The effects of the Reformation in Scotland upon the Law of Husband and Wife with particular attention paid to the Constitution and Dissolution of Marriage during the period 1560 to 1690.

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P R E F A C E

Sine historia caeca est jurisprudentia, a statement made by the sixteenth century French humanist Balduinus is a fitting maxim for this particular thesis.

Law is an essentially historical discipline and can best be understood with a historical perspective. Furthermore Canon law is quite unique amongst the legal systems of the world, in terms of its continuity from early antiquity and the foundations of ecclesiastical organisation, in terms of the influence which it has exerted upon other legal systems and in terms of its evident equity and justice.

These twin aspects of historicism and canonism lead one, as a secular lawyer to the necessary inquiry, How did Canon law affect one's native system and does it still?

This thesis attempts to answer the first part only of this question. Given that His Holiness Pope John Paul II promulgated the new Codex Juris Canonici on 25 January, 1983 which came into force on the First Sunday in Advent 1983, the answer to the second part of that question may be ripe for answer only some time in the future.

That the Canon law did exert a considerable formative influence on the law of Scotland can hardly be doubted. To examine every branch of law where the Canon law may have had or could have had an effect would be the work of many lifetimes, hence the restriction on the subject matter viz. the law of husband and wife.

Whilst every possible care has been taken to ensure that the study has been conducted in as thorough a manner as possible and that all relevant sources have been consulted or at least pondered upon, some are inaccessible or if accessible only of use with skills which are outwith my competence. Accordingly there are errors and omissions which remain my responsibility.

Gratitude must be offered to many without whose assistance, encouragement and forebearance this work would have remained undone, and particularly there must be mentioned His Grace Thomas J. Winning, Archbishop of Glasgow, Professor David M. Walker, Sheriff J. Irvine Smith, Professor William M. Gordon, Robert Sutherland, W.S., Dr J. Durkan, and Mr H.J. Clifford. June Parr must be thanked for her painstaking transliteration of my manuscript into a legible form. My parents and my brothers, Laurence and Timothy must also be commended for their seemingly unending patience which contributed in no small part to the completion of this thesis.

INTRODUCTION

This thesis is intended to set out in as concise a manner as possible the results of three years research into the law of husband and wife as it was before, during and after the Reformation.

During any revolution, the sequence of events becomes disturbed, the stories garbled, the sources altered for instantaneous political motive and inevitably the historian's task is rendered more difficult. Fortunately much material has survived but much more is missing. The case records of every Official's court barring the Court of the Official of Saint Andrews, the cases of the Court of High Commission, and many other fruitful sources have simply, in the mists of time, disappeared.

This thesis attempts to draw on several disparate sources and to piece together a coherent picture of the substantive and adjective law of husband and wife of the period of the Reformation. The time scale involved is from 1555 to 1690. The two dates are somewhat arbitary, 1555 being sufficiently before the Reformation to show what the law was during the latter days of the Catholic Ascendancy, 1690 being the year in which Presbyterianism was formally fixed by the Confession of Faith as the rule of the Scottish Church.

In the Church Courts 1555-1690, I examine the form of the Church Courts, their structure and Constitution and with regard to the Post Reformation Period the origin of the Church Courts and the emergence of the secular intrusion on ecclesiastical jurisdiction. I examine the extent and content of the ecclesiastical jurisdiction.

With regard to the adjective Law, I examine the procedure employed in the Canonical Courts and compare this with the Post Reformation Courts. I examine the extent of the Canonical survivances into the post Reformation era. I examine the emergence of specific rules of procedure and evidence.

I examine the appeals system as employed before the Reformation and conclude that certain cases of a matrimonial nature were discussed not before the Rota but before the Penitentiary. I also examine the legal

profession in Scotland at this time and appraise their function in importing canonical practice and law by indirect routes.

In the substantive law of husband and wife 1555-1690, I examine the full ambit of effects which the law had upon the domestic relationship. I examine engagement, the constitution of marriage, by ceremony in facie ecclesiae, by verba de futuro and by verba de praesenti. I also include relationship stante matrimonio and examine the status of women, the property rights of husbands, the concept of communal property, dos, terce, maritagium and tocher, and donationes inter virum et uxorem.

Finally, I examine the dissolution of marriage by death, and the emergence of true divorce, a vinculo matrimonii by default of the secular power in its failure to appreciate ecclesiastical philosophy. I conclude that the Reformers did not introduce divorce for adultery or for desertion but adhered to the theory of the indissolubility of marriage, and that adultery and desertion were introduced in conjunction with the legal fiction of the spiritual and civil death of excommunicates.

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CHAPTER I

THE PRE REFORMATION COURTS

The Pre-Reformation Consistorial Jurisdiction and Procedure

The Ordinary Jurisdiction

The history of the consistorial jurisdiction is essentially one of contest between Royal courts and Ecclesiastical courts, between temporal and spiritual power.

The struggle between Church and State is a well known feature of European social and legal history and is well documented. In particular when discussing the development of the ecclesiastical control of consistorial jurisdiction some commentators[1] have placed the consistorial jurisdiction firmly within the ambit of the Church in Italy and France by the 10th Century. In the Byzantine Empire, the Bulle d'Or of Alexis Commenus the First granted to Bishops the cognisance of matrimonial causes in 1086. The reasons for this assumption of jurisdiction by the Church are difficult to define from the confusion of the times. However, it is certain that the failure of Royal power or the inability of the secular arm to exercise power lies near to the heart of the answer.

As it was on the Continent, so it was in Scotland. The Scottish Monarchy of the early medieval period was with some notable exceptions, notoriously weak. One can imagine that the King in assenting to those Acts contained in the Regiam Majestatem which allow Bishops to enquire into marriage was probably relieved that a competent authority, one which was learned and independent, would take over the task. One can suspect that it is from this point that the

Canon law begins its far reaching influence upon the law of Scotland and through which the Roman Law or rather Roman Civil Canonical Law found its way into and finally became the native system of Scotland.

The author of Regiam Majestatem, the manual of substantive 13th and 14th Century law, based in great part upon Glanvill's De Legibus et Consuetudinibus Angliae (1187) can be said to have introduced much Canonical influence into the law of Scotland. However, the present work is not concerned with this earlier legal osmosis and the Regiam Majestatem is referred to only to show a point of entry of some of the particular norms and legalisms presently dealt with.

The law of Husband and Wife whether adjective or substantive was deeply influenced by the Canon law. The attitude of the Medieval law was such that this important area of human relationship with all its spiritual and moral facets could not be left unregulated. There were no alternative laws which could fill the breach, with the possible exception of customary law. Scotland had been Christian in the main part since the reign of Queen Margaret and King Malcolm (1058-1093). As such a member of Christendom she had been exposed to canonical influence from the 10th Century until the 15th:- what has been called "L'age classique du droit canonique"[1]. There was not the same measure of conflict between the secular and spiritual Estates in Scotland as had existed in, for example, France[2]. For one thing the Feudal system was less well developed in Scotland. The doctrine of the Church was substantially settled before it had reached Scotland, comparatively two centuries later than in France.

The principal consequence of this relatively late arrival in Scotland

is that virtually all the 'developmental' problems of the ecclesiastical legal system had been smoothed out and that the system as applied in Scotland was confident and strong.

The ecclesiastical jurisdiction then covered much not now considered to be of interest to the Church. There were five broad categories of matter dealt with by ecclesiastical forum.

(a) All matters involving the benefit of Clergy, i.e. all litigations in which ecclesiastics were involved.

(b) All matters involving the cura animarum, i.e. in which faith and morals were concerned.

(c) All matters involving oaths, which included many contracts.

(d) All matters of status before God, i.e. marriage, legitimacy. Questions of wills and succession and their adjuncts, e.g. dos and terce.

(e) All matters of a criminal nature involving the Church, e.g. witchcraft, simony, heresy, etc.

The Church in Scotland adopted jurisdiction with royal approval at an early date in relation to dos and testaments[3], and in matters of marriage:-

"Et mandabitur episcope loci quod de matrimonio illo cognoscat et quod inde judicaverit Domino Regi vel eius justiciarius scire faciat".

"And command shall be given to the Bishop of the diocese to make enquiry into the marriage and to notify the King or his justiciars of the result"[4].

The case envisaged here was one of the devolution of property and the marriage had to be certified as a preliminary question in order that the proper heir should inherit. The Church however was not granted this jurisdiction by the Crown as some writers have tried to suggest, but held this of its own authority.

The judicial system of the Church existed in conjuction with the ecclesiastical hierarchy. Thus, superior ecclesiastics whether secular or religious, were entitled to hold court by virtue of the ordinary authority of their office.

It is necessary to examine the hierarchy as it stood in Scotland on the eve of the Reformation in order to comprehend fully the judicial framework and the ecclesiastical context in which the canonical judges worked. It should be noted that only the secular clergy will be examined as regular clergy did not exercise the same function in respect of marriage in as many instances.

In 1176, Pope Alexander III, distressed at the attempt made by Henry II to subject the Church in Scotland to the See of York commanded the Scottish Church "not to obey by metropolitan right any but the Roman Pontiff"[5].

The Bull Cum Universale of Honorius III published in 1218 and reiterating Bulls of Celestine III and Innocent III acknowledged the

position of the Scottish Church as "Filia Specialis Ecclesiae Romanae", 'the special daughter of the Roman Church'. By this declaration of Papal Authority the "Scottish Church ... is subject to the Apostolic See as a special daughter with no intermediary"[6]. In this way the claims of York and Canterbury to Metropolitan authority with the attendant claim of English secular sovereignty over Scotland were silenced. In being placed under the direct authority of the Holy See, the Scottish Province was unique in Christendom in so far as she was without a Metropolitan See. This state of affairs obtained until 1472 when by a Bull dated 13th August, Sixtus IV erected the See of Saint Andrews into a Metropolitan See. The preamble to the Bull relates that because of the absence of a Metropolitan See there is great inconvenience with regard to appeals due to the great distance between Scotland and Rome. The suffragan Sees of Saint Andrews were Glasgow, Dunkeld, Aberdeen, Moray, Brechin, Dunblane, Ross, Caithness, Whithorn, Lismore (Argyll), Sodor and Orkney. In the Bull, Patrick Graham, Bishop of St Andrews was granted "the rights, jurisdictions and all and sundry things which Metropolitans can do of right"[7]. Twenty years later, in 1492, Innocent III erected Glasgow to Metropolitan status, its Suffragan Sees being Dunkeld, Dunblane, Galloway and Argyll. The other Sees of course remained with Saint Andrews with the swift restoration of Dunkeld and Dunblane and thus the ecclesiastic framework of the Church in Scotland was settled until the Reformation.

The key ecclesiastic in the diocese was the Bishop who was Judex Ordinarius or Ordinary Judge in the diocese. He held jurisdiction by ordinary authority, his appointment, on a spiritual plane being made by virtue of the Epistolae Apostolicae. The Formularium

Instrumentorum[8] of 1552 lists the principal elements of episcopal jurisdiction in the folio "De Casibus Episcopalibus". This details the subject matter of the jurisdiction and lists inter alia the following as within the competence of the Bishop to decide:-

The fraudulent deflowering of virgins, i.e. abduction and rape, cognatio spiritualis or spiritual relationships, those who incur the impediment of cultus disparitas, those cases involving adultery, clandestine marriages and incestuous marriages.

Bishops, in Scotland, as far as can be ascertained, rarely judged matrimonial cases themselves. The principle of Canon law whereby an Ordinary could delegate to an Official was well used in Scotland.

At the fourth Lateran Council (1215) Pope Innocent III decreed that any Bishop who was overburdened by the weight of his episcopal duty could appoint an ecclesiastic to assist him. So there emerged the familiar figure of the Bishop's Official or delegated judge in episcopal jurisdiction.

The Bishop in the Transalpine Sees generally delegated his jurisdiction to an Official. In Italian Sees, the Official was termed Vicarius Generalis. Lyndwood states:

"Qui libet enim Ordinarius potest ea quae ad eius Juridictionem spectant alius committere".

"For any Ordinary may commit another to his jurisdiction"[9].

In such jurisdiction the Official had the same consistory as the Bishop. Lyndwood again provides some authority:-

"Ommissis argumentis in contrarium dico quod in Officialem Episcopi et eius Vicar in Temporalite et spirituale quorum ultranique constat idem consistorium cum Episcopo".

"Omitting the arguments to the contrary I say that in the Official Principal of the Bishop and his Vicar in temporal and spiritual matters in every case there stands the same consistory as the Bishop"[10].

The Official was therefore regarded as the Ordinarius and his Tribunal had the same jurisdiction as the Bishop. There could be therefore no appeal from the Official to the Bishop. The delegator was responsible for all sententiae of the delegated authority. The maxim "Qui facit per alium est perinde ac sic faciat per se ipsum"[11] "Who does a thing through another is the same as he who does it himself" applied as fully here as in any area of vicarious liability.

The appropriate forum for appeal, if the Ordinary or Official were acting, was the Metropolitan forum, with of course, the possibility of appeal to Rome, if necessary.

There is further native indication of the jurisdiction which the Official exercised on behalf of the Bishop. The appointment of John Waddell as Official Principal of Saint Andrews (c. 1523) displays the jurisdiction which he would be expected to hold:-

"Et dignitatis Nostre archepiscopaeis et metropolitane sedis St Andree officialem principalem fecisse".

"And to the dignity of our Archiepiscopal and Metropolitan See of Saint Andrews he is made Official Principal"[12].

"Dantes, concedentes ac committentes prefato nostro officiali principali nostram plenam et omnimodam potestatem ac mandatum speciale omnes causas, personales, criminales et matrimoniales properes et mixtas et alias quas cunque".

"And we give transfer and commit to our foresaid Official Principal our full and total power and special mandate in all causes, civil, personal, criminal and matrimonial, temporal and mixed and all others"[12].

The Vicar General who in Scotland is the official dealing preponderately with spiritual matters also displays the jurisdiction in his appointment.

"Omnes causas civilles, criminales et matrimoniales".

"All causes, Civil, Criminal and Matrimonial"[13].

The Official was a full time Judge, learned and very often schooled in Canon and Civil Laws. For example, John Waddell whose appointment has been commented upon was a licentiate of both laws[14]. John Guillerim, Commissary of Saint Andrews during the period 1534-1537 was a Licentiate in the Decreta as was John Spittall, Official Principal of

Saint Andrews from 1546 until 1553. This aspect of the Canonical Courts, i.e. the qualified Judge, was one of the most attractive for the lay litigant and brought much profitable business to the Canonical Courts which was strictly speaking not within the Church's power to judge.

In addition to the legal qualification which Officials held at the Provincial Synod held in Saint Andrews in 1539 it was ordained that all officials should be Priests[15].

The Official's Court was not the only inferior forum which dealt with consistorial matters. The Commissary Court also held some function although there is some speculation as to its exact function. Lyndwood describes a Commissary General as an "officialis foranus in certo loco", "A forane Official in certain places"[16]. It is to be noted in this context that Martin Balfour, Official Principal of Saint Andrews 1540-1545 is described in the "Liber Officialis Sancte Andree" as the "Official Principal of Saint Andrews, Commissary General and Judge"[17].

From such information it is possible to deduce that the Commissary was inferior to the Official and possibly that there existed an appeal from the Commissary to the Official[18].

It is not speculation however to contend that the Commissary Court operated upon specific instructions from the Ordinary whether Bishop or Official. The case between the Bishop of Glasgow and the Archdeacon of Teviotdale[19] (1427) illustrates the point:-

"Ordinaverunt quod dictus episcopus haberet habere suas commissarios

de jure eodem per totem archdeconatium ... qui cognoscere possint omnes minores causas et eas judicare et terminare".

"It is ordained that a Bishop has his Commissaries by law throughout the Archdiaconate who can cognosce all minor causes and judge them and deliver sentences therein"

How then can it be stated that Commissaries had any matrimonial jurisdiction? The only explanation is by specific Commission. A similar situation obtained in other provinces, e.g. England or Ireland where Rural Deans, an office roughly analagous in many respects to the Commissary, were also prohibited from hearing matrimonial causes unless at the delegation of the appropriate ecclesiastical superior. Lyndwood explains the position thus:-

"In causis statuimus ut Decani rurales nullam causam matrimoniale decaetro audire praemat sed cascu examinatio non nisi discretis viris committatur quibus affidentibus si commode fiere poterit postmodum sententia pronuncientur".

"We ordain that in cases Rural Deans may hear no matrimonial matter except with careful examination by only discreet men. This trust can be committed to them if it is convenient and thereafter that sentences can be pronounced"[20].

The Appellate Jurisdiction

The appointment of Patrick Graham in 1472 to the newly created Archiepiscopal Metropolitan See effected two major changes to the

Scottish Church. It put the Church in Scotland on a par with each other province in Christendom and eventually also led to greater Royal control.

Whatever the wider state and political implications which the creation of the Metropolitan See had, the immediate legal consequence was to have a Court of second instance on Scottish soil. Appeal lay to the Metropolitan from the inferior judicatures of the Officials and the Commissary Courts. Prior to the erection of the Metropolitan See appeals could only be made to the Curia as could petitions for dispensations. Such matters were ruled by the Bull Cum Universale.

The creation of this superior jurisdiction did not alter the right of litigants to appeal directly to Rome. Mr J.J. Robertson of the University of Dundee has under the auspices of the Department of History of the University of Glasgow examined the Vatican Archive and Library for Scottish Appeals during the period 1464-1560. He has discovered that the frequency of appeals is seldom less than three per year[21].

There are however native Scottish indications that certain matters of a matrimonial nature when taken to Rome did not come before the Rota but those where non consummation was alleged were adjudicated at the Tribunal known as the Sacra Penitentiaria Romana, the Sacred Roman Penitentiary. The Sacred Penitentiary granted dispensations and adjudicated in matters which contained confessional secrets, therefore its records until recently were closed and there can be no direct evidence of this proposition. Native evidence however culled from disparate sources does shed some light upon the destination of many

appeals from Scotland.

The protocol books of Scottish notaries display many cases which have had some stage of procedure dealt with by the Sacred Penitentiary. The Formulare Book of Saint Andrews contains at least one process of divortium a vinculo matrimonii on the ground of consanguinity which is followed by a dispensation to allow marriage which decrees and the procedure leading thereto are governed by letters Apostolic "sealed with the seal of the sacred Apostolic Penitentiary"[22].

However, the protocol books are perhaps the more illustrative of the role of the Penitentiary.

On 17th December, 1509, Lord John Fleming and Margaret Stewart who had earlier been divorced due to consanguinity were granted a dispensation, permitting them to marry anew. Archbishop Beaton, who granted the dispensation was instructed in this act by Cardinal Ludovic of St Marcellus the Great Penitentiary of Pope Julius II[23]. There are three other cases during the period 1509-1510 which are directed by Cardinal Ludovic of St Marcellus[24].

The records of the period from 1510 until 1550 are somewhat incomplete. However one can tell that in 1523 an unnamed couple from the diocese of Glasgow obtained letters Apostolic from the Penitentiary[25].

In August 1550 William Gordon, Dean of Dunblane, Abbot of Sweetheart and Chanter of Glasgow received letters Executorial "granting commission to absolve and dispense Herbert Maxwell of Kirkconnell and

Janet Maxwell for marrying within the fourth degree and to decree that the survivor would remain unmarried and that any child should be legitimate"[26].

Occasionally, particularly after Cardinal Beaton was appointed Legate a Latere, dispensations could be had from the Legate rather than the Papal Seat[27].

There is other evidence of the weight of business going to Rome. Much of course related to matters of benefice and the presentment to livings but the consistorial matter was considerable. During the 15th and 16th centuries the expense of the many actions at the "Court of Rome" was beginning to worry the "Secular Authoritie". Lord Fraser states that "the money lavished in conducting them (the pleas) seriously impoverished the nation and alarmed the government"[28].

