parts of Germany at different times. Wide powers of choice existed. Parties were free to choose the regime which they preferred, which perhaps would be one in accordance with the local custom in their own part of Germany. One system became the statutory regime[1] and the others were optional contractual regimes[2]. There was power to parties to opt out of the statutory regime, or to change their minds about their chosen system, whether statutory or contractual, by postnuptial marriage-contract, although the provisions of the latter were not effective to bind third parties unless known to them or registered in a local matrimonial property register. Grane notes[3] that that system was sufficient to prevent abuses, which is an interesting opinion.

The history leading to change in 1958 is described by Grane[4] and Glendon[5]. Until 1953, Germany had a system of separately owned property, broadly speaking, but the husband had wide powers of administration and enjoyment of the wife's property, under exception of the Vorbehaltsgut (property designated as such by marriage-contract, donation or bequest, together with the wife's earnings from her separate employment, and articles for her personal use). In 1953, for technical and constitutional reasons,[6] Germany became a system of /

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1. that is, (Grane pp.115-116) (German Civil Code, 1896: Guterstand der Verwalfung und Nutzuiessung) retention by the wife of title to her moveable and immoveable property (hence giving it protection, especially in the husband's bankruptcy) but administration thereof by the husband: rules acceptable to the spirit of the nation and the times. The husband could not dispose of the wife's immoveable property.
2. cf. French approach.
3. p.116 (supported by references - p.169, fn.12).
4. pp.118-119.
5. pp.39-42.
6. Glendon, ; it was necessary in terms of the Basic Law of May 23, 1949, arts.3(1) and (2) to seek and enforce equality and equal rights, and separation was favoured - Grane,

of full separation of property. This period was a "Code-less" five year hiatus of judge-made law. German jurists then looked to the laws of its neighbours, Austria and Sweden, and found there the notion of division (between the partners) of the material benefits of the marriage on the dissolution thereof. Grane relates[1] that the Federal Ministry of Justice and a Sub Committee on Matters of Family Law, both concerned with the reform of the law here, considered that a full-blown community system, as was becoming prevalent "especially in the Spanish-speaking and the Socialist countries"[2] did not protect the wife adequately against the dangerous effects of the husband's bankruptcy, in "swallowing up" her share in the community, and chose an Austro/Swedish/Swiss system, under which, stante matrimonio, each partner has power to dispose of his/her own property (subject to certain limitations), and that upon dissolution of the marriage, the gains of each shall be computed, and he/she who has fared less well shall have a claim to one half of the sum by which the other spouse's gains exceed his/her own[3].

The latter suggestion was not accepted in its entirety by the legislature. In view of the difficulty of tracing the origin of property, the division advocated on death was that, where the survivor had been disinherited by the predeceaser, the former should take what was allotted to him/her by his/her statutory right of succession, and in addition should take one quarter of the total estate[4].

Here /

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1. pp.119-120.
2. see fn.27, p.170 - reference made, with citation of authority, to the laws of Spain, Chile, Argentina, Bolivia, Peru, Venezuela and Paraguay.
3. See now German Civil Code Arts. 1363, 1364, 1371, 1372, 1378: Grane fn.30, p.171.
4. German Civil Code, Art. 1371(1).

Here again Professor Grane's "insider" comments are interesting. He relates that wealthy husbands took the opportunity afforded by the legislature's transitional arrangements to opt for a regime of separation and "to escape the new regime, which they correctly understood as a deterrent against divorce."[1]

The new system came into operation in (West) Germany in June, 1958. In 1966, the German Democratic Republic followed the general socialist trend in embodying a community system in its Family Code.

The Federal Republic's Code of 1958 allows contracting-out[2] of the general system, which is described[3] in the following terms:- "The husband's and the wife's property shall not become joint property of the spouses; this shall also apply to property acquired by either spouse after marriage. However, the gains obtained by the spouses during their married life shall be compensated upon the termination of the community of gains." As Professor Grane points out[4], the definition demonstrates that the term "community of gains" is a misnomer: rather, the term "compensation of gains" is appropriate. Such a system is often called a system of "deferred community", (Zugewinngemeinschaft) and the German/Scandinavian model has been described by many[5] as the matrimonial property system of the future.

During marriage, the spouses do not enjoy unfettered freedom of administration of their own property. Of the whole property of one spouse, or the /

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1. G., p.121.
2. BGB §1363(1).
3. §1363(2).
4. p.122.
5. Cf. Glendon, p.41, fn.63.

the items of household plenishing and equipment belonging to one spouse, he/she may not dispose (including mortgage, pledge or encumbrance, or "modification of its contents (Inhaltsanderung)") except with the consent, express or implied, of the other spouse. Without consent, any such purported contract is inchoate, and will be null and void if consent is refused. Judicial consent may be given, and will suffice, if the other spouse is unable or unjustifiably unwilling to give consent,[1] and (in the case of transactions concerning an entire estate) if in addition "consent is urgently needed"[2].

Some at least of the strength of the provision appears to have been taken from the rule by the general construction that it imports a subjective test and that the ignorance of the third party that his contracting partner is disposing of his whole estate would render the transaction unobjectionable. Prima facie this interpretation would appear to open up a path for much litigation and difficult decision[3].

Moreover, the term "household items" does not appear to include heritable property, and of course it is frequently the problems with regard to rights in the matrimonial home which are the most important, both in terms of unhappiness and in terms of monetary value.

Where /

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1. a common provision - perhaps even a necessary concomitant - in every case or system in which consent, or joint action, is required. Cf. Sc.L. Com.Memo.No.41, 6.29 (court to be empowered to dispense with consent of occupant spouse to a transaction concerning the matrimonial home, where inter alia consent unreasonably withheld).
2. Grane, p.123.
3. Cf. the sanguine opinion of Grane upon the freedom of spouses to make postnuptial agreements (German Civil Code, 1896 into effect 1900): these however are not effective against third parties unless known to them, or registered in a local matrimonial property register. (Grane, p.116)

Where a spouse acts without consent in a matter where he/she should have obtained consent, the other spouse is entitled[1] to take the remedies provided by the ineffectiveness of the transaction[2]. Many questions are unanswered. How is a bona fide third party to know whether his purchase will exhaust or barely diminish the seller's property? How does he know with certainty the marital status of the seller? How far is ignorance a defence to the third party? How is consent evidenced? How is its existence guaranteed to the third party? Where there are two captains on one ship, these questions must always arise and be answered[3].

Compensation takes place upon dissolution of the marriage for a reason other than death, and most commonly on divorce[4]. Upon order of divorce, one spouse at this point becomes creditor and the other becomes debtor. "There is no split in title but merely a statutory debt ..."[5]. Compensation on divorce is a different matter from that question of aliment ("alimony") which is linked to conduct and culpability. Division of property is set apart from assessment /

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1. 1368 BGB.
2. It appears that the provision may be invoked by the disposing spouse also. Should he be personally barred from doing so? Crome suggests (p.125) that "it should be sufficient as a rule to let the other spouse sue the third party, for re-delivery of the property to the disposing spouse".
3. A partial answer is elicited (Crome, p.125). Lack of consent appears to operate in the manner of a vitium reale. Third party innocence is no defence. And see infra.
4. Glendon comments (p.41 and p.73 et seq) that the "community" nature of the German regime becomes apparent on divorce; it is not seen during marriage, or on death intestate.
5. (the gainer being the debtor and the loser the creditor) - G., p.126.

assessment of conduct[1].

The dates for valuation of property are as follows:- initial property (owned at marriage or acquired thereafter) is valued at the date "when the statutory regime began to govern the marriage" or the date of acquisition. Final property (belonging to either at termination of marriage) is valued at the date of dissolution of marriage[2].

The attractiveness of such schemes can pall when difficulties of proof are encountered, and these must always be anticipated if possible. In Germany, there is a presumption in favour of the accuracy, as between the spouses, of an inventory and valuation comprising the initial property and subsequent acquisitions of each.[3] Unless such an inventory has been made, "the final property of either spouse shall be deemed to be his or her gains"[4]. That spouse will not be heard to say that part of his 'final property' is 'initial property'. Grane suggests that this rule is one which was made by practical men who realised that the making of inventories of property is not spontaneous human conduct, nor even perhaps likeable, and the rule appears to favour the wife, usually the weaker party in /

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1. Cf. approach taken by Law Faculty, University of Glasgow, in comments upon Sc.Law.Com.Memo.No.22, 'Aliment and Financial Provision. At p.129, Professor Grane notes rightly that this may be logical in principle, but may have outrageous results. A little thought will demonstrate how good a harvest might be reaped by the adulterous wife who, by her behaviour, has brought to an end a short-term marriage with a successful business man. (See discussion at p.129).
2. §1376 BGB.
3. §1377(1).
4. §1377(3). See generally Grane, p.128.

in economic terms.[1]

Once more is found the distinction between onerous gains and gratuitous acquisitions. The latter are taken to form part of 'initial property'.[2] It is clear that it is in the financial interests of each spouse upon dissolution to have as great a proportion as possible of his property placed on the pile of 'initial property'.

By the same token, gratuitous alienations ("designed to harm the other spouse's interests") are deemed to be part of the donor spouse's 'final property'. Grane explains[3], however, that the compensation claim cannot exceed the net final property of the debtor spouse. Redress can yet be obtained because the creditor spouse may seek from the third party donee[4], even if bona fide, the subject of the donation or its monetary equivalent, by taking against him an action of unjust enrichment. As to "other fraudulent acts", only those known to the third party to be in prejudice of the other spouse's interests are reducible[5]. In this way justice may be done between the spouses, but it seems rough justice, or no /

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1. G., ibid. Glendon (pp.73-74) also notes that the aim must have been to make as much property as possible available for division, ("[S]ince the legislature surely knew that married couples do not customarily make inventories of their belongings ...") and that, in most community systems, other evidence (that is, besides the production of an inventory) that an item of property is not an acquest is admitted.
2. in general "deemed to be part of the initial property", since the other did not contribute thereto. §1374(2) BGB, Grane, p.128.
3. p.128. §1378(2) BGB. See also Glendon.
4. What would be the rights of a party further removed?
5. §1390(1) and §1390(2) BGB respectively.

no justice, to strangers to the marriage.[1]

Whether or not an inventory of initial property has been made, each spouse is obliged to make an inventory of final property.

The debtor spouse may refuse to satisfy the claim for compensation if he/she feels that the case falls within the definition of "gross inequity", but this expression does not include, it is thought,[2] considerations of the morality of the behaviour of the spouses. That which is relevant is the failure of the debtor spouse "to perform the economic duties" arising from the marriage.

In addition, there is a defence of "set-off", that is, set-off of benefits received by the creditor spouse from the debtor spouse during the marriage against the compensation claim arising. This is permissible only where the debtor spouse intended that this should be the result in the event of dissolution involving compensation, but there is a helpful presumption which operates in the donor's favour, to the effect that such intent will be presumed where the benefit exceeds "the limits of normal gifts between spouses".[3] Moreover, the claim must be made by the creditor spouse within three years of notification of the dissolution of the community and "in any case" within thirty years thereafter. There is provision for postponed payment in case of hardship (under payment of interest and possibly on deposit /

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1. The view has been put forward that in general third parties should be entitled to rely on what they see, or on how matters seem. Yet if compensation was limited to the extent of the other's final property, of which he had been disposing regularly (and perhaps on some basis resting in law evasion) it might be a right worth little.
2. Grane, p.129.
3. BGB 1380. Contrast South African prohibition of post-nuptial gifts.

deposit of security) and provided that the creditor spouse's interests are not prejudiced.

Upon divorce, gains are calculated as at the date of initiation of proceedings, not as at the date of their conclusion.

A further protection for a spouse against unjustifiable or unco-operative behaviour by the other is the remedy of anticipatory compensation, for which a claim may be made in cases of separation[1] or where the other spouse has disposed of his entire estate, or has reduced it in an attempt to preclude a claim for compensation[2] or where the spouse refuses to divulge information concerning his/her property: that is, in circumstances where there have been "repeated violations by one of the spouses of the economic duties arising from the marriage, provided that his culpability is established".[3] A system of separation, upon finalisation of the order for anticipatory compensation, rules thereafter.[4] Deposit of security may be ordered in an action of divorce or nullity or in one for anticipatory compensation, to guard against prejudice of the claimant's rights.

Effect of Death Upon Property

It has been seen that different principles apply here.

The /

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1. in circumstances in which the claimant spouse is entitled under German law to live apart, but not where both spouses are so entitled: in the latter case divorce could be sought on the ground of "objective disruption of the matrimonial relationship".
2. §1375 BGB. This is a crucial area of possible weakness in such a system: even in the Scottish system of separation, some safeguards are necessary: Divorce (Sc.) Act, 1976, s.6.
3. §1386 BGB; Grane, p.131.
4. Cf. similar 'safety valves' in South Africa, France, Sweden (Boskillnad)

The basic (Austro-Prussian inspired) rules of intestate succession are that the survivor takes one quarter of the deceased's estate if he/she takes with descendants, and one half if he/she takes with the deceased's parents, siblings, nephews and nieces, or grandparents.[1]

Thus, in the normal case, where the deceased leaves children, the surviving spouse will take one half of the estate (being one quarter with in addition one quarter of the estate in name of compensation of gains) and three-quarters if there are no children, but there are other relations as mentioned. The survivor is entitled also to all household equipment and wedding presents if there are no children and such as he/she may reasonably require if children survive.[2] Grane points out[3] that in many cases much of the estate may consist of household chattels.

If the spouses have chosen to contract out of the statutory regime into a system of separate property, the survivor is entitled only to the basic statutory right of intestate succession, being one half or one quarter as the case may be.

In this area, there has been criticism, on the ground /

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1. Additional benefit to the extent of one quarter of the estate was given in the 1958 changes: §1371(1) BGB. This was prompted by the view (G., p.120 - supra,) that, where the marriage was dissolved by death, it would be too difficult to ascertain parties' initial property.
2. §1932 BGB.
3. p.135. Cf. "The Succession (Scotland) Act, 1964" (2nd ed.) Michael Meston, p.27 "The great social significance of these rights lies in the fact that in the large majority of intestacies, prior rights will exhaust the estate and ensure that the surviving spouse is the sole beneficiary, even although others may have nominal rights of succession." At p.13, "The figures clearly indicate the need for the law of intestate succession to be relevant to the small and very small estate rather than to the large estate."

ground that the survivor has received over-generous treatment at the expense of the remainder of the deceased's family.[1]

Testate Succession: Marriage-Contracts

It seems that German spouses may "freely" disinherit each other.[2] The right to the statutory share (that is, the rights guaranteed on intestacy) may be excluded also by renunciation or by "indignity".[3]

In all these cases, however, it would appear that the disappointed spouse may demand his/her basic share in testacy, which is one half of that which would have been due to him/her as a statutory heir on intestacy (but without the additional one quarter share as described above). Thus, depending upon the existence of children, the survivor will receive one eighth or one quarter share, together with the compensatory debt due in divorce and nullity. Why the survivor should receive the compensatory claim - thought not to be appropriate in the case of dissolution by death intestate[4] - is not clear. Moreover, the grammatical /

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1. for example, stepchildren, who, although they may seek from the survivor in case of need, the cost of education, cannot ask more than the additional quarter share, and generally have now "lost ground" as against the surviving spouse. (Grane, p.136). Professor Grane's own solution would have been a liferent/fee distribution (based on the fideicommissum of Roman Law). As to the Scottish system, see Chapter 5(2). Relatively little alteration of the rules of intestate succession is proposed in Chapter 7.
2. but, as in Scots law, this is not the right which it appears to be: see consequences below.
3. Fraud, forgery, falsification of will, duress, homicide, as enumerated by Grane, p.138; cf. treatment in Scots law of "the unworthy heir" (Chapter 5(2)).
4. because (according to Grane, p.120, "it would be too difficult in many cases to find out what the respective property of each spouse had been at the beginning of the marriage.").

grammatical construction[1] has left open the possibility that the survivor, if the gains of the deceased were few or non-existent, might elect instead to forego the compensatory debt, and take instead the rights in intestacy.[2,3] However the question was decided by a ruling of the Federal Supreme Court in 1964, in favour of the strict or narrow interpretation.

Marriage-Contracts in German Law

Within the limits of "mandatory rules of law and ethics",[4] German spouses may alter, ante-nuptially or postnuptially, the statutory scheme of matrimonial property to suit their own needs.[5]

If /

1. §1371(2) BGB: Grane, pp.139/140.
2. Cf. the principle of Approbate and Reprobate or Election in Scots law.
3. There are provisions of German law, complex to a stranger to the system, applicable where the survivor has been bequeathed a legacy, or has been treated by the will of the predeceaser in such a way as to give him/her a smaller share of the estate than he/she would have been entitled to in intestacy or on complete disinheritance. See Grane ("Modification of Statutory Succession") pp.140-143.
4. §1408 BGB. G., p.144.
5. Only the optional extremes of separation and of universal community (and of course the norm of 'deferred community') are available now, without special provision. Grane notes (p.146)(W.Muller - Freietels - "Family Law and The Law of Succession in Germany". 16 Inst. & Comp. L.Q. 409 (1967) at p.425 states, though, that in the usual case the statutory regime applies, because no special particularised regime is chosen.) that separation remains popular, especially among the better educated and wealthier (an interesting point; and cf. South Africa) and where both spouses are self-supporting, but remarks rightly that the motives underlying such a choice may not always be simple or referable to uncomplicated criteria.

If the alternative regime desired is not one to be found in the Code, the spouses must themselves specify by marriage settlement the provisions which they wish. The deed must be entered into when both parties (or their representative(s)) are present and must be effected by "notarial agreement". The notary or other representative may be the agent of both. Without registration of the agreement in the local court marital settlements register (or private knowledge of the third party, at the time of contracting with the spouse), the deviations from the statutory scheme will not affect third parties,[1] and generally "[T]he application" (for registration) "must be made by both spouses, each of them being under a duty to cooperate;"[2] The Register is a public document, and publication of the entry will be ordered to be made in a local newspaper.[3]

Choices Available Under the Code

The choice of "community" under the German Code is that of universal community, and two sets of rules exist[4] to govern this option, one concerned with the case where it is agreed that administration of the common property will be by one spouse only, and one applicable to those who wish joint action to be the rule.

Property /

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1. The same applies to the effect of a subsequent settlement altering the first. See generally upon this subject, G., pp.145/146.
2. Grane, p.145. The duty to co-operate is an interesting feature and one which might be thought to be necessary for the working of a system in which registration plays so important a part.
3. Does this mean notification of the entry merely or of the details thereof? If the latter is meant, surely this would be unacceptable to many?
4. Grane, p.147 et seq.

Property of each spouse at marriage, and property subsequently acquired, form the common fund. This means that, on marriage, entries in land registers become incorrect, and must be "rectified".[1] Outside the common fund (Gesamtgut) is Sondergut, which Professor Grane translates as specific property[2], and over this each spouse has unfettered right of administration. Examples are claims to alimony, to what appears to be an approximate equivalent to the Scots claim for solatium, in respect of personal injuries, rights of usufruct, copyright, "claims not subject to attachment": all in all, items of property which "cannot be transferred by a legal transaction."[3]

In addition, there is the Vorbehaltsgut, the reserved property, which Grane states[4] has its origin in the notion of paraphernalia. Here, it signifies gratuitous acquirenda, and such property as the spouses agree shall not form part of the common fund, and any property purchased therewith or exchanged therefor. Here too the owner spouse has full right of administration.[5]

With regard to Gesamtgut, neither spouse may dispose of an item nor insist upon partition.

In the absence of explicit choice by the spouses, joint administration is presumed. The spouses may provide for either to be sole administrator/trix, but notification /

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1. This is explained by Grane in a few words - "title to land is transferred off the land register, so the new entry giving a joint title to both spouses will be of a merely declaratory character." (p.147) - but, at least as matters stand at present in Scotland, automatic common ownership of the matrimonial home, if accepted in principle, would be difficult to put into practice. Cf. Chapter 7.
2. p.148.
3. Cf. Swedish "personal rights".
4. Ibid.
5. The presumption here is that there is no reserved property, unless notification thereof is made in the marriage settlements register.

notification thereof must be entered in the marriage settlement register. "This is a very clear rejection of the patriarchical concept embodied in the law before the Reform."[1]

The effects of joint and sole administration respectively[2] are, as would be expected, that the spouse having sole right of administration will transact, sue and be sued alone, and his/her actions will import no personal liability[3] on the other spouse: in a joint administration, there must be concurrence by each joint administrator.

In sole administration, consent of the "passive" partner (of, if necessary, judicial consent) is required in important transactions - for example, disposals of the entire joint property, or disposals or undertakings to dispose of[4] land, or transactions concerning ships, or gifts of unusual size. In joint administration, there is a duty upon each spouse 'to concur in necessary actions', and again the consent of the court may be substituted for that of the spouse. An inchoate contract will result where consent has not been obtained (in circumstances not justifying application for judicial consent) unless or until ratification by the other spouse takes place. In sole /

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1. G., p.148. Contrast South Africa. As to France, Colomer writes (p.98): "It is clear that the idea that the husband is "lord and master of the community" has finally been abandoned: he retains his place as head of the community, but instead of exercising a right, he fulfils a function in the interests of both husband and wife." Previously, German law held the husband to be head of the community: the wife's consent was necessary only rarely - notably in transactions pertaining to immoveable property.
2. See list of relevant rules, G., pp.148/149.
3. Whether in joint or in sole administration, there is full liability for debts upon each spouse quoad his/her shares in the community fund.
4. for German law draws a distinction here.

sole administration, the passive spouse, whose consent to a transaction was required and was not obtained, may take action against the third party involved. "No such right is provided for under joint administration, where it was not felt to be necessary".[1] However, in an irregular transaction (that is, one lacking the necessary consent) "any increase in joint property" resulting therefrom "must be returned to the third party, in conformity with the rules on unjust enrichment".[2] Even under universal community, it seems that it is competent for either spouse to run an independent business, and, in respect of transactions and litigation connected therewith, it will not be necessary (or proper, presumably) for the other spouse to give his/her consent.[3]

There is joint and several liability for debts. In cases of joint administration, each is liable to the extent of his/her entire property (including Sondergut and Vorbehaltsgut) for debts concerning the common fund, subject to a 'reckoning' at dissolution according to the rules of liability inter se. In sole administration, the sole administrator is liable in his/her whole estate for debts of the other affecting the common fund, subject to 'reckoning' at dissolution.

Diligence is used against the sole administrator, or against both if there is joint administration.

Bankruptcy /

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1. Grane, p.149.
2. §1434, §1457 BGB. G., ibid.
3. It is strange, therefore, to read (G., p.150) that "If one of the spouses, who does not have power or sole power of administration, is running an independent business, a judgment against him will in principle be sufficient for execution against the joint property" (§741 ZPO - ZPO: Code of Civil Procedure).

Bankruptcy

If the sole administrator becomes bankrupt, the common fund is answerable. The common fund will not be affected by the bankruptcy of the passive partner. In joint administration, "the joint property may, upon application by any creditor or by either spouse, become subject to independent bankruptcy proceedings".[1] Where bankruptcy proceedings have been taken, both against the fund and against the separate property of one spouse, the fund must first be liable.[2] Professor Grane appears to consider[3] that this position is an improvement upon the previous rule under which the husband's bankruptcy would have repercussions on all his wife's property, but as the author himself implies, the improvement is only to the extent that it is conceivable now that the wife may have played some or all of the active part in the management of the parties' financial affairs. On the other hand, where spouses are prepared to live under a system of universal community, with sole administration by husband or wife, no other consequence than that described is fair to creditors.

Termination of (Universal) Community

(Universal) Community comes to an end upon post-nuptial agreement to that effect by the spouses, or by violation by one spouse of his duties under the rules of community or upon inability of one to manage his affairs, "or if one spouse's interests are endangered by the other's indebtedness".

Between /

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1. §236(a) KO (Bankruptcy Code) G., p.150
2. a result referable, presumably, to the essential 'jointness', and consequent potential danger and potential advantage, of universal community. "In principle, creditors of each spouse may demand satisfaction of their claims out of the joint property". §1437(1), §1459(1) BGB. G., p.149.
3. G., ibid.

Between termination and liquidation, joint administration always obtains. At liquidation, net profits are divided. On divorce, the innocent or less guilty party[1] may demand restitution of what he has contributed to the community. This is both crude (at least in insanity cases), and quite out of keeping with German legal thinking elsewhere, which, rightly, it is submitted, has drawn a distinction between assessment of conduct and division of property.[2]

On death, the German community rules produce an interesting variant[3]: the predeceaser's share in the community is part of his estate, and devolves according to the ordinary rules of succession, but there is a "continued community" between the survivor and the heirs of the deceased.[4] It seems that this notion is traceable to Germanic-Nordic tradition.[5] Today, however, spouses must declare specifically that they wish continued community to apply in their case.

If they do so, and if the survivor does not refuse to continue the community, the community share of the predeceaser will form part of the continued community, and will be administered by the survivor under the 'sole administration' regime, the descendants taking the part of, or representing, the other (deceased) spouse. The remainder of the deceased's estate will devolve /

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1. or petitioner, if innocent, in a case of dissolution of the marriage on an "objective" (presumably non-culpable) ground such as insanity or "incurable disruption" G., p.151 or contagious disease.
2. Cf. Grane, p.151.
3. not unknown elsewhere - cf. South Africa.
4. cf. embryo of a similar idea, in Scots law, before the Intestate Moveable Succession (Sc.) Act, 1855. See Chapter 1, pp.73-74.
5. Grane, p.151.

devolve according to the ordinary rules of succession.[1]

Termination of the (continued) community is brought about by agreement of parties, by death or re-marriage of surviving spouse, by action initiated by descendants on grounds similar to those which justify dissolution of universal community *ipsum jure*, or by "unilateral declaration of the surviving spouse to the probate court", and upon termination there is liquidation. Testamentary arrangements by the predeceased which affect the operation of continued community or which exclude certain persons otherwise entitled to participate in the continued community are effective only if made with the consent of the other spouse, and here Professor Grave sees[2] a resemblance to the joint will, which, as he points out, is competent in Germany.

To bind third parties, the agreement adopting continued community must be registered in the marital settlements register.[3]

This is an outline of continued community: it is clear that its practice and operation, and, in particular, the identification of the property which is to form the continued community[4], must be complex. That /

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1. Under universal community, however, all property which is not specific or reserved property forms part of the community, and thus the "remainder" of the deceased's estate would consist, presumably, only of items included in these exceptional categories. It is the more difficult, therefore, to understand the explanation that, "The continued community will consist, in theory at least, of joint property, and the specific and reserved property of the deceased" (G., p.152). From the joint property will be deducted, *inter alia*, the survivor's share in the deceased's estate(What will happen about legacies?). The survivor's specific and reserved property remain so, and *pendente* of the descendants will not accrue to the continued community.
2. p.153.
3. Since the regime is now the exception rather than the rule - G., p.153; §1412 BGB.
4. See G., p.152.

That continued community is no longer the rule in the absence of specific agreement is significant.[1] It is suggested that this also is an aspect of German matrimonial law/law of succession[2] which Scots law would do well to ignore.

Schlusselgewalt (praepositura)

Under the new Code of 1958, the German equivalent of the wife's praepositura[3] was retained. It is interesting to see not only the differences but also the similarities between systems.[4,5] For example, to date, there has been seen in France, Louisiana /

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1. Cf. South Africa - supra.
2. In the conflict of laws (G., p.153), continued community has been classified clearly as a matter of matrimonial property law, and not as a matter of succession (cf. De Nicols v. Curlier [1900] A.C.21: In re Martin [1900] p.211 (similar problems of classification addressed to our own courts)) and under German conflict rules has been referred to the law of the husband's nationality at marriage.
3. Known as Schlusselgewalt: "the power of the keys".
4. See generally the appraisal by Professor Grane at pp.163-167, of the German position against the background of other systems discussed, and his interesting summary of different matrimonial property systems, past and present (from Greece to Sweden). e.g. (p.167) "In Spite of the difference between the regimes of community of acquests and separation coupled with a mutual interest, it is remarkable that both jurisdictions have connected the idea of compensation with the time of liquidation; in both systems, it is at the end rather than during the existence of the regime that significant effects come to light." He adds, "It remains to be seen whether this construction, especially to the extent that it modifies the rules of succession, will stand the trial to which it will be submitted by social evolution and legal practice." See also pp.163/4. The Scottish system - if a system at all - forms an attenuated version of a system of "separation coupled with a mutual interest", the mutual interest being evidenced rather by the rules of intestate than of testate succession.
5. Schlusselgewalt removed by reform of 1976. See p. 810, fn.3.

Louisiana and Germany, special treatment of acquirenda,[1] the requirement of consent for important transactions where there is only one captain on the bridge, and (see also South Africa), provision for the cutting short of community on grounds of maladministration by one, or violation of a party's duties under the regime. Similarly, it is common to find some form of agency or mandate in the wife, though this, wisely, it is submitted, is giving place to the notion of joint authority and joint and several liability for household debts.

As amended by the 1958 Code, the German rule was that the husband shall be liable in respect of the wife's contracts in her domestic sphere, "except where a different conclusion is imposed by the circumstances", and in the husband's insolvency, the wife also is liable therefor.[2,3] The husband may limit or exclude his wife's rights here, but such limit or exclusion will be annulled by a court if shown to have /

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1. See also East Germany (§13(1) and (2) FGB), where tangible property, proprietary rights and savings acquired stante matrimonio by one or both spouses through work or income from work ("income from work" including pensions, scholarships "or similar recurrent payments") is held to form the common fund, but the property of each acquired before marriage is not included, nor are donations acquired during marriage, or property inherited by either spouse during marriage nor (an East German peculiarity) "tokens of distinction" (Auszeichnung), which Grane explains (p.159) "refers to prizes and awards granted for meritorious performances..." (Also excluded from the East German community is property "used by one spouse only for satisfaction of personal needs or for the exercise of his profession"). See further "East Germany", infra, commencing at p. 812.
2. §1357(1)BGB.
3. Position now:- BGB 1357: each spouse may contract for necessaries and each spouse has rights and duties under the contract.

have been effected without proper reason.[1]

In Germany, as elsewhere, difficulty has been encountered in determining which transactions properly belong to the domestic sphere. Third parties are entitled to rely on the existence of the agency: only if the limitation or exclusion is registered in the marriage settlements register or is personally known to them will the spouse be protected against third parties.[2]

Onus of Proof

Moveables designed for the use of one spouse rather than the other are presumed to belong to that spouse.[3] "For the benefit of the husband's creditors and the wife's creditors it shall be presumed that moveables in the possession of one spouse or both spouses belong to the debtor. This presumption shall not apply when the spouses live separately and the moveables are in the possession of the spouse who is not the debtor ..."[4].

These rules ensure that the creditor need not concern himself unduly about the property system which is in operation to govern the parties.[5] If the non-debtor /

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1. §1357(2) BGB. Grane, p.154. Now applies to either spouse.
2. §1412 BGB. Grane (see generally pp.154-6) states that a newspaper statement is ineffective without registration of withdrawal of authority, or proof that it had been read by the creditor. Moreover, it might found a divorce by the wife by reason of the injury to reputation. Cf. Scottish position, supra.
3. (§1362(2) BGB, as amended). However, jewellery may be proved to belong to the husband, or to have been bought as an investment (which latter circumstance presumably rebuts the presumption - but to whom then does the jewellery belong? Cf. queries at Chapter 1, pp.21-22.)
4. §1362(1) BGB as amended. See generally Grane's treatment of the subject at pp.156-158. (under the heading, "Statutory Presumptions in Attachment and Bankruptcy Proceedings").
5. a feature which Pascal stresses is greatly to be desired in a system.

non-debtor spouse avers that his/her property has been wrongly attached for the other spouse's debt,[1] that spouse must prove his/her title to the property in dispute.

EAST GERMANY

(Grane, op.cit.)

Since 1966, East Germany has had as the general system in use a system of community of acquests: "in this it follows soviet and other socialist laws."[2] One interesting characteristic of the East German system is that marriage settlements are permitted, (and little formality is required) but property "designed to serve the needs of family life" must remain in community. Grane considers that "This rule is remarkable in that it makes the community regime mandatory for certain property needed for the upkeep of the family ...."[3] Perhaps it is remarkable that such a rule is not more commonly to be found.[4]

In the general case, the land registry authorities must ensure that title to land ("through purchase, barter or foreclosure") is taken in the name of both spouses, not only in the name of the (married) applicant. Hence the matrimonial home if owned will stand /

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1. It will be recalled that, during the subsistence of the marriage, the German statutory regime is one of separation of property.
2. G., p.158.
3. G., p.159.
4. Cf. Sc. L. Com. Memo. No.41, 7.32 (suggestion that spouse having 'occupancy rights' in the matrimonial home should have a right to use and enjoy the household furniture and plenishings (even) where owned by the other spouse) (and Faculty Comments, to the effect that the more satisfactory approach would be to give rights of ownership to both spouses in (defined) family assets): Law. Com. No. 86 (Family Law: Third Report on Family Property) (1978) 3.39: discretionary "use and enjoyment order" in respect of "household goods" (broadly defined - 3.104).

stand in both names.[1] Disposals of houses require joint action, but in other cases action may be joint, or by one partner with the other's approval, and third parties are protected unless they have knowledge of the passive spouse's disagreement.

Where a debt is personal to one spouse, the creditor has access both to personal and to community property, but must first seek satisfaction out of personal property. If community property is attached for personal debt, the non-debtor spouse may seek "anticipatory termination of the community, if this is necessary in the interest of the applicant spouse, or of minor children;"[2]

Upon termination of marriage by divorce or nullity, the responsibility of making a just and amicable division of community property (each spouse being entitled to claim a one half share thereof) lies in the first place upon the spouses themselves, a notion which seems eminently sensible. If they cannot do so, the court must make the distribution, as it sees fit in the circumstances.[3] At this point, it seems that a strictly equal division is not insisted upon, and indeed (FGB §39(2)), in a suitable case, one spouse may seek more than a one half share, and might even be granted the entire joint estate.[4]

From the date of judgment or agreement, the property so allocated becomes the separate property of each former spouse; if the spouses delay for more /

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1. Cf. proposals by Scottish Law Commission, Memo. No.41 - 'Occupancy Rights in the Matrimonial Home'.
2. G., p.160.
3. its remit including distribution, change in title, compensation.
4. an unequal division might be indicated if one spouse has care of dependent children or if one spouse could be said to have made no contribution to the joint property, through work inside or outside the home. (G., p.160).

more than one year to seek such (judicial) distribution, the (moveable) property in the possession of each is then regarded as the separate property of each. In addition, within that time limit, a spouse may claim a share (up to one half) in the separate property of the other, if he/she "has materially contributed to the increase in or maintenance of the other spouse's property".[1] This share is non-assignable , nor generally "inheritable" but the court in its discretion may order that it devolve in whole or in part to such children of the deceased creditor spouse "as are not statutory heirs of the other spouse".[2] Post-termination agreements as to title to land, in order to be effective, must be executed notarially.

Professor Grane notes the wide discretion given to the East German Court in making distribution of the community property.[3] Indeed, if the discretion of the court is sufficiently wide to permit the grant of all the community property to one spouse, as appears to be the case, although exceptional, the system could then be thought to be the opposite of a system of deferred community: here there would be community stante matrimonio, but no community on termination.

As in other regimes, circumstances falling short of divorce or nullity may bring to an end the community, and /

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1. G., p.161.
2. G., p.161.
3. Cf. systems of 'separation' with wide judicial discretion upon dissolution of the marriage or (Law Commission Third Report on Family Property 1978) if need (for a right of user) arises - England, Australia. It is tempting to think that the only difference lies in the presumption of joint ownership and use which a community system provides while the marriage subsists. Rights of dissolution and on marriage emergency are the rights which matter.

and the court will make distribution in the same manner as upon divorce.[1] Upon resumption of cohabitation, community resumes automatically, unless excluded by the parties[2]. In other cases, restoration of community property is subject to an agreement in writing".[3] Subjects acquired in the interim fall into the community, unless the parties provide to the contrary. A dictatorial attitude is taken in the case of land. If land is acquired, "the land register becomes incorrect and must be adjusted; the spouse registered as sole owner must co-operate."[4]

On death, the survivor is entitled to a share equal to that of each descendant, and, in any case, to not less than one quarter.[5] If there are no descendants with rights of inheritance, the spouse is sole heir, but will receive only a one half share if the predeceasing spouse was under a duty to pay alimony to his/her parents, since, in that case, "the parents will compete with the survivor as statutory /

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1. available on complaint by one spouse generally "if such a step is necessary in the interest of the complaining spouse, or of minor children", (G., p.161) and particularly appropriate if there has been cessation of cohabitation. Title to joint property moveables reverts to the acquirer and title to land "must be re-transferred by notarial agreement". (but both apparently are subject to the 'wide judicial discretion' rule).
2. §41(2)(2) FGB. G., ibid.
3. §41(2)(3) FGB. G., ibid.
4. §13(3) EGFGB. G., p.162. Other systems seem to approach with a lighter heart the problems and complexities involved in a joint ownership of heritage rule. Cf. Sc.L.Com.Memo.No.41 and Faculty Response, Sched.1.
5. that is, of the community estate, presumably: if community has terminated previously, does either spouse have an interest in the estate of the other? In Scots law, the estranged spouse still may claim legal rights, subject to the provisions of the Conjugal Rights (Sc.) Amendment Act, 1861, s.6, Chapter 1, p.77.

statutory heirs;"[1] It is open to the predeceaser to test otherwise.[2]

As upon termination by divorce the survivor may claim a compensatory share[3], if he/she has contributed 'materially' to the property of the deceased.

THE SCANDINAVIAN COUNTRIES

DENMARK

Sources

Matrimonial Property Law in Denmark. Inger M. Pedersen (1965) 28 M.L.R.137 ('Pedersen').
Danish and Norwegian Law. (A General Survey edited by The Danish Committee on Comparative Law), Chapter IV (Family Law) and Chapter V (Succession). 1963. ("D. and N. Law).
As to Norway, see also The Status of Women in Norway - Hoffermehl. Americ. Jo. of Comp. Law (20), 1972, p.630.

The /

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1. 10(2) EGFGB. G., p.162.
2. The tone of the brief discussion suggests (p.162) that in the face of this right, the survivor has no claim. Where then is the community? Cf. remarks above.

3. This is where the rules of succession and of matrimonial property cross. Grane (p.162) notes that, from 1966, the surviving spouse now has a combination of succession and matrimonial property rights. He comments, "At a time when marital property relations have a tendency everywhere to be terminated upon death and to give way to rules of succession governing the rights of surviving spouses, the two political entities on German soil are making an attempt to compensate surviving spouses for their contribution to the marriage, through rights based on matrimonial property concepts." Scots law achieves this end - whether or not it recognises the end - in the conventional manner of a system of separation, through the rules of succession, and rather through the rules of intestate, than of testate, succession. The rules of testate succession, though long prepared to recognise the claim of the surviving family against the estate, yet allow to the testator (since the abolition of terce and courtesy by the Succession (Sc.) Act, 1964) the exercise of free will with regard to heritage. (See Chapter 5(2)).

The traditional system in Denmark has been one of community of property, but, in common with many other communith systems, in its earlier stages (until 1880), administration of the common fund - and even of the wife's separate property if the parties by private paction had decided that the wife should enjoy separate property - lay with the husband. Thereafter, she became entitled to use as she wished her own earnings[1], and it came to be recognised that certain acts concerning the community property required the wife's consent.

Judge Pedersen states that questions of matrimonial property have been discussed "at Scandinavian level",[2] with the result that there is great similarity of thought, and law, on the matter, in Denmark, Finland, Iceland, Norway and Sweden. These countries, she says,[3] though different terminology is employed, "all have legal regimes giving the spouses during marriage an equal right to administer and dispose of property and at its dissolution (either by death or divorce) a half share of any property owned by them." In 1965, the principal regulating Act in Denmark was the Danish Matrimonial Property Act, 1925 (and in Norway, the Act (no.1) of May 20th, 1927).

A general starting-point in Norwegian and Danish matrimonial law is that 'man and wife are equals, and that they shall reach the necessary decisions concerning the /

1. Cf. France - and this was also the pattern in systems of separation (England, Scotland): "The Sweet Cheat Gone" - 'Protection' gives way to 'Equality' (M.A. Glendon).
2. As early as 1875, the question was dealt with at the Second General Scandinavian Lawyers' Conference (Pedersen). Sussman (Spouses and Their Property under Swedish Law - 1963 (12) Americ. Jo. of Comp. Law p.553) says that the Swedish Marriage Code, 1920, was "a product of pan-Nordic co-operative legislation".
3. pp.137/138.

the life of the family in common."[1]

In Denmark, there is community of property owned at marriage as well as of <u>acquisitions</u>[2], but the right to share therein does not arise until the occurrence of an event which dissolves the marriage.[3] "<u>During marriage</u> both spouses have an equal right to manage their financial affairs; each spouse administers his or her own assets and may incur debts without the consent of the other."[4] Although Drake stressed the debt owed by the German reformers to the Scandinavian model, Pedersen considers that the Dutch system[5] resembles more closely the Nordic example. In Denmark also, there is power to contract out of the community system,[6] but no great use is made of that /

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1. D. and H. Lee, p.51, where also is stressed the fact that in these countries there are "very few positive provisions regulating the married life", and those which do exist are mainly to be found in the Acts concerning matrimonial property. At p.68, the remark is made that these systems are neither 'common law' nor 'civilian' systems.
2. a community of property as well as of profit and loss, therefore - cf. Inhalo, South Africa; however, see details, infra.
3. death, divorce, nullity or "formal" (judicial or administrative) "separation".
4. Pedersen, p.159.
5. introduced in 1958.
6. 90% of Norwegian marriages are under 'joint estate' (Hoffmehl, p.635). The choice is limited - parties cannot create their own system or adopt a foreign system. In Denmark, the spouses may elect to live under a system of separation, or a system under which certain property shall be separate, "while other property or the proceeds of separate property shall be community property". In Norway, there is another option, that of a system of separation which gives to the survivor on the death of the predeceaser the same rights as if the spouses had lived under community (that is, "the spouse has the right to half the property and the possibility of remaining in the possession of the whole of the property" - D. and H. Lee, p.54) (See remarks above upon the point that the content of the rules governing distribution upon dissolution or emergency is likely to be much more important than the name given to the system). Postnuptial /

that power.

Each spouse during marriage has freedom to administer his/her "bodel" (estate); the notion of joint administration of the common fund was discarded as a general rule, as being productive of difficulties for the spouses and for third parties.

An interesting feature of the Danish system is the freedom of action with regard to a spouse's own property, while the marriage subsists. Neither spouse is liable for the debts of the other, unless he/she was involved in the transaction or upon undertaking specifically responsibility. In this respect, the Nordic and the Germanic systems resemble each other. Under Dutch legislation, on the other hand, a debt (incurred for the community by one spouse) may bind the property of the other spouse, though it "does not create a personal liability for the other spouse."

Under the Nordic system, though, each partner is liable for debts for household purchases, regardless of which spouse incurred them. The husband is liable for purchases by the wife "for her own necessities",[1] but the wife is not so liable for purchases by the husband /

Postnuptial changes of mind can be given effect to generally only by approval 'by public authority'. The choice of regime (which must be restricted to a choice among the options offered, and parties are not free to choose a foreign or individually-tailored regime) must be written, and registered in a public register. Absence of registration renders the contract invalid in Denmark, but not in Norway. It is stated that gifts of value between spouses or engaged persons must also be so recorded. Further, "in other respects the requirement of proof with regard to transactions between spouses is specially rigid." (D. and N. Law, pp.54/55). Generally, however, the whole seems to carry the mark of free and easy Scandinavia.

1. This agency operates only if the purchases are reasonable, having regard to the standard of living of the parties. (D. and N.Law, pp.51/52).

husband for his own use. In Denmark, the liability of each partner for household debts arises whether or not the spouses are living under the community system.

The system belongs to the genus "deferred community regimes". "The difference between this system and a system of separate property is that the spouses reciprocally are given certain rights over the property of the other spouse. Some of these rights may be exercised during the marriage, others only become of importance when the marriage is dissolved either by death or by separation or divorce or when the estate is divided at the request of one of the spouses or after mutual agreement."[1]

In the interests of justice and to give substance to the "rights" which are given, there must be limitations upon freedom of action, and the broadest limitation is that neither may administer his/her own property in such a way as to cause undue injury to the other spouse's interests.[2] As in other systems, there are special rules concerning the matrimonial home. If the title to the house stands in the name of one spouse, he/she is not empowered to sell or encumber it, nor to let it (if to do so would terminate its use as the family home) without consent of the other.[3] Similarly, if title to heritage used as business premises in a joint business venture undertaken by the spouses stands in the name of one spouse, consent of the other spouse must be obtained before /

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1. D. & N. Law, p.52. In Scots law, upon separation or divorce, an award of aliment or a periodical allowance may be a likely result but is not guaranteed. Far less are any property rights guaranteed, and on death, legal rights and prior rights are of little benefit, if there is nothing upon which they may operate. A man is not prohibited from divesting himself of his property before death.
2. 1925 Act, Para.17.
3. Cf. proposals of Sc.Law.Com. in Memo.No.41.

before sale, encumbrance or lease thereof.

What is the position of third parties? In the case of the matrimonial home, unless the marriage certificate is registered in the Real Property Register, the transaction, carried out without consent, may be reduced only if the third party did not act in good faith. The aggrieved spouse must prove the third party's bad faith. Pedersen points out that it is usual to inspect a house before buying it, and the fact that it was being used as a family home should put a third party on his guard, and would rebut the inference of good faith in the third party.[1]

Furniture, 'articles bought for the personal use of children', and articles used by the other spouse for his/her work cannot be sold by the owner spouse without consent of the other.[2] Good faith again protects the third party, but in this connection, it is for the third party to prove his good faith.

As in many systems, abuse of discretion in the administration of property will justify the seeking of a dissolution of community, as also will bankruptcy, unlawful cessation of cohabitation, the begetting of an illegitimate child with rights of inheritance, or the discovery of the existence at marriage of such a child[3]. The common thread running through all these cases is the danger or potential danger to the petitioning spouse's interests.

Moreover, upon dissolution and division, at whatever /

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1. Cf. Memo.No.41, and Faculty Response (University of Glasgow) Sched. 1.
2. Cf. generally Memo.No.41, Part VII: 'The Furniture, Plenishings and Other Household Moveables. See also Law Commission, Third Report on Family Property (1978), orders for use and enjoyment: 3.35 et seq. England (infra).
3. P., p.141.

whatever time, if it emerges that there has been abuse, causing "considerable loss of assets", the other spouse may make a claim for compensation.[1]

The principles on which division is made are the same whether dissolution has been brought about by death or by divorce or by any other qualifying event. "The share of a deceased spouse belongs to his or her heirs."

Judge Pedersen gives practical examples of division of various estates.[2] In the first place, the net estate of each spouse is calculated, and one half of the husband's net estate is placed in a separate column, together with one half of his wife's net estate, and a sum equivalent to his own debts. These three figures are added together, and the resulting sum is termed the husband's net estate. The same calculation is made in the wife's case, and these sums appear to be the sums able to be claimed by each respectively, on dissolution of the marriage, under the system provided by the Distribution of Estates Act. (In Pedersen's example, the gross assets of each combined were 70,000 kroner (husband, 50,000: wife, 20,000), and the result of making the calculation outlined above was to give each spouse 29,000 kroner, sums with the addition to which of the debts of each (husband, 10,000: wife, 2,000) amount to 70,000 kroner. This amazingly neat result at first sight seems to have been effected by mathematical sleight of hand: on consideration, it can be seen that the principle of equity (or equalisation) has been brought /

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1. Cf., e.g., the East German claim to share, on the basis of having contributed materially to the other spouse's property. Pedersen (p.142) remarks that such rules stress "the duty of each spouse to consider the other when he is exercising his powers over his own property."
2. at pp.142-144.

brought in by the requirement that each shall surrender one half of his/her net estate to the other, and in this way the less well-endowed spouse (wife) is compensated, and on the other hand, the other spouse (husband) is entitled to be indemnified in full for his (larger) debts.).

In practice, however, Pedersen says that a simpler method is used, in which the husband's and the wife's assets are massed, as are their debts, and the latter are deducted from the former to produce the net community estate. From this, the husband is entitled to a sum to cover his debts, and to one half of the net community estate (calculated as above before taking out his debt indemnification), as also is the wife. The result is the same, as follows:- each spouse is entitled to 29,000 kroner net,[1] "and with funds to cover the full amount of his or her liabilities." Pedersen stresses that neither is liable under these systems, for the debts of the other,[2] and contrasts this with the Dutch system.

In /

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1. or, more properly, to a 29,000 kroner share of the community estate, which in the normal case will be satisfied by a mixture of cash and corporeal moveables or heritage. There are two stages in the settlement of property on the dissolution of community. One is 'calculation of share' and the other 'distribution of assets'. Only once calculation of share is effected does it seem that entitlement to assets can be decided and satisfied.
2. In Denmark there is community of assets: in Holland, there is community of assets and of liabilities. Under the Danish system, though, is not each affected by the other's debts and is paying for them? He/she who has incurred a smaller sum of debt will not receive a larger sum of community. In the size of his/her ultimate share, he/she is helping in the payment of the other's debts, but perhaps in view of the lack of method, or record-keeping, in most marriages, and of the fact that (he) who earns more may incur more debt, the arrangement effects a rough justice. Only the debts outstanding at division appear, but surely other debts previously incurred lie hidden in the current assets figure? Strictly speaking, though, it is true that in Denmark it is the 'positive' which is shared.

In bankruptcy, the bankrupt spouse will retain all his/her assets to set against his/her liabilities: the solvent spouse must contribute half of his/her net estate to the bankrupt spouse, but retains the remainder of his net estate and sufficient to pay his/her own debts, and these sums are out of reach of the bankrupt spouse's creditors.[1] This seems exceptionally neat, though it demands altruism from the solvent spouse: in the Scots system of separation, except where there has been immixture of funds or the principle of separate property has been departed from by the spouses, the bankruptcy of one does not affect the wallet of the other.[2] In Holland, Pedersen points out the solvent spouse must undertake liability for half of the other spouse's debts. This liability may exhaust his/her whole estate and may exceed also his/her share in the community, although the latter could be renounced. "This risk for spouses is in Holland considered an inherent element of the community principle, which can be avoided by matrimonial settlement only".[3] This is not so in the Nordic systems, and in Germany too, Judge Pedersen notes,[4] "a spouse will never have to pay more than half the value of his property at the end of the marriage."

In nullity, there is divided as community property only property acquired during marriage by each spouse "through work and thrift".

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1. According to Pedersen (p.152), attempts by the husband to place everything in the name of the wife (to defeat creditors) are "strongly discouraged", but there is no amplification of this statement.
2. See generally, Chapter 2 (Bankruptcy).
3. P., p.144.
4. p.146.

The only other exception to the general rule or method of division (until recently) was that a spouse could claim (apart from the calculation) articles acquired for personal use, provided that their value was in keeping with the spouses' financial circumstances.

The thought has spread to Denmark also, however, that, where the marriage is short or if misconduct is mainly on one side,[1] the principle of equality of division is not without flaw.

Thus, in the case of divorce, certain changes have been made, with effect from 1964. The specialty of articles for personal use is retained, and articles for the personal use of children may be claimed by the spouse having custody of them. A previously under-used provision concerning small estates and preponderance of "guilt" has been 'modernised' and extended.

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1. Though it may be argued that conduct should be relevant to ground of divorce (and perhaps not now even there) and not to division of property. (Cf. Fin.Hosp. to Nemo.No.22). Different principles may be said to apply here, depending upon whether the system is one of separation or of community. In separation, the property of each is restored to each, and compensatory payment, lump sum and/or periodical allowance (e.g. Scotland) may be made, according to the circumstances or, in previous years, according to guilt and need. Such an award might appear to be compensatory in nature, in the case of an 'innocent' wife though the rationale of these awards (and see also proposed property transfer orders - Nemo.No.22) since the 1976 Act is by no means clear. Where the normal starting-point is equal division of a common fund, conduct might render that starting-point inappropriate.

The new rule of greatest importance, though, is that which allows the court to depart from the principle of equality, if the community assets have been acquired principally by one spouse before marriage or gratuitously during marriage, both subject to the proviso that equal division would result in clear injustice.[1] Discretion has entered, therefore, though a spouse is yet always entitled to one half of onerous ('work and thrift') acquirenda,[2] and the Act states that "the new rule is to be used chiefly where the marriage has lasted a short time only and no financial community of any importance has been established."[3]

Judge Pedersen then considers[4] whether conduct ought to be a relevant factor in the matter of distribution of property on divorce. By 'conduct' is not meant guilt or innocence of matrimonial offence. Pedersen's examples are of cases where one spouse has contributed much more to the community (in pecuniary terms alone?) than the other, or where the breakdown of the marriage has been brought about mainly by the spouse with the smaller estate. She rejects the suggestion, partly because of the difficulty of proof and partly because of the potential and undesirable litigiosity of such a widening of discretion. The Dutch courts are permitted no discretion, and though the German courts have a certain latitude to allow one spouse to refuse to pay half of his/her surplus, if to do so would cause serious injustice (as evidenced in /

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1. P., p.147. Here again is seen the closing of gaps, the growing approximation of effect if not of starting-point among systems.
2. Perhaps "acquests" is the correct expression but "acquirenda" is used as a term of art throughout this thesis to denote property acquired after marriage.
3. The Danish Matrimonial Law Committee recommended only sparing exercise of the new rule if the marriage had subsisted for five or more years.
4. p.147/8.

in particular by neglect by the spouse having the smaller estate of his/her financial duties), the effect of this (in 1965) was not then clear.[1]

"Separation as an independent remedy is not known;"[2] dissolution is effected by separation followed by divorce[3] or by immediate divorce, by nullity or death. Yet separation in Denmark and Norway is relatively easy to obtain. If there is agreement to separate, and upon other related matters such as custody and maintenance of children, then in Denmark separation may be granted if the spouses show "that they are not able to continue the marriage because of profound and lasting disagreement". In Norway, even less is required in that a spouse may obtain separation because of failure by the other spouse in his/her duties (to aliment or, for example, in a case where one spouse has become a heavy drinker) or if "the marriage may be said to be destroyed because of profound disagreement, provided the spouse who requests the separation is not the one at fault"[4]. In other cases (see below), divorce may be granted immediately but in Denmark the spouse having a right to demand divorce may demand separation instead.

After separation, the duty to cohabit ceases, the estate is divided, and the rights of inheritance of each in the estate of the other falls. "... with a few /

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1. But see Grane, supra.
2. D. & N. Law, p.49.
3. That is, "the parties may of course go on living in separation but..." and in Denmark, there is an entitlement to divorce when 2½ years have passed since separation, and in Norway, when 3 years have passed, "even against the protest of the other"; if divorce is consensual, then the periods are 1½ and 1 years respectively.
4. D. & N. Law, p.49.

few exceptions the marriage is practically no longer existing".[1]

The grounds of divorce in Denmark and Norway are factual separation (for four years (Denmark), or for three years (Norway)), malicious desertion (two years), incurable insanity (for three years without hope of recovery), adultery, cruelty, bigamy, imprisonment for two years or more, exposure of the other spouse to contagion with venereal diseases without consent, and disappearance of one spouse for three years. (separate procedure: "a judgment of presumption of death in Danish law has the effect that the surviving spouse may marry anew without the disadvantages for the surviving spouse resulting from a divorce."[2]).

On death, the situation is complicated, as in other systems, by the fact that the survivor is entitled not only to his/her share of community, but also to a share in the predeceaser's share of community.

In intestacy, the survivor is entitled to the whole of the predeceaser's estate, if there is no issue, and to a one third share if there is issue. In testacy, the survivor has a right to not less than one half of his/her entitlement on intestacy. These rules apply whether or not the spouses lived under community.[3]

The survivor is entitled to claim personal belongings and articles acquired for children's use, and has a preferential money claim (1965: 12,000 kr.) "including /

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1. D. & N. Law, p.49/50. Financial support is due only if specified in the decree. However sexual intercourse with another would be adultery justifying divorce. The spouses clearly cannot re-marry nor indeed bind himself to marry and the separation will lapse and the marriage revive if cohabitation resumes.
2. D. & N. Law, p.50.
3. Pedersen, p.148.

"including his own share of the community, his separate property and any sums inherited from the deceased's separate property." "As there are many small estates this provision will be of considerable practical importance."[1]

It seems that in Denmark, and in Norway,[2] the concept of continuing community remains. A solvent surviving spouse may take possession of the whole community estate if the co-heirs are children of the marriage or their issue, and may be entitled in certain circumstances to take possession if the co-heirs are stepchildren. Where there are no children, the possibility of continuing community may be excluded by the will of the deceased. In the case of continuing community, distribution need not take place until the re-marriage of the survivor, or abuse of powers by him, or death of the survivor. Distribution when it occurs takes place in the manner described, "except that the surviving spouse or his estate is responsible for all debts of the community estate."

Distribution of property

Since in Germany there is no 'community' in the traditional sense, but simply a sharing of 'surplus' neither spouse can lay claim to any particular piece of property[3] belonging to the other. "In Holland the community estate is distributed in accordance with the /

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1. See D. & N. Law, Chapter V, Law of Succession, especially pp.59-61. Cf. M.C.Meston, 'The Succession (Scotland) Act, 1964', (2nd ed.) p.12 "... the Act was framed with the medium to small estate in mind" and p.13, "The figures clearly indicate the need for the law of intestate succession to be relevant to the small and very small estate rather than to the large estate".
2. See D. & N. Law, p.53/4.
3. though the transfer of particular items in lieu may be ordered if serious injustice otherwise would result (P., p.151).

the rules concerning deceased persons' estates."[1] In Denmark too there must be distribution of physical property - if necessary, by judicial decision.

When dissolution and distribution come about during the lifetimes of the spouses, the commonest solution is that effected by amicable arrangement. Failing such agreement, a background framework of rules exists to resolve disputes.

Where resort is had to judicial decision, there is a valuation[2] of all community property, and either spouse may 'take over' a particular item at that valuation (by using the money previously calculated to be his/hers?). Where both wish to 'buy' the article, preference is given to the spouse who originally acquired it. This rule has given rise to complaint, because whether the marriage has been 'in' or 'out of' community, it is found most often to be the husband who has bought the bulk of the property.[3] Thus here again, discretion has entered, and the courts may use that discretion in the case of the matrimonial home, the holiday home, the household furniture, business undertakings run mainly by one spouse though acquired by the other, and similarly items of property used for the trade or profession of one spouse though acquired by the other.

Although Judge Pedersen draws a distinction between 'share calculation' and 'distribution of assets', the two appear to be interlinked. In her example of a 29,000 kroner entitlement of each spouse, the entitlement is first calculated, and is then satisfied as circumstances permit. Sale of assets is rarely ordered /

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1. P., p.149.
2. perhaps at a somewhat low level, Pedersen indicates (p.150).
3. However, here, all that is at stake is priority of preference in a basically equitable division. Contrast systems of separation.

ordered by the court. The spouses will take a mixture of assets and money according to the composition of the community fund. If a spouse elects to take assets the value of which exceeds his/her share, that spouse must pay the balance to the other spouse.

By inference, though not directly, Pedersen indicates[1] that the spouse to whom is given the custody of the children has the better claim to the matrimonial home.[2] If the value thereof exceeds the spouse's entitlement, under the above rule he/she may pay the balance to the other.

Where dissolution comes about by death, the survivor's wishes as to a particular item of property always prevail over those of the co-heirs, even if the item originally belonged to the deceased spouse. Again, the survivor may exceed his/her entitlement, and pay the balance into the estate.

Pedersen's conclusion is that the real interest of her study lies in the extent to which it reveals the similarities, rather than the differences, of the Dutch, Danish and German systems. "...all three systems give the spouses equal powers of administration[3], but /

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1. p.151.
2. Cf. Scottish Law Commission's comments (Memo. No.22) upon the link between claims for custody and the ability to provide accommodation for children; see also proposals for property transfer orders and postponement of sale of the matrimonial home until the youngest child of the marriage attains the age of sixteen.
3. Holland, while wishing to depart from a system of administration solely by the husband, has avoided the "two captains on the bridge" difficulty by a novel and ingenious solution described felicitously by Professor Bateman (Le Droit des Pays Bas, Professeur G. Bateman. Kiraly. Chapter III) as "deux bateaux avec deux capitaines, mais naviguent de concert". It is a system of community of all assets except those of "special" (for example, personal) "character". Each spouse has freedom of action /

but stress that they must not squander their estates. They also - although to a varying extent - emphasise that family assets, such as the domestic home or the family furniture, must be administered with due regard to the interests of the other spouse and the children of the marriage. The fundamental principles all express the idea that there is a community of interests between the spouses, and all three regimes have found it inequitable for one spouse at the dissolution of the marriage to keep all his or her assets without allowing the other a share.[1] In all three systems, Pedersen notes that there is little litigation on matters of property. This is true of systems of separation /

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action in respect of his own personal property. Joint consent is necessary for the sale or encumbrance of the matrimonial home or furniture, for the making of gifts of extraordinary nature or size and for the entering into of contracts of caution to guarantee a sole debtor otherwise than in the course of the spouse's business. Generally, though, a third party may presume that a spouse in possession of property (whether personal or community property) has capacity to act in respect of it. For bona fide third parties, the appearance of authority to act will suffice, but the theory is that each spouse administers only those community items which he/she contributed. Debts incurred by the spouses bind the community. There is separate administration within jointness. Views of prudent administration can diverge and one wonders how the system works in practice. Both parties are representatives of the matrimonial establishment. Balteman admits that each runs the risk of ruin through the unwise transactions of the other, but cites in defence the requirement of joint consent for certain transactions, and the rarity of the true squanderer. Yet the Dutch spouse does seem to be less well protected in that regard. Balteman (ibid., p.77) writes "Le seul vice grave du systeme est de n'avoir pas prevu de remede contre les engagements dus a l'esprit de dissipation on de fraude", but Pedersen, in summing up, generalises perhaps upon that point.

1. P., p.152.

separation also, but for fundamentally different reasons.

The trend in Denmark has been towards greater protection of the family assets and greater emphasis of the "community of interests established by marriage." This is significant, as is her point that simplicity in matrimonial property systems is often bought at the expense of the wife.

SWEDEN

Sources

"Spouses and Their Property under Swedish Law", Howard S. Sussman. 1963 (12) Americ. Jo. of Comp. Law, p.553 ("Sussman").
"Marriage or No Marriage. The Directives for the Revision of Swedish Family Law." J.W.F.Sundberg. (1971) 20 I.C.L.Q. 223. ("Sundberg").
"The Status of Women in Sweden", Gunvor Wallin 1972 (2) Americ. Jo. of Comp. Law, 622.

The Swedish Marriage Code, 1920, with amendments, forms the basis of a discussion of the Swedish system. It governs marriages entered into on or after 1st January, 1921.

The Code[1] provides a half way house between a system of full community and one of complete separation. As in Denmark, stante matrimonio each spouse is proprietor and administrator of his/her own property "and each is liable out of his property for the satisfaction /

1. In the 1970's attention has been directed to the revision of the Code.

satisfaction of his debts."[1] There is wide power to contract out of the system.

The community consists of the mandatory, but as yet intangible, contribution of each spouse ("giftorattsgods"), and remains a common fund though invisible until (or only recognisable when) separation takes place, on the occurrence of[2] death, divorce, nullity, judicial separation, or circumstances justifying dissolution of community. The process of dissolution ("an essentially non-judicial procedure"[3]) is termed "bodelning".

Giftorattsgods form much the greater part of a spouse's property, and comprise goods owned at marriage and acquired thereafter. However, they are "in the air", rather than tangible, because there is no physical common fund *stante matrimonio*. There is only a claim, which crystallises, as it were, at bodelning. The claim at that point becomes a share[4], and the community is divided. In modern terminology, this is "deferred community".

However, certain property may be declared by marriage settlement separate property and gratuitous acquirenda (so termed in this thesis) may not be deemed part of the giftorattsgods if the terms of the donation or bequest state that the donee or beneficiary shall take the benefit as separate property.

Subject to the terms of special agreement, property substituted /

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1. Sussman, p.554. Sundberg (p.223) describes the attitude of Swedish law to the institution of marriage as "bourgeois" (that is, showing a concern for economic factors and matters) and "liberal" (that is, departing from the "religious" and adhering to the secular conception of marriage - yet not so much as to entertain, at least initially, "easy" divorce).
2. Cf. all systems previously considered.
3. Sussman, p.554.
4. Sussman, p.555.

substituted for separate property is also regarded as separate, but the income from separate property is giftorattsgods.

Legal rights of a personal nature are giftorattsgods only insofar as this is compatible with their essential character.[1]

Similarly excluded are contracts of personal service, and certain rights under policies of life assurance, and, in most cases, employee pension rights, because of their inalienability by the employee. Rights therein of spouses (past or present[2]) upon bodelning, arising because of the employee's death, depend upon the terms of the particular contract of employment-linked insurance.

Sussman points out[3] that division of property at bodelning involves only the giftorattsgods, but collateral matters such as liability for debts, compensation, damages and support may affect separate property and personal rights as above described. These two categories together with giftorattsgods form the three types of property (that is, from a /

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1. Thus generally the right of an author or artist to unpublished work is not included in bodelning, though royalties from published work is giftorattsgods. Liferents (in deference to the wishes of the testator) and leasehold rights (in deference to the landlord) are not regarded as falling within the category of giftorattsgods, nor are included at bodelning unless the landlord 'has waived his veto power' or unless bodelning has occurred on the death of the lessee spouse because the estate is entitled to assign the lease to a tenant reasonably similar to the deceased irrespective of landlord consent. Likewise, the bodelning consequent upon judicial separation, divorce or nullity may include the lease of heritage used exclusively or principally as the domestic home, because transfer between spouses in such a case is allowed, irrespective of landlord consent, though Sussman is unsure whether that leasehold right should or should not be regarded as giftorattsgods.
2. S., p.558.
3. S. ibid.

a 'matrimonial' point of view) known to Swedish law. The limitations upon administration are greatest with regard to giftorattsgods, but property in none of the categories is held in common. The incidents of ownership are more restricted where giftorattsgods are concerned, but the owner spouse remains nevertheless the owner thereof.

This means that, though title to heritage appears to be taken as evidence of ownership in the spouse in whose name it stands, the usual problems arise with regard to title to moveable property. Moveable property is presumed to belong to the debtor spouse (to aid third parties and creditors?), but this presumption may be rebutted. As in Scotland, "Neither exclusive possession nor exclusive use effects a transfer of title between the spouses." If the husband provides the housekeeping allowance, he is the owner of savings therefrom. However, if one spouse provides for the other, property for the other's "special needs", and delivers the same to him/her, the latter becomes sole owner of that property.[1]

Where spouses do own property in common, their rights in the common property depend upon their contributions. Where there is/are in addition another co-owner(s), or where one spouse is co-owner with others (strangers to the marriage), his rights as an 'ordinary' co-owner are overlaid by his rights and liabilities in respect of his spouse with regard to giftorattsgods, if the property in common is part of that spouse's giftorattsgods.

Where one spouse provides the funds to make a purchase /

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1. Such problems and situations or variations thereon are familiar, and serve to underline the difficulties which all systems encounter with regard to marriage and moveables.

purchase taken in the name of both, or contributes to a purchase made by the other and taken in the other's name, does this constitute a gift of the money used, or of the property bought? Only a lower court authority was available to Sussman, and that decision favoured the latter view.

The limitations upon freedom to administer the goods are twofold - "those aimed at protecting the financial interest that spouses have in each other's property because of the giftoratt claim, and those aimed at promoting spousal consultation over certain proposed transactions."[1]

Thus, a spouse must administer the giftorattsgods in such a way that they will not be unduly diminished to the detriment of the other spouse[2] and, as a result, at bodelning, the other spouse may claim compensation for the other's misuse, and may hasten bodelning, by citing such abuse or misuse as a ground for bringing the community to a (premature) end (boskillnad). Compensation likewise is due to a spouse whose partner has used his/her giftorattsgods to obtain property which will not be subject to division at bodelning, "or if he has paid certain types of debts with giftorattsgods."[3]

Second, alienations of immoveable property, or household goods, or children's goods, or goods necessary for the other spouse in his work, are invalid unless the consent of the other spouse has been obtained. The rule operates well in the case of immoveable property, where there is a system of formal consent and registration, and those entrusted with /

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1. Sussman, p.560.
2. "Neither may diminish his or her property through acts "disloyal" to the other", Wallin, p.625.
3. Sussman, p.560; such rules are typical of 'deferred community' systems, and highlight an important difference between such systems, and the systems of separation, to which often they are likened or which stante matrimonio, they are often said to be.

with the registration of the new transaction must ensure, before permitting registration, that the consent of the other spouse has been given.[1] (However, in the case of moveables, the good faith of the third party will bar reduction.) Where there is unjustifiable refusal,[2] the court may substitute its consent for that of the reluctant spouse.

Sussman emphasises[3] that before these sanctions can operate, there must be both misuse and "a substantial resultant diminution" in the value of the maladministrator's giftorattsgods, and it seems that maladministration per se is seen only where a spouse uses giftorattsgods to improve the value of property not included at bodelning. Within these limitations, there is considerable freedom of action. Sussman's view[4] is that personal rights, on becoming alienable, are subject to the same duty of care as giftorattsgods.

For ante-nuptial and post-nuptial debts, each spouse is liable. His/her goods and separate property may /

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1. Such rules are necessary, and in outline always appear reasonable, yet in practice many additions and provisos may be required, to serve the ends of justice and clarity. Upon whom does loss fall if the registration authorities err? Presumably the bona fide third party is protected by the public fact of registration. Is absolute liability laid upon the authorities? Is this reasonable? Cf. Response of Faculty of Law, University of Glasgow, to Sc.L.Com.Memo.No.41 (especially at sched.1, Faculty Memorandum).
2. that is, "if no reason for the refusal is found" GB6 : 6. To what extent does this mean that an absurd reason is "no reason", and that the court may adjudicate upon the absurdity, or good sense, of the stand taken by each spouse? Probably such discretion in the court is a necessary element in a scheme of this type, and such schemes are a necessary part of a system the rules of which on occasion demand consent of both for a transaction.
3. p.561.
4. p.562.

may be attached.[1] As in Denmark, neither is liable for the debts of the other, though there is joint and several liability for household debts,[2] for joint contracts and ('although the wife enjoys a privileged position with respect to such debts') "from one spouse's assuming liability on a debt previously undertaken by the other alone."[3]

The vexed question of proof of title (especially to moveables) in a separation or quasi-separation system has been mentioned. Swedish law has adopted the inventory device. There is a (rebuttable) presumption that a formally executed inventory, prepared and signed by spouses is an accurate record of what it contains except "in execution or bankruptcy proceedings brought within one year after it was drawn up", and for false declarations there are severe criminal penalties. Nevertheless, Sussman notes[4] that the inventory is rarely used, or rarely, used, in good faith, and is inadequate for its purpose.

Apart from the general enjoinder not to prejudice the rights of the other spouse through maladministration of property, there are other, more specific rules, such as the prohibition upon <u>irrevocable</u> appointment of the other spouse to act as administrator of the granter's property and upon agreements between the spouses to a diminution in their obligations to support one another or the children or to deviate from rules of the substantive law reflecting "ethical or social principles". It is competent for spouses to make their /

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1. though generally - except in the case of pension rights of a spouse who has defaulted in the payment of aliment (when the other spouse may attach them) - personal rights are not subject to creditors' claims.
2. though see <u>infra</u>.
3. Sussman, p.562.
4. p.563.

their own arrangements concerning aliment, but these may be altered by the court if it considers that they are "manifestly unreasonable" for either spouse. Marriage settlements must be formally executed, and filed in the (husband's) local court. If the settlement contains a gift from one to the other, there must be public notice of the fact.

Unlike their South African and like their German counterparts, the Swedish couple may make an ante-nuptial and/or a post-nuptial marriage settlement. The limits of individual regulation are that they may choose to exclude altogether the operation of giftorattsgods or declare that property otherwise so categorised shall be treated as separate property, or they may declare otherwise separate property to be giftorattsgods, provided that such action does not conflict with any provision rendering such property separate. They may treat differently the husband's property and powers from the property and powers of the wife. "... they may stipulate in advance whether the gifts they give each other shall be held separate or giftorattsgods."[1] They cannot agree that there shall be other than equal division of the combined giftorattsgods at bodelning. Hussman suggests[2] that there may be contractual (other than marriage-contract) powers (to effect ends not possible of achievement by marriage-contract).

As to choice of matrimonial home, the rule[3] is that each spouse has an equal right to decide where the spouses shall live. This is a rule bravely formulated - but is it workable?[4] Wallin says that the /

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1. Hussman, p.364.
2. p.565.
3. Wallin, p.624.
4. See Scottish position, Chapter 6 (Aliment), and proposals, Chapter 7. S.L.C. Consultative Memo. No. 54, 9.1 -9.4.

the matter usually will be decided by factors affecting the breadwinner's employment (the breadwinner being usually but not necessarily, the husband), and thus "it is therefore conceivable that a wife's" (or possibly a husband's?) "refusal to accompany her husband" (his wife?) "to the place where his" (her?) "work requires him" (her?) "to live might be deemed neglect of duty."

ALIMENT

The obligation to aliment is exigible from each spouse in cash and/or in kind, according to what is considered to be an appropriate contribution from that spouse. Conduct is relevant in the matter of aliment, because, after judicial separation, it will be extremely unusual for the principally guilty spouse to be awarded support, and, on divorce, such an award would seem to be incompetent.[1]

In order that an appropriate amount may be decided upon, each spouse is under an obligation to give the other necessary information concerning his/her finances.[2] Where it appears that one has "manifestly exceeded" his responsibilities, he is given a "limited right" to recover these payments. It is competent for spouses to agree upon these matters in detail in marriage-settlements.

The /

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1. GB 11:26, Second point, though at p.566, fn. 138, Sussman quotes Schmidt (p.144) as being of the view that only those guilty of uncondoned adultery had been held in practice absolutely barred from seeking, and being granted support (1963). Generally in divorce, "a spouse's right to judicially decreed support payments is determined on the basis of his need as balanced against the other's capacity to pay, evaluated in the light of the circumstances of the particular case;" (Sussman, p.566).
2. Cf. Sc.Law.Com.Memo.No.22, 2.209; Faculty Response, pp.47-49.

The alimentary payments (which include payments in respect of a spouse's "special needs") may be enforced judicially even while the spouses cohabit,[1] though it seems that advantage is not commonly taken of this provision.

As an exception to the general rule with regard to debts, joint and several liability follows contracts for household or children's expenses. This agency covers daily necessities, but not larger-scale expenditure such as that of rental of an apartment. The conceptual basis is agency, though implied consent may found joint and several liability in contracts outwith the normal scope of agency.

However, there is not true joint and several liability because, in the first place, there is a time limit of two years in which actions against the wife under this head can be raised, the husband alone being liable thereafter, and, in the second place, the wife's goods including goods acquired (otherwise than through bodelning) after dissolution of marriage, judicial separation or boskillnad are protected against claims under the agency.[2]

Creditors therefore are entitled to rely upon the general rule that debts for necessaries bind both spouses, but they may not so rely if they did have knowledge or should have had knowledge that the subject of the transaction was not in the particular case /

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1. an important and interesting provision: cf. Scottish position, Chapters 4 and 7, and Memo. No.22, 2.178 et seq., Propn.39, and Faculty Response pp.41-42.
2. as also is property acquired by the wife during or after bankruptcy. Walker, p.625 - "if the wife becomes bankrupt her liability for household debts incurred prior to her bankruptcy is limited to the distribution from her estate."

case a necessary.

GIFTS

Property transfers between spouses are presumed generally to be gifts. Inter-spouse gifts do not bind creditors,[1] unless, as mentioned above, the gift takes place by virtue of a provision in a marriage-settlement, in which case it must be published in the press.

However, "customary donations" (such as birthday presents) of a size appropriate to the parties' resources[2] are valid without formality, and transfers up to a certain monetary amount[3] or representing not more than half of the donor spouse's annual savings from income are valid, provided that certain formalities are observed, and that the donor was clearly solvent (having sufficient funds to satisfy the claims of all creditors) at the time of the donation. Any excess is attachable by creditors. This sum is regarded "as an advancement against the recipient spouse's giftoratt", and "as embodying a legislative judgment of the yearly money value of a wife's services in the home". Both points are interesting.

The onus of proving that a particular gift is appropriate (or alternatively that a transfer is not a gift[4]) lies upon the spouses and not upon the creditors.[5]

Apart /

1. except in the two cases set out below.
2. Cf. South Africa where the law of inter-spouse donations has reached perhaps its most detailed point of development - see above.
3. 5000 crowns (c.£500) (1963).
4. in which case the parties must show that the transfer was not a gift (thus necessitating the rebuttal of the presumption), and that reasonable compensation was received by the transferor spouse. "There is no requirement that the spousal agreement involved be written, but the burden imposed by the presumption is nonetheless a heavy one" (Sussman, p.569).
5. "Were the rule otherwise, the loophole created would effectively destroy all restrictions on inter-spousal gifts" Sussman, p.569 fn.174.

Apart from these two exceptions, gifts not effected by marriage-settlement may be reduced by creditors.[1] Even those so effected are subject to reduction if made within one year of the donor's bankruptcy.[2]

These problems are ubiquitous. One of the results which a summary of this type can achieve is first, the laying bare of those situations which in many systems are a source of difficulty in the attempt to produce a fair and workable regime, and then the ascertainment of the various remedies or treatments adopted.

BODELNING

At bodelning comes division.

Generally speaking, though there are exceptions, property acquired by either spouse after the 'determinative day' (that of finalisation of decree of divorce, nullity, judicial separation, application for boskillnad, or death) is regarded as separate property of the spouse. "Boskillnad", as Sussman points out[3], "is purely economic". The application for boskillnad in no way necessarily imports or requires /

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1. In Swedish law, the donee will be liable to the creditor, if the creditor can show that, at the date of gift, the debtor was unable to pay the debt to him, or had otherwise been shown to be insolvent, for the debt, up to the amount of the gift (less the value of any compensation paid for it and less any diminution in value of the subject of gift not attributable to the donee's bankruptcy, "even though the exact amount of the deficiency has not been calculated", but not if the creditor has begun proceedings to recover the subject of gift.
2. Cf. Scottish position: M.W.P. (Sc.) Act, 1920, s.5.
3. p.571

requires a cessation of cohabitation. Bankruptcy of one spouse, as well as the grounds of risking, or causing, diminution of one's property in prejudice of the other spouse, will found an application.

A bodelning occasioned by nullity is restricted in the subjects to be divided to onerous acquisita. Property owned by each party at marriage and gratuitous acquisitions are deemed the separate property of each.[1] Bodelning at death takes place between the survivor and the heirs of the deceased.

Bodelning "is .... essentially a closing of books as of the determinative day."[2] The only cases in which Bodelning will not take place are those in which neither spouse is possessed of giftorattsgods 'at the time of the event involved.'[3]

Assets are valued at the date of Bodelning, and, on the 'closing of books' principle, all assets and liabilities, though not pertinent to giftorattsgods are included in the closing inventory. (Valuation may be by agreement between parties so long as reasonable and not in excess of the fair market value).

As in Denmark, division may be by agreement of parties and the "sequence" afterwards described gives them a guide; if the intervention of authority is necessary, it is provided in the person of a "bodelning overseer" who will use the rules of "sequence". Where division is purely consensual, parties have a large measure of freedom, and are not bound to make an equal division, though their scheme must not prejudice /

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1. Cf. Norway, above.
2. Sussman, p.573.
3. Sussman, p.571: though (p.57, fn.191), the holding of a residential leasehold alone, even without giftorattsgods, will found Bodelning on divorce, nullity, or judicial separation.

prejudice creditors. When bodelning is completed (by either method), it is filed in the court, and notice that this has been done is published in the press and entered in the marriage registry. In the period between the "determinative day" and bodelning, each spouse retains power to administer his/her property, but is liable to give an account of his administration thereof at bodelning. It may be that circumstances justify the placing of the property (up to the amount the other may legitimately expect to receive at bodelning) of one spouse under "special administration" for that period. (A similar entitlement is open to heirs against the survivor, but not to the survivor who is otherwise protected by the Code or, in a bodelning on death).

The "special administration" may be overtaken by bankruptcy of the spouse whose goods are involved, and the special administration then will give way to bankruptcy procedures and Bodelning will take place between the bankrupt estate and the other spouse. Except in these two cases, creditors may attach a spouse's giftoratts goods during this period in the ordinary way. Under special administration, they may attach the goods "only if both spouses are liable on the debt involved or the property sought is in some manner specially answerable for it."[1]

If bodelning is not consensual, then the overseer will effect partition according to the statutory scheme provided by the Code. ("Sequence").

The rules operate in the following way:-

Personal effects up to a reasonable amount are excluded.

Debts. /

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1. Sussman, p.574.

Debts. Out of his/her own giftorattsgods, each spouse is entitled to take sufficient to cover his/her debts which are "included in the bodelning". If this exhausts his/her giftorattsgods, his/her separate property is answerable, but there liability ends (except that the creditors may wait to find whether the debtor spouse receives anything from the bodelning from the other spouse), because, as in Denmark, it is an article of the regime that neither spouse shall be liable (at least directly[1]) for the other's debts. For non-Bodelning debts, a spouse's separate property is primarily liable.

Where there is joint and several liability in respect of a debt, and one spouse is unwilling to bear his share, the other, on giving security for payment of the debt, is entitled to receive the requisite amount from the share otherwise destined for the other spouse at bodelning, and thereafter is alone liable on the debt.

Personal Privileges. Out of the residue, a surviving spouse and the innocent party[2] in divorce or separation is entitled to "necessary household goods and property necessary for the continuation of his occupation even if the other shares at the bodelning are thereby diminished,"[3] and may include property belonging to the other spouse, provided that compensation is given therefor, and the survivor in a bodelning on death is entitled to have the residue made up to (1963) 6000 crowns (c.$600), unless the deceased left heirs "who are not also issue of the survivor." (most commonly stepchildren of the /

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1. But see "Creditors" infra.
2. that is, the spouse (petitioner) who has suffered "grave injury" by the conduct of the other.
3. S., p.575.

the survivor)[1]. The rights are personal, "and may not be exercised by creditors or heirs."[2]

Compensation. Compensation is due to the other spouse (out of 'combined putative residue') where one spouse has been allowed to take out of his giftorattsgods the wherewithal to meet a debt for which non-bodelning property is primarily liable, where one spouse has used his giftorattsgods to increase the value of non-bodelning property, or has unjustifiably diminished the value of his giftorattsgods,[3] or, on the other hand, when he has used separate property to increase the value or enlarge his giftorattsgods (in which case he receives compensation from himself - out of the putative residue of his own giftorattsgods).[4]

The claim to compensation, like the claim to personal privileges, may be met out of the creditor spouse's own net giftoratts goods. "The right may also be satisfied if the spouse liable on the claim has, after the determinative day, incurred new debts that he can not pay, or even if he has entered into bankruptcy[5]".

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1. It seems that the claim may be satisfied out of (up to the value of) a spouse's own giftoratts goods, even though the other spouse, and hence his creditors, may fare accordingly less well at bodelning.
2. S., p.576.
3. and compensation here. if 'combined putative residue' is insufficient, may be taken from up to half the value of the other spouse's separate property, which is not required to meet debts (S., p.576).
4. Such rules and calculations tend to make a nonsense of the assertion that, during marriage, there is no community of property. Almost certainly they would not appeal to those used to the blunt simplicity of true separation of property. Almost certainly, English law (though not perhaps Scots law) would prefer a judicial discretion.
5. S., ibid.

A spouse who feels that he has a claim for compensation must state it at bodelning: a claim thereafter put forward is out of time. The personal privileges are personal to the claimant, but the deceased's estate or a bankrupt estate can claim compensation.

Division. After these balancing factors have been taken into account, division is made. That which is envisaged is an equal division of the putative residue of the giftorattsgods remaining, though the spouses may agree upon other fractions. In that case, however, because creditors and heirs are, as it were, "at the ringside looking on", and since, as Sussman reminds us, they too have an interest in the outcome of the bodelning, the creditors "acquire additional means to support their interests."[1]

Damages and Support. Where a claim for either or both of these may be competent, the value(s) thereof are computed, and set against the debtor spouse's share at bodelning. If this is insufficient to meet the claim(s), the creditor spouse may make the claim(s) in the future.[2] However, the creditor spouse's claims are here preferred to those of the debtor spouse's creditors.

Residential /

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1. See references, Sussman, p.577, fn.257.
2. Sussman (p.577, fn.258) explains that the purposes of an award of damages may have a punitive character (as in adultery), but primarily operates to offset any harshness produced in a particular case by a strict adherence to the division rules of bodelning. Such awards are not competent in judicial separation but are competent in divorce, nullity and death bodelnings, where the marriage was annullable at the date of death. Support claims are "once for all" ("en gang for alla"), and are also a means of "bodelning corrective".
   A possible right to periodical payments of aliment is a different right.

Residential leaseholds. If the home is a "residential leasehold" (not generally assignable), no money value is accorded thereto, but on separation, divorce or nullity bodelnings the lease is granted to the spouse standing in greatest need of it.[1] A non-residential leasehold, if inalienable, is non-bodelning property. If alienable, it is valued and comes within the bodelning calculation as part of the giftorattsgods of the lessee spouse.

After these stages, if appropriate, are passed, the value of each spouse's share, as calculated, is satisfied, and it would appear from the foregoing that the shares will be satisfied partly out of corporeal moveables and partly out of cash. As in Denmark, a spouse who is especially anxious to retain a particular item of his own giftorattsgods may do so,[2] if necessary upon payment of compensation to the other spouse for the value which it represents in excess of the first spouse's share. A similar latitude is allowed, in recognition of human nature and its whims, in that, where one spouse owes compensation out of his separate estate to the other spouse, he may choose those items which are to meet the claim. To make up his share, a spouse, or his heirs, may keep such of his (own) goods as he wishes, provided that they have not been assigned specifically to the other spouse, and "to obtain such property as is necessary for the continuation of his occupation."[3] If one spouse has amassed a larger supply of giftorattsgods than the other (housewife marriage), and /

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1. What are the rights of the landlord? As to the difficulties in Scotland, see Sc. L.Com.Memo. No. 41, Parts III,IV and V.
2. This right is available in a bodelning on death, only to the 'body heirs' of the deceased, and is restricted to real property specially defined.
3. Sussman says that this right is restricted in a death bodelning to the survivor.

and equal division is agreed, it would seem that one spouse would receive many of the giftorattsgods owned and acquired by the other, and in the normal case this will amount to a good (understated) method of equalisation or general compensation. "... such passage of title as is necessary" is made. Moreover, certain special rules (as e.g. the 6000 crowns rule under 'personal privileges' damages and compensation rules)[1] make the tool a finer instrument.

When bodelning is complete, the property allotted to each spouse is then the separate property of each spouse.

Non-Equal Partition

Non-equal partition at Bodelning may arise not simply from a division of the whole (putative residue of giftorattsgods) into unequal portions, though that, as has been seen, is competent, so long as the rights of creditors are not prejudiced, but may be the result of forethought, such as the provision by marriage-settlement before bodelning (or in anticipation thereof) that all, or part of, the property of one spouse shall be deemed to be separate property. In that way, the other spouse is renouncing all, or part, of his share in community, because the other is thereby relieved of the duty to make any contribution to the community. It is clear, therefore, that spouses in Sweden may opt out, at the last minute, of the statutory system of "deferred community". "One spouse can also make a marriage settlement gift to the other before the determinative day, but such a gift is subject to the normally applicable rights of the donor's creditors. The spouse can not, however, effect through marriage settlement deviations greater than these manoeuverings within /

1. S., p.578.

within the statutory bodelning scheme, and a "renunciation" by marriage settlement accordingly does not give the renouncing spouse's creditors any special rights against the other spouse."[1]

"Agreed" bodelnings may have special significance for creditors. Thus where one spouse renounces at that time all or part of his right to his bodelning share, his creditors acquire "special rights" against the other spouse, who is thought to have received a gift from his/her spouse.[2] At bodelning, parties are free to depart from the statutory rules and to divide the giftorattsgods as they please.

Pre-bodelning agreements intended to be substitutions for statutory bodelning division depend for their continuing validity upon the time at which they were made. If valid, there occurs, in effect, an agreed bodelning. Generally speaking, the closer in time is the agreement to bodelning, the more likely is it to be regarded as binding on the parties to it. Even in such a case, the court may modify the agreement if it considers it to be "manifestly unreasonable." Thus, pre-marital bodelning substitutions are not regarded as binding: post-marital substitutions immediately preceding an event which will bring in its train bodelning will be regarded as binding unless "manifestly unreasonable" for a spouse. Post-nuptial agreements where such an event is not clearly able to be /

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1. S., p.579.
2. See generally on this complex topic, S., pp.579-581. It seems that, alongside the rule permitting spousal freedom of contract there are special rules governing marriage settlements and the result is confusing, at least to the outsider. The rules upon compensation, damages and 6000 crown entitlement represent deviations legislatively-inspired as desirable.

be foreseen are of doubtful application. Such agreements are not subject to the special rule permitting judicial modification. If the death of one spouse occurs before the "contemplated judicial separation or divorce", the agreement becomes null.

Many writers have expressed views on the matter. Sussman notes[1] that there are restrictions upon what spouses may do by marriage-settlement, which do not exist to fetter spouses' ordinary freedom of contract inter se, and the latter freedom he feels "is not lightly to be overridden". Sussman therefore favours the view that spouses competently may make such an agreement long in advance of the event, in the absence of statutory proscription, and suggests amendment of the Code.[2]

Creditors

After bodelning, creditors remain entitled to pursue the original debtor spouse, and also to have bodelning reduced if that debtor spouse has renounced wholly or in part his right to the share with which statute provides him in bodelning. If the debtor, who has effected such renunciation, is unable to discharge an ante-bodelning debt, the other spouse will be liable therefor to the extent of "the excess he has received unless he can show that directly after the bodelning the debtor had property that manifestly sufficed to satisfy the debts he then had."[3] Similarly, in bodelning on death, when the survivor is a debtor and renounces his bodelning right in favour of the heirs, the heirs are liable (jointly and severally) as above.

Further /

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1. p.581.
2. See "Appraisal", infra.
3. Sussman, p.581.

Further, if the debtor ("having "in marked degree" renounced his right") is made bankrupt within one year of registration of bodelning, the creditors are entitled to demand rescission of the bodelning, and there is a new bodelning between the bankrupt estate and the other spouse.

If the benefit of bodelning is the other way (that is, renunciation by heirs of a deceased debtor in favour of the survivor), the two remedies last-mentioned are not available to creditors, who, however, in that case, "have even sharper remedies."[1]

Insolvency at bodelning will entitle creditors to render the debtor spouse bankrupt, and bodelning will take place between the non-bankrupt spouse and the bankrupt estate (or presumably between two bankrupt estates). "The bankruptcy of an insolvent spouse - in no way prejudices the rights of the solvent spouse[2]", because the spouse, if solvent, may satisfy any claims which he may have out of his own giftorattsgods, though this may affect injuriously the creditors of the other, since there may be a smaller or nil passing of estate from solvent to insolvent spouse at bodelning.

Rights of Engaged Persons on Death of One Party

Engaged persons under Swedish law have rights in each other's estates, or, more accurately, the woman has a claim for maintenance out of the fiancé's estate, if the engagement was in being at the time of his death, and if the claimant had borne, or expected to /

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1. Sussman, p.582. It cannot be denied that the Swedish Code has used ingenuity and thoroughness in thwarting possible schemes of an anti-creditor nature, or 'neutralizing' actings which would have the effect of being anti-creditor. But see effect of insolvency below.
2. Sussman, p.582.

to bear, a child to the deceased and if the claimant is in need of maintenance. The maintenance can extend to one half of the deceased's estate, as "a kind of compensation for the right to half of the man's property that would have accrued to the fiancée had the two been actually married."[1] "Departing from the equality principle, but reflecting the normal economic and social situation of the parties",[2] there is no equivalent right for a fiancé.

APPRAISAL

One criticism of the Swedish system which Sussman puts forward is the exclusion of "personal rights" from evaluation and distribution at bodelning. Even if these are properly regarded as inalienable, could they not be taken into account (showing the true relative wealth of the parties), yet be returned in every case to the owner of the right(s)? Difficulty would arise, however, where the personal right was of great or increasing value.[3]

Sussman /

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1. Wallin, p.626.
2. Ibid.
3. See Sussman's discussion of the upphorsratt (author's composer's or artist's right to unpublished work) (p.583) and of pension rights, especially in view of the growing importance of the latter to the family budget. He advocates (at 1963) amendment. Writing in 1971, Sundberg (p.228) explains that "peculiar compromises" between the "property relationship" and the "alimentary relationship" have resulted in the situation that, where the benefit of a state pension is to be allocated, equal shares are to be given to the widow and to one divorcee ("in need of support at the time of the divorce") but not to more than one divorcee. Thus only two persons can share the fund, no matter how frequent had been the husband's marriages. (Until 1962, the rule had been that "each divorcee had earned her share in proportion to the number of years she had endured the marriage.") At divorce, the divorcee must ensure that she receives a decree stating that she will be entitled to share in the pension, but she cannot obtain this unless she shows that, at that date, she stands in need of, and is entitled /

Sussman criticises also the position of the owner of corporeal moveables which are sought to be attached by creditors stante matrimonio in reliance of the presumption that such goods belong to the debtor spouse. He argues that the device of the inventory has not proved to be satisfactory in Sweden, but confesses that he is unable to solve the problem of "personality within the common household." This problem is present always: why should not items of domestic use be deemed jointly owned by the spouses, irrespective of monetary contribution[1] and be attachable for the debts of either, in the same way that, in many countries, including Sweden, there is joint and several liability for household debts?

The area of post-marital inter-spousal contract with the aim of modifying the statutory property order by means of 'ordinary" contract or by marriage settlement, is also unsatisfactory, partly "because these two types of inter-spousal agreements can cover much the same ground".[2] Sussman's suggested solution[3] is /

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entitled to, alimony from the husband. It appears that only in about 10% of Swedish divorces is an award of alimony made. If the first divorcee succeeds in obtaining this, the odd result is that the benefit of the pension will be shared between the first and last wives. This appears strange, but it will be remembered that, when English divorce law was about to be changed, one of the greatest anxieties of those opposed to the "Casanova's charter" was the property effect upon the cast-off wife in just such matters as pension rights.

1. Cf. Law Commission, Third Report on Family Property Book Three: there, though, proposals are limited to a recommendation that a spouse may apply to the court for a use and enjoyment order. (See England infra.) Sc.Law Com.Memo.No.41, Part VII. See also, proposals contained in Chapter 7.
2. S., p.585.
3. p.586.

is that there should be only one type of post-marital contract between spouses, which should bind the parties thereto if made in accordance with the general rules of contract, and should not require special solemnities, but should be able to be modified by the court if it affected the "property order" or the claims or partition at bodelning and was shown to be "manifestly unreasonable" for the petitioning spouse.

Sussman advocates the adoption of the mullity-bodelning rule (which restricts the subject-matter of Bodel, while not altering the basic rule of equal shares) in divorce, especially where the marriage has been of short duration and there are no children. He suggests that the rights of a surviving spouse should be greater, both in monetary terms and in the sense that they should be less "circumscribed", and that, regardless of the existence of other relations, the survivor should have an absolute right to the statutory minimum, which should be "large enough to ensure that the marital home is not splintered through an application of the equal partition principle."[1] He is concerned also that if spouses agree by marriage-settlement that all the property of one shall be deemed separate, the other, if the survivor, has no rights in that separate property if the predeceaser has left "body heirs", and recommends that the survivor should be entitled to a certain proportion of the property so rendered separate, or at least to a liferent interest therein[2].

Upon the point that the husband's savings from income are not sufficiently protected for the benefit of /

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1. S., p.588: cf. Scots rules of intestate succession (especially prior rights: Succ.(Sc.) Act, 1964, ss.8 and 9: Chapter 5(2)).
2. This would infringe parties' freedom but would not perhaps be unreasonable, nor indeed uncommon: cf. Germany, France, Scottish legal rights on testacy.

of the wife (particularly a non salary-earning wife), Sussman does not favour the compulsory transfer by husband to wife (or vice versa, presumably) of a certain proportion thereof every year.[1]

Finally, the author wonders whether the giftoratt scheme is fitted to today's realities. "One might say that the 1920 Code, with its concern over separate and inherited property, is strongly directed to the problems of propertied spouses. The problem in Sweden today is the adequate treatment of the family of moderate means."[2] Sundberg indeed dismisses preoccupation with questions of marital property as indicative of what a Swedish student would term "squirrel mentality". "Instead the modern Swedish mind concentrates on the accumulation of claims against such bodies as insurance companies or the State."[3]

In Sweden, there seems to be a growing determination to take from the specialties of the married state. It appears that there is no difference in the treatment of the legitimate and the illegitimate child in, for example, matters of maintenance or inheritance. The result is that "the reforms which have taken place have certainly deprived parents of the idea that they are doing something for the benefit of their children when they marry."[4]

Now /

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1. Contrast suggestions for Scotland, Chapter 7: Separation of Property with concurrent compensation of Gains.
2. This is not peculiar to Sweden. The Succession (Sc.) Act, 1964, was born partly out of concern for the widow of the deceased of small or medium estate. Note also Glendon's point that although the German and Scandinavian systems have been heralded as the systems of the future, in an era of marriages of (perhaps) shorter duration, where there are fewer children, and the wife is accustomed to work, "it is separation of assets, not deferred community, which will draw the spotlight."
3. Sundberg, p.224.
4. Sundberg, p.227.

Now, though the author notes that that was not the case at the time of the Code (1920/21), it does seem strange to the Swedish way of thought, that "those who depend on marriage for their living should be protected by insurance in case support is no longer forthcoming after the marriage has been dissolved ...".[1]

The nub of Sundberg's argument is that today in Sweden, because of the existence of a developed Welfare State, few people are dependent on their relations in financial emergency. Their finances are underpinned by the State in the event of unemployment, sickness, old age, or death, of the breadwinner, and the State will provide much help in the education of children. In such a context, a private law system of rules may begin to look inappropriate and irrelevant.[2]

Moreover, marriage itself appears outmoded, according to Sundberg. "Socialist ideology in Sweden always took a negative view of the bourgeois church marriage and favoured, as a matter of principle, the de facto marriage or free partnership based on conscience." This followed the Bolshevik pattern in Russia in the 1920's, "and survived the later twists and turns in communist ideology."[3] Since the mid-1920's, according to Sundberg, there has been 'a new radicalism' which demands that "society's transformation /

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1. Ibid. Cf. Chapter 4 (Aliment).
2. Cf. Sc.L.Com.Memo.No.22.

3. Sundberg, p.230. As to the communist ideology, see "The Status of Women in the Soviet Union", Alice Erh-Soon Tay (1972)(20) Americ. Jo. of Comp.Law, p.662; "Matrimonial Property in Soviet Law", 1967 (16) I.C.L.Q. p.1106; "Soviet Family Law in the Light of Russian History and Marxist Theory". (1946) 56 Yale L.J.26.

transformation into a Socialist Welfare State be taken to its logical conclusion." Aliment should yield place to social security. Adultery, bigamy, and even incest have lost, or are losing, their stigma.[1] Mention must be made, however, of the fact that the Swedish electorate in the election of September, 1976, gave the lie to some of these sentiments by showing a decided swing to the right and a disenchantment with an expensive full-scale socialist Welfare State.

Sundberg goes so far as to say that the ideals of Christian marriage are not relevant to the new property legislation in Sweden. The "helpful" systems are the Communist system of the 1920's, and the Roman law of marriage: strange bedfellows. "In the brave new directives of the Socialist Swedish Government there lurks a Roman-Russian approach."[2]

Marriage, according to the Minister of Justice in the Protocol on Justice Department Matters (15th August, 1969) should be a "voluntary cohabitation by independent persons", having the results, inter alia, that there should be no maintenance payments after divorce, and that the limitations upon freedom of action over a party's own property should be lifted (while leaving in being the requirement of joint consent in relation to the matrimonial home and furnishings). The legal-economic consequences of marriage should be restricted. Through social benefits, the spouses, having enjoyed previously legal equality, would have true economic independence.[3] "... free marriage is only tolerable if marriage is deprived of most of its legal consequences."[4]

It /

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1. Sundberg, p.231.
2. Ibid., p.233.
3. Wallin, p.628.
4. Sundberg, p.235.

It can probably be said that the views of Sundberg and Vallin, expressed in the early 1970's, would have been unacceptable to British majority opinion at the time they were voiced, but now there are signs that a certain sector of British opinion would have extended to the unmarried (enjoying a "stable union") some of the rights (and duties) which those who are married owe to each other.[1] This would mean that the incidents of "non-marriage" would begin to resemble the incidents of marriage, and that, in effect, there would be no longer an alternative to marriage. Most relationships, sooner or later, would become subject to external regulation. It is submitted that, in principle, this is not desirable, although in particular areas (for example, domestic violence) the grant of certain new legal rights may be justified.

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1. See Sc.L.Com.Memo.No.41, Part VIII; contrast Faculty Response with submission by Scottish Women's Action Group.
It seems that alongside a growing marriage and divorce rate in Britain, cohabitation outside marriage grows more popular. One out of ten unmarried women over the age of 17 lives with a man as 'husband and wife' ("More married to idea of 'living together', Eveline Hunter. Gl.H. 11/2/81) The statistic does not reveal attitude, of course. The parties may crave, or abhor, married respectability. A very interesting statistic, significant in relation to family inheritance, succession and property matters, is that, while in 1971 only 57% of women under 40 were married, in 1981 the proportion was 80%, and now is 95%.
The article notes that in Sweden cohabitation is very common and one third of births are illegitimate (cf. Sundberg supra.) and in Denmark too cohabitation is far from unusual. One would wish to identify the proportion cohabiting prior to marriage and those choosing cohabitation instead of marriage. Figures were given for France and Germany also - though the statistics were not exactly comparable - and cohabitation before marriage seems more popular in Continental Europe than in Britain. Matrimonial Homes (Family Protection) (Sc.) Act, 1981: certain rights are conferred on cohabiting partners.

ENGLAND

Sources

Bromley, P.M. 'Family Law' (4th and 5th edns.)
Cretney, S.M. 'Principles of Family Law' (2nd and 3rd edns.)
Kiralfy, A. Comparative Law of Matrimonial Property, Ed. A. Kiralfy. Chapter VI, 'English Law'.
Passingham, Bernard. Law and Practice in Matrimonial Causes.

The history of English law in this area, at least in the 19th and 20th centuries, is similar to that of Scots law. The similar late 19th century pattern of development has been traced in Chapter 1.

As a result of these statutory changes, there existed until the middle of this century, a system of separation of property. "By extending the equitable principle of the separate estate, the Married Womens Property Acts replaced the total incapacity of a married woman to hold property at common law by a rigid doctrine of separate property."[1] Kiralfy notes that /

1. Family Law (4th edn.) P.M.Bromley, p.355. See also upon the reasons for the choice of separation, Cretney, pp.223-5. The final blows for separation and equality were the Law Reform Act, 1935, s.2, and the Married Women (Restraint upon Anticipation) Act, 1949. (The 'restraint in anticipation' was a restriction inserted in a marriage settlement preventing a woman from having control over - and unwisely using (principally, it was feared, for the benefit of her husband) - the capital of her preserved estate).
Kiralfy says (see generally, pp.182-185) that the importance and status as equals of women in the Middle Ages was a feature of the lives of single women or widows (femes soles), not of the lives of married women (femes covertes).

that from 1949 there was pressure for reform.[1]

Before the flood of reforming English family law legislation, 1969-1975, aid and authority in these matters was sought from the terms of the M.W.P. Act, 1882, s.17[2], which entitles a court summarily /

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1. He discusses in outline Edward Bishop's Bill (1969 - later withdrawn on Government assurances that the Law Commission would prepare a Bill) which had advocated that there be categories of separate property and of matrimonial property, the latter comprising onerous acquisitions and increases in the real value of separate property. Third parties might competently and with confidence transact with that spouse who was the titular owner of the asset in question. Limitation was placed upon dispositals by gift. There was judicial power to modify the general regime if the terms were "unreasonable" (undefined) in the circumstances. The ante-nuptial and/or post-nuptial contract was to be permitted so as to exclude the operation of the general regime, but only if the court in the circumstances thought it just to uphold it. The community achieved would have been that of acquests only (property owned before marriage was excluded from community) and would not have included gratuitous acquisitions. The Bill is set out in its entirety in Law Comm.W.P.No.42, Appendix II; and see W.P.No.42, 5.27.

2. The co-existence today of s.17, and s.24 (of 1970 Act) is unsatisfactory, in the view of J.Neville Turner: "Confusion in English Family Property Law - Enlightenment from Australia" (1979) 39 M.L.R.397. However, see Cretney (2nd ed.) pp.382-3, and (3rd ed.) pp.268-270 where he explains that since the English court now has such extensive discretionary powers to distribute "family assets", there will be less need to determine property rights in the old way, but in the following situations, matters must be referred to the pure property rules; bankruptcy, if a wife should claim as against creditors property in her husband's bankruptcy; absence of jurisdiction in the court to use its discretionary powers, as where neither party will institute matrimonial proceedings, or where a foreign divorce earlier in date must be recognised (under our conflict rules) (cf. quick action in granting immediately the decree absolute; Torok v. Torok [1973] 3 All E.R.101), where the applicant has remarried, since property adjustment orders can not then be started, or where the parties have /

summarily and within its discretion to decide "any question between husband and wife as to the title to or possession of property", and this could be applied to any species of property. However, if it was decided judicially that the disputed item belonged to one, and if it had been disposed of by the other, the Act of 1882 was unable to supply a remedy, though this problem was solved by the Matrimonial Causes (Property and Maintenance) Act, 1958, which permitted a court to make an order transferring to the spouse entitled thereto, that property which represented the proceeds of disposal, or an appropriate sum.[1] The situation was far from satisfactory because the attitude of the courts in applying s.17 varied considerably, from timidity (exploratory as to title only) to boldness (taking upon themselves a discretion which /

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have never been married nor have had an agreement to marry (unless the circumstances merit decree of nullity); upon death of the predeceasing spouse, the survivor may wish to establish that certain items of property do not fall into the estate (quite a different point from that with which the Inheritance (Provision for Family and Dependants) Act, 1975, is concerned).
Applications under s.17 may be made within the period of three years from the date of dissolution or annulment of a marriage. (Matrimonial Proceedings and Property Act, 1970, s.39). This allows therefore, a property argument in circumstances where property adjustment is precluded because of re-marriage of the applicant: moreover, the policy of the M.C.A. is that lump sum awards, if appropriate, should be made at the time of decree and not, except in special circumstance thereafter. (Gretney, 2nd ed., p.213).
In addition, a s.17 application may result in an order for sale, whereas " T here is no power to order a sale under the discretionary jurisdiction". (C., 3rd ed., p.270)

1. Passingham, p.190.

which "transcends all rights legal or equitable"[1]), and, in the end, the bold approach was disapproved.[2] It was clear that the 1882 Act could not be strained further to meet modern dilemmas, and the phrase "family assets", in so far as it might have any significance in questions of ownership and title (as opposed to use), did not receive favour.[3]

The only light which shone was that cast by the Married Women's Property Act, 1964, concerning savings from the housekeeping allowance and providing that these, in the absence of contrary agreement, belong to each spouse equally.[4] Until 1970[5] there was much confusion /

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1. per L. Denning, Hine v. Hine 1962 1 W.L.R.1124 at 1127/28, quoted by Passingham, ibid; see the use of the provision in a conflict case - Re Bettinson's Question 1956 Ch.67.
2. Pettitt v. P. 1970 A.C.777; and see Gissing v. G. 1970 2 All E.R.780. Freeman (p.85) says that the teeth of s.17 were extracted by the House of Lords in Pettitt.
3. See however now the potentialities of the concept: John G. Ross Martyn, "The modern law of Family Provision", pp.4/5.
4. According to Kiralfy (citing Howard v. Digby (1834) 2 Cl.&F.634 at p.654) at common law a wife might retain savings from a clothing allowance. He says that many women would wish to see the housekeeping fund "treated as given to the wife", but makes gentle objection to this on the grounds that the husband often "helps out" his wife in expensive weeks, and there is no reason why he should not share in less expensive weeks. Should he have money returned for times spent away from home? Freeman (pp.96/97) suggests that, before 1964, a wise wife would ensure that nothing remained of the housekeeping money. He remarks (p.96) that "It is difficult to think of a more inept piece of drafting than the 1964 Act". Professor Kahn-Freund ((1970) 33 M.L.R.601, at p.604) describes the measure as "important but quite inadequate", and uses the adjective "lopsided" because, as he points out, the husband of a thrifty wife can make (and keep) the savings simply by giving her less "housekeeping". "This is one of those scraps of reform which can only be justified as pace makers for more systematic measures." See also O.M.Stone: "M.W.P.Act, 1964" (A Note on Statute) 27 M.L.R. (1964), p.576, and analysis and criticism of the Act by Bromley, pp.362-363.
5. Matrimonial Proceedings and Property Act, 1970, s.37, which /

confusion about the effect of "improvements" made by one spouse upon the property of the other: that is, could such improvements be said to give the "improver" a beneficial interest in the proceeds of sale?[1] Passingham explains, though, that the discretion given by the 1882 Act could be used to aid the non-proprietor spouse in giving him/her possession of, for example, the matrimonial home until, perhaps, suitable alternative accommodation had been found,[2] though such a right, although enforceable between spouses, was held not to have effect against third parties.[3] That authority was followed by the passing of The Matrimonial Homes Act, 1967, which did provide security against third parties, in addition to, and not in substitution for, the basic common law right of a well-behaved wife to /

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which gives to the "improver" the right to a share, or an enlarged share, in the beneficial interest in the property (real or personal), to which he/she has contributed an improvement in money or money's worth. The improvement must be substantial, and there must be no agreement between the spouses to a different effect. See Jansen v. J. (before the Act) - 1965 P.478.

1. See also the wide powers given by the 1970 Act, ss.4 and 5, discussed infra.
2. Lee v. Lee 1952 Q.B.489. Where both spouses had contributed to the purchase of the house, but in proportions difficult to ascertain, the 1882 Act could be of use in authorising the court to divide the interest therein as it thought fit.
3. National Provincial Bank Ltd. v. Ainsworth 1965 A.C.1175, over-ruling Bendall v. McWhirter 1952 2 Q.B.466, and other cases. See Freeman, pp.90-91, and "Equity Deserts the Wife" Margaret Buckley 20 C.L.P. (1967), p.144 (concerned with the rights in the matrimonial home of the deserted wife, and written before the Matrimonial Homes Bill, then under Parliamentary consideration, became law.)

to a roof over her head.[1]

Under the 1967 Act (which gives its benefits indiscriminately to husbands and wives), where one spouse is entitled by contract or otherwise to occupy a dwellinghouse, and the other is not, the latter may not be evicted by the former without court order. On the other hand, if the latter is not in occupation, then, with permission of the court, he/she may enter and occupy the house. That spouse's rights of occupation are registrable (under Land Charges Act, 1925, or Land Registration Act, 1925, as appropriate) as charges on the land. "The charge takes effect on the husband's" (or wife's) "acquisition of the property, the date of the marriage, or the commencement of the Act (1st January, 1968) whichever last happens."[2] Where there are two matrimonial homes, the non-owning spouse may have rights of occupation in both, but can have rights against third parties only as to one. "The importance of registration of such a charge is that in practice it ensures that thereafter there will be no sale or mortgage of the dwelling house by the spouse in whom the legal estate is vested unless the registration is discharged or the other spouse consents."[3]

The protection of the Act is extended only to the case where the spouse seeking its aid has no right in /

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1. See per L. Denning in Gurasz v. G. 1970 P.11, at pp.16-17, quoted by Joseph Jackson, "Matrimonial Finance and Taxation", pp.224-5.
2. Bromley, p.392. Registration here, therefore, has taken the place of injunction, and the Act "uses the machinery of publicity in order to transform the internal right of enjoyment into a modification of title" ("Recent Legislation on Matrimonial Property", Otto Kahn-Freund (1970) 33 M.L.R. 601, at p.610. See generally the author's comments and criticisms with regard to the 1967 Act, at pp.611-615).
3. Passingham, p.197. Cf. Sc.Law Com.Memo.No.41, 6.31-34: Fac.Resp., pp.55-60 and Sched.I..

in the dwelling-house,[1] but Pascoingham comments that, in a case of joint ownership, each spouse has a right of occupation, and if the behaviour of one spouse has been intolerable, the court may order that spouse to vacate the home in favour of the other[2],[5]. Similarly, if divorce takes place, there is a remedy, because of the "transfer of property" provisions of the 1970 Act.

In order that third parties shall take a house subject to the equitable rights therein of the other spouse, it is necessary that he/they shall have notice of that equitable interest. He/they is/are deemed to have such notice if registration has taken place.[3]

Either spouse may apply to the court (s.1(2)) "for an order declaring, enforcing, restricting or terminating those rights, or regulating the exercise by either spouse of the right to occupy the dwelling house."[4] In dealing with such an application, the court must consider all the circumstances of the case, including conduct towards each other and otherwise, to the needs of the spouses, and their financial resources and to the needs of any children and to all the /

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1. See refinement effected by Matrimonial Proceedings and Property Act, 1970, s.36. "The Matrimonial Proceedings and Property Act, 1970", Pascoingham, 153 - 156, pp.72/73, explanatory comment.
2. Great changes in thinking have taken place during the decade of the 1970's: see now similar rights of cohabitees - Domestic Violence and Matrimonial Proceedings Act, 1976, s.1(2); Davis v. Johnson 1978 2 W.L.R.553. New chapter in Bromley, 6th edn. 'Extra-Marital Cohabitation'.
4. However, in Burr v. T. 1973 A.C.254, on the construction of s.1(2) it was held that the court could not "terminate" the right of a husband-owner to occupy the house, it could only "regulate" it, e.g. by ordering that he should not use the kitchen save at certain times; power to regulate did not include a power to prohibit" Gretney, p.209, fn.73, observing that a step was put to the effect of this decision by the Domestic Violence and Matrimonial Proceedings Act, 1976, s.3.
3. But see William's and Glyn's Bank Ltd. v. Boland (1981) A.C. 487.

infra, pp.936(7).

i.e., in personam aspect.

5. And see Bromley, 6th edn., p.458: the original purpose of the Act was to give greater protection to a spouse who could not claim any proprietary interest to occupy the matrimonial home. This placed such a person in a better position than one who had such an interest. Hence, amendment by Domestic Violence Act, 1976, and now the rights of occupation of all spouses

the circumstances of the case. There may be ancillary orders affecting matters such as payment of money by one to the other in recognition of the right to occupy, duties to effect repairs and to meet mortgage repayments, and severance of the "professional" or "trade" part of a matrimonial home from the "dwelling" part thereof.

These rights come to an end upon death or divorce unless, in the latter event, before decree absolute passes, the court has made an order which keeps the rights in being. Whether during marriage or at the point of divorce the rights have been recognised, it is vital that the rights of occupation should have been registered, and in the correct Register (notice or caution under Land Registration Act, 1925, or Land Charge Class F under Land Charges Act, 1925). Even a registered charge, however, does not prevail against the owner spouse's trustee in bankruptcy, nor against his creditors, if he has assigned to them the house under the terms of a deed of arrangement. "Even if the court has ordered the right to continue after the husband's death, the charge will also be void if the husband's estate is insolvent".[1] It is open to the wife (probably to facilitate financing arrangements), to agree that her charge will be postponed to 'another charge or interest'.

Thus, Passingham emphasises the importance of registration where title stands in the name of one spouse and where "there are signs of matrimonial discord", and of the timeous seeking of a court order continuing those rights in being where divorce or nullity /

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1. Bromley, 5th edn., pp.485-6. Freeman (p.92) comments that this factor distinguishes the Act's provisions from the "homestead" laws as found in many states of America and in New Zealand.

nullity litigation is pending. Kiralfy points out that registration is unlikely unless and until an emergency arises (as, for example, the discovery of the owner's intention to sell[1], and in this connection Bromley's comment that a wife has less to fear from a potential purchaser than from a mortgagee as she is more likely to be aware of her husband's activities with regard to sale than to security arrangements is apt[2]). It is suggested that, if protection is to depend upon registration, rather than upon the ownership of vital matrimonial assets by both, automatic registration upon marriage is both more effective and more /

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1. at which point there will be a race between the third party purchaser, and the solicitor acting for the spouse wishing to register. See generally L.C.W.P.No.42, 1.44 and 1.104-106. The Law Commission's proposals contained therein (1971) included suggestions that the 1967 Act be amended to "extend and strengthen a spouse's rights of occupation in respect of a matrimonial home which is in the name of the other spouse" (1.125).
2. He notes that there may be no-one to advise her to register. Thus, "when the marriage does break down, the property may already be mortgaged and her registration will come too late unless she can protect herself by continuing to pay the mortgage instalments herself". (Outgoings (rent, rates, mortgage payments) tendered by the spouse in occupation shall be as good as if made by the other spouse - 1967 Act, s.1(5) Cf. Sc.Law Com.Memo.No. 41, 3.31, 4.11, 6.38). "Herein lies the weakness of the Act which will give effective protection only when an automatic registration of the wife's right of occupation becomes a common practice." (Bromley, pp.393-4). Professor Kahn-Freund (The Josef Unger Memorial Lecture, 29th January, 1971: Matrimonial Property: Where Do We Go From Here?, p.16) notes that the 1967 Act makes it clear that the wife's right to occupy the matrimonial home arises upon marriage and not "through a matrimonial catastrophe". Yet for the practice to match the premise, automatic registration would seem to be a prerequisite.

more tactful.[1.2.3]

The/

1. Cf. Sc.Law Com.Memo.No.41, 6.31-34, and Faculty Response (University of Glasgow), pp.55-60, and Schedule I.
2. As to Conveyancing problems posed by the Act (and inequitable effects against the husband as e.g. by the wife's obstinate refusal to remove a charge though she "was in no danger of being deprived of a roof over her head" - Wroth v. Tyler 1973 1 All E.R.897; cf. Faculty Response to Memo.No. 41, Sched.I), see "Conveying the Matrimonial Home - some Problems Facing Solicitors and their Clients", D.G.Barnsley 27 C.L.P. (1974), p.76.
3. Matrimonial Homes and Property Bill, (3/2/81), contains in Part I certain amendments to the 1967 Act, viz:- certain amendments where a matrimonial home is held on trust; where the matrimonial home is mortgaged, this shall not affect the spouse's right to occupy, but (her) right of occupation against the mortgagee shall not be higher than that of the former spouse unless under (section) clause 2 of the (Act) Bill, the rights of occupation are a charge, affecting the mortgagee, on the estate or interest mortgaged; where the matrimonial home is held on trust, the occupying spouse shall be entitled to be made a party to an action brought by the mortgagee to enforce his security if the court sees no special reason against it, and is satisfied that the applicant may be expected to make such payments in respect of the mortgagor's liabilities as might affect the outcome of proceedings; certain changes are made to the rules regarding registration of charges; the power to the court to order transfer of Rent Act tenancies is to be exercisable in cases of judicial separation; the court, in ordering transfer of tenancies, may make an order of joint and several liability for obligations due at the date of the order where otherwise the obligation would have fallen on one party only, and, if such an order is made, the court may direct that either spouse shall be liable to indemnify the other in whole or in part against any payment made; transfer orders may be made on granting decree of divorce, nullity or judicial separation or subject to rules of court at any time thereafter, but not if, after the grant of either of the two decrees first-mentioned, the applicant spouse has re-married; rules of court shall require the court to give the landlord an opportunity of being heard; the Act of 1967 as amended applies as between a husband and wife notwithstanding that the marriage in question was entered into under a law which permits polygamy.