The complaints of "ingentes labores et expensas"[29], the prodigious works and expenses had been heard at least since 1415 and became so loud that Parliament felt forced to legislate upon the matter. In 1493 Parliament advised the King's subjects who were conducting "plegis, persecutions and litigations" at the Court of Rome to return home to Scotland and to submit their processes. King James undertook to assume that responsibility to have justice done "be thair ordinare juge" whom failing, in case unruly ecclesistics would become turbulent, the King would appoint a Judge to dispense justice in the case[30].

There were of course numerous and substantial litigations in process at the Court of Rome. However, it seems that the majority of cases

involved:-

(a) matters of ecclesiastical discipline, and

(b) matters of benefice and Church property.

There were of course many other heads of action pled at Rome; it had for example its own local jurisdiction. Those broad categories adumbrated above could all be adjudicated there. However marriage was to the Court of Rome a special interest because of its sacramental nature[31].

The costly litigation which is condemned by Lord Fraser was the "Great Cause" or contest between the Bishops of Saint Andrews and Glasgow. It is this anomalous and unique instance of ecclesiastic and legal contest of which the Act 1493 complains as being "of which the expens is unestimable damnage to the Realme". It is contended that the case was not typical for its length or complexity and indeed the fact that this case was singled out for attack in the Committee of the Lords of the Articles points to its important nature. Certainly litigation in Rome was a costly affair. The Formulare Notarium Rotae gives a tariff of "Taxae ordinariae Dominorum Notariorum Rotae ab antiquo seratae et deinceps observande". The table of 'Standard Charges' lists the charge per item as used in the Curia, e.g. for the Register (process) of an Ordinary Cause consisting of 12 folios the charge was one ducat, for a Citation with an Inhibition by edict for a Defender outwith the curia one ducat, for the noting of a definitive sentence in the first instance, five ducats[31].

The same formulary provides the Notary with a table of exchange rates in use within the Camera and Apostolic Chancellary which gives some idea of the relative cost of these items[32]. The usual Scots pound was equivalent to one ducat whereas the English pound fetched six ducats. The scale of these charges can be realised when it is disclosed that James Thornton, Advocate was paid £144 at Whitsunday 1558 for remaining at the Court of Rome for the Queen's affairs[34], whereas Edward Henrison who then was acting as the "Pure Lawyer" in Edinburgh received £44 for the same period[35].

That these expenses must be multiplied many times to obtain an accurate picture of the economic drain which the Court of Rome was causing is certainly true. However, when it is realised that at least 25 advocates, procurators and writers of apostolic letters, many of them native Scots, were retained at the Curia and in the Cancellaria during the years 1530 to 1558, it is obvious that many were engaged in matters of Benefice but a large proportion, as their designations betray were involved in Matrimonial and Consistorial work.

Master George Hay was sent to Rome by James V in 1530 who gave him "all power and licence 'per se vel suos procuratores ... in Curia Romana ... ad levandum omnes bullos executoriales et processus', "through himself or his procurators in the Roman Curia to take up all bulls, executions and processes"[36].

Later, in 1546, Queen Mary, the Regent, appointed Masters James Curtesium, Jheroninus de Justinis, Johannes Aulusium de Arogonia and Athonius Gabrielus as "Aule consistoriale advocatos", "Advocates before the consistory".

In the same Letter of Appointment, Johannes Lamikin, Alexandrus de Urbinis, Nicholaus Ricardus and Nicholaus Cuming all Writers of Apostolic letters together with Jacobus Salomond and David Bonar, Vicars respectively of Borg and Panbride and expressly stated to be "Natione Scotos" are created, "Nostros veros legitimos et indubitatos procuratores, actores, factores et negotiorum nostrorum ... gestores".

"Our true legitimate and undoubted Procurators Agents, Factors and Agents for our business[37].

In the same year, 1546, Johannes Stevinsoun, Jacobus Salmont and Johannes Duncan are appointed Procurators to act "In curia Romana coram sanctissimo domino nostro papa eius vel vicecancellario aut cancellariam apostolicam regente aliove quocunque ad id a sanctissimo domino nostro papa potestatem habente, habent in camera seu cancellaria apostolica aut alibi ubi opus fuerit comparendum".

"In the Roman Curia before our Very Holy Master, the Pope himself or the Vice Chancellor or a regent of the Apostolic Chancellary or whomsoever to whom the Most Holy Master Our Pope has given power in Camera or the Apostolic Chancellary or wherever else the work can be done"[38].

An entry of the following year, 1547, displays the number of legal representatives of Scots nationality acting in the Curia. Nicholaius Richardi, Nicholaius Cummyn, Writers of Apostolic letters are mentioned and the following are listed as "de presenti Rome agentes", "Agents present in Rome", Johannes Bellendon, precentor of Glasgow, Johannes Thorton Canon of Moray whose father had also represented in a

legal capacity at Rome, Johannes Stevenstoun prepositor of Biggar, Patricius Lyddale, Johannes Spens and Johannes Stonehouse listed as "clericos regni nostri nativos", "native clerics of our Kingdom".

In addition to the names given above Jacobus Salmond and David Bonar are also retained in the action contemplated, one of presentment to a benefice. It is also interesting to note that a certain Sebastianus Grullot is also retained to act in this case indicating that Scottish work was not exclusively channelled to Scots[39].

The numbers are not essentially important, although with so many advocates, procurators and writers it is no surprise to hear at least occasionally of complaints of expense.

What must be appreciated is that the volume of business must have been great to require so many legal representatives and also probably the most important effect, the expertise and knowledge which these men acquired, their acquaintance with canonical procedure and their learning in law, both Roman and Canon would be amongst the most important invisible imports to Scotland during the Medieval period. Aspects of this reliance on Roman-Civil-Canonical law will be shown later. What is almost certain is that during the earlier development the process of intellectual osmosis occurred unconsciously. However, as the canonical adjective and substantive law became more readily available and was recognised as a more effective and efficient system of law than the poorer Scoto-English system of Regiam Majestatem, it would be adopted by the secular authorities and assumed into the municipal law. Examples of such adoption are, in the field of procedure, the initial summons or libel and the oath of calumny and in

the substantive law, the wide use of presumptions and the equity of treatment between husband and wife.

Consistorial Process in Scotland

There were many grounds whereby a case dealt with matrimonial matters could be brought to the canonical Courts. These grounds relate to the substantive law and will be dealt with under that head.

The Ordinary Procedure

The Solennis Ordo or Ordinary Procedure was that generally used throughout Europe[40]. The following summary comes from the "Summa Notariae" of Johannes de Bononia[41] and whilst this has no direct connection with the Scottish Courts, the examples of other Notary Protocol Books and Formularies show that similar works must have been in use. Of course there were certainly copies of the Corpus Juris Canonici, containing the procedure in scattered form[42] and the works of other canonists, particularly Durandus the Speculator[43] were well known.

Primo si partes per procuratores comparerent mandatis exhibitis utrique parti prefigitur terminus ad dicendum et dandum in scriptis tam contra mandata hinc inde exhibita quam contra personas procuratorum nec non ipsi reo contra commissionem impetratan sive rescriptum quicquid dicere et dare voluerit. Et decernitur eis copia exhibitorum facienda infra terminus eis datum, Adveniente termino eis dato et comprobatis mandatis si libelli parati non sunt datur terminus ad dandum et recipiendum libellum. Si autem libellus paratus est

offertur judici vel notario recipienti pro judice. Et ipse judex vel notarius de mandato ipsius dat ipsum libellum reo et prefigitur sibi terminus ad deliberandum utrum cedere vel contendere. Partibus postmodum in judicio die termini constitutis judex quaerit a reo utrum deliberaverit cedere vel contendere scilicet respondere se velle cedere vel contendere quod nunquam planum esset. Si vero responderet se velle contendere tunc judex, secundum quandam ordinationem et mandatum factum auditoribus palacii a domino Nycolao Papa IV quaerit a reo si habet aliquam exceptionem dilatoriam vel declinatoriam quam velit proponere. Et si responderit non vel etiam sic dummodo non nominaverit aliquam efficacem judex compellit cum respondere libello. Si autem nominet vel proponat aliquam efficacem tunc datur ei peremptorius terminus ad omnes dilatorias et declinatorias proponendas. Exhibitis exceptionibus rei datur terminus ad replicandum et ex evidenti causa, si negotium arduum est, exhibitis replicationibus actores ad reum iterum datur alius actori ad replicandum. Sic communiter datis exceptionibus et replicationibus judex dat eis terminum ad audiendum interloqui super ipsis. Lata interlocutoria pro actore reus litem contestari compellitur et jurare de calumnia. Quo facto judex statim utrique parti dat terminum ad ponendum et si negotium magnum est iterum post illum dat alium terminum peremptorium ad proponendum. Positionibus hic inde factis secundum modum curie Romane datur hinc inde copia ut partes deliberare possint super responsionibus faciendis. Bononia vero et in pluribus aliis locis, ubi fui non datur copia positionum ab adversa parte datarum sed tantum advocate partis per judicem ostenditur ut videat si est ibi aliqua contraria implicata vel impertinens cui non debeat respondere. Et prefigitur terminus ad respondendum ad positiones. Responsionibus subsecutis prefigitur terminus ad dandum articulos

sicut de positionibus dixi. Videlicet si negotium non est magnum unus terminus tantum, si negotium magnum est datur primus pro prima dilatione secundus postea pro omnibus et peremptorius. Approbatis articulis si testes ibi recipi debeant vel si articuli debeant per instrumenta probari statim aliquibus testes prefigitur terminus ad probandum. Si vero testes remotisunt petitur ut committatur ipsos recipiant et examinent et tunc, si partes sint de diversis dyocosibus vel locis distantibus fit conventio de loco si ambo partes probare volunt et conveniunt etiam inter se-si possunt-de aliquo vel aliquibus qui communiter testes ipsos recipiant. Si autem concordare non possunt quaelibet pars eligit sibi unum, et judex dat eis tertium et assignat eis peremptorium terminum ad probandum coram electis judicibus id quod probare volunt. Post haec fiunt commissionis littere inter quas articuli et interrogatoria concluduntur. Et datus terminus partibus ad dandum interrogatoria si qua dare volunt. Post terminum citantur partes vel saltim reus ad videndum quando articuli et interrogatoria sic exhibita dictis commissariis litteris includuntur. Remissis attestationibus et sigillis quibus vallate sunt recognitis vel probatis a partibus, in termino ad ipsas attestationes aperiendas et publicandas specialiter assignato aperiuntur et publicantur ipse attestationes. Et datur terminus ad recipiendum ipsorum copiam et dicendum contra personas et dicta ipsorum testium quicquid volunt. Et si contra testes vel eorum testificata quicquam non dicitur, sequitur in causa conclusio, cum dicti examinatoris testium de mandato specialiter a judice sibi facto - prout moris est, quando attestatione remittunt ipsis partibus ad comparendum coram dicto judice cum omnibus actis et munimentis suis qualitercumque causam ipsam tangentibus peremptorium terminum assignassent. Verum si petatur a partibus, nihilominus ad producendum omnia instrumenta acta

et munimenta peremptorius terminus assignatur. Post quem terminum sequitur immediate conclusio et postmodum terminus ad sententiam audiendam".

First, if the parties are compearing by procurators, a term is fixed for both parties exhibiting mandates to decide and to give opportunity to lodge objections against the mandates exhibited or against the persons of the procurators but not against the commission to judge or rescript above that which it is wished to judge and rescript. And it is decided that the parties make a copy exhibited to each in the time fixed for the term. Upon the arrival of the term given and the mandates being proved, if the libels are not prepared a term is set for the lodging and receipt of the libels, but if the libel is prepared it is offered to the judge or a notary to receive it for adjudication and the judge himself or the mandated notary gives the libel itself to the defender and a term is fixed to decide whether to admit or defend the libel. After, on the day fixed for the term the judge questions the parties on the cause, each decides to admit or to clearly answer, either to contend or admit because it is never clear.

If indeed he answers that he wishes to contend, the judge immediately following the ordinance and instruction made to the auditors of the palace, by our Master Pope Nicholas IV, asks of the defender if he has any dilatory exceptions or declinatory exceptions, which he wishes to propose. The defender can answer or, if not, so long as he has not declared any preliminary pleas, the judge can compel him to answer. If he declares or proposes any preliminary plea then a peremptory term is appointed for the disposal of all dilatory and declinatory pleas. The defender's defences being declared, a term is appointed for

replication and on cause shown if the matter is difficult, the pursuers replication being known the defender is given a term again to answer to the replication of the pursuer. Thus both parties having given in on the one hand exceptions, on the other replications, the judge appoints a term for the parties to hear the interlocutor on the exceptions and replications. Having given the interlocutor for the pursuer, the defender is compelled to join issue and swear the oath of calumny. This being done the judge at once appoints to both parties a term to propone and if the matter is important he appoints a term to propone upon the peremptory. Positiones are then made up, following the mode of the Roman Curia, and are lodged with copies in order that the defender may deliberate upon the responsae to be made. In Bologna and indeed in many other places, copies of the positiones are not given by the adversary to the other party but such are shown to the party's advocate by the judge in order that he may see if there is any incompetence and irrelevant defence which he need not answer and a term is fixed to answer the positiones. Following the responsiones, a term is fixed to lodge articles just as has been stated in the case of positiones, viz, if the matter is not great, one term only, if it is weighty there is given the first term only for the dilatory pleas, the second thereafter for all other pleas and peremptory defences. If to prove the articles, the Court has to receive witnesses there or if the articles have to be proved by instruments, a term is at once fixed for proof. If indeed the witnesses are remote it is to be sought that it is committed to others that they receive and examine the witnesses and so if the parties are of diverse dioceses or of distant places a meeting place is fixed. If both parties wish a proof and if they can then meet between themselves the one who heard the witnesses can receive the parties. If again the parties cannot settle, if one party

adheres to his own case, the judge will appoint a third term and he assigns to them a peremptory term to prove before the chosen judges that which they wish to prove. After this they make a commission to write between which articles and interrogatories are concluded and a term is appointed to the parties to give in interrogatories if they wish to lodge them. After this term the parties or only the defender are cited to view how much of the articles or interrogatories as shown are included in the said commissary letters. The evidence being returned and the seals thereto being valid and recognised by or proven to the parties in a term specially assigned in order that the evidence may be discovered and made public, the evidence is discovered and made public, and a term is appointed for the reception of the copies and that if they wish to say anything against the persons or the evidence and if nothing is said against the witnesses or their evidence. The conclusion of the cause follows next, the parties compear with the examiner of the witnesses, appointed by the judge, before the judge with all acts and muniments whatsoever pertaining to the cause itself and a peremptory term is assigned. Indeed if sought by the party nevertheless a peremptory term is assigned to produce all instruments, acts and muniments. After which term there follows immediately the conclusion and after that the term to hear the sententia.

The Course of Action under the Solennis Ordo

It is necessary to examine this continental description of the Roman Process and compare it with the process as known and practised in Scotland during the middle ages. Fundamental to the Solennis Ordo was the designation of parties as actor and reus[44]. Whilst such a delimitation of roles is borrowed from the Civil Law[45] certain

features of the civilian system were not carried into the canonical system, e.g. the institution of the Vindex of the formulary system. Indeed the cognitio procedure appears as that most drawn upon.

Robertson[46] lists the preparatory acts to an action in the canonical courts as:-

1. The preparation of the petition
2. The citation and certification of service
3. The appointment of procurators and lodging of the libel
4. The reception of dilatory exceptions, and
5. the fixing of a dilatory term ad deliberandum to hear the exceptions.

The earlier elements of the process, e.g. the preparation of the petition was substantially an extrajudicial act. In cases under the solemn order, by way of editio actionis, the pursuer issued his complaint by way of the petition to the court. This petition was lodged in court and a copy was provided to the defender.

The petition contained the essential elements of the pursuer's cause, the parties, the judge, the claim made upon the defender, the legal basis for the claim and the remedy sought. There are some extant libels or petitions[47] from the Scottish courts at this time. These together with the processes of dispensation sought at Saint Andrews following upon Apostolic letters obtained from the Penitentiary can be instructive by analogy.

A case in point is KM and DG[48] occurring in 1523 which is an

application to the Court of the Official for a divorce and dispensation. The parties are given in the instance together with the judge to whom the case is presented. Then there follows an intentio or condescendence stating the facts of the case; that the parties had married within the fourth and third degrees of consanguinity and that children had been conceived. The crave or remedy sought is for divorce[49], dispensation and licence for the parties concerned to remarry one another together with a petition for absolution and the legitimation of any children concerned.

It was important to formulate the claim in the libel as precisely as possible for it was the definitive statement of the right of action from which the entire subsequent action flowed. The petition should be proposed in terms of the Synodal Statutes of Perth whereby the documents are to contain legal contention and specification referring to the relevance of the arguments.

The importance of ascertaining the correct ground for action or defence is stressed by a Synodal Statutes of the Synod of Saint Andrews held in 1549[50] where the advocates or procurators are enjoined "not to undertake" rashly the prosecution or defence of causes in the ecclesiastical courts without "full information as the facts", and that unless they can swear to the verity of their information they may not appear. The procurators are also instructed to examine with discretion "the merits of the case and on what legal ground the action or the defence may be based".

If the facts were insufficient to ground an action or defence the procurators were required by the Synodal Statute to refuse to take

instructions in the cause, however great a fee may be offered.

The following stage was the citation or service and certification thereof. The judicial summons formed a pivotal point in the Roman-Civil-Canonical process. In the development of the process, summons by the pursuer had died out at an early date. Instead the courts made the order summoning the defender to appear and answer the libel. The procedure bears some relation to that of the later period of cognitio procedure prior to Justinian[51] where a magistrate issued the summons on the basis of the libellus conventionis[52].

The duty to obey the summons was as in the Civil Law a duty owned by both parties to the Court, the pursuer disobeying could have his case dismissed and the defender could be subjected to penalties for contumacy. This having been stated the Roman-Civil-Canonical system was more lenient than the Civilian to litigants who failed to compear at the first calling or indeed subsequent callings. The fault of contumacy could incur severe penalties ranging from the paltry to the extreme ecclesiastical censure: - excommunication. Where a pursuer failed to appear before the issue was joined a hearing was held at which only his libel was heard, if the default occurs after issue is joined all libel and proofs are heard and the decision unless in grave and manifest injustice, was always for the defender.

The defender on the other hand if contumacious is not presumed to have admitted the libel; an adverse sentence is granted only if his defence is plainly irrelevant or incompetent. There is evidence to suggest that the Scots canonical courts were less even tempered than their European counterparts in so far as they were inclined to grant a

decree, in absentia against a defender who was unwilling through arrogance to appear. The cause was taken as admitted and having been examined publication was made in the Act Book of the Court[53]. The Decretals spoke much on this stage of the action[54]. If a pursuer was suing for a separation ex toro by adultery and, prior to litiscontestation, the defender was contumacious it was possible to excommunicate the defender but witnesses could not be heard nor could the case be decided. Further, the Decretals inform us that if witnesses were heard in a matrimonial cause against a contumacious party before the issue had been joined, the testimony was null[55]. Obviously the Court was interested in the prosecution of initiated causes and could compel appearance but it must be stated that whilst it was generally lenient towards the contumacious party, in Scotland at least the Court's patience could be short towards the contumacious party. In 1549, the Council of the Scottish Church held at Perth laid down Statutes for the reformation of the consistorial courts where it is found that if the witnesses have not been seen nor have the other proofs generally received been judged and admitted and the defender was unwilling by arrogance even to appear in the case, the cause is to be set out and being admitted and examined at once, publication is to be made of the act and the conclusion[56]. The statement that the procedure was not truly contumacial is a shade too emphatic[57].

The next stage in the process was the appointment of procurators or advocates.

That parties were entitled to be represented by canon lawyers is well known. These however were not the forespeakers of which we read in baronial courts. It is quite plain that by the mid-fifteenth century

in Scotland, a trained body of legal representatives were organised and practising in the canonical courts. Whilst every litigant had the right to pursue or defend by himself it would be a brave man indeed who would venture into the complexities of an action before the canonical courts, without some qualified assistance[58].

The procurator or advocate was appointed by a formal mandate executed before a notary public. The mandate stated before whom the procurators were to compear and specified in some detail the subject matter of the dispute in which the appointed agent was to act[59]. The topic of mandates for procurators and advocates is dealt with by Stair[60] where it is observed that "advocates are presumed to have Warrant from parties for whom they compear, without producing any Mandate". This appears to indicate a different practice from that of the canonical courts. However, if the procurator or advocate could not produce evidence or special allegations of facts, in inferior Courts, the compearance was held to be without warrant and the decree could be declared in absence.

Earlier in Scotland, in the civil courts, the position was not that stated by Stair. Balfour tells us that "na man may be Procurator in ony action or cause bot he quha has ane speciall mandat be writ and seill, contenand sufficient powar gevin and grantit to him to win or tyne the cause"[61]. Roman Law rules are echoed in the subsequent passage given by Balfour[62] where a "general Procuratorie" may be repelled unless judicial caution is found and given[63].

The offices of both procurator and advocate were in use at the canonical courts in Scotland. Lyndwood[64] describes some of the

differences between these two branches of the profession. The representation was direct representation as a general indication of which the phrase "patronus causa" is used by Lyndwood in his description of the office of advocate. The advocate is pictured as acting in court in controversial matters; where wearing his gown, he was termed togatus. No one was admitted advocate unless he had spent three years in the study of Civil and Canon Laws. The advocates' education could of course be obtained in universities at home or abroad.

Glasgow was a Studium Generale which had been established in 1451 for the study of Canon and Civil Laws and the Liberal Arts[65]. It is even the case that a degree of Doctor Juris in Canon Law was granted there.

Aberdeen[66] founded at the instance of Bishop William Elphinstone, a canonist himself of some note, had an extensive course in Canon Law and Theology. The notable canonists Hector Boece and William Hay both taught there. Saint Andrews, the oldest Scottish university, was less noted for her legal teaching. No formal civil law courses were taught there although some Canon Law would appear to have been taught. Canon Law teaching in Scotland was somewhat overshadowed by the activities of the Law Faculties on the Continent. Bologna of course together with Perugia and the other Italian Universities attracted many Scots students. Scots names appear in the matriculation albums of the Law Schools of Louvain and Douay, where Wellwood read much material for his work on Sea Laws. In Paris there was a Natio Scotorum such was the large number of Scottish students. Thus one can observe that in combination with the practical knowledge gained by the advocates, procurators and writers at the Curia, there was also the more direct

means of intellectual importation, through the return of those students to their homeland who had drunk at the springs of legal education in the great continental universities.

Apparently advocates did not have a universal right of appearance before the canonical courts and required to register with the court in which they desired to practise. For example Sir John Paris registered at the Consistorial Court at Glasgow in 1505[67].

Similarly procurators described by Lyndwood as "assistants to the Cause"[68] legal representatives who had less legal education than advocates also had to register with the court wherein they were to appear, viz the registration of Magistri George Hay and Archibald Crawford[69]. Both advocates and procurators in the consistorial courts in Scotland were subject to strict judicial control and discipline.

Procurators, unless described in the Catalogue (law list) were obliged to observe the rules of reverence to the judges, both in and out of court and if guilty of any failing were to be punished at the discretion of the judge and suspended from their office[70]. The penalties befalling the procurator who advanced a cause without investigating the claims of his party have been already described but even more so were a procurator to maintain an unjust action or deter a party from advancing a just cause, he could be removed from his office by the Ordinary[71]. A procurator or advocate exhibiting frivolous defences or any other party of the process was punished by fines of 40s and £5 for the first and second offence respectively and for the third offence by suspension from practice in that Court forever[72].

Removal from office, then as today was the supreme sanction operative against a legal representative who had failed in his duties to the Court and to his client or who had otherwise engaged in unethical practices. Thus we find, in 1549, the penalty of suspension and removal from office being ordained for those who bargained with either litigant for a proportion of the award or promised their services to those who enter into such bargains with them - the pactum de quota litis[73] - which Stair tells us "is rejected both the Civil Law and our own custom ..... which is to prevent the stirring up and too much eagerness in pleas". The paction is rejected by Stair because of its interference with the due process of law. He does not state whether there is any penalty of removal from practice attaching to involvement in such a pact[74].

The behaviour of legal representatives in the court was also strictly controlled, particularly with regard to order in court. Already mentioned is the duty of reverence for the judiciary placed upon legal representatives. Standards of behaviour were maintained by requiring "Procurators and other members of the Judiciary" to abstain from shouting and thereby disturbing the judge in judgement[75]. In court or in debate all representations were to be made calmly and without disorder[76]. Silence was ordained for those not involved in oral argument. In presenting an argument the vulgar tongue, whilst frowned upon was not outlawed. Witnesses of course very often could not cope with the learned tongues[77].

A term would be fixed for the exhibition of mandates and an opportunity was given to the parties to object to the mandates and against the persons involved. However no objection could be heard at

this against the commission to judge, should the case be heard by a judge delegate. At this term the mandates were proved whereupon the libels or libelli were lodged with the Court. This is the developed stage in canonical process based upon the editio actionis. Being written it was more formal than the analogous procedure[78] of the Civil Law. It was in reality the editio per oblationem libelli, by the presentation of the Libel and the requirement of writing signified a tremendous advantage in the systematic treatment of actions by the canonical courts over their secular counterparts.

Therefore there is no surprise that scribae curiarum or clerks of court feature in the Synodal Statutes of Saint Andrews in 1549[79]. A bureaucracy is a requirement of a system of written pleadings indeed perhaps a causa sine qua non. A statute was passed at the Synod relating to the presentation of documents and the narration of the steps in the process. Registers were ordained to be kept for the recording of all the steps in the process and for the recording of all documents produced in court. In order to avoid the loss or forgery of documents produced in court all original documents were to be received by the court and retained there, receipts being given for documents lodged. If however, the clerks were found culpable of the loss or destruction of documents they were replaced[80].

The defender was then formally summoned by service of the libelled summons by the judge or a notary appointed by him.

A term was fixed to enable the defender to state whether he admitted the claim or wished to defend the action. This term and the statement of the defender thereat sets the subsequent procedure. The Synod held

at Perth in 1549 gave some legislation on the point to the effect that if the defender appeared at this first calling, the petition or libel qualified at once and the action followed.

If however the defender was unwilling to appear and answer the entire petition he could be given three days or a shorter period at the judge's discretion in which to answer the petition. Failure to answer within this extended time resulted in the continuation of the action without the defender. The judge then sought of the defender whether he had any dilatory or declinatory exceptions which he wished to propose. If the defender declared any preliminary plea, a peremptory diet was fixed in order to dispose of all dilatory and declinatory pleas.

The use of the word exception in the last paragraph is perhaps unfortunate. Such was the debased knowledge of the civilian procedure as possessed by the canonists who were responsible for the canonical procedural system that 'exceptio' simply meant to them 'defence'. Thus the canonist comprehended matters of fact and matters of law as grouped under this head.

In an attempt to bring order to this chaos the following classification of defences was adopted. On the one hand, those of immediate concern, the so called 'exceptiones dilatoriae' which obviated the need for litiscontestation and on the other the 'exceptiones peremptoriae' or peremptory defences, which did not defeat litiscontestation.

Dilatory defences attacked both the foundation in law of the pursuers

claim and the procedural validity of the action. These characteristics caused them to be classified as either "dilatoriae solutionis" or "declinatoriae judicii". They could be lodged orally by motion before the judge but more commonly they were set forth in writing. If there was any peremptory defence a term was then fixed for the disposal of all exceptiones[81].

Peremptory exceptions could be lodged only after the all-important procedural step of litiscontestation or joinder of issue, such defences included res judicata and arbitratio.

If the defender objected to the answering of the argument and libel, he was nevertheless upon appearance taken to have defended[82]. This brings the procedure to the trial of the issue, litiscontestation takes place, the issue is joined. Whilst in the Civil Law, litiscontestation could be considered as a contract between the parties[83] or as a quasi-contract[84] the Canon Law cannot be said to have followed this theory slavishly. The defender, if contumax, could have decree passed against him, the presumption of defence puts the pursuer in a powerful position. The theory of contract was known to the canonists, as the Synod of Perth stated, the contentious matters are narrowed because the law acknowledges the agreement to be a compact so that the parties are now agreed and are happy with the bills and the law is not hindered by the mala fides defence of the other party[85]. Upon receipt of the libel the defender would join issue by declaring to the judge his intention to contest the matter before the judge[86]. Upon this clear expression of animus litem contestandi the parties lost a great deal of control over the process, the matter became of public concern.

Indeed a 'procedural relationship'[87] was formed between the parties. The substantive and procedural effects of litiscontestation were far-reaching. Firstly, it suspended all old obligations pending the judicial determination, secondly it preceded the creation of new obligations and thirdly, it initiated mora and mala fides: - which attempts to delay or disrupt an action where legislated upon in 1549[88] to the effect that if any one brought forward obstructive arguments or exceptions or brought them up and protracted them after they had been disallowed or if allowed, had not been proven, then he would be found liable to an additional charge in damages, rising on a scale in relation to the number of times the fault occurred. The party attempting to bring in 'irrelevant' arguments or defences could be made to swear that his propositions were not invalid but pertinent and relevant.

Mora was particularly frowned upon. It has already been noted how this fault featured largely in the criticism of the canonical courts[89]. However the Synod at Saint Andrews attempted to check delay by legislating to prevent (a) long delays other than those absolutely necessary and false excuses for mora, (b) suppression of documents aimed at hindering the execution of a decree, or (c) actions from failing asleep through collusive agreements between legal representatives.

The swearing of the oath of calumny was a procedural act following so closely upon the heels of litiscontestation as to be in the mind of some commentators almost a part of the joinder of issue. It was "an act which by reason of its conspicuousness was easily fixed in the mind". The oath of calumny was however a completely separate

procedural step which signified the desire of the canonists to avoid trickery, to prevent vexatious or malicious litigation and to promote fairness between the litigants. It clearly represented the link between the Civilian and Canonical systems.

The Iusiurandum de Calumnia originated in the Roman Law. As Gaius recounts, it was in use in the Formulary procedure[90]. Justinian retained the oath as part of the Cognitio procedure. As part of that procedure, each party swore that the proceedings were genuine and not collusive[91]. Evidence could not be produced in court unless the party who wished to lead it first took the oath[92]. The nature of the oath was such that it was a preventative check upon prospective litigants and constituted along with the Cautio Juratoria the major method whereby Roman litigants were protected against abuse of process. The party swore that he was undertaking a given procedural step in good faith. The oath could either be generale relating to the entire process or speciale, relating to a specific step in the procedure[93]. It was upon this civilian basis that the canonists built remembering at all times the motto ecclesia vivit jure Romano. (The Church lives by the Roman Law). The oath as mentioned was generally administered after litiscontestation although Naz[94] states that it could be taken at the beginning of the process. Gregory IX regulated its administration in the Decretals[95]. An examination of the comprehensive content of the oath displays its purpose in the Roman-Civil-Canonical process. Naz describes five major topics which were sworn upon:-

1. That the party believed his cause is just
2. That the party would not hide the truth

3. That where the party was questioned he would not offer false proofs
4. That the party would not seek a re-trial by malicious design
5. That nothing would be given or promised to anyone involved in the cause unless the law permitted it, e.g. payment of an honorarium to an advocate.

It is obvious that the functions of the canonical oath in distinction to that of the Civil Law, i.e. preventing people from recoursing lightly to litigation, were much wider. It was designed to prevent the suborning of witnesses, bribery, unjust extensions of time limits and frivolous defences.

By the Decretals the oath need only be sworn in temporal causes, spiritual actions being exempt. Failure to swear the oath resulted in the dismissal of the cause or in the defender being held pro confesso. The oath was a requisite solemnity for the validity of any definitive judgement. Pope Boniface VIII amended Pope Gregory's Decretal by allowing the oath to be taken at any time in the process, which in effect permitted the retrospective validation of otherwise invalid actions[96].

The oath of calumny had a broader basis on Canon Law than it had in Roman Law. The Decretists and the Decretalists acknowledged that recourse could be had to the oath in many more circumstances than were allowed in the strict romanised procedure. As such the oath highlights an aspect of the principle of aequitas canonica in contradistinction to the districtio legum of the secular laws.

Lord Mackenzie in the interesting case of Paul -v- Laing[97] states the following, obiter "Our practice is borrowed from the Roman Law and there the oath was administered at the beginning of the cause the object being to prevent rash and vexatious litigation. It was an oath merely of credulity that the party had a good case and was altered by the Canonists who allowed it to be put at any stage of the case, a practice which neither the ecclesiastical or civil courts ever followed. By the Old Scots Act of 1429[98] it was ordained "that advocates and forespeakers in the temporal courts and also the parties that pleade in them gif thai be present in all causes that thai pleade, in the beginning or gif they be heard in the cause he sall sweare that the cause he trowis is gude and leill; that he sall pleade and gif the principal partie be absent, the advocate sall sweare in the saule of him after as is contained in these metres:-

"illud juretur quod lis sibi justa videtur
et si quaeretur verum non inficitur
Nil promittetur nec falsa probatio datur
Ut lis tardetur dilatio nulla petatur".

"He swears that the action seems to him right,
And if asked the truth he will not corrupt it.
That he has promised nothing nor will give a false proof
He will seek to do nothing to delay the action".

There are some points to be noticed in Lord Mackenzie's dictum:-

1. The origin of the Oath in Scotland, and
2. The purpose of the Act of 1429.

1. The origin of the Oath of Calumny in Scotland

The oath clearly represents a Roman-Civil-Canonical survivance rather than a borrowing from Roman Law. Only in so far as the Roman Law was a source of the Canon Law could one say that the Oath as used in Scotland came from that Law. The Canon Law was the living part of the jus commune and the canonical courts were the great transmitters of legal doctrine and practice. It is not therefore unreasonable to propose that the Canon Law was the true source of the Scots practice. There are good reasons for saying so. Firstly the rhyme quoted as part of the Act of 1429 bears more relation to the description of the oath given by Naz[99] than that given by Justinian.

"Et actor quidem juret non calumniandi animo litem movisse sed existimando bonam causam habere".

"And the Pursuer swears that he has not begun the cause by thoughts of calumny but by the thought that he has a good cause.[100]"

The oath of calumny was certainly in use in Scotland in the canonical courts, notwithstanding that there is no mention of the oath in the extant court records. These courts would have been under obligation to follow the general adjective law as stated in the Decretum, Decretals and Sext. There is mention of the oath in William Hay's lectures on Marriage[101]:-

"Licet iurare de Calumnia ut iurare in principio litis hoc est Credit suam causam esse justam quam nititur defendere et actor iurat quod credit suam esse justam quam prosequitur".

"It is lawful to swear the oath of calumny. This is the oath sworn before litigation by the defender that he believes his cause is just and by the pursuer that he believes his suit is just".

2. The purpose of the Act of 1429

It is clear that during the 15th century the Crown was most conscious of the poor state of the administration of justice. It embarked early in the century upon a programme of statute law revision, amendment of earlier laws and the curing of injustices by legislation. For example, in 1424 the first provision of free legal advice was made[102]. In 1425 a Commission was set up to "se and examyn the bukis of law of this realme and to mend the Lawis that need mendment". No matter how ineffective this last measure was, and its attempted successors show it to have been so it does display the attitude of the Three Estates towards the development of the Law.

Due to the proficiency of the canonical courts, the legal expertise exhibited therein, and the fairness and impartiality of the Courts it comes as little surprise that the secular courts would wish to emulate canonical practice and thereby perhaps attract some of the profitable business which hitherto had been referred to the canonical courts. Of course it would not be until 1532[103] with the establishment of the College of Justice that the secular powers would have a fixed judiciary capable of competing on an equal footing with the Courts Spiritual. No doubt the semi-ecclesiastical nature of the Court of Session bench facilitated the transfer of expertise, for example John Leslie, Bishop of Ross and sometime Official of Aberdeen[104] and possibly also Commissary of Moray[105] was Lord of Session from 1564-65.

Henry Sinclair, Bishop of Ross and John Sinclair of Brechin were also Lord Presidents in 1558 and 1566. In addition to this the Court of Session was ordained at its inception to be staffed to the extent of half its number by clerics and to always have an Ecclesiastic as President. This system of court staffing is also shown in the half lay/half cleric composition of the Commissary Court.

Even after the Reformation, as Erskine recounts[106] and as has been shown, Parsons, Rectors and other Churchmen were received as judges. Parochial Ministers were first disqualified for office in 1584[107] and in 1640 the prohibition was extended to all Churchmen[108]. Although the influence of the Canon Law was relatively minor by 1640 it is certain that from that point onwards it ceased to be a source which could be called upon with confidence by the Court where lacunae arose in the native Law. By then of course the Canon Law had been received or rather absorbed to saturation level into the municipal law of Scotland[109]. However, one could point to legislation like that of 1429 importing the oath of calumny into temporal procedure as part of a process of deliberate improvement and conscious development of the secular Courts and process upon ecclesiastical models. It is from the Act of 1429 that the secular Courts adopt the oath. The oath passed into usage in the Commissary Court after 1563[110] and notwithstanding the Reformation was used in the Kirk Session[111].

As part of the secular procedure it gave rise to a great deal of litigation[112] which developed the concept farther eventually with the assistance of legislation to extinction[113] and in the consistorial sphere eventually to abolition[114].

Following upon the administration of the oath of calumny the peremptory exceptions were proposed and a term fixed for their disposal. Peremptory defences have already been touched upon but require some further investigation. Following the Roman Law, the canonical peremptory defences were perpetual in their validity, e.g. fraud, duress[115] and res judicata[116]. Then positiones or separate allegations of fact were lodged by the pursuer in court with copies which were passed to the defender. These were designed to fix the contentious points and sift the relevant matters from the superfluous. The defender answered in a curt form, yes or no, although failure to answer a position was counted as admission. Positions were acts of the parties and constituted part of the suit, however the judge also had a method whereby he could ascertain the substance of the case, the interrogationes in jure[118].

Upon the positions being formed the pursuer was asked to state that he believed in what was stated in his positions, by way of re-enforcing the oath of calumny and certifying that he was satisfied with the content of his case after the amendment and specification of the positional stage. The defender having made responsiones to the positiones was asked by the judge, whether he believed in his answers.

The case then proceeded to the probatio or proof of the positiones and responsiones in issue, a term ad probandum was therefore fixed. The stages of allegation and proof merged without any distinct points of cessation and commencement.

The proof proceeded by the pursuer attempting to prove his positiones and the defender his responsiones or exceptiones. This required oral

arguments by the parties or their representatives by way of disputationes et allegationes, the matters of fact and law were clarified.

The pursuer's pleadings or allegations were put first and the defender made reply thereto by way of exceptiones, these in turn could be replied to by way of replication. The defender could then return with a duplicandum and the pursuer with a triplicandum and so on until the case for both parties is set out as fully as possible. It was stated by the Statute of the Synod at Perth[119] that the Judge had a great discretion to allow replies to false allegations. Fines were instituted by the same Synod of those who proposed frivolous defences, replicandum, or duplicandum.

The general rule in proof was that of the Roman Law, "onus probandi incumbit ei qui asserit, actore non probante reus absolvitur". The onus of proof is upon him making the allegation[120] on the pursuer not proving then the defender should be absolved[121]. It is in the theory of proof and the means of proof that the Germanic influences course strongest in canonical procedure[122]. Durandus, the Speculator gives a list of means and grounds of proof. These are not all relevant for the present purposes. Those important for this topic are probationes per testes, per confessionem, per instrumenta, per evidentiam facti, per praesumptionem and per indicia indubitata.

By probatio per testes the Judge could be satisfied by the evidence of witnesses. Once the positiones were alleged, the pursuer would announce his intention to prove them by witnesses. Following Roman Law direct evidence was the best evidence. Hearsay, for example was

frowned upon[123]. The Canonists also took from the Gospel of Matthew that two or three witnesses provided full proof - plena probatio, a rule which now finds sway in Scottish Law by the requirement of corroborative testimony[124].