The Law Commission: Family Law
Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods[1]

The latest thoughts of the Law Commission on the subject of family property in English law are contained in this report. (See also L.C. No.115 — 1982)

The report is the third in a series. The First Report[2] recommended co-ownership of the matrimonial home and strengthening of occupation rights, rights of use and enjoyment of the household goods, and an extension of rights of family provision rendering unnecessary in the view of the Commission any system of fixed rights of inheritance. Additional (fixed) sharing of assets rules on death or divorce (community of property) also were deemed to be unnecessary. The proposals of the Second Report on Family Property[3] were implemented as the Inheritance (Provision for Family and Dependants) Act, 1975[4].

In the Third Report, the Law Commission makes proposals with regard to (1) Co-ownership of the Matrimonial Home; (2) Rights in respect of Occupation of the Matrimonial Home; and (3) Use and Enjoyment of the Household Goods.

The Report confirms the earlier preference for co-ownership of the home, and sets out proposals (in the English context) for the implementation of such a rule[5]. The device is adopted of appending to the proposals at the end of the discussion of each part a draft Bill, with accompanying Explanatory Notes, the /

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1. Law Com.No.86 (13th June, 1978).
2. A New Approach. Law Com.No.52 (1973)
3. Family Provision on Death. Law Com.No.61 (1974)
4. Supra.
5. "... a considerable amount of innovation and complexity was inevitable..." (0.13). (Hence, where there was a choice between adaptation and innovation, the former was chosen).

the Bill, in this area of reform, being termed the Matrimonial Homes (Co-ownership) Bill.

Book 2 of the Report suggests amendments to the Matrimonial Homes Act, 1967, to improve rights of occupation in the home ("Matrimonial Homes (Rights of Occupation) Bill"). These proposals are independent of the co-ownership recommendations[1].

Naturally, both sets of proposals are designed to fit into the English context. In Scotland, concern about these subjects has expressed itself in (a) Scottish Law Commission Memorandum No.22: Family Law. Aliment and Financial Provision and (b) Scottish Law Commission Memorandum No.41: Family Law. Occupancy Rights in the Matrimonial Home and Domestic Violence (1978) and (1980). Early in 1981, a Bill was introduced, namely, the Matrimonial Homes (Family Protection) (Scotland) Bill (3/2/81), which is concerned to strengthen occupancy rights of spouses and cohabiting couples, to strengthen the law relating to matrimonial interdicts, and to facilitate transfers of tenancies during marriage and on divorce and in certain cases between cohabiting couples also.[2]

Book 3 of the Report is of greatest interest perhaps, in that, while many would accept that there should be co-ownership of the home, the subject of rights with regard to household goods is one which is discussed less frequently and one which gives an opportunity for the airing of views on the philosophy, desirability and implementation of some species of community /

1. A new Bill has been introduced into the House of Lords early in 1981 (3/2/81) (Matrimonial Homes and Property Bill), intended to implement these amendments; Part II is intended to implement the Law Commission's Report on Orders for Sale of Property under the Matrimonial Causes Act 1973.
2. Now in force as Matrimonial Homes (Family Protection) (Sc.) Act, 1981.

community of property[1].

By the use of the term 'household goods', the Law Commission means the contents of the home and goods (including the car or other family vehicle) used in connection with the home[2]. The Report advocates that at any time during the marriage, unless there is a subsisting decree of judicial separation, the court on application of either spouse should have power to make an order "giving him or her the right, as against the other spouse, to use and enjoy the household goods".[3] The proposals do not extend to include goods which are the subject of a hiring, hire-purchase or conditional sale agreement. A draft "Matrimonial Goods Bill" is presented. The Law Commission, although doubtful[4] about the merits of a scheme of co-ownership[5] of the household /

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1. In fact, in this Report, discussion of this is avoided, or at least postponed. (3.7).
2. 0.22.
3. 0.21. This remedy would be available in relation to mobile homes and caravans which are not to be regarded as part of the land and to houseboats (Part V).
4. on the grounds 1) that "household goods .... are numerous and liable to rapid change"; there would be problems of identification and of tracing funds, where old household goods were sold or part exchanged for new items and 2) that a presumption of co-ownership would not help a spouse from a practical point of view if the other removed them and sold them, leaving the first with a right to a one half share of the proceeds of sale, a share which in money terms would not be sufficiently large to allow replacement of the items.
   On the other hand, it could be argued 1) that the central core of household goods remains constant and most people know what is meant by the term; 2) the situation envisaged surely is relatively rare (though see remarks infra about the emergency nature of the remedy). On termination of cohabitation, it would be a comfort for the non-earner to be sure (she) knew what were (her) rights, and to know that she was entitled to one half of the furniture and plenishing.
5. 3.5.

household goods, appears to be willing to give further thought to such a suggestion. It is possible that a Working Paper may canvass opinion. "However, there are, in one view, reforms falling short of co-ownership which should be put into effect now."[1]

The Commission now bases the view that its aims in this area can best be achieved by means of the provision of a procedural remedy which would enable the aggrieved spouse to apply to the court for an order conferring a right of user rather than by the adoption of the broader remedy of giving to the spouse in occupation of the matrimonial home a right of user until the court orders otherwise. Such a right of user ending by operation of law would bring in its train the requirement of a precise statutory definition of household goods and the Commission feels that it would not be possible to devise a definition which would be both clear and certain on the one hand and sufficiently flexible on the other to meet 'the infinitely varying circumstances of every kind of marriage'.[2] In any event, in the emergency situation in which the proposals would be of greatest use, an application to the court would almost certainly be necessary.[3] However, the remedy would not be limited to emergency cases. It could be sought 'as a precautionary measure' or 'simply to put an end to uncertainty'.[4] Wide discretion would be given to the court to grant or withhold an order. Against the background of a wide definition of household goods the court would "specify precisely the goods to which the order was to apply."[5]

Orders /

1. 3.7.
2. 3.25. Cf. views (3.5) on rights of co-ownership of household goods.
3. 3.28.
4. 3.32.
5. 3.29.

Orders may be made that one spouse should be entitled to the use and enjoyment of household goods in the possession or control of either, such goods being specified in the order. If the goods are in the possession or control of the applicant, an order may be made to the effect that the other shall not remove them, or if in the possession or control of the latter, that the respondent shall deliver them to the applicant, and in either case that the respondent shall not sell or otherwise dispose of any goods comprised in the order.

The order may contain exceptions (in favour of the respondent), conditions and supplementary provisions (on such matters, for example, as responsibility for servicing and insurance of the family car).

Orders would be seen as making suitable rules for the time being. The court in England has sufficient powers to make orders concerning use and enjoyment of goods, in the case of the grant of divorce, nullity or judicial separation or of family provision on death. Hence the orders here envisaged would continue to apply for so long as the marriage subsists or until a decree of judicial separation is granted. It should continue notwithstanding the filing of a divorce nullity or judicial separation petition.[1] Obviously, though, the order might not be needed for so long a period: the court should have power to make orders 'until further order' or for such period as it thinks right. (It becomes clear that this is a remedy very much in the English tradition of judicial discretion). The order would terminate by operation of law on the death of the applicant /

1. 3.44-45. The court should have no power to make such an order while a decree of judicial separation is in force or after the termination of marriage by decree of divorce or nullity.

applicant or of the respondent. The court has power under the 1975 Act to order transfer or settlement of property of the deceased for the benefit of the survivor where it considers that the will or the law of intestacy does not make reasonable provision for the survivor. Similarly, under the Matrimonial Causes Act, 1973, the court has wide discretion to make financial provision by means of awards of lump sum or periodical payments or by transfer or settlement of property when granting decree of divorce, nullity or judicial separation.

The court may vary or discharge its earlier order.

Third Parties

Where a hire, hire-purchase or conditional sale agreement[1] is in force, third parties will have rights subsisting when a household goods order is made: these should not be disturbed. The articles which are the subjects of such agreements should not be proper subjects for the making of an order. Similarly, (household) goods belonging to a third party should not be proper subjects for the making of an order.

What should happen in cases where, at the time of making the order, the third party has no interest in the property but later[2] becomes involved as, for example /

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1. See in greater detail discussion of Goods on Hire, Hire-Purchase or Conditional Sale, contained in Part VI of the Report.
2. It is interesting that the Commission divides the discussion into part (a) (rights of third parties existing at the time when the court is about to make an order, and part (b) rights of third parties subsequently acquired. In the result, the proprietary rights of third parties in both cases are held supreme, but the approach taken to the discussion is noteworthy nonetheless.

example, if (the husband) sells or gives to him goods specified in the order? The Law Commission proposes that the third party, whatever his state of knowledge, should take the goods free of (the wife's) rights. The rights essentially are personal. This accords with remarks made in Chapter 7 infra about the desirability of protecting third parties from the internal disagreements, and arrangements of spouses concerning property. On the other hand, although there would be no consequences with regard to the (new) ownership of the property specified in the order, the Commission envisages[1] that not only a spouse, but also a third party in knowledge of the existence of the order, who acts in breach or knowingly complies with a breach, as the case may be, should make lump sum compensation to the aggrieved spouse. A penalty for disobedience (civil contempt) might be made also, or solely, if that was the only order the court thought it appropriate to make.

Sales and disposals would be prohibited during the period between application for and determination of the order. The respondent, or third party in knowledge of the position, may be required to make compensation if the court considers that an order would have been made in respect of the goods in question.

Should there be a remedy if the respondent removes the goods before the other has had opportunity to apply for an order? The Commission thinks that if a prejudicial transaction took place within three months of the order, the spouse first-mentioned might reasonably be required to make compensation. The aggrieved spouse may make application for an orthodox order or for compensation as seems appropriate.

Probably these proposals would be workable, but they /

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1. 3.62 et seq; 3.65.

they seem cumbersome and they are discretion-based. Anti-avoidance provisions, though, in any system are by nature cumbersome. It is suggested that joint ownership and partnership authority (Chapter 7) would provide a neater and more comprehensive solution.

A very wide discretion is given to the court in fixing the size of compensation. ((The wife) would be entitled to use the compensation money as she wished, and property bought with it would be separate property.) The court would be expected to take into account the needs of the applicant ("replacement value") and loss through loss of use, and even the motives of the disposer, a factor which if used surely would intermingle property and financial matters and moral behaviour rather more closely than now is favoured. The guideline given to the court in the matter of awarding compensation would be very general indeed.[1]

The proposals would extend to be of potential application to all valid and voidable, but not to void, marriages.[2] This seems a sensible approach. In nullity the court has powers to grant ancillary relief.

Jurisdiction

The High Court and county courts would have concurrent jurisdiction to apply the scheme. Concurrent jurisdiction exists already in the cases of other, existing, linked remedies under the M.W.P. Act, 1882, the Matrimonial Homes Act, 1967 and the Domestic Violence and Matrimonial Proceedings Act, 1976. Cases could be heard, therefore, either by the Family Division of the High Court, or by a county court /

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1. 3.83.
2. cf. outline approach Scotland: Nullity (Chapter 7).

court, upon which no financial limit as to jurisdiction would be imposed. Transfers between courts would be competent, and in accordance with present English practice. Section 17 applications and applications for use and enjoyment orders would not be mutually antagonistic or inconsistent, and applications could be heard together. Similarly, applications under the 1967 or 1976 Acts could be heard at the same time as an application for the new remedy.

Jurisdiction would not be conferred on the Magistrates' Courts to hear applications. There is not yet a "fully integrated system of family courts",[1] and magistrates' courts should continue to hear maintenance claims, and should not decide questions of property rights, which, in any case, according to evidence, infrequently accompany such claims.

The Law Commission has discussed, with thoroughness and sympathy, and with the aid of consultation, over a period of years, a subject[2] of contemporary concern. It has reached a conclusion which is essentially English, discretion - based and in harmony with its (discretion-based) approach where the rules of termination of marriage by divorce or death touch property matters. The solution proposed is not necessarily suitable for Scots law where there is freedom (especially since so little is said in the Divorce (Scotland) Act, 1976 about the philosophy or practice of allocation of property on divorce) to strike out on a path of its own, eschewing discretionary solutions which traditionally have not found favour in our systematic approach.

Common Law Rules of English Law Concerning Matrimonial Property

Leaving /

1. 3.159. Cf. Chapter 7(&c) "The New Remedies: The Court."
2. And see further L.C. 115 (1982):automatic co-ownership of the matrimonial home.

Leaving aside questions of settlement of property on divorce or other catastrophic event, the basic rule of English, as of Scots, law, has been that marriage per se has no effect upon title to property: the ordinary rules of ownership apply. Earnings belong to the earner, unless the funds are pooled, in which case each acquires "a joint interest in the whole fund."[1]

Acquisitions belong to the purchaser, whether bought with the purchaser's own money or from drawings from the "common purse", but in the latter case, "investments representing joint savings - will remain part of the spouses' joint property."[2] Bromley comments[3] that ownership of presents given to a spouse by a stranger to the marriage depends upon the donor's intention. Thus, under the useful s.17 of the 1882 Act, wedding presents can be divided between the spouses, or retained by the spouse from whose side of the family they came, by order of the court.

Where division of property between the spouses is called for, the English courts have attempted to ascertain the parties' implied intention in the matter. This is a delicate task, for often parties do not entertain /

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1. Jones v. Maynard 1951 Ch.572. The principle governing joint bank accounts is that, provided that there seems to have been a general pooling of resources, then, irrespective of contribution and drawings, each is entitled to one half thereof if the account is closed, and division made stante matrimonio; if the account is not closed, then, on the death of the predeceaser, the balance accrues to the survivor. (See e.g. Kiralfy, pp.206/207; Cretney, pp.163/164). The position in Scots law is less simple: an effort to ascertain contribution is made. It is suggested that joint title to heritage would be an improvement but that joint bank accounts are a backward step. (See Chapter 7).
2. Bromley, 5th edn., p.447.
3. p.448.

entertain any clear intention upon the point[1], and Kiralfy interprets[2] the attempt as an endeavour to formulate "rules which they find just". Thus, he remarks, "the result is increasingly beginning to resemble the kind of community of property division on divorce which one encounters in Continental Europe."

Some consideration has been given to the matter of rights of occupation of the matrimonial home.[3] Questions of title to the matrimonial home[4] depended in English law first upon the name in which the title stood /

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1. See e.g. Bromley, p.377: "As the majority of the House of Lords held in Pettitt v. Pettitt, if the spouses did not apply their minds at all to the question of how the beneficial interest in a particular piece of property should be held when it was bought, the court cannot give effect to an agreement which they never entered into even though it is satisfied that they would have made it had they thought about it. In other words, it can impute to them an intention which they probably never had but it cannot impute to them an agreement which they clearly did not make. This nicely reflects ingrained principles of English law, but its application here" that is, to the matrimonial home "is unfortunate because the opposite rule would have been much more likely to work justice."
2. p.199.
3. See also explanation: "His, Hers or Theirs? The Spouses' Rights in the Matrimonial Home" Professor D.G.Barnsley, An Inaugural Lecture, University of Leicester. (1974).
4. A good exposition of English rules to determine spouses' rights of ownership in the matrimonial home, is contained in L.C.W.P.No.42, "Family Property Law", in detail at 1.28-1.44, and in summary at 1.49-1.51. As to beneficial joint tenancy, severed joint tenancy, and beneficial tenancy in common, see 1.80-1.81. (See also generally 1.78-1.79). There is a later Law Commission Report (1978) - Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods. See supra. See also L.C. 115 (1982).

stood: if there was any dispute that this did not reflect the true state of things, then it had to be shown that the legal owner held on trust for the other, and this brought in such difficult and unsatisfactory matters as proof of intention. The effect upon intention of contribution (especially contribution in kind) has been mentioned.

It appears that where both legal title and beneficial interest lie in one spouse[1], then that spouse takes the whole proceeds of sale. Where legal title lies in one, and beneficial interest in the other, the latter takes the whole proceeds. Where the beneficial interest is shared, division seems to be in accordance with contribution, at least where contributions are identifiable. If all is confusion, equal division may be the best answer.[2,3] In normal circumstances, "each will have a right to use the house and the furniture in whichever of them the legal or /

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1. As to legal and equitable interest, see infra.
2. Lord Denning's concept of "joint venture" is useful here. See Kinally's discussion at pp.200-205, and at p.186.
3. On death, the question whether spouses having beneficial rights in the home are joint tenants (jus accrescendi to the survivor) or tenants in common (share descending according to the will of the deceased or the rules of intestate succession) is important, and Bromley suggests (p.365) that if the facts would have merited an unequal division inter vivos then some dicta suggest that the spouses should be regarded as joint tenants in unequal shares "but it is submitted that this offends against fundamental principles of our land law". In the supplement to the 4th edition, Bromley refers to the cases of Re Cumming, Cumming and Thompson 1972 Ch.62, and Re Nicholson 1974 1 W.L.R.476, in which tenancies in common, not joint tenancies were held to have been created, while submitting still that "in some cases greater justice will be done by holding that the spouses take a joint interest in equity." (In Cumming, the wife had given unpaid help in the business for 20 years. With the profits, which he kept, the husband bought property).

or equitable title is vested."[1] It is in cases of marital unrest that difficulties arise.

At common law in England a wife has a right (which may competently be the subject of a binding contract between them) to look to her husband for maintenance, and, if he deserts her, to remain in the matrimonial home, unless her conduct[2] is such as to deprive her of that right to maintenance. Hence, if the husband has legal title and all equitable interest in the matrimonial home, the wife's rights are contained not only in the Matrimonial Homes Act, 1967[3], but in the common law also. Similarly, where title and interest lie in the wife, Bromley notes[4] that the wife's duty to cohabit will protect the husband, unless by his conduct, her duty is discharged. (On dissolution of marriage, the Act's protection ceases.) In terms of s.7, the court on pronouncing decree of divorce or nullity, may transfer a Rent Acts tenancy, but not another type of tenancy. "The provision - seems not well related to the powers now enjoyed by the Divorce Court to order transfers and settlements of property."[5]. If the spouses are joint tenants or tenants in common, upon dissolution of marriage, either can insist (since the purpose of the trust has failed) upon division and sale. It seems that, although a wife may be entitled to remain in her husband's house, she will probably not be entitled to retain all his furniture in addition to that which she herself bought. "If she has not forfeited the right to be maintained, she /

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1. Bromley, p.386.
2. e.g. adultery - contrast Scotland. (The Englishwoman's agency of necessity was abolished by the Matrimonial Proceedings and Property Act, 1970, s.41. See Cretney, p.273).
3. and Domestic Violence and Matrimonial Proceedings Act, 1976, infra.
4. 4th edn., p.387.
5. Cretney, 3rd edn., p.213.

she must be left with the means of subsistence; it then becomes a question of fact in each case where the line is to be drawn"[1].

The Matrimonial Homes Act will apply where one spouse is the contractual and then the protected tenant (controlled or regulated tenancy)[2]. Hence the 1967 Act has given to a deserted spouse the privilege of being regarded, for the purposes of the Rent Acts, as being equivalent to the deserting tenant spouse. Accordingly, only on the conditions generally applicable may the deserted spouse be removed.[3]

Where the tenancy is contractual only, the effect of continued payment of rent by the deserted wife will not be to vest the tenancy in the wife if the landlord is unaware of the change in circumstances, and if he treats the wife merely as her husband's agent. Where he is aware of the situation, "it is a question of fact whether he is continuing to treat the wife as her husband's agent (in which case the husband will remain the legal tenant) or whether he has accepted her as a new tenant (in which case the wife will become a new contractual tenant.)"[4,5] The landlord, by serving a notice to quit upon an individual who has a statutory right to stand in place of the tenant, would merely "convert a contractual tenancy into a statutory one": equally, it is in the interests of the wife, if she wishes /

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1. Bromley, p.389. See W. V. W. 1951 2 T.L.R.1135. The case envisaged is that of desertion without or before the occurrence of some judicial act of dissolution.
2. S.1(1) and s.1(5). Prior to the Act, the courts had helped the wife by regarding her occupation as a species of occupation by the husband - Old Gate Estates Ltd. v. Alexander 1949 2 All E.R.822. (Contrast Scotland, Chapter 4, But see now 1981 Act.)
3. Upon this subject generally (and with regard to the Scottish position) see Sc.Law Com.Memo.No.41, Part IV.
4. Bromley, 4th edn., p.399.
5. As to public authority tenancies, see Housing Act, 1980.

wishes to remain, to meet the payments,[1] since non-payment of rent is a ground of removal. It is open to her to try to recoup the money from her husband, but this may be an empty right.[2,3]

As in the case of owner-occupied houses, the protection given by the 1967 Act will end, in the general case, on dissolution of the marriage. In terms of s.7, however, a court is empowered to transfer a protected or statutory tenancy from one spouse to the other at the date of decree absolute, and where the spouses are joint tenants, "to extinguish the interest of one of them and vest the tenancy exclusively in the other."[4]

Until 1970, the courts' powers in the sphere of the property consequences of divorce resembled those then available in Scotland and now little changed: in divorce, nullity and separation[5], an award of a periodical allowance and/or a lump sum might be made to the innocent party. Because of lack of powers with regard to capital assets and to achieve fairness, "the courts developed the law of property rights so as to give both spouses some interest in "family assets"....The court's anxiety to /

1. Cf. Memo, No.41, 3.31, 4.11, 6.58 (proposed right of occupying spouse to make payment of rent or Building Society repayments). See now 1981 Act.
2. Bromley, p.399 and fn.13.
3. And see now Matrimonial Homes and Property Bill (supra) - Dwelling House Subject to Rent Acts etc. (Schedule 2). The Memorandum to the Bill explains that clause 1(2) provides that where a matrimonial home is held on trust, the spouse with rights of occupation has a right to stand in the trustees' shoes as regards payment of rent, etc. which is the same as the right to stand in the other spouse's shoes.
4. Cf. Memo.No.41, Part IV. It may be thought that, in recent years, English law has been quicker to anticipate social needs. The "discretionary" path chosen may not, of course, be that most suitable for Scots law. And see now 1981 Act - Nichols and Meston, Chapter 4.
5. In Scotland, neither in nullity nor separation are awards of lump sums and/or periodical allowances competent.

to give both parties a share in such windfall gains" (arising from increase in monetary value of the matrimonial home, the 'clearest example' of the 'family asset') undoubtedly led to some distortion of orthodox concepts of property law."[1] Since the Matrimonial Proceedings and Property Act, 1970, (now Matrimonial Causes Act, 1973, Part II) and the appearance of a liberal trend in judicial use thereof,[2] "I t will now rarely be appropriate to litigate questions of property law on the breakdown of marriage."[3] The existence of the discretionary powers make the question of title 'largely irrelevant', but in questions affecting strangers to the marriage, and in matters of inheritance, Cretney comments, the rules remain relevant.

The "New Deal" For England

The first steps were taken in the late 1960's and early 1970's. After Law Commission and other deliberation, and much public discussion, two important Bills were passed, and both came into force on 1st January, 1971. These were the Divorce Reform Act, 1969,[4] which, though passed in 1969, was held in abeyance /

1. Cretney, 3rd edn., p.219.
2. See Wachtel v. W. 1973 Fam.72.
3. Cretney, ibid. Doing justice in individual cases has resulted in a flood of interesting cases difficult to relate to one another and to general principle.
4. brought to fruition by a path beginning at "putting asunder", Report of Archbishop of Canterbury's Group, published 1966 ("Putting Asunder: A Divorce Law for Contemporary Society", S.P.C.K., 1966); "Reform of the Grounds of Divorce. The Field of Choice" (1966), Law Commission (Cmnd.3123): Private Member's Bill (introduced for the second time 1968/69, the first attempt having been thwarted by lack of time: Royal Assent, October, 1969) - see Bernard Passingham, the Divorce Reform Act, 1969, Chapter I, Introduction. Discussions of the Act are to be found in "The search for a Rational Divorce Law" M.D.A.Freeman, 1971, 24 C.L.P.178, and "The Divorce Reform Act 1969", Jennifer Levin (1970) 33 M.L.R. 632.

abeyance until the passing of its sister Act, The Matrimonial Proceedings and Property Act, 1970,[1] which, it had been promised, would accompany the new divorce provisions into the family law of England. Certain other provisions of relevance here were inserted in the Law Reform (Miscellaneous Provisions) Act, 1970.

The whole is embodied now in the Matrimonial Causes Act, 1973[2], which came into force on 1st January, 1974. (1973 S.I.No.1972)

Settlements

Ante-nuptial and post-nuptial marriage-contracts are not common in England, but marriage "settlements", of various types, in terms of which property is transferred by the spouses to trustees, occur. Kiralfy comments that this device ensures impartiality in administration,[3] and inspires the confidence of third parties.[4] Such are practically unknown in Scotland, and /

1. Here, the history included the Law Commission's Reports on Financial Provisions in Matrimonial Proceedings (Law Com.No.25) and on Abolition of Proceedings for Restitution of Conjugal Rights (No.23). It was passed with great haste in May, 1970, when the General Election of that year was imminent - see Bernard Passingham, "The Matrimonial Proceedings and Property Act, 1970", Chapter I. Introduction.
2. 21 and 22 Eliz.II, c.18.
3. and may provide another possible answer to the "dual control on the bridge" problem.
4. See interesting discussion by Kiralfy at pp.191-197, which includes at pp.193/4, a statement upon rights of creditors (over and above those stemming from the English bankruptcy laws), against "misuse of settlements" to defraud creditors (mala fides not being of necessity an item of proof, it being sufficient to show that the creditors "would inevitably suffer" as a result of the settlement). See L.P.A. 1925, ss.172/173 (wife's good faith a sufficient answer in ante-nuptial, but not in post- nuptial arrangements, the reason being that an ante-nuptial settlement is made for the good consideration of marriage, whereas a post-nuptial settlement is voluntary and the wife's good faith is regarded as immaterial). These fraudulent settlement rules apply even after the death of the debtor but the bankruptcy rules apply only during the debtor's lifetime. Kiralfy, p.194.

and, since a similar background of thinking is absent, it may be that the adoption of an equivalent would be alien and of little help. The notion that there may be both a legal and an equitable interest in property is strange to us.[1]

For example, the act of spouses in purchasing together, with contributions from both, a house in which to live, or the purchase of a house by one, followed by the taking of title in joint names, or variations on these facts, will be regarded in English law as a settlement. In the latter example, the purchasing spouse would be regarded as making a donation[2] to the other of one half of the value of the house, and it could not be disposed of thereafter without the donee's consent also. On the other hand, the ordinary rules of common ownership in English law (upon which there is no prohibition of application to husbands and wives[3]) allows /

1. See Cretney, pp.151/2 - "... it is only by showing the existence of such a trust that a wife can be held to have a proprietary interest in a matrimonial home, the legal estate of which is vested in her husband". Prima facie, the legal estate "carries with it the whole beneficial interest". The presumption will be displaced where the court procures using the presumptions of "advancement and resulting trust", that there has been an original intent to hold jointly or "an original common intent", or where the court imposes a trust "in the absence of evidence of agreement" and for reasons of "justice and good conscience". As to details, see Cretney, pp.153-160 and pp.160-163. See also Bromley, pp. 367/8.
2. Cf. Scottish approach: Chapter 5, p. 643, et seq.
3. The fact of the relationship has caused problems concerning the applicability thereto of the right of a joint tenant to "sever" and create a tenancy in common. Possibly there is such a right (Kiralfy, p.198) (Cretney, pp.161/2, states that either spouse, where there is a joint tenancy, may sever, to create a tenancy in common.)

allows free disposal of the beneficial share without consent of the other co-owners "But the value of the beneficial interest can only be realised by means of a sale, and the court may forbid such a sale, on the application of the other spouse, as where an unfaithful wife purports to make a gift of her half-interest in the matrimonial home to her lover."[1] The point which Kiralfy is anxious to make clear is that, upon a sufficiently substantial change of circumstances, such as to render the initial arrangement as envisaged, inappropriate, the court, before the 1971 changes, had power to alter the terms of the settlement. Thus, the whole interest in the home might be given to the husband. "Correspondingly, an innocent wife who contributes to the purchase of the home may be awarded sole title against a guilty husband".[2] (Variation on behalf of/to benefit the 'guilty' was not necessarily precluded).[3] The judicial powers of "variation" seem to have been at common law far-reaching. Kiralfy almost casually reports that "There appears to be no reason why a will should not constitute a "settlement" liable to variation, as where a husband's parents have left generous bequests to his wife without anticipating a divorce."[4]

The Matrimonial Proceedings and Property Act, 1970, s.4 /

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1. Kiralfy, p.195.
2. Kiralfy, ibid.
3. Under the Matrimonial Causes Act, 1965, s.17(2), the court could "settle" property of a 'guilty' wife, but not of a 'guilty' husband. Kiralfy notes that although this provision did violence to "the ordinary principles of the law of property", nevertheless it was intended to be used as a vehicle for "restoring the original financial position of the parties" (which point he demonstrates amply by reference to the case of Compton v. C. and Hussey 1960 P.201) and not as a vehicle for punishment (p.196). The sexual inequality seems strange and was removed by the 1970 Act, s.4 (see body of text).
4. ibid.

s.4[1] permitted a court, in cases of divorce, nullity and judicial separation, at decree, or at any time thereafter (before or after decree absolute) to order transfer of property from one spouse to another or to or on behalf of a child of the marriage, to order the making of a settlement of property by the erstwhile owner to the other party and/or the children, to order a variation for the benefit of the parties or either of them and/or the children, if any ante-nuptial or post-nuptial settlement (including a settlement by will or codicil) or to make an order "extinguishing or reducing the interest of either of the parties to the marriage under any such settlement." The aid of conveyancing counsel may be sought in the drafting of such alternative instrument, and decree may be deferred until execution of the instrument.[2] Considerations to be borne in mind by the court in the exercise of their powers under sections (2,3 and) 4, are contained in s.5.[3] Variation (and, it would seem, substitution of a new settlement), Kiralfy notes[4], may include "elimination from benefit" of a spouse who would otherwise have benefited from a settlement. The new or varied settlement is not protected, by virtue of the new arrangements, from attack by creditors, who may still invoke the Bankruptcy Act, 1914, s.42(1),[5] to have the settlement reduced[6]. Where there is a joint /

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1. New Matrimonial Causes Act, 1973, s.24.
2. 1970 Act, s.25; 1973 Act, s.30.
3. Infra. The equivalent sections of the 1973 Act are ss.23,24 and 25.
4. p.197.
5. power of settlor's trustee in bankruptcy in the general case to reduce the settlement at any date within 10 years of the making of the settlement. "The general case" means, it seems, that the remedy is restricted to "bad faith" post-nuptial settlements, and does not extend to ante-nuptial settlements or settlements for value and in good faith.
6. 1970 Act, s.25; 1973 Act, s.39.

joint tenancy or a tenancy in common, in English law either party can insist upon sale. However, if the matter is sufficiently contentious, application can be made to the court under the Law of Property Act, 1925, s.30, and the court, in its discretion may refuse to order a sale if it would be inequitable to do so, or if a trust purpose is still to be discharged.[1]

EFFECT OF DEATH ON PROPERTY OF SPOUSES IN ENGLISH LAW

A. INTESTACY

English law, in common with German law as recently changed, and with Scots law since 1964, now has rules of intestate succession which tend to benefit the surviving spouse rather more than they benefit the children of the marriage.

In terms of the Administration of Estates Act, 1925 (as amended by the Intestates' Estates Act, 1952 and by the Family Provision Act, 1966), a surviving spouse is entitled to a cash sum of £25,000[2,5] if there is issue of the marriage, and to £55,000[3,6] if there is no issue ("the statutory legacy").

In addition, whether or not there is issue, the survivor takes all "personal chattels" (including domestic equipment, cars, jewellery, clothes and other similar items, but not business articles[4]), and if there is issue, he/she enjoys the liferent of one half of the remaining estate. He/she is entitled to a one half share of the capital value of the balance, if there is no issue but the intestate has left parents or siblings or their issue, and to the whole thereof if there is no issue /

1. Cretney, 3rd edn. p.241.
2. Family Provision (Intestate Succession) Order 1977.
3. Family Provision (Intestate Succession) Order 1977.
4. 1925 Act, s.55 (i)(x).
5. Now £40,000 with interest at 7% until paid.
6. Now £85,000 " " " " " "
Family Provision (Intestate Succession) Order, S.I. 1981 No. 255; Intestate Succession (Interest and Capitalisation) Order, S.I. 1977 No. 1491.
Bromley's Family Law, 6th edn., p.617.

issue and the deceased has left only relatives more remotely related.

If the deceased is the surviving partner of the marriage, the issue will take all the benefit of the estate: failing issue, the spouse's parent(s) will take, equally between them, or all to one, if only one survives: failing parents, the order is:- first, siblings, then grandparents, then uncles and aunts: all of whom failing, the estate passes as bona vacantia to the Crown,[1] although Cretney notes[2] that "as a matter of grace", the Crown may make provision out of the estate for ""dependants" (whether kindred or not)", and other persons for whom the deceased might have made provision, and suggests that the Crown may make a payment to the deceased's mistress, who, neither in English nor in Scots law, has any claim to the deceased's estate under the rules of intestate succession.

Cretney comments[3] that in many cases the survivor's rights will exhaust the estate.

With regard to the intestate succession to the estate of a parent of an illegitimate child, or to the estate of the child, rights of parties shall be the same as those arising had the child been born legitimate.[4]

Under the Intestates' Estates Act, 1952 (Schedule 2), the survivor may require that his/her share in the estate be taken in the form of the matrimonial home (he/ she /

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1. Cf. conflict cases In re Barnett 1902 1 Ch.847, In re. Musurus 1936 2 All E.R.1666, Goold Stuart's Trs. v. McPhail 1947 S.L.T.221.
2. p.260.
3. Ibid. Cf. Meston, The Succession (Scotland) Act, 1964, 2nd ed., p.27 and Graue, supra.
4. Family Law Reform Act, 1969, s.14. In appropriate circumstances the "issue" of the illegitimate child may have rights of succession. Presumably "issue" in that context includes illegitimate issue. But see Meston

she having been resident therein at the time of the deceased's death), paying the difference in value, if applicable. Kiralfy comments[1] that the administrator of the estate would be likely to arrange this in any event. However, it may be necessary to realise the value of the house for the purpose of payment of debts. The administrator can give a good title to a purchaser for value and since there might be no very good case for damages against the administrator "for needlessly selling the home", if the neighbourhood contained similar houses of like price, Kiralfy suggests[2] that "a more effective remedy would be to ask the court to issue an injunction to prevent the administrator disposing of the home without cause, thus avoiding the upset of moving and the breaking of sentimental ties with the home." Surely in many cases though, provided that statutory instrument keeps abreast of changing house values,[3] and especially where the deceased has left no issue, the survivor will take the house as part of his/her statutory legacy? It is noteworthy, however, that in Scots law, the right to the house (at present to the monetary value of £50,000) is a specific prior right, an entitlement in addition to the rights to contents and to a cash sum[4].

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1. . . p.210.
2. p.211.
3. The 'statutory legacy' amounts now to £25,000 if there is issue, and £55,000 if there is not. In either case, the survivor takes the personal chattels and in the former case, a liferent of one half of the balance of the estate and in the latter case, one half of the balance absolutely. The survivor takes the whole balance if there is no issue and the relations, if any, are more remote than parent or sibling. (Cretney, p.259; Family Provision (Intestate Succession) Order 1977.)
4. Succ.(Sc.) Act, 1964, ss.8 and 9. The cash entitlement is an entirely separate right; the right to furniture and plenishings is to the furniture and plenishings of a dwelling house to which s.8 applies. If the intestate estate contains the furniture and plenishings of /

As in Scotland, so in England, a husband had no claim upon the acquisitions of his deceased wife obtained after separation. The rule in Scotland, which has been criticised, rests upon the Conjugal Rights Amendment (Scotland) Act, 1861, s.6. Until 1971, the position was the same in England, but by the Matrimonial Proceedings and Property Act, 1970, s.40, sexual equality here was achieved: if there had been judicial separation, neither spouse could claim in the intestate succession of the other. Section 40 has been repealed and overtaken by the Matrimonial Causes Act, 1973, s.18(2), which is in similar terms, and which states:- "If while a decree of judicial separation is in force and the separation is continuing either of the parties to the marriage dies intestate as respects all or any of his or her real or personal property, the property as respects which he or she died intestate shall devolve as if the other party to the marriage had then been dead." The provision therefore treats the spouses equally, and removes the difficulty of ascertaining which items of property had been acquired after decree.[1] A spouse may still apply for a reasonable provision under the Inheritance (Provision for Family and Dependants) Act, 1975, however.[2]

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of two or more such dwelling houses, the survivor may elect (within 6 months of the date of death of the deceased) which set of contents (she) wishes to take. Within the same period, (she) must elect which dwelling-house to take. (She) may choose to take the contents of the house not chosen. The survivor will be entitled to contents even where the circumstances are such that (she) receives only the monetary value of the house (Meston, p.34). The section (8) applies "to any dwelling house in which the surviving spouse of the intestate was ordinarily resident at the date of death of the intestate" (s.8 (4)) (provided, of course (Meston, p.29) that the interest in the house belonged to the deceased spouse).

1. See Chapter 1 and Chapter 5.
2. Discussed infra, "Family Provision". Such a (separated) spouse may apply for 'reasonable provision' in the sense of maintenance, but not for the fuller award potentially available to other spouses (s.1(2)).

In cases of death in a common calamity, the presumption is the logically impossible one that each died first[1].

Where there is partial intestacy, a spouse must set off his/her provisions in the will against the statutory legacy, but not against any other right of intestate succession, and not against inter vivos gifts.[2]

B. TESTACY

The law of England has always prided itself upon the freedom of testation which it allows,[3] and novels abound with threats to "cut off with a shilling" sons who do not fulfil their fathers' expectations of them. "Seen in a comparative context, the English law of succession is characterised not only by the generosity with which it treats the surviving spouse in the event of intestacy but also by its reluctance to give her or him adequate protection in the event of the exercise by the predeceasing spouse of his or her freedom of testation in a manner adverse to the interests of his or her spouse and children".[4]

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1. The Scottish position (Succ.(Sc.) Act, 1964; Meston, p.19) is that, in the general case subject to s.31(2), the younger is presumed to survive the elder but that, in a husband and wife case, it is presumed that neither survived the other (s.31(1)(b) and (a) respectively).
2. See generally "Family Provision" infra.
3. Cf. Re Inns 1947 Ch.576 cited by Martyn at p.4.
4. Otto Kahn-Freund, "Recent Legislation on Matrimonial Property", 1970 33 M.L.R.601 (considered infra, Chapter 7), at p.603. Professor Kahn-Freund states in passing, though the article is concerned principally with inter vivos problems, that a reform of the law of family property would contain as an "integral element" reform of the law of family provision, and that this might involve "far-reaching restrictions of the freedom of testation", or alternatively perhaps the introduction of a system of community of property. (See now 1975 Act, infra). Such restrictions are no novelty to Scots law, but England has consistently and with resolution eschewed a system of fixed rights (cf. L.C.W.P.No.42 (1971)/

The opposite end of the spectrum is represented by systems of the Germanic family, such as those of Denmark and Norway,[1] where originally succession by will was excluded. "The family received the estate by law and only slowly the will was recognised as a result of the influence of the Catholic church". The trend has been for the representatives at each end to drift to the middle. Thus, in Denmark and Norway, there is testamentary freedom, subject to restriction (as in Scotland[2]) where the deceased leaves spouse and/or descendants. "In these cases the right of the family in the old law still survives in the legitim of the spouse and the children."[3]

At the late date of 1938, change came, but Kiralfy describes /

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1. (1971) which at 0.36-41, and generally in Part 4, considered a system of English "legal rights", but in L.C. 1st Report on Family Property (A New Approach: 1973) an extension of the family provision rights was favoured, and the proposals of the 2nd Report (1974) were implemented as the Inheritance (Provision for Family and Dependants) Act, 1975; Todd and Jones' Review, both infra, Chapter 7), retaining its natural preference for discretionary remedies. The author remarks upon the restricted nature of the surviving spouse's rights in intestacy in France, and compares that attitude with the English attitude towards the disinherited spouse ("vital differences" (being) "that the French right is fixed by law and is not discretionary and that it must be seen in conjunction with the matrimonial community right.") John G. Ross Martyn ("The modern law of Family Provision") notes, though, that in mediaeval times, fixed rights were a part of English law and that this gave way to the favour steadily shown to the concept of testamentary freedom. (See p.2).
1. D. & N. Law, p.59, supra.
2. See Chapter 5.
3. D. & N. Law p.59. A footnote at p.59 relates that the term is taken from Scots Law, which is interesting. In that context in which it is used, however, it is a comprehensive term for the indefeasible rights of spouse and/or descendants.

describes it as "modest" and terms the new right or duty "posthumous aliment". One point which differentiates the English from certain other systems (including the Scots system) is that the (discretionary) rights possibly available under the Inheritance (Family Provision) legislation may arise now also in intestacy.[1]

Family Provision

The Inheritance (Provision for Family and Dependants) Act, 1975 repeals the 1938 Act in its entirety but does not alter the basic approach provided by that Act, which was to permit to be changed the provisions of a will and/or the rules of intestate succession so as to make "reasonable provision" for certain persons who are members of the deceased's family or dependent on him. The 1975 Act replaces also the Matrimonial Causes Act, 1965, ss.26-28, which themselves replaced certain sections of the Matrimonial Causes (Property and Maintenance) Act, 1958, an enactment which contained provisions concerning orders out of the estate of a deceased former spouse in favour of a former wife or a former husband who had not re-married, and "changes the old law....very substantially, so as to form a new and comprehensive code of family provision law".[2] All is discretionary; "both the right and the quantum alike are matters of judicial discretion."[3] This is not a Scottish approach.

The 1938 Act applied to testacy only, but its remedies were made available in cases of intestacy by the Intestates' Estates Act, 1952. Originally, applications /

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1. As to Scotland, see prior and/or legal rights: Chapter 5.
2. "The modern law of Family Provision", John G. Ross Martyn 1978 (cited hereinafter as "Martyn"), p.1.
3. Martyn, p.2.

applications were limited to those by the spouse, infant sons, daughters who had not been married or were incapable of maintaining themselves, and adult sons incapable of maintaining themselves. In 1958 the list was extended to include a former spouse who had not remarried,[1] which is an interesting extension, at odds with the "clean break" theory. There is no provision for former spouses in the Scots rules of intestate succession ((prior rights and legal rights) or testate succession (legal rights)).

In the latest Act, judicial powers are enlarged, there are anti-avoidance powers, in the case of the spouse applicant[2], "reasonable provision" is not limited to /

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1. See 1958 Act, s.3.
2. that is, a spouse married to the deceased at the time of the latter's death: in the case of a former spouse (and a separated spouse) the provision, if granted, is limited to the "reasonable for maintenance" test, (Martyn, p.11, but see also Martyn, p.22) though there is a transitional provision where the death occurs within 12 months of the decree of divorce, nullity or separation, and provided that in the antecedent matrimonial proceedings no financial provision or property adjustment order (Matrimonial Causes Act, 1973, ss.23,24) had been made. However (s.15), the court in the earlier proceedings, if it thinks just to do so and with the agreement of the parties, may order that neither party shall be entitled to apply for such an order.(s.14). It is competent for a court in divorce, nullity or separation proceedings, if it seems to the court just to do so and with agreement of the parties, to order that the surviving (separated) spouse or former spouse on the death of the predeceaser shall be precluded from making application for reasonable provision. See infra. A reference in the Act to a wife or husband shall be treated as including a person who in good faith entered into a void marriage with the deceased unless either the marriage was dissolved or annulled during the lifetime of the deceased, and the dissolution or annulment is recognised by the law of England and Wales, or that person has during the lifetime of the deceased entered into a later marriage, notwithstanding that the subsequent marriage or the earlier marriage is void or voidable. (s.25(4) and (5)). Martyn (p.10) points out that this means that there could be more than /

to maintenance requirements but may include a lump sum, and property transfer (in other words, an arrangement not dissimilar to a monetary and/or property award on divorce) and the list of competent applicants has been increased from spouse, former spouse and child to include in addition any person treated by the deceased as a child of the family in relation to a marriage to which the deceased was a party, but whose natural child the applicant is not, and any person who immediately before the deceased's death was being maintained, wholly or partly, by the deceased[1]. The last category includes those related by blood or affinity but not included in any of the foregoing /

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than one spouse applicant. In the case of polygamous marriages also, clearly this could happen, and it did happen in the case of Re Sehota 1978 3 All E.R.385. Where objection to the application on the ground that the claim was for matrimonial relief and that the courts of England were not open to give such relief in the case of a polygamous marriage was made by the second wife, the objection was rejected, the court taking the view that the claim was not for matrimonial relief but was a question of succession but that in any event the Matrimonial Proceedings (Polygamous Marriages) Act, 1972, s.1 (power to courts in England and Wales to grant matrimonial relief or to make a declaration concerning the validity of a marriage despite the fact that the marriage was entered into under a law which permits polygamy) was apt to cover the case. Where separated spouses are mentioned, the Act refers always to judicial separation. Presumably, a consensually separated spouse is a competent applicant (cf. Martyn, p.11) but on the facts his/her claim may not be strong (see infra and Martyn, p.20 "fossil marriages".) Martyn comments that there is no reason in principle why a widower applicant should be less well treated than a widow.

1. S.1.

foregoing categories, or linked only by the fact of dependency[1].

Application should be made within six months of the taking out of representation in respect of the estate.[2]

The court must be satisfied that the arrangement of the deceased's estate effected by the deceased and/or by the rules of intestate succession does not make reasonable provision for the applicant. The test is objective. If the court decides that reasonable provision was not made, it may make any one or more of the following orders:- an order for periodical payments out of the net estate of the deceased, or an order for a lump sum, or for a transfer of property or for the settlement of property for the benefit of the applicant, or for the acquisition out of property in the estate of specified property and transfer or settlement thereof or for an order varying any ante-nuptial or post-nuptial settlement ("including such a settlement made by will") "made on the parties to a marriage to which the deceased was /

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1. Martyn, p.14. He notes that in an appropriate case, a grandparent, parent or grandchild might apply, as might a housekeeper, or a remarried former spouse "in the unlikely event of her still being a dependant", or indeed a de facto spouse, though in the last-mentioned case Martyn considers that in the wife/mistress combat, the mistress may fare badly if e.g. the wife makes use of the Act to attempt to cut down the testamentary provision for a mistress. In intestacy, where the man's property passes to the wife, the mistress, on the other hand, may have a claim. Yet de facto spouses have become favoured more greatly by the law, and who is to say that, in the future, the dependent cohabiting mistress will not be preferred to the wife? Indeed, is it possible that both wife and mistress might be aggrieved by a will leaving much to a worthy charity? How then would justice be done?
2. s.4. Thereafter, application may be allowed with permission of the court.

was one of the parties", in the last case[1] the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.

The powers given entail the giving of linked powers. Hence, in terms of s.2(4), the court may order any person who holds any property forming part of the net estate of the deceased to comply with the payment or transfer order, and (s.2(4)(b)) may "vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will or the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case." The court may[2] confer on the trustees of any property which is the subject of an order such powers as appear to the court to be necessary or expedient.

Section 3 gives guidelines to help the court to decide whether reasonable provision has been made and, if not, what provision should be made. These are:- the financial needs and resources of the applicant and those of any other applicant and those of any beneficiary of the estate, any obligations and responsibilities owed by the deceased to the applicant or to any beneficiary, the size and nature of the net estate, any physical or mental disability of the applicant or of any beneficiary, and any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case, the court /

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1. s.2(1)(f).
2. s.2(4)(c).

court may consider relevant[1]. In the case of a spouse or former spouse, the court shall have regard to the age of the applicant and the duration of the marriage and the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family. Where the applicant is a spouse (not being a (judicially) separated spouse) the court shall have regard to the provision which the applicant might reasonably have expected had the marriage been terminated by divorce rather than by death. In the case of children, regard shall be had to the child's expectations in respect of education or training, and of children treated as children of the family, whether the deceased had assumed any responsibility for the applicant's maintenance, and, if so, the extent and basis and duration of responsibility, ignorance or knowledge in discharging that responsibility, that the applicant was not his own child, and liability of any other party to maintain the applicant. Similarly, with regard to the "dependant" category, the court shall have regard to the extent and basis of responsibility and duration of discharge of responsibility.[2,3]

Emergency /

1. i.e. "the court shall....have regard to the following matters, that is to say -" (s.3(1)(a) - (g)).
2. See generally s.3.
3. As to the treatment of the spouse, consider Martyn, pp.19/22: "How far is the concept of family assets embodied in the Act?" ("partially"). "In which cases will the concept of family assets influence the Court?" "How far will the court make use of the one-third starting-point?" (only if helpful) "How relevant is conduct?" (possibly less so than under the 1938 Act, in view of or by analogy with the attitude to conduct adopted in the matrimonial jurisdiction.) Martyn concludes (p.22) that there is a difference, insufficiently appreciated and not explicit in the Act, between the treatment of the spouse and that of other applicants. "The basis for surviving spouses becomes a moral obligation to leave a part, probably a substantial part, of the estate to the spouse, in contrast to the basis for other applicants, which remains an obligation to provide sufficient maintenance."
Yet /

Emergency aid can be given in case of need, and if property is available, and subject to conditions and further order, before the decision is made as to whether an order for provision under the Act should be made, and if so, what size it should be.[1] The guidelines shall apply, so far as time permits.

An award under s.2 for periodical payments may be altered at a future date by the court. A lump sum award may be satisfied by instalment payments.

Net Estate

Nominations by the deceased in favour of any person(s) shall be taken to form part of the net estate, as will donationes mortis causa, but in neither case shall any party who has paid or transferred such property to such person be rendered liable for having done so.[2] The severable share of a deceased's beneficial interest in a joint tenancy may also be treated as part of the net estate.

Anti-avoidance provisions

An applicant for a provision may ask the court to make an order against a donee (as after explained) to provide such sum of money, or such property, as specified, if the court is satisfied that less than six years /

Yet the obligation surely now is more than moral; it may be enforced at law, though the chosen means of a wide judicial discretion, which may leave testator or predeceaser in his lifetime and the survivor after his death, unsure of its extent.

1. s.5. Cf. in Scotland the possibility of claiming interim aliment out of the estate (C. & W. p.692).
2. s.8. Provisions of this nature (and see further infra) are interesting, when viewed against the argument that, in property matters, to strangers to the marriage all should appear straightforward. (Cf. generally conflict of laws classification case of In re Korrine 1921 1 Ch.343)

years before the death of the deceased, with the intention of defeating an application for provision under the Act, / the deceased made a disposition, that full consideration was not given by the beneficiary of the disposition ("the donee") or by any other person, and that this exercise of power by the court would facilitate the making of financial provision for the applicant under the Act.[1] The order may be made whether or not the donee at the date of the order holds any interest in the said property, and shall not exceed the amount of the disposition (or value of the property at the deceased's death or at earlier disposal by the donee) less any capital transfer tax paid by the donee. If, in course of the application, another 'objectionable' disposition is revealed, the court may exercise the same powers in respect thereof as in respect of the original application.

In deciding whether to exercise its powers, the court shall have regard to the circumstances in which the disposition was made, and any valuable consideration[2] given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee, and all the other circumstances of the case.[3] "Disposition" does not include any provision in a will, any nomination such as mentioned in s.6(1), or any donatio mortis causa, or any appointment of property made, otherwise than by will, in the exercise of a special power of appointment, "but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument /

1. s.10.
2. "valuable consideration" does not include marriage or a promise of marriage (s.25(1)).
3. s.10(6).

instrument or otherwise",[1] but the provisions do not apply to any disposition made before the commencement of the Act (1st April, 1976).

Where the court is satisfied that the deceased (after commencement of the Act) had contracted that money or property would be left by will or transferred out of his estate to any person, and the contract was made with intent to defeat an application under the Act for financial provision,[2] and that full valuable consideration was not given by the donee, and that the exercise of the powers conferred would facilitate the making of financial provision for the applicant under the Act, the court may make an order against the donee, if the money has been paid or the property transferred, or, if not, an order directing the personal representatives not to pay or transfer, or only to pay or transfer in accordance with the terms of the order. The powers of the court may be exercised only to the extent that the court considers the value of the contract exceeded the value given in consideration and "the court shall have regard to the value of the property at the date of the hearing."[3] In addition, the decision whether and in what manner to exercise the powers shall be taken in the light of the circumstances in which the contract was made, the relationship, if any, of the donee /

1. s.10(7).
2. How is the court to be satisfied upon the point? The answer is supplied by s.12(1): the condition (that "the court shall be satisfied that") shall be fulfilled "if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract" was to prevent or reduce a future financial provision under the Act, unless (in a s.11 case) no consideration was given, in which case there shall be a rebuttable presumption that the intention was to defeat an application for financial provision under the Act.
3. s.11(3).

donee to the deceased, the conduct and financial resources of the donee "and all the other circumstances of the case."[1]

It is a most English Act; the court, when making a s.10 or s.11 order may make such consequential directions as it thinks fit to give effect to the order "or for securing a fair adjustment of the rights of the persons affected thereby".[2] This must be read in conjunction with s.11(5) - "the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under s.12(3) of this Act and shall survive to such extent only as is consistent with giving effect to the terms of that order."

Through judicial discretion shall the solution be achieved.

This is not a familiar manner of reform in Scots law and it is to be hoped that, however worthy the cause and however attractive speed of action, it will not become so.

Orders against the donee, or applications made by him,[3] may be made against or by his personal representative, but the powers of the court shall not extend to property which was part of the donee's estate, and which has been distributed by the personal representative, and the latter shall not be liable for distribution made before notice is received of the making of an application on the ground that "he ought to have taken into account the possibility that such an application would be made."[4]

Special /

1. s.11(4).
2. s.12(3).
3. that is, under s.10(5): 'other objectionable disposition'.
4. s.12(4)(b).

Special provisions are made (s.13) where orders are made in respect of dispositions made by the deceased to any person as a trustee: in respect of dispositions consisting of the payment of money, the trustee shall not be ordered to pay more than the money and/or the value of property representing the money or derived therefrom which is at the date of the order in the hands of the trustee, or, in respect of a transfer of property, the order shall not exceed the aggregate of the value at the date of the order of so much of that property and the value of property representing that property or derived therefrom as is at that date in the hands of the trustee. The trustee shall not be liable for distribution of money or property on the ground that "he ought to have taken into account the possibility that such an application would be made".[1] In such circumstances, any reference in s.10 or s.11 to the 'donee' shall be construed as including a reference to the trustee(s) for the time being of the trust in question.[2]

If the applicant was entitled to receive from the deceased secured periodical payments at the time of death, the court may discharge or vary the earlier order in the light of all the circumstances including any order proposed to be made under the 1975 Act.[3] A similar power is given[4] in respect of maintenance agreements previously agreed between the parties to the marriage.

Where application is made for variation or discharge of a secured periodical payments order or for alteration of a maintenance agreement after the death of the 'debtor' spouse, the court shall have power to direct that the application /

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1. s.13(2).
2. s.13(3).
3. s.16.
4. s.17.

application be deemed to have been accompanied by an application for an order under the 1975 Act, and the court shall have the appropriate powers which it would have had, had a s.2 (1975 Act) application been made.[1]

There is jurisdiction in the County Court to hear s.2 applications where the value of the net estate of the deceased at death does not exceed £5,000 or such larger sum as may be fixed from time to time by order of the Lord Chancellor.[2] "Net estate" is defined in s.25 (Interpretation Section) and it does not appear that 'estate' is limited to movable estate.[3] The financial limits of the county court seems, therefore, low indeed. Most applications must be heard in the High Court.[4] The general usefulness of the Sheriff Court is thrown into relief; of course, wide discretion is conferred upon the judges by this Act, and perhaps there was little enthusiasm for the grant of a wide discretion to that which is an inferior court.

Where an order is made, the terms of the will and/or the rules of intestacy, otherwise applicable, shall be subject thereto; and orders made in favour of a former spouse, or a judicially separated spouse, shall terminate, except with regard to arrears, on the re-marriage of that party; and a copy of every order shall be filed at the principal registry of the Family Division, and a memorandum of the order "shall be endorsed on, or permanently annexed to, the probate or letters of administration /

1. but not if, in an earlier decree of divorce, nullity or judicial separation, in terms of s.15(1), a subsequent s.2 application prospectively had been declared incompetent.

3. (e.g. "net estate"....means:- (a) "all property of which the deceased had power to dispose by his will...."; "property" includes any chose in action.)

4. Chancery Division or Family Division, as seems appropriate. See further, pp.41-43.

2. Now £15,000 : County Courts Jurisdiction (Inheritance — Provision for Family and Dependants) Order 1978.

administration under which the estate is being administered."[1]

No liability shall attach to the personal representative of the deceased if, after the passing of six months from the date on which representation with respect to the estate is first taken out he shall have distributed any part of the estate, although remedies against the distributed estate[2] as previously described are available. It cannot be argued that the personal representative ought to have taken into account the possibility of action under the Act. If the representative is ordered to make a payment out of the estate for the immediate needs of the applicant[3] no liability shall attach to him if the estate is insufficient "unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient."[4] In the case of contractual arrangements made by the deceased which the personal representative "has reason to believe" the deceased entered into with the intention of defeating an application under the Act, the personal representative may postpone implementation of the contract, whatever its terms, until the expiry of six months from the taking out of representation, or until the determination of s.2 proceedings if application for a s.2 order is made during that period.[5]

All /

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1. s.19.
2. that is, against the donee. See supra.
3. under s.5.
4. (if it should transpire that in truth the estate was insufficient to meet the interim order: s.5(1): "Where...it appears to the court - that property can be made available: Current Law Annotations to Statute, s.5(1)).
5. This authorises the personal representative to refuse to perform obligations under such a contract: it is not clear whether, if he does implement the contract within the six month period, he does so at his own risk, as is the case (s.20(1)) with regard to distribution /

All in all, this is a very English solution to a problem encountered by every system of law which contains rules concerning family law and succession.