"But if thy brother shall offend against thee,
go, and rebuke him, between thee and him alone.
If he shall hear thee, thou shalt gain thy brother.
And if he will not hear thee, take with thee one or two more,
that in the mouth of two or three witnesses every word may stand[125]".

The requirement to show to the Judge what truly happened, leads to an acceptance of Roman concepts of the worthy witness and in conjunction with this to Lombard or Germanic ideas of oath - helpers or cojuratores. Upon the naming of witnesses, objections would be heard against them, there were those witnesses who would be alleged as unconditionally credible, the so-called 'classici', others who were suspecti or doubtful would be alleged as incompetent, thereafter the acceptable ones were summoned by the Judge and upon their appearance were sworn.

It was essential that litiscontestation had occurred otherwise the evidence of the witnesses was null[126]. It was not necessary for witnesses to be heard in non-contested cases, where evidence per confessionem would suffice, however, where the case concerned carnal or spiritual marriage it was ordained that witnesses be heard whereupon a definitive sentence could be granted[127]. Then the Pursuer made up interrogatories or questions on the basis of the positiones which were then termed articuli or intentiones, these interrogatories

were lodged with the judge who transmitted copies thereof to the defender. The defender framed objections or cross-interrogatories and the judge thereupon decided the admissibility or otherwise of the questions.

Upon swearing de veritate, the witnesses were then examined without the parties being present. The examination normally was made by the judge. The examination had to be prudent and circumspect; cross examination was advised to be close and upon only those facts and circumstances necessary and suitable for testing the bona fides of the witnesses[128].

If the Judge could not conduct the examination of the witnesses a Roman Notary was duly appointed to interrogate and to receive answers. However, this could only be done, for example, in the Archdiaconate of Lothian after the permission of the Official of Lothian or his commissary had been sought and obtained[129]. In sees other than Saint Andrews the power of examination of witnesses was assigned to the Ordinaries, Officials or Commissaries General of those sees exclusively. No deputies or substitutes were permitted to examine witnesses and no faith was put in the testimonies of witnesses examined in any other way[130].

The tampering with witnesses was a great problem and much legislation was passed in an attempt to prevent the suborning of witnesses and the perverting of justice. In 1549, for example a Synodal Statute was passed punishing with excommunication anyone who "shall use persuasions to induce the parties or the witnesses to swear falsely or cause them to get out of the way by stealth or in order to create

delay"[131].

The Commission to proceed in the Divorce of J.A. de S and E.N. granted by Archbishop Forman states that if witnesses hide faithful testimony by reason of a bribe or for a favour they can be compelled, by the authority of the Archbishop and by a church censure (e.g. excommunication) to speak the truth in the cause[132].

There were particular rules regulating the evidence of those witnesses in cases of divortium a vinculo matrimonii on the ground of nullity arising from impotentia, so it was that a husband was not to be believed, even if he swore on oath, that he had relations with his wife, if she proved to the contrary by the testimony of seven matrons, i.e. the testimonium septimae manus[133]. In this one can see the Germanic influence emerge briefly on the surface of Roman-Civil-Canonical procedure, for the seven matrons giving evidence are little more than cojuratores or compurgators. They testify to character not events, in the main they are mere oath helpers, lending credibility to the claims which one party makes about events, in toro[134].

In the three cases of impotency adjudicated upon in Scotland prior to the Reformation of which there are records, there is no indication that testimonium septimae manus was in use[135]. It was however known of by Hay who in speaking of the proof of impotence declares that where impotence could not be clearly shown "they (the parties) are bound to live together for three years ... doing their best ... to have intercourse and when the three years have elapsed they must swear with seven witnesses that they did all they could ... but without

success"[136]. It survived the Reformation and is found in the cases of Drummond -v- Murray (1691)[137] where physical impotence ad coitum omnino impotens is testified to by means of proof septimae manus.

Similarly, in the later case of Nicholson -v- MacGloss (1693)[138] the parties utilised the testimony of relatives who spoke of both physical and psychological impotence. However, it seems that the mode of proof had ceased to be merely oath helping by that time. In the case of MacMalvak -v- MacGlashan (1693)[139], on physical impotence, the evidence of witnesses who had bedded the couple was taken. The witnesses testified that after the defender had essayed copulation, two witnesses, one one either side of the bed, asked the pursuer if the defender was active or not. The pursuer answered in the negative, the defender protested, whereupon the witnesses, to find the proof put their hands between the couple and found that the pursuer spoke the truth. This was indeed a change from compurgation to direct evidence. In that way one could state that Willock[140] in claiming that the allusions are bare is correct but it is submitted, incorrect in stating that Septimae Manus as strictly understood, had survived the Reformation. Just as the Canonists in their way were guilty of misconceiving Roman procedural and substantive law, similarly the Reformers were also at fault in their understanding of canonical process. Septimae Manus as it appears in Lord Hermands Consistorial Decisions appears to differ greatly from that form of proof described by the same name in the Corpus Juris Canonici. It appears as direct proof, not compurgation.

Proof of impediments could not be taken from those who suffered from the same impediments[141]. Witnesses' statements were ordained by

Synodal Statute to be taken down by the scribae curiarum, the clerks of court and after they had been considered by the judge, were to be entered in the protocols[142].

There were also regulations affecting instrumenta or documentary evidence. All documents were to be registered with the court lest they be lost or destroyed or lest they be substituted by other documents which had not been produced originally in court[143]. The penalty of excommunication was decreed for those who tampered with instruments lodged in court or who altered the protocol books kept by the clerks of court[144]. Similarly, the suppression of documents in an effort to hinder the execution of decrees was punishable[145].

The other methods of proof including that by oath are dealt with more fully in the survey of Romano-Canonical procedure given in Naz, Dictionnaire Canonique[146].

Upon the proof being complete the Canon Law judge moved directly to the proclamation of the judgement which was the application of the law to the facts of the case[147]. Following the Germanic custom, the Canon Law retained the division between the proof and the conclusio in causa. Similar to the Roman Law which admits of interlocutiones and praeiudicia, the Canon Law had decreets interlocutory and definitive[148]. Sententiae interlocutoriae decided matters arising from the cause. Sententiae definitivae decided the cause itself and allowed the plea of res judicata to be proponed in relation to the cause. A judge who rendered the judgement definitiva could not recall it, the appropriate method of recall was on appeal to a higher court. The Sententia definitiva was thus a decree in foro; if made in absence

it was not valid unless the absentee was contumacious. If he had a relevant excuse then he had to be allowed to submit an answer and to join issue[149]. A sententia in matrimonial causes was never subject to the doctrine of res judicata and could always be revoked if constituted in error[150]. Sententiae did not fall upon appeal unless the appeal was relevant. They could only be reduced by a higher authority and until then were valid and of full effect[151].

The judgement was delivered orally[147] in Court and thereafter confirmed in writing[153] narrating the Judgement and of which an abstract which was later entered in the Protocol book of Court Actae[154]. The pursuer's advocate craved the judge on bended knee for his decision which was always granted in open court[155].

The definitive decision could then be enforced with what was described "Canonical Coercion", i.e. such power as was necessary to pass it into effect[156].

NOTES

1 Esmein, Le Mariage en Droit Canonique pp. 20-28

2 Georges Duby, Medieval Marriage Ch. 1.

3 Regiam Majestatem (Stair Society) Chapter 2, hence quoted R.M.

4 R.M. Ch. 50.

5 Scottish Annals from English Chronicliers, quoted Donaldson's New History of Scotland, Vol 3 p.28, hence Donaldson...

6 National Manuscripts of Scotland; No. XIVII

7 Robertson, Statuta Ecclesiae Scoticanae i CX

8 Formularium Instrumentorum, (G.U. Special Coll) fo. 251

9 Lyndwood, Provinciale seu Constitutiones Anglicae II, 14

10 Lyndwood, op. cit. II, 1,79

11 Lyndwood, op. cit II, 1,79

12 Saint Andrews Formulare No. (Stair Society)

13 Saint Andrews Formulare No.

14 Utriusque Juris, both Canon and Civil Law

15 Patrick, Statutes of the Scottish Church; 287 (S.H.S.)

16 Lyndwood; Loc. cit.

17 Liber Officialis Sancte Andree passim

18 St Andrews Formulare: i, 31-32 ii 192

19 Registrum Episcopi Glas. 332

20 Lyndwood II, 1, 79.

21 See "Canon Law as a Source" Stair Tercentenary Studies (Stair Society)

22 St Andrews Formulare, No. 100, Process of Dispensation

23 Protocol Book of Cuthbert Simon 394

24 Protocol Book of Cuthbert Simon 426, 437, 502

25 Saint Andrews Formulare loc. cit.

26 Protocol Book of Mark Carruthers (S.R.S.) p.46

27 Protocol Book of Mark Carruthers p.37

28 Treatise on the Law relating to Husband and Wife; Fraser.

29 Fraser op. cit. passim.

30 A.P.S. 1493 C.7.

31 Esmein op. cit. passim.

32 Formularium Notariarum Rotae fo. 267

33 Op. cit. fo. 261.

34 Acts of Lord Treasurer Whitsunday 1558.

35 See infra

36 Registrum Secreti Sigillii (R.S.S.) Jac V 1530, 6th Jan.

37 R.S.S. 1589, pg 224 1588.

38 R.S.S. 2226 pg 359

39 R.S.S. 2238 pg 362.

40 For a good summary see Ollivant, 'The Court of the Official' (Stair Society).

41 Continental Legal History Series Vol III Ch. 4, p.455.

42 See Glasgow University Library List in Stair Tercentenary Studies (Stair Society) p.124.

43 A will which occurs in the Protocol Book of Gilbert Grote narrates some of the works which were included in the private Library of David Quhytlaw, including Durandus, Panormitanus, Cynus de Pistoia, Baldus, Bartolus and others, Protocol Book of Gilbert Grote (S.R.S) 107.

44 See Liber Officialis Sancte Andree (Abbotsford Club) passim and European Legal History Vol III 460 et seqq.

45 Inst IV, VI, 1 et seq.

46 Stair Tercentenary Studies p.119. (Stair Society)

47 See Ollivant, The Court of the Official in Pre Reformation Scotland passim.

48 Saint Andrews Fomulare No. 99.

49 Divorce in the sense of Divortium a vinculo matrimonii on the basis of nullity.

50 Patrick; Statutes, (S.H.S.) No. 288, p.p. 128-34.

51 Buckland, Textbook of Roman Law, 665.

52 Inst IV, 624 where libellus conventionis can be translated as Statement of Claim.

53 Cooper; Select Scottish Cases of XIII Century passim.

54 C. I, 6

55 C. 4, 6.

56 Statutum Concilii Ecclesiae Scoticana apud Perth (1549) quoted in the introduction to the Liber Officialis Sancte Andree.

57 Continental Legal History Vol III, 465.

58 Balfour's Practicks (otherwise Balfour) 297, C. I.

59 Saint Andrew's Formulare No. 99 see also the Memorandum listed in the Protocol Book of Alexander Gaw, (S.R.S.) No. 82.

60 Stair, 1, 1, 12.

61 Balfour 299, C. IV

62 Balfour loc. cit.

63 Cf Stair IV, XI, 4.

64 Lyndwood, "Provinciale seu Constitutiones Anglicae" Loc. cit.

65 The University of Glasgow (G.U.P.) Durkan and Kirk.

66 Aberdeen University was founded in 1494 therefore it is Scotland's youngest medieval University. Hay's lectures on Marriage and the other Sacraments were delivered there. The lectures on Marriage are edited by Rt Rev Mgr J.C. Barry and published by the Stair Society. I am presently translating the lectures on Extreme Unction and Orders.

67 Protocol Book of Cuthbert Simon No. 117.

68 Lyndwood; Loc. cit.

69 Protocol Book of Cuthbert Simon No. 115.

70 Statutum Concilii Ecclesiae Scoticana apud Perth (1549)

71 Patrick Statutes, 229.

72 Statutum Concilii Ecclesiae Scoticana apud Perth (1569)

73 Patrick Statutes, 229.

74 Inst 1, 10, 8.

75 Statutum Concilii Ecclesiae Scoticana apud Perth (1549)

76 Patrick, Statutes, 233.

77 Patrick, Statutes, 233.

78 Buckland; Textbook, 630.

79 Patrick, Statutes, 234

80 Patrick, Statutes, 235

81 Continental Legal History Vol III, 469

82 Statutum Ecclesiae Scoticana apud Perth (1549)

83 Buckland, Textbook, 632.

84 As Kaser suggests 82, I, 1 and 87, I, 4.

85 Statutum Ecclesiae Scoticana apud Perth (1549)

86 For the Interrogatories see Continental Legal History Vol III, 465; C. un, X, de litis 2, 5.

87 See Note 85 ultra

88 Patrick, Statutes, 230

89 See ultra.

90 G. IV, 74

91 C. 2, 58, 1, 2. Thomas, Textbook of Roman Law, 120.

92 C. 2, 49, 1.

93 Inst. IV, 16, pr.

94 Naz, Dictionnaire de Droit Canonique; sub voce Serment de calomnie.

95 CII, X, 7, 2.

96 I, II, IV, I in Vi.

97 (1855) II D.604.

98 A.P.S. 11, 1429, C. 16.

99 Op. cit. Serment de calomnie.

100 C.2, 49, 2.

101 Hay, 304.

102 1424 C. 45; A.P.S. ii, 8 C. 24.

103 A.P.S. 11 335, C. 2; Stair IV, 1, 778-787.

104 Hay XXXII.

105 Fraser, Sutherland III, 20.

106 Erskine, J. Principles I, III, 24.

107 A.P.S. III, C. 133.

108 A.P.S. IV C.24

109 Robertson, Stair Tercentenary Studies, passim

110 See infra

111 Ollivant, op. cit. does not seem to acknowledge this survivance.

112 Lovat -v- L. (1577) M. 9374

Ker v. Ker (1582) M. 9375

Stair, IV, 44, 16 et seqq.

113 A.S. Feb 1715, S.6.

114 Divorce (Sc) Act 1976 S.9.

115 Inst IV XIII, 8 and 9.

116 Not applicable in matrimonial causes C.7. X, 11, 23.

118 See Continental Legal History, Vol III, 473.

119 Inst IV, XIV, pr - 3, Statutum Concilii Ecclesiae Scoticana 1549

120 D.G. C. 3, IV q. 2 and 3, II 12 in VI, de exceptione.

121 D.G. C. 75, XII q. 3.

122 Naz op. cit. 289

123 Nov. 90, 2.

124 See Walker & Walker on Evidence, passim

125 Matt 18; 15 and 16. cf Deut 19 15-17.

126 C. X, 11, 6.

127 C. X, III, 6.

128 Patrick, Statutes, 244

129 Statutum Ecclesiae Scoticana (1549). Apparently Vicars General

could also examine witnesses see, St Andrews Formulare No. 100 (1534).

130 Patrick, Statutes, 244.

131 Patrick, Statutes, 231

132 See Saint Andrews Formulare

133 C. 57, X de Frigidis IV, 5

134 D.G. C. 5 IV, XV I.

135 See infra sub-voce, impotence.

136 Hay 119.

137 20 July, 1691 Lord Hermand's Consistorial Decisions, 76

138 14 Nov 1693, Hermand, 76.

139 16 Nov 1693, Hermand, 77.

140 Hay, XL.

141 D.G. C. 6, 14, XII, 1 and 9.

142 Patrick, Statutes, 234.

143 Patrick, Statutes, 235.

144 Patrick, Statutes, 231.

145 Patrick, Statutes, 232.

146 Naz op. cit. 287 et seqq.

147 Statutum Ecclesiae Concilii Scoticana (1549)

148 Statutum Ecclesiae Concilii Scoticana (1549)

149 C. 8, X, 11, 27

150 C. 7, X, 11, 28

151 Statutum Ecclesiae Concilii Scoticana (1549)

152 Statutum Ecclesiae Concilii Scoticana (1549)

153 Saint Andrews Formulare (1523).

154 Liber Officialis Sancte Andree passim.

155 Saint Andrews Formulare (1523).

156 Saint Andrews Formulare

CHAPTER II

THE POST REFORMATION COURTS

The Post-Reformation Consistorial Jurisdiction and Procedure

The Reformation

The period immediately following the Reformation[1] is a clutter and confusion of many contesting jurisdictions. For roughly four years a struggle was pursued between the secular and spiritual powers. A contest which had been thought of as won by the Church in early Norman times in Scotland was re-opened and four hundred years of jurisdictional stability were thrown to the wind.

The turbulences of the Revolution and Reformation found expression and were magnified in the jurisdictional contest. The Court of Session, the Privy Council and Commissary Court, the Kirk Sessions, the Presbyteries and the General Assembly were all to put forward claims to exercise the consistorial jurisdiction. The essence of the spiritual and secular conflict was born in the throes of Revolution, a Revolution whose chief ecclesiastical effect was canvassed in the act of the "Reformation Parliament"[2].

"The three estatis then being present understanding that the jurisdiction and autoritie of the bishope of Rome callit the paip usit within this Realme in tymes bipast has bene verray hurtful and prejudiciall to our soveranis autoritie and commone weill of this realme. Thairfoir hes statute and ordainit that the bishope of Rome

haif na jurisdiction nor autoritie within this realme in tymes cuming. And that nane of oure saidis soveranis subjects of this realme sute or desire in ony tyme heireftir title or rycht be the said bishope of Rome or his sait to any thing within this realme under the panis of barratrye that is to say proscription banischement and nevir to bruke honour office nor dignitie within this realme. And the controvenaris heirof to be callit befoir the Justice or his duputis or befoir the Lordis of Sessioun and punist thairfor conforme to the lawis of this realme. And the furnissaris of thame with fynance of money and purchessaris of thair title or rycht or mainteanaris or defendaris, of thame sall incur the same panis. And that na bischope nor uther prelat of this realme use ony jurisdictioun in tymes to cum be the said bischope of Romeis autoritie under the pane foresaid".

The act also annulled all acts of previous Parliaments which legislated to an effect not "agreeing with Goddis Word" and which were contrary to the Confession of Faith of that Parliament. The Mass too, was proscribed and penalties ranging from confiscation of moveables to death in accordance with the number of faults were ordained.

There are many observations to be made regarding this most important act. The primary observation is with reference to the validity of this legislation. The act has a particularly interesting history. It was passed by the so-called "Reformation" Parliament, that meeting of the Three Estates held at Edinburgh in August 1560 which followed closely upon what P. Hume Brown termed "the central point of her (Scotland's) history"[3]; the Treaty of Edinburgh.

The power struggle between Mary, the Queen Regent, the Protestant

Lords and Elizabeth, Queen of England, culminated in the Siege of the town of Leith which began on 6th April, 1560. Mary of Guise had taken refuge in Edinburgh Castle on 1st April and appeared adamant that the rebellious Lords and their English allies should not conquer. In the end a combination of events, none strictly military, forced the surrender of the city. Particularly one should note the political and religious opposition to the Family of Guise which prohibited attention from France together with difficult communications and the death of Mary, Queen Regent on 11th June.

The French Commissioners Monluc, Bishop of Valence, and Charles, Sieur de Rardan had already been discussing terms with Sir William Cecil and Dr Nicholas Watton and the Treaty of Edinburgh was concluded there on 6th July, 1560. Perhaps as important as the treaty itself which provided for the cessation of hostilities between the English and French and the withdrawal of foreign forces from Scotland and for the renunciation of the use of English arms, thereby, by implication, acknowledging Elizabeth's title to the English throne, were the concessions granted by the representatives of Mary and Francis, King of France to the Scottish subjects of the Queen of Scots at the same time as the treaty was concluded. The concessions authorised a Parliament to be held which met in August. By Article IX of the Concessions it was concluded that "it shall be lawful for those to be present at that meeting who are in use to be present". By implication this ordinance rendered illegal the presence of many lesser Barons who although entitled in strict law to attend Parliament were not so "in use". This significant change in attendants has importance because the Barons lent weight to the proposals which became enshrined in the Acts of the Reformation Parliament. More noteworthy perhaps was the

proscription upon the discussion of matters of Religion at this Parliament.