PRIVATE FINANCIAL AGREEMENTS BETWEEN THE PARTIES

In England, "separation agreements" are valid, "provided the separation has actually occurred or is inevitable."[1] A separation agreement usually will contain financial provisions, and Cretney relates[2] that at common law the English courts took the view that it was contra bonos mores for a woman to "sign away /

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distribution generally of the estate. However, if the contract has been implemented, s.11 envisages that an order may be made against the donee (transferee: in what, in this instance and generally, does the personal representative's liability consist? If the circumstances merit an award, and the award cannot be enforced by reason of actings of the personal representative within the six month period, is the latter to be liable to the applicant to the extent of the award or perhaps to an extent specified by the court in its discretion? As to general distribution (s.20(1)), the personal representative's protection arises upon the expiry of the six month period whether or not application proceedings have been set in motion. In a s.20(3)(contract) case, it would seem prudent for the personal representative to postpone payment or transfer until determination of proceedings brought within the six month period, for his statutory authorisation covers such an eventuality, and possibly it is arguable that by inference protection would not be afforded if he proceeded in the face of the prospective litigation; however the question is one for judicial interpretation perhaps of the relationship if any between s.20(1) and s.20(3). The reason for the six month time limit is that, after the expiry of that period, a s.2 application may be made only with permission of the court. (s.4). However, personal representatives "should not adopt a purely negative attitude" to requests for payment within the time limit - see Martyn, pp.6/7.

1. Cretney, 3rd edn., p.367. Agreements which are purely maintenance agreements are competent.
2. p.368.

away" her right of recourse to the courts to fix maintenance, since " T he wife's right to future maintenance is a matter of public concern which she cannot barter away."

The courts will pay great regard to the parties' own agreement, but may increase or decrease the amount payable if there has been a change in circumstances.

Formal expression of these principles was made in the Maintenance Agreements Act, 1957, as amended by the 1970 Act, ss.13-15.[1] Upon change of circumstances either party may apply to the court for a variation of the terms of the agreement. In general, such agreements should be binding as between the parties. The statutory provisions are concerned with written agreements: regulation of oral agreements rests on common law.

A provision which seeks to oust the jurisdiction of the court is void.[2] The court in the exercise of its jurisdiction has wide-ranging powers, including revocation as well as variation of the agreement, and insertion of new arrangements for the benefit of one of the parties thereto or "a child of the family." These are matters entirely within the court's discretion.[3] If there is a maintenance agreement and each of the parties thereto is domiciled or resident in England and Wales, either party may apply to the court or a magistrates' court for alteration thereof.[4] "Maintenance agreement" means /

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1. M.C.A. 1973, ss.34-36. See generally Cretney, pp.369-371.
2. Cf. Sc.Law Com.Memo.No.22, S.104 et seq and Faculty Response, pp.76-80.
3. "If the court....is satisfied either - that by reason of a change in the circumstances the agreement should be altered...." (s.35(2)). Such alterations (including insertion of financial arrangements) may be made "as may appear to that court" (court or magistrates' court) "to be just, having regard to all the circumstances" and if relevant, the factors mentioned in s.25(3). (s.35(2)).
4. s.35.

means any written agreement containing financial arrangements whether made during the continuance or after the dissolution or annulment of the marriage, or a separation agreement which contains no financial afrrangements in a case where no other written agreement between the same parties contains such arrangements.[1] Cretney points out[2] that the term "financial arrangements" has a broad scope, and may encompass subjects such as use of property, maintenance and education of any child ("whether or not a child of the family"), and rights and liabilities of spouses including former spouses rendered so by divorce or nullity.

Grounds for variation are lack of "proper financial arrangements" in the deed for any child of the family, or changes in circumstances (including changes foreseen by the parties) and that, by reason of a change in the circumstances in the light of which financial arrangements were made or omitted, the agreement may be altered [3] or there may be inserted in it financial arrangements.

"Apart from the normal case of a variation of periodical payments, this means that the court could vary agreements about the ownership and occupation of the matrimonial home (or furniture). More surprisingly, it seems clear from the plain words of the definition that the court has power to insert a provision for a lump sum or other capital provision into an agreement, in sharp contrast to the prohibition on varying court orders for periodical payments in this way. This point was left open in Pace (formerly Doe) v. Doe" (1977 Fam.,18,23), however. Even if it is held that /

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1. s.34(2).
2. p.231.
3. s.35(2).

that such power exists the court may, in the exercise of its discretion, be reluctant to exercise it".

The variation cannot be formulated so as to remain in effect after the payee's re-marriage[1]; if the agreement makes provision for continuation of payment after the death of either party, there is power to the survivor or to the deceased's representatives within six months of the taking-out of representation to apply for variation[2].

Financial agreements in contemplation of divorce are competent and if, after investigation, are given effect to by the court, will be final,[3] and, according to Cretney, probably will become much more common[4]. Long-term separation agreements have advantages and disadvantages.

FINANCIAL PROVISION ON TERMINATION OF MARRIAGE OTHER THAN BY DEATH

In this sphere, one notable difference between English and Scots Law is that in England "fundamentally different codes apply" in the Superior Courts and in the Magistrates' Courts. At present in Scotland there is but one court competent to grant divorce or nullity[5], and in the case of judicial separation, no difference is discernible between the approach and principles in use in the Court of Session and in the Sheriff Courts.[6]

THE /

1. Cretney, 3rd edn., p.371.
2. s.36.
3. Minton 1979 1 All E.R.79. Cretney, pp.373-4.
4. Cretney, pp.372-3.
5. Contrast Scottish and English approaches to the subject of the financial and property consequences of nullity.
6. Separation actions are heard mainly by the Sheriff Courts. See as to procedure in each court Sc.Law Comm.Memo.No.22, 2.205-208. Put see, as to Scotland, Divorce Jurisdiction, Court Fees and Legal Aid (Sc.) Bill. And as to England see Domestic Proceedings and Magistrates' Courts Act 1978; See also "Proposals for Reform", Bromley's Family Law, 6th edn., pp.7/8.

THE SUPERIOR COURTS: orders potentially available

That which a Scots lawyer would term "interim aliment pendente lite" is available to either spouse upon order of the court.[1]

Upon grant of decree of divorce, nullity or separation, the court may order[2] either spouse to make periodical payments, as specified in size and duration by the order, to the other, or an order that either spouse shall "secure" such payments to the other.[3] An order for the periodical payment of money ceases automatically upon the payee's re-marriage.[4]

In terms of s.23(1)(c) of the 1973 Act, the court is empowered to order either party in divorce, judicial /

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1. M.C.A. 1973, s.22.
2. Ibid., s.23(1).
3. This means that the payer spouse must set aside for the purpose a suitable capital sum, which Cretney at p.187 notes will be vested usually in trustees; thus, if the payer fails to fulfil his obligations, resort can be had to this fund. Unless and until such an event occurs, the payer remains the proprietor of the fund. This is a most useful provision: contrast the unsatisfactory Scottish position concerning periodical payments (see e.g. Chapter 4, "Enforcement of Alimentary Awards"). Cretney points out that the order remains enforceable and the fund attachable by the wife in the husband's bankruptcy (among other disastrous happenings befalling the husband). Moreover, although it might be thought inequitable for unsecured payments to continue after the payer's death, where there is a security fund, it can then be drawn upon without doing violence to the remainder of the estate, which for example might be destined for a second wife). It may be that the security is provided by a second mortgage on the house (Parker v. P. 1972 Fam.116. See Cretney, pp.187/188).
4. 1973 Act, s.28(1). This was not always so (the change having been made by the 1970 Act, s.21(1)), and Cretney (p.188) regrets the change in the rule.

judicial separation or nullity proceedings to pay to the other a lump sum, if necessary in the form of (secured) instalments.

Orders of periodical payments and/or of a lump sum may be made in favour of children or in favour of persons on behalf of children.

Provisions concerning the lump sum and the periodical payment are not mutually exclusive. Both may be made in one case.[1]

VARIATION

A periodical payment order may be varied upon proof of change of circumstances. There cannot be variation of a lump sum award, except in respect of matters concerning the details of instalment payment. Upon application for variation of a periodical payment award, the court shall not make instead a lump sum award. Where originally no capital sum award was made (presumably irrespective of whether a periodical payment order was made) it is competent[2] for a party subsequently to apply to the court for such an award, but Cretney remarks[3], "the court will not allow the declared policy of the Act to be outflanked in this way unless there are special circumstances."

To this point, there is considerable similarity between the English and Scottish[4] rules.

In terms of s.24 of the 1973 Act, the court, on granting decree of divorce, nullity, or judicial separation may order a transfer of property from one party to the other or to a child or children, whether the /

1. s.23(1).
2. s.23(1).
3. p.342.
4. See Chapter 5.

the property is in possession or in reversion, or to vary, or extinguish, or alter the terms of benefit of any ante-nuptial or post-nuptial marriage settlement, or to make a new settlement, the terms of which the court will specify. The remedy of the transferring of specific property may be given as an alternative or in addition to a lump sum order.[1]

The exercise of the court's discretion is to be guided by certain factors statutorily specified, and pre-1970 precedent is not generally to be used in the interpretation of the new criteria.[2] Seven factors are set down. These are:- income and resources of the parties, now and in the foreseeable future, financial needs and responsibilities of the parties now and in the foreseeable future, standard of living of the family before breakdown, age of each partner and duration of the marriage,[3] any physical or mental disability of either, "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;"[4] and, in divorce or nullity, the value to either spouse of any benefit (for example, a pension[5]) which, by reason of the dissolution or nullity, that party has lost the chance of acquiring. The court, having had regard to these matters, is enjoined "so to exercise those" (discretionary) "powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so[6], in the /

1. See Cretney, p.280.
2. Ibid., p.284.
3. Cf. German and Scandinavian ideas, supra.
4. s.25(1)(f).
5. Cretney p.304 comments that the husband's private occupational pension may be the spouses' "only substantial asset" next to the matrimonial home.
6. Note the creeping entrance of 'conduct' as a criterion. Cf. Memo.No.22, 3.1 et seq and Faculty Response pp. 50-55. As matters have turned out in England, it appears that only "obvious and gross" misconduct, such as to make it "repugnant to justice" to award support to the perpetrator thereof, will be taken into account. (the Wachtel principle). But there may be some falling away from this: "it is possible that conduct may be taken into account rather more readily in the future than it has been during the past few years." (Bromley's Family Law

the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."[1]

Courts are not fond of permitting any judicial habit to be regarded as a rule; hence, although one third of the erstwhile joint income and one third of "family assets" often will be given to the wife, reliance cannot always be placed on this[2]. Certainly, the courts must be free to award a larger or smaller fraction as circumstances suggest.

In the era of the Welfare State, and of a rising rate of divorce and re-marriage, social security payments are important. However, the court, when first ascertaining the parties' means, will not pay regard to the 'social security aspect'.[3] Thus, although if a man's payments to his former wife are small, she may be entitled to supplementary benefit, an award will not be made for the purpose of allowing a man to slough off his responsibility, and to rely on the State.[4] As to the sensitive subject of the significance of a wife's earning capacity, although few would argue that her actual earning capacity is not relevant, few (although perhaps more, as time progresses) might demand that the childless wife qualified to earn a /

6th edn., p. 556). Moreover, the parties may be, as it were, "in pari delicto", each being as bad as the other, in which case conduct will not impinge upon property distribution. (See Cretney, pp.194/5.)

1. s.25(1).
2. Cretney, p.193, and cases cited footnote 61.
3. The Scottish judicial attitude is the same: see supra, Chapter 4.
4. Cf. Aliment (Chapter 4) and Divorce (Chapter 5(1)); Memo.No.22, Part V Relationship between Public and Private Law and Faculty Response; Cretney, pp.238-252, "Supplementary Benefit and Other Social Security Provision". C. & W., p.390 et seq, pp.553-4, and pp.562-3.

a living must do so, in order to lessen the burden upon her (deserting) husband's income and/or upon the State. This matter has been discussed in the Scottish context.[1] Attitudes are changing, and, as the years go on, most people will be 'married people' for at least some years, and most people will be members of the (paid) work force for many years. In England, at present, the attitude seems to be that the young and able-bodied wife, relatively free of family responsibilities, "should not necessarily expect" as large an award as the older woman who has spent many years caring for family and home, and in respect of whom it may be unreasonable to expect her later years to be spent in paid employment. It seems reasonable that the courts should recognise new philosophies of life,[2] and should insist, in a suitable case /

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1. Chapter 5(1) and see Chapter 7. The philosophy of the Divorce Reform Act, 1969 (albeit with the addition of new statutory property regulation) and of the Divorce (Sc.) Act, 1976 seems to have been that, at least as far as dissolution of marriage (as opposed to property consequences) is concerned, the 'innocent' party, whether or not economically weaker, may rest no longer in the safe anchorage of legally blameless conduct.
2. and realities of life: however, an award in favour of a husband is still a sufficiently rare event to excite press comment - see recent Scottish case of Henderson (Glasgow Herald 6/4/79), in which a capital award of £1900 (amount sued for being £5000) against the wife was ordered. It appears that the sum awarded represented one-third of the wife's interest in the jointly owned home. The wife was aged 28, and earned £100 per week tax-free as a secretary in Qatar. The husband was aged 30, and earned £85 per week as a panel beater. The wife's rent was low (£15-£20 per month). The ground of divorce was the irretrievable breakdown of the marriage as evidenced by the wife's adultery.

case, that the new woman live up to her ideals. The presence or absence of children and the arrangements made for the care of them, must be a factor of great importance.

Another problem common to both jurisdictions is the treatment of the interests of the former spouse and of the mistress. In England, it appears that a spouse must take her spouse as she finds him, encumbered, if it so happens, by former families and responsibilities,[1] which is the rule in Scotland, but that, where making an award to a second wife after dissolution of the second marriage, strict arithmetical accuracy may not be appropriate.[2] Similarly, the presence of a mistress may be "taken into account". In Scotland, the mistress is despatched to oblivion and her existence does not (or so it is said) weigh with the court, although enforceability of the award surely must be an important, even if sometimes unspoken, consideration.

MAGISTRATES' POWERS

The magistrates' courts, originally designed to provide justice for the poor, still do not claim the attention of the more prosperous classes in the resolution of disputes. The magistrates' courts in their matrimonial jurisdiction (maintenance and custody[3]) deal with /

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1. C., p.198.
2. See C.'s example, ibid. The author suggests (see p.198, fn.16 and cases there cited) that the new divorce legislation may operate in such a way that the claims of the wife, and of the mistress, are strengthened and weakened, respectively. If so, this is an example of a concept perhaps alien to the basis of the Act, yet one which such an Act may inevitably bring in its train, to offset the potential harshness of its liberalism.
3. though see extension of powers - Domestic Proceedings and Magistrates' Courts Act, 1978 (below).

with those at the lower end of the income scale: in consequence, "the substantive law must be viewed in the context of its inter-relation with the Social Security System."[1]

Until 1978, the Act of principal importance was the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. Relief was obtainable if either spouse could prove an offence, such as desertion, adultery or "persistent" cruelty.[2] Hence, the matrimonial offence lived on in the magistrates' courts. The relief offered was an order for periodical payment or a separation order,[3] but there was no power to the magistrates to award a lump sum nor to order a secured provision.[4]

The remedy of a financial order arising from "wilful" failure to maintain may be pursued in the High Court or in the Magistrates' Courts. Originally, at common law, the wife could have recourse to the ecclesiastical court or she could rely upon the agency of /

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1. C., p.211.
2. The adjective differentiates this ground from "the old divorce ground of cruelty" -Cretney.
3. The separation order, which has now been abolished and replaced by the protection order (s.16 below: not so called in the Act) and the exclusion order (for which either party (to a marriage) may apply (contrast 1976 Act)), was able to be obtained by a wife, but not a husband, on proof of an offence, So long as she herself had not committed adultery which had not been condoned, connived at or "by wilful neglect or misconduct conduced to". On receipt of a separation order, the applicant was no longer bound to cohabit with the respondent, but the latter was not thereby removed from the matrimonial home, and the separation order also terminated the running of a period of desertion. (See Annotations to Statute, s.16).
4. Even under the 1978 Act (q.v.), there is no power to order the latter.

of necessity[1].

It seemed strange that there should be in the same jurisdiction two sets of courts, one applying the old notion of offence, and one applying the new philosophy.[2] A different family law appeared to be administered by each. The assimilation of the two has now been attempted by the Domestic Proceedings and Magistrates' Courts Act, 1978,[3] which repeals in its entirety the Act of 1960, and is a lengthy piece of legislation extending to 90 sections.

The points of greatest importance[4] are that lump sum orders may now be made by magistrates, to a limit of /

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1. The English agency was "irrevocable" in the sense that it could not be revoked by any act of the husband (C., p.218/219): the Scots praepositura may be revoked in the manner earlier explained (Chapter 4), but the wife, unless she is not willing to adhere, does not lose her right to pledge her husband's credit for necessaries (for what that right is worth) if he refuses to maintain her. (See e.g. C. & W., pp.263-5).
   In England, the agency was terminated by commission by the wife of an act removing from the husband his duty to maintain (adultery, cruelty, desertion): as has been seen, in Scots law, adultery by the wife combined with her willingness to adhere does not relieve the husband of his duty to aliment, if otherwise exigible.
   Since it was competent for the courts directly to enforce the husband's duty in this regard, the wife's agency of necessity was abolished as an anachronism by the 1970 Act. (C., p.273).
2. It might have been a system which suited the cases and circumstances; but see criticism, Cretney, pp. 216/217 and 224.
3. following Law Com. (Report on Matrimonial Proceedings in Magistrates' Courts, Law Com.No.77, October 1976).
4. See Annotations to Statute (M.D.A.Freeman)
   The Act came into force on 1/2/81.

of £500[1]; an order may be obtained to the effect that the respondent (of either sex) shall not use violence against the applicant or a child of the family and, if violence has been used, or there has been a threat of violence and the use of violence against some other person, or if in contravention of an order there has been a threat of violence against the applicant or a child of the family and (as a general, additional, requirement in any of these cases) there is danger of physical injury to the applicant or a child of the family, then the court may order the respondent to leave the matrimonial home and/or prohibit the respondent from entering the matrimonial home. There may be "expedited orders" in suitable cases[2], but in such a case the order shall not take effect until the date on which notice of the order is served on the respondent, or such later date as the court may specify, and the order shall cease to have effect on the expiry of 28 days from the making of the order, or the date of commencement of the hearing of the application for an order under this section (16) of the Act, whichever is the earlier. A power of arrest may be attached (s.18) to a s.16 order if the court is satisfied that the respondent has physically injured the applicant or a child of the family and considers that he/she is likely to do so again. Where no power of arrest has been attached, and where the applicant for the (s.16) order /

(to applicant, and/or to a child of the family).

1. but magistrates may not make property transfer orders, not order secured periodical payments.
2. such an order being effective though no summons has been served on the respondent or none has been served within a reasonable time before the hearing of the application or though the summons served requires the respondent to appear at some other time or place. In these matters speed is important. Cf. Sc. Law Com. Memo. No.41 ("Occupancy Rights in the Matrimonial Home and Domestic Violence" - April, 1978), Propn. 12 (2.62) and Fac. Resp. criticisms, p.25.

order considers that the other party has disobeyed the order, he/she may apply to a J.P. of the area in which either party ordinarily resides for the issue of a warrant for the arrest of the other party. The application must be substantiated on oath, and the justice must have reasonable grounds for believing that the other party to the marriage has disobeyed the order.

In terms of s.1 of the Act, either party to a marriage may apply to a magistrates' court for an order for financial provision (s.2[1]), on the ground that the other has failed to provide reasonable maintenance for the applicant or to provide, or to make proper contribution towards, reasonable maintenance for any child of the family, or has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent, or has deserted the applicant.

Here there are certain points of importance. Either party (to a marriage) may apply for an order. Under the 1960 Act, a wife might be ordered to maintain her husband only where he could not maintain himself. The principle of equality of duty is introduced. It exists now in English divorce law[2]. It is no longer necessary that there had been wilful failure to maintain by the party against whom an order is made (i.e. that (he) was under a common law obligation to maintain his wife (the payee)).[3]

Cohabitation is not a necessary bar to application, if /

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1. that is, for periodical payments, for such term as may be specified in the order,(to the applicant and/or to the applicant for the benefit of a child of the family and/or to such child and/or to such person/s) the payment of a lump sum (not in excess of £500).
2. Calderbank v. C. 1976 Fam.93.
3. Cretney, p.336.

if the applicant has little choice but to remain with the respondent. This seems to be of less significance than might be thought at first[1]: the comments upon the Act are concerned with the question whether cohabitation after an incident means that it cannot be said that the applicant "cannot reasonably be expected to live with the respondent." The provision (s.1(c)) is intended to enable a 'wife... to escape from her husband'.[2]

Section 3 contains guidelines to which the court "shall have regard" when considering an application under s.2. These are:- present and future income and financial resources, needs and responsibilities of each, standard of living previously enjoyed by the parties to the marriage, age of each party to the marriage and duration of the marriage, any physical or mental disability of either of the parties to the marriage, contributions made by each to the welfare of the family, "including any contribution made by looking after the home or caring for the family, and, (s.3(1)(g)), "any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage." The "Wachtel principle" is to the effect that, quoad the 1973 Act, only "obvious and gross" conduct should be relevant. Possibly that lead will be /

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1. It may be thought that one of the most urgent needs of the wife today is that she should be able to insist upon receipt of a reasonable proportion of the money earned by the husband during cohabitation - or owned by the husband? Would the aim be secured maintenance or property adjustment? Cf. Chapter 7 - 'Separation of Property With Concurrent Compensation of Gains'. See also Memo.No.22, 2.179 and Fac. Resp. pp.41/42.
2. Cretney, p.348.

be taken: yet within the Wachtel principle there is room for variation of opinion as to what is "obvious and gross".[1] Although conduct is relevant, Freeman notes that not only has adultery ceased to be an automatic bar to an award but it is no longer a ground for the making of an order.

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1. And see Bromley's 6th edn., p. 556.

LEGISLATION 1969 - 1978

As is well known, the Divorce Reform Act, 1969, introduced into English law as the new, and sole, ground of divorce the ground that the marriage has broken down irretrievably.

The court is entitled to hold that irretrievable breakdown has occurred if it is proved that any one, or more, of five factors is present. This obviates the need[1] for a thorough investigation of all the circumstances of every marriage sought to be dissolved, an idea advanced by the Archbishop of Canterbury's Group ("Putting Asunder", 1966), and rejected subsequently by the Law Commission as lengthy, expensive and impracticable. The prohibition[2] of the bringing of divorce proceedings within three years of the celebration of the marriage, except with judicial permission, to be granted only in an exceptional case, remained in 1969, but was repealed and replaced by a rule to similar effect in the Matrimonial Causes Act, 1973 (s.3). Of course, events which took place within the three-year period competently may be referred to to found an action thereafter (s.3(4)). The factors are merely "guidelines"[3] by reference to which the court may reach the decision that the marriage has irretrievably broken down. However, at least one of the facts specified must be proved.

References are to the consolidating Act of 1973.

The factors which are relevant to the proof of irretrievable breakdown ("The court - shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts...."[4]) are the commission of adultery by /

1. Passingham, p.12.
2. in terms of the Matrimonial Causes Act, 1965, s.2.
3. Passingham, p.14.
4. s.1(2).

by the respondent and "that the petitioner finds it intolerable to live with the respondent[1]", "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent[2]", "that the respondent has deserted the petitioner for a continuous period of at least two years, immediately preceding the presentation of the petition", that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition - "and the respondent consents to a decree being granted", and that "the parties to the marriage have lived apart for a continuous period of five years immediately preceding the presentation of the petition[3]". Upon averment of one of these factors, the court must inquire "so far as it reasonably can" into the facts alleged, and if satisfied, shall grant decree of divorce "unless /

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1. Thus, here there is a double test, but the latter point is judged on a subjective basis.
2. This is an objective test, though Passingham points out (p.22) that the personal circumstances of the petitioner must be taken into account in order to find the answer in the particular case to the objective test. Clearly this ground is to be compared with the old "offence" of "cruelty". Passingham emphasises (p.23) that, his examples are not intended to be exhaustive. The conduct must be serious, not trivial. Evil intent is not necessary, though it is relevant. 'old-style' cruelty, obviously, is comprehended by this subsection (s.1(2)(b)); so too is constructive desertion (conduct such as would drive a reasonable person from the matrimonial home), sodoney or bestiality, and (Passingham, p.23) some forms of unsoundness of mind, or perhaps since the list is not closed, modern sources of grievance such as sex-change operations or the submission by the wife to A.I.D. without consent of the husband (Cf. in Scotland MacLennan v. M. 1958 S.C.105 (A.I.D. even without consent does not amount to adultery: L.Wheatley); the Royal Commission on Marriage and Divorce (1956) suggested that this should form a new ground of divorce (C. & W., pp.449-450). The subject is of increasing importance in view of modern developments such as "sperm banks").
3. s.1(2)(a) - (e).

"unless it is satisfied on all the evidence that the marriage has not broken down irretrievably"[1]. The concept of decree nisi, to be followed by decree absolute six months later is retained in the general case[2]. This gives to the court the opportunity to reconsider the case in the light of alleged material facts not previously adduced: the court may confirm the decree, making it absolute, or rescind the decree, or require further inquiry.[3]

Section 2 contains provisions which concern cohabitation - and possible presumption of condonation arising therefrom - after the discovery by the petitioner of adultery by the respondent[4] or occurrence of intolerable behaviour[5]. A similar rule is applied in the case of desertion, though the period(s) of cohabitation (not exceeding six months in all), which do not break the continuity, nevertheless do not "count" towards the total period of desertion.[6] Section 2(7) gives a necessary measure of protection to the respondent in declaring that where the "two year with consent" (s.1(2)(d)) provision is used, the 'consenting' spouse (respondent) must have been given such information as will enable him to understand the consequences of his consent. (The protection is to be effected by means of rules of court, which must specify also "the steps which he" (the respondent) "must take to indicate that he consents to the grant of a decree")[7]. "Living together /

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1. s.1(3) and (4).
2. s.1(5).
3. s.9. See also s.10(2) and s.10(3) (below).
4. After 6 months, that act of adultery cannot found an action.
5. a similar 6-month rule.
6. s.2(5). In these cases, no mention is made of the elaboration - "with a view to reconciliation" - contained in the Matrimonial Causes Act, 1965, s.1(2): see Passingham, pp.8/9, Para. 19 .
7. See also s.10 (rescission of decree before it is made absolute, if it can be shown that "the petitioner misled the respondent (whether intentionally or unintentionally) about any matter which the respondent took into account in deciding to give his consent." (s.10(1)).

together" means cohabitation in the same household.[1] Section 4 deals with "conversion" of judicial separation into divorce.

In the case of the "five year separation" (with or without consent) ground of action (s.1(2)(e)), the respondent may oppose the grant of decree by averring that the dissolution will result in grave financial or other hardship to the respondent, and that it would in all circumstances be wrong to dissolve the marriage, and if the court, upon consideration of all the circumstances, concludes that it would be wrong to dissolve the marriage, it shall dismiss the petition. "For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved." (s.5(3)). "Reconciliation" provisions are to be found in s.6.

"Arrangements" made by the parties in connection with the divorce proceedings may be referred by the parties to the court (which may have made provision by rules of court for this) in order that the court may express an opinion "should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit."[2]

Intervention /

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1. s.2(6). Thus the spouses do not necessarily cohabit though they live under the same roof, because there can be two households under the same roof (Bassingham, p.17, para. 41 .).
2. This seems a coy and circumlocutory provision. Cf. Sc.L.Com.Memo.No.22, 3.104 et seq and Fac.Response, pp.76-80. Bassingham (with reference to the similar s.7 of the 1969 Act) explains (pp.29/30, paras 75 and 76) that it avoids the disappointment which would arise if the parties' financial situation were such as to place the court in a position in which it must refuse decree or refuse to make a decree absolute. Proposed arrangements can be scrutinised in advance. It is obviously desirable that the same judge should consider the arrangements and make the ultimate decision on the grant or withholding of decree of divorce /

Intervention by the Queen's Proctor remains competent (s.8).

Where the respondent (in a "2 year" or "5 year" case, and before decree is made absolute) has applied for consideration of his financial position as it will be after divorce and the court, in granting decree (nisi), has made no finding upon any other matter apart from the fact of the requisite period of separation, the court shall consider "all the circumstances" (age, health, conduct (note), earning capacity, financial resources and financial obligations of each, and financial position of respondent as having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first). Following upon such consideration, the court shall not make the decree absolute unless it is satisfied that the petitioner should not make any financial provision for the respondent, or that the financial provision made by the petitioner "is reasonable and fair or the best that can be made in the circumstances". Despite the enforced consideration of these factors, it is still open to the court to confirm the decree nisi if it appears "that there are circumstances making it desirable that the decree should be made absolute without delay and the court has obtained a satisfactory undertaking from /

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divorce (P., p.30). S.7 of the 1969 Act could be used also in the case of judicial separation (P., p.35, para 92); presumably this is true of the identically worded new s.7, but in any event (Cretney, 3rd edn., p.156) suggests that the provision is ineffective. Rules of court were made, but were repealed and were not replaced. Perhaps the section was too hesitant and tentative. "...there could be no obligation to refer an agreement to the court, and the court's only power was to express an opinion on the reasonableness of the agreement and to give directions". Agreements may be made, but "there is no effective provision for prior reference to the court."

from the petitioner that he will make such financial provision for the respondent as the court may approve."[1] These provisions give an interesting "property" sidelight not contained in the "property" part (Part II) of the Act ("Financial Relief For Parties To Marriage And Children Of Family"). Part I concerns "Divorce, Nullity And Other Matrimonial Suits."

The grounds of judicial separation are that any of the five factors specified in s.1(2) exists, but the court here shall not be concerned to find whether the marriage has broken down irretrievably.[2] The effect of judicial separation is that "it shall no longer be obligatory for the petitioner to cohabit with the respondent." (s.18). Moreover (s.18), if, during judicial separation, either party dies wholly or partially intestate, the intestate estate shall devolve as if the other party were then already dead. This goes slightly further than before: previously, and still in Scotland (Conjugal Rights (Sc.) Amendment Act, 1861, s.6[3]) the surviving separated spouse lost his rights of succession only in property acquired by the other spouse after separation.

Part II of the Act pertains to financial matters: maintenance, during and after litigation, lump sums; lump /

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1. S.10(3) and (4). See Passingham, pp.27/28, paras. 67 - 70 , concerning the comparable provision - s.6 - of the 1969 Act. He contrasts these rules with the defence of grave hardship under s.4 of the 1969 Act (s.5 of the 1973 Act) in a "5 year" case, which, if sufficiently made out, will bar divorce; a reasonable and fair provision or "the best that can be made in the circumstances" will suffice to overrule the respondent's objections and allow the court to make decree absolute.
2. s.17: the "guide-lines" become grounds - Passingham, p.34.
3. Apart from the larger issues of matrimonial property philosophy, there is not equality of treatment of the sexes in Scots Law here. See Chapter I: Statutory Reforms.

lump sum payments may be made to or on behalf of children of the family), property transfers and criteria for making such awards[1], maintenance in the case of neglect to maintain, the effect of re-marriage, variation, discharge and enforcement of orders and orders for repayment.[2]

Part III concerns the protection and custody of children and Part IV is "Miscellaneous And Supplemental". The Act of 1973 repeals wholly the 1969 Act and Part I of the 1970 Act, together with certain /

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1. See Passingham (1970 Act), Chapter IV, pp.23-26, paras. 52 - 59 ; and see Cretney's exposition (p.284 et seq.) referred to above in the text, pp.
2. The Matrimonial Homes and Property Bill (5/2/81) (designed to amend two English Acts; it will not apply to Scotland or Northern Ireland) in clauses 7 and 8 makes certain amendments to the 1973 Act. Clause 7 inserts a new section 24A, conferring on the court power to order the sale of property of either spouse where an order for financial relief, other than an order for unsecured periodical payments, is made; requirements may be attached that the property should be offered for sale to a specified purchaser or class of purchaser and that payment be made out of the proceeds of sale but any other supplementary provision may be made, as the court thinks fit; orders for sale made on divorce or nullity shall not take effect until the decree has been made absolute; generally, the court may direct that the order, or specified provision thereof, shall not take effect until the occurrence of an event specified by the court or the expiration of a period so specified; where the proceeds of sale are to be used to secure periodical payments to a party to the marriage, the order shall cease to have effect on the death or re-marriage of that person; a new quideline is inserted into the 1973 Act, S.25, namely that where a party to a marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and a stranger to the marriage also has such interest, then, in deciding whether to exercise its powers under s.24A, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order, and any representations shall be included among the circumstances to which the court is required to have regard. This is the usual English answer to a difficult problem: the court, in its discretion, shall have regard to the different interests involved. (Contrast generally Scotland - Chapter 7 - Rights of Third Parties)

certain other sections thereof.[1] The Law Reform (Miscellaneous Provisions) Act, 1970 abolished actions for breach of promise of marriage[2], but regulates property /

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1. see Passingham, "The Divorce Reform Act 1969" and "The Matrimonial Proceedings and Property Act 1970". See also Otto Kahn-Freund (1970) 33 M.L.R.601, at pp.615 et seq. for a discussion of the background to, and analysis of, the 1970 Matrimonial Proceedings and Property Act, which, the author notes, was "not a new venture" (as was the Matrimonial Homes Act, 1967), because " I t presents itself as an expansion and systematisation of the - oddly named - ancillary provisions of the Matrimonial Causes Act "(1965)" which deal with the financial relations between the spouses", and he takes the view that the expansion aspect thereof makes possible judicial reform of this sphere of law, and provides powers which, though requiring modification perhaps, would still be appropriate in a system which had adopted some type of community rule. (p.616, making reference on the latter point to L.C.Report No.25, Family Law, Financial Provisions in Matrimonial Proceedings (July 1969) para.67). At p.627 he comments on the possibilities of the property transfer order, which, unlike the (re)statement "of the powers to settle property and to vary settlements" is "a complete innovation". It is suggested that it is the discretionary tone of the English legislation which renders it unsuitable for conversion to "some type of community rule", and that England, by choosing the path of discretion and by building up a body of 'pragmatic' or 'justice in the individual case and otherwise unrelated' decisions, has set herself at a considerable distance from continental community ideas. See Professor Kahn-Freund's ideas, expressed in the Josef Unger Memorial Lecture in 1971: outward separation of property vis-a-vis third parties, concept of 'family assets' (including matrimonial home) and presumed jointness thereof as between husband and wife, judicial variation of shares therein by matrimonial property adjustment order, registration by non-title-holding spouse of beneficial share in the home, legal title to furniture and other chattels in common use of both spouses to vest in both spouses jointly and restriction on disposal thereof by one without consent of the other or judicial consent.
2. s.1(1)("no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement" - an interesting conflict point).

property matters between engaged couples (ss.2 and 3), and abolished actions for enticement and seduction (s.5)[1] and for damages for adultery with the plaintiff's spouse[2].

Domestic Violence and Matrimonial Proceedings Act, 1976

This Act is intended to help the "battered wife".[3] It does not apply to Scotland[4]. Injunctions against molestation of the other party and/or of a child living with the applicant are to be available from the county court (" Without prejudice to the jurisdiction of the High Court"), as are exclusion orders from the matrimonial home or part thereof or from the area in which the matrimonial home is situated, and orders requiring the other spouse to permit the applicant to enter and remain in the matrimonial home "whether or not any other relief is sought in the proceedings." The potential protection extends to those who are living together as husband and wife.

Where an injunction is granted, the judge may attach to it a power of arrest, if actual bodily harm has /

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1. although it is thought that in English law no action ever lay in tort by the woman herself; Rosses v. Bhagvat Sinhjee (1891) 19 R.31, Soutar v. Paters 1912 1 S.L.T.111.
2. L.R. (Misc.Provs.) Act, 1970, s.4, repealed by Matrimonial Causes Act, 1973, s.54(1)(b), Sched.3. "....the plaintiff now has an action for damages for loss of consortium only if this was due to the defendant's breach of contract or tort" (Bromley's Family Law, 5th edn. p.123.
3. though M.D.A.Freeman, who provides the annotations to the Act, notes that nowhere in the Act is the word "batter" found. Rather, the word "molesting" is used, which has been liberally interpreted, to mean constant pestering (Vaughan v. V. 1973 3 All E.R.449). Physical violence is not a requirement.
4. As to proposed solutions for Scotland, see Sc.L. Com.Memo.No.41. See 1981 Act; Nichols and Meston, Chapter 3, Exclusion Orders.

has been done and he considers it likely to occur again, and, if so, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of the injunction. A person so arrested must be brought before a judge within 24 hours of the arrest. The terms of the section (s.2) do not comprehend suddenly-arising cases of (often week-end) domestic violence. The line between civil and criminal law and remedies seems also to have been muddled.

Section 3 amends and strengthens s.1(2) of the Matrimonial Homes Act, 1967[1]: as to occupation rights, application may be made for court order, not only to "regulate" but to "prohibit, suspend or restrict"[2] the exercise by either spouse of the right to occupy the dwelling-house, or to require "either spouse to permit the exercise by the other of that right". Freeman takes the view that " V ery little use is made of the Matrimonial Homes Act ....".

In terms of s.4, where each spouse is entitled to occupy a dwelling-house in which they have or at any time have had a matrimonial home by virtue of the vesting in them jointly of a legal estate or by virtue of a contract or by virtue of any enactment giving them the right to remain in occupation, either may make application to the court with respect to the exercise during the subsistence of the marriage of the right to occupy the dwellinghouse for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant. Freeman explains that this extends s.1(2) of /

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1. 1967 Act - see supra.
2. Contrast Tarr v. Tarr 1973 A.C.254, which this section overrules.

of the 1967 Act, so that its orders may apply where the legal estate in the matrimonial home or former matrimonial home is jointly owned, or where each of them is entitled to occupy by virtue of a contract or of any enactment[1]; previously, unless the case was one of divorce, when the Matrimonial Causes Act, 1973, s.24 became applicable, recourse had to be had to the Law of Property Act, 1925, s.30, "under which the court in its discretion can order a sale but nothing else."

Inheritance (Provision for Family and Dependants) Act, 1975[2]

Domestic Proceedings and Magistrates' Courts Act, 1978[3]

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1. s.1(2) begins, "So long as one spouse has rights of occupation...."
2. See supra.
3. See supra.

THE PROPERTY OF MARRIED PERSONS

ACCORDING TO THE LAW OF SCOTLAND

VOLUME IV

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THESIS SUBMITTED FOR THE DEGREE OF Ph.D.

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VOLUME IV

CHAPTER 7

SUGGESTIONS FOR REFORM

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SUGGESTIONS FOR REFORM

It is clear from the foregoing discussion that the search for the optimum system of matrimonial property regulation is one which has been occupying many minds in many jurisdictions.

The range of choice runs from systems of fairly strict separation[1] through systems of separation in which the legislature has gone far to ameliorate the sometimes harsh effects of separation (as in England, and as in New Zealand and Australia[2], where perhaps even greater enthusiasm, especially for detailed guidelines to aid the judiciary in the use of its discretion, has been shown) while restricting the operation of the rules to situations of "marriage emergency", such as divorce, or marriage termination by death, and systems of community of acquests or, in the South African phrase, of profit and loss, systems of "deferred community" (Germany and Scandinavia, the latter much affected by the notion of State support of marriage, and non-marriage), to the system of community and profit and loss, the "full-blooded community", found in South Africa and frequently 'contracted out of' by persons married there. Among the systems studied, none prohibited the contracting out of the norm, though the choice of regimes was restricted in some cases to a few prescribed options. In others choice was unrestricted, allowing to the parties the opportunity to select a regime as their whim /

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1. A system of total separation (no duty to maintain stante matrimonio, no rights de jure to the surviving partner on death) has not been encountered. Such duties exist, of course, in Scots and English Law (though English law will not, it seems, embrace the concept of 'legal rights', but, as always prefers the remedy of judicial discretion - see Chapter 6, England), as they do in Italian Law, which also operates a system of separation.
2. see infra.

whim directed[1].

It may be argued that a system of separation is out of date and unrealistic, in that the rules bear no relation to the realities. The Louisiana lawyers are anxious to retain their system of community if they can render it "sex neutral". France, for its new, post 1965, regime, has chosen to retain community, though of acquests only, and has "toned down" its bias in favour of men, as befits the new thinking, though in the general case, the husband's headship remains. Germany, too, has made a new choice[2] with effect from 1st June, 1958 (change having been prompted by constitutional reasons), and has made the transition from separation to "deferred community" on the Scandinavian model, which model has been said to be "the system of the future". Holland appears to have adopted an amalgamation of different concepts and rules, but, like France, has a history of "community property", not "separate property". Apart from Sundberg and the Scandinavian ideas, which are different in genus, in basic thinking and view of society, only Professor Glendon has ventured to suggest that, if roles of the sexes /

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1. or to select separation, which has been described (by Rene Savatier) as 'not so much a system as not a system'. Contracting out of separation of property by means of a marriage-contract in England or Scotland seems now to be as rare as contracting out of community of property by means of a marriage-contract is common in South Africa. In South Africa, certain effects of marriage are 'invariable', and marriage-contracts must be ante-nuptial and cancellation and variation are subject to strict regulation. Contra, a feature of community systems, whether deferred or traditional, is the opportunity given, in qualifying circumstances, to seek early separation of property.
2. the resulting system having characteristics both of community and of separate property regimes - see Glendon, p.41.

sexes are to become increasingly interchangeable and similar, a system of separate property and of financial independence within marriage[1], is the system of the future.

There follows a resume of the salient features of the various types of community system. The treatment accorded by each to problems and difficulties common to all, is of interest, and a noting of the solutions adopted may be helpful when attempting to gauge the strengths and weaknesses of our own system and of the suggested reforms thereof.

FEATURES OF SYSTEMS OF COMMUNITY OF PROPERTY AND/OR PROFIT AND LOSS

1. One, or other, of the spouses must be caput et princeps familiae. This person is most often the husband, though increasingly his powers are being restricted.[2] The privilege has two facets: there is the power of administration of the common fund, and there is the status of head of the family. In South Africa, if marriage is in community, the latter attribute cannot be withdrawn from the husband by agreement of parties.[3]

In /

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1. At odds with these thoughts are American trends towards financial and property dependence within non-marriage; cf. Californian decision in Marvin v. Marvin, reported in the press April, 1979.
2. See 3. below.
3. See Chapter 6 (S.A.). In England and Scotland, general attitudes are ambivalent (see "A Woman's Place (1910-1975)", Ruth Adam, a book which demonstrates that, during this century, women have changed their attitudes, aptitudes, natures, and professional and/or home-making capacities, chameleon-like, to suit prevailing economic conditions. This is a gentle, wry and ruminative account(contrast the tone of "Patriarchal Attitudes", Eva Figes) and the legal aspects are not highlighted.

In any jurisdiction, a guide to that system's stance on the matter is to be found in its strictures, or its silence, upon the question of the "duty" of the wife to "follow" the husband.[1] It may be argued that this is now an academic point: economic necessity will dictate the travels of the wife and the husband and "who shall follow whom". It is unsatisfactory that in Scots Law the position should not be clear - but can it be clear, and might not clarity be a doubtful virtue in this context?[2]

2. One, or other, of the spouses has principal power of administration of the fund.

This is a feature which is undergoing change. There may now be a requirement of joint action, or at least of concurrence of the spouse passive in a 'transaction of importance' (of which almost universally included are transactions pertaining to heritage). The less fundamental approach is to hedge the administrator about /

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1. Consider, for example, Belgium (Prof. G. Rateman supra.): it is noted (p.25) that the Belgian code of 1958 does not contain, "as do the laws of our neighbours", any such sentiment as that the husband is head of the family. "The only prerogative left to the husband is his right to decide the situation of the matrimonial home, should no agreement be reached between the spouses." As to Scotland, see Chapter 4.
2. See however proposals concerning location of matrimonial home (Chapter 7). The primary career of the marriage may no longer be clear. It is beyond the scope of this discussion to reflect upon the benefit or otherwise of this trend, but it seems reasonable to note it. On the other hand, it is not impossible that there will be seen a return to home and hearth - perhaps of members of both sexes, if indeed there is to be more leisure for all. Yet it is thought that the advance of women to equal partnership with men (which they have enjoyed at various times in earlier eras, though perhaps not to the same degree) is not a movement which will be reversed.

about with restrictions. Thus, he must act "reasonably" (but the behaviour required of the husband administrator in nineteenth century Scotland was also so described), and unreasonable administration of the matrimonial assets, as by squandering, in many systems of community is sufficient cause to have the community brought to an end, though a judicial act to confirm the cessation of the husband's power of administration and restoration of the wife's power may be necessary, as in South Africa. In the case of the husband's illness or incapacity, the wife may be named as the substitute of the husband as administrator of the community.[1] The "two captains on the bridge" aim has been pursued with greater success perhaps by those systems which have taken a slightly different approach in matters of matrimonial property law.[2]

3. The husband bears the primary duty to maintain.

In South Africa, although in principle each spouse has a duty to support the other, in the normal case the husband bears the duty of supporting wife, children and household.[3] As far as third parties are concerned, where /

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1. as in France, for example.
2. See the German and Scandinavian systems of deferred community. See also the highly individual Dutch approach. Even where the system is not one of deferred community, but there are exceptions to the existing community (as biens reserves in France), the wife (or the spouses), although she will (or each will) have separate administration of these, must suffer restriction in some matters (e.g. gifts). This is comparable perhaps with the restriction in the interests of both parties, of the separate administration stante matrimonio of property which at death, divorce or bodeining will become community property under a deferred community system. A comparison can be drawn with the French rules concerning separate property of spouses under a community system because the community has an interest in the savings from the incomes of the separate property. (Kiralfy, p.91).
3. Hahlo (4th edn.) p.112. Of course, individual circumstances will decide the question of which spouse shall support the other.

where the marriage is out of community contracts for household necessaries import joint and several liability upon the spouses, although the Matrimonial Affairs Act, 1953 alters that liability as between the spouses.[1] "Necessaries" is a word which must be construed in accordance with the standard of life of the spouses. More may be comprised under the husband's duty to support than under the wife's power to pledge her husband's credit for necessaries.

Similarly in Louisiana, each spouse owes to the other a duty of support,[2] but, as in other systems, in recognition of facts, it is the husband who bears the primary financial duty. As far as he is able to do so, he must provide his wife with "all the conveniences of life".[3] However, the wife's duty to contribute to the expenses of running the home is recognised: if she brings a dowry, the income therefrom will be allocated to this purpose, but no further contribution will be demanded of her. If she brings no dowry, she will be liable to contribute to a maximum of 50% of her income, regardless of its size or the fact that it exceeds her husband's income. It is open to the spouses, it seems, to make other arrangements which are better suited to their own case. Pascal, as previously noted, advocates equality /

1. The wife, if she pays, has a right to be reimbursed by her husband. See Colomer's distinction between the rules of "contribution" (between the spouses) and of "responsibility" (to third parties) - a crucial distinction. See generally South Africa, supra. If the marriage is in community, the debt becomes a community debt, and, while the marriage subsists, the husband is liable in full. After dissolution of the marriage, the third party may sue the husband (or his estate) in full, or the wife (or her estate) for half. If, after the division of the joint estate, the husband pays in full, he may claim against his former wife (or her estate) for half. See Hahlo (4th edn.) p.175.
2. La. Civil Code 1870, art.117.
3. Ibid., Art. 120.

equality of burden between the spouses here, and suggests that there should be joint and several liability only for ordinary household expenses. For other expenses of the marriage, he would render the contracting spouse liable.[1] He sees no good reason for the existence of the "50% rule", and argues that the incomes "from both separate and community sources" of each spouse should be calculated, and that the spouses should be liable for household debts in the proportion which the income of one bears to that of the other.[2]

In France, contribution to household maintenance is demanded from each spouse according to his/her means, but the heavier burden, as always, falls on the husband, who must provide his wife with the "necessaries of life" according to his ability. It will be recalled that Colomer concludes that the duty to contribute would not extend to the capital of a non salary earning wife. Contribution in kind to the maintenance of the household is to be recognised.[3] No longer, as regards third parties, is the wife seen, or considered, to be pledging her husband's credit. The new answer (after 1965) is joint and several liability for all debts of the nature of household expenditure which are in accordance with the manner of life of the parties.[4]

In /

1. This seems odd: in marriage, the choice of contracting spouse is often a matter of convenience or accident, and the apparent method of financing a transaction may bear no relation to its true funding.
2. This is an interesting thought. The result as between the parties would probably be equitable. With regard to third parties, however, the notion of joint and several liability is neat and satisfactory. Other systems also call upon contribution according to resources, though perhaps in less specific terms. (See e.g. France, below).
3. Art. 214, Code of 1965.
4. Certain transactions (e.g. h-p contracts), however must be entered into with consent of both spouses. See also below.

In the German system of "deferred community", the rules concerning household plenishing and equipment form an exception to the general rule of the granting of reasonable freedom to each spouse to administer his/her own property stante matrimonio. For example, there can be no disposal of household articles belonging to one spouse without consent of the other. (Similarly in the community of acquests system in France, joint consent is necessary in transactions relating to the matrimonial home or furnishings and equipment). It has been noted that the new German regime retained "the power of the keys," under which, despite the general rule of separate administration stante matrimonio, the husband is liable - on the basis still of agency, it appears - for his wife's 'domestic' debts. A third party, therefore, may look with confidence to the husband unless he has excluded or limited his liability by public registration (in the marriage settlements register) or the third party himself has knowledge of the limitation. The limitation will be ineffective in any case if made without "proper reason" or "if there is insufficient ground" therefor. In respect of such transactions, the husband shall incur the liabilities and enjoy the rights, "except", it is said cryptically,[1] "where a different conclusion is imposed by the circumstances" (Grane), "unless the circumstances indicate a different conclusion." (Forrester). Where the husband is insolvent, creditors may rely on the additional liability of the wife.[2]

In Denmark, also, household debts form an exception to the general rule concerning debts which is that neither spouse shall be liable for the debts of the other. Whether the marriage is in, or out of, community, the /

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1. 1357 BGB. But there is a change (1976):both spouses bound by contract for necessaries.
2. See doubts and questions, Grane, pp.154-156.

the debts of one, in this sphere, oblige the other. As in Germany, furniture (inter alia) cannot be disposed of by one spouse without consent of the other.[1] Joint and several liability arises in the case of household debts. In Holland, both spouses are regarded as it were as agents for the household[2] with the result that both spouses are liable to third parties for household debts, except in certain cases (such as inability or mismanagement) where the court considers it appropriate not to adhere to the general rule.

This discussion has been concerned principally with the systems of community. It has been noted, though, that England has abolished the wife's agency of necessity[3] since it was thought[4] that the courts can "enforce the duty to maintain directly" in "wilful neglect to maintain" proceedings. What is to become of the Scottish praevositura and agency of necessity? Are these notions to remain unchanged?

Types of Community of Property

It has been seen that community may comprise "property and profit and loss," which means that all property and rights of each spouse owned at marriage and subsequently acquired is included in community. Thus, in its most comprehensive form, the community would /

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1. A similar rule obtains in Sweden: there, the good faith of the third party will operate to prevent reduction of the contract complained of - see supra).
2. Which is a better approach, it is thought, than that which considers the wife to be the agent of the husband.
3. Matrimonial Proceedings and Property Act, 1970, s.41.
4. Cretney, p.219. Of course this is a very different rationale from that which prompted a change from husbandly liability to joint and several liability for household debts.

would claim all property of whatever nature, the only exceptions being rights of a highly specialised character (as, for examples, rights of a very personal nature) or property competently excluded from community by the wish of the parties or of a third party benefactor,[1] the rules governing exclusions being made clear, of course, by the community system in question.

In some systems studied, there is community only of acquirenda, or acquests, that is, of property acquired during the marriage, and gratuitous acquirenda frequently are excluded from the eventual computation of assets. In Louisiana, however, the wife has the option, at the end of the association, to disdain the community and to incur merely limited liability in the joint venture of marriage. The Louisiana wife may "hedge her bets". In France, there is a separate category of property entitled "reserved property" of the spouses.

In the systems which have adopted the regime of deferred community, the distinction is taken between property earned and property acquired through good fortune. Thus, in Germany, under the main system, gratuitous acquisitions, in the ultimate calculation, are taken to form part of the recipient spouse's initial property (that is, not part of that spouse's "gains"). Further, under the rules of the German version of the option of "community", rights of a personal nature (non-assignable) are excluded from community, as is reserved property (assets excluded from community by agreement of the parties, and gratuitous acquirenda).

In /

1. Thus, for example, in South Africa, unless a testator provides otherwise, a bequest to one spouse will fall into community: there is no general difference of treatment of onerous and gratuitous acquirenda, as there is in many European systems.

In the Danish system of deferred community, that postponed community does encompass, when it emerges from hiding, both property and profit and loss. There is a more flexible rule here, at computation. Since 1964, the rule of equal division may yield place to a division more suited to the particular case, if the effect of equal division would be to work injustice, and if the assets have been obtained in the main by one spouse before marriage, or by gratuitous acquirenda during marriage. In contradistinction, a spouse is always entitled to a one half share of onerous acquirenda, and it may be recalled that Pedersen notes that the use of judicial discretion seems to be competent in cases of marriages of short duration where "no financial community of any importance has been established." In Sweden similarly, there is never at any point during the marriage a "concrete" community fund. However, when the community emerges, it also is made up of property owned at marriage and acquests. As in South Africa, there may be excluded that property which the spouses by marriage-contract declare shall be separate, and gratuitous acquirenda is not included if the benefactor states exclusion to be his wish. Rights of a highly personal character also may be excluded, by reason of their nature. In Holland, too, the community, which there is immediate, not deferred, encompasses all assets except those of a special, non-assignable and/or personal nature.

Commencement and Termination of Community

Except in the systems of deferred community, when, ex hypothesi, rights crystallise and the community fund becomes apparent only upon the happening of certain events, community commences at marriage[1], and, in every system /

1. though it may throw its shadow backwards: cf. S.Africa, and see also Scottish nineteenth century rules concerning contracts by betrothed girls.

system studied, comes to an end when the marriage is brought to an end by a judicial act.[1] On the other hand, marriage may continue though the community has been terminated.

Then, again, community normally is dissolved by the death of one of the parties, but this is not always so, for in some jurisdictions there is the possibility of 'continuing community' between the surviving spouse and the heirs of the deceased. This notion receives little support, and seems infrequently encountered in practice.

In every system considered, there is a safeguard for the spouse whose marriage partner proves himself to be an untrustworthy or inept administrator of the fund (or of his/her "own" property stante matrimonio in systems of deferred community or even of biens reserves in France) which provides a remedy in cases where divorce is not the wish of the parties. In South Africa, a spouse may apply for boedel scheiding (a separation of property which may be only of limited duration), or in Sweden seek boskillnad, and there is a similar remedy in Louisiana. In France, where each partner retains power over property owned by him/her at marriage, incapacity or mismanagement by one may cause the judicial withdrawal from him/her of this power and although the husband retains the initiative in general administration of the common fund, subject to certain limits, dangerous maladministration thereof such as 'to imperil the interests of the non-managing' spouse may result in the substitution of the wife for the husband as the partner administrator, or it may result in separation of property.

The need for protection against the maladministrator is /

1. as by divorce or nullity. It is frequently found that judicial separation in itself does not terminate community. In Louisiana, though, separation a mensa et thoro brings community to an end. See also Sweden.

is felt not only in orthodox, immediately-effective community systems. In the German and Scandinavian systems of deferred community or "compensation of gains" can be seen a similar anxiety, as, for example, in the rules concerning the inability of one spouse to dispose of household items or of his whole property, without consent of the other. Under the "orthodox community" option in Germany, community may be terminated, (anticipatory termination) inter alia, if one spouse cannot manage his affairs, or there is a likelihood that that spouse will prejudice the interests of the other by his own indebtedness. In East Germany, the termination of the community of acquests will be brought about by divorce, nullity or death, or by reason of the need for that solution of applicant spouse and children or because the spouses have ceased to cohabit. Under Danish law, an even wider selection of grounds exists, all having a bearing upon the property interests of the petitioner: besides death and divorce, "unlawful cessation" of cohabitation, bankruptcy, or the begetting since marriage or the discovery of the existence at marriage of an illegitimate child may bring the community to an end. Abuse of the administrator's discretion in the management of the common fund is also a ground. In the case of nullity, the rules of compensation come into effect only to a limited extent, in order to allocate onerous acquirenda. Bodelning is competent in Sweden upon abuse of the power of administration (by either spouse of "his own" property in such a way as potentially to be to the detriment of the other spouse)[1] or upon divorce, judicial separation, death or nullity. As in Denmark, division is limited to onerous acquirenda when the case is one of nullity. In Germany, "anticipatory compensation" may be sought /

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1. Premature ending of the community is called boskillnad.

sought where one spouse has been guilty of lack of co-operation[1] or worse[2] or where the spouses are separated and the circumstances are such that the claimant is entitled to live apart while the other is not.

Debts

The subject of the rights of third parties is one of very great importance in any system of matrimonial property, whether the system be detailed in its rules, or 'a system of no system' as separation systems sometimes are described.

In systems of separation, the creditor is anxious lest he be defrauded by "artificial" inter-spouse transactions. In systems of community, whole or partial, the creditor must know which spouse has authority to act and to incur debts which will render liable the whole common fund. It has been said that, however complex and refined the rules concerning inter-spouse liability, which will attempt presumably to do justice between them, third parties should not need to inquire into the niceties thereof, or into questions of title or discussions upon the nature of property - as common or separate, initial property or acquest, onerous or gratuitous acquisition.[3] This admirable aim has resulted in many systems in joint and several liability for debt, and in presumptions governing ownership, or at least governing the right to administer property of which the partner who purports to administer appears to be possessed.

A noteworthy feature of Scandinavian and German law is /

1. such as refusal to give information with regard to his/her property.
2. such as attempts to prejudice the other's interests by diminishing his/her estate or purporting to dispose of the whole of it.
3. The spouses "should present as simple a legal posture as possible in the presence of third parties" (Pascal).

is the insistence that - except for household debts, or transactions where both have been involved or where one specifically has taken on liability for the other or with the other - neither spouse is liable for the debts of the other. The equalisation therefore comes at division in the rules governing debts and compensation when compensation of gains is effected.

In most systems, the competition between the interested but non-contracting spouse and the innocent third party with whom the other spouse has contracted is resolved by a mixture of the concepts of knowledge, and of good faith (of the third party) and registration in a public register (by the spouses, or by one on behalf of the other) of the spouses' rights in certain assets. The latter solution is common in relation to heritage, and in particular in relation to the matrimonial home. On the other hand, in Holland, the general rule is that all debts incurred by either spouse bind the community.

Methods of Division at Dissolution

In South Africa, Germany, and Scandinavia, there is the specialty of continuing community after death, though the concept does not seem to be highly regarded.

Death Intestate

On death intestate, there is a most noticeable trend in many systems, whether of community or of separation, to favour the surviving spouse as against any other possible claimant. In Germany, the rules of intestate succession have provoked criticism as being over-generous to the surviving spouse. It is common /

common for the survivor to be given a preferential claim to a certain sum of money (or to the whole of the estate if less), or a right to a certain portion of the estate, and possibly an entitlement to certain articles of the other.[1]

Death Testate

To a certain extent, the duties which are placed upon spouses to administer with care the common fund (community systems), or their own estate which will become common at dissolution (deferred community systems) operate as a type of restriction on testamentary freedom, although the terminology here is strained. What is meant is that the option of gratuitous alienation before death of all his/her property (as opposed to the making of a will which is silent concerning, or less than open-handed[2] towards, the other spouse) is not open to a spouse inclined so to do. Upon the question of specific testamentary restriction, German law appears to allow "freedom of testation", but this is no true freedom since the aggrieved spouse may demand a basic share in the other's testate estate which, it seems, is one half of the share which would have been due on intestacy. In South Africa, a spouse whose partner has disposed by will of his/her share in the joint estate, must choose whether to /

1. e.g. Denmark: a right to personal belongings and "articles for children's use"; in Germany there is a right to all wedding presents and household equipment if there are no children of the marriage and to a reasonable supply of those if there are children: in Sweden, the survivor is entitled to household goods necessary for the continued occupation of the home. In Scotland, of course, there are prior rights to the matrimonial home, furnishings, and to a money entitlement (Succession (Sc.) Act, 1964, as amended) but this is on the basis that these subjects formed part of the estate of the deceased.
2. The general question of the degree of open-handedness required if required at all in law is one, of course, for the matrimonial property rules of any legal system.

to take the benefit (if any) to him or her under the will or to claim his/her own property in community.