"There have been presented articles concerning religion and certain other points in which the Lords deputies would by no means meddle, as being of such importance that they judged them proper to be remitted to the King and Queen. Therefore the said nobles of Scotland have engaged that in the ensuing Convention of Estates some persons of quality shall be chosen for to repair to their majesties and remonstrate to them the state of their affairs, particularly those last mentioned"[6].

It may be that the Commission referred to in this article, consisting of the persons of quality finds expression in the Commission of 1560 of which Knox writes[7], which consisted of John Winram, Sub prior of Saint Andrews, Master John Spottiswoode, John Willock Superintendent of Glasgow, John Douglas, Rector of Saint Andrews, Master John Row, former Agent in Rome, Papal Nuncio, and John Knox[8].

It is certain that following upon this article when Parliament met nearly one month after the granting of the Concession, the idea of a Commission to examine the state of Religion in Scotland was fresh in the minds of the members of the Three Estates.

It may be that the foundations of the "Good and Godly policy" of the Kirk, laid in the Book of Reformation were built upon by this Commission and thereby account for the interpolations which are to be found in the First Book of Discipline and which are dated by Cameron, in the autumn and early winter of 1560[9].

The effect of the Concessions is that a Parliament was held in August 1560 without being summoned by the Queen and, that in express contradiction to the Concessions not only discussed "Religion and certain other points in which the Lord's Deputies would by no means meddle", but passed the legislation abrogating Papal Authority, forbidding Mass and accepting the reformed Confession of Faith[10]. These acts, not entirely surprisingly were never ratified by Queen Mary and at least until 1567 were legally invalid[11].

The immediate effects of the Act 1560

The immediate effects of the Act were far-reaching and substantial. Those effects principally of a political and ecclesiastical nature are well documented[12]. The strictly legal effects are less well recorded. Inevitably the principal effect was that the authority of the Pope and of the structures of the Canon Law were of no effect in Scotland. The jurisdiction and authority of the Pope were abolished in Scotland for all time. Appeals and supplications on all matters could no longer be heard at the Court of Rome, the Cancellaria, the Rota, or the Penitentiaria. Also, no bishop or prelate was to hold any jurisdiction by the Pope's authority.

However, as can be observed by an examination of the Act, there was no dismantling of the Catholic Church's judicial system. Only the papal jurisdiction and jurisdictions and authority operated under papal authority were affected by the Act. The Church judicial structure was not directly affected by the abrogation of papal authority. However, the political and ecclesiastical effects soon overcame this exemption by omission and as the Reformation progressed the courts of the Church

found it increasingly more difficult to work and the only course open was that which led to the absorption into the Reformed system. There are however some instances of the apparent survival of papal authority and jurisdiction, e.g. in 1577 when John, Archbishop of Saint Andrews, grants letters of dispensation to Robert Hamilton and Marjory Wotherspoon, he is named Papal Legate. This could be of significance as an indication of papal authority or could indicate merely, and probably more likely the natural conservatism of the notary who drew the letters of dispensation[13]. Similar hints of such survivance are indicated by Kirk[14].

The rejection of papal authority placed the Reformers in a crisis of conscience and self doubt. This crisis was yet to be recognised and indeed would only become purged by the intellectual development contained in the Second Book of Discipline: the concept of the "two kingdoms". The rejection of the (earthly) papal intermediary between the people of God and their divine Lord laid the foundations for the hoped for rejection of the (earthly) princely intermediary.

The first ground however where contest was found between the new religion and the state was not unexpectedly to spring from the ruins of the judicial system which, although not demolished by the Act of 1560, was dealt a death blow from which it could not and did not recover.

The Juristic Vacuum and the Jurisdictional Contest

There were many conflicting claimants who entered the lists for the consistorial jurisdiction. Of these some were temporal in nature and

others of the new spiritual order.

The New Ecclesiastical Courts

In tandem with the uneven development of the Reformed religion on an organisational and administrative basis, the judicial development was similarly piecemeal. Whilst the archbishop of Saint Andrews and the bishops of Dunkeld and Dunblane were leaning towards the Reformers they did not assent to the Confession of Faith. This reticence even in sympathetic sees, explains the impromptu fashion in which the essentially congregational church established Kirk Sessions, e.g. as in Saint Andrews. From mid-May 1559, Saint Andrews had been held by the 'insurgents', reinforced by the arrival there of the Protestant Lords Argyle and James Stewart on 6th June. Knox proceeded with the Reformation of the town, a great psychological victory as such, striking at the heart of the Superior Metropolitan's seat. The Dominican and Franciscan monasteries were destroyed and the Kirk Session of Saint Andrews was established, basking in the protected medium of the newly reformed town. This gathering of the minister and elders of the congregation at Saint Andrews almost immediately began to adjudicate on various matters taking over effectively from the ancient but now overcome Court of the Official of Saint Andrews, and his Commissaries. That this convocation of the minister and elders considered itself as a Court is clear from the Session Registers[15]. It met in the Consistory House[16] and appointed an Officer known as the scribe of the Consistory Court, with whom notifications of banns were to be lodged[17].

Although the First Book of Discipline did not perhaps appear in its

final form until January 1561 it is useful in displaying the ideas which the Reformers had about the Kirk Session, its form and its function. It should be remembered that it was merely a set of recommendations made to the Lords and was never passed into Law.

The Kirk Session was constituted by the elders or seniors of the Church, based upon a Swiss Calvinistic model. It was an attempt to establish a Reformed consistory[19]. The office of an elder of the kirk was generally to assist the "ministers in all publike affaires of the Kirk". This direction was specified by including the determination and judging causes, admonishing licentious livers and having respect to the "manners and conversation" of all men within the charge of the kirk[19]. There were other ecclesiastical officers canvassed as part of the scheme of the reformed Church, e.g. Superintendents, Readers and Deacons. The offices of Reader and Deacon had no essential juridical function[20].

The superintendent as an ecclesiastical office is one of exceeding interest. Many have claimed that the superintendent is merely a bad Latin translation of the Greek Episcopos, others that the difference of approach to the office stated in the First Book of Discipline, particularly the temporary nature of the office, denotes a specially presbyterian stance.

In many respects the superintendent was a bishop in other guise; he operated within a diocesan framework[21] having jurisdiction over ministers[22], kirks and the manners of the people as well as fulfilling evangelical roles in preaching and visitation[23]. Due however to the renunciation of the Apostolic succession, a rejection which was to

cause grave doubts in the minds of many Scottish and English Protestants as the number of episcopally ordained priests decreased through natural wastage and which caused much theological and philosophical discourse, the superintendent ceased to have powers of ordination and confirmation.

It must also be stated that in being subject to the censure of the ministers and elders[24] of his province, the superintendent showed that the office owed much to the German Lutheran Churches and Lasco's Church of the Foreigners in London[25]. As Dr Ian Cowan rightly points out the question of the correlation of episcopacy with superintendence "breaks down in terms of spiritual authority"[26].

The Jurisdictional Contest:

The Jurisdiction of the Kirk Session and the Commissary Court

Apart from the general indication of the Session's jurisdiction given in the First Book of Discipline[27] there was no formal statement of the jurisdiction and it must be said, for example, that the Kirk Session of Saint Andrews, the first Session and the only one for which there are near-complete early records, exercised the jurisdiction of the Canonical Court as it were, by default. This unopposed assumption of jurisdiction was easily achieved because the Catholic Church had not been endowed with the jurisdiction to recognise cases by the Crown, consequently the Crown could have no legal objection to the assumption of a jurisdiction which was based upon ecclesiastical loyalty in times of ecclesiastical power or upon the convenience of parties in terms of ecclesiastical weakness.

Meetings of the Kirk Session of Saint Andrews or of any other congregation did not require, until the Black Acts, any royal licence. Indeed there is some slight evidence for suggesting that at least originally, royal policy was to allow the Kirk Sessions to meet and to use this ecclesiastical forum for the local administration of justice.

The case of Alexander Lothrisk[28] who resided in Kirkcaldy and was deserted by his wife who committed adultery is instructive. He sought divorce from his wife for this alleged cause. The minister and elders refused to take the cause without the orders of the Kirk Session of Saint Andrews. Lothrisk then proceeded to petition the Lords of Secret Council to order the Saint Andrews Kirk Session and to require the minister and elders to proceed and do justice in the cause. The citatio to the minister and elders of Kirkcaldy narrated the request by the Privy Council and stated that the Saint Andrews Kirk Session could not "proceed to any judicial act in this ... cause without true cognition". The Session of Kirkcaldy was ordained to summon Lothrisk's wife to appear in the consistory House of the 'Paroche Kirk of Saint Andrews'.

This co-operation between the secular Privy Council and the Kirk Session exhibits the pragmatism of the temporal authorities. In other parts of the country where the secular arm was not perhaps so weak, the Kirk Session seemed also to operate the consistorial jurisdiction, e.g. in Edinburgh the Kirk Session pronounced a divorce simpliciter between James Hamilton of Kincavil and Isabel Simpson[29]. In the years preceding the promulgation of the Second Book of Discipline in 1578 as a statement of the policy of the Kirk, the Crown's opinion vacillated between approval of the Kirk Session and condemnation and revocation

of Sessional decrees and judgement[30].

The decreet rendered by the Kirk Session in the above case of Hamilton -v- Simpson was revoked by the Commissaries in 1564. The General Assembly was determined to clarify this vacillatory and confusing state of affairs and in 1562 ordered that supplication be made to the "Secreit Counsal" to give up universally the judgement of divorce to the Kirk and their sessions or "els to establish men of good lives, knowledge and judgement to take the order thereof". This supplication will be examined later in connection with the Commissary Court. Suffice to say that the confusion was not ended thereby and the question of jurisdiction remained vexed and troublesome.

In 1560 the Court of Session, then, of course, still staffed to the extent of one half by clerics and with Henry Sinclair, Bishop of Ross as Lord President exercised a jurisdiction which Riddell[31] attributes to the nobile officium, in a matter of adultery. The case from which this jurisdiction was exercised was Chalmers -v- Lumsden (1560) which Balfour[32] quotes as authority for the proposition that the Lords of Counsel have power to cognosce and decide on spiritual causes if the 'consistorie or ecclesiastical jurisdiction ceises or be stopt be civil wars or utherwayis'.

However it is submitted that this is not an exhibition of the Nobile Officium. There may have been 'na Consistories instant' and the spiritual jurisdiction may have been ineffective, but one must remember the Kirk Session of Edinburgh was hearing consistorial cases as was the Kirk Session of Saint Andrews, and if any doubt remained a commission could be sought from the Privy Council to order the Session

to cognosce. It is contended that this was an attempt by the secular jurisdiction to impugn the growing reformed judicial establishment and gain control of a very important ecclesiastical function.

The Kirk Session continued to develop and re-emerge in the description of the 'particular' eldership contained in the Second Book of Discipline[33] in 1578 as part of the perfect policy of the Kirk, albeit more as a begrudged survivance than as a sanctioned and fostered organisation.

In the intervening period between 1562 and 1578 much happened which effectively deprived the ecclesiastical power of its privative jurisdiction in consistorial matters.

As has already been noted the General Assembly in 1562[34] suggested a supplication to the Privy Council to either give up the divorce jurisdiction or to appoint men of good lives, knowledge and judgement to take up the jurisdiction, providing that the Privy Council made provision for the punishment of the wrong-doer. This suggestion was taken up by those making a supplication to the Queen and the Privy Council on behalf of the General Assembly but in some different terms; "That Judges be appointed to hear causes of divorcement for the Kirk can no longer sustain that burden"[36], The real problem however related to the enforcement of decrees.

A supplication of this nature struck a chord in the ears of the Privy Council. It was well aware of the pleadings of litigants such as Chalmers and the action of the General Assembly in appraising an ordinance that "no minister or other officer of the Kirk is to

cognosce or decide in Divorce except the Superintendents[36] and their special commissioners and between special persons[37]" would perhaps put fear in the minds of the Privy Council that the Church was once again asserting a jurisdiction which the State could not politically admit.

The Privy Council was also quite aware that such supplications exhibited weakness on the part of the Assembly which situation was to be contrasted with times of relative ecclesiastical strength, e.g. in 1570 when the Assembly once again sought the jurisdiction in matrimony[38].

When the nineteen year old Queen Mary arrived from France and made landfall at Scotland on 19th August, 1561, her position was seen to be one of the utmost delicacy. This is all that could be expected of the position of a Catholic Queen in a country which had rejected the authority of the Pope.

The early years of her reign were dominated by two conflicts. Internally that between the Monarchy and the Church, and externally, that between Scotland and her allies and England. These two conflicts were aspects of essentially the same problem, that of sovereignty. She was fortunate in her two principal advisers at that time. Maitland of Lethington served her exceptionally in foreign affairs, whilst at home, James Stewart (later Earl of Moray) dealt with the problem of Huntly (1562)[39].

Campaigns like those against Huntly and the diplomatic discussions with Knox which resulted in the prosecution of Archbishop Hamilton of Saint Andrews and some forty-seven other clerics for saying Mass

caused the stability required for a Convention of Parliament to be called and enabled the Queen to call a Parliament and obtain from it whatever she desired.

This equivocal policy was enforced by a confusion of conflicting signals which Mary sent the Reformers; upon her return to Scotland Mary issued a proclamation to her lieges that they "containe themselves in quietnes, keap peax and civile societie" and further that none of her subjects make any alteration or innovation of the state of religion or attempt anything against the form which she found existing upon her arrival[40].

The confusion was not, in a sense inadvertent, as perhaps some[41] would suggest in alluding to the non-papal Catholicism of Lorraine and the inauspicious match with Bothwell. Instead one could contend that it was deliberate Marian policy designed to lead the Reformers astray, to allay the fears of the powerful parties, including the secular Lords and Elizabeth and to ensure the retention of the Crown for the Queen on her own terms.

One can perceive a particular expression of this policy and an event of great juridical importance in the creation of the Commissary Court in 1564. On 28th December, 1563 the Privy Council professed some concern about the long delay in obtaining justice and how litigants were frustrated in obtaining relief for their causes and therefore Her Majesty with the advice of the Council, "thought good" that a jurisdiction be "erecit in sindrie pairts of this realme" in order to adjudicate on Consistorial Causes, and particular in those which Prelates had decided 'of befoir'.

To this end a Commission consisting of Henry Sinclair, Bishop of Ross, Lord President of the Court of Session, Richard Maitland of Lethington, William Maitland, Maitland of Lethington's son, Secretary of the Privy Council and the Queen's diplomat, James McGill of Nether Rankelaur the Clerk of Register, Sir John Bellenden the Lord Justice Clerk, Lord Auchnoull and Sir John Spens the Queen's advocate was established to 'sit down and devise' an order for the Commissary Court and that the conclusions are to be put into articles (bills) which were to be subscribed by the Queen[42].

The Commission duly reported to the Privy Council and on the 8th February, 1563 the following Charter of Constitution was issued from the Privy Council:-

Maria, Dei Gratia Regina Scotorum, omnibus probis hominibus suis, ad quos praesentes literae pervenerint salutem. Noveritis, quod uti palam constat ob cessationem seu absentiam ecclesiasticae jurisdictionis Officialium et Commissariorum intra hoc nostrum regnum omnes actiones et causae consistoriales cognoscendi et in consistoriis decidendi antea in usu fuerant per longam justitiae dilationem sic dampnificatae extiterunt magna una pars nostrorum subditorum, quod ipsi qui dictas actiones occurrentes habent mentisque existunt promptitudinem atque ad prosequendum habens multimode per carentiam ordinis eiusdem postpositi existunt. Et nos ingens gravamen aut populi nostri laesionem per huiusmodi recepimus ac in dies recipimus volentes eos inde relevare, nec non per provisionis viam in huiusmodi locum vulgo Rowme bonum quendam ordinem stabilire sic quod justitiam illis exacte rationabiliter et cum omni diligentia in posterum ministrari seu fieri poterit: Quocirca cum avisamento Dominorum

nostri secreti consilii, fecimus, constituimus et ordinavimus ac facimus, constituimus et ordinamus per praesentes dilectos nostros consiliarum consisum et clericos Magistros Jacobum Balfour, Rectorem de Flisk, Edwardum Henryson in juribus seu legibus Doctorem, Clementem Litill, Advocatum, et Robertum Maitland ac quomque eorum conjunctim et divisim in modo sequenti nostros Commissarios Edinburghi in hac parte. Dando, concedendo et committendo illis, illorumque cuique conjunctim et divisim nostram plenam potestatem ac mandatum speciale intra burgum nostrum de Edinburgh in quacunque conveniente parte ejusdem sedendi et ullo diei tempore prout illis placuerit, coram eis omnes nostros ligeos infra bondas, vicecomitatuum nostrorum de Edinburgh principali, et intra constabulariam de Haddington, Peblis, Linlithgow et vicecomitatus nostri de Striveling, a Striveling orientaliter, in eisdem villanus et parochiam de Striveling comprehendendo atque omnes actiones concernentes decimas testata bona, injurias curatorum donationem, acto nostri parliamenti conformiter discutiendi, decernendi, et decidendi: nec non omnes alias actiones et causas intentatas seu intendandas coram illis per ullas personas intra bondas praedictas residentes aut contra ipsas per quascumque alias quae in consistorio perprius judicari et decidi solent. Una cum omnibus causis et actionibus beneficialibus, matrimonialibus, divortii et bastardiae, intentatis sive intentandis per quascumque personam seu personas infra ullas huius nostri regni partes vel loca commorantes aut materias matrimoniales inter partes procul residentes, quae ob paupertatem, longum placitum seu justitiam prosequi minime valent, qualificatis personis in patria, vel locis proximioribus locis quibus ipsii commorantur sive resident committendi pro quibus in causa illa respondere tenebuntur. Omnibus quoque appellationibus interpositis seu dependentibus ab ullo alio Commissario, seu Commissariis, quoquore

alio judice ecclesiastico hoc nostrum infra regnum retroactis temporibus; appellationes sive reductiones interponendas postea ab alio quocunque Commissario infra hoc nostrum regnum; Cum potestate praenominatus Magistris Jacobo, Edwardo. Clementi et Roberto ac ipsorum ulli conjunctim et divisim omnes alios judices incompetentes in illis causis seu casibus infra hoc nostrum regnum inhibendi ad procedendum in causis dictorum Commissariorum nostrorum jurisdictioni pertinentibus sive spectantibus; cum certificatione iis si in hoc succubuerint aut desecerint, sive processerint, quod cunque illis agere contigerit depost in se nullum nulliusque effectus declarabitur, cum omnibus quae desuper sequentur, ipsique pro eorum inobedientia punientur Omnimodos contractus obligationes a aliave scripta per partes vel notarios ad ipsorum mandata subscripta proportantes sive gerentes quod ipsae partes eosdem in dictorum Commissariorum libris registrari contentae sunt, cum literis ad eorum nostrum positionis seu nomationis desuper donandis, recipiendi atque in eorum libris supradictis registrari causandi; Praecepta pro testium summonitione ad comparendum fidele testimonium perhibere in omnibus causis motis movendisve coram illis. Sub similibus pecuniariis poenis ac si praelibatis nostris Commissariis secundum qualitatem causae expediens visum fuerit dirigendi; et si testes summoniti existentes minime comparuerint, eorum Officiarios namare, et dictos poenas instructionibus sibi desuper exhibitis applicandas fore causandi; Omnia deforciamenta per quascunque personam seu personas super eorum Officiariis praescriptis commissa vocandi discutiendi ac coram illis decernedi, quorum poenae adeo graves erunt ac si noster officiarius armorum in executione nostrarum literarum deforciatus extitisset; ex eo quod eorum Officiarii executores nostrae justitiae et respectu in hoc nostri Officiarii existunt; Testamenta quarumcumque personae vel

personarum infra bondas suae particularis jurisdictionis supradictas, cuius valoris et quantitatis cuiuscunque sint; Nec non omnia alia testamenta quarumcumque personarum infra ullam aliam partem huius nostri regni residentium aut commorantium, quorum pars defuncti summam quinquaginta librarum excedet confirmandi praefata testamenta in libris ipsorum Commissariorum registrari causandi; dativas si opus fuerit, in forma juris sub cautione dandi sive deliberandi Qui quidem processus ac quaecumque dicti Commissarii ullive ipsorum conjunctim aut divisim aut eorum Officiarii in actionibus et causis suprascriptis illorum nominibus agere seu perficere contigerint, cum omnibus incidentibus emergentibus, annexis, connexis et dependentis desuper adeo valide, legitime tantique grandis valoris, fortitudinis et effectus, veluti ullus processus seu sententiae, quae per quemcunque judicem aut judices consistoriales deductae, vel datae intra hoc nostrum regnum, quocumque elapso tempore fuerunt; Acta, decreta et sententias pronunciandi: Procuratores coram illis, pro prosecutione defensioneque dictarum actionum admittendi; Ordinarios officiarios pro executione suarum directionum faciendi creandi et ordinandi; pro quibus respondere tenebuntur et generaliter omnia alia et singula faciendi exercendi et utendi quae in similibus officiis de jure seu consuentudine sunt aut ullo elapso tempore dignoscuntur pertinere; Ratum et gratum habentes et habituare totum et quicquid praenominati nostri Commissarii, aut eorum quiccumque suive officiarii et ministri im praemissis rite duxerit seu duxerint faciendum. Ac volumus quod praesens nostra commissio jurisdictioni collegii nostri justitiae Vicecomitum, Senescallorum, Balivorum regalium regalitatum Comittum, Dominorum, Baronum, et Liberetenentium, Praepositorum ac Balivorum seu ullius alius temporalis judicis cuiuscumque infra hoc nostrum regnum, in causis eorum jurisdictioni pertinentibus nequaquam praejudicabit

neque derogationem faciet Quare, universis et singulis quorum interest, vel interesse poterit, stricte precipimus et mandamus quatenus supra specificatis nostris Commissarius aut eorum cuilibet conjunctim et divisim suisque officariis et ministriis in omnibus et singulis praemissa concernentibus prompte respondent pareant et intendant, sub omni poena quae competere poterit in hac parte; Praesentibus, nostris bona voluntate et beneplacito, ac quo usque ulterior ordo in praemissis capiatur duraturis. Datum sub testimonio nostri magni sigilli apud Edinburgh octavo die mensis Februari, anno Domini Millesimo quingentesimo sextagesimo tertio et regni nostri vicesimo secundo. Per signaturam manu S.D.N.R. subscript[43].

Mary, by the Grace of God, Queen of Scotland to all her subjects to whom these presents may come, greeting.

You are aware that because it publicly appears by the delayings and absence of the ecclesiastical jurisdiction of the Officials and Commissaries in this our realm where once all consistorial actions and causes were cognosced and decided in consistory, those who seek justice and relief experience delay. A great number of our subjects have no decisions because they had the same said actions current then and they exist now in deception only and that in any case without a proper order for consideration there are many actions stored up. And we, comprehending the extreme gravity and injury to our people which we receive hereby, wish to unveil the following scheme to them.

Not by provisions of going to the place called in the vulgar Rowme but rather to establish good order here, just because justice must be got for them so it can be got and administered reasonably and with all

diligence in the future. Therefore with the advices of the Lords of our Secret (Privy) Council, we make, constitute and ordain and have made, constituted and ordained by these presents our chosen conciliares and clerks, Master James Balfour, Rector of Flisk, Edward Henryson, Doctor of both Laws, Clement Litill, Advocate and Robert Maitland, who are now, whether sitting together or separately in the following way, our Commissaries of Edinburgh in that part.

We give, concede and commit to them either sitting together or separately our whole power and special mandate to sit in our burgh of Edinburgh or wherever it pleases them and at whatever time of the day pleases them. All our liegies within the boundaries of our Sheriffdom of Edinburgh in principal and also in the Constabulary of Haddington, Peebles, Linlithgow and our Sheriffdom of Stirling and to the east of Stirling and the town and parish thereeof can bring their cases before them and in particular to decide, decern and judge in conformity with our Acts of Parliament all actions concerning tithes, bequeathed goods, delict and the gift of curators, but not all other actions and causes of the kind intended or to be intended, which ought to be decided and adjudicated in consistory before them by persons residing within the said boundaries, or against them wherever else. Including however one and all causes and actions relating to benefice, matrimony, divorce and illegitimacy intended or so to be, by whomsoever person or persons staying in any part or place within our realm. Whether by poverty, as accords ancient opinion or to pursue the smallest justice the qualification of the persons joining issue is that they reside or have stayed in the country or in a place very close to the place where the person to be pursued stays. For which they are held to answer in those causes. Also all appeals placed or

pending from any other commissary court or courts or from whatever other ecclesiastical jurisdiction in our realm invented through time. Appeals or even reductions can be interponed after decrees from any other Commissary in this our realm.

With power to the aforementioned Masters James, Edward, Clement, and Robert and any quorum of them sitting together or singly, to inhibit all other judges incompetent in these causes within our realm from proceeding in the said causes pertaining specially to our said Commissary. If others try to deceive or revolt or continue judging or permit causes they can under a certificate from the Commissary be declared of null effect and to be null in se. And on everything following on the above the Commissary can have them punished for disobedience. If parties wish they can register in the Books of the Commissariat all kinds of contracts, obligations, acts, writs of parties and notarial mandates, whether subscribed in part or totally. When they receive letters giving them our positiones and judgements they are to cause these to be registered in aforesaid books.

To prohibit in all causes the taking of witnesses before the summoning to compear with faithful evidence, with power to our said Commissaries to cause the witnesses to come before them under a penalty of a fine which shall vary with the expense and nature of the cause. And if the witnesses who are summoned are still alive and do not compear they are to name officers and the said instructions shown within are to be caused to be applied. For all deforcements by whomsoever person or persons on the above written officers, sent out on court business, the doer is to be called, judged and decerned and the punishments for which deforcements are to be grave and especially if our officers are

deforced in the execution of our letters and that because the officers are executors of our justice and for that purpose they are our officers.

And the testaments of whomsoever person or persons within the boundaries of the above written jurisdiction are within the jurisdiction of the Court of whatsoever value or quantity. But they are not to confirm any other testaments of whomsoever persons living or dead in any other part of our realm of which the dead's part does not exceed fifty pounds. The said testaments are to be caused to be registered in the Books of the Commissaries. You are to give, if the work requires it, judgement in the form of law under caution. With which process and with all incidents, emerging matters collaborations and connected matters and items dependent thereon of equal validity and the legitimacy of such value, worth and effect whomsoever of the Commissaries any of them together or separately or their officers acting in their name can in the actions written above, concern themselves and any execution or dealing therewith. They are to confirm the testaments of whomsoever person or persons within the boundaries of the above written jurisdictions of whatsoever value or quantity but not any other wills of whatsoever person or persons residing or dying together in any other part of the realm unless the dead's part exceeds fifty pounds. The said wills are to be caused to be registered in the Books of the Commissaries. You are to give judgement or deliberate if the case requires it in the form of Law under caution. Which process with all incidents, emerging matters, collaborations and connected matters and items dependent thereon of equal validity and legitimacy of such value, worth and effect can be intromitted with by the Commissaries either together or separately or

by an official acting in their name who can concern themselves with the execution and dealing of the process and this applies, if they wish, to any process or sentence given by any judge or judges in consistory and dated in our realm no matter what time has elapsed. They can pronounce acta, decreets and sententiae. They can admit procurators before them for the prosecution or defence of such actions. They can ordain, create and make Ordinary Officials for the execution of their directions for which they are held to answer and generally they can do all other and singular deeds, exercises and uses which are in use by custom in such offices, they will distinguish what pertains to them in the lapse of time.

It is agreeable and pleasing that those having or about to have actions should lead them before the above named Commissaries or some of them or before their officers or ministers and we wish that our College of Justice, our Sheriffs, Seneschals, Bailies of Baronies of Regality, Lords, Barons, freeholders, Provosts and Bailies and any other temporal jurisdiction within our realm will do nothing to derogate from or prejudice the causes pertaining to the jurisdiction of this our present Commission of jurisdiction. Whereby we strictly urge and ordain to all and sundry persons whose interest or potential interest they are bringing forth or intend, to send the matter in hand before our said Commissaries, either together or separately or to their officers or ministers who will answer swiftly that which concerns them and this under all punishments which can be used in this realm.

Let these presents sustain at our good wishes and pleasure no matter to whichever remote part of our realm they are taken.

Given under the witness of our Great Seal at Edinburgh on the Eighth day of February in the year of our Lord 1563 and the 22nd year of our reign.

Signed by Her Majesty

One can raise many observations upon examination of the Charter. Firstly, it was a Royal Charter issued by the Queen in her Privy Council. It was not ratified by Parliament. Parliament did not make objection to the constitution of the Court, doubtless due to the influence which at that time Mary exercised over the Three Estates. Ratification came with a formal recognition of the jurisdiction and privileges of the Commissaries in 1592_{44}. The ratification noticed that the "jurisdiction ecclesiastical belonging to the officials of auld is and was devolvit in the Commissaries chosen and nominate".

There was great emphasis on the continuity of the jurisdiction and yet from the charter of constitution it is clear that the older courts had effectively ceased to function. Nevertheless, and it is in this that the tone of the constitution of the Court is set, notwithstanding that the old order was alluded to and the Officials and Commissaries' courts and their customary powers mentioned, the possibility of referral to Rome was totally barred. There was also no doubt as to the origin of the Court. The Queen established the Commissary Court to provide for good order in consistorial and other matters and was supported in this seemingly laudable venture by the Privy Council. Possibly the Court was constituted as a temporary expedient to clear the many actions then pending. There are indications that this may have been one of the reasons which featured in the Privy Council's deliberation. It may however be that the constitution was merely an

expedient, the Court was sustained at Her Majesty's good wishes and pleasure it was not declared to be a permanent and irrevocable establishment; accordingly the maxim "unum quodque eodem modo dissolvitur quo colligatur" applied and the Queen could have, should she have seen fit, abolished the court by a prerogative act. The temporary nature of the Court was expressed by the Lord Morton in 1575 when he attempted to revise the legal system in order to provide for the better disposal of cases. In his argument he stated with, as has been seen, some justification "The Commissarys constituted by the Queen for the decision of beneficiall and matrimoniall causis ... quhill a mair perfyct order micht be provided for and establishit"[45].

It can also be remarked that the Ratification of 1592 states that by virtue of the Royal constitution, the Commissaries of Edinburgh and their predecessors with the other inferior Commissaries within the Kingdom have been in use and possession of the jurisdiction in spiritual causes, "and has faithfully and diligentlie dischargit thair dewties in the administration of justice to the liegies; Thairfor his Hienes and estaites ... ratifyes and appreives the said institution of the said Commissaries"[46]. One could construe that from terms of this ratification the Commissaries had in effect been on trial themselves and that the court would only attain permanent establishment upon proving itself as a reliable and acceptable provider of justice. The appointment of the Commissaries is also noteworthy, as it represents a facet of Marian policy which was to enable the establishment of a jurisdiction which would have power to render "all other judges incompetent in the said causes pertaining to our said Commissary". There was, as has already been noted, only one jurisdiction to which this clause could have any applicability that of the Kirk Session.

The new court struck directly at the juristic pretensions of the new Church. The polity of the Reformed Church was so far undefined and the Kirk Session was as yet without formal ecclesiastical establishment[47]. These legalistic matters are important when taken in conjunction with the inferred circumstance from the rapidity of the reappearance of parishioners before the Session that indicates a certain contempt for its decreets. Perhaps Marian policy-makers perceived constitutional weakness combined with parochial apathy as providing the ebb point in the reforming juristic tide to which the Commissary Court could act as a dam. Undoubtedly if the other political and religious devices of Mary had been successful the Commissary Court would have featured largely in the pro-monarchical victory, as it was, instead of being the death knell of the ecclesiastical courts it was (and one hesitates to use the word) merely a decisive move which divested the Church of the greater part of her naturally assumed jurisdiction and brought into secular control those matters which affected the majority of the Queen's subjects, matrimony, divorce, illegitimacy and the confirmation of testaments. Had secular control not been imposed at this time the Private law of Scotland would have developed along ways very much different from that which it did. One can only view the Commissary Court as a political establishment for the secular party not as such for the Catholic party. Whilst the Commission which established the order of the Commissary Court contained high ranking Catholics, e.g. Henry Sinclair, and whilst the Commissaries appointed were at least split in half between supporters of the new order and the old it is certain that politically speaking the broad spectrum of the middle way of Lethington had emerged as the overall tone of the Commissary Court. Certainly if the Court was designed to assert Royal influence and

dominance the composition was correct. James Balfour[48] who had been Official of Lothian from 1554 until 1560 was coming to his ascendancy under Mary. In 1561 he replaced the Abbot of Dunfermline as a Spiritual Lord of the Court of Session, he sat on the Privy Council in that year[49] and became a more frequent member[50] of that body when, as McNeil notices it was a 'very catholic council'[51].

He was to become one of Mary's most trusted Statesmen. However in later betraying her trust he showed that with Machiavelli he recognised political expedient more than perhaps any other of his generation; a generation which was not without its treason, plotting and falsehood. It is clear that for as long as he was trusted by Mary he fulfilled many functions and was of some use to her. He resigned from office as Commissary in 1565, demitting office in favour of Maister Alexander Sym[52]. In 1566 he took the office of Clerk Registrar from James McGill[53] of Nether Rankelaur, who had sat on the Committee which formed the Commissary Court. In 1567 he returned this Office to McGill and in exchange obtained the Lord Presidency of the Court of Session from Lord Provand which office he held till at least 1571[54] when the Lord Provand returned to the College of Justice[55]. Obviously an able lawyer, his services were great to his Queen. However, it is also plain from the career of this 'manifest blasphemer' that he viewed his own profit above any cause. It is important that from the period in which he was Commissary his support for Mary and indeed later for the Marian party was great and he would have been a man upon whom the Queen could rely in her efforts to control the Country and Church. Certainly with men like Balfour with her Mary could perhaps have been confident enough to form a vision of the day when Catholicism would once again be the religion of the Scots

and when Scotland would return to the fold of Rome.

Edward Henryson was a well known figure in the legal establishment of Scotland during the 16th Century. He was appointed lawyer for the poor in 1556 for a period of three years. His tenure of this office was later extended by a further three years[56]. He obtained his doctorate some time between 1556 and 1564 from the University of Bourges in France. His degree was significantly a doctorate utriusque juris, of both Canon and Civil Laws. He was almost certainly teaching in Edinburgh around 1556 in Law and Greek[57]. He was noted as 'unus Commissariorum' when witnessing a Disposition and Charter confirming William Maitland and his wife to land near Stevenson[58]. In 1569 he is also noted as jurisconsult, showing that whilst Commissary he had not given up his private legal practice in Edinburgh[59].

Clement Litill was an advocate of some renown. He was educated at Louvain and Saint Andrews. His first important brief was the representation of Thomas Kennedy of Barganny before the Privy Council in 1561 regarding the holding of a French ship[60]. Litill is the enigma among the Commissaries. He alone stands out as having strong links with the Reformed Church. He may have owed his position to his close connection with Henry Sinclair, Bishop of Ross. He was also a very able lawyer and these factors together with a desire to appease the Reformed party may have prompted the confirmation of his appointment as Commissary. In July 1563 he was listed amongst those commissioned by the General Assembly of the Reformed Church to take cognition in an appeal by Magnus Halcro and Margaret Sinclair from a decreet of the bishop of Orkney in a divorce action. This commission included the superintendent of Lothian, James McGill, the Clerk

Register and Sir John Spens the Queen's Advocate[61].

Later that year he was appointed by Edinburgh Town Council to plead their cause before the General Counsale (Assembly) of the Kirk held in Edinburgh. This appointment was renewed in 1568[62]. In 1572 he was appointed as a member of the Committee of the General Assembly to reason the divorce of Lord Argyle from his wife. The results of this Committee were never made public due to the Earl's pre-emptive move in Parliament which resulted in the Act 1573, permitting divorce for desertion[63].

In 1576 in his capacity as Procurator for the Kirk, an office which he held in conjunction with Alexander Sym the future Lord President of the Court of Session, he was a member of the Lothian sub-committee of the Commission for the making of the overture of the "policie and jurisdiction" of the Kirk[64]. He was also appointed to the Glamis Committee of October 1576 charged with reviewing the draft articles of the earlier commission[65]. In 1576, like Henryson, evidence of his private practice comes to light as he was designed as advocate when he purchased land at Over-Libertoun in Edinburgh[66]. In that year he also bequeathed his library to the University of Edinburgh, an important gift to the nascent college[67].

Of Robert Maitland, less is known. He was probably related to the Maitland of Lethington and could have been Dean of Aberdeen[68]. He was ordained to produce his seal with the other Commissaries in 1568[69]. In the Letter of Commission in 1563 he along with Henryson and Litill is paid 300 marks. Balfour, some would say characteristically, obtained 400 marks for his services[70].

The complexion of the Commissary Court then made it an instrument for Marian policy. Balfour, at this time, was a staunch supporter of Mary, Henryson was also bound in many respects to the Monarchy. Maitland whilst perhaps not so 'catholic' in outlook was at least in accord with the middle way of his relative Lethington's policy. Litill alone was connected with the Kirk but even this conformed to the middle way policy and would indicate an appeasement of the Reformed party. Substantially the Court fulfilled its political function well. It removed the cognition of an important jurisdiction from the Kirk Session and also through the canonical training and inclination of its judges applied Roman-Civil-Canonical law and not the scriptural fundamentalist code of the Church as sketched in the First Book of Discipline.

The Court sat in Edinburgh apart from a brief period when it sat at Leith, during the plague[71]. In terms of area the sheriffdom of Edinburgh, Haddington, Peebles, Linlithgow and the sheriffdom of Stirling were within the jurisdiction of the Court. The remaining areas of the realm were serviced by inferior commissaries.

In terms of the subject matter of the jurisdiction, the local jurisdiction pertained to tithes, bequeathed goods and matters arising ex delicto. The universal and exclusive jurisdiction extended to questions of benefice, matrimony divorce and illegitimacy and confirmation of testaments. Occasionally the local Commissary Court would receive a commission to adjudicate in a matter usually within the Edinburgh Commissary's exclusive competence, e.g. On 29 February 1582 Mr James Pont Commissar of Stirling is recorded as having had jurisdiction conferred on him to grant a divorce in the case of Andro

Wilson v. Jonet Crystesone[72]. Indeed these delimitations portray the Commissary Court as successor in toto to the jurisdiction of the Officials and Commissary courts of the old order. The appellate jurisdiction enabled the Edinburgh Commissaries to reduce the decreets of the other Commissary or any other ecclesiastical jurisdiction[73]. Stair notices the superiority which the Commissaries of Edinburgh had over the inferior commissaries[74]. Perhaps however even more important than the right to reduce decreets of other courts, the Court was given the power to inhibit "all other judges ... without our realm from proceeding in the said causes pertaining to their commissary". This was effective power which would inevitably secularise such jurisdiction.

The Kirk Session 1564-1578

The First Book of Discipline had not been accepted by the secular authority. It had never passed into law principally because of its revolutionary financial provisions. Nevertheless the elderships had functioned as courts for the period of 14 years between the establishment of the Commissary Court and the publication of the Second Book of Discipline, which crystallised the church policy and the hierarchy of ecclesiastical courts and which went some way to delimiting the secular and spiritual jurisdictions. The Convention of Leith (1571) abandoned many points contained in the First Book of Discipline. The details of the search for the "perfyct polity of the kirk" are not within the scope of this work[75]. Suffice to say that in 1576, according to Spottiswoode, the Assembly, in answer to a question raised by James Patton, Bishop of Dunkeld nominated a committee to "with all diligence set down a constant form of church policy"[76]. The

Committee consisted of Andrew Melville, Andrew Hay, David Cunninghame, George Hay, Alexander Arbuthnot, David Lindsay and many others including, as has already been mentioned, Clement Litill and Alexander Sym, by then brother Commissaries. Those trained in Canon or Civil Law included on the Committee in addition to Litill and Sym were Melville and Arbuthnot, Principal of King's College, Aberdeen, John Row, Doctor utriusque juris, minister of Perth, former agent in Rome and Papal Nuncio[77] and Archbishop James Boyd of Glasgow.