Division on Other Events

At dissolution of community, there is an opportunity to take stock and to make compensation, to share the good or bad fortune of the marriage and to allow redress to be made if, for example, one spouse has met community debts out of his own[1] property. Certain systems[2] allow, or encourage, before the compensation and division procedure is set in motion, a consensual arrangement by the parties to which effect will be given by the courts.

In the law of Louisiana, we see a highly developed body of rules governing division at dissolution. There may be voluntary partition (to be preferred) or judicial partition, a lengthier process, based upon inventory (of common property), itemisation (of separate property of each), the presumption in cases of doubt being that property possessed by spouses at dissolution is common property, and reimbursement to each partner of money made over to community stante matrimonio by either spouse. When this accounting is complete, equal division of remaining community assets is made.

Another /

1. The South African system is the one which comes nearest to creating a community of all property owned at marriage and subsequently acquired, but there is always the possibility that a benefactor at some time during the marriage might grant to one spouse a benefit stated to be excluded from community. In the other systems studied, it is competent for, and likely that, each spouse will have certain property of his/her own, separate from the community property, or to be regarded as separate at dissolution when the community aspect of the deferred regime becomes evident.
2. e.g. S.Africa, E.Germany, Sweden.

Another highly developed system is that of Sweden. Bodelning[1] involves valuation of assets, and, in cases where consensual partition is not possible, partition and distribution by the Bodelning overseen in accordance with the statutory rules. Bodelning debts of each are paid out of the giftorattsgods of each and compensation is made in cases where - broadly speaking - the actions of one or other of the spouses has increased his own separate property at the expense of his giftorattsgods. Personal effects are excluded from the computation as are necessary household goods, which go to the survivor or the "innocent" partner in divorce. Thereafter, division is made, and it is effected usually on the basis of equal shares, although unequal division may be agreed upon at Bodelning by the parties, or there may be division according to pre-Bodelning marriage settlement, which may or may not be regarded as binding on the parties.

In Denmark too there is an opportunity at division for compensation to be made to the aggrieved spouse if the other is seen to have 'abused' his assets - that is, without good reason, has diminished them or has squandered them.[2] The absence of such a power might make premature division based thereon a remedy coming too late to be of use, and at whatever point division takes place, such a power would seem to be a necessary feature. The basis of the rules of division /

1. "a closing of books....", in Sussman's words.
2. This is a notion common to many systems of community, present and deferred, and represents a restriction, upon ownership albeit necessary in the context of a system of community which is unknown in a system of separation. Thus, for example, in Scotland, there is sometimes disquiet about the freedom enjoyed by a spouse during his lifetime to alienate his goods, but acknowledged inability greatly to alter the position.

division is that, whatever event prompts division, each partner shall make over to the other one half of his/her net estate. Alternatively, the two estates may be massed, and the debts of both deducted therefrom. One half of the net sum produced is then allowed to each spouse, the effect being to meet out of the whole the debts of both, so that each is entitled to have met his/her debts at division.[1] Pedersen still feels able to assert that the Scandinavian ideal that neither spouse shall be liable for the debts of the other is achieved, and contrasts with this the Dutch position.

The German rules differentiate between division of property at death and on other events. Upon division during the joint lives of the parties, the notion of compensation applies. In the case of each spouse, valuation is made of "initial property" (being property owned at marriage and acquests) and "final property" (being property owned at dissolution and division). Where no inventory of original and acquired property has been kept,[2] property owned at dissolution is presumed to be "gains". The larger the 'pile' of gains deemed to belong to the economically stronger party, the greater will be the ultimate "benefit"[3] to the economically weaker party. Gratuitous acquisitions are added to the list of initial property. Gratuitous alienations are deemed to be added to the list of final property, from which compensation will be due: a neat and just solution. Compensation cannot exceed the sum of final property in any case, though. As noted earlier, the creditor spouse may seek even from /

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1. See in more detail supra Chapter 6 (Denmark).
2. If an inventory has been kept, there is a presumption in favour of its accuracy.
3. Ex hypothesi, of course, this is not a "benefit", but a right.

from a bona fide third party a gift or its monetary value. The debtor spouse may plead that compensation will result in gross inequity, or may plead set-off as a defence or partial defence. Compensation is effected by the making over to the economically weaker spouse of one half of the amount by which the gains of his/her partner exceed his/her own gains amassed during the marriage.

Proof (Inventories)

Even under a system of full community, certain items of property of a spouse may be excluded[1]. In other systems, matters tend to be less clear, and difficulties frequently are dealt with by the use of presumptions.

The system of judicial partition of assets in Louisiana has been described. The division is based on an inventory of community property and an itemisation is made of the separate property of each. Both lists are made up by a notary. The inventory is not conclusive evidence of what it contains, but it is accorded great respect. As in Germany, the presumption is that all property in the possession of the spouses at dissolution is community property. Gratuitous acquisitions also are excluded from community property, as is property brought to the marriage by the spouses and property derived from such separate property. The important point is that, as a result of the existence of the presumption, the onus of proof lies on the party averring that a certain item of property falls within one of these categories. Further, to what extent do the /

1. In South Africa, the wife's earnings are excluded in terms of the Matrimonial Affairs Act, 1953; in France, where community is restricted to acquests, the wife's earnings are biens reserves.

the parties have power to impugn the notary's inventory and accounting? Where claims of reimbursement by a spouse against the community are concerned, presumptions operate, and tend to favour the wife (non-captain) alleged creditor rather than the husband alleged creditor.

Division and distribution is the function of the notary, and this he does, using as his base-point the inventories, as adjusted for debts owed by the community to the separate estates of the spouses. A crucial matter, therefore, is the extent to which there is power to "traverse" the inventory: Lee suggests that to discourage frivolous objection, there should be a time limit after which challenge only on the basis of fraud would be allowed. The partition (as opposed to the Inventory) may be attacked and reduced on the grounds of "error, lesion, violence or fraud".

Pascal suggests that a welcome change in Louisiana would be the departure from the presumption that all objects are community assets until proved otherwise, and the adoption of a rule that, in the absence of an agreement between the spouses on the point, a decision would be reached upon the rules of evidence unaided or unhindered by presumptions - a decision 'on the preponderance of evidence'. It is notorious, though, that in these matters evidence is often sparse and presumptions must supply the lack.

In France, presumptions are found which pertain to powers of management. In a system which has gone some way to abolish the husband's headship of the family, and has adopted the requirement of the obtaining of the wife's consent to transactions of importance, there are presumptions concerning the management of the common fund and the separate funds, which facilitate business and ease the flow of commerce. Under Dutch law, a third /

third party, if in doubt, is entitled to assume that the spouse in possession of a moveable is entitled to deal with it.[1] The position in France is that each spouse has power to dispose of a moveable item in his/her possession (to bona fide third parties), provided that the moveable is not an article of household furniture or ex sua natura appears to be the (separate) property of the other spouse. There is freedom to each[2] in respect of property owned at and before marriage - but how does a spouse prove that items owned at dissolution should be placed in these classes? Article 1402 states that all property, moveable or immoveable, is to be regarded as an acquest if not proved to be the separate property of either. Generally, therefore, the onus of proof lies on the party averring that the property is excluded from community. Mutatis mutandis the same attitude is found in Germany.

In the Scandinavian countries, and in Germany where the gains by each party to the marriage must be calculated, there is the additional necessity for presumptions to govern the question whether property should be regarded as initial or final property. The need for these rules may be greater or less depending upon the content of the particular rules adopted by various systems to effect division. In Denmark, for example, there would seem to be no need so to categorise property and hence no need for rules on this point of the type found in Germany. The Swedish system, on the other hand, requires rules to set apart from other property, property to be regarded as Giftorattsgods,[3] but these rules have no sexist basis, nor /

1. Art.167. C.C.
2. though freedom limited in the manner of community systems - see "Limitations on freedom of action", infra.
3. which include goods owned at marriage and acquests, though not gratuitous acquests if the benefactor wishes such to be treated as separate property: of course, stante matrimonio, there is no community fund to be seen.

nor do they allow the risk of potential injustice arising from a perhaps necessary presumption, and have the virtue of certainty. During marriage, each partner remains owner (subject to the usual restrictions imposed by community upon the freedom which belongs to ownership) of truly separate property, and his/her own contribution to Giftorattsgods. Title to heritage suffices to establish the ownership of the title-holder. Moveable property is deemed to belong to the spouse who has incurred debt in respect of it, though Sussman notes that this presumption is rebuttable. Here, as in Germany (where Grane remarks that the inventory rules favour the economically weaker partner because the legislature cannot have thought the making of inventories a common and natural occurrence), use is made (though infrequently, it seems) of the inventory, which, if made in proper form, is evidence of what it contains, though its record may be refuted.

It is clear that neither in a system of separation nor in a community system, though for different reasons, can there be a successful regime without certain rules and presumptions concerning ownership (and administration) of moveables. One feature of Continental systems is the greater readiness to transfer title to immoveable property from one spouse to the other, as occasion demands. Although title is accepted as proof of ownership, it seems to inspire less awe than it does in England and Scotland. Greater flexibility and fluidity is probably welcome.

Marriage-Contracts Ante-Nuptial and Post-Nuptial

In two traditional systems, those of South Africa and Louisiana, though choice of regimes is open to those contemplating marriage, post-nuptial deviation from the system chosen (or not avoided) is not competent.[1]

It /

1. Lee points out that, while contracting out of the principal system is extremely common in South Africa, it is rare in Louisiana and in France.

It has been seen that spouses in South Africa may exclude only the variable consequences of marriage. However, they may choose, within the confines of the invariable consequences of marriage and the limits of legality, morality and public policy, any regime. They may adopt the rules of another jurisdiction, or they may create an individual and personal set of rules which meets their own needs. Within the South African system itself, they may choose a modified version of community of property alone, or community of gains alone, in each case being free to exclude or include the husband's power of administration. Exclusion of that power must be express.

"Contracting-out" in France also is competent, but it is rare. As in South Africa, there are fixed bounds outside which parties cannot step, but these are not many. There is a great measure of freedom of contract: the spouses may choose, for example, joint management of community property or a system under which either may administer community property but consent of both is necessary for disposals, or, again, to revert to a system which provides that the husband will take all powers of administration. They may adopt a species of separation of property, or a system similar to those in operation in Scandinavia.

Grane notes that in Germany wealthy husbands took the opportunity of adopting a system of separation before the changes effected in 1958 came into force. Even after 1958, however, contracting-out is competent.[1] Some of the effects on the complex rules of succession of contracting-out are mentioned above.[2] Ante-nuptial or post-nuptial changes of mind are permitted within the bounds imposed by "the mandatory rules of law and ethics". The scheme adopted in substitution may be one /

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1. BGB 1363(1).
2. Chapter 6.

one the framework and details of which are specified in the Code (that is, the variants of universal community or separation)[1], or one "tailor-made" for the parties. Formalities exist with regard to the deed effecting the choice, and registration thereof or private knowledge of third parties of the deviations from the norm are necessary before third parties will be bound. Little more could be demanded in the way of contractual freedom, and nothing which has followed seems greatly to have weakened the German standard system.

In Denmark, the standard system appears to suit the needs of the majority, though indeed, although there is freedom to contract out of it, there is no great freedom in the choice of substitute. The only options offered are true separation, or separation with elements of community. A foreign, or individual, system is not a competent choice. In Sweden, where ante-nuptial and post-nuptial settlements are valid, there is a similar lack of choice of substitute system, though, surprisingly, there is great scope for alteration of the division which otherwise would arise at Bodelning, by means of pre-Bodelning settlement.[2]

Contracting-out is competent also in Holland, and here too, as in France, it has been recognised that post-nuptial alterations of the system chosen are permissible, though such must receive judicial approval. Marriage-contracts, ante-nuptial and post-nuptial, are permissible in English and Scots Law, but at present are almost unknown.[3]

Limitations /

1. Since community of acquests and community of moveables and acquests have been "removed from the books" (Grane, p.146), they must be selected by special agreement.
2. as by providing that all property of one spouse shall be regarded as separate property - see Sussman's comments, noted, supra.
3. This may not always be so, if our "non-rules" of matrimonial property change. Marriage-contracts in the past were utilised by the propertied classes. Now, the idea tends to be treated in a light vein.

Limitations on Freedom of Action

Under the full community of South Africa, the theory is that the spouses equally are owners of the property in the condominium, but the husband is the administrator thereof. Each has a one half share therein. Inter vivos disposals of the shares in joint estate are not competent, though mortis causa disposals are permitted.[1] There are certain restrictions upon the husband's rights of administration, and his power may be taken away by separation of property or interdict, as appropriate. The Louisiana husband also may find his power of administration removed if his conduct has been such as to merit an application by the wife for separation of property, as may the French husband. It is clear that for inept or fraudulent administration by the principal administrator there is always a remedy.

Further, where separate property is allowed to spouses under a community regime (as in France), the "free power to manage" such separate property may be taken away when there has been mismanagement thereof.[2] Probably the restrictions are in proportion to the closeness of the link between the separate property (and the income thereof perhaps, which often is found to accrue to the community) and the prosperity of the community fund, a link absent, of course, in a system of separation which knows no common fund.

A greater scope is given to the wife to participate /

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1. Hahlo, p.213. (3rd edn.)
2. In Denmark, maladministration of one spouse's property deleteriously affecting the other's interests will found an action for dissolution of community. If there have been "disloyal" acts, compensation is competent at division (Sweden, Denmark).

participate in management,[1] and this is right.

The foregoing discussion highlights some of the problems common to many systems, and the solutions adopted to meet them.

It is not sufficient to say that the problem would not have arisen, and the (perhaps) complex solution would not have been required had the system been the straightforward one of separation of property. The view that the straightforwardness of the system is adequate justification for it seldom seems to be argued fully. Problems of matrimonial property are complex, and a simple solution is not necessarily the best. On the other hand, it has not been established that /

1. This is most apparent in France. Generally, the European systems do not seem to have decided yet upon joint management. Contrast American jurisdictions such as Texas and Mexico. France appears to go as far as possible without adopting joint management (while providing options which do provide for that). For example, neither spouse may dispose of the matrimonial home or furniture without the other's consent (Of.Sc.Law Com.Memo.No.41) Similarly in Holland, co-operative action is necessary for the purchase of certain goods (household goods) or for the entry into certain transactions (e.g. hire purchase, the sale or pledging in security of the matrimonial home or furniture, contracts to guarantee a sole debtor, or the making of gifts of unusual size). In the Scandinavian systems, there are similar restrictions. For example in Germany, a spouse cannot dispose of his/her whole property or of his/her items of household plenishing without the other's consent. In Sweden, consent of both spouses is necessary for alienations of heritage or household goods or goods necessary for the other spouse's work, or children's goods. In Denmark, too, joint action is necessary where the matrimonial home is concerned.

that a system of separation is not satisfactory.

Trends

Only a very small minority of the States of the United States are community systems, but these states appear to be striving to make their rules, in their sex-based aspect, acceptable and constitutional, and show no inclination instead to embrace a regime of separation.

In South Africa, in family law, there are stirrings of reform (for example, in divorce), but perhaps because the greater proportion of the middle class discard the standard system, and because there is freedom to do so and ease in doing so (ante-nuptially), there appears to be no urgent clamour for changes in matrimonial property law except perhaps for the ability post-nuptially to change the regime.

France has modified her system by the law of July 13, 1965, as has Holland, by the law of June 14, 1956. Germany, in June, 1958, adopted a version of a system established in the Scandinavian countries since the 1920s[1], a system with which Sweden, the pioneer, may perhaps be growing tired, and which it might wish to replace, in whole or in part, by rules of State insurance.

East Germany in 1966 adopted a system of community of acquests, and this, it seems, is the approach preferred by the Soviet countries.

England has considered community of property, but ultimately may prefer its traditional answer of judicial discretion /

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1. though Grane (Kiralfy, p.117) says that a similar system has existed in Austria since 1811.

discretion. What is the Scottish attitude to be?

NEW ZEALAND AND AUSTRALIA

Here too there have been many interesting recent developments.

New Zealand

At the time of the passing of the Matrimonial Property Act, 1976 (into force 1st February, 1977), it seems that the position in New Zealand law was that, questions of ownership of property being subject to the Matrimonial Property Act, 1963, much depended on the construction of that Act, but that the Privy Council decision of 1976 (Haldane[1]) suggested that a fairly liberal approach was permissible. Certainly, when the spouses came to court to seek a division of assets and a ruling on title (as to home and furniture), on dissolution of marriage, Haldane's case indicated that indirect contribution might be regarded as contribution, and contribution was the basis upon which the property awards were made.[2] Scots law looks threadbare when compared /

1. Haldane v. H. 1976 2 N.Z.L.R.715.
2. See "The Law of Matrimonial Property in New Zealand", (P. von Dadelszen) which was a paper submitted to the Fifth Commonwealth Law Conference, Edinburgh, 1977 (Developments in Family Law: Family Property) and from which the information upon the New Zealand rules has been drawn. See also the Conference paper, "Matrimonial Property Disputes in New Zealand - Two Experiments" (J.M.Priestley). Priestly notes that under the Matrimonial Property Act, 1963, s.6(1), the court was required to consider the respective contributions of all kinds ("whether in the form of money payments, services, prudent management or otherwise howsoever.)" of husband and wife to the property where that property was the matrimonial home, and in the case of other property, had a discretion to consider contribution.

compared even with that pre-1976 approach.[1]

The new rule is that there is "a presumption of equality, irrebuttable (with only narrow exceptions) in the case of the matrimonial home and what may be described as "family chattels", but rebuttable in the case of other assets which fall within the general definition of "matrimonial property."[2]

There is provided, therefore, a presumption of equal rights in all property as a starting-point for the division of assets on the dissolution of the marriage, but " T he Act does not go so far as to create a "Community of Property.""[3] The property so treated comprises both ante-nuptial and post-nuptial property of each spouse. The author points out that the Act is concerned with the division of property on dissolution, not with "how the property is held while the marriage subsists." There is a lengthy list of those activities which are to be regarded as contributions of spouses,[4] and a direction[5] that monetary contributions are not to be regarded as of greater value than non-monetary contributions. Hence, "a contribution to the marriage partnership" (and it is the notion of partnership which Von Dadelszen considers to be the underlying principle of the Act) includes, for example, care of children or of aged or infirm relations (of either spouse), management of the household, the giving of assistance (material or non-material) to the other partner, including help /

1. Cf. Professor M.C.Meston, (Fifth Commonwealth Law Conference) "Family Property in Scotland" "It may seem remarkable to those who criticise the family property provisions of English law that Scots law has virtually no family property provisions to criticise, but this is one of the areas where Scots law is certainly not a model for anyone."
2. Dadelszen, ibid.
3. von Dadelszen, p.401.
4. s.18(1).
5. s.18(2).

help to gain qualifications or to carry on a business or occupation, the forgoing of a higher standard of living than would otherwise have been available, (generally non-material contributions) and (material contributions) the acquisition or creation of matrimonial property, including payment of money for these purposes, the payment of money to maintain or increase the value of the matrimonial property or the separate property of the other spouse and the performance of work or services in respect of the matrimonial property or the separate property of the other spouse.

Perhaps intentionally not first on the list, sub subsection (c) of s.18(1) brings in "The provision of money, including the earning of income, for the purposes of the marriage partnership." The relatively lowly place accorded to this "contribution" (once so highly regarded) is a measure of the modernity of outlook: the realistic and practical approach cannot fail to be noticed.[1]

It is extremely interesting to find[2] that, in adjudicating upon contribution, no account is to be taken /

1. cf. (as to itemised approach, and in tone) England: M.C.A.1973, s.25. As to Scotland, even now, under our new 1976 Act (which introduced the new "irretrievable breakdown of marriage" basis into Scots law, but made only such property changes as the new rules necessarily demanded: "....it would be unbelievable to anyone who did not know of the obstacles which had been placed in the way of reform that no significant alteration other than permitting a defender to apply for a property provision was made in the property consequences of divorce." Meston Fifth Commonwealth Law Conference, p.377) we have no property transfer order powers. If a party is ordered to make over a capital sum of £2,000, he must find it where he may, out of such property accepted or established as his according to the normal rules of ownership applying between strangers.
2. s.18(3).

taken of misconduct, unless "gross and palpable" and having affected significantly the extent or value of the matrimonial property. This has a mirror in Wachtel and it has been argued at points throughout this discussion, especially with regard to aliment[1], that conduct should be considered to be irrelevant in the settlement of property disputes unless perhaps it has been gross and unconscionable.

A distinction is drawn between matrimonial home and family chattels,[2] and other matrimonial property. In the case of the former, there is to be equal division, and division extends to the proceeds of the sale of the house where no other house has been bought and property division takes place within two years of the sale. If there is no home, "the Court is to award each spouse an equal share in such part of matrimonial property as it thinks just so as to compensate for the absence of interest in a matrimonial home." Where the /

1. See Chapter 4 above, see also Memo No.22 and Faculty Response.
2. "Family Chattels" comprise furniture and household equipment, motor vehicles, caravans and boats, and household pets. (s.2(1)). Priestly (Fifth Commonwealth Law Conference) observes that "It matters not that any such chattels may be subject to a hire purchase agreement" (s.2(1)). (Where division takes place during the currency of such an agreement, how is the outstanding liability to be apportioned between the (equally sharing) spouses?) Priestly considers that the definition of "matrimonial property" "is in effect a "community of gains", which includes the matrimonial home and family chattels." (although earlier he notes that since besides other indications the parties remain free to deal with property, and third party rights are not affected, the Act has not replaced a system of separation with a community system).

the land held is not used wholly or principally for the family accommodation, there is equal division of the monetary equivalent of the equity in the "homestead".

However, the presumption of equality is rebuttable in certain instances, as, for example, where the marriage is of short duration. This question has given pause for thought on occasion, and the view has been expressed that she who marries a millionaire and lives with him for a year should not be entitled to a sizeable annuity for life. The New Zealand rule is that, where the marriage has subsisted for less than three years (or such longer period as the court may think fit), there shall not be equal division of ante-nuptial property or of gratuitous acquirenda, nor shall there be equal division where "the contribution of one spouse to the marriage partnership has clearly been disproportionately greater than that of the other spouse." Division here is to be in accordance with contribution, which criterion shall apply also where "extraordinary circumstances" render equal sharing "repugnant to justice."[1] These exceptions seem sensible. The author wryly predicts that many spouses will be inclined to think that his/her own circumstances are sufficiently extraordinary to render equal sharing repugnant to justice. Priestley remarks that "it is unclear how much persuasion a court will require before it is satisfied that a spouse's marital contributions are "clearly greater"".[2]

As to other matrimonial property, the equal sharing rule is to apply, unless it is clear that the contribution to the marriage partnership of one partner has exceeded that of the other, in which case division shall be in accordance with the contribution criterion.[3] A very wide /

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1. s.14.
2. p.395.
3. Is, then, the difference one of emphasis within the principal rule? In the case of home and chattels, the (rebuttable) presumption is that there will be equal division. With regard to other property, the contribution approach is to apply as an exception to the equal /

wide discretion is given to the court in the orders which it can make.[1] Moreover, it remains to be seen what the courts will make of their powers under s.18 to assess contribution. The 'contribution' referred to is contribution to the marriage partnership, and not to each asset[2]: in any legal system which were to adopt this or a similar system, a fairly wide judicial discretion would require to be given in order to avoid decisions such as that of Solomon's preliminary judgment. Thus, if it was held that the contributions of wife and husband to the success of the marriage venture had been in the ratio $\frac{3}{8}:\frac{5}{8}$, a division on that basis would be made, but at least until a substantial body of case law had been built up, and even then, a solicitor might find it difficult to predict to a client present in his office what the outcome might be.

Matrimonial Property and Separate Property

Reference has been made to 'matrimonial home and family chattels' and to 'other' or 'remaining' matrimonial property. There is another distinction, which is that drawn between matrimonial property and separate property. Separate property (s.9) is property which is not matrimonial property (although vonDadelszen explains that separate property can become matrimonial property, as by the application to the separate property of action by the other spouse or the application of matrimonial property thereto such that an increase in its value results, or income is created: such increase in value /

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equal division rule. Perhaps there, the latter rule is less formal and more simple than that applicable to home and chattels.

1. s.33; cf. 'property transfer orders' - Scotland. Memo.No.44 and Faculty Response.
2. In any event, the Privy Council, in Haldane, had "rejected the "asset by asset" approach", in the case of the 1963 Act.

value or income would be matrimonial property.).

Matrimonial property (s.8) shall consist of the matrimonial home, whenever acquired, the family chattels whenever acquired, property owned jointly or in common in equal shares by husband and wife, and property owned immediately pre-marriage by either spouse, if acquired in contemplation of the marriage and intended for the common use and benefit of both spouses.[1] In addition, there is included post-nuptial property acquired by either, "including property acquired for the common use and benefit of both the husband and wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned",[2] any income and gains derived from, the proceeds of disposition of, and any increase in the value of, any property described in the categories above deliminated, any policy of assurance taken out by either on his/her life or the life of the other, whether for his/her benefit or the benefit of the other, but not policies fully paid up at marriage or policies to the proceeds of which a third party is beneficially entitled, whether the proceeds are payable on the death of the life assured or on the occurrence of a specified event or otherwise, any policy of insurance in respect of any matrimonial property, any pension or benefit to which either is or may become entitled, if the entitlement is derived, wholly or in part, from contributions made to the scheme after marriage or from employment or office held since the marriage and all other property /

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1. Is use in itself not to be a criterion? (see Professor Otto Kahn Freund's views on 'use') Pre-marriage property long owned by one, not acquired in contemplation of marriage, but used by both thereafter, does not appear to be catered for. See fn.2 below. Perhaps agreement to regard such property as matrimonial property might be inferred.
2. Presumably the source of the new property must not itself be such as to be regarded as matrimonial property since otherwise this provision surely would not be necessary.

property which the spouses have agreed shall be matrimonial property and any other property that is matrimonial property by virtue of any other provision of the Act or by virtue of any other Act.

Gratuitous acquirenda (other than home and chattels) are not included within the class of matrimonial property, but they may cease to be regarded as separate if such items, with the express or implied consent of the recipient spouse, have become so intermingled with matrimonial property as to make it unreasonable or impracticable to regard as separate property. (s.10(1)). A gift from one spouse to the other (unless home or chattels) will not be regarded as matrimonial property unless used for the benefit of both spouses.[1]

There is complete freedom to contract out of the new system, which means that there may be a growth in the use of marriage-contracts. Each party must have independent legal advice. In certain circumstances, a court may declare that an agreement shall have effect only in part.[2]

The Act shall apply only during the parties' joint lifetimes. No equivalent procedure was provided for distribution of property on dissolution of marriage by death, and the subject continued to be regulated by the law of succession.

Valuation of property is to be at the date of the hearing, unless the court decides otherwise, and the shares of spouses are to be determined at the date of cessation /

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1. This would appear to mean that there can be no doubt about the ownership and destination of expensive presents of jewellery. See Chapter 1.
2. The juxtaposition of ideas tends to suggest that lack of advice rather than content of the agreement although the state of the latter may reflect the presence or absence of the former, is the legitimate source of complaint.

cessation of cohabitation, or of the hearing, if the parties still cohabit.

Debts and Creditors

Adjudication between "innocent" spouse and creditor is one of the most difficult problems encountered by any system of matrimonial property, be it a detailed system of community or a casual system of separation.[1] In New Zealand, each spouse shall have /

1. See Chapter 2, 'Bankruptcy'. A very recent Scottish example is McManus's Trustee v. McManus 1979 S.L.T. (Notes) 71, in which the bankrupt husband's trustee successfully challenged and had reduced a "love, favour and affection" disposition by the husband to the wife of the matrimonial home, executed on 12th December, 1963, but not registered in the General Register of Sasines until 4th April 1975. The trust deed for creditors was dated 24th September and registered in the Books of Council and Session on 23rd October 1975, and on 21st November 1975 the husband's estates were sequestrated, the trustee's appointment being confirmed by act and warrant dated 11th February 1976. The marriage had not been very secure, and a condition of a reconciliation had been that the house be placed in the name of the wife in order, as was admitted by the wife, to provide her and the children of the marriage with security. L.O. McDonald held that the disposition was not granted for a true, just and necessary cause (though the 'true and just' criterion alone would have sufficed, if satisfied, to protect the deed: Armour v. Learmonth 1972 S.L.T.150) and that it must be reduced as being a gratuitous alienation to a conjunct person to the prejudice of the bankrupt's creditors contrary to the Act 1621, c.18. The wife had no valid irrevocable title until recording in 1975. Though ante-nuptial formal (or even informal) arrangements have a sufficient consideration in marriage, post-nuptial arrangements (even if formal) are not protected. Agreement to continue marriage/cohabitation would not seem, therefore, to be comparable with agreement to enter marriage. This was simply a donation stante matrimonio without consideration (and reference was made to Robertson's Tr. v. R. (1901) 3F. 359). "It cannot therefore be said to have been granted for a true and just cause at least in a question with the bankrupt's creditors." (L.O.McDonald, p.72).

have "a protected interest in the matrimonial home as against creditors[1] to the extent of £10,000, or one half of the equity of the husband and wife in the home (whichever is the lesser), and this protected interest is not to be liable for the unsecured personal debts of the other spouse."[2]

There is power to the court to settle matrimonial property for the benefit of minor dependent children whose interests it must take into account. The court may vest the tenancy of a house in either spouse, or may make an order conferring a right of personal occupation.[3]

One of the important points which vonDadelszen makes in his preliminary consideration of the Act is that the wife, having (in the normal case) a claim to one half of the value of home and chattels - a state of affairs which reflects perhaps a new awareness of her contribution to the family prosperity - will receive in addition credit for her domestic activities in the assessment of her contribution to other assets. The author makes no comment upon this matter. It is suggested, though, that this is no 'double' or unwarranted benefit, but rather a reflection of what ought to be the result in all cases except those where the wife is slothful /

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1. but presumably not against heritable creditors: in such a case is the 'family law' rule displaced by the terms of the loan agreement? It is difficult to reconcile the interests of the Building Society and the occupying spouse in cases where the Society's de facto debtor has deserted (his) spouse or has been ordered to leave the home - cf. Memo.No.41 and Faculty Response. Where the home is being sold, there is a greater chance of reasonably satisfactory treatment of all parties.
2. P. von Dadelszen, p.403.
3. cf. Memos. No.22 and 41 and Faculty Response to each.

slothful and has made no effort in any direction, a situation which under the New Zealand rules and guidelines would be noted and taken into account by the court.

Priestley notes the difficulty of engrafting upon a common law system and upon its rules of property a scheme essentially Romanist, and European, and suggests two other possibilities, one being the retention of separation of property, allied with great judicial discretion (an approach which might be thought to be a peculiarly English one, and indeed among Priestley's examples he cites the Matrimonial Causes Act, 1973, s.24) or the adoption of a "hybrid" system, such as that of deferred community. Prior to the Act, the court's discretion was fettered where it could be seen[1] that the parties themselves had entertained a common intention concerning the property in question. The court was directed also to ignore wrongful conduct when deciding property questions, unless the misconduct had had a direct effect upon the property under discussion. According to Priestley, this direction received differing welcomes from the judges and "conduct was still a legitimate factor to consider when determining such matters as the form of the order, or possession of the matrimonial home."

There is no provision under the new Act for the automatic application of its rules. The onus is on the parties to apply to the court for an order regulating property matters. Both writers point out that the new legislation does not displace the principle of separation of property with that of community. Priestley notes that the new Act, or Code, does not alter parties' rights to deal /

1. always a difficult exercise, requiring of the court some perception and perhaps a little imagination.

deal with property nor are the rights of third parties affected.

Has courage failed at the last moment? The pre-existing New Zealand provisions seem enlightened: perhaps the most striking differences or 'reforms' now made are the cutting down of the area of individual judicial discretion (though the weight which he accords to the different factors, especially to that of domestic work, may vary surely still) and the 'formalising' of notions and considerations perhaps previously less consciously taken into account, and this may produce a more uniform, predictable and fair result, in a system which remains at heart one of separation of property. Perhaps this is a first step,[1] and New Zealand yet may come to make a whole-hearted choice between the two systems of separation and community. Priestley's conclusion is that this is "a hybrid system, being an uneasy amalgamation of deferred community of gains and discretionary judicial powers".[2] Clearly, though, much thought has been given to the subject.

The spouse must make application under the Act for an order. Hence the spouse's property entitlement is inchoate. The broad 1963 judicial discretion has been restricted and Priestley identifies only four areas[3] where /

1. though indeed Priestley notes that this is the third change in rules and/or attitude upon the subject of matrimonial property within 13 years: before 1965, M.W.P.Act, 1952 enshrined a system of separation, unadulterated, between 1965-77, when the 1963 Act came into force, there was wide judicial discretion, and after 1977 there was the fairly vigorous gesture of welcome to new ways of thinking contained in the 1976 Act, coupled with retention of what is basically a system of separation.
2. p.396.
3. viz., marriages of short duration; extraordinary circumstances (to determine whether such exist); decision upon contribution in the case of matrimonial property not being matrimonial home and chattels, and the resultant allocation of such property. Presumably also, there may be cases where the court must adjudicate upon a dispute as to whether certain property is matrimonial or separate property, yet the definition is ample, and strictly this would be a matter of interpretation and not an example of unfettered discretion.

where it remains. The system reveals a debt to "deferred community" systems, while retaining the common law tradition of judicial discretion to provide flexibility. It is a "package",[1] and possibly this is the type of solution which for the English lawyer would hold the greatest appeal. This is no all-embracing community system, yet, by its liberal approach to the definition of "contribution to the marriage partnership", its definition of matrimonial property, its differentiation between home and chattels, it produces an effect of modernity, a fashionable gloss. Systematically, it is unsatisfactory.

Whether property remedies should be extended to those participating in 'stable unions' is a related question, and one which is attracting attention, especially in America.[2] It appears that, in the New Zealand Matrimonial Property Bill, provision was made for /

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1. but a surprisingly limited one: surely a solution ought to proffer some suggestion in all the areas in which the subject is of relevance, including rights of creditors and rights of succession? Admittedly however, the new statutory scheme is not put forward as an alternative to the basic system of separation.
2. See the celebrated case of Lee Marvin, in which both parties claimed the victory. Another similar instance, it seems, would be the property aspect of the Mick Jagger (Bianca Jagger divorce, in which, quoad property distribution, the latter appeared to have enlisted the aid of Californian lawyer Marvin Mitchelson, who acted for the female party in the Lee Marvin case. It has been suggested, at present lightheartedly, that in America, cohabitation outside marriage, being no longer able to be guaranteed to have no legal significance with regard to property, should be accompanied, for safety, by a non-marriage contract, agreeing that there shall be no property consequences or that future litigation on the matter shall be barred.
See Scandinavia (Chapter 6), and, for Scotland, Memo.No.44 and Faculty Response.

for applications to the court for property adjudication by parties to a de facto marriage, provided that the parties had lived as husband and wife for a period of not less than two years preceding the application, and the court thought it just to entertain it, and the application had been made within twelve months of the cessation of cohabitation as man and wife. These clauses were deleted from the Bill following a change of Government. In England, and in the Commonwealth countries of the common law tradition, such remedy as may be provided for the mistress seem to have been founded on the law of trust, though Pidgeon identifies a difference of approach between the House of Lords, and Denning, M.R. on the subject. Pidgeon argues that the wife and the mistress should be put on a par with one another as regards property disputes, though not as regards maintenance, praises the (deleted) clauses in the New Zealand Bill, and advocates statutory intervention. The subject is beyond the scope of this discussion; it is suggested, though, that these matters are best left as property disputes between strangers.[1] There must be a limitation upon the assimilation of non-marriage to marriage, for the sake of believers in either. Parties to short-term liaisons at least should look out for themselves. Children have a claim against either parent for support. Divorce in Scotland is now easier to obtain. It may be that long-term stable unions should be treated differently, especially with regard to the 'matrimonial' home, but 'reforms' in matrimonial property law (which in effect usually mean the endowment of more generous financial and property rights upon wives, usually the weaker parties economically) are to be given in recognition of (lengthy) contribution to marriage and family, and while possibly due to long-term mistresses or common law wives, should be withheld, it is submitted, from participants in short-term unions (legitimate as well as illegitimate) and from all but the most stable extra-marital households.

AUSTRALIA /

1. This view is adhered to, though it is noted that Matrimonial Homes (Family Protection) (Sc.) Act, 1981, S. 18 permits a non-entitled cohabiting partner to apply to the court for an order conferring occupancy rights. See N. and M., Chapter 7. (Where parties have been

AUSTRALIA

Until 1976, the rules regulating dissolution of marriage were fault-based. The Family Law Act, 1975, swept away "the multiplicity of previous grounds"[1] and introduced irretrievable breakdown of marriage[2], though misconduct may still be relevant in deciding subsidiary matters and of course is of great importance with regard to custody of children. However "It does seem....on the decided authorities that matrimonial misconduct (not including misconduct with financial ramifications) is no longer really relevant to the issues of maintenance or property entitlement".[3] In terms of s.117(1), the basic rule is that each party to proceedings under the Act shall bear his own costs, though (s.117(2)), the court may do as it thinks just with regard to costs where circumstances demand special treatment. Davies and Fowler note that the latter power is rarely used.

Maintenance

Each party is liable to maintain children under the age of 18, so far as he/she is able, and one party is liable to maintain the other, so far as reasonably able to do so, "if, and only if," the other is unable to support herself/himself adequately, by reason of having the care and control of a child of the marriage under 18 years old, or by incapacity (physical or mental) for "appropriate gainful employment or for any other adequate reason...." (s.72). The breadth of expression and absence of sex bias are noteworthy. The words /

1. "The Impact of the Australian Family Law Act, 1975", C.F.Davies and S.G.Fowler, Development in Family Law (Marriage and Divorce), 5th Commonwealth Law Conference.
2. The authors stress that a principle enshrined in the Act is the protection of the institution of marriage and the family.
3. Ibid., p.336.

words "any other adequate reason" of s.72 are amplified by s.75(2), which provides an extensive list of relevant matters in the form of fourteen factors, including, for example, age and state of health, income and financial resources, eligibility for pension, contribution to the financial position of the other party, duration of the marriage and extent to which it has affected earning capacity, the financial circumstances relating to the cohabitation of the potential recipient with another person, and the less usual or more modern grounds[1] of (s.75(2)(h)), "the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income", and (c) the need to protect the position of a woman who wishes only to continue her role as a wife and mother.

These fourteen factors encapsulate a most interesting attitude. The court shall take into account only those matters which the statute specifies: the scope of discretion is restricted considerably by the number and breadth of the factors which shall be taken into account, and which only shall be taken into account. Two of those factors are the financial resources of each ("and the physical and mental capacity of each of them for appropriate gainful employment"), and the financial needs and obligations of each, and these are the most important factors weighing with a Scots court. The others may or may not influence the individual judge in making his decision.[2]

Davies and Fowler identify both a change in philosophy (no /

1. especially significant perhaps in allegedly male-dominated Australia.
2. See Sc.Law Com.Memo.No.22 and Faculty Response.

(no longer is the wife entitled as of right qua wife to be maintained), and in the matter of quantum (no longer is the standard to be the pre-existing standard of life of the married pair, but will be in accordance rather with that which she (or he) needs, and that which he (or she) can afford to pay).

It seems that imprisonment is no longer competent in cases of non-payment.

Whether these provisions can be utilised by the wife as a means of obtaining an allowance during cohabitation is not clear.

In terms of s.79, the court is empowered to make such order as it thinks fit as regards property allocation (on dissolution, presumably), but must consider the factors outlined above concerning maintenance, where relevant, the effect of any other orders made under the Act, the effect of any proposed order on the earning capacity of either party, and "the financial or other contribution made directly or indirectly to the acquisition, conservation or improvement of the property including any contribution made in the capacity of homemaker or parent."[1]

There is now a Family Court of Australia, set up by the Act. It is "a federal superior court of record."[2] There is a permanent body of court counsellors. A Family Court sits in each State, and it seems that there is a greater degree of informality than is found in other courts. There is a single judge of original jurisdiction, and appeal is available to a Full Bench of three judges, whence /

1. Davies and Fowler, p.338.
2. "Developments in Family Law in Australia", The Hon. Justice Evatt (Chief Judge, Family Court of Australia): Main Session Address, Developments in Family Law, 5th Commonwealth Law Conference, 1977.

whence further appeal may be taken to the High Court of Australia, if public interest is involved. The Family Court has jurisdiction in marriage, divorce (including custody and guardianship), nullity, validity of marriage and recognition of divorces, maintenance during marriage and on or after divorce, and property rights on or after divorce. One problem which might occur in such a scheme is that, in order to achieve a full solution, the court might wish to rule upon some question of rights of inheritance or interpretation of a will or trust, or upon a creditor's action for a household debt. In other words, a more widely drawn jurisdiction might be necessary - and in matters of property or contract or succession, albeit arising out of problems of family law and family property, what would be the standing of decisions of the Family Court? Perhaps a Family court, operating within a system of community would enjoy an extensive and elastic jurisdiction within that system of relatively clear-cut rules. Davies and Fowler take the view that the Family Court Full Bench has become a court of review rather than a court of appeal, and that "Important matters of legal principle seem to be more permanently expounded in the High Court of Australia". They suggest that it would be advantageous to have a permanent Court of Appeal in family matters, on the persuasive basis that new concepts require consistent and definitive treatment.[1]

A Family Law Council has been set up to keep under review and to advise about the working of the Act, the working of legal aid in family litigation, and upon "any other matter relating to family law". Research into marital and family stability, "with the object of promoting the protection of the family as the natural and fundamental group unit in society", is to be promoted by /

1. Davies and Fowler, p.339.

by the Institute of Family Studies, also set up under the Act.

"There is no possibility that a Family Court will be established in Scotland in the foreseeable future".[1] The reason is absence of money, but the Sheriff Principal, after discussing the main features of commonwealth and American examples, argued that the establishment of a system of family courts to service a population so small, and so unevenly spread, as that of Scotland, might not be sensible in terms of money and personnel. Rather did he advocate the extension of shrieval jurisdiction to include divorce, and suggested that the Sheriff Court, with that addition, would become a family court in effect, though one lacking certain of the trappings thereof, such as the availability of counselling services and the creation of a less formal atmosphere. In Sheriff Reid's opinion, a unified Family Court would not fit into the pattern of population, of existing courts and their jurisdictions, or of the Social Services system. However attractive appears the introduction of a Family Court system as a handmaiden to a (possible) new matrimonial property system, Sheriff Reid's arguments are persuasive. Moreover, the establishment of a new system of courts would be an expensive exercise, an unpopular cause in a time of public expenditure reduction. The physical and personnel resources of the existing Sheriff Courts, however, would require to be increased considerably. Sheriff Reid admitted that a separate family court building would be the best solution, and perhaps he had his own Glasgow courthouse in mind when he wrote "the atmosphere in a building which houses a busy civil and criminal court is /

1. The late Sheriff Principal Robert Reid, Q.C. ("Scottish Reforms and Commonwealth Examples", Developments in Family Law, Courts and Jurisdictions, 5th Commonwealth Law Conference.)

is not conducive to the calm consideration of emotionally charged problems."

Property

Victoria, sometime thought to be Victorian in outlook as well as in name, nevertheless operates a presumption of joint ownership of the matrimonial home, subject to certain exceptions.

There seems to be no other evidence of any system of matrimonial property *etente matrimonio*. Property transfer orders are competent on dissolution, but Evatt notes[1] that the provisions of the Act and the powers of the Family Court "do not extend to disputes between spouses or to applications for a transfer and settlement of property before divorce proceedings have been commenced", except that an order may be made concerning the use or occupation of the matrimonial home[2], and that the court may grant an injunction concerning the property of the party. Family property law is under review in Australia. Will Australia follow New Zealand in the adoption of a modern, liberal, but hybrid and unsystematic 'system'?

Statistics and Trends (in England and Wales)

A recent statistical and sociological guide is that compiled by J.E.Todd and L.M.Jones, entitled "Matrimonial Property".[3] It is the result of a survey carried out on behalf of the Law Commission by the Social Survey Division of the Office of Population Censuses and Surveys,[4] among married and formerly married persons upon questions relating to financial and property arrangements within marriage, and canvassing opinion on these matters. The scope of the survey was limited to England and Wales. This is unfortunate, since it seems clear that the subject is /

1. Evatt, *ibid.*, p.328.
2. Cf. proposals for Scotland: Sc.L.Com.Memo.No.41.
3. H.M.S.O. (1972) SBN 11 700129 5.
4. A similar survey was carried out for S.L.C.:- A.J. Manners and I. Rautta, Family Property in Scotland (H.M.S.O. 1981).

is one with regard to which there are regional variations in attitude, and, of course, in many respects - and especially since 1970 - the laws of England and Scotland have drawn further apart in matters of family law. The survey describes the position[1] as it was found to exist in England and Wales in the spring of 1971. It is a useful review. Until recently, the happily married have been reticent in conversation about their property and financial arrangements; moreover, the happily married rarely fight in court over such matters. This is not to say that a happily married wife, non-employed, and a non-owner of capital, would not be happier still if the law were to provide her with a guide to her rights in the matrimonial home and property, which was both readily understandable, and reasonably acceptable to the majority of married couples. Surveys of the kind under discussion provide a valuable indication of what is acceptable to the majority at a given time, but their limitations must be recognised. Nevertheless it is suggested strongly that, if a matrimonial regime is devised, contracting-out should be permissible.

The Home

In 1971,[2] of those interviewed (base 1877 currently married persons) the matrimonial home in 52% of cases was owned or in course of being purchased by the spouses, in 45% of cases was rented (principally from a local authority), and in 3% of cases was provided in some other manner, as a result of which the spouses were not responsible for finding a home (in most instances, the spouses were living with relations).

In 82% of rented houses, the tenancy stood in the husband's name. Among those with joint-name tenancies,[3] the /

1. Within the limits of the inquiry, as described at 1.3: 'The design of the inquiry'.
2. Todd and Jones, 2.0 *et seq* (p.9).
3. 14% of tenancies were in joint names, and 3% in the wife's name.

the reason for the joint tenancy seems rather to have been the landlord's suggestion than an enthusiasm for equality within marriage.

Among owner-occupiers, 52% held their homes in joint names[1]. Advice upon this question had been received from various sources, most notably, and not unexpectedly, from a solicitor. 57% of non-joint owners and 57% of joint owners had received advice from that source. Tenants often were ignorant that a joint tenancy might be possible, but in the case of owners, ignorance is less likely, since a solicitor in taking instructions will wish to discover the parties' intentions in this matter, and will be afforded an opportunity to advise the spouses.

Of the reasons most commonly given for the fact of joint ownership, automatic transfer on death (51%) and belief in the jointness of marriage (30%) were the most popular, but it is interesting that among those where the title stood in the name of the husband alone, the great majority of husbands and wives considered that the property belonged to both. A study of attitudes among non-joint owners revealed no strong antipathy to joint ownership, but rather an acceptance of the existing situation, coupled with a certain willingness, varying in degree with the likelihood of removal to another house, to change to joint ownership. The cost of the change deterred some.

It might be possible to draw the tentative deduction from these findings that, if automatic co-ownership were to come about, relatively few would wish to make a different arrangement.

The Household Goods

Here /

1. Hence, of those surveyed, the overall proportion of married couples holding their homes in joint names was 33%.

Here, the survey's findings were presented under three headings - a. the car; b. furniture and fittings; c. other large household items.

a. the car

59% of couples canvassed (all being married persons at the date of the survey) owned one car or more than one car. Of wives, 62% thought of the car as being jointly owned, 7% thought of it as belonging to the wife, and 32% thought of it as being the husband's. A larger proportion of husbands (72%) felt that the car was jointly owned. The survey notes (2.2) that "There was, overall, a strong feeling that the car was an asset which belonged to both spouses."[1] At 3.0, it states that "Though a couple may have views as to which assets belong to each and which are owned jointly, their views do not always coincide with the legal principles which would be applied in the event of a dispute between them."

b. furniture and fittings

Over 95% of couples considered that some, and perhaps even all, of the furniture was owned jointly. In fewer than 3% of cases, did either feel that some furniture was in separate ownership.

When it is considered how much attention might require to be given[2] to the establishment of ownership of corporeal moveables, this unanimity is remarkable. The finding, even if accepted as representative of opinion /

1. Cf. Sc.L.Com.Memo.No.41 and Faculty Response.
2. Cf., e.g., Clive and Wilson (pp.294/5) upon the treatment of donations from strangers to the marriage. There it is suggested that what is important is the intention of the donor (which is often to benefit both parties) rather than the notion ('rather appealing anthropologically') that the item belongs to the spouse from whose side of the family it sprang.

opinion generally, is a two-edged weapon. First, it could be argued that, if this is the view taken during the subsistence of marriage, why should not all property of this kind be treated in law as jointly owned, and be divided accordingly on dissolution? Second, it might be said that any step to render more clear and equitable the rights in such items of parties during the marriage is unnecessary. On the latter point, however, parties in reality often are not generous and are self-interested and and 'equal share' hope or opinion may be a cruel misconception.

c. other large household items

Under this head were placed 'consumer durables' (for example, washing machine and refrigerator) and here spouses were prepared to attribute individual ownership.

Financial Arrangements

40% of couples holding bank accounts (21% of couples interviewed) had at least one joint bank account, convenience (63%), 'jointness of marriage' (34%) and advantages on the death of one partner (22%) being the main reasons adduced for such a choice. The principal reason given for maintenance of separate accounts was that (43%) this made it easier "to keep track of financial affairs."

The compilers allow themselves to draw a suggested conclusion from the contrasting attitudes to joint ownership of the matrimonial home and to joint bank accounts, to the effect that jointness is more palatable in long-term financial arrangements which do not come into prominence until the end of the marriage, than it is in matters affecting "current money matters". This hints at the suitability of a species of deferred community rather than at a community of acquests. It may be that the relative unpopularity of joint bank accounts may be attributable to a natural desire to spend as one wishes to spend, and nothing is more natural /

natural than that two persons may have different notions of spending money - and, it may be argued, those of the wife may be legitimately larger-scale than those of the husband, upon whom the duty to purchase everyday items and family presents rarely falls. Indeed, it would be surprising if married couples were at one in their ideas of level of spending. In the pages which follow, the argument is presented that the co-existence of jointness of home and household goods with separation of other property[1] is possible.

Savings held in other ways (Post Office account, Building Society account) were in separate ownership in the majority of cases. No doubt many were begun when the depositor was unmarried, and the same apathy which was found in the matter of changing into joint names the title of a house would be present here perhaps. A similar proportion of husbands and wives held such savings. Insurances, often small, were held in separate names. Although a larger proportion (95%) of husbands had such insurances, a surprisingly large proportion (65%) of wives also had taken these out. Insurance companies, it is thought, press their arguments on the family man rather than upon the family woman.[2]

Few couples had other investments such as stocks and shares, but, where they existed, they were rarely in joint names, and where they stood in separate names, substantially more stood in the name of the husband. The same applied to investment heritage, which was even more /

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1. albeit, in necessary cases, produced through donation from the other spouse - see infra.
2. However, it should be noted that the benefit of the Married Women's Policies of Assurance (Scotland) Act, 1880, has been extended to policies taken out by married women or unmarried persons for benefit of spouse and/or children by the Married Women's Policies of Assurance (Scotland) Amendment Act, 1980.

more rarely found.

Only 9% had 'businesses', and these businesses varied greatly in scale. 20% said that the business was owned jointly, 74% considered that it was the husband's alone, and 7% considered that it was the wife's alone.

Of other items of capital, 79% of interviewees considered that the item belonged to the husband. It is clear that in some cases, documentary evidence was available, and where no transfer is alleged to have taken place, this usually will be sufficient to establish ownership.[1] In some, parties' beliefs have been assessed, and these may be inaccurate.[2]

The comment is made[3] that ownership in joint names occurred more frequently in the case of current bank accounts than in the case of any other kind of financial asset discussed.

The statistics concerning estimated value of matrimonial home and other assets is of less value in view of the decrease in the value of money which has taken place since 1971, but the finding that "in the population as a whole many married couples do not have large financial reserves behind their every day expenditure" (2.5) is probably as true, or more true, to-day. In times of inflation, to save becomes increasingly difficult and, except perhaps when taking the form of investment in works of art or on the stock exchange, increasingly unattractive. It was found that where assets other than the home and bank account were few, ownership of those assets usually was separate, but /

1. though see, as to deposit receipts and bank accounts, Clive and Wilson, pp.304-306.
2. though perhaps not, especially if there was agreement between the spouses on the point: agreement as to division of property may be all that matters, on dissolution of marriage.
3. 2.3 (p.17).

but, as prosperity increased, so did the likelihood of finding joint ownership and mixed ownership (that is, some assets held in joint, and some in separate, ownership).[1]

Contribution

Opinions upon ownership of items which had belonged before marriage to one spouse were considered. This is most interesting, for in effect the survey canvasses views about what should be the manner of treatment of items which often have been excluded from community. In general, spouses appear to have considered that what they owned before marriage they brought to the marriage for the use and benefit, and to come under the ownership of, both partners. This generosity and feeling of 'jointness' was less pronounced among those who had been married before, and the feeling was most strong among the wives.

"Gratuitous acquirenda"

Here, it was found that husbands and wives had been equally fortunate, and that the size of the good fortune in 69% of cases was less than $500. 74% of husbands and 64% of wives considered that the inheritance belonged to both spouses. Only inheritances were considered. Gifts were not considered. In this case, the 'jointness' attitude was less marked among wives (a caution stemming perhaps from an economically weaker position, and a desire for 'her own' property in addition to the obligation to maintain owed by the husband) but, all in all, no strong case for general exclusion from a community property system of such property emerges from the findings. However, it seems that the question was confined to those who were parties to /

1. This is a little surprising. It is often assumed that the greater the worldly wealth (of each), the less strong is the desire for community of property.

to a subsisting marriage, and was not put to the group of formerly married persons.

As to earnings, which, it is thought, would form the bulk of 'acquests', a study of employment patterns among married women revealed that 85% of the field had been in paid employment at some point during their married lives. Most men are able to make a continuing financial contribution towards the upkeep of the home, by means of earnings, and most women are able to make such a contribution conjoined with or alternating with the contribution which they make in the physical running of the home, and in the care of the children. The result of the survey's inquiry was the finding that most wives felt that they had made a contribution towards the acquisition of matrimonial property, but it must be said that the method of eliciting a response was to suggest to wives ways in which they might have contributed, as, for example, by earnings, pre-marriage savings, use of gratuitous acquirenda, and effort in running the home. With the exception of the last-mentioned factor, of course,[1] these are elements legitimately taken into account in the ascertainment of property rights between strangers. Although many wives may never before have thought about contribution to property in legal terms, it is clear that many felt that their efforts in the home could be regarded as a contribution. A response should have been elicited from husbands on the question of /

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1. On divorce, in England (see Matrimonial Causes Act, 1973, s.25(1)(f); see also New Zealand, supra) this is one of the matters to which the court shall have regard in making an order for financial provision and/or a property adjustment order; the vital question is whether this is a relevant factor when consideration is given to property rights within marriage, in the absence of marriage emergency and whether indeed there is to be any machinery for the decision of such points during the subsistence of a marriage.

of how much, if any, importance they would attach to contribution in the form of running the home, in ascertaining rights of ownership in home and contents. He who feathers the nest does not spend his time sitting on it.[1]

Among owner-occupiers, 85% of wives considered that they had made some financial contribution to acquisition of home and contents, and, among those who did not own their own home, 79% of wives considered that they had contributed financially towards the home and contents.[2]

The Management of the Household

Much has been written about roles in marriage. The Survey questioned couples about their attitudes and practices.

In 1971, 89% of the wives of the marriages studied purchased the food, 49% paid fuel bills, 45% paid rates, rent or mortgage, and 36% dealt with any surplus remaining. This reveals what might have been expected - namely, that most wives took upon themselves the responsibility of the family catering, but that other domestic duties were shared by the spouses. Whose money did the payer use to meet the bills? At this point, the survey seems to have been concerned to find the executive partner (who may or may not have been the funding partner). Husbands who were paid in cash were more likely to entrust payment of bills to the wife /

1. per Sir Jocelyn Simon
2. S.S. Opinion varied according to the asset under consideration. Thus, 72% of wives felt that, by running the home, they had contributed to the acquisition of the home; 35% thought that by so doing they had contributed to the acquisition of the car. It varied also according to the method of contribution; 67% considered that their earnings had helped towards the acquisition of the matrimonial home; 74% to the acquisition of the car.

wife; in other cases, often the husband will pay the bills.

There are regional variations in habit. 15% of wives in the North of England received the whole contents of the husband' pay packet, compared with 2% (of wives whose husbands receive payment in cash?) in London and the South-East of England.

Approximately equal support was given to the opposing notions that the wife should be entitled to savings from the housekeeping and that the surplus should be shared equally. At the date of the survey, few persons could give a correct statement of the law.

24% of husbands and 10% of wives had given thought to the future by making a will. It is well known that most people are loth to make a will. 12% of husbands who had made wills and 22% of wives who had done so had been prompted to make a will because they felt that they had acquired sufficient property to render the exercise worth while. A survey breakdown of the ages of the testate and intestate would have been helpful. Prople were found not to be entirely ignorant of the rules of intestate succession, but "Only three people, that is about one spouse per thousand, knew in detail the parts of the intestacy laws which affect the family, and they all had close connection with legal work."[1]

The survey then considered the responses given to questions of a more general, and less subjective nature.

A surprisingly high proportion of spouses (91% of husbands; 94% of wives) approved the idea of joint ownership of the house and contents irrespective of which spouse had paid for them. This question was followed closely by a question designed to discover whether /

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1. 5.3, p.37.

whether the spouse who normally would be the beneficiary of the above arrangement should be obliged to take a secondary responsibility for the financing of the home should the husband fail to do so, and on the assumption that the wife had some money of her own. 41% of husbands and 43% of wives thought that this responsibility should arise. 27% of both husbands and wives answered, "It depends", a viewpoint which reflected the notion that conduct should be relevant.

It is interesting that even those who favoured the sharing of responsibilities did not express the view - or were not given the opportunity to express the view - that the responsibility should be equal, or that the wife (joint owner) should be liable in so far as she is able, to contribute to mortgage repayments and other outgoings relating to the matrimonial home. This may reflect the practicalities of the case, for relatively few wives have private income and, for reasons of quality of life, neither husband nor wife may favour paid employment for the wife during the childbearing and child-rearing years.

Among those who favoured joint responsibility, the 'partnership' reasoning was strongly held. Among those who did not favour sharing, the "husband is the natural provider" opinion prevailed, and among the "It depends" group, the attitude that, "She should be responsible if the husband is doing his best, but not if he's not" was the most prevalent.

As to division of property on marriage emergency (separation), the spouses independently showed a strong predisposition to equal sharing of the material items acquired during the marriage (house, car, savings), in a situation in which both spouses had been employed and earning money, and this attitude was even slightly more strongly taken where the situation of working husband and housewife wife was postulated. This displays an interesting /

interesting approach, and a more generous one than often is ascribed to spouses in matrimonial difficulties. Of course, in reality, there might be more acrimony. There must be set against the findings of such surveys the fact that fair-mindedness is more likely to be present in a situation free from emotional upset (and those whose opinions were recorded here were persons currently married. Among the formerly married, there was less enthusiasm for equal shares on dissolution of a 'housewife' marriage. (See infra 'Fundamental Concepts of Matrimonial Property'.) At 11.2, the survey notes that this group adopted a perhaps more realistic approach than was possible for the currently married and spouses in the latter category were being interviewed in the presence of each other).

The group was asked about the manner in which they considered a post-marital legacy of £500 to the husband from his grandfather should be treated. This tested in effect English attitudes to gratuitous acquirenda, and 46% of husbands and 59% of wives felt that the legacy should remain with the husband. 41% of husbands and 29% of wives thought that the legacy should be shared equally between the spouses. Similarly, questions were posed about the destination of ante-nuptial property, and in particular about a notional £200 saved by the wife before marriage, and retained by her after marriage. 68% of husbands and 70% of wives considered that the wife should be given that sum in the division of property. 26% of husbands and 24% of wives favoured equal division between the spouses.[1]

It is clear that there was a preference for the retention of individual rights of ownership of those items /

1. Among divorced and separated spouses, the "individualist" view was held even more strongly (11.2), and most strongly of all among the females of that group.

items, the history of the acquisition of which pertained so clearly to the life history of one spouse, rather than to the previous history of both or to the efforts of both. A tentative conclusion might be drawn to the effect that, if a form of community of property were to be introduced, popular opinion would tend to favour the exclusion from community of gratuitous acquirenda and - even more clearly - of property acquired ante-nuptially. It is thought, however, that a distinction might be able to be taken between property owned by each spouse before marriage and specifically brought to the marriage or the use for which for the benefit of both was acquiesced in thereafter by the original owner, and property owned by each spouse before marriage and retained in the individual name thereafter, making little or no "property impact", as it were, on the material prosperity of the marriage.[1]

It is not surprising to find that a higher proportion of the female "formerly married" group had never been in paid employment.[2] Here there was an /

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1. At 17.0, there is a summary of findings, and of such gratuitous acquirenda or pre-marital property is written (p.103), "Although the proportion of people who felt such possessions should be shared was much lower than that for property which had resulted from earnings during marriage there was, nevertheless, considerable feeling that these more personal assets should be shared. The results also showed some indication here of the idea that what was the husband's should be shared, and what was the wife's should not". Given economic inequality, there may be common sense at the root of the old joke by the wife that "What's yours is mine, and what's mine is my own".
   See position in Sweden (Chapter 6).
2. This group was smaller and more difficult to find. The total number of interviews was 600; the total number of interviews with persons then married was 1877.

an older average age, weighted by the relatively large number of widowed persons interviewed. It was noticeable that, when views were canvassed about contributions thought to have been made towards the home, the car and the furniture, 67% of widows (as opposed to 92% of divorced or separated women and 79% of wives) considered that they had contributed to the home, 40% (68%; 57%) to the car and 73% (82%; 85%) to the furniture. As to methods of contribution (to furniture, "this being the only kind of property that sufficient numbers of formerly married people had owned during marriage"), the two factors (all factors mentioned having been suggested to the interviewees) which predominated were contribution by effort in the home, and money earned during marriage. Fewer divorced or separated wives had contributed by effort in the home (39%, as opposed to 63% who considered that they had made a contribution through earning); 53% of widows and of wives thought that they had contributed by effort in the home, but 70% (as opposed to only 46% of widows) were of the opinion that they had contributed through earnings.

The proportion of widows who had been content to leave money matters to the husband was higher than in other categories.

The attitude towards savings from the housekeeping allowance did not vary greatly, though the preference for an equal sharing approach was slightly more marked among the currently married.

A less strong feeling of having contributed to the material assets, a relative lack of earning power and a relative lack of interest in money matters are characteristics of members of the widow category who belonged in the main to an older age group.

Fundamental Concepts of Matrimonial Property

Widowed and currently married persons differed little in the favour which they showed to the concept of /

of joint ownership of the matrimonial home. There was less enthusiasm among divorced and separated spouses: a feeling existed that the matter should be determined by contribution. However, when the question was posed whether a wife with money should be obliged to continue mortgage repayments if the husband failed to do so, the divorced and separated wives were less in favour of this than were widows or wives. The divorced or separated wives revealed a preference for the older view that maintenance is a male obligation, and a distaste for the "equal responsibility inherent in the relationship of partnership which is a marriage" attitude. This seems at odds with their views concerning the matrimonial home. In the study, the compilers remark upon the occasional inconsistency of people.

When views were canvassed about division of property on marriage breakdown, currently married persons looked more kindly on the suggestion that capital assets should be shared equally between the spouses, even where the husband alone had been in paid employment and the wife had been looking after the home.

Further research revealed features of the incidence of joint ownership of the matrimonial home.

The decade of the celebration of the marriage and the incidence of joint ownership were studied. This produced the surprising result that the lowest percentage of joint owners (39%) had been married in the 1970's, the next lowest (44%) having been married in the 1920's or before. Of course, when the survey was carried out, the decade of the 1970's was not well advanced and so the comparison may not rest on a good foundation. It was suggested that, at the date of the survey couples "had had little time to establish themselves". There was nothing to indicate that, given time, both the level of ownership and the pattern of ownership would not come into line with those of other couples".[1] On the other /

1. 12, 1, pp.78-79.

other hand, earlier in the Report[1], commenting upon the attitudes of single-name title holders towards joint ownership the compilers remark that "These results suggest that it is very unlikely that any steps will be taken to change the type of ownership except in the circumstances of a new purchase." Still, "Once a couple have their home in joint names they do not seem to change back to single name ownership later."

Although the highest proportion of joint owners (56%) was found among those of the highest social class considered (professional and managerial) no great variation was found to occur from class to class. For example, 55% of the "semi-skilled non-manual class" held their homes in joint names. The Social Survey Division turned in surprise from the conclusion that "neither length of marriage nor social class are related to joint ownership" to view the importance of the year in which the current home was acquired, and there a steep and steady rise in the rate of joint ownership was seen. In the 1930's, 20% of homes were jointly owned. The corresponding proportion for houses acquired in the 1970's (that is, early in the 1970's) was 74%. The 1960's proportion was found to be 57% and so in the mere fifteen months of the 1970's which had elapsed before the survey was taken, there had been a sharp rise. The results suggested that "the number of couples who would wish to opt out of a system where joint ownership was the general pattern is small." Joint ownership was more common among couples where the wife had made some financial contribution, and later it was found[2] that it was least common in cases where the wife had never been in paid employment during the marriage. In addition, the increasing publicity given to the subject, and to remedies for the non-owner (as for example /

1. 2.1, p.12.
2. 13.0, p.84.

example contained in the Matrimonial Homes Act, 1967) may have reinforced the trend. To the factors of financial contribution, year of marriage, number of houses previously owned and interest in the legal rights of spouses with regard to the matrimonial home[1] was added what the Social Survey Division aptly termed the "catalyst" of the solicitor who "is in a unique position to communicate the advantages and disadvantages of various types of ownership...."

Enquiry was made into ownership patterns in relation to other assets also.[2] No clear trends emerged, but we are told that of never-employed wives, wives who have been employees, and wives who have been self-employed or have worked for their husbands, 61%, 59% and 53% respectively were partners of a marriage where each partner had "some" property, but no joint property, and that 25%, 30% and 36% respectively had both joint and separate property. How much separate property did the wives have? Using the same categorisation of wife, and with reference only to separate property, 13%, 19% and 47% of cases assets of a value between £1,000 - £9,999 stood in name of the husband; in 7%, 7% and 17% assets of like value stood in the name of the wife. Perhaps even a larger difference between the financial positions of husbands and wives might have been expected.

The greater material prosperity of couples of whom the wife had been self-employed or had worked for her husband was notable. Such wives were found to favour more strongly the notion that a wife should bear part of the financial burden if the husband was not able to do so[3]. Here also the concept of automatic rights /

1. as opposed to the factors of length of marriage and social class which were found not to be relevant.
2. p.85.
3. Perhaps the further question should have been posed: "Regardless of the financial and other circumstances of the husband, do you think that a wife should bear as much of the financial burden of the marriage as is reasonable in the particular case?"

rights of inheritance was more popular.

Among "never-employed" wives, though, the pattern of ownership within marriage was not very different. The marriage was likely simply to be less affluent. On the fundamental issues (wife's liability to finance the home, financial settlement on marriage breakdown (including treatment of gratuitous acquirenda and pre-marital savings) and rights on testacy and intestacy), opinions did not differ according to whether the wife had or had not been in employment at some point during the marriage.

Rights on Death

Views were canvassed upon the subject of rights in intestacy and the results tabulated in a somewhat confusing form.[1] As to spouse inheritance, the inference drawn by the Social Survey was that "People who thought that there should be no inheritance rights for spouses were more likely to favour some form of sharing between the wife and sons, while those who felt that there should be inheritance rights, or who gave qualified opinions, were more inclined to think the wife should take it all." As far as inheritance by children was concerned, of those opposed to automatic rights of inheritance by children, approximately two thirds considered that the wife should be sole inheritor in intestacy, and one third favoured the sharing of the estate between wife and sons. (The family example taken in all cases was that of a mother with three adult sons).

The compilers concluded that "a fairly substantial proportion of people felt that although children should not have to be included in the will, if no will was made" (in the situation envisaged) "the children should share /

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1. 15.0, p.97.

share in the estate". Is this a sweeping conclusion? Among those in favour of automatic inheritance rights, over 50% felt that there should be a sharing between wife and sons, but 41% of husbands and 38% of wives thought that the wife should be the sole inheritor. The Social Survey Division comments, "These people were clearly not equating the intestacy situation to that of making a will." Inconsistency, they say, is likely where people are asked to think and respond quickly, the subject being a complex and unfamiliar one.

The Survey's Conclusions

The first major finding was that, at 1971, among owner-occupiers, a majority (52%) held their home in joint names. Single-name owners displayed no great antipathy to the idea,[1] and it would appear to be the case that, as the 1970s have progressed, a greater number of married persons are taking joint title to the matrimonial home.

Joint arrangements with regard to bank accounts were less common than with regard to houses, but 40% of couples with bank accounts had at least one joint account. The "at least" may be significant: couples who bank all their funds jointly subscribe impliedly, it might be thought - even allowing for the complexity of the legal rules concerning property in bank accounts of /

1. Enthusiasm for joint ownership, and for the assuming of financial responsibility therefor by the wife, was less marked among the formerly-married group (the divorced, separated, and widowers) than among the currently married and widows (p.104).
Some interviewees intimated an intention to hold the next home in joint names: moreover, single-name ownership, it transpired, did not import an absence of an attitude of sharing. "In nine out of ten cases the spouses each thought of the home as belonging to both of them" (17.0., p.102).

of which those couples probably are ignorant - to a notion of sharing of material goods, and good and bad fortune, and liability for debts, within marriage.[1] Those who have separate bank accounts as well as one joint bank account (maintained perhaps to save for a new car, or a holiday, or some other luxury, or to meet household bills) do not necessarily hold the same view, or do not hold it so strongly, or fully. Indeed, their preference might be for general separation of property in marriage, and that would be more true, prima facie, of those who maintain separate bank accounts only.

The bank account, concluded the compilers, was an arrangement "which had to work for day to day living; the pattern of ownership of the home, on the other hand, did not affect daily living at all, but was a long term arrangement the importance of which might not become apparent until the end of the marriage." Does this mean that it was felt that community was acceptable only at dissolution and that during the subsistence of marriage a semblance of separation[2] or actual separation was preferable?

The survey notes the mixed views upon the question of the financial responsibility of the wife for the house, as contrasted with the overwhelming favour (nine out of ten husbands and wives) shown towards the "fundamental concept" of joint ownership of the matrimonial home. Views on division of property on dissolution of the marriage by death or divorce did not vary greatly according to whether or not the wife had been in employment during the course of the marriage. Perhaps /

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1. although possibly the thought may not be formulated consciously.
2. cf. systems of "deferred community", or (infra) a system of separation with concurrent compensation of gains.

Perhaps the rationale is that, while it was felt to be inherently right that the husband provide and maintain the home and contents, a more 'enlightened' attitude should prevail upon dissolution in the matter of division of the material assets, no matter by which partner they had been acquired: all in all, a wife-favouring conclusion.

More approval was given to the notion of automatic rights of inheritance for wives than for children, though even with reference to the former, one third of the (English and Welsh) interviewees supported the view that a husband should have complete freedom of testation. However, "over half of husbands and wives felt that if a man made a will then he should be obliged to include his wife in it ...".[1]

The Survey revealed great ignorance of the law as it affects property rights within the family. Equally, a study of the sample, which included "married couples of all ages and ranges of financial circumstances" showed that many do not own a great deal of property. 48% were not owner-occupiers; 47% did not have a current bank account; 23% (presumably of the remainder) stated that, apart from the house or bank account, their total assets amounted to less than £100. "There are thus very few people for whom detailed knowledge of the intestacy laws is necessary."[2] In consequence, the compilers consider that "It seems to follow that changes in the law should be framed in such a way as to take account of the low level of assets owned by the majority of couples." That may be true, and it may also be true that the better-off may be unenthusiastic about automatic legal regulation of property matters. However, unclear rules do not help either category.

Rules /

1. p.103. But one third felt that he should be quite free to exclude her.
2. p.105.

Rules of Scots Law pertaining to the Ownership of Corporeal Moveables, as those rules affect married persons

Before suggestions are made concerning possible reform of the rules of Scots law governing spouses' financial relations (in the widest sense), a review is given of the rules which now regulate the resolution of disputes as to ownership of corporeal moveables.[1.2]

It is clear that the earnings of a spouse, and the items of furniture or property of any kind which he/she chooses to purchase therewith, are the property of that spouse alone. The practical results of this rule, even in a society in which paid employment for married women is becoming increasingly common, do not require re-statement. This strict system has advantages as well as disadvantages: many a creditor may find that the household furniture is alleged to belong to the wife and that a united front is presented to the stranger.[3]

The rules concerning paraphernalia[4] remain valid,[5] but except in cases where jewels have been showered upon the wife, purely from motives of affection and/or for reasons of investment,[6] this category of property is not of great importance.

Where property is not paraphernal in nature, and where it has not been purchased out of the income or capital of the spouse who claims to be the owner thereof, then /

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1. See "Some Questions of Property Between Spouses", A.E.Anton, 1955 S.L.T. (News) 193; "The Effect of Marriage upon Property in Scots Law" A.E.Anton (1956) M.L.R.653.
2. As to heritage, see Chapter 5.
3. Cameron v. Cuthbertson 1924 S.L.T. (Sh.Ct.) 67, per
4. Chapter 1.
5. "...a wife's clothes and other things quae sunt de mundo muliebri (Mistress of Gray v. The Master (1582) F.5802) are paraphernal and the separate estate of the wife." (quoted by Anton, 1955).
6. See Chapter 1.

then, leaving aside for the moment the difficulties of proof, it may be that the latter argues that the item was a present to him/her from the other spouse, or from a stranger to the marriage. It has been seen that, in terms of the M.W.P. (Sc.) Act, 1920, s.5, donations between spouses are rendered irrevocable quoad the spouses, but reducible by the donor spouse's creditors if made within a year and a day of the donor's sequestration.

There is, however, a presumption against donation, which operates in the general case and in the case of husband and wife, though there less strongly. Normally, the requirements of animes donandi and physical delivery must be fulfilled, in order that donation can be held to have taken place, but, as has been noted by many authors, delivery may be found to be an unrealistic requirement[1] when the goods which are the subject of the /

1. cf. C. & W., pp.295-7. At p.297, Professor Clive opines that insistence upon delivery in transfers of corporeal moveables in the home (the stance taken in Shearer v. Christie (1842) 5 D.132 and subsequent cases) is obsolete. "Actual delivery of corporeal moveables, such as furniture, in the matrimonial home is not essential to pass property from one spouse to the other if they are living together. Apart from the possibility of striking down a sham or simulated transfer, creditors are protected by the law on gratuitous alienations and by their right to revoke gifts between husband and wife made within a year and a day before the donor's sequestration." Still, in a dispute between husband and wife, the true position will be difficult to ascertain. At p.293, Professor Clive takes the view that there is no rule that the husband is the custodier of the wife's deeds. Nevertheless, he notes the frequency with which the property of one spouse and the titles thereto are immixed with those of the other spouse. Hence, to discover property alleged to have been donated by one spouse to the other in the repositories of the alleged donor may not be fatal to the argument that there has been a gift. At p.294 it is suggested that matters such as donee's knowledge of the deed, (or not) customary intermingling (or not) of assets and history (or not) of acting on behalf of the other will aid the decision. See generally, authorities discussed. Clive /

the donation in question form part of the household plenishing. It may be argued that the subject of "ownership of household goods" is permeated by a lack of recognition of the circumstances of family life. Let these at least belong to the married pair in equal shares.[1] On the other hand, the asset may be identifiable as a wedding present from a particular donor, whose intention may have been, if not to benefit one partner only, at least that the item in question (especially if of family heirloom character) should remain in the ownership of one side of the family, in the event of subsequent divorce or separation. Such intention may be found only infrequently. More often than not the intention will have been to benefit both, and then "it is submitted that joint ownership should be presumed."[2]

The name(s) in which money stands in a bank account is by no means conclusive of the ownership of such money. This is a matter which may arise, for example, in the administration of the estate of the predeceaser of the marriage partners when the interest therein of the deceased must be discovered.[3] The contributions which made up the sum standing at credit must be ascertained, and /

Clive and Wilson add that, since delivery no longer is essential for a sale of goods, alleged sales of corporeal moveables between spouses must be judged rather on whether the transaction was genuine. And see Smith v. S.'s Trs. (1884) 12 R. 186, per L.Shand. (Anton (1955) at p.199; C. & W., p.294)

1. See suggestions made below, (Family Assets); cf. C. & W., p.294 and fn.92.
2. C. & W., p.295; and see Chapter 2.
3. "The fact that the multiple names and the survivorship provision do no more than require the bank to pay to the named person without settling the question of ownership comes as something of a shock to many spouses, especially just after the death of the other", M.C.Meston, 5th Commonwealth Law Conference 1977, "Developments in Family Law", "Family Property in Scotland", Proceedings and Papers, p.375.

and if the account stands in the name of one other than the sole or principal contributor, or jointly with him, then "At best, the terms in which a deposit receipt or bank account may be expressed are evidence of the intention of the proprietor."[1] When it is remembered that, in a husband/wife case, that which the wife saves may bear a relationship to the level of salary which her husband earns,[2] the complexity and unreality of matrimonial property matters, and the practical inter-dependence of husband and wife, however strong /

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1. C. & W., p.306. Reston (Family Property in Scotland p.375) remarks that parties probably do not intend that a detailed examination shall be carried out. "They may very well intend that the appearance of both names on the account is to prove that they each own one half, but - the law is reluctant to give effect to that intention. It would be an excellent idea if, in the event of dispute, a court were to presume donation by each spouse to the other of one half of the sums paid in, but it is not clear that there is authority for them to do so. That would involve the creation of a community fund, and some very difficult problems might arise, as they do in most community systems, of the extent to which this community fund was available to the creditors of either spouse for separate debts. Unfortunately it seems that a Scottish court would have no option but to embark upon such a detailed study of the account, and it does not even have the powers conferred upon an English court by section 17 of the Married Women's Property Act 1882".
2. For example, her own resources may be largely untouched by marriage, if not required to meet household expenses; her "housekeeping allowance" may be sufficiently ample to enable her to make savings therefrom - a less likely case, nowadays, and of course, strictly (M.W.P. Act, 1964, s.1), the savings would belong equally to both: or, on the other hand, the level of her husband's salary and her own circumstances (care of young children) may mean that she cannot save at all. See also infra, "Separation of Property With Concurrent Compensation of Gains".

strong their championing of the principle of separation of property may be, is emphasised. This is true of separate, as of joint, bank accounts: who knows by what effort (in paid employment or in work in the home) of the one, the other is enabled to save? Who knows the truth about contribution, and what are the criteria? Are the criteria the best which can be devised? Are they lacking in subtlety? It may be, though, that, except in case of dispute, the apparent proprietor will be treated as the true proprietor. Indeed, if any person - spouse or third party - has allowed money to lie in another's name in a bank account, might not donation be presumed?[1]

Where husband and wife are concerned, adherence to strict rules of property ignores realities. No matter what is the attitude of a married couple towards the topic of matrimonial property in general, in their marriage there will be an immixture of money and other resources. Views on the matter may be coloured by the opinion held about the desirability or not of certainty in this area of law. Todd and Jones noted[2] that "complaints about the present law are that there is no clear cut rule as to what is recognised as a contribution to the acquisition of property, and even if there were, in any given case it might involve litigation and expense to decide the extent of a spouse's contribution."

In /

1. It may be that the concepts of trust and donation, used in England and Scotland respectively, are an unnecessarily complex and somewhat unsuitable guide to the resolution of matrimonial property disputes. The subject is difficult and productive of uncertainty. Reference is made to the clear and succinct treatment by Clive and Wilson at pp.297-306 ('Property to which there is documentary title' (No Transfer between spouses)(Direct Transfers between Spouses): special reference is made to Deposit Receipts and Bank Accounts and to heritage in which neither spouse is infeft).
2. 1972, 1.1.

In 1955, after his first survey, A.J.Anton[1] wrote that it was clear "that there is little trace in the Scottish cases of a "new equity" in property questions between husband and wife ____ the Scottish judges are more reluctant to depart from the strict considerations of law which are commonly applied between strangers. The tendency is to approach such questions purely from the patrimonial point of view, and to regard the matrimonial relationship of the parties as irrelevant."

Twenty five years have elapsed since the hope was expressed[2] that the adoption of L.P.Cooper's approach in Beith's Trustees v. Beith[3] would "do much to remove the anomalies and injustices to be found in this branch of the law." The advantage to the husband normally brought about by strict adherence to the notion of separate property in the author's opinion was "accentuated by the adherence of the courts to precedents dating from the period when the husband on marriage became the proprietor of his wife's moveables, and her curator."

In a further article of broader scope,[4] the same author, having advocated the courageous application of L.P.Cooper's approach, wrote that "rather more than that is required to make the law reflect current social conceptions of the family", and urged[5] that L.P.Cooper's suggestion[6] that "the wider aspect of the present problem may yet have to be solved by reintroducing in a limited form the old conception of a communio bonorum so far as relates to the common home and its maintenance" receive /

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1. Some Questions of Property Between Spouses, 1955 S.L.T.(News) 193 at p.199.
2. Ibid., p.200.
3. 1950 S.C.66.
4. (1956) 19 M.L.R. 653.
5. at p.668.
6. found in Preston v. P., 1950 S.C.253 at p.297.

receive serious consideration. In early days, there may have been a concept of community of property in Scots law, but the nineteenth century rules of Scots law governing property relations of spouses were irreconcilable with such a concept, and of course the aim of the Victorian legislative reforms was separation of property.[1] Such consideration does not appear to have been given, although dissatisfaction frequently has been expressed about the rules, or lack of rules, of Scots law in this area.[2]

The Communio Bonorum - a short note[3]

Anton /

1. See generally Chapter 1; C. & W., p.286; Fraser v. Walker (1872) 10 Macph. 837 at p.847; and Anton, "Le Regime Matrimonial Legal dans les Legislations Contemporaines" (ed. Audre Ronast) 1957 (This book provides a comparative introduction, and studies (at 1957) of very many (around 40) systems, from Australia to Yugoslavia, including less well known systems, but its defect now, of course, is its date.) "Ecosse", A.E.Anton, pp.115-127 (below). In his article of 1956, Anton (at p.655) notes that there was an attempt to provide for Scotland a separatio bonorum, on French lines (Turnbull v. T.'s Creditors (1709) M.5895), but that this failed. He writes, "Its failure made inevitable the eventual rejection of the community concept."
2. See e.g. Professor M.C.Meston, 5th Commonwealth Law Conference Edinburgh, 1977 "Developments in Family Law: Family Property in Scotland". "It may seem remarkable to those who criticise the family property provisions of English law that Scots law has virtually no family property provisions to criticise, but this is one of the areas where Scots law is certainly not a model for anyone." Proceedings and Papers, p.371. Certain specific areas of law which affect the property rights of husband and wife (for example, rights on divorce, on death, to savings from the housekeeping allowance) have been the subject of change since the dates of Anton's articles.
3. Anton, "Le Regime Matrimonial Legal Dans Les Legislations Contemporaines" (ed. Ronast) 1957. "Ecosse" (above).

Anton directs our attention to the rapport which existed between the law of France and the law of Scotland before the Union, and in particular to the fact that the concept of community of goods, while almost unknown in England, was "usual" in Scotland.

In the author's opinion, some system of community existed in Scotland from the middle ages to the nineteenth century. It was a system which drew a clear distinction between immoveables and moveables. Thus, the enjoyment by a husband of the heritable property of his wife was limited to the fruits thereof, and to the right of courtesy after her death provided that a child heard to cry had been born of the marriage. The corresponding right of terce (to one third of the liferent of the heritage of the husband) attached to the wife if the marriage had subsisted for one year and a day or if a child had been born of the marriage. The moveables of the wife, which passed to the husband jure mariti were known to the Institutional writers as "the goods in communion" without comment on the infelicity of the phrase. Anton notes that the husband's liability for his wife's debts was another manifestation of the existence of community. He sets out the rules governing the survivor's rights upon the death of the predeceaser, including the pre 1855 rule that the estate of the predeceasing wife benefit on the husband's death to the extent of one half or one third of the goods 'in communion' (the husband's moveable estate).[1] Again, on decree of divorce for the husband's adultery or desertion, the wife was entitled to ius relictae, on the basis that the husband was notionally dead. The true basis, Anton suggests, was the feeling that the wife, by reason of the community, had an interest in the goods, as well during the life as after the death of the husband.[2]

However /

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1. Chapter 1, p.73. C. & W. p.286.
2. Cf. C. & W. Chapter 10: Property: Historical: p.286, and fn.20.

However, the husband appeared to enjoy many attributes of ownership, and the notion of community did not correspond to that of orthodox partnership.

Thereafter, Scots law became influenced more strongly by English law, and the emphasis on community waned.[1] Then came the nineteenth century legislation[2], indicative of the movement towards emancipation but linked also to ideas of redistribution of wealth.[3] Anton remarks that the legislation of 1881 - 1920 dismantled a body of rules but put nothing in their place. It might be said that the new rules amounted to the establishment of a system of separation of property, but he notes that this could hardly be so because "such a phrase would appear to imply the existence of a special body of law regulating the pecuniary relations of the spouses"(duty to contribute to household expenses, ownership of immixed property and related questions) and this was lacking. Generally, the rules which were relevant were those which applied between strangers, apart from rules of aliment and legal rights on dissolution of the marriage.[4]

Marriage since 1920 has had in Scots law no direct effect on property. Each spouse remains proprietor of his/her own goods with no fetter inter vivos upon his/her right to dispose thereof. Alienation of property /

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1. Anton refers to L.Kinloch's famous statement concerning communio bonorum contained in Fraser v. Walker (1872) 10 Macph.837, at p.847, which, in modern parlance, helped to 'destroy the credibility' of the communio bonorum. The communion has now only historical curiosity status.
2. See also generally, Meston's account: Family Property in Scotland: 5th Commonwealth Law Conference.
3. Nevertheless, Meston (p.373) quotes L. Neville Brown, Comparison, Reform and the family, to the effect that the legislation was fashioned by the draftsmen for cases of "wealth marrying wealth".
4. Anton (1956) p.656.

property without consent, or in prejudice of the other spouse's legal rights is competent, and a spouse is not liable for the other's ante-nuptial debts. The resultant 'equality', in Anton's view, is purely formal.[1]

Anton in 1957 wondered aloud whether, although the Royal Commission on Marriage and Divorce in the proportion 12/7 rejected the introduction of some form of community, if certain of its recommendations were implemented by legislation, this would mean that a community system, in disguise, had been adopted. The proposal that spouses should have equal right to savings from the housekeeping allowance has been implemented (M.W.P. Act, 1964) and the discussion concerning the matrimonial home has been taken up and continued,[2] but there has been no substantial change, and in 1977, Professor Meston[3] argued that "what is clearly needed in Scotland is - a system of family property based on sharing of acquests since the date of the marriage. Such a system of community of property would not be alien to the traditions of Scots law and would indeed support one of its best traditions, namely using a logical principle from which to deduce particular consequences. At the expense of increased complexity it would recognise the joint venture aspect of marriage by giving both spouses an equal share in the /

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1. and see in the words of Meston (p.373)(acknowledging Anton) - "in the majority of cases the rule that each spouse keeps his or her own property means that the husband keeps his. Declaring that a wife is capable of managing and disposing of her own property does not give her any to manage or to dispose of so that equality in theory may mean injustice in practice".
2. See e.g. Sc.L.Com.Memo.No.41; Matrimonial Homes (Family Protection) (Sc.) Act, 1981.
3. Proceedings and Papers, p.377. He makes reference to the Scandinavian/German systems of deferred community as useful models.

the increase of prosperity of the family".

"The fact of joint use does not raise a presumption of joint ownership".[1] should it raise such a presumption[2]?

Is a system of separation of property the best solution which we can devise to the problem of property rights within marriage? Family law, and family property law, is at a point of change in many jurisdictions.

It is submitted that the rules governing certain matters (praepositura, the law of bankruptcy as it affects spouses, provision on death and on divorce, aliment during cohabitation) could be improved in a manner which would not involve any fundamental change in our approach to the general subject of matrimonial property. (Our present approach is low key: the difficulty lies in finding our rules of matrimonial property law and thereafter in overcoming the difficulties of proof which attend their application. The scarcity and age of the authorities reveal their retiring nature. They are almost out of sight). Improvements could be made to the existing structure in such a way as to leave the structure intact. Where title to moveables and to the matrimonial home is concerned, changes novel and striking in nature could be made. Probably the result would /

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1. C. & W., p.294. Attention is drawn to 'The Law of Husband and Wife in Scotland', C. & W., Chapter 10 ('Property'), which contains an examination of the present law to Jan.1, 1974. See in particular summary of existing rules governing donation and trust (and as to the application of these rules to heritage, see p.292). This book, which is the leading work on the Scots law of husband and wife, naturally sets out the Scots rules on the property rights of husband and wife, and a great debt is owed to it. Upon that statement of the existing law is the suggested scheme of reform founded.
2. cf. Professor Otto Kahn Freund, "Matrimonial Property. Where Do We Go From Here?", Josef Unger Memorial Lecture, 1971. (the importance of use as a criterion).

would become acceptable generally, within a few years, and might be well suited to popular attitudes and customs here, but it would be wrong to attribute to such a piecemeal solution the name of matrimonial regime. On the other hand, the majority might be better pleased with that outcome than with the effects of full-blooded reform.[1]

However, there is also the possibility of the creation of a new body of rules, which perhaps should have come into being in 1920,[2] comprehensive in scope so as to include all fields of law in which the property relations of husband and wife might be expected to be important. Here allowance must be made for the attractions of novelty, the neatness of the 'clean sweep', the enthusiasm for full-scale reform: the attraction of system and cohesion is strong, but although there is a natural popular desire for certainty, those whom a legal system serves have a greater interest in good and acceptable policy and satisfactory practical results.[3] Yet it is to be hoped that the choices are clearly /

1. The law of England has chosen this path, while being convinced, it seems, that changes are necessary. A somewhat haphazard and judicial discretion-dominated results, but it may work well. See Chapter 6. An excellent compendium of events to 1976 is to be found in "Cases and Materials on Family Law", Peter Seago v. Alastair Bissett Johnson. However, a tauter framework for Scotland is suggested in the pages which follow.
2. The removal of the last substantial remnant of the communio bonorum might have been attended by the creation of a new communio bonorum more worthy of the name, but at that point the abolition of what was rightly seen as an injustice (jus administrationis) appeared to be satisfaction enough. See Anton (1956), p.656.
3. Many would say that new or amended (e.g. of financial support, to occupy the house, of protection from a violent spouse) rights are needed, whatever their theoretical foundation or even if they lack one. The purist and the reformer often disagree, and the purist reformer tends to be slow.

clearly seen. The merits of each and the merits of retention of the existing rules, require assessment. Professor Meston suggests[1] that progress initially will be limited, "beginning with special legislative provision for the matrimonial home. In the longer term however the aim of a logical and coherent system of community of property between spouses should be kept before us."

It is proposed to set forth for consideration two possible schemes of reform.

Towards a New Communio

It has been seen that there are many variants of community of property, and that those jurisdictions anxious to provide a 'modern' approach to matrimonial property tend to adopt a system of (instant) community of acquests, or a deferred or participatory community, or, if of the Anglo-American-Commonwealth tradition, to choose wide judicial discretion in the matter of property division on dissolution of marriage.

It may be that whole-scale community of property and profit and loss on the South African model is old-fashioned and extreme: without complex rules providing for "two captains on the bridge", on Dutch lines, 'reform' in this direction would be a return to the Scottish position before 1881, when there existed communion under the administration of the husband. The wife's property became the husband's, but if she outlived him, she might hope to see something of her property again. Indeed, before the Intestate Moveable Succession (Scotland) Act, 1855, if the husband survived the wife, the wife's relations, on the husband's death, would have a claim upon his estate, sub nomine communio bonorum.

A system of deferred community would create perhaps the /

1. Proceedings and Papers, p.377/8.

the greatest confusion in the minds of those for whose benefit it was created. In every jurisdiction in which it applies, it imposes limitations on the manner in which a spouse may administer his/her 'own' property. Sic utere tuo ut alienum non laedas is carried very far indeed: there must be no "disloyalty". Each must use his property in such a way as not unduly to diminish the property of the other. If this rule is not respected, the latter at division in Sweden (Bodelning), and in Denmark, may make a claim for compensation and abuse may even hasten division (Boskillnad). In addition, in respect of certain categories of property (commonly immoveable property and household goods, or - in the case of Germany - the whole property of the spouse), joint consent is necessary before action can be taken. Such a rule entails in turn the possibility of provision of judicial consent to aid the spouse of an unreasonable person, and the existence of rules to govern the rights of third parties in cases where transactions requiring joint consent are carried out by one partner unilaterally.[1]

It is thought that such a regime would be productive of uncertainty and frustration in Scotland. The restrictions upon the normal rights of ownership are unpleasant and perhaps unrealistic. Better would be a system of retention of certain joint property in joint control (or in control of one, subject to objection by the other and/or possible reinstatement of the other as administrator), conjoined with certain separately held property in the sole control of each partner.

Admittedly, in Sweden, certain property is deemed to be truly separate property. Contra, the property over /

1. But in all systems which are not systems of separation (and even in those, given the special relationship of the cohabiting separate proprietors) such problems must occur. Often proven good faith in the third party will save the transaction.

over which care must be exercised in the administration thereof is Giftorattsgods (capital at marriage and acquirenda). There is no tangible common fund stante matrimonio. Joint administration has been discarded, having been found to be productive of difficulties for spouses and third parties, although there is joint and several liability for household purchases.

A system of deferred community, or compensation of gains[1], though advantageous in certain respects, would create upheaval and anxiety without giving immediately ascertainable benefits. Almost certainly some would find its confining freedom intolerable.

A system of (instant) community of acquests would require the introduction of extremely complex and possibly unsatisfactory rules concerning the administration of the common fund and concerning the involved process of accounting at dissolution, and it may be open to more fundamental objections. Is it to be assumed without further thought that equality of ownership rights of all property gained onerously during marriage is a notion of inherent rightness? Surely it is not beyond the inventiveness of Scots lawyers to devise a system of rules which protects the interests of the homemaker wife without, by the blunt instrument of community, extinguishing all traces of independence within marriage? The core of an acceptable regime might be the rules that (a) certain items of property must be held in common, and that (b) adequate provision must be made for the economically weaker party, not only in marriage emergency, but throughout a peaceful marriage. Let there be jointness /

1. In some respects, (that is in its effects, not in its rationale) this system resembles the judicial discretion solution favoured by the common law countries: ultimately the less financially secure partner receives compensation, though the amount received is obviously subject to variation in accordance with the views of the party exercising the discretion.

jointness where interests are joint (home and children, food and clothing), but in the separate adventures of each let there be separation of property. Where the spouses are well disposed to each other, there is no need for further regulation,[1] but at divorce, in a suitable case, some compensation may be necessary to deal fairly with the homemaker.[2]

That which is proposed, therefore, is something of a hybrid system, an intermediate stage between tinkering and overhaul. It is felt strongly that some degree of separation of property and separate administration is a desirable feature and that the principal reason for its falling into disfavour is not the concept itself, but the fact that so often the (separate) property has belonged to one party only. A transfer of such property from one partner to the other stante matrimonio (to become that other's separate property, separately administered) might cause many to view such a system in a different light: would it then be regarded as a system of community - or not? Here, however, there would not only be separate administration but separate ownership. There would be an ongoing, not a deferred compensation, in order to enable the economically weaker party to match strides with the increasing prosperity of the other, as a matter of right and not of favour: an affirmation by the law of that which amity might (and should) itself alone achieve, yet not so ample as to provide undue reward for the idle. Recourse to the court stante matrimonio would be a necessarily available remedy.[3]

It is uncertainty, and lack of compensation for unequal /

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1. as to provision on death, see infra, pp. 1106-1119.
2. Cf. generally discussion of the subject and conclusions drawn by Clive & Wilson H.& W. pp. 321-3, "Proposals for Reform".
3. Cf. Sc.L.Com.Memo.No.22, 2.182 (Propn.39)(2.178 et seq.) and Faculty comment thereon.

unequal opportunity which are the true complaints against separation of property as a system. If each had equal opportunity to amass, and did so amass, fewer criticisms would be made. A little separation is a healthy thing, not least for third parties. There is nothing wrong with separation of property, so long as each spouse has separate property or the means of acquiring it, either in truth or by legal device.

SEPARATION OF PROPERTY WITH CONCURRENT COMPENSATION OF GAINS

AN OUTLINE

Within this system, despite its title, certain items are held in common. These are the matrimonial home, and the 'family assets' (to be defined). All capital held at marriage by each spouse is to be regarded thereafter as the separate property of that spouse, unless, being a corporeal moveable, it becomes a "family asset",[1] or, being heritable, becomes the matrimonial home, or, being money, is used to purchase 'family assets', or to purchase, or help purchase, the matrimonial home.

Gratuitous acquirenda of each spouse will be the separate property of that spouse unless the intention of the donor is otherwise, or unless, being a corporeal moveable, it is of the nature of a family asset and is used as such, or, being money is used to purchase a family asset, or family home, or, being heritage, is used as the matrimonial home or, having been realised, the proceeds of sale thereof are used for family purposes.[2] In general, use of money to acquire family assets or to improve the existing home, or help finance the /

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1. See in greater detail below.
2. See in greater detail below.

the purchase of a new matrimonial home, shall deprive the original owner of any claim that that which has been acquired is his separate property.

The income (earned and 'unearned') of each spouse shall be the separate property of that spouse, but there shall be joint and several liability for household debts. The praepositura shall be abolished, and liability as a (commercial) partner be substituted. Each spouse shall owe a duty to support the other during the subsistence of the marriage, which duty, if not fulfilled, shall be capable of quantification (whether or not marriage 'emergency' in another form be present) by the (Sheriff) court, and of enforcement through employer/tax deduction for remission to the other spouse.[1] Similarly, spouses may seek a declarator of property rights at any time (whether or not marriage 'emergency' in any other form be present) in the Family Property Court (or Family Court) of the appropriate Sheriff Court.

For all other debts, each spouse shall be liable out of his separate property to third parties. Hence, the bankruptcy of one spouse shall affect the other (only) to the extent that the creditors will have right to one half of the home and family assets.

The rights of disposal inter vivos and mortis causa of the home and family assets, and the rights of third parties transacting with spouses, require detailed exposition.[2]

Donations between spouses shall be competent and irrevocable, (except, as at present, in the case of the occurrence of the sequestration of the donor estate within a year and a day of gift) but spouses should bear in /

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1. Cf. Memo.No.22, Part V and Fac. Response.
2. Infra.

in mind the concurrent compensation procedure.

Concurrent Compensation Procedure (which shall be optional)

In so far as the income of one spouse is either insufficient for his/her own maintenance and/or falls below one third of the income of the other, each shall be required to pay to the other one third of his/her salary - by court order and employer/tax deduction - enforcement procedures if necessary[1] - and this sum shall form the peculium of the other. In consequence, the /

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1. Since parties may _ choose to adopt these rules, enforcement procedure should be a less important issue than it would be in other circumstances. However, the option would be chosen early, and in advance, perhaps, of marital disagreement. At the inception of the marriage, or at the introduction of the scheme, spouses may contract out of the concurrent compensation procedure. This they may do formally (the action must be joint, and will be irrevocable) or informally. If the latter method is chosen, agreement alone would be necessary (for the essence of such a scheme must be its usefulness in a particular marriage - and spouses might decide to use the scheme (or not) as circumstances dictated (see below)), but it would be understood that at any time either spouse could apply to the court to have the scheme and enforcement procedures made applicable to his case. This the court with only limited discretion to deal with mala fides, would be bound to do, and so for the doubtful, the better course would be to opt out formally and then later voluntarily to use the rules if they seemed to be of help. Informal contracting-out (subject to recourse to the court, as above explained) would be competent at any time. This would hardly be worthy of such a name, or of mention, however, since it simply would mean agreement not to use the rules - as being, perhaps, inappropriate in the circumstances at the time - and there would be little difference between application by a spouse to the court to enforce the procedure, such having become necessary through unwillingness of the other to adhere to the rules, and application to re-establish the procedure, it having been waived informally and proof being required that there had been no formal (irrevocable) contracting-out. The aim should be the creation of a scheme which is flexible, useful and workable. It should have "teeth", and yet those opposed to its philosophy or who consider it inappropriate should be entitled, at the outset, to draw back from /

the 'housekeeping allowance' should cease to exist in practice and the relevant rules[1] equally would cease to be necessary. The peculium would be used by the recipient to meet personal expenses, and to meet his/her share of the household debts. That which is bought with peculium, so long as of a separate, personal nature - is to be regarded as separate property. Alternatively, spouses might open a joint bank account for pooled income, operable by either on the understanding that the amount standing at credit at any time is to be regarded as joint property. This would be at odds with the philosophy of the scheme[2] which is that financial independence within marriage (whether fictional and 'engineered' or genuine) is greatly to be preferred, as are separate bank accounts (even if the funds in one are a direct transfer from the resources of the other), and that joint bank accounts should be used only for joint ventures of some particularity, such as the meeting of household debts, or the payment of a holiday.

One of the outstanding advantages of the scheme would be the relative simplicity (and fairness, if the initial concept of compensation is accepted) of the division of property on termination of the marriage, and another would be the certainty produced as to property rights during marriage.

Clearly, among those who decided not to opt out of the procedure, these rules would take the place of the /

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from it. Indeed, such an approach might be argued to be the most satisfactory general approach to the subject of 'rules of matrimonial property'. The rules should be imaginative, protective and efficient, but not officious.

1. M.W.P.Act, 1964.
2. and, to come within it, the sum at credit of joint account would require to be regarded as voluntarily pooled peculium.

the present rules concerning aliment.(The present rules of aliment (modified, as earlier suggested[1]) would remain to regulate maintenance rights and obligations of those who contract out of the Concurrent Compensation Procedure, but since the compensation procedure may not always work well, such parties still may seek aliment, and the court must make the best arrangement in the circumstances.[2]). Gross misconduct of the Wachtel type would remove the obligation to transfer funds as would unjustified/unreasonable refusal to adhere, but generally conduct falling short of conduct leading to judicial separation or divorce would not entitle non-payment of peculium. On voluntary separation, a modified compensation procedure would be agreed (recourse to the court being available if necessary), as it would on judicial separation.[3] In some cases - notably, perhaps, where there are no dependent children - a decision that compensation should cease would be the fairest conclusion. On divorce, the granting of a periodical allowance[4] should be competent, but relatively little in the way of capital division powers would be necessary, for separate property would remain separate, and there should have been, by virtue of the compensation process, an equal chance of gathering it. The starting-point in the matter of division of family assets would be equal division,[5] as it would be with regard to the matrimonial home, but in the latter case the court should be empowered to make an order permitting occupation of the /

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1. Chapter 4 (e.g. reciprocity of obligation to aliment, possibility of award of aliment during cohabitation).
2. And see infra, Aliment.
3. If the other spouse has disappeared, or will not co-operate, it might be more honest to revert to the term 'award of aliment' at this stage.
4. on the lines envisaged by Fac.Resp. to Memo.No.22.
5. Conduct would be relevant: this would not be entirely a property matter. (Wachtel).

the house by the spouse having custody of minor children (if applicable) until the attainment by the children of maturer years and completion of at least school education.[1] If the scheme were in force, there would be much less need of "anti-spite" provisions as seen, for example, in the Divorce (Scotland) Act, 1976, s.6 (disposals inter vivos in contemplation of divorce) and often said to be necessary in the case of disposals made with the aim of reducing the fund upon which the surviving spouse may claim.

That which has been acquired by either party out of separate estate/income (originally separately owned or earned or acquired from the other party through the compensation procedure), and which is of a "non-family asset" nature will be the separate estate of that party with which he/she may deal at will. He may give it away, save it or squander it. It is felt that the provisions of instant and deferred community systems are extremely restrictive of freedom in this matter and that a freedom to administer one's own property is a prized feature of systems of separation of property, and one not lightly to be given up.

Succession

The survivor would be entitled to one half of the house and family assets, and hence would succeed to all the 'family property' items, provided that the spouses were cohabiting at the date of death. On cessation of cohabitation, the court should be open to either or both spouse(s) to apply for a declarator of property rights and a division. Here a degree of judicial discretion would be necessary in order to provide the best solution in the instant case.

"The /

1. a commonly found solution. And see Memo No.22.

"The Contractors-Out"

In what manner should "the contractors-out" be treated? It has been suggested that a formally executed rejection of the compensation scheme should be irrevocable. If, in its place, a marriage-contract be drawn up, might the terms be subject to review? If so, what would be the grounds for review?[1] If review were incompetent in general or in a particular case, it seems possible that, on death or divorce, parties' rights might be governed by the terms of a marriage-contract or by the rules of the general law (excluding the compensation rules: contractors-out cannot be left without rules) or by the compensation rules. One answer would be to render the "jointness of home and family assets" rule the norm, thus providing a common core of regulation, the details of which may be thought now to be gaining general acceptance. Other assets might be divided then in accordance with the terms of the marriage-contract, or, failing such regulation, or special pre-divorce agreement, on the basis of strict ownership or judicial discretion: it is difficult to know the minds of the contractors-out. Do they wish pre-eminence to be given to the rules of property? Do they prefer a "system" of free-ranging judicial discretion?

The Compensation Scheme - Joint Action

Agreement would be necessary in the administration of important family assets, and in transactions concerning the matrimonial home. On the other hand, neither party might meddle with the separate property of the other. Accordingly, actions inter-spouse for theft and fraud would be competent, as would inter-spouse contracts, actions for breach or implement thereof, and actions in delict.

It /

1. Duress, undue influence, minority and lesion?

It is hoped that such a system, here outlined, and now to be explained in detail, would provide security, and certainty, and compensation (where necessary), while giving as little offence as possible to the protagonists of financial freedom and independence within marriage: freedom with regulation, separation with community - a concept, with accompanying rules, to espouse, or not, as the parties think fit.

A NEW SYSTEM : SOME DETAILED SUGGESTIONS

Since the new system would contain, as a uniform provision for all, a rule of joint ownership of the matrimonial home and family assets, it is necessary first to consider the details of such an arrangement. Many problems and queries arise.

The Matrimonial Home

The Subject-Matter Defined

The Succession (Scotland) Act, 1964, in dealing in Part II with prior rights, states that its provisions in this connection apply (s.8(4)) "to any dwelling house in which the surviving spouse of the intestate was ordinarily resident at the date of death of the intestate." If the intestate had in a dwelling house a 'relevant interest' not exceeding £50,000,[1] the survivor should be entitled to receive the relevant interest or a sum equal /

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1. When the Act was passed, the figure was £15,000; amendment was made by the Succession (Sc.) Act, 1973, s.1. The furniture entitlement value was raised to £8,000, and the money right was raised to £4,000 and £8,000. Clearly the value of money these days changes rapidly, and the Act provided that the Secretary of State by statutory instrument might increase the amount(s), to take effect in relation to the estate of any person dying after the coming into force of the order. In terms of the Prior Rights of Surviving Spouse (Scotland) Order, 1977 (s.1.1977, No.2110),(into operation 31/12/77), the financial provision awards contained in s.9 were raised to £8,000 and £16,000 respectively. Now (1.8.81.) house £50,000, furniture - £10,000, cash - £15,000 or £25,000: Prior Rights of Surviving Spouse (Sc.) Order 1981 (No. 806.).

equal to the value of the relevant interest, if the dwelling house forms part only of a tenancy or lease under which the intestate was the tenant, or the dwelling house forms the whole or part of subjects used by the intestate for carrying on a trade, profession or occupation, and the value of the estate as a whole would be likely to be substantially diminished if the dwelling house were disposed of otherwise than with the assets of the trade, profession or occupation". (s.8(2)). If the value of the relevant interest exceeds £50,000, then the survivor shall be entitled to the sum of £50,000. Further, if the intestate estate comprises a relevant interest in two or more dwelling houses, the survivor may elect to take one of them as his/her prior right, and election may competently be made within six months of the date of death of the intestate.

Similarly here, it is thought that spouses must make such arrangements as they think fit with regard to a second or subsequent home. The special provisions concerning the matrimonial home shall be limited in their application to that dwelling house in which the family resides, being a house which is owned, not rented.[1] Where the matrimonial home forms part of a medical or veterinary surgery, bank, farm or other business, problems arise, as can be seen from the terms in which the Succession (Scotland) Act, 1964 was drafted. In such a case it is submitted that the rule of joint ownership still should apply. This would necessitate joint consent for sale and purchase (though judicial consent may be interposed (infra)[2]), and on breakdown of marriage, if the spouses could come to no amicable agreement, the court in making division of the assets, would /

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1. See S.L.C.Memo.41 and Faculty Response.
2. Judicial consent would be given (or withheld) where one party was thought to be acting unreasonably: the interests of the business would be considered dispassionately. Cf. 1981 Act, s.7.

would find the best solution possible. (This would be a case in which the court would have a discretion to depart from the strict 50/50 division[1]). If, at that point, ownership of the whole of the premises were transferred to the "business"spouse, compensation to the other in the form of money and/or furniture would require to be made.

The Law Commission[2] is not decisive about this matter of business premises. While it accepts in principle the justice of a co-ownership rule "provided that the practical difficulties in assessing separately the value of the living accommodation could be overcome", yet it considers that not all of the consequences of the matrimonial home trust would be practical to apply, and that on breakdown the court would be required to consider specially the needs of the "business" spouse, and the fact that disposal of business without living accommodation might be difficult.

Transfer of the majority of family assets to the non-business spouse as compensation (provided that they are sufficient in value and not an integral part of the house; in these cases, compensation must be sought also from the separate property of the business spouse) may be the best solution. In effect, the business spouse must 'buy out' the other, and that is not an uncommon concept.

The /

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1. A wife's contribution as receptionist or book-keeper if unpaid or uncompensated might be a relevant factor at division. Where the spouses are business partners, the point may be (should be) dealt with by the terms of the partnership agreement. There would require to be discussion of the relative standing of general 'matrimonial' law, marriage contract provisions (if any) and commercial partnership agreement terms, should these conflict.
2. No.42, at 1.102. NOTE: 1981 Act, s.22. defines "matrimonial home" - any house, caravan, houseboat or other structure provided or made available by one or both spouse(s) as, or has become, a family residence, including garden, other ground, or building, attached to, and usually occupied with, or otherwise required for the amenity or convenience of, said house, etc.

The dwellinghouse, to qualify as 'the matrimonial home' must be the principal residence of the family: it matters not that there are no children, or that the children are adult and forisfamiliated. Such circumstances will not alter the character of the home, though they might make a difference to the manner in which the asset of the home is treated on marriage breakdown or emergency. Neither does it matter that one or both spouse(s) are frequently away from home on business or in course of employment. The house in which a merchant seaman's wife resides is a matrimonial home, without a doubt. These points are clear. However, correct categorisation must be made of a house in circumstances where one spouse deserts the other, or the marriage breaks down. The house does not cease to be a matrimonial home in law, though it is no longer a matrimonial home in fact. Even if neither spouse wishes divorce, it would seem that nevertheless a declarator of property rights and distribution of assets (perhaps partial) is appropriate.[1]

A house would be regarded as of the "matrimonial home" character, if acquired in contemplation of marriage, or during the course of marriage, with the intention that it be used as a matrimonial home, or if (at any time) inherited and subsequently used as a matrimonial home.[2]

The Rights of Parties In The Matrimonial Home

Transitional provisions on an extensive scale would be necessary.

The established scheme, it is suggested, would contain /

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1. Cf. Boskillnad, infra.
2. even if inherited before marriage, it is thought. But not if so inherited, but not so used (cf.L.C.No.42, 1.98-1.100. At 1.100, it is suggested that, for reasons of tact and not to discourage gifts, such a home should not be subject to the rules of co-ownership unless the donor made an express gift to both spouses, or unless the donee agreed to share with the other spouse. If the interest of one spouse is a 'life interest' or liferent only, a recognition of joint interests is not recommended. (1.101)).

contain the following features: since each spouse will have a pro indiviso share in the home, neither may alienate or dispose of his share mortis causa or inter vivos, and the share of the predeceaser will accresce to the survivor. The home, the most important of the family[1] assets, remains the central core of the family's wealth. Consent of both spouses is necessary for the sale of the home.

The Management of the Property

It is proposed that, in the case of the home and principal family assets, there should be a rule of joint consent. In transactions of great importance (and hence transactions concerning heritage), the consent of each spouse must be obtained at the outset.

As in many of the systems studied, the remedy of the grant of judicial consent to a transaction would be available on cause shown, in cases of unreasonable refusal or persistent unwillingness to co-operate. A considerable measure of judicial discretion would be necessary here.

Alan Milner, writing in 1959[2], suggests that a petition for grant of judicial discretion might be made where husband and wife are living apart by agreement (the discretion extending to a consideration of the whole context of the separation), or where the owner of the homestead has deserted, is insane or in prison and the application is for family, not simply for personal benefit /

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1. The scheme is concerned with matrimonial, rather than 'family' (Otto Kahn-Freund) property. Children's rights are considered where they impinge on the subject-matter (e.g. aliment, succession, postponement at divorce of sale of matrimonial home) but their rights are not the principal concern here. Moreover, substantive 'family' rights or powers to dispose of 'family' property are not advocated.
2. "A Homestead Act for England?" (1959) 22 M.L.R.458.

benefit, or where the non-owner has deserted, is insane or in prison. (Here the court must weigh the interest of the owner wishing to sell with that of the absent spouse in having a home to which to return). Possibly this would not be an exhaustive list of justifying circumstances.

It is conceivable that, in a career marriage, one spouse might refuse consent to the sale of one house and purchase of another in a different city, the change having been necessitated by the employment needs of one: in such a case, the court might be required to consider the cases concerning the husband's right to choose the matrimonial home, subject to a general test of reasonableness, and might experience difficulty in reaching a decision. Ultimately the parties surely must come to some agreement, and, if not, it may be that a division of assets on breakdown is not far distant.[1]

Whatever may be the rules concerning sales and purchases of family assets, it is thought that sales and purchases of heritage are transactions of such great importance that joint consent must be obtained.

In the case of heritage, this means that in the dispositions, both husband and wife must dispone the property to the purchasers, and title to property must likewise be taken in joint names. It is safe practice for solicitors today, in drawing up missives, to offer to purchase from "your clients, Mr. and Mrs. X, the proprietors, the dwellinghouse known as 5, Brown Street, Downtown", and in this way to elicit from the agent of the sellers a denial or, by reason of tacit acceptance (and repetition?) confirmation that Mr. and Mrs. X. are indeed the proprietors. When noting the title and checking the Search in the General Register of Sasines, formal /

1. And see "Location of Matrimonial Home", infra.
Cf. Nichols and Meston, 6-11. 'A wife who refuses consent to a sale because she does not want to move to a less home on her husband obtaining employment elsewhere would no doubt be regarded as unreasonable. It would be otherwise if the sale was simply to raise money and no alternative accommodation was offered to her.'

formal confirmation of this state of affairs as well, of course, of absence of outstanding charges, is provided.

In regimes which provide for joint ownership of the matrimonial home, it is sometimes found that there is a rule to the effect that the viewing of the house and appearance of the house to be a family home is sufficient to 'fix' the third party with knowledge that this is indeed a matrimonial home. Potential arguments as to bona fides and ignorance of the true state of affairs are thereby killed before they arise.

In 'homestead' states, rules are commonly found to the effect that consent must be free from duress, undue influence and fraud, the presence of which will vitiate the transaction.

Milner notes that in Saskatchewan, a wife would appear before a district judge, local registrar, solicitor, J.P. or N.P., to be examined "separately and apart", from her husband, and would acknowledge that she knows her rights in the homestead, and that she signs the instrument freely and without compulsion. No person who has been engaged in the conveyance may take the acknowledgment.

A requirement of this type could cause difficulty or inconvenience, and yet the reason for its presence is abundantly clear. Would it suffice if each party was interviewed separately by another partner in the firm which is dealing with the conveyance, and was catechised by him to ensure that consent was given freely and with knowledge of the right to refuse and of all other factors (including the possibility of interposition of judicial consent)?[1] By such means the possibility of absence of true consent could not be removed, but in a /

1. Possibly both parties might be required to sign a Deed of Consent, to be placed with the Titles and transferred at settlement.

a subsequent attempted reduction of the contract on these grounds, the fact that the proper procedure had been complied with would be noted by the court, together with all surrounding circumstances (of the marriage and of the transaction). The protective worth of the procedure would vary from case to case. In some instances, the procedure would be a nonsense, a formality only, and in other cases it would be a nonsense in another and much more serious sense, in that one party may have been browbeaten into compliance, a fact which may never come to light if later reduction of the transaction is not sought. It is suggested that its true purpose would be to protect third parties. If the procedure has been complied with, the contract could not be reduced after the expiry of, say, a year and a day from the date of signature of the Deed of Consent (or Disposition, if Deeds of Consent were thought cumbersome[1]). On the other hand, such a rule, seemingly sensible, might be thought to offend against the principle of sanctity of the public register regarding land,[2] and might be considered useful only in (non-heritable property) transactions of great importance, yet when, for example, a car is sold, neither buyer nor seller nor the spouse of either is likely to find it necessary to consult a solicitor. For some transactions,[3] a framework such as this might be beneficial, but there is the danger that it might be regarded as well-meaning but cumbersome, ineffective or unnecessary. Except in the case of transactions pertaining to the home, probably written consent given in the presence of the third party or in probative writ should be sufficient as evidence of consent without /

1. yet there would require to be some record that the consent Procedure had been carried out.
2. see provisions with regard to heritage, infra. "The faith of the records is a very important principle", Prof. M. Meston, "Family Property Law in Scotland" (1977) Fifth Commonwealth Law Conference Papers, p.374. But see 1981 Act.
3. See "Family Assets", infra.

without further procedure. All joint ownership/joint consent variations bring in their train practical problems difficult of solution, which is one reason why separation of property so often appears to have the advantage in clarity and simplicity.