The Second Book of Discipline deals, not with Kirk Sessions or Presbytries but rather with elderships. The definition over which much learned discussion has taken place, is that "Elderships or assemblies ar constitute commonlie of pasturis and sic as commounlie we call eldaris ...

Assemblies are of four sorties; for ather ar thay of particular Kirkis and congregationis ane or ma, ather of ane province, ather of ane haill nation, or of all and divers nationis professing ane Jesus Christ"[78].

Thus on the face of it the Second Book of Discipline then defines four Assemblies in the Church, The Church Universal, the Assembly of the Entire Nation (the General Assembly), the Assembly of the Province (the Provincial Synod) and the Assembly of the Particular Kirk.

The assembly of the particular kirk received farther definition being within a "particular congregation yet exercising the power authority and jurisdiction of the kirk"[79]. This broad statement is farther specified in so far as particular congregations are not meant as every

particular parish kirk having its own eldership but rather especially in landward counties that every three or four may have a "commoune eldership to thame all to judge their ecclesiasticall causes"[80].

This scheme when read in conjuction with the later "special head of reformation", craved that "As to eldaris, their wald be sum to be censuris of maneris of the peple, ane or ma in everie congregatioun bot not ane assemblie of elderis in every particular kirk, but only in the townes and famous places quhair resort of men of judgement and habilitie to that office may be had"[81] and with the advice given by Beza to Lord Glamis shows a desire upon the part of the authors of the Book to have the Kirk Session suppressed in favour of the eldership of more than one parish; the Presbytery[82].

The history of the establishment of Presbyteries is a long and complicated one. The administration of Lennox had provoked a Protestant reaction which culminated in the revolution which came to be known as the Ruthven Raid. The King, James VI was seized in August 1582 and a pro-Reforming government was carried on by Lord Ruthven, the Earl of Gowrie and his associates. The General Assembly approved of the coup d'etat, in return for which support the revolutionary government encouraged the provisions of the Second Book of Discipline to be put into effect. In 1583 the King escaped from the Raiders and as part of the policy of the reassertion of Royal power, the administration of Annan passed the Black Acts in 1584. These Acts amounted to a Royal answer to the Second Book of Discipline[83].

Royal authority was re-established, spiritual and temporal jurisdictions were made subject to Royal approval, and convocations

were prohibited unless called under Royal consent. Episcopal government in the Church was approved and for want of a better word, established[84].

For all the Black Acts were a stark reassertion of Royal power they were not fully enforced. It would simply not have been possible to prevent sessions or elderships from meeting, and if attempted would probably provoked a far worse and more popularly supported revolution than that of 1583.

Thus it was that in 1592 Parliament authorised a Presbyterian church government by an Act known as "The Golden Act". In particular the "presbiteries and particulare sessionis appointit be the said Kirk with the haill jurisdictioun and discipline of the same" were approved[85].

There were several good reasons for this shift in pastoral organisation. (a) To root out the plurality of charges, (b) to phase out the use of readers, (c) to replace bishops and (d) to provide a more effective witness.

Unfortunately such a scheme could only work with a massive reduction in the number of parishes. Because of the failure on the part of the Church to achieve this reduction and with the slow nature of the establishment of Presbyteries, e.g. by 1581 there were only 15 model Presbyteries in the lowlands. Kirk Sessions by and large remained effective and operative having ordinary jurisdiction over parties in consistorial matters. Indeed the establishment of the Presbytery at Saint Andrews in 1582 seems to have caused little or no disturbance at

all to the business of the local Kirk Session[87].

The Kirk Session: Jurisdiction and Procedure

The general scheme of the Session's jurisdiction has already been examined.

With regard to specific content the subject matter of the jurisdiction compares well with that of the Official's court of the old order. There are sessional cases dealing with the constitution of marriage, engagement[89] with solemnities[90] and impediments[91]. Relations stante matrimonio are discussed as are adherence[92] and divorce[93].

The Kirk's exclusive jurisdiction in ecclesiastical matters was recognised by Parliament in 1567 with the ratification of the Acts of the Reformation Parliament. Acts were passed acknowledging that "there be na uther ecclesiasticall jurisdiction acknowledged in the realm uther than the trew Kirk"[94] thereby ratifying the Reformed Church establishment.

Also in 1567, the General Assembly placed the jurisdiction for divorce in the hands of the superintendent alone or his commissioners reiterating a similar act already mentioned[95].

Whilst the Commissary Court did affect the Kirk Sessions' jurisdiction and did on occasions reduce sessional decreets, it is obvious that in those areas where the Session was powerful cases strictly speaking within the Commissary Court's exclusive jurisdiction continued to be cognosced by the Session.

The Second Book of Discipline condemned the 'dependancies' of the papal jurisdiction i.e. the Commissary 'so far as thay mell with ecclesiastical materis and have no commissioun of the kirk thereto'[97]. This attack on the Commissaries followed a claim by the Assembly in 1570 to take the cognition of divorces as truly belonging to the Church.

By then, of course, the superintendents court, i.e. the Kirk Session of the principal town in the province had ceased to effectively deal with matrimonial matters, e.g. adherence and adultery in any other capacity than disciplinary[98]. The truly decisive function clearly lay with the secular court. The ecclesiastical claims to jurisdiction in Scotland can be compared with the Catholic dogmatic assertions at the Council of Trent.

"If anyone says that matrimonial causes do not belong to ecclesiastical judges, let him be anathema"[99].

The procedure of the Kirk Session displayed an astonishing dependence on the ancient canonical process. This is not entirely surprising and can be explained by reference to several factors.

Firstly, the Canon Law was not nullified by the acts of the Reformation Parliament. Certainly laws were passed annulling all laws, acts and constitutions, canon, civil and municipal which were contrary to the religion "now professit in the realm"[100] but the bulk of Canon Law did not offend against the Reformed doctrine[101] and procedure was an area relatively free of abhorrent passages. It must also be noted that the number of references to Rome had been declining

steadily in the years immediately prior to the Reformation. Many explanations have been postulated for this decrease in use of the papal jurisdiction; expenses, the rise of Metropolitan jurisdictions and the appointment of Legates a Latere probably all played their part, however the net result was that when the papal jurisdiction was abolished the gap left in the legal system was not unbridgeable.

Secondly, the Canon Law which had been recognised by the King, the Three Estates and the litigants as a superior procedural system of great equity and justice had been emulated by the secular law and woven into the fabric of the municipal law. For example, Craig in his Jus Feudale states, "in Scotland, notwithstanding that we have thrown off the Papal yoke the authority of the Canon Law endures ... it prevails also in the departments of wills, marriages (both as to constitution and dissolution) and legitimacy"[102], and even later Stair, writing from a stance of hostility towards Canon Law and at a time more than 120 years after the fall of the Roman tradition in Scotland states "so deep hath the Canon Law been rooted that even where the Pope's authority is rejected, yet consideration must be had to these laws ... as containing many equitable and profitable laws"[103]. It was the Roman-Civil-Canonical jus Commune which was being taught in the Universities and which had been imported into the municipal law by the University trained civil service[104] and in particular had been imported in some measure by the ecclesiastical members of the Court of Session which as has already been noticed was constituted by clerics to the extent of one half.

Even in post Reformation Universities in Scotland Canon Law was taught alongside the Civil Law. Provision was made in the First Book of

Discipline[105] for the teaching of Roman Laws and Municipal Laws but after at least three centuries of ferment, from the Canonical references in Regiam Majestatem it would be a lawyer of great discernment who would have attempted to separate the Canon from the municipal laws.

It is against this background of Romano Canonical influence that one must now view the adjective and indeed the substantive post Reformation Law. The post Reformation procedure falls broadly into the broad pattern of the Canon Law. There are preparatory acta, the tryell and the decreet. One broad observation should be made. It appears that there is a greater reliance in the Kirk Session on a procedure analogous to the Denunciatio Evangelica[106] of the Canon Law possibly because the Kirk was fulfilling a more active criminal jurisdiction, moulding the people into God's elect and receiving support from the Three Estates, (often the General Assembly wearing a different hat), which made behaviour hitherto merely morally reprehensible or sinful into criminal activity the penalties for which were severe.

As in the canonical procedure the constitution of procurators or advocates constituted the first cognisable stage of court procedure of the Kirk Session. In Saint Andrews between 1562 and 1581 there were at least 19 advocates or procurators operating in the Courts. In addition to this expert legal representation there were also some seven notaries who at various stages acted in a representative capacity. Some of those appearing for example John Row[107], were advocates of European status, others, in particular David Meldrum[108] were of a less high calibre. Regulations were made to govern the

behaviour of legal representatives, in some respects similar to those of the old courts, for example, David Meldrum was repelled from representing his client because of his insulting behaviour[109].

The most striking observation of the procedure in a matrimonial cause at the Kirk Session was that there was no strict formally regulated process. The procedure in contradistinction to the ordinary process was flexible and capable of adaptation to fit the instant case. The following therefore is a series of observations on the procedure and not a description of a fixed delimited procedure.

The pursuer or petitioner made up his petition[110], or supplication[111], or if the action was being taken by the Procurator for the Kirk, his accusatio[112]. This document narrated the petitioner's allegations of fact and his crave or remedy sought[113]. It requested the Kirk Session to adjudicate and take probation[114]. The document was also sometimes termed a bill or lybil[115], names reminiscent of the canonical process.

The Court agreed to adjudicate by granting warrants to the pursuer to cite the defender. The libelled citation was then delivered to the defender[116]. An alternative method of citation was by the superintendent's letters[117].

Service was executed thereon and endorsed, the libelled summons with the citation endorsed was delivered to the Court[118]. An induciae of 15 days followed upon the service to enable the defender to answer[119], sometimes a longer induciae was allowed e.g. 60 days[120].

The defender answered the petitio by appearing at the Kirk Session on

the appointed day and either denying or admitting the averments as libelled[121]. If admitted the superintendent and elders proceeded at once to the definitive sentence[122], if denied the date was fixed for probation or tryell[123]. If the defender did not appear there were various courses of action open to the pursuer or to the Court ex proprio motu. The defender could be noted as contumax and letters of inhibition granted against him[124]. The letters of inhibition would prohibit cohabitation or solemnisation of marriage and show an early adaption of the interim interlocutor[125]. A decree in absence could be granted against a contumax[126]. There seems to be some reluctance on the part of the eldership to grant decreets in absence, in which case attendance was often ordained, reservice warranted[127] and the cause continued ex proporio motu to allow the defender to appear[128].

The defender upon compearance made his responsio[129] to the intention[130] of the petitioner. The use of these terms exhibits a clear dependence on the terminology of the Canonical process. He states his defences, which could be dilatory or peremptory[131]. However, if the word exceptio meant little to the Canonists who constructed the Roman-Civil-Canonical procedure so the distinction such as that of dilatory or peremptorary pleas meant even less to those conducting pleas at the eldership of Saint Andrews. The distinction means very little if there is no litiscontestation and there appears to have been no formal act of this nature in terms of canonical process. In fact one could submit that in answering the summons the defender was assenting to litiscontestation at that point. This would have the effect of rendering all defences peremptorary in the sense that they could only be proponed after litiscontestation. Therefore the defences were 'qualifiet in articulis' and the

superintendent was able to be advised of every allegation and 'peremptor exceptione proponit'[132]. It was also open to the defender to make a counterclaim[133].

A term was fixed ad probandum for the proof of the pursuer's allegations and the defenders counterclaim and defences. Caution would be taken from a defender to ensure compearance at the diet, a relatively high figure of £20 was set in one particular case[134] during 1560. Upon the setting of the term for proof superintendents' letters were provided to the parties in order that they may summon witnesses. Witnesses who did not compear were marked as contumaces[135] and attracted the requisite penalties.

The procedure at proof was also similar to the second major step of the Roman-Civil-Canonical process.

The oath of calumny was in use and was sworn by both petitioner[137] and defender[138]. The petitioner's failure to swear the oath resulted in the renunciation of the claim. The defenders failure would result in being held as pro confesso. Were the oath taken the superintendent would admit the defences to probation and the proof would proceed. It thus seems that the taking of the oath represented a condition precedent for the farther progress of the action. The oath occurs rarely, whether this exhibits the confidence of the 'godlie ministry' in the lack of chicanery perpetrated by their flock or rather more likely, it represents a lack of appreciation of the oath as the indicia of litiscontestation which by now, as a formal judicial act had practically ceased to exist. This change in emphasis could be claimed to show a lack of legal sophistication on the part of the

Reformers but one could argue that this is one more aspect of the Reformer's contempt for empty symbolism, as litiscontestation was in later Roman-Civil-Canonical process and displayed a rejection of formalism and a leaning towards flexibility of procedure.

The principles of proof appear to have been the same as those of the canonical courts. Probation in particular was incumbent on the proponer. The methods of proof again indicate an acceptance of the Canonical pre-Reformation practice, with some simplification. Proof encompassed probation per testes, and per instrumenta. The other classes, per confessionem, per evidentiam facti, per indicia indubitata and per praesumptionem do not appear to be noticed by the eldership as separate and distinct types of proof. There is certainly no evidence of such categorisation in the extant Kirk Session registers. It is probable, however, that such matters were 'understood' by the ministers and kirk lawyers and therefore escaped the privilege of separate comment.

There is evidence of a variance in the practice of examination of witnesses. On the one hand one can state that witnesses could be heard in open court and in the presence of the parties[139]. This was contrary to the canonical practice[140]. On the other hand there are indications of the interrogation of witnesses outwith the presence of the parties. The examination of witnesses varied on a regional or even on a personal basis. In Saint Andrews the procurator John Row, for the pursuer examined witnesses, in Edinburgh the pursuer in the case of Brown -v- Wallis[141] had the Kirk examine the witnesses whilst a similar practice was exercised in Saint Andrews in the case of Matison -v- Ayton[142].

Evidence from witnesses could be taken on commission[143] and to lie in retentis, e.g. when witnesses were sick or when they were to depart furth of the realm[144] to lie ad futuram perpetuam rei memoriam[145]. Certain classes of person were excluded from being witnesses, for example, the procurators in the cause. Women were however permitted to give evidence[146], a surprisingly enlightened attitude for the times.

Documents could also be produced in court to aid probation. Often testimonials from other Kirks[147], court processes from other courts, including pre-Reformation courts[148] and marriage contracts were produced.

Once the tryell or term of probation was complete the Kirk Session moved to the definitive sentence. This could be announced immediately or at a specific term ad pronounciandum[149]. The decreet of the definitive sentence was a formal act of court. It commenced with a prayer and narrated the reasoning of the court based upon the substantive facts as proved, the provisions of the Book of Reformation (the First Book of Discipline) and the practicks of previous decisions[150]. This is most interesting as it shows the acceptance of the Kirk of the Book of Discipline in contradistinction to the secular authority and also displays an acceptance of precedent, though it is difficult to divine from the sources whether any binding precedent was in use.

The Commissary Courts: Jurisdiction and Procedure

The establishment of the Commissary Court represented at least, as has

already been stated, the major secular intrusion upon the presumptive acquisition by the Kirk of the failed consistorial jurisdiction of the Officials.

The universal jurisdiction of the Commissary Court included the cognition of benefice matters, matrimony, divorce, illegitimacy and the confirmation of testaments above a certain value[151]. The ability of the Court to commission inferior Commissary Courts in these functions has been noted.

The constitutive charter of the court provides the general framework within which the procedure of the court was to develop. The Commissaries were ordained to deliberate and decide the causes as required. They were to concern themselves with every aspect of an action and were also given the express power to consider the processes or sentences given by any judge or judges in consistory and dated in the realm no matter whatsoever time had elapsed[152]. It was on the basis of this power that the Commissary Court was enabled to examine records from both the Officials' Courts and from the Kirk Session[153]. The other general prescriptions of the procedure will be adduced in the appropriate passages.

The second major guide to the procedure of the Commissary Court is James Balfour's Practicks (c 1579)[154] written only some 15 years after the establishment of the Commissary Court. The Practicks therefore provide a unique, contemporary and almost complete record of the form of process in use in the new court.

The procedure of the Commissary Court as that of the Kirk Session is

Roman-Civil-Canonical in origin, terminology and principle. There were however many differences from the Roman-Civil-Canonical process and from the Reformed procedure and whilst these differences are important of themselves the similarities are striking and just as important in many respects as the variations.

Like the proceedings of the Session but in contradistinction to those of the Official's Court the proceedings were conducted in the vulgar[155] tongue.

There were two methods of procedure in the Commissary Court. i. ad instantiam, or ii. per libellum. Proceedings ad instantiam were appropriate if the matter were urgent and of small or no great value, process per libellum being more fitting in serious causes or difficult matters where deeper investigation or involved proof was required. This distinction in the initial stages of action, stated in the instructions given to the Commissaries of Edinburgh of 1563 echoes roughly the canonical distinction of summary or ordinary actions. It is also interesting to note the use of the libelled summons as in the sessional procedure[156].

In process ad instantium i.e. in rebus levibus et facilibus, the process was proponed by the pursuer orally, in contradistinction to the written libelled summons. The reply was made by the defender in a similar fashion. The connection between the process ad instantiam and summary causes is farther enforced when it is appreciated that all causes of less than £40 worth were considered as such[157].

In processes by libelled summons the summons was executed by a

'sufficient man' before two witnesses and was returned to the Clerk of Court duly endorsed[158]. The form of libelled summons and execution is given by Balfour[159]. In ad instantiam causes upon the answer of the defender by 'grant, deny or exception', a term was assigned to the parties to prove their cases and an act is made of their averments[160]. However, if the matter related to the defender's death, another's death, about ancient facts or where the nature of the matter requires amplification the defender could be allowed a farther term to answer the pursuer's claim[161].

In proceedings by libelled summons, i.e. grave and serious processes, the pursuer proponed his petition at once at the time of the proceedings, and the judge assigned a term to the defender at once to answer the petition[162], by grant denial or exception. If the defender was absent, the pursuer was assigned a term to prove his averments. It was permitted for the pursuer, at the first day of compearance to alter or amend his pleadings by adding to or subtracting from his averments, whereupon the defender could be assigned a term ad respondendum[163]. At the trial of the cause the Commissary used the process as in use before the Lords of Council and Session inclusive to the provision of a definitive sentence[164].

The above prescriptions on the initial stages of the action before the Commissary Court in Edinburgh were given on 12 March, 1563[165]. The instructions were sufficiently successful as to be recommended with little variation to all Commissaries in 1610[166]. Balfour describes the content of a libel in terms not dissimilar from the Canonist Hostensis[167]. It "is ane petition made in writ be the persewar contenand the namis of the judge, of the persewar and the defendar,

the thing that is claimit, and the cause quhair foir the samin is claimit and askit", a formulation which compares well with "quis, quid, coram quo, quo jure petitur, et a quo"[168].

We are led to understand from Balfour that the execution of the libelled summons is given to the defender in order that he may decide his subsequent course of action.

Stair too, speaking of ordinary actions speaks of libels as "larger summonses" which upon execution advertise the defenders to appear and answer thereto at the terms therein prescribed[169]. The certification by the judge is important for Stair as the 'sting' which gives a libel efficacy, as it was in canonical procedure.

The major judicial step in an action in the Canonical and Commissary procedure was litiscontestation. As part of the process of the Court of Session, litiscontestation was adopted by the Commissary Court. Stair stresses the Roman or Civilian origins of the concept in its application in the Court of Session. However, the Roman-Civil-Canonical influence in the adoption of the 'judicial contract' cannot be forgotten.