Protection of the Spouse : Fair Dealing with the Third Party

To the outside world, married persons should present as uncomplicated as possible a view of their property relations. Contracts with third parties should not lightly be set aside. No unnecessary difficulties should be placed in the way of commerce and business.

Milner thinks that the protection of the spouse and of third parties are not mutually exclusive aims. He advocates a compulsory declaration of homestead in the purchase of a matrimonial home, in the disposition, and similarly a formal notice of abandonment of use as a matrimonial home (in a separate deed if there is no prospect of sale, or in the terms of the next disposition?) up to which time, the house would be regarded as 'homestead'. Registration as 'homestead' is an extremely important feature of the American 'homestead' system: thereafter, homestead benefits are available to the spouses, and, further, registration gives constructive notice to a potential purchaser of the character of the property in question.

In England, there is much talk of beneficial interest and matrimonial home trust. Law Commission Working Paper No.42 favoured amendment of the Matrimonial Homes Act, 1967, to strengthen a spouse's rights of occupation, and it identified the following range of choice:- retention of status quo (that is, dependence on strict rules of ownership based on financial contribution to acquisition and improvement, together with a discretion to effect transfer on other considerations on marriage breakdown), discretionary rule (allowing judicial /

judicial intervention to determine the rights of spouses "along broad equitable lines" at any stage of the marriage) and co-ownership, effected either through a presumption or by operation of a rule in terms of which each party would receive a direct beneficial interest in the home, but (typically) the court would still enjoy a broad discretionary power to vary the interests therein of the spouses on divorce, nullity or judicial separation. This proposal survived the change of heart in 1973, when full-blooded community was rejected. The proposals of the Law Commission (1978)[1] recommend that husband and wife should be equal co-owners of the matrimonial home,[2] by virtue of statutory provision and include a suggested draft Bill to that end: "Matrimonial Homes (Co-ownership) Bill". It urges amendment of the Matrimonial Homes Act, 1967 and provides suggested draft Bill ("Matrimonial Homes (Rights of Occupation) Bill"). It advocates the introduction of a new scheme of rules concerning the use and enjoyment (but not, it seems, proposing fundamental changes in the rules of ownership of the goods) of the household goods. Here again a suggested draft Bill has been produced ("Matrimonial Goods Bill"). The proposals are compendious, well set out and thoroughly thought out, and differ in many instances from the scheme envisaged by the Law Commission in W.P.No.42.[3]

Scots Law : heritable property

Difficulties may arise where one spouse wishes to sell the matrimonial home. How is the solicitor for the seller, still less the solicitor for the buyer to know /

1. Law Com.No.86. Family Law. Third Report on Family Property: The Matrimonial Home (Co-ownership and occupation Rights) and Household Goods.
3. Sched.1, p.67 et seq.
2. So too in 1982 (L.C.115).

know the marital status of the client, the true views of the other spouse (if the existence of the latter is conceded) or the character of the heritage as a "matrimonial home" or not?

The Faculty of Law, Glasgow University, when considering Scottish Law Commission Memorandum No.41 (Family Law : Occupancy Rights in the Matrimonial Home and Domestic Violence) put forward for consideration a scheme of rules (including the suggested establishment of a Matrimonial Property Register) to help the non-owning spouse in these circumstances , and it is thought that the same rules could be used in a situation in which the spouses were co-owners, in order to ensure that all actings with regard to the home were agreed between them. Of course, when the transitional phase had run, many dispositions would stand in joint names, thereby giving a warning to solicitors that the property was likely to be a matrimonial home. With consent of the members of the Working Party, reference is made to Faculty Response, Schedule 1.[1] At p.72 of Faculty Response, a tentative definition of matrimonial home is given: "the principal accommodation provided by the spouse owing the duty to aliment for the spouse with the right to receive aliment".

Similarly houses purchases with the intention that they should be used as matrimonial homes should be registered as such[2] (in the 'Matrimonial Property Register') upon marriage, but registration at any time thereafter would be competent. Upon the law agent would lie the duty of informing spouses of the necessity of compliance. Should there be an oversight or failure for any reason to register, it is thought that the innocent third party should not be prejudiced. Rather should a pecuniary remedy be sought by spouse against spouse or against solicitor.

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1. p.67 et seq.

2. See 1981 Act — N. and M. 6-22. "Although the Act only applies to matrimonial homes it is prudent practice to treat any residential property as a matrimonial home at least until clear evidence to the contrary is produced."

This must now be read against the background of the Matrimonial Homes (Family Protection) (Sc.) Act, 1981, which aims to confer rights of occupation[1] of the home upon a non-entitled spouse and to protect a spouse against domestic violence but, in the pursuance of those aims, must enter the complex areas of title and conveyancing law and practice. See Nichols and Meston, Chapter 6.

Instead of adopting a matrimonial home notice device, it was decided that the occupier spouse should be entitled to continue to occupy, despite dealings by other spouse with third party. (6-01). An occupancy right is an over-riding interest, prevailing over registered interests in land without registration (6-02). A prospective purchaser must ascertain the position re occupancy rights by inquiry of the owner or by inquiries elsewhere (6-02).

However, the non-entitled spouse may consent to the transaction, or (her) consent may be dispensed with in the discretion of the court (s.7(3)), principally if the former is acting unreasonably.

Moreover, the occupancy right falls in favour of the bona fide purchaser of the home, who must have made reasonable inquiries and who has been shown an affidavit that there is no entitled spouse or that that spouse has consented. (This would be safer than reliance on assurances by the seller that the subject of sale was not a matrimonial home: it is prudent (6-22) to assume that any residential property is a matrimonial home.) The affidavit should be made as near in date as possible to the date of settlement, and the documents must be produced at the time of dealing - "an inexact phrase". (Nichols and Meston, 6-15.) The purchaser should insist on delivery before settlement.

The protection which this scheme affords to the non-entitled spouse is extended by s.9 to cases of jointly entitled spouses.

1. but not rights of ownership.
A spouse having occupancy rights may apply to the Court for an order granting (her) the possession or use in the matrimonial home of furniture and plenishings owned, hired, or the subject of an h-p. or conditional sale agreement entered into, by, the other spouse (without prejudice to 3rd party rights under such agreements.

Nichols and Meston provide (6-22) a table showing good conveyancing practice to be used in the light of the new provisions.

A Third party may be left to buy a different house, "although he may be entitled to be indemnified by the Keeper of the Land Register of Scotland if the title sheet contained a note which wrongly stated that there were no occupancy rights in respect of spouses of previous proprietors". (6-22). See also 6-02: the Keeper may note an over-riding interest on the title sheet of an interest in land registered in the Land Register and the Register may be rectified (Land Registration (Sc.) Act, 1979, s. s. 6(4) and 9(4).). The Keeper will not note the occupancy rights of the current proprietor's spouse (impossible, one would think), but will add a certificate that no occupancy rights exist in respect of spouses of previous proprietors. The occupancy rights, being conferred by statute, "there is no deed recorded or recordable inthe Register of Sasines which will disclose their existence" (6-02). See generally Nichols and Meston, Chapter 6.

This is one way of trying to achieve a very difficult (and laudable) aim. It is certainly the first time any legislative exercise of this kind has been attempted in Scotland, and the necessary complications which it brings in train must surprise, and irritate occasionally, those used to the non-regulation which is the mark of a system of separation of property. There is no simple way of achieving the desired result. At some stage, it is inevitable that third parties will be involved, and the interests of <u>bona fide</u> third parties and of "innocent" spouses must always be weighed (and placed in order of preference) in any particular situation. Time will tell whether practioners can make this legislation work.

On death, to the survivor would accresce the pro indiviso share of the predeceaser (if there had been no intervening marital upsets[1]), and this fact would be narrated in the normal manner in the next disposition of the house.

Since the spouses would own jointly, there could be no alienation inter vivos or mortis causa of the pro indiviso share of each in the home. The inflexibility of this rule could cause difficulties. Sale, purchase, lease or gift would require the consent of both, and, as has been mentioned, there would need to be rules providing for and regulating - (a) substitution of judicial consent in the case of deadlock and (b) a procedure designed to ensure that consent was given freely, and setting up a cut-off point after which it would not be competent to seek reduction on grounds of fraud, force and fear, or duress. This would mean that specialised matrimonial rules would be overlaid upon the rules of contract and of property, and some would regard this as a confession of failure. It does not seem, though, that even a modest matrimonial scheme can be established without them.

Divorce and Intervening Marital Upset

Divorce

On divorce, the simplest treatment would be division of house sale proceeds and common assets and return of separate property to separate owners.[2]

If the house is to be sold, then by joint consent this will be done. (If, at this stage, one objects, counsel may persuade the court to allow withholding of consent, to the effect, for example, of allowing the youngest /

1. See below.
2. See generally, "Divorce", infra.

youngest child to live in his accustomed home until, say, the age of sixteen). So long as the third party later receives a disposition granted by two disponers, the circumstances of the sale are no concern of his.

Separation, Voluntary and Judicial, Desertion, Marital Upset

This is the area in which particular difficulty arises. Nevitt and Levin[1] remark that where capital is tied up, a party is less likely to walk away but, if a party should disappear, it is obvious that the court must be able to stand in his shoes and give consent to necessary or highly desirable transactions in respect of the home. In the general case, though, it is suggested that, where cohabitation ceases, whether or not a decree of separation is sought, application may be made to the Sheriff Court (Family Division) for division of home and assets.[2] This remedy would be available also in cases of fundamental disagreement about property or financial management while cohabitation continues.

Location of the Matrimonial Home

The present Scottish position has been discussed[3], and the matter was considered in Faculty Response to Scottish Law Commission Memorandum No.22 (Aliment and Financial Provision).

Professor Kahn-Freund[4] cites the case of Dunne v. Dunne[5], in which the Court of Appeal took the view that this must be a matter for joint decision, and, failing agreement, the court must decide which spouse has acted "unreasonably /

1. "Social Policy and the Matrimonial Home", (1973) 36 M.L.R.345.
2. akin to Boskillnad. See "Remedies", infra.
3. Chapter 4. See also S.L.C.Memo.No.54,9.1-9.4.
4. (1959) at p.259.
5. 1949 B.98.

"unreasonably". Without entering the priority of career argument, it seems that that is the best approach. Under the proposals now advanced, purchase of a new home and sale of the old would be transactions requiring joint consent and permitting recourse to the court and judicial intervention to help one spouse against the other, if the latter is held to have been acting unreasonably. If matters go so far, the outlook for the marriage is not good.

The Financing of the Purchase of the Home

If the house is not owned outright, and a Building Society loan is being repaid, the rules which are relevant include the rule that there shall be joint and several liability for household debts, of which this is one. Hence, if one spouse cannot pay, the Building Society may look to the other (a proper outcome in any event, because the spouses will be joint owners). The twin principle involved is that each spouse will have a duty to aliment the other. A new dimension would be the presence of compensation of gains. (Therefore it is possible that one spouse may repay the Building Society out of money given to (her) by the other). Ultimately, biological and other facts must be faced: while joint financial contribution is a desirable aim appropriate where both spouses are earning approximately equal salaries or where the non-earner has capital, joint contribution cannot be a prerequisite of joint ownership in the matrimonial sphere.

Urgent problems arise where the principal earner departs the home. Nevitt and Levin have suggested that local authority mortgages might be made available to fatherless families, enabling the wife to repay the Building Society outright and then commence repayment of a new, local authority mortgage. In effect the authority "would undertake a new housing responsibility". It might be that repayment should be of interest only until the youngest child should attain the age of sixteen, and thereafter /

thereafter capital and interest could be repaid over a period of, say 15-20 years. They urge that the debtor should be entitled to take a lodger and so make use of the house as a capital asset; one might add that if the capital gains tax disincentive affecting the use of a house as a business (e.g. for the giving of music lessons or as a nursery school) were removed, the debtor might make use of this benefit, having perhaps little to lose in the matter of the income tax benefit sometimes given in exchange.[1]

In the authors' opinion, local authorities are the only bodies which "could achieve both the flexibility and the ready availability when required". They would require power to borrow for this purpose. The interest rate would be the same as that in force for any other mortgagor and the risk of financial loss would be small because the rising value of the house would outstrip the amount outstanding on the loan, and, in default, the house could be sold.

Clearly the canvassing of opinion among building societies and local authorities would be necessary before even a tentative view could be taken of this plan, but it provides a suggestion of one way in which this very difficult practical problem might be treated.[2]

On divorce or separation, it is likely that the house will be sold: where this does not happen, and one "buys out" the other (infra), or has the use of the property, perhaps on payment of compensation, and the Building Society has not been repaid, then it seems that the Society should be entitled to look to the two joint and /

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1. i.e. if a proportion of e.g. the rates upon a house is allowed for tax, the Inland Revenue is better placed to argue that that proportion of the home is a "business". See changes in Finance Act, 1980.
2. Cf. e.g. Sc.L.Com.Memo.No.41, Propn.50 - Fac. Resp. p.63.

and several debtors, and the debtors should be able to come to some agreement between themselves, arranged by the court in its discretion, (if necessary). Indeed such an arrangement in the event of divorce or judicial separation would come in the normal way under the scrutiny of the court. Possibly the non-occupying spouse should pay less, but it must be remembered that, when repayment is made, each will be owner of a valuable heritable asset.

It is generally believed that it is not in the interests of Building Societies to insist upon the sale of property in cases where the debtors are having difficulty in meeting the commitment, for the Society will bear the expenses and of course must repay out of the proceeds of sale the balance remaining after satisfaction of the loan. Except in extreme cases of recalcitrance, an easier repayment scheme of longer duration is usually arranged. On the other hand, a Building Society is unlikely to welcome as a mortgagee a wife with young children and little earning capacity, and might prefer the substitution of the local authority as mortgagee, as Mevitt and Levin suggest. Is the family entitled to retain its home? If so, who is to bear the ultimate financial responsibility?

FAMILY ASSETS

A definition of "family assets" must be found. Professor Kahn-Freund's preference is to have assets categorised according to their purpose and use: family assets are assets at any time by consent of spouses dedicated to the common use of the household, whether acquired through work or thrift, or through inheritance or gift. Earlier (in 1959), he wrote, "It is in the nature of these assets that husband and wife should enjoy and administer them jointly. The essential point is not so much that they both may have contributed to their acquisition .... nor that they are intended for joint use or consumption .... but that they are actually so used /

used. What one may call the "community element" does not or does not only consist in the past history or the future destination of such assets but in their present physical nature.

The matrimonial home and its contents are, as it were, the material substratum of the matrimonial consortium. We are here at the point where property relations and personal relations become indistinguishable. To divide the "family assets" is tantamount to destroying the basis of cohabitation, and if a judge excludes either spouse from their use by reason of the ownership vested in the other he pronounces what in fact is the equivalent of a separation order[1]..... ....Joint administration, so far from being impracticable, is here inevitable in view of the very purpose of the assets involved. The law may insist on separation of ownership and even postulate separate possession in the legal sense; separate enjoyment or separate administration is incompatible with normal married life."

Lord Diplock[2] has stated that "This expression" (family assets) "I understand to mean property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels. It does not include property acquired by either spouse before the marriage but not in contemplation of it",[3]

The Law Commission[4] gives a fairly wide definition - "Household /

1. However, "early" division of property while cohabitation continues is an established Community Property remedy, and one which here is advocated.
2. 1969 2 All ER 385 at p.410.
3. hence, it seems, perhaps placing greater emphasis upon intention than upon use (actual use - Kahn Freund).
4. Law Com.No.86 (Family Law: Third Report on Family Property) (1978).

"Household goods" means any goods, including a vehicle, which are or were available for use or enjoyment in or in connection with any home which the spouses are occupying or have at any time during their marriage occupied as their matrimonial home. "The court would have a general discretion in making a 'use and enjoyment order', subject to the direction to have regard to 'the extent to which the goods to which the application relates are needed to meet the ordinary requirements of the applicant's daily life' (3.39). This, together with the widely drawn definition of 'household goods' is thought by the Commission (3.40) to be sufficient to allow the court to do justice in the variety of cases with which it will have to deal."[1]

In 1970, J. Gareth Miller[2] made a review of English authority upon the question whether there exists in England a doctrine of "family assets". If it exists,[3] its main features, in Miller's opinion, are that it emerges only if there is no evidence of actual intention by the parties and in circumstances where both parties have contributed to the acquisition of the asset, the matter being considered in isolation, distinct from other matrimonial matters. In these circumstances only a presumption of equal rights of ownership therein arises. Miller himself appears to take the view that the doctrine is less far-reaching than may be hoped or feared. If it is thought that 'family assets' have special characteristics, it may be possible, he says, to recognise that contributions to the acquisition thereof "may also be /

1. Quotation taken from Meo.No.41, Faculty Response, p.79, fn.2.
2. "Family Assets" (1970) 86 L.Q.R.98.
3. Lord Denning's attempts to gather to the court a bold discretion having failed: "The position after Pettitt is that it is now established that in dealing with disputes between spouses as to title to property the function of the court is to ascertain their rights and not to alter those rights" (at p.125).

be special and in fact of a different character." He favours power to determine the right to individual items of property before breakdown but not, it seems, power to adjust, nor any basic community system with regard to those assets during marriage. Professor Kahn-Freund's view is that there must be property rules arising by virtue of the marriage, and not by virtue of its failure, and that is the approach taken in this discussion.

It has been seen that the New Zealand Matrimonial Property Act, 1976, in S.8, defines "matrimonial property" as the matrimonial home and family chattels, joint property, property acquired by either in contemplation of the marriage and intended for the common use and benefit of both, all property bought after the marriage by either, "including" (not "comprising") property acquired for common use and benefit out of property owned by either the husband or wife or both before the marriage or out of the proceeds of any disposition of any property so owned,[1] income and gains, including sale proceeds of all property above described, from policies of assurance, policies of insurance in respect of common property, pension or other benefits to which contributions have been made since marriage, any property which the spouses have agreed shall be matrimonial property and "(k) Any other property that is matrimonial property by virtue of any other Act".[2]

Here, an outline scheme has been given. It is suggested that property which belonged to either spouse before marriage, or which is acquired by gift or inheritance /

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1. It would seem that separately funded acquests are to be placed in the class of matrimonial property only if their use so suggests (see also s.9(3) - (6) and s.10), or of course (s.8(j)) if the spouses so agree.
2. As to consequences of categorisation as "matrimonial property", see supra (New Zealand)

inheritance thereafter, shall be considered to be separate property unless, being a corporeal moveable, it becomes a family asset, or, being money, it is used to purchase a family asset.

It is clear that the Kahn Freund 'use and purpose' criterion is helpful here.

Furniture and articles of household decoration are "family assets" by this test. All furniture, paintings, porcelain, soft furnishings, cutlery, china and household appliances will be "family assets", unless, in any case, the item falls into the 'heirloom' category.[1] That which is necessary for, or conducive to, the running of the home is likely to be regarded as a "family asset". The television set and the washing machine will be family assets, as will bedlinen, glass and silver, furniture (including bookshelves but excluding books[2]), and garden tools. In general, items the principal purpose of which is domestic will be included.

Where assets appear to be of the nature of "family assets", and are used as such, and are not designated judicially as 'separate' or 'heirloom', they will be family assets even though contained in a second home which is not jointly owned.

It can be seen that, in respect of many of the items above listed, little controversy would arise between well-disposed individuals who have chosen to marry and to run a common establishment. In dispute, items of value, of family history, or of particular use in a new establishment are those in respect of which the question of ownership is most likely to be keenly contested.[3] [4]

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1. See below.
2. See below.
3. See generally infra - separate property, hybrid property, heirlooms.
4. See 1981 Act. Nichols and Meston. "Furniture and plenishings comprise articles which are reasonably necessary to enable the house to be used as a family residence." (Tables, chairs, etc. but not personal effects; books, pictures, television or piano are doubtful.)(2-16)

In the case of valuable paintings and furniture, there are many possible modes of acquisition, of which the following perhaps are the most commonly encountered:- 1. they may have been the separate property of either before marriage. 2. they may have been bought by either or both during marriage. 3. they may have been acquired by either or both during marriage by means of gift or inheritance (or purchased with funds thereby acquired).

A joint bequest (3.) during marriage causes few problems. Ownership will be dictated by the terms of the bequest or, failing provision, it will be held that each party has a one half share therein. Neither may sell without consent of the other.[1] On dissolution of the marriage or on Boskillnad if division of all assets is wished, then, since physical division may be impossible or undesirable, a compensation scheme would be necessary. A bequest to one spouse of an item which in its nature is a 'family asset' would operate to carry the item into the matrimonial property stock, unless the intention of the testator was that the item be not treated as a "family asset". Here, difficulties will arise in that a grandfather clock and a refrigerator may equally be regarded as by their nature family assets, and the solution will lie in the special rules of 'heirloom' and 'separate property' set out below.[2] The beneficiary spouse may seek the court's (necessary) approval to have the item excluded from the stock of 'family assets'.

Again (1.) where each spouse brought to the marriage items of value, beauty and history which at the same time were 'family assets' in being adornments to the matrimonial home /

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1. As to the protection given to third parties (transactions concerning corporeal movables) see infra.
2. Petition for court approval for heirloom or separate status must be put in train within, say, two years of marriage or inheritance, as the case may be. If not, the item will fall into the matrimonial property stock.

home, these would become family assets, unless the owner took steps to exempt them from that category and its effects, by having them declared 'heirloom' or 'separate'.[1]

Where (2.) such property is bought by both during marriage, it shall become a family asset, whatever may have been the contributions and whether the item is a machine or a grand piano.

Where an item is bought by one spouse out of separate property but is of a 'family asset' nature (of beauty and/or of use), then this too shall become a family asset, unless within the (two year) time limit, the purchaser seeks 'separate property' classification.

In general, in dealing with such applications, the court might look more kindly on 'heirloom' applications and less favourably on applications to deem 'separate' the purchase of a washing-machine. In less clear-cut cases, the general scheme of community of family assets would require to be borne in mind, and perhaps a fairly strong case for 'separateness' would need to be made out, since otherwise the scheme would become of minimal use. (Indeed, a series of such applications by a particular individual might herald Boskillnad, and it would be better if that remedy were sought as soon as the general scheme began to be unworkable within a marriage.) The court would proceed from the starting-point that, in all but exceptional transactions, 'family asset' purchases are intended to be, and should be, family assets. (An ever-available remedy should be declaration by the court of the correct classification of property in cases of doubt.) The interdependence of conjugal prosperity must /

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1. Petition for court approval for heirloom or separate status must be put in train within, say, two years of marriage or inheritance, as the case may be. If not, the item will fall into the matrimonial property stock.

must be recognised. This interdependence is seen even in orthodox systems of separation (for one may be enabled to buy as a result of the thrift or domestic work of the other) and would be more strongly in evidence where the finances of one receive a 'boost' from the finances of the other. "In general, use of money to acquire family assets or to improve the existing home, or help finance the purchase of a new matrimonial home, shall deprive the original owner of any claim that that which has been acquired is his separate property."[1]

Where wedding presents have been given, the rule of return to donor if no marriage takes place would remain. Unless the donor wished the item to be the property of one spouse only[2], on marriage the presents would become family assets.

Hybrid Items

One basic difficulty is the classification of property which, though having the appearance of a family asset, is truly to be regarded as investment property, and was so regarded by the spouses at purchase. Professor Kahn-Freund writes,[3] ...most assets are "ambivalent" - even the washing machine may be a means of production if the wife takes in laundry for washing." He advocates a system of rebuttable presumptions in cases where the nature of an asset is "negative" (that is, it is unclear whether the item should be classified as an 'investment' or 'household' item), and takes the view that investment property might become family asset property upon change of the family's circumstances. It is suggested that it may be better that a list be compiled of articles to be regarded /

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1. Supra.
2. Since the wish is unlikely to be given formal embodiment, application for separate, or possibly, in these circumstances, heirloom status would require to be made by the donee spouse. Application would not be refused if the donor's intention was clear.
3. Memorial Lecture (1971) p.39.

regarded as of the 'family asset' nature, with power to either party to apply to the court (a) for grant of heirloom or separate property status as explained or (b) for a declaration (available at any time; for (a) there would be a time limit) of the correct classification of property of doubtful nature.[1] There is a precedent in Scots law: the Succession (Scotland) Act, 1964[2] defines "furniture and plenishings" as including garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, articles of household use and consumable stores, but excluding any article or animal used at the date of death of the intestate for business purposes, or money[3] or securities for money or any heirloom. "Heirloom", in relation to an intestate estate means any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate.[4]

Separate Property

The separate property of each spouse shall consist of, first, those items which have been declared to be of separate or heirloom character by the court or by the terms of a bequest, and, second, items which by their nature are not 'family assets'. In the second category would be placed for example clothes, jewellery,[5] sports equipment and other 'hobby' property[6] and, as Professor Kahn /

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1. e.g. perhaps, sewing machines and power tools - family asset, or separate 'hobby' property?
2. s.8(6)(b).
3. cf. Kahn-Freund: "For cash there can be no presumption. Too much depends on the social and economic circumstances of each case." (p.40).
4. s.8(6)(c).
5. Cf. e.g., Chapter 1.
6. The judicial 'declaration in case of doubt' always would be available.

Kahn-Freund points out, a professional library. Pensions (contrast New Zealand) would be regarded as separate property. Though contributions thereto were made during the course of the marriage, they would be made out of funds truly or artificially separate, and upon separation or dissolution, the pension income would be noted as part of the general financial 'picture' of the spouses, on which would be based decisions as to aliment and maintenance rights and duties. The proceeds of policies of insurance taken out on family assets shall be of a family asset nature[1]; proceeds of policies on separate property shall be separate property. Possibly the sums will be re-invested in property of a similar nature to that lost or stolen.

Donations between spouses shall remain competent (except that it is not thought that family assets should be the subject of gift) and the rule of irrevocability would not be altered.

Into the category of separate property would fall rights of action in contract or delict which pertain to the separate property or personal rights of the married pursuer. Damages recovered would be separate property. On the other hand, where the action concerned family assets, litigation and its financial consequences would be a joint responsibility. Inter-spouse litigation would remain competent except that matters pertaining to pure family asset and property questions would require to be dealt with according to the scheme of rights and remedies outlined. Damages in tort recovered by a wife from her husband (arising perhaps out of a car accident) would fall to her as separate property.

The Family Car

The family car would be regarded as a family asset, but /

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1. See Money, Investments, and Bank Accounts, infra.

but a second car, if bought out of separate property by one spouse (whether 'genuine' or 'artificially produced' separate property) would be the separate property of the purchasing spouse. Many new cars are leased by companies from car hire companies on contract hire and given to the employee for his use, both for business and pleasure. Clearly here both spouses have the use and enjoyment of the car, and neither has the ownership of it. The fate of the car will depend upon the terms of the hire, of the employment and the duration of the employee spouse's association with the employer company, rather than upon principles of matrimonial property law.[1]

Money and Investments

Bank Accounts

Money owned before marriage and money acquired thereafter by work, luck, gift or bequest becomes a family asset only if the owner thereof decides to let it be used for the purchase of a family asset. Similarly the income from employment is the separate property of the earning spouse.[2]

There is therefore every reason for the maintenance of separate bank accounts. There is scope for friction in the notion of the joint account in respect of which there may be unequal contribution and participation. For this reason, only joint accounts, the contents of which are owned jointly (without proof presumed to be so), opened for family purposes would be encouraged at all, and even these would not be necessary. Spouses would have only themselves to blame if a joint account, divided at Boskillnad or separation or termination of marriage, is divided in a manner which they did not foresee or intend. Joint /

1. Cf. Memo.No.41, Propn.56, and Faculty Response, pp.82-84. See L.C. No.86, 3.117.
2. See, however, compensation scheme.

Joint bank accounts would not be forbidden, but joint ownership would be presumed and there would be no room for proof of contribution, where the spouses have chosen the family asset system[1]: where they have not, joint bank accounts would be dealt with in the present manner, according to contribution, but such persons are likely to prefer separate bank accounts in any event.

Ante-nuptial investments shall be separate property, and so too will be shares bought with separate property - though the income arising may be called upon for compensation purposes or to help with the running of the household (there being joint and several liability for household debts)[2]. Savings from earnings not required to meet household debts, will be placed in separate bank or (perhaps) Building Society accounts, as convenient. Where family assets are realised and the proceeds not reinvested in other family assets or lodged in joint account for family purposes, the sum should be divided and one half thereof placed in the bank account of each spouse. (Equally, a 'separate' investment might be realised, and the money used to buy a family asset (or 'separate' cash used to buy such an asset), and here again, there would be a change in the character of the asset).

The 'separate property' and 'family assets' distinction will /

1. It would be better by far, it is submitted, for the parties to have separate accounts from which they may extract sums to pay into a common household account when necessary in terms of the joint obligation for household debts and the reciprocal obligation to aliment.
2. Of course, spouses may wish to buy shares as family investments (and hence family assets) and the share certificate would be in joint names. As to administration thereof, see below.

will render quite unnecessary provisions common in systems of deferred community which exist to discourage 'waste' of one's own assets, resulting in prejudice to the other's rights on dissolution. The concept of 'disloyalty' in the use of one' own funds is, it is submitted, confusing, productive of uncertainty, undesirable and unrealistic.

Change in the Nature of an Asset

Professor Kahn-Freund has suggested that in his view, change of character would be possible, especially from 'investment' to 'family' character.

In the scheme envisaged here, it has been pointed out already that investment or separate property might be used to purchase family assets and thereby become part of the matrimonial property stock, and that realised joint property might come into (equal) separate ownership. However, in general, 'separate','heirloom', and 'family asset' status would be constant. The nature of an asset may be changed judicially.[1]

Protection of Third Parties

Kahn-Freund's scheme (1971) is one for internal operation only. "Third parties should be protected in their reliance on the outward appearance of things." (It may be thought that the greater is the incidence of separation of property, the happier is the creditor.) Kahn-Freund pleads for justice within the family, not for "homestead" legislation, designed to protect the family against its creditors. At least in relation to heritage, he wishes the system to operate in personam only. Household chattels are treated differently: that which is apparently joint property should be held to be so, and neither spouse should be able to dispose of such property without the concurrence of the other, and /

1. See infra, Remedies.

and the creditor of one spouse should be entitled to enforce his debt against the debtor's one half share in the subject attached.

In the system here advanced (Assets)[1], for "important transactions", joint consent shall be necessary (and judicial consent interposed in cases of unreasonable, unjustified refusal of consent). "Important transactions" must be defined. The remainder of the topic is bound up with joint and several liability in the matter of the household running costs, and rights in bankruptcy.

Important Transactions

Joint consent is necessary for important transactions: in matters of everyday administration, where the act comes within a criterion similar to that found in the Partnership Act, 1890, s.5 (acts for carrying on in the usual way business of the kind carried on by the firm /family), joint consent can be presumed, and internal prohibitions on a spouse's powers of administration[2] are no concern of the creditor, and will not prejudice him. The rules of actual and ostensible authority shall apply, and where, according to internal rules, a spouse habitually oversteps his actual authority, a stripping of authority and return to orthodox 'housekeeping allowance' system may be necessary.[3]

It is necessary, therefore, to define "important transactions". In Germany, where there is no instant community, married persons nevertheless are hampered in transacting with their own property in that some such transactions must be made with consent of both spouses.

A /

1. As to heritage, see supra.
2. unless made public knowledge (which is unlikely until Boskillnad - see Remedies).
3. See Remedies. At this point, it may be that some compensation should be given by the erring to the aggrieved spouse, if possible out of his 'own' resources.

A spouse without the other's consent may not dispose of his whole property, nor his items of household plenishing and equipment, and any purported contract is inchoate, and is null and void if consent is refused. Again, in France, contracts of hire-purchase must be entered into by both parties, but in other contracts third parties are entitled to assume that a party who has possession of a moveable is entitled to transact with regard to it, unless the moveable is an item os furniture, or by its nature might raise a query as to whether it was not the property of the other spouse.

Pascal (Louisiana) writes, "Being married must not be made an occasion for inconveniencing third persons in their normal dealings with husbands and wives in daily life". This is a starting-point generally agreed, the more so in any projection for future dealings with married persons, because it seems likely that by the end of this century, there will be few people who are not, or have not been, married.

These things being so, it is suggested that the following shall be "important transactions" requiring joint consent[1]: first, hire-purchase[2], and all security transactions, where money is advanced on the security of a 'family asset', and second, the sale, gift or loan of any 'family asset' exceeding, say, £400 in monetary value.[3] Hence for example, if a painting is sent for auction, the duty shall lie upon the auctioneers when it is lodged for sale to make all reasonable enquiries about status of owner, joint consent, heirloom or separate status and related /

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1. Joint ownership of the home demands of course joint action in important transactions in respect of it - e.g. sale, purchase, security, large-scale improvement (but not small-scale, daily management transactions).
2. adding a new dimension of complexity to a subject highly complex. (Consumer Credit) Act (1974).
3. the sum to be 'inflation-linked' and able to be raised by Statutory Instrument.

related points. If this were a formality, it would be a nonsense. If too heavy a duty were laid upon the auctioneer, it would be unworkable and a nonsense. Similarly, where a valuable item appearing to be of the genus 'family asset' is offered for sale, gift or loan to a third party by a married person, the third party is put on his enquiry. It is suggested that if any of the following is produced, the third party should be justified in transacting with the person before him:- certificate of (unmarried) status[1], or statement of joint consent (signed in the presence of the third party or in probative form[2]), ante-nuptial marriage contract providing for separation of assets, decree of divorce or separation, or decree of separation of assets (Boskillnad), or of withdrawal of partnership authority from the other partner (infra), or order of 'heirloom' or 'separate' status. Upon sight of one of these, the third party might safely proceed; if he should transact without such guarantee, he must take the possible consequences.[3] On the other hand if necessary consent had not truly been given (through mental reservation or falsification of documents), this would be no concern of the bona fide third party. Third, where there was a suggested sale, gift or loan of assets appearing to be family assets and amounting in aggregate to a monetary value of £400, an "important transaction" again would be encountered and the above rules would apply. Here there would be an attempt to protect sales of the majority or totality /

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1. to be obtained from the Registrar of Births, Marriages and Deaths. For practical reasons and ease of business transactions, few situations should require reference to be made to the Registrar. And see suggestion infra that persons should be presumed to be unmarried, in the absence of actual or constructive knowledge of the third party that that is not so.
2. See discussion above with regard to the obtaining of true consent to transactions pertaining to the home.
3. See infra.

totality of the family assets. Fourth, transactions pertaining to land and heritable property would be "important transactions"[1]. It goes almost without saying that transactions concerning the home are important transactions. The home is also a family asset and so would be included also in the categories of transaction above mentioned, although in the foregoing discussion, for convenience, reference was made to "the matrimonial home and family assets". In any case the title to the home stands in both names, and one might say that there, as distinct from the situation with regard to the family assets, there is 'formal' joint ownership clearly visible to the outside world and importing, of course, the normal consequences. Special suggestions are made above about a procedure which might be followed to try to ensure that consent of each to a transaction pertaining to the home was freely given.

If consent of the non-contracting spouse is necessary in terms of these rules, and if it has not been given, and if the third party has not insisted upon having sight of any of the documents listed above, the contract shall be reducible at the instance of the non-contracting, non-consenting spouse at any point up to the transfer of title to a subsequent bona fide third party. In other words, the contract will be voidable.

Undoubtedly these provisions seem clumsy yet some such procedure is a concomitant of joint ownership and joint administration, unless it be held that each joint owner must 'take his chance' as regards the actings of the other, for the sake of the smooth and speedy running of business and the protection of third parties, retaining always the remedy of the seeking of Boskillnad if the financial aspect of the marriage partnership becomes unworkable. Certainly, remarkably few disputes appear to /

1. Cf. above (matrimonial home).

to arise at present with regard to the administration of what, in a system of separation, are in effect family assets, and it may be that, in transactions concerning corporeal moveables[1], the best course is to allow strangers to the marriage to assume joint consent, and let the married parties settle matters between themselves. However, for the sake of argument, a distinction is drawn in the present rules between "important transactions" and "minor" family asset transactions.

"Minor" Family Asset Transactions

In all transactions, which are not "important" transactions as above defined, there shall operate in favour of a third party a provision similar to that contained in the Partnership Act, 1890, s.5. Each married person shall be vested with authority to carry on the 'business side' of the marriage in the usual way, unless the third party knows that he/she has no such authority. The third party therefore may assume either that the person with whom he is dealing is a married person with authority to transact[2] or a person not currently married who may do as he wishes with what is his own. Only where a person known to be married purports to make a contract extraordinary in its terms should the third party be put on his guard.[3] Here alone would the notion of constructive bad faith[4] be used, allowing /

1. at least, those where no writing is required; in the already cumbersome credit contracts, a further complexity would be less troublesome, more easily absorbed into a scheme of paperwork, and less surprising and unwelcome.
2. i.e. married within the scheme, so married but scheme's provisions having been terminated by Boskillnad, married with independent property regulation.
3. cf. (partnership) Paterson Bros. v. Gladstone (1891) 18 R.403.
4. Actual knowledge would amount to actual bad faith; and see infra, 'Remedies' (4).

allowing the aggrieved, non-contracting, non-consenting[1] spouse to reduce the contract at any time up to the transfer of title to a subsequent bona fide third party. The contract is voidable.

The maxim omnia rite ac solemniter acta praesumuntur would apply, to entitle the third party to assume that the rules of indoor management were orthodox. Unless the third party knew of a diminution in a married person's ostensible authority endowed by marriage, he would be entitled to assume that each party had full power to carry out normal purchases and sales (and to make reasonable gifts) and generally to enter into such transactions as are usual in the running of a household. Proof of knowledge of actual (less extensive) authority would fix the third party with bad faith, and render the contract voidable.

If a contract is not reduced (by reason of delay by the entitled spouse, or by reason of his/her choice), compensation may be sought from the third party and/or the other spouse. Their liability shall be joint and several. If no blame can be attached to the third party, compensation may be sought from the other spouse,[2] to be funded out of the latter's separate property. Actings beyond ostensible authority might be ratified by the other spouse, in his/her option.

It might be that, to purchase a family asset, a spouse is using his separate property (thereby changing its nature). An apparently unusual or eccentric transaction might put a third party on enquiry, to find that the transacting spouse was merely making a unilateral contribution to the stock of family assets.

Such /

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1. In such circumstances, in theory, consent would be necessary, the "minor" transaction being an unusual one, and would not be forthcoming in fact, if the other party's wish is to reduce the contract.
2. See Remedies, below.

Such a system would protect third parties, preserve independence of action in everyday transactions, remove the outmoded praepositura and achieve a harmonious whole with the rules, next outlined, of liability for household debts.

Liability for Household Debts.

Here the model followed is the pattern of liability for partnership debts (Partnership Act, 1890, s.4(2) and s.9). The liability of husband and wife for household debts (their ostensible authority being on a s.5 basis as above explained) shall be joint and several. Hence, a third party may hold as liable the party with whom he contracted; on finding (her) to be a woman of straw, he can pursue the other for the whole debt, and leave the latter to seek compensation from his partner.[1]

It can be seen that no clear line of distinction could be drawn in practice between household debts and "minor" family asset transactions. Joint and several liability would be particularly attractive and appropriate because liability would remain the same no matter into which category the transaction in question was thought to fall.

Equally, debts which pertain to the separate property of each are due only by the owner spouse, and neither has any right to look to the other for aid. Creditors can attach in satisfaction only those separate assets of the married debtor, together with his half share in the family assets /

1. In most cases, it would be hoped, compensation would be made informally. However, (the family court of the) Sheriff Court could make an order for compensation or in extreme cases might order withdrawal, perhaps temporarily, from a spouse, his partnership authority. If the property scheme was not thought unsuitable in practice in a particular case, Boskillnad might be ordered.

assets. On the other hand, for partnership debts, all the family assets[1] and all the separate property of each would be attachable. One is liable in all one's property for all one's debts. The liability of a partner is in normal circumstances unlimited, and in marriage it is not thought that there could be any limited partners. Even where one spouse is deprived by the court of his authority to act, he/she must accept the actings of the other unless/until Boskillnad or possibly reinstatement of his/her authority or indeed replacement by the court of the active by the passive partner.

The 'housekeeping allowance' would disappear, together with the praepositura, to be replaced by a system of family assets, joint and several liability for household debts, reciprocal duty to aliment, and concurrent compensation. There would be no 'savings' from housekeeping, unless the parties were to operate a joint household account, which then would be the natural repository of surplus common 'housekeeping-earmarked' funds.

Where it appeared that, though concurrent compensation was being given, and though in theory each spouse must take his share of the household debts, yet the burden was falling more heavily on one than on the other, and little compensation was being received, a remedy would be necessary. It is thought that on application the court might re-assess the compensation given in the particular case and/or withdraw administrative authority from the other spouse and/or allow Boskillnad. (This would necessarily involve withdrawal of authority). In such a case, the court might consider it best to reinstate /

1. Jointness of family assets at least would remove the argument in answer to the Sheriff Officer - that all assets belong to the spouse who is not in debt.

reinstate the duty to aliment, and that in the new 'compulsory' (notwithstanding cohabitation) form.

Probably a spouse should cease to have any liability for the ante-nuptial debts of the other.[1] Separate debts (not being marriage partnership/household debts) whenever incurred should not be attributed to the non-debtor spouse whether or not he has profited by or through the marriage, and debts "running with" assets which on marriage become family assets would normally become household debts carrying joint and several liability.

Bankruptcy

The principles applicable shall be that, in the normal case, where there has been no judicial separation of property, creditors, whose debts relate to family transactions, may attach all the family assets of the marriage partnership, and all the separate property of each spouse. For "separate property" debts, creditors may attach all the separate property of the debtor spouse (including, of course, heirlooms), and one half of the family assets.[2]

It follows that the solvent spouse will be affected to some extent by the bankruptcy of the other, yet his/her own separate property shall be immune. Clearly, though the bankruptcy of one partner will affect the lives of the family; concurrent compensation will cease whether the bankrupt spouse was the donor or recipient[3]; the /

1. Contrast present position: M.W.P. (Sc.) Act, 1877, s.4. (husband's liability only) (Chapter 1). This provision (see C. & W., pp.265-6) is of little practical importance.*
2. Under this system, each spouse owns one half of the totality of the family assets. 'Heirlooms' are separately dealt with, and there would be no ownership of particular items.
3. On bankruptcy, the court would take the property side of the marriage in hand, and there would be a re-assessment. If compensation did not cease, the recipient (solvent) spouse would be regarded as a preferred creditor; if the donor spouse was solvent, compensation /

* See S.L.C.Memo. No. 54, 7.1-7.2.

the practical working-out of the duty to aliment will be changed.

As at present, donations inter virum et uxorem made within one year and day of bankruptcy may be reduced at the instance of creditors.

Where Boskillnad has taken place, creditors may attach only the separate property of the bankrupt spouse. Since (his) separate property now will include assets of the family asset genus, it might be that the situation would be as confusing as it is at present. All that can be said is that at Boskillnad, division of family assets would have taken place, and ownership would have been established of particular items as evidenced by inventory; thereafter perhaps parties would be more aware of such matters, and might be able to provide accurate information about funding, and contribution to funding, of assets.[1] (After Boskillnad, separateness would rule, and only if divorce later occurred would 'contribution in kind' perhaps be a relevant consideration.[2] 'Contribution in kind' would be at odds with the philosophy of concurrent compensation of gains, and, moreover, it might not find favour /

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compensation funds would pass to the creditors, laying a burden of repayment upon the solvent spouse. (That which at bankruptcy lies in a spouse's separate bank account is his separate property attachable by creditors, even if lodged there the previous day by virtue of the compensation scheme). It is sufficient that the bankruptcy of one touch the other as to half of the value of the family assets - that is, as to capital rather than as to income.

1. If desired, the inventory drawn up at Boskillnad could be kept up to date, by agreement of the parties in respect of each entry, but this could never be an enforceable requirement: only the punctilious or highly-motivated would comply.
2. i.e. generally in property or property-related emergencies during marriage (including bankruptcy) the strict rules of ownership (softened by the effect of the compensation device if applicable) would apply.

favour with those who eschewed the concurrent compensation device. Nevertheless perhaps at divorce, whatever the antecedent circumstances (in-scheme, out-of-scheme, Boskillnad), some discretion should be given to the court in the matter of distribution of property. On the other hand, the scheme is intended to render such considerations unnecessary, and out-of-scheme protagonists would be likely to consider contribution in kind to be an uncertain and undesirable guide. Perhaps indeed it is a suitable criterion only in the cohabiting post-Boskillnad situation, and even there should be used only sparingly).

It remains to decide whether the terms of the M.W.P. (Sc.) Act, 1881, s.1(4) would remain appropriate. That section postpones (to the claims of other creditors) the claim of a wife who has lent or entrusted money to her now bankrupt husband or who has allowed her funds to be immixed with his. Possibly a cohabiting spouse should be taken to acquiesce in a postponed ranking if (she) lends, or immixes funds, in addition to fulfilling (her) duty to compensate and to aliment; if there has been separation of assets or, even more telling, if co-habitation has ceased (with the result that the 'creditor' spouse will receive no indirect benefit through living in the same house as the 'debtor' spouse) perhaps there is a stronger argument in favour of treating the spouses as strangers[1] and excluding the application of /

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1. The general position now (and under the scheme, it is suggested, quoad separate property of the solvent spouse subject to what is said in greater detail above) is set out in the 1881 Act, s.1(3): "....the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband."

of s.1(4) in those circumstances. Perhaps then she should be treated in the same manner as any other creditor.

One effect of the bankruptcy of a spouse would be, it is thought, a corresponding increase in the amount of aliment due to him/her by the other spouse, if the latter's resources allowed.

Aliment

In Glasgow University Law Faculty Response to Scottish Law Commission Memorandum No.22 (Aliment and Financial Provision), the Memorandum's suggestion[1] that the spouses' obligation to aliment be reciprocal is endorsed, although doubt is expressed about whether the obligation ever would bear equally on each. (If so, would there be any need for it?). It was thought that the wife's duty should be to make a monetary contribution to the running of the household .... if and in so far as she is reasonably able to do so, but that the obligation should be 'reciprocal'[2], where there were no children of the marriage and where both parties were in good health and had employment potential. In effect, however, all that is meant is that neither should shirk the responsibility to the household and that each should make a contribution[3], A partnership basis, joint and several liability, and compensation should help to ensure this.

Comments on the existing rules of aliment were made in Chapter 4, and Faculty comments were made upon the Scottish Law Commission's proposals for change. Among the subjects upon which comment was made were reciprocity of obligation (Faculty Response pp.4-6), hierarchy of liability /

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1. Propn. 2 (2.13).
2. equal? Would that be necessary, logical or even possible? See Fac. Resp.
3. in cash (but also in kind - and often the wife's considerable contribution, over a long period, is in kind, and, at some points, also in cash).

liability and entitlement (16-19), conditions of liability (19/20), expenses of litigation (21), resources of obligant (22-25) the important subject of non-patrimonial conditions of liability (relevance of conduct: pp.25-31) (in respect of which a framework of rules, taking account of conduct, is set forth, which includes a new concept: "gross contempt of the marriage"), methods of fulfilling alimentary obligations, variation of provisions for aliment in separation agreements (34-36), and 'remedies' (38-41).

"Compulsory" Aliment During Cohabitation

In particular (at p.41), the Faculty responded with enthusiasm to the suggestion (Proposition 39) that a spouse should be entitled to obtain and to attempt to enforce a decree for aliment notwithstanding the fact of cohabitation. "An offer by the defender to provide support in kind in the home should not be a defence to such an action if in fact it was the lack of adequate support which rendered the action necessary." This seems to be one of the areas where reform is most greatly to be desired. Whether or not parties choose to avail themselves of the compensation procedure, it is thought that this remedy should be open. However, it is more likely to be appropriate where the parties are not affected by a compensation scheme, or where the scheme has proved unworkable, and termination of compensation, together perhaps with separation of assets,[1] is sought. Strictly, if the concurrent compensation scheme is working correctly, there should be no need to seek 'compulsory /

1. Compensation rules may be expunged without rendering Boukillnad necessary. See infra, 'Remedies'. Compensation, jointness of assets and pretence of partnership authority bear no necessary relation to each other except that partnership authority would be inappropriate where there was separation of property.

'compulsory' aliment.[1]

Memorandum No.22 says nothing about the enforcement of such an award of 'compulsory' aliment, exigible while cohabitation continues. Where the obligant is paid by credit transfer, arrangements could be made through employer and bank; where the recipient is a taxpayer, a system of tax credit might be evolved. Where the alimentary debtor is paid weekly in cash, the employer would be given a copy of extract decree and would deduct the amount specified, retaining it for collection by the wife or having it paid into her separate bank account. Hence, strangers to the marriage would be inconvenienced, but there may be no alternative to the adoption of such schemes. Where the obligant changes his employment frequently, the problem becomes acute. It may be thought odd that co-habiting spouses should need to make use of such machinery but the reasons for its adoption might be many, ranging from unhappiness in the home and ignorance of the obligant's income to hapless ineptitude in the management of money. Where the spouses are not cohabiting and enforcement of an award is difficult (the usual situation), perhaps the recipient's right against the obligant should be assigned to the Ministry of Social Security, which then would meet the recipient's needs.

'Compulsory' aliment would have no effect upon the central family property scheme. It would be a blunter instrument than that of concurrent compensation, and would contain no inherent equalising factor, being designed /

1. See supra, Concurrent Compensation Procedure (outline): if the marriage itself has broken down, and cohabitation has ceased, a party who had made use of the compensation scheme would not, of course, be precluded from seeking the traditional remedies of separation and aliment or adherence and aliment. Earlier it is suggested that this could be termed either 'modified compensation' or 'aliment'.

designed for maintenance of home and family, rather than assimilation of opportunity to amass. Hence, property division on subsequent divorce might be an apparently more far-reaching exercise, and one having a less certain result than would the same process where the parties had adhered throughout marriage to the concurrent compensation system.

Inter-Spouse and Other Litigation

In all matters affecting separate property, it is thought that a spouse may sue the other ex contractu or ex delicto. Property (ownership) disputes would be settled by (the family court of) the Sheriff Court, using the new rules here put forward for consideration. Contractual or delictual damages would fall into the separate funds of the successful spouse. Expenses would be met out of separate funds. The outcome of, and financial consequences of, litigation, instigated or defended by a married person against a stranger to the marriage with regard to the former's separate property would be no concern of his spouse. On the other hand, litigation by or against a married person with regard to family property would be of family property significance, since the cost of litigation would be a household debt, and sums received would be regarded in the first instance as of family asset genus, perhaps to be used to buy family assets or to be lodged as joint property in a joint bank account, if such exists, but would be subject to change of nature through actings of the parties in dividing it and placing the money in separate accounts.

Gambling Gains

Where family assets are used[1] in order to enter a competition or lottery, any resulting gain should be a family /

1. ... no matter whose was the skill or the luck in bringing success.

family asset (which may become separate property by division and payment into separate accounts, as above noted), and where separate property is used[1], the prize should be regarded as separate property. However, this is simplistic, because there might be difficult matters of proof,[2] and presumably the court would continue to refuse to entertain actions concerning spousiones ludicrae. Moreover, the spouses' fortunes remain linked, in that an increase through good luck (or through any other cause) in the resources of one is likely to have an effect upon the operation of the compensation or (to a less extent), compulsory aliment, scheme. In many cases, a spouse would choose to re-invest the winnings in family assets or to give the other partner a share in the good fortune, yet, in principle, the rule governing gratuitous acquirenda should apply, and thus where separate property has been used to qualify to enter a competition, the winnings should be regarded as separate property.

Where the family asset scheme was not in operation[3], the traditional approach of attempting to ascertain contribution, would be used.

The New Remedies

The Court

It is suggested that the court from which the new remedies would be available would be a new court, to be found within the Sheriff Court structure administrative and physical. Sheriff Courts are accessible, and it would be essential that a remedy could be sought with relative ease and speed, and without the necessity of incurring /

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1. . . . . no matter whose was the skill or the luck in bringing success.
2. though this is less likely under the scheme here envisaged than in the traditional system.
3. as a result of choice, or of judicial separation, or of separation of assets.

incurring great cost.

Ideally there should be a family courtroom within every Sheriff Court building but at the present time, because of lack of money for public expenditure, this may not be a feasible suggestion.[1] Legal aid would be available in suitable cases (judged by the extent of the litigant's property (separate property and value of one half share in family assets)), and the court would be manned by a greatly increased staff of Sheriffs. It might be that such a court should be empowered to grant divorce, but that is quite another issue.[2] The relative informality of the Family Court /

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1. cf. Fifth Commonwealth Law Conference Papers Developments in Family Law. Courts and Jurisdictions. "Scottish Reforms and Commonwealth Examples". (The late) Sheriff Principal Robert Reid, Q.C., p.345. "It will be seen that, if jurisdiction in consistorial actions - or in actions of divorce - was conferred upon Sheriff Courts they could have the comprehensive family jurisdiction of a family court although they would lack its social welfare and marriage counselling facilities and might fall short in providing that degree of privacy, informality and lay participation which are commonly thought desirable in the settlement of family disputes. If these deficiencies could be made good there is much to be said for approaching the legal ideal represented by the unified Family Court by the cautious development of our ancient, native and vigorous Sheriff Courts."
2. See suggestions by Law Society and Royal Commission on Legal Services; contra, the Faculty of Advocates (Memorandum, November, 1980) has questioned whether Sheriff Court divorce would be cheaper when all aspects are considered, including under-use of the Court of Session. Moreover, many people prefer the 'relative anonymity' of the Court of Session. The Faculty called for a full consideration of all the implications of conferring divorce jurisdiction on the Sheriff Court (Glasgow Herald 4/11/80). But see now Divorce Jurisdiction, Court Fees and Legal Aid (Sc.) Bill.

Court might render it unsuitable for the taking of so fundamental a step. Perhaps change of status should remain the province of the Supreme Court. Many property matters might have been dealt with during the course of the marriage, as here suggested, and those remaining at divorce might be remitted to the Sheriff's Family Court, which might be familiar already with the financial circumstances and problems of the marriage.

The Remedies

The Sheriff's Family Court shall have jurisdiction in the following causes:[1]

(1) Declarator of Property Rights

At any time,[2] either party may seek a ruling upon the correct classification of any item as 'separate' property, 'heirloom' or family asset. In particular, for classification of ante-nuptial property and post-nuptial gratuitous acquirenda as 'separate' or 'heirloom' this remedy would require to be available, but the petition must be commenced within two years of marriage or acquisition.

Memorandum No.22 in Proposition 70 recommended that a declarator of property rights of the spouses and any other relevant matter should be available, but such a remedy seems to have been intended for use in actions of divorce only. The Faculty suggested[3] that the remedy could be of use in other circumstances, even during subsistence of the marriage and cohabitation, "as a touchstone to resolve dispute where no consistorial remedy is sought, in accordance with the property rules current."

(2) /

1. In all instances, appeal would be to the Court of Session.
2. Subject to the two year time limit in certain cases (below and also see supra.)
3. p.63.

(2) Third Party Dealings

Consent of both spouses is necessary where an "important transaction" is being entered into, but it has been seen that a third party will be protected if some evidence is produced to suggest that the normal rule does not apply. Hence, decree of divorce, of judicial separation, of separation of assets, order of withdrawal from the non-transacting partner of authority to transact, or proof of judicial finding of the 'heirloom' or 'separate' character of property will be sufficient, and should be able to be produced by the contracting-spouse. The court's function here would be simply that of providing copies where necessary, except that, as above explained, a declarator may be sought in case of doubt as to the nature of an asset which is the subject of a transaction, unless the situation is one to which the two-year time limit applies, and the time limit has expired.

A third party would be justified in proceeding if the other spouse gave written consent to the transaction in his presence, or if evidence of consent in probative form was produced. (In addition, there would be available from the Registrar of Births, Marriages and Deaths a certificate that no current marriage of the transactor appeared on the Register. In such a case, where there had been error in the Registrar's office in searching, or where a marriage did not appear by reason of having been celebrated abroad, or where for any other reason the certificate was not correct, compensation would be due only between spouse and spouse. The third party would not be prejudiced, and the Registrar would not be liable. Moreover, for practical reasons, it is suggested that, unless there is reason for doubt, a third party should be entitled to rely upon the accuracy of a transactor's statement as to status (e.g. unmarried; widowed) (although he should seek information on the point). Hence, recourse to the Register would not often be had; perhaps its greatest use would be in the

case where an important transaction was proposed to be entered into by someone of marriageable age who could produce none of the certificates listed and who, having negotiated with the third party in circumstances (e.g. in a 'family' home) which suggested that he was a married man. On the other hand, it may be that the best or most practical approach is to proceed from the starting-point that a stranger may presume the transactor to be unmarried, unless he has actual knowledge to the contrary or is fixed with constructive knowledge, or at least with possible constructive bad faith, through having been put on enquiry by circumstances[1] (even perhaps by the presence of a wedding ring). Only then should the third party ask for production of any of the certificates listed).

(3) Compensation

The protection of third parties and the smooth running of business lies in the concept of inter-spouse compensation. Unless the third party has been fraudulent or lax, his transaction usually should stand. Thus, where a partner has overstepped his actual authority and/or has misled a stranger of the marriage to the prejudice of his partner, the court should be open to the latter to seek pecuniary compensation. Even where reduction remains possible, the aggrieved spouse may elect to take compensation instead.

(4) Withdrawal and Reinstatement of Partner's Authority to Act

On application by a married person, the court shall hear reasons (of maladministration of family assets, prodigality, frequent absence, irrational or unco-operative behaviour) to substantiate a claim that the other is not fit to exercise the married person's authority in important transactions /

1. Cf. approach taken to "Minor" Family Asset Transactions,

transactions. If the application is refused, the petitioner may not re-apply within one year. If it is granted, the other may seek reinstatement and/or removal of the authority of the first mentioned partner, but this may not be done within one year (or possibly judicial discretion)

This remedy might be accompanied by the seeking and granting of separation of assets, but that would not necessarily be the case. (On the other hand, separation of assets would be accompanied always by withdrawal from both, of the partner's authority to act - and necessity for partner's consent). Unless separation of assets has taken place, liability for household debts would continue to be joint and several, although only one spouse had authority to act (in important transactions), and creditors would continue to be entitled to look to family assets and all separate property of each for satisfaction of their debts.

It is not thought that it would be possible to enforce generally the withdrawal from a person of his minor transaction authority. Despite the precedent of Letters of Inhibition, providing constructive notice to all traders, (surely unsatisfactory and very infrequently met with), it is thought better that strangers to the marriage should be protected unless they have actual knowledge of judicial withdrawal of authority. The point will arise in important transactions, since one spouse will act alone but is much less likely to arise in minor transactions. Hence, the suggestion is made that, although the order in its terms will withdraw the married person's authority to act, strangers to the marriage will not be affected by this event, except in so far as they have actual knowledge of it.[1] A trader, aware /

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1. This means that cohabiting married persons retain authority to enter into minor transactions. If one is extravagant, or if the parties cannot agree on levels of spending, separation of assets rather than withdrawal of authority, therefore, would appear to be appropriate.

aware of the situation by reason of having entered into an important transaction with the 'capax' spouse, could not then, without further enquiry, freely trade in matters of minor transaction with the other. The only other inhibition upon acting would be in cases where the (minor) transaction is so extraordinary in its terms that the ordinary ("s.5") authority could not be said to apply to it, and that is a different principle.

In effect, then, the withdrawal of authority would pertain (only) to the requirement of joint consent for important transactions.

(5) Substitution of Judicial Consent

Withdrawal of authority would follow an established pattern of irresponsible and/or uncooperative behaviour; substitution of judicial consent would be available in cases of emergency, difficulty, isolated unhelpfulness or genuine disagreement.

Application having been made, the court may interpose its consent to a transaction concerning the matrimonial home or to any other important transaction. In certain, non-contentious, cases (where one partner, for example, was abroad, and swift action was necessary) the procedure would be speedy and quasi-administrative; in others, the whole circumstances would require to be laid before the court and a judicial discretion exercised. A free discretion is advocated, but the trend now perhaps is to give a relatively wide, but fettered, discretion, in the form of a list of factors deemed to be relevant subjects for consideration.[1]

Where /

1. Cf. e.g. M.C.A.1973, s.25(1) ("It shall be the duty of the court...to have regard to all the circumstances of the case including the following matters, that is to say - "factors (a) - (g); The Unfair Contract Terms Act 1977 Sched.2 ('Guidelines' for the application of the 'reasonableness' test)(The Law of Contracts and related obligations in Scotland, David M. Walker, p.350).

Where one spouse knows that he will be absent for any length of time, and where there are, for example, shares the value of which may fluctuate, it would be wise for him to grant to his wife a power of attorney and thereby render the seeking of judicial consent for sales and purchases unnecessary. Indeed, this should be standard practice in cases where consent to important transactions may be required speedily and may be difficult to obtain.

(6) Boskillnad

It may happen that, though the spouses intend to continue cohabitation, the system of jointness (and concurrent compensation, if chosen) is not suited to their temperaments or wishes. In this case, the court will effect separation of all family assets except the matrimonial home, which will remain in joint ownership. Division would be made on a simple basis of equal shares. Since many of the assets would be corporeal moveables, ideally division would be according to individual preference with money compensation if necessary.[1] A spouse would have separate power of administration[2] to deal with his own separate property. Title to property acquired thereafter would be decided in accordance with orthodox rules of property. The non-earning, or economically /

1. Cf. Scandinavian systems (Chapter 6).
2. Hence, withdrawal of authority from both spouses (and withdrawal of necessity for consent of both) would be ordered. There could be withdrawal of authority without Boskillnad, but the nature of Boskillnad would render the notion of partner's authority quite inappropriate. Creditors must look to the separate property of the transacting spouse, no matter what the nature (household or personal) of the debt. As between the spouses, arguments about liability would be settled by reference to the operation within the marriage of the reciprocal duty to aliment or possibly, if applicable, to the terms and operation of a "compulsory" aliment order.

economically weaker partner therefore would be in a less good position then had jointness of family assets continued to be the rule. Boskillnad means early separation of assets. It would be appropriate where the system of jointness proved unworkable in a particular marriage. Where the spouses, at marriage, were inimical to the system and the degree of community which it imports, they would "contract out" of it.[1] Boskillnad would be available at the request of both parties, or if the 'financial' conduct of one rendered it desirable or necessary, in the view of the court.

(7) "Compulsory" Aliment

An award of aliment may be made while cohabitation continues[2] but, as has been pointed out, this remedy would be intended for use where the concurrent compensation scheme was not in operation. Thereafter, petitions for variation would be entertained upon change of circumstances.

Existing remedies of adherence and aliment and separation and aliment and interim aliment[3] would remain.

(8) Concurrent Compensation of Gains

A scheme of concurrent compensation would form the heart of the new System.

Parties might choose to adopt a standard arrangement, or to make their own rules (to be ratified by the court) or to contract out[1] of this most "community-influenced" aspect of the new rules here put forward. Whether the standard scheme or an individual scheme was chosen, enforcement and oversight of the system would lie with the court. Parties would be free to alter the arrangement by /

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1. See "Contracting-Out", below. However, later "contracting-in" would be competent, one aim of the device being maximum flexibility and helpfulness in the manner of its use.
2. giving effect to Sc.L.Com.Memo.No.22, Propn.39.
3. though see comments upon "interim aliment", Chapter 4.

by agreement, but judicial ratification would be necessary if it was proposed to terminate the compensation process.

Concurrent compensation would bear no necessary relation to jointness of assets and presence of partnership authority. Ideally, all three would be present, but it is possible that a compensation scheme might be in operation in the context of a marriage in which (otherwise) there was separation of property. Alternatively, parties might choose to opt out of the compensation scheme, while retaining the notion of jointness of assets.

It is envisaged that an amount would be transferred by standing order each month from the bank account of the economically stronger partner, the amount having been agreed by parties or set by the court, taking into account the theoretical basis of the arrangement, namely, that each shall pay to the other one third of (his) income. It may be, of course, that the economically weaker spouse has no income, earned or unearned.

If termination of compensation is proposed, the court must accede to the request,[1] but it is thought likely that the court might consider it proper to make an award of "compulsory" aliment if the respective financial positions and earning opportunities were such as to suggest this.

On the other hand, if the parties preferred to revert to an informal, amicable agreement, or if the financial /

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1. that is, if termination is proposed by both parties (Difficulties would be met in ascertaining whether each truly had consented to this course of action). Where termination is proposed only by one party, see infra "Contracting-In". This is an area where the manner of exercise of the judicial discretion would reveal the attitude of the judge towards community and equalisation notions. Perhaps guidelines should be provided.

financial circumstances of recipient spouse had changed for the better, it would be desirable that the parties be released from the compensation regime. To some extent, the law would be attempting to create a climate in which the compensation device, in a form suitable for each individual case would be the normal situation. In this respect, compensation would resemble the 'housekeeping allowance', but it would be more far-reaching in its effects, being designed to promote financial fairness, equality and independence within marriage.

(9) Judicial Separation

The court would entertain, in the usual way, actions of separation. At separation (i.e. cessation of cohabitation), there would be separation of assets, and new arrangements would be made with regard to the matrimonial home.[1] The 'clean break' philosophy in property matters both on separation and divorce is favoured, but this might not be possible in respect of rights, including rights of occupation, in the matrimonial home and in many cases an award of maintenance (divorce) or aliment (separation) might be appropriate.[1] It is quite possible that the popularity of separation as a remedy may decrease.

"Compulsory" aliment would cease at this time, as would a scheme of concurrent compensation.[2]

(10) Divorce

Divorce /

1. See infra, judicial powers on divorce. However, active efforts should be made to make a 'clean break' with regard to the house as soon as possible.
2. On cessation of cohabitation (as opposed to decree of judicial separation) concurrent compensation and "compulsory" aliment would not cease, but it would be open to either party (and presumably the payer would be the more interested to do so) to ask the court to terminate the arrangement. In these circumstances, of course, enforcement may be very difficult.

Divorce jurisdiction would remain in the Court of Session exclusively.[1]

Under the new scheme here proposed, divorce would be granted or refused in accordance with the rules set forth in the Divorce (Scotland) Act, 1976, as amended to take account of the new property arrangements and also to take account of any flaws in the 1976 Act which experience has revealed.[2] The 1976 Act changed the basis of divorce entitlement from fault to irretrievable breakdown, in name at least, but made minimal changes to the treatment of property on divorce. The system remains that of provision of capital sum and/or periodical allowance to the party who (irrespective now of guilt and innocence) may reasonably claim such provision. There is no power yet in the court to order property transfers. The principles upon which, under this scheme, division of property would be made, in the event of Boskillnad, judicial separation and divorce are later outlined.

CONTRACTING-IN

The standard system would comprise joint ownership of /

1. But see now Divorce Jurisdiction, Court Fees and Legal Aid (Sc.) Bill.
2. Is a party entitled to withhold consent to a 2-year 'separation with consent' divorce on the sole ground that the proposed financial arrangements are not entirely to his liking (there being no dissent in principle i.e. to the severance of the marriage tie)?

of the matrimonial home, and of the family assets, and concurrent compensation of gains. Jointness of home is commonly found now[1], and it is the aspect of 'community of property' which arouses least resentment among those generally opposed to change, and anxious to retain self-regulation. For these reasons, it is suggested that the only basic and (generally) unalterable rule of the new property system[2] should be that spouses shall be joint owners pro indiviso of the matrimonial home; other rules of the new system may be contracted into (but not out of[3]) at any time during the continuance of the marriage. The problem for discussion is whether unilateral application for operation or termination of these rules should be competent.

If unilateral application, normally to be acceded to by the court, were to be allowed, the system would cease to be "optional" in a true sense; on the other hand, if joint consent always was necessary, it might be argued that the rules would operate only in the cases where there was least need for them.

The tentative suggestion is made that either party should be entitled to make application to the court in order that it might consider the financial circumstances of the parties and the marriage, the onus lying on the applicant to show cause why, on a temporary or permanent basis /

1. and where title stands in the name of one spouse only, attempts are being made to establish occupancy rights of the non-owning spouse and to give strong ancillary provisions. See Matrimonial Homes (Family Protection)(Scotland) Act (1981).
2. that is, of the property system; as at present, there would be rules of the general law of universal application on such subjects as aliment and rights on death testate and intestate. Moreover, "compulsory" aliment would be worthy of its name; a spouse could not be prevented at least from seeking such remedy. However, even with regard to the matrimonial home, some degree of freedom of action would be permitted. See infra, Contracting-Out.
3. See below, "Contracting Out".

basis, the marriage should be subject to the jointness of family assets and/or concurrent compensation procedure. Proof would concern matters such as the earnings and earning power of each, the expenses of running the household and the manner in which that financial burden was met, the amount of aliment (if any - probably 'housekeeping allowance') made by the economically stronger party and the wife's opportunity, if any, to amass separate property. The procedure would resemble closely an application for "compulsory" aliment. A considerable degree of judicial discretion necessarily would be present.

A different solution would be a presumption that in all marriages, parties were married with jointness of assets and with the benefit of compensation. This would necessitate recourse to the court to ratify contracting-out, or to hear application by one party as to why there should be contracting-out[1]. The initiative as to action, and the burden of proof, therefore would lie on the would-be 'contractor-out'. This would be the more full-blooded approach.

Certainly, unilateral application for termination should be competent in cases where parties could not reach agreement. (Where parties agree that compensation should cease, joint application for court approval (always granted unless there is evidence of fraud or coercion) would be necessary). Factors relevant for the /

1. Earlier, it has been submitted that where both parties seek termination of the concurrent compensation procedure the court should accede to the request but may think it proper to substitute an award of 'compulsory' aliment. Where only one party wishes to contract-out, the whole financial circumstances should be reviewed, as suggested above in the case where only one party wishes to contract in, and reliance must be placed on the discretion of the court.

the court's consideration would be variation in the financial circumstances of each or one party(ies), unreasonable refusal of the economically weaker spouse to make as good a contribution as (she) could in cash or in kind, or extravagance: in effect, that which would be relevant would be evidence about finance and what might be termed 'financial conduct'. What might be termed 'marital conduct' would not normally be relevant, unless it had reached "Wachtel" or "gross contempt of the marriage" proportions.[1]

In all cases, the onus would lie on the applicant, the party advocating change, to show cause why change should be made.

Enforcement

Where the compensation system was chosen expressly by the parties, or was not excluded by choice of the parties, as the case may be, implementation normally would proceed smoothly by way of transfer by order of the economically stronger spouse from his bank account. Where compensation has been ordered by the court, the employer making payment in cash, or the bank having the payer's account, must comply with the terms of the extract decree presented by the payee, if it is in their power to do so, however inconvenient and time-consuming this may be. It must be admitted that where goodwill between the spouses is lacking, enforcement is likely to cause as many problems as occur today in the enforcement of awards of aliment. As has been said, the notion of compensation would provide, it is hoped, a climate of opinion; where the payer becomes reluctant to pay, the payee might be advised temporarily to renounce (her) rights of compensation, and obtain a decree of aliment which might be enforced through a tax credit scheme[2], or by means of assignation to D.H.S.S. of the payer's right to sue.

1. Cf. Memo.No.22, 3.73 and Fac.Response, p.66: factors relevant to entitlement to aliment.
2. Cf. Memo.No.22, Part V and Fac.Response, p.82.

In March, 1983, the Scottish Law Commission published Consultative Memorandum No. 57: Matrimonial Property.

A cautious approach is taken, bearing in mind that the Scottish legal system is not used to systems of community, having had a system of separation of property for over a century. The Commission seeks views, but itself does not favour a system of community, or statutory co-ownership of the home and/or the assets (but provides in an Appendix detailed Possible Schemes with regard to (1) co-ownership of the home and (2) co-ownership of household goods). Instead, minor reforms are suggested: presumptions of co-ownership of goods, and of funds in joint names, the facilitating of co-ownership of the home (exemption from stamp duty on conveyances by one spouse to the other of a share in the home), the modernisation of the relevant statute law on the subject, much of which is Victorian, and the suggestion of a remedy of distribution of property in circumstances other than divorce.

In view of the dates of publication of the Scottish Law Commission's proposals, and of final preparation of the thesis, it is not possible to make fuller reference to this important Memorandum.

CONTRACTING-OUT

Most community regimes permit "contracting-out". Some (for example, South Africa) enforce fairly strictly a rule of "ante-nuptial contracting-out only".

In the scheme set out, the rules pertaining to the matrimonial home have been presented as standard rules and the remainder of the regime as optional.

Matrimonial Home

As a matter of principle, choice and freedom are desirable attributes of any system of matrimonial property. Is it the case, though, that there exist "matters of public policy beyond the reach of any contrary agreement"[1]? Contra, that which may be a sensible rule for suburbia may be quite unsuitable for the great houses of the land. It is suggested that jointness of ownership of the home be the norm, but that the norm may be displaced either by the presence of trust provisions regulating the devolution of heritable property or by application to the court, but not by ante-nuptial or post-nuptial marriage contract provision.

Family Assets

The three principal features of the scheme presented for consideration are (a) joint rights of ownership of the home and (b) of the family assets, and (c) concurrent compensation of gains. It is envisaged that (a) would be of wide application, (b) of usual application and (c) of application where thought useful in the particular circumstances and, it is hoped, of (fairly) common application /

1. Professor Otto Kahn Freund (1959), p.270 (with reference to certain matters e.g. occupation of the home and use of the contents).

application.

However, it would be competent for parties by ante-nuptial contract to exclude the operation of the family assets rules. The correct procedure if parties after marriage wished to exclude these provisions would be to seek Boskillnad, rather than to enter into a post-nuptial contract to that end, a course which would not be competent. On the other hand, post-nuptial modification of agreement would be allowed for the purpose, for example, of having applied to the marriage the 'family asset' provisions in whole or in part. 'Contracting-in', therefore, could be effected by agreement of parties at any time; 'contracting-out' must be done before marriage or by judicial order of separation of assets after marriage.

These would be the provisions governing what the parties may do, if they wish. It would be necessary to read together with them the rules governing what one party may do to force the issue if he (she) wishes.[1]

Marriage-contracts today are rarely found. Where parties take trouble to draw one up, the reason is likely to be the existence of considerable or spectacular wealth.[2] It is possible that, in an atmosphere of heightened /

1. See supra, 'Contracting-In'.
2. Consider, for example, Onassis-Kennedy ante-nuptial marriage-contract (October, 1968), which is reputed to have contained 173 clauses, many non-financial in nature. The marriage contract has not been published, but hearsay suggests (The Daily Express 22/9/77) that a transfer of nearly £2m in tax-free bonds was made to Mrs.Onassis, that, if husband left wife, he would give her nearly $6m for each year of their marriage and that, if she left him before 5 years of marriage had elapsed, she would receive $12m. Onassis was to pay the rent of his wife's New York flat (nearly $6,000 per month) and her personal expenses ($4,000 per month). A clothing allowance ($4,000 per month) was given, and provision of $3,000 each made for Mrs.Onassis's children. Mrs. Onassis's share of her husband's estate amounted to $15m, after out of court negotiation with Onassis's daughter. This was very much less than she might have received since it appears that under Greek law a widow is entitled to one quarter of her husband's assets /

heightened awareness of matrimonial property problems and remedies, (or even for the sake of clarity in a more complex legal regime), there might be a revival of interest in them, and they might become more commonly used. The normal rules concerning reduction of contracts (fraud, error, undue influence, force and fear) would apply.

Concurrent Compensation of Gains

Here too reference is made to the rules which govern the case where one party wishes compensation to operate, or not to operate, and the other disagrees.[1]

Where the parties are at one in wishing to exclude the operation of compensation, this aim can be achieved by the making of an ante-nuptial contract containing such a provision: the contract may or may not contain a provision to exclude the family assets rules. As has been explained, if, after marriage, compensation proves unworkable or becomes unsuitable, the proper course is to seek judicial approval for it to cease. It would not be competent to try to arrange this by post-nuptial contract.

Hence, although there would be no general prohibition on post-nuptial contracts, the permitted ambit of such contracts would be narrow, being that of alteration /

assets. Onassis's fortune, greatly reduced by the end of 1974, was estimated to be £300m. However, at least in America, cohabiting couples appear to be sufficiently apprehensive about the property consequences of non marriage to draw up non-marriage contracts, in order to ensure that neither has a claim against the other on termination of the relationship. They are concerned that there shall be no property consequences of non-marriage, despite the efforts of the American lawyer, Marvin Mitchelson.

1. Supra, Contracting-In.

alteration of ante-nuptial arrangements. Basically, the spouses would choose at marriage whether they wished to participate in the property rules not at all,[1] or in part, or wholeheartedly, and a post-nuptial change of mind would require judicial oversight and approval.

The Principles Upon Which Division of Property will be effected, in the event of Boskillnad, Judicial Separation and Divorce

Division of property will be rendered necessary in the cases of judicial separation and divorce, and will be sought and granted, upon the proven unworkability of jointness, in the form of Boskillnad, where the marriage continues.

Boskillnad

This will be granted if sought by both parties or where the ("financial") conduct of one justifies the granting of the remedy.

Since the spouses cohabit still, a change in the rights of ownership of the matrimonial home will be made only in exceptional circumstances. However division will be made of family assets, and any concurrent compensation scheme will come to an end in the majority of cases, though not, of course, if the parties wish to have it continue nor if, in the discretion of the court, it is deemed desirable that it continue. (If compensation ceases, the court may make an award of "compulsory" aliment and, of course, the reciprocal duty to aliment, latent if compensation is in operation, remains ready to revive, and will apply in all cases where there is no compensation or 'compulsory' aliment special arrangement). There /

1. except in respect of the home - and even there the trust exception might apply, or special application to the court might be made.

There would be withdrawal of authority to act and termination of joint and several liability for household debts.

Boskillnad or early division of property would effect a return to an orthodox system of separation of property for the spouses. The family assets would be divided and to this end an inventory would be drawn up. As explained, money standing at credit in a joint account would be divided into equal shares, and equal division would be made of investments in stocks and shares or any other 'paper' investments. Corporeal moveables would be divided in as equal a manner as possible, given the nature of such property, and in accordance so far as possible with the preferences of each. Monetary compensation would be due if ultimately one partner received more than the other. Since the spouses would intend to continue cohabitation, the significance of early property separation might lie rather in its effects upon the ownership of later acquired assets (now to be strictly separate), and in its significance in any future decree of judicial separation or divorce (for early division arrangements as evidenced by inventory would be unlikely later to be disturbed) and perhaps in many cases the remedy would be accompanied by a request for termination of compensation, on the basis that the parties had found community to be distasteful or unsuitable in their case.

The aim would be clarity and relative simplicity at division. Equal division would be made, unless special considerations (infra) made a different treatment appropriate.

Judicial Separation

Here some method must be found of dealing with the matrimonial home. On divorce, the commonest solution will be sale and division of the proceeds, but in every case account must be taken of the circumstances. In /

In both separation and divorce, where there are children, it may be best to leave the spouse having custody in occupation of the home until, say, the youngest child has attained the age of sixteen, or has completed his school education.[1] It might be that the occupying spouse would be able, by the use of inherited funds, or savings to 'buy out' the other spouse, but in many cases that would be impossible. Division of sale proceeds would come later, therefore, and in the meantime the non-occupying spouse must find somewhere to live. It might be thought just that (his) responsibility for outgoings such as rates and repairs, and to meet the Building Society repayments should be reduced or extinguished during these years, but this would have to depend on the view which the court took of the feasibility of this, from the occupant spouse's point of view, and upon the maintenance/aliment arrangements, if any, which were made, and upon the general circumstances. At this point, 'marital' conduct and family circumstances and responsibilities meet property rights. Both spouses have an interest in the maintenance (in a wide sense) of a capital asset probably increasing rapidly in value.

Any form of concurrent compensation in use would cease to operate, and where it had been absent but "compulsory" aliment present, the latter would terminate also. Aliment after separation would be withheld, or granted and calculated, in accordance with the principles set out in Memorandum No.22 and Faculty Response.

Assets would be divided equally, unless there were special considerations (infra). However, if Boskillnad had taken place, only assets acquired after early division of assets would remain to be dealt with, and, since the parties /

1. Cf. Memo.No.22, Propn.68.

parties had chosen separation, those after-acquired assets should return to the owner thereof, after the period of (probable) joint use. Under the present system, no equalisation (in the form of grant of capital sum award) is competent in separation, and it is not suggested that any change be made in this rule.

Divorce

I Divorce following Upon Boskillnad, Judicial Separation or in cases where Property Matters have been regulated by Marriage-Contract provision

In outline, the approach envisaged is that with regard to the home as in judicial separation, there could be sale, buying out, or rights of occupation and subsequent sale, the financial aspect of the last arrangement (compensation: outlays: debts pertaining to the home) being in the hands of the court. The lump sum award competent under the present rules would become inappropriate unless "special considerations" existed. However, in these cases, at least where there is no marriage-contract, it is arguable that capital compensation in the form of lump sum award at divorce would have greater justification than in category II cases below, where compensation has taken place throught marriage.[1] Strictly speaking, assets would be distributed according to division made at Boskillnad or judicial separation, and assets acquired thereafter by means of the application of the strict rules of separation of property, which the parties have chosen, but a lump sum award might be a helpful equalisation device and should be available. Thus, both as to allocation of corporeal moveables and as to the question of a lump sum award, the concept of "special considerations" would be relevant and appeal could be made to it. When, if ever, should maintenance payments /

1. See "special considerations", below.

payments be awarded?

Upon the subject of maintenance, reference is made to the discussion to be found in Memorandum No.22 and Faculty Response.[1] There, a distinction is drawn between questions of support and questions of division of property. It is suggested that the basic rule might be that after divorce, neither party should owe a duty to support the other, unless the party is unable, by reason of age, infirmity, physical or mental incapacity, the care of dependent children (or parents), general unfitness for work, or "for any other adequate reason" (e.g. the case of an elderly wife untrained for work) to support himself/herself[2], but, even if such circumstances existed, the duty would not arise if the party in need of support has been guilty of "gross contempt of the marriage"[3] rendering it manifestly unjust for the court to make such award. (A return to the court on change of (financial) circumstances /

1. Memo No.22, 3.2 et seq., and Fac.Resp. p.52 et seq.
2. There seems to be a groundswell of opinion in favour of the abolition of maintenance except in cases where the potential recipient has the care of the (young) children of the marriage. (Payments might be made for, say, a three year rehabilitation period to enable the (wife) to make the transition into employment). Suggestions have been made that the English legislation is over-generous to first wives at the expense of the ex-husband and second wife and family, and it is understood that the Law Commission has been asked to canvass opinion and present a report. It must be said, though, that given the factors of lack of training, arrival at middle age and bleak employment prospects in the country even for the better prepared (male or female), a strict "adults must look after themselves" philosophy, whether desirable or not, may be quite impracticable.
3. Fac.Resp., p.66.

circumstances would be competent) In this way a link is made between conduct and financial arrangements, but the connection is not too close. A similar guide-line could be drawn up in the case of awards of aliment after judicial separation; there, the "clean break" argument is a little less strong.

Where the parties have made their own property arrangements, by marriage-contract, it is suggested that they should be required to abide by their agreement, but that it should not be competent for a provision to oust the court's jurisdiction to make a maintenance order, in accordance with the guidelines specified. Contra, the Court of Session, both before and after the 1976 Act,[1] has /

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1. See Div.(Sc.) Act, 1976, s.5(1)(c) - power to the court to make one or more of the following orders:- (periodical allowance (capital sum) (c) "an order varying the terms of any settlement made in contemplation of or during the marriage so far as taking effect on or after the termination of the marriage" ("settlement" shall include policy of assurance to which M.W.'s Pols. of Assurance (Sc.) Act, as amended 1980, 1880, s.2 applies - s.5(7)). A case raising 'certain interesting and perhaps novel questions of law' came before Lord Allanbridge, in January 1981 (Duncan v. Duncan 1981 S.L.T.(Notes) 46). A proof before answer was ordered. Parties in 1974 in contemplation of divorce had agreed upon a financial settlement to which Lord McDonald upon granting divorce in December, 1974, had interponed his authority. In January, 1975, the parties resumed cohabitation but the husband continued to make payments until May of that year. In 1976 the parties emigrated to Australia and in June, 1977 separated in Australia. Counsel for the wife who was seeking arrears allegedly due under the minute of agreement argued that since there had been no variation discharge or modification of the original probative agreement, it must stand despite subsequent events; counsel for the husband submitted that the agreement was entered into on the basis of the parties living apart, and on resumption of cohabitation, the basis of the contract disappeared. The parties' joint minute envisaged a return to the court for a variation. Moreover, there was the question of personal bar, in that the pursuer by her conduct had justified the defender in believing that the agreement was at an end. Lord Allanbridge, taking the view that he could not at this stage hold the defences irrelevant, also said 'I respectfully agree with the observation of Lord Avonside in the case of Robson' (Robson v. R. 1973 S.L.T.(Notes)4) 'to the effect /

has power to make an order varying the terms (taking effect on or after the termination of the marriage) of a settlement made ante-nuptially or post-nuptially. The Scottish Law Commission has suggested[1] that this power should remain. Perhaps, then, the court should retain a discretion to vary the terms of the contract where they appear inequitable or at the request of both parties and to make the standard rules concerning home, division of assets, lump sum awards and "special considerations", and maintenance payments apply. The question is the extent to which parties should be free to make their own financial arrangements on divorce.[2] So long as there has been no coercion to ensure agreement, freedom of agreement seems a desirable feature, even though the agreement reached may bear no theoretical or philosophical relation to the particular type of property arrangement by which the marriage, while in existence, has been governed. Whatever the 'system', a /

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effect that where parties to a marriage have come to an agreement to settle or discharge liabilities that is not necessarily an end of the matter in matrimonial causes so far as the court is concerned. In this case a very unusual situation arises....".

1. Memo.No.22, 3.61. In Thomson v. T. 1981 S.L.T. (Notes) 81, the parties in 1948 entered into an ante-nuptial marriage contract which, inter alia, regulated their rights in each other's estates should the marriage be dissolved and these provisions were to be in lieu of all other rights and claims otherwise arising on death or dissolution. The husband, seeking divorce, concluded for payment of a capital sum and a periodical allowance. Lord Stott held that the marriage contract discharge prevented the husband both from seeking a financial provision and from seeking variation of the contract. Counsel for the husband argued that s.5(1) gave the court an overriding discretion to vary any terms of a marriage contract including a purported discharge of all rights accruing on divorce. The terms would be highly relevant to the court in its deliberations. However, the right to apply for variation contained in s.5(1)(c) was itself, in Lord Stott's view, excluded by the terms of the marriage contract, and variation would have been necessary in view of the terms of the discharge in the contract.
2. Ibid., 3.111. Fac.Resp. pp.76-79.

a solution is being sought to the problems of treatment of home, assets, compensation and maintenance, and that which has been agreed/by parties will be the most civilised and workable solution.[1]

II /

1. It must be said that under the present system, the court has power to make an imaginative settlement. Thus, in Henderson v. H. (1981 S.L.T.(Notes)25), where a husband pursuer concluded for a capital payment of £5,000 and where the wife opposed that conclusion, while not opposing the conclusion for divorce, where there were no children, and adultery of the wife was established (she attributing breakdown to the intolerable behaviour of the husband) and the association with the paramour held to be the principal ground of breakdown, Lord Stewart awarded a capital sum of £1,900 in all the circumstances. Conduct was to be taken into account, in a fair-minded way. The wife's conduct with the paramour, whether or not there was justification, had been the principal cause of breakdown but it was possibly true that the husband was moody and financially mean. The interesting point is that the matrimonial home (free value £11,400) was in joint names. The pursuer had provided the capital and made the loan repayments. At the time of divorce their financial positions were close. His was the better capital position, since he owned the car and the contents of the house, but she had money in bank accounts and a secretarial job in Qatar with an Arab company, and had the better income position and was not repaying loan payments on the house. Lord Stewart did not think that the husband, because the wife's conduct had led to breakdown of marriage and because he had paid the capital sum on the house, was entitled to her share thereof minus a sum for contribution to the marriage.
Since the parties were young, childless and in work, neither of them needed the heritage as a home and so it should be considered a substantial sum of money belonging to each. Their finances had been intermingled and so not too much stress should be laid on the fact that repayments had been made by the husband - at least until 1976 when they separated. All in all, L.Stewart thought a one-third of the wife's interest in the matrimonial home should be given to the husband and fixed the capital sum at £1,900. This is a most interesting and fair discussion of a modern 'career' marriage. In effect earnings were shared, and L.Stewart concluded (p.26) that 'The result of this is that certain household goods which the pursuer has retained were bought with funds which came at least in part from the defender's earnings' - a truth in many cases, one would think.

II Divorce Where the Marriage has been Carried On under Community (Family Assets and Concurrent Compensation)

The treatment of the matrimonial home and of entitlement to maintenance payments would be the same as that advocated for Category I (non-community) cases.

Family assets would be divided equally. A lump sum award would be most unlikely to be granted. Both statements would be subject to the possibility of appeal on the ground of "special considerations", but, as explained above, much less weight would be given to these considerations in 'community' marriages. The outstanding merit of the system, especially if both jointness of family assets and concurrent compensation were adopted, is that the economically weaker spouse would be protected throughout the marriage from the earning and acquisition inequalities which are inherent in most marriages. In current jargon, compensation would be an "ongoing process", and the position at divorce should be clearer because of that. Parties would participate equally in the family assets amassed and in the rising value of the home; under compensation, there should have been an assimilation of the opportunities to acquire 'separate' property - which should remain separate property at divorce. Little equalisation "tinkering" should be necessary. Absence of property rules during marriage tends to increase the likelihood of the existence of discretionary powers in the court on the dissolution of marriage, and also increases the likelihood of disputes about the extent of the property of each. This may involve the granting of a commission and diligence to recover documents if the parties' averments about size of income and/or capital differ greatly.[1] Similarly, a wife (more commonly than a husband) may seek inhibition on the dependence of a divorce /

1. A recent example is provided by the case of Savage v. S. 1981 S.L.T.(Notes) 17.

divorce action to prevent suspected disposal by the husband of assets otherwise potentially relevant to a possible capital sum award.[1]

Nevertheless, a residual power to order transfer of property or to make a lump sum award if special considerations were present should be given to the court; for less fundamental reasons of convenience also, the court should be able to order a particular division of property or to grant compensation if in the 'equal' division of family assets one has fared better than the other. It is possible that, as part of the divorce process, the court might find it necessary to pronounce a declarator of property rights.

The future treatment of home and assets, family and separate, could be predicted more accurately by parties and their advisers and the main subject of speculation and possible dispute would be that of the appropriateness, or inappropriateness, and the size if appropriate, of a periodical allowance.

"Special Considerations"

These would be more likely to be relevant where there has been Boskillnad or judicial separation, and hence there has been no compensating effect of jointness.

Assistance can be derived from the New Zealand example. There, the presumption of equality is departed from in two cases, namely, marriages of short duration (marriages in which there has been cohabitation for less than three years, or of longer duration in the discretion of the court) and cases where there are "extraordinary circumstances". Equal division is to be departed from where "the contribution of one spouse to the marriage partnership has clearly been greater than that of the other spouse" ("contribution" in the context of that provision /

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1. See Wilson v. W. 1981 S.L.T.101.

provision and others is not limited to financial contribution. Care of children, of the elderly, household management, provision of money, performance of services, giving assistance, foregoing a higher standard of living are all included. "It is expressly provided that there is no presumption that a monetary contribution is of greater value than a non-monetary contribution"[1]. Misconduct is not to be taken into account, unless it has been gross and palpable and has significantly affected the extent or value of the matrimonial property)[2].

Similarly, in our example (Category I divorces), by means of appeal to the concept of "special considerations", the economically weaker spouse might argue a case in favour of the grant of a lump sum award and/or the transfer of certain items of the separate property of the other if, since, for example, early separation of property, (she) had been unable for good reason (most commonly, perhaps, for the reason that she bore the main responsibility for the care of the children) to earn money but had contributed greatly in kind to the happy and successful running of the home. To a great extent, this would mean a return to the present standard Scottish position (separation of property and limited discretion on dissolution of marriage).

It is possible (Category II divorces) that a spouse might even have recourse to the "special considerations" argument in order to persuade the court that his partner, through lack of effort, had given up (her) right to one half of the family assets.

In both cases, the starting-point should be that parties /

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1. J.M.Priestley, op.cit.
2. Here is an interesting link in thought with the argument presented in this discussion (and see also Faculty Response to Memo.No.22) that 'marital' conduct should be relevant to financial and property consequences, but only in extreme cases.

parties had chosen separation or jointness and should be required to adhere to their choice unless the circumstances were exceptional, but that the court must have a discretion in the matter. With regard to the latter point, it should be said that while it is conceded that marital conduct may still sometimes properly have financial consequences, this should be a rare occurrence, and marital conduct, to be relevant, would require to be of Wachtel (gross contempt of the marriage) proportions.

Generally, the existence of the "special considerations" proviso (not to be defined with great exactitude) would give to the court an opportunity to waive the normal property consequences in abnormal cases, that is, in cases where they would be manifestly unsuitable.

NULLITY

Whether the marriage is void or voidable, and whether it is putative, it is likely now (and certain in the future, under these proposals) that the home will stand in joint names. In addition, the parties may have chosen to adopt jointness of family assets, and a concurrent compensation scheme. (If separation of property has been the norm, then a clean property break, as between strangers, with no reference to special considerations, lump sum awards and property transfers seems consistent with present practice,[1] under which the court in Scotland may not order a capital sum or periodical allowance in the case of a grant of nullity ——— odd, perhaps, in some ways, in that the cohabitation, though not marriage in law, closely resembles marriage in its practical consequences and /

1. "All things return 'hinc inde'". Stair i.4.20, See Walton, H. & W., p.233. And cf. Memo.No.22, p.295.

and (property) expectations wishes and interests of parties)[1].

Where one at least of the parties has acted in good faith, and where the parties have been living under the communio regime, is there any reason why division of property should not be made on the same basis as division of property is made in Category II divorces?[2]

Presumption of Death (Scotland) Act, 1977

This Act replaces the Presumption of Life Limitation (Scotland) Act, 1891 and the Divorce (Scotland) Act, 1938, s.5.

Any person having an interest (including the Lord Advocate for the public interest) may raise an action of declarator of death of a person who is missing and is thought to have died or has not been known to be alive for a period of at least seven years. The Court of Session shall have jurisdiction to entertain such action /

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1. Memo No.22 notes that such a "marriage" may have "existed" for many years and suggests that the court might be able to differentiate between 'genuine' cases, and cases where one or both did not act in good faith.
2. One cogent reason is that this union was not a marriage and the proposals here put forward pertain only to marriages, and not to extra-marital unions, since it is believed to be in the interests both of the institution of marriage and the freedom of persons so inclined to contract out of marriage, that a difference in legal (including property) consequences should exist. However in the case of nullity, it is likely that at least one, and possibly both, party(ies) intended the situation to be that of marriage rather than that of extra-marital cohabitation. Memo.No.22, Propn.98 favours a concession in this direction (i.e. that a court granting a decree of declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce).

action if the missing person was domiciled in Scotland on the date when he was last known to be alive or had been habitually resident there throughout a period of one year ending with that date or if the pursuer is the spouse of that person and is domiciled in Scotland at the date of raising the action or has been habitually resident in Scotland for one year ending with that date.[1]

If the court finds, on the balance of probabilities, that the missing person has died, it shall grant decree accordingly, and in so doing shall have power to determine "any question relating to any interest in property which arises as a consequence of the death of the missing person", and may appoint a judicial factor on the estate of the missing person, whatever the value of the estate.

Where no appeal is made within the time allowed for appeal, or where appeal was made and refused or withdrawn, decree shall be conclusive of matters contained therein, and shall be effective against any person "and for all purposes including the dissolution of a marriage to which the missing person is a party and the acquisition of rights to or in property belonging to any person." Where a marriage subsequently is dissolved, by virtue of the decree, the dissolution shall not be invalidated by the later discovery that the missing person was alive at the date specified in the decree as the date of death. Decree in an action of declarator may be varied or recalled[2] by the court which granted decree, on application at any time by any party having an interest, but the variation order if made shall not have the effect of reviving the marriage of the missing person, nor shall it /

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1. There is jurisdiction also in the Sheriff Court: s.1(4). In a case of great importance or complexity, the Sheriff may, and must, if so directed by the Court of Session (possibly on application by a party to the proceedings) remit the action to the Court of Session.
2. s.4.

it have effect on property rights acquired as a result of the declarator. However, with regard to the latter, "the court shall make such further order, if any, in relation to any rights to or in any property acquired as a result of that decree as it considers fair and reasonable in all the circumstances of the case", though not so as to affect income accruing between the date of decree and the date of variation order, and in any event such further order shall not be made if application for variation order has been made outwith a period of five years from the date of the original decree. Moreover, rights of bona fide third parties shall not be affected by such "further orders".[1]

Where decree has been granted, the court, on the application of an alimentary creditor of the missing person or a trustee, may then or at any time thereafter make an order that the value of any rights to or in any property acquired as a result of the said decree shall not be recoverable by virtue of such a "further order".

Where a decree or a variation order is granted, the clerk of court shall notify the particulars thereof to the Registrar General of Births, Deaths and Marriages for Scotland, who shall make the appropriate entry in the register.[2]

Section 13 provides that it shall be a defence to a charge of bigamy for the accused to prove that at no time /

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1. ss.4 and 5. This gives an example of the tortuous provision necessary to achieve the best justice which can be achieved in these property questions. Discretion and statutory meddling with property rules, and the use of the device of time limits all seem to be requirements, and together provide an interesting precedent.
2. s.12. This is an interesting example of automatic administrative action following upon judicial decree and its existence is significant in view of suggestions made earlier e.g. Matrimonial Property Register; certificate of (unmarried) status.

time within the period of seven years immediately preceding the date of the purported marriage forming the substance of the charge had he any reason to believe that his spouse was alive.

The Act removes the choice of statutory remedy which formerly existed. A party who would have pursued his action either under the 1891 Act or the 1938 Act, according to his purpose[1], will now sue under the 1977 Act, whatever his purpose.

It is thought that the broad discretion given to the court in the property aspect here would be suitable also if the new rules here suggested were in operation. The court would apply the relevant rules of devolution of a married's person's property on death testate or intestate (infra) and the cautious and thoughtful tone of s.5 allowing further orders in relation to property and taking into account the interests of other parties, in the event of variations or recall of decree and hedged around with provisos, would not be inappropriate.

SUCCESSION

Unless the house has already been dealt with following upon decree of judicial separation (below), the rule will be, both in Category I and Category II cases, that the predeceaser's one-half share therein shall pass to the survivor.

This means, inter alia, that the provisions of the 1964 Act pertaining to the prior right to the house (in which the survivor was ordinarily resident at the date /

1. Proceedings would be initiated under the 1938 Act if the adm was to obtain a decree of dissolution of marriage. Decree obtained under the 1891 Act would not have the effect of permitting re-marriage, but was necessary rather in connection with questions of devolution of the estate of the missing person. Decrees were not interchangeable.

date of death) would cease to be appropriate.

In all cases, whether of Category I or II, a second house would fall to that person to whom it was destined in the deed or in the will (legal rights being limited now[1] in their application to the moveable estate of the deceased) and if intestacy occurred, it would devolve according to the Succession (Scotland) Act, 1964, s.2., which contains a list of entitled relatives. Although in neither Category of case does the survivor appear to fare so well as under the present rules (by reason of choice of separateness (Category I) or of jointness (Category II)), it is not thought that the surviving spouse's claim should rank higher in the hierarchy.

I Rules of Succession in Cases where there has been Boskillnad, Judicial Separation or Regulation of Property Matters by Marriage-Contract

Where the spouses have been living under a system of separation, it would be convenient to let stand, without amendment, the rules concerning prior rights and legal rights on intestacy contained in the Succession (Scotland) Act, 1964, and (legal rights) at common law and to allow claims for jus relicti(ae) on testacy. There is an objection to this in that the 1964 Act in effect provides almost a community of property on death, in the tenor and in the practical result of its provisions especially where the estate is small. Is it right to impose such a system in a case where the parties themselves have chosen to adopt strict separation? (At present, these rules soften the effect which a standard system of separation may produce). On the other hand, spouses who favour separation should make wills /

1. 1964 Act, s.10.

wills which are in accord with their philosophy, and thought would require to be given as to whether or not the law should allow fixed (legal) rights of succession to the survivor in the estate of the predeceaser.

As the law of prior rights stands at present in the case where the spouses have separated[1] the survivor in any case would have no right to house, furniture and plenishings[2]. Indeed, the rules applicable where there has been judicial separation would require special consideration.[3]

Intestacy

Where the parties cohabited, but had excluded jointness of family assets and concurrent compensation by simple marriage-contract containing no other provisions, and had not made wills their attitude towards property would be clear; so too where Boskillnad had taken place. It is suggested that it would be wrong to allow a prior right to plenishings in such a case (although ultimately they may fall to the survivor) but that it would be for discussion whether there should be a cash entitlement.[4]

Legal /

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1. but contrast the situation where there has been merely early separation of assets.
2. since the spouses were not cohabiting at the date of death (see terms of Succ.(Sc.) Act, 1964, s.8(4)) But see also Conjugal Rights (Sc.) Amendment Act, 1861, s.6, both separately treated, below.
3. See "Judicial Separation" and "Marriage Contracts", and "Boskillnad" (below).
4. On the whole, it is thought that, both in Category I and Category II cases, there should be a 'cash' prior right. In Category II cases, this may be taken out of the deceased's separate but not his heirloom property. The same principle should apply in Category I cases, but it is unlikely that, where separation is the norm, parties will have taken the trouble to effect that differentiation. Hence, if the executors feel that the cash right is being exacted from property which might be regarded as heirloom, the court would be open always (remedies - (1)) to give a ruling on the point (Declarator of Property Rights).

Legal rights (q.v.) would then be taken. Thereafter, the spouse would take his/her (unchanged) place in the list of those entitled to residue, as is the rule at present.[1] It can be seen that the survivor's rights would not differ greatly from those to which he/she at present enjoys, despite the new conscious choice of separation of property. If this is unacceptable (and in many happy 'separate property' marriages it would not be) parties should make wills expressing and implementing their preference.

Partial Intestacy

If it is thought right that there should be a cash entitlement (and this would be in sympathy with the suggested retention of legal rights in Category I cases of testacy), the entitlement would be payable subject to deduction of any legacy(ies) which is/are not legacy(ies) of plenishings. (At present[2] prior rights are exigible in a partial intestacy out of so much of the estate as is undisposed of by will, but as explained above, prior rights would be thought to be a concept alien to those committed so clearly to separation of property).

Testacy

A rule of fixed legal rights has been a characteristic feature of the Scots law of testate succession for a very long time, in contrast with the law of England.[3] In the same way that community during marriage would lessen the need for a redressing of the balance at divorce, so would it lessen the need for claims against the predeceasing spouse's estate, and later (Category II cases) it will be argued that in those cases, the long-held rights of jus relictae(i) should be abolished. However /

1. Succ. (Sc.) Act, 1964, s.2.
2. see Meston, p.27.
3. See Chapter 6 (England): Family Provision.

However, some recognition of a long association perhaps is due even where spouses have chosen separation of property, and so it is suggested that here legal rights be retained in this case. Where a legacy has been given, a spouse will be put to election, except where the legacy in fact is a bequest of plenishing in which case it may be taken in addition to legal rights.

If the concept of fixed rights of succession be retained, should there be under the new rules (or, more accurately, in cases where the new rules have been excluded) as extensive a right as at present exists? Would the principle (applied now both as to prior and as to legal rights) that more may be obtained if there are no children of the marriage remain appropriate?

It is not suggested that any change be made in the rights of children to succeed. Hence, the legal rights of children should remain rights to one third or one half of the moveable estate according to whether or not a spouse[1] survived, and the prior right of the surviving spouse would be a right to a smaller sum if the deceased left children. The 'cash' prior right, as now, would vary, therefore: its size would require to be kept in line with the level of inflation.

Although children's legal rights would vary according to whether or not the deceased left a spouse, in view of the fact that, in this category of case, spouses have chosen separation, to give to the survivor a potential right /

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1. not separated (Judicial Separation, below) nor, of course, divorced. If the marriage was in full community (Category I case), the children's rights of legitim would be to one half of the moveable estate, because in such cases it is suggested (see below) that the survivor would not be entitled to jus relictae(i). To some extent this would offset for the children the disadvantage arising for them from the fact that all the family assets would fall to the survivor.

right to one half of the predeceaser's estate seems wrong, and therefore it is suggested that the legal right of the spouse be limited in all cases to one third of the moveable estate. This proportion, if chosen, would mean that some link with ius relictae(i) as always understood, would remain, but some might think that, in the circumstances, the standard proportion of one-sixth would be more appropriate.

Marriage-Contracts

Marriage-contracts may contain terms which are of a testamentary character. Mutual wills, though rare and generally thought undesirable, are competent and may be found.

In the same way as it is provided that the right of a child to legitim can no longer be discharged prospectively ante-nuptially[1], perhaps it might be provided that the testamentary provisions of a marriage contract cannot be less generous to the survivor than would the general law be to him in a case of testate succession under a system of separation.[2]

By this method, in effect, a limitation is placed on (testamentary) contractual capacity, being the same limitation as is placed on testamentary capacity (including testamentary capacity with regard to mutual wills) - that is, in all cases, a claim for legal rights (to one third or perhaps to one sixth of the moveable estate) is exigible. Testamentary provisions in a marriage contract which may be re-written by the court on the death of the predeceaser might be thought hardly worthy of insertion. The position should be that, if the survivor feels aggrieved, he should be put to his election /

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1. Succession (Sc.) Act, 1964, s.12.
2. The position may be different with regard to marriage-contract provisions to take effect on divorce; see above.

election between accepting the contract provision and claiming legal rights.[1]

II Rules of Succession Where Parties have lived under the Standard System of Community (Family Assets and Concurrent Compensation)

Since the family assets have been held jointly in these cases, the survivor automatically would acquire right to the predeceaser's share therein. These rights would arise ex communione, rather than ex successione. Hence, the rules of succession here would concern principally the rights of the survivor in the separate and heirloom property of the predeceaser on his death testate or intestate. It may be argued that what matters is sufficiency of provision. Perhaps rights arising out of community are adequate for his/her protection and support and/or for the recognition of the marriage relationship and/or for any other reason for which rights of "succession" exist.

Intestacy

As has been noted, all furniture and plenishing used for family purposes (not declared "separate" or "heirloom" by the court) will be categorised as "family assets" (even if situated in a second, 'holiday' home) and hence will fall to the survivor as surviving joint owner.

Where community has existed, should the survivor be /

1. An alternative - but a *result* less predictable by a party and his advisers - would be for the court to study the contract, and then to apply, at the option of the survivor (who would choose between that remedy and the contractual provision), the testate succession rules of separation or community according to whether it considered that the marriage had been carried on under separation or community.

be entitled to more than that to which she has right by "matrimonial property law" as strictly understood? It is thought that an entitlement to more would be proper. Rights of succession may be regarded as part of matrimonial property law, without which an incomplete treatment is given, and as a matter of principle and policy, the surviving partner of a marriage which was subsisting at the death of the predeceaser should have a further claim. It is suggested therefore that while, as in all cases, the prior right to the house is inappropriate and, as in this case, the prior right to the furniture is unnecessary[1], in Category II as in Category I cases, the survivor should have right to a 'cash' prior right, inflation-linked[2], and its size depending upon the presence or absence of children of the deceased. In effect, this means that, in order to satisfy the claim, recourse would have to be had to the deceased's separate estate. Heirloom property would be left intact.

Succession to the free estate would be in accordance with the rules at present in operation[3], but neither in intestacy nor testacy, in Category II cases would legal rights be exigible.

Partial Intestacy

As in Category I cases, the cash entitlement would be payable, subject to deduction of any legacy. There would be no proviso as to legacies of plenishings, because in Category II cases a legacy of plenishings (unless /

1. In Category I cases, the prior right to the furniture is excluded. Rights to furniture depend, in life and after death, upon property rules. A surviving spouse may become entitled thereto, however, if he/she is entitled to take the residue.
2. Succession (Sc.) Act, 1973; L.R.(M.P.)(Sc.) Act, 1980, S.4.
3. 1964 Act, s.2.

(unless 'separate' or 'heirloom' property) would be incompetent and unnecessary.

Testacy

Under the present rules, a man, if he has a wife and children, can dispose freely of only one third of his moveable estate.

It is proposed that if, during the whole or a substantial part of the marriage, there has been full communio (family assets and compensation) then the survivor should lose his entitlement to jus relictae(1). The survivor therefore would have no rights of succession on the death testate of the predeceaser. (She) would be entitled to home and assets ex communione, but to no more.

The children would retain their right to legitim which would be a right to one half of the moveable estate, in view of the fact that the survivor could be treated as if he were not in existence, because he has no claim for jus relicti.[1]

Thus, the testator would have freedom of testation over one half of his separate and heirloom property. (So far as possible, the claim for legitim would be met out of the testator's separate property and heirloom bequests respected, but, if this is not possible, at least the heirloom falls to the heirs). The spouse would not be left destitute, and indeed might be among those favoured by the will.

Compensation during marriage favours the wife. Is it right that the husband should receive, at the wish of his wife, so little on her death testate? Category II rules in the case of intestate succession are fairly generous to the surviving spouse of either sex, but the rules /

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1. As has been pointed out, this might offset the disadvantage arising from the fact that the children can have no claim to the family assets.

rules place in the hands of a testator who has lived under full community the power to exclude his spouse, an eventuality against which the wife, during marriage, would be cushioned. Were the wife so minded to exclude her husband, he might be thought to be the victim of the system. Yet if one is true to the theory of the system, one must abide by this result. Moreover, where spouses cohabit in community, they are not likely to exclude each other in their wills.

A difficulty would arise in the hybrid case where there had been jointness of assets, but no compensation. Possibly the modified jus relictae(i) earlier suggested in the discussion of Category I cases (of one sixth of the moveable estate) would be a just compromise solution, there having been community but no continuing compensation during the marriage. The survivor would be entitled, of course, to family assets, and so might be said in all to have been well treated.

Boskillnad[1]

Where the parties had begun their marriage under the system of jointness, but there had been early separation of assets and possibly termination of compensation also, the case does not differ greatly from that where the parties' initial and unchanged choice has been that of separation of property. Hence, it is thought that the same rules should apply.[2] The survivor would have a claim to legal rights (to one third or perhaps one sixth of the moveable estate) on testacy or to the 'cash' prior right on intestacy, if opinion generally favoured the retention of the 'cash' prior right in separation. There would be no right to furniture and plenishings and as, at Boskillnad (supra), no change is /

1. Boskillnad is taken to mean early separation of assets while cohabitation continues.
2. This would not be so where there had been also voluntary separation - see infra.

is made in the (joint) ownership of the home, the home would be treated in the same way as in all the other cases, that is, the predeceaser's one half share would accresce to the survivor.

It might be argued that where compensation too has ceased, there is a stronger case in favour of the entitlement to a 'cash' prior right. Again, in initial choice separation, there never would be compensation, except in rare cases where parties had chosen separation with compensation. On the other hand, if parties have chosen to exclude compensation during their joint lifetimes, why should it arise and be exigible in the form of a right to a lump sum after the death of one?

Judicial Separation

Under the existing rules[1], where a wife has obtained decree of judicial separation, property acquired by her thereafter descends on her death intestate as if her husband had been dead at her death, whether or not that was the case. The provision demands exact compliance before it will operate: decree must have been obtained by a wife pursuer who must die intestate. The provision will not operate if cohabitation resumes.

Clive and Wilson urge amendment of this provision. "It would appear that if a wife holding a decree of separation inherits a fortune and leaves it to a charity by will her husband can take his jus relicti. If, however, she dies intestate he cannot. The practical difficulties of separating the wife's property acquired after a separation decree from her previously acquired property are immense, and there is a strong case for amending this provision."[2]

Under /

1. Conjugal Rights (Sc.) Amendment Act, 1861, s.6
2. C. & W., H. & W., pp.690-691.

Under the proposals here put forward, at judicial separation, there would be separation of property (including, if possible, then, and, if not, later, but within the joint lifetimes, a 'clean break' solution to the problem of dealing in a fair manner with the capital asset of the house) and cohabitation would cease. It is by no means clear that either spouse should have any rights in the estate of the other after that event. The only link between them, if indeed there is any link, will be the link of aliment.[1] Lives and property interests have diverged. It is thought that in these cases, there should be right neither to a prior right nor to a legal rights claim. The association in its property aspect as in other aspects has ended.[2] Clearly, after divorce, as now, no rights of succession arise.

Change in Property Regime of Marriage

Rules of succession will be applied to suit the type of property arrangements used at the date of death of the predeceaser: that will be the general rule. However, on application by an aggrieved party, the court must have a discretion within which to act. This rarely would require to be exercised, because, although flexibility and choice are hallmarks of the system, it is envisaged that at least the larger part, if not the whole duration of most marriages would be carried on under one system. The attitudes of most people would be clear, and, if there was a change of mind, and Boskillnad was made, then it is clear that the parties, on reflection, had chosen separation and that the rules applicable to 'separate /

1. Which will terminate, normally, on death - C. & W. p.202; Memo.No.22, Part IV: Aliment on Death of Liable Relative.
2. Rights of children would be unaffected - except for the better in that, in calculating legal rights, the existence of a separated spouse could be ignored.

'separate property' marriages should regulate the succession to the estate of the predeceaser.

Where parties had decided to adopt community, and soon thereafter one of the parties died, the appropriate course would be less clear. Is it right that the survivor, finding (herself) with right to all the family assets, but having reaped little benefit from compensation (which is designed to render compensation on divorce and death unnecessary), should be deprived of jus relictae(i)? The answer in each case of this type must lie in the discretion of the court. Traditionally this is not a solution which has found favour with Scots lawyers, but in a very limited number of cases it might be necessary to have recourse to it. Another situation which might require the exercise of judicial discretion would be that where there had been voluntary separation: it is thought that in general the approach should be the same as that adopted in the case of judicial separation. Hence, no claim to the (cash) prior right nor to jus relictae(i) could competently be made.[1]

It is quite likely that there will have been no formal separation of property.[2] Parties will have made /

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1. In the general case, but see below.
2. After judicial separation, separation of property, if not applicable up to that point, would be established; after voluntary separation, there would be factual separation of property. Parties' arrangements should be upheld. Unless a clear preference to continue community is shown, despite its artificiality where no common home is kept, the court would be inclined to hold that cessation of cohabitation and establishment of separate households implied a return to, or was evidence of, continuance of, a separation of property and would treat property acquired thereafter, by any means (inheritance, work, thrift) accordingly. If there is no common home, can there be any more family assets? Existing family assets are likely to have been divided, as the parties see fit.

made their own arrangements. If a system of jointness had applied, the family assets will have been divided physically, and compensation will have terminated. Possibly a small sum will have been paid in name of aliment. A more formal manner of acting may have been adopted with regard to the matrimonial home.

Since property matters will not have received the same formal treatment as occurs where the remedy of judicial separation is granted, the court must have power to clarify (perhaps by means of a declarator of property rights) and set forth the property rights of parties. Moreover, where the marriage had been carried on under a system of separation, and the parties had ceased to cohabit a short time before the death of the predeceaser, should the survivor be deprived of jus relictae(i)? Clearly there would be difficult, marginal cases. The situation does not fall neatly into any of the categories identified. If jointness had been the system originally chosen, jointness de facto did not continue throughout the marriage; if there had been separation of property and separate habitation, at what point should the parties lose their potential claim to legal rights? It is possible that there has been factual separation of assets, but that compensation has been made though the parties have separate establishments. Such cases must be dealt with by the court as it thinks fit in the particular circumstances.

CONCLUSION

An attempt has been made, first, to describe the historical origins of the provisions of Scots law which affect the property rights of married persons, second, to state the rules applicable in areas where property queries arise, and third, to suggest, in outline and in detail, rules which might be adopted by Scots law in order to provide a fair but flexible, and optional, system of matrimonial property law. However, in all but very exceptional /

exceptional cases, joint ownership of the matrimonial home is advocated.

The new system would display the features of jointness of ownership of home and family assets (but not of assets of heirloom or truly separate nature), with freedom (and opportunity) to amass separate property, over which there would be complete power to dispose inter vivos and considerable power to dispose mortis causa. The rules of treatment of property on divorce and death would reflect the fact that, during the subsistence of the marriage, recognition had been given to inequality of opportunity to earn, and an attempt made to redress the balance.[1]

The subject of property rights of married persons has been discussed, and continues to be discussed, in the civilian and in the Anglo-American countries and in our own country.

The argument is urged here that we should avoid apparently helpful, short-term, changes of limited ambit if they be not accompanied by clear connection with identifiable principle. It would be unsatisfactory and uncharacteristically unsystematic to amass an array of well-intentioned remedies, unrelated to each other or to /

1. It could be argued that the present rules of divorce and devolution of property at death attempt compensation and that their ex post facto nature does not matter, and indeed is natural because in a happy marriage, it is said, property rights do not interest or concern the parties. It is submitted that their haphazard and uncertain nature, at least in the case of divorce, is a serious flaw and that, within marriage, a degree of independence and inter-dependence in property matters is a proper and worthy aim. Cf. Law Commission Third Report on Family Property (Law Com.No.86) (1978)...."in our view it is a poor and incomplete kind of marital justice which is excluded from continuing marriage relationships and allowed to operate only when those relationships end." (0.11).

to any principle of law, or of social policy beyond that of general and uncritical goodwill.

There is proposed a system of partial, or limited, community of property, its rules designed to try to remedy the flaws inherent in a system of separation which takes no account of difficulties of proof of ownership, and, more important, of the practical communion of interest in family property matters during the subsistence of the marriage. Yet adult persons should be entitled to insist on self-regulation of property matters if they wish. It is the general law which is unsatisfactory.

New rules of property rights as between married persons must bring in their train rules concerning the property rights of strangers to the marriage. These should be clear, and, as a matter of policy, should favour the third party in case of doubt. A central core of new administrative provisions would be necessary to service the new system, and this should be accepted with a good grace as being the price of greater certainty in matrimonial property matters, or, as it might be said, of the establishment in Scots law of a body of matrimonial property rules - a Matrimonial Property Law of Scotland, worthy of the name.

The cock can feather the nest because he does not spend all his time sitting on it[1]; that is true in fact and unfair in consequences.

This is a plea for thought and perhaps for change.

1. Sir Jocelyn Simon.