Balfour states that litiscontestation as "maid in ony actioun or cause, efter the proponing of ane peremptour exceptioun or quhen the summondis, or ony part thairof, or ane peremptour exceptioun or alledgeance is admittit be the judge to the persewar's or defendar's probatioun"[170].

The definition forwarded by Stair states that litiscontestation is 'a

judicial contract, ... it is esteemed as a transaction whereby the parties agree that the cause shall have its event according as the points contained in the act shall be proven or not proven'[171]. He also states that litiscontestation signifies, 'a taking a term to prove by the testimony of witnesses, writ or oath'[172].

Litiscontestation had several effects in the procedure of the Court of Session and therefore in the Commissary Court. Firstly only peremptory defences could be proponed after litiscontestation[173], the pursuer could not abandon his summons or renounce the instance contrary to the defenders will and pleasure and also the pursuer could not alter, correct or amend any substantial part of his libel[174].

The defender could propone defences prior to litiscontestation; these were termed dilatory defences which according to Balfour "delay the actioun or clame to ane certaine time' exceptions which are dilatory include objections to the judge and litis pendentis[175].

Peremptory defences, on the other hand, were absolute defences which, "for ever cuttis away the action" and were proponed after litiscontestation[176].

The cause then proceeded to the probationary term. There were opportunities for a contumacious defender appearing late to make defences[177]. At the probationary term the pursuer endeavoured to prove his libel and claim to be relevant, and the defender attempted to propone or allege any exception or defence against the libel or claim, which if found relevant by the judge should be proved by the defender[178].

A decree of absolvitor could be granted to a defender upon a pursuer's non-appearance, similarly a decree in absence could be granted to the pursuer upon the defender's disinterest[179].

Balfour allows of probation by oath[180], by writ[181], by witnesses[182] and by confession[183]. Stair admits oath, writ and witnesses[184], but categorises confession along with notorious fact and presumption as probation extraordinary[185].

With regard to oath there were as in the Canonical practice two oaths in usage, the juramentum calumniae and the oath of verity. The juramentum calumniae was in the Court of Session at least, the secular oath of the act of 1429[186] in the Commissary Court however, one would hazard that the oath was closer to its Roman-Civil-Canonical form. In the original charter of constitution the Commissaries of Edinburgh could prevent the pre-action interrogation of witnesses, they were also empowered to cite witnesses and require their attendance 'under such pecuniary pains as the judges shall think expedient'[187]. The judge and clerk were to be present at every examination of witnesses. In the advice to the Commissaries of 1610 the phrase 'excluding all others' follows the injuction that the clerk or judge examine the witnesses, this would indicate a similar procedure to that of the canonical court[188].

There were many exclusions from being a witness; one was excluded for example from being a witness "by any of his consanguinity or affinity to the party or ally within the feird degree inclusive"[189].

Women were excluded subject of course to the well known exceptions

falling within knowledge of motherhood, nurses and also those acquainted de septima manu were allowed. Adulterers also were excluded as being personae infamae.

With regard to instruments there were many detailed provisions, however in relation to matrimonial causes only one is of essential interest, viz, that a promise of tocher gude may be proved by witneses and it was not necessary to produce the contract of marriage[190].

The Definitive Sentence

The constitutive Charter empowered the Commissaries of Edinburgh to pronounce acta, decreets and sententiae. This was, as in Roman-Civil-Canonical procedure the final and important stage in an action. All dooms and sentences given by a judge were subject to the general prescriptions of legality of time, place, issuant judge and court, process[191] and conformity with the libel[192]. The decrees could be registered in the court books, extracted therefrom and execution done thereon[193].

The decision of the inferior Commissaries could be appealed to the Commissary of Edinburgh. A reduction of the decision of the Commissary of Edinburgh in prima instantia or secunda instantia could be made by the Lords of Council and Session. Such appeals proceeded by libelled summons and prescribed within a year and a day from the date of the giving of the sentence[194].

NOTES

1 Which I date as occurring during August 1560, see infra.

2 A.P.S. C.2, 11, 534-535; see also Spottiswoode, History of the Church of Scotland (1655).

3 P. Hume Brown, History of Scotland Vol. II, 70

4 Foedera, XV, 593-7

5 Keith, History of the Affairs of Church and State in Scotland 1.298-306

6 Keith, op. cit; Art XVII

7 Laing, Knox's Works 2.128

8 J. Cameron First Book of Discipline, 8. hereafter Cameron....

9 Cameron, 9

10 August 1560; Spottiswoode Op. cit. 150-151

11 When ratified by James VI see infra

12 See, Donaldson, Scotland James V - James VII; P. Hume Brown Op. cit; Cowan, The Reformation in Scotland.

13 Protocol Book of Dom Thomas Johnstoun (S.R.S), 379.

14 J. Kirk Second Book of Discipline, passim hereafter Kirk....

15 D.H. Fleming, Register of the Kirk Session of Saint Andrews, (S.H.S.) 2 vols. passim. hereafter R StA KS

16 R StA KS 77.

17 R StA KS (Maitland) 240.

18 Cameron, Eighth Head, 174

19 Cameron, 175-176

20 Cameron, 178; see Spottiswoode, III 174

21 Cameron, 116

22 Cameron, 123

23 Cameron, 123

24 Cameron, 127

25 J.A. Duke; History of the Church of Scotland to the Reformation. passim

26 I.B. Cowan, The Scottish Reformation, 130

27 See infra

28 R StA KS (Maitland) 248 et seqq.

29 Riddell; Peerage Law, 431

30 See Riddell, loc. cit

31 Riddell, 427

32 Balfour Practicks, 99, 269

33 See infra

34 B.U.K. i, 19

35 B.U.K. i, 23

36 Similar to the Statute of Saint Andrew's Synod restricting divorce jurisdiction to Bishops.

37 B.U.K. i, 30

38 B.U.K. i, 187

39 P. Hume Brown, 93 et seq, Donaldson; 110 et seq

40 R.P.C. i, 266-7

41 Donaldson, 113

42 R.P.C. i, 252

43 Balfour, Practicks; 670

44 Balfour, 676

45 R.P.C. ii, 455

46 Balfour, 676

47 This was only to happen with the Second Book of Discipline

48 See biographical note in Introduction to Practicks

49 R.P.C. i, 188

50 R.P.C. i, 340 et seq

51 Balfour, introduction, XV

52 R.S.S. v, 2396

53 R.S.S. v, 2705 R.P.C. i, 436, 438

54 R.P.C. i, 633

55 Introduction to Scottish Legal History passim

56 R.S.S. v, 69

57 R.S.S. iv, 3144, 3268

58 R.M.S. iv, 1881, 2281

59 R.M.S. iv, 1880

60 R.P.C. i, 166, 179-82

61 B.U.K. i, 35

62 Edinburgh City Archives M.S. Vol 4 quoted in Kirk J, Second Book of Discipline 282-3

63 B.U.K. ii, 262

64 Kirk, 46

65 Kirk, 48

66 R.M.S. iv, 1927, 2783

67 Donaldson passim; Clement Litill

68 D.E.R. Fasti

69 R.P.C. i, 551

70 R.S.S. v, 1633

71 R.P.C. ii, 86-91

72 J. Kirk, Stirling Presbytery Records, 91

73 See ultra Chalmers v. Lumsden; Riddell, op. cit.

74 Inst. IV, 1, 36

75 Kirk 23-42

76 Spottiswoode, V, 276

77 R StA KS Synton v. Roberton (1562)

78 Kirk, vii, 1; 2

79 Kirk, vii, 13

80 Kirk, vii, 14

81 Kirk, xii, 6

82 Kirk, 23

83 Donaldson, 170-196

84 A.P.S. 1584, iii 292

85 A.P.S. 1592, iii 541

86 S.B.D. 101 et seq

87 R StA KS passim, S.B.D. 108

88 See ultra

89 R StA KS, 421

90 R StA KS 532

91 R StA KS 247

92 R StA KS, 423

93 R StA KS Maitland, 221

94 A.P.S. 1567, iii, C. 7

95 A.P.S. 1547, iii C. 3

96 B.U.K. 130

97 B.U.K. i, 187

98 See I.B. Cowan; The Scottish Reformation passim

99 C. XII, Session XXIV

100 A.P.S. 1581, iii, C. 1

101 Many areas of law remained undisturbed, e.g. the law relating to benefice

102 Craig, lus Feudale, I, 3, 24

103 Stair, 1, 1,14

104 H. Coing, Roman Law as Ius Commune on the Continent 89 L.Q.R. (1973), 505

105 Cameron, 141-143

106 H. Coing, English Equity and the Denunciatio Evangelica of Canon Law L.Q.R. (1955) 223

107 Synton v. Robertson, R StA KS, 143

108 R StA KS 251

109 ibid II

110 Ade v. Mason, R StA KS 684

111 Tweeddale v. Ramsay, R StA KS, 29

112 Oliphant v. Morton, R StA KS, 149

113 Clark v. Sherez, R StA KS, 60

114 Colland v. Alexander, R StA KS (Maitland) 150

115 Beton v. Arnott, loc. cit.

116 Colland v. Alexander loc. cit.

117 Budger v. Jak, R StA KS, 145

118 Clerk v. Sherez loc. cit

119 Rantoun v. Geddes, R StA KS (Maitland) 221

120 Thecar v. Morton, R StA KS (Maitland) 270

121 Synton v. Robertson loc. cit

122 Scrymgeour v. Dundas, R StA KS (Maitland) 293

123 Leslie v. Forest, R StA KS 128

124 Tynclar v. Strong, R StA KS 188

125 Long v. Fleming, R StA KS 225

126 Clerk v. Scherez loc. cit

127 Synton v. Robertson loc. cit

128 Clerk v. Scherez loc. cit

129 Brown v. Foulis, R StA KS 189, Oliphant v. Morton loc. cit

130 Beton v. Arnott, R StA KS 278

131 Beton v. Arnott loc. cit

132 Beton v. Arnott loc. cit

133 Moffat and Thomson, R StA KS, 573

134 Colland v. Alexander, R StA KS 260

135 Beton v. Arnott loc. cit

137 Hunter v. Skyling, R StA KS 278

138 Benyong v. Hepburn, R StA KS 234

139 Syntoun v. Robertson, R StA KS 143

140 See ultra

141 Buik of the Kirk of Cannongait, 12 January 1565

142 R StA KS loc. cit

143 Matison v. Aytoun ibid

144 Colland v. Alexander loc. cit

145 Thecar v. Morton, R StA KS (Maitland) 270

146 Tweedale v. Ramsay, R StA KS 29

147 Lowmont, R StA KS 401

148 Lindsay v. Schewes, R StA KS (Maitland) 256

149 Moffat, R StA KS, 564

150 ibid

151 See ultra

152 See ultra

153 Bellenden v. Spens, 24 February 1581

154 Stair Society edition by P.G.B. McNeill (1967)

155 Balfour 655

156 Balfour 551

157 Balfour 657, C. 5

158 Balfour 656, C. 3

159 Balfour loc. cit

160 Balfour 657, C. 5

161 Balfour loc. cit

162 Balfour, loc. cit

163 Balfour, 657, C. 6

164 Balfour,657, C. 5

165 Balfour, 662

166 Balfour, 664

167 The Court of the Official, Ollivant, 100; Marriage litigation in Medieval England, Helmholz passim

168 Balfour, 313, C. 1

169 Stair, IV, 3, 27

170 Balfour, 342, C. 1

171 Stair, IV, 40, 8

172 Stair, IV, 40, 9

173 Balfour, 343, C. 1

174 Balfour, 342, C. 1

175 Balfour, 343, C. 1

176 Balfour, 343, C. 1

177 Balfour 347, C. 22

178 Balfour, 352, C. 1

179 Balfour, loc. cit

180 Balfour, 359

181 Balfour, 363

182 Balfour, 373

183 Balfour, 381

184 Stair, IV, 42, Pr

185 Stair, IV, 45, 3-9

186 A.P.S. 1429, II, C. 16

187 Balfour 657, VIII

188 Balfour, 665

189 Balfour, 377, C. 34

190 Balfour, 376, C. 28

191 Balfour, 386, C. 1

192 Balfour, 387, C. 4

193 Balfour, 658, C. 16

194 Balfour, 659, Cc. 19, 20

CHAPTER III

The Constitution of Marriage under the Canon Law

The Sources of the Substantive Law of Husband and Wife

As in the majority of the branches of Scottish legal history and as in the case of the adjective Law the sources are disparate and difficult to pull together, they are woefully incomplete and, at best can only present a cross section of the law at a particular time.

For the pre Reformation era there is little problem. The sources of the Canonist Ius Novum (from Gratian to the Council of Trent) are well known. The Decretum or Concordia discordantium canonum (c 1140), the Liber Extravagantium (1234), the Liber Sextus (1298), the Clementinae (pub 1317) and the Extravagantes communes (1294-1484) all display the general Canon Law of the West.

With regard to Scotland in particular there are the Synodal Statutes, the Liber Officialis Sancte Andree[2] (which in its printed form provides most of the matrimonial cases heard in Scotland between 1518 and 1558), Balfour's Practicks[3] and especially the Lectures on Marriage by William Hay[4].

The lectures provide a complete exposition of the Canon Law relating to the formation of the constitution and dissolution of marriage from a contemporary, if at times theoretical viewpoint. Much reference will be made to these lectures in the ensuing pages.

There are further sources, Morison's Dictionary[5] provides some cases covering relations stante matrimonio but is more important as a post Reformation source. Notary Protocol Books[6] and Rentals[7] are also indicative of the life of the law during this period.

The post Reformation era provides more by the way of material. Balfour's Practicks, Craig's Jus Feudale[8] and similar works come into their own. Stair's Institutions[9] provides a unique view of the law at the end of the period of Reformation. On the ecclesiastical theme are Kirk Session Records, Presbytery, Synod[10] and General Assembly Records[11]. The First Book of Discipline[12] in some respects the Second Book in many respects provide interesting material.

The legislative activity in this area during the post Reformation era is partisan and changeable with astounding flexibility. However in the Commissary Court sufficient activity develops the law. There is also at this time a change in influencing factors. No longer do ideas and law emanate from Rome but the new philosophy comes from Geneva, Nürnberg and Holland. Writers such as Beza and Calvin had great influence on the Reformers and it is to these Continental influences that one must point for the philosophical bases for much development in the consistorial law of Scotland.

The Medieval Theory of Marriage

It is necessary to examine the theoretical context of marriage during the 16th Century as a theological concept before embarking on the juridical aspects which were to an extent governed by the theological and religious philosophy underlying the conjugal contract. This facet

of matrimonial law may seem alien to the secular mind. It must be remembered that in both the pre and post Reformation eras in Scotland secularism was not as yet a significant factor in determining matters of status, duties, and rights. Indeed the juridical and legal relationship of the married status and its dissolubility or not were based upon the respective religious theories holding sway at any given time.

The Catholic theory of the sacramentality of marriage was dogmatically asserted during the Twenty fourth Session of the Council of Trent, celebrated on 11th November 1563.

Canon 1 states -

"If anyone states that marriage is not truly and properly one of the seven sacraments of the evangelical law, instituted by Christ the Lord, but has been devised by men in the Church and does not confer grace, let him be anathema"[13].

In Catholic theology there had been assertion from the 13th century at least in the writings of the Fathers in conciliar declarations and in the interpretation of Scripture and developed theological argument that the institution of marriage was a sacrament, that is an efficacious sign of grace. It is, strictly speaking, outwith the scope of this work to examine in any great depth the theological concept of matrimonial sacramentality. However, some mention must be made of the matter because it is only from an understanding of the Catholic position in this regard that one can place in context the major difference between the Catholic and Protestant traditions in

respect of marriage - namely the dissolubility of marriage and the counter proposition of indissolubility.

Esmein[14] attributes to the principal of sacramentality of marriage two major consequences, 1. the concept of indissolubility, and 2. the exclusive competence of the ecclesiastical jurisdiction. The latter has already received some examination[15] the former requires some attention.

There is biblical reference to the concept of the matrimonial sacrament. Paul in his letter to the Ephesians[16], which is quoted in the principium of the 24th Session of Trent[17] states;

"For this cause shall a man leave his father and mother and shall cleave to his wife and they shall be two in one flesh.

This is a great sacrament but I speak in Christ and in the Church"[18].

The 'great sacrament' is, within the Catholic interpretation of these verses, quite obviously the marriage between man and wife and the representative character of this marriage in relation to the union between Christ and the Church. Paul is here drawing the analogy between the sanctification of the Church by the grace of Christ and the sanctification of man and wife by the grace brought in marriage.

This interpretation is pursued by Saint Augustine who links sacramentality with indissolubility, although with at least one exception to the general rule.

"Huius procul dubio sacramenti res est, ut mas et femina connubio copulati quam diu vivunt inseparabiliter perseverent, nec liceat excepta causa fornicationis a conjuge conjugem dirimi. Hoc enim custoditur in Christo et Ecclesia ut vivens cum vivente in aeternum nullo divortio separetur ... Ita manet inter viventes quoddam conjugale quod nec separatio nec cum altro copulatio passit auferre".

"Without any doubt the matter of the sacrament is, that a male and female are united for as long as they live and that they are not to be separated, and that it is not permitted, except for the cause of fornication for a husband to depart from his wife. For this is protected in Christ and the Church that spouses are to live together for ever, not separated by divorce. As long as they live there is conjugium which neither separation nor intercourse with another can remove"[19].

The allusion to divorce for a wife's fornication is to be understood in relation to certain passages in Matthew which will be discussed under the head of Adultery.

The other Fathers, e.g. Ambrose, Ignatius, and Innocent wrote similar works but only with Hincmar of Rheims in the ninth century is the sacrament linked to the concept of indissolubility. He developed the theory that marriage becomes truly indissoluble when, consummated by carnal copula, it represents the union of Christ and his Church.

The later theologians, Peter Lombard, and Saint Thomas Aquinas both follow the earlier theory of Hincmar. William Hay quotes extensively from Peter Lombard's Sentences, and states -

"Matrimony as instituted under the Law of grace is a Sacrament in this sense, for Matrimony is now an efficacious sign of grace for those properly disposed, those who do not put any obstacle in its way"[20].

When read alongside the following passage from Peter Lombard the theory appears complete:

"Sacramentum vero ita inseparabiliter conjugio haervet legitimarum personarum ut sine illo conjugium non esse videtur quia semper manet inter viventes vinculum conjugale ut etiam interveniente divortio fornicationis causa conjugalis vinculi firmitas non solvatur".

"The sacrament indeed resides in the inseparable union of legitimate persons, and without the union is not to be seen, but is always where they live in conjugal union, and even an intervening separation for the cause of fornication cannot dissolve the stability of the marriage bond"[21].

The Catholic Church therefore considered marriage to be a sacrament, which was instituted by God in Paradise before the Fall[22]. Marriage was regarded as excelling the other Sacraments, because of its perfect origins, because it is preventative of sin rather than the other sacraments which are remedies for sin, and also because of its symbolism, where the unity of Church and Christ are displayed in the unity of man and woman[23].

The Reformed attitude to Sacramentality in Marriage

For the Reformers in Scotland marriage was "the blessed ordinance of

God"[24]. This conformed with Calvin's view[25] of divine ordinance:

"The last of all is Marriage, which while all admit it to be an institution of God, no man ever saw it to be a sacrament until the time of Gregory ... It is a good and holy ordinance of God ...

For in a sacrament, the thing required is not only that it is a work of God but that it be an external ceremony appointed by God to confirm a promise. That there is nothing of the kind in marriage, even children can judge".

There were only two sacraments in the reformed theology of Calvin viz. baptism and the eucharist. It had been Luther who in 1520 in his "Babylonian Captivity of the Church" a treatise of theological weight principally designed to sway the Catholic clergy and provide the intellectual basis of his reforming beliefs, first presented his theory of the sacraments.

He reduced the seven Catholic sacraments to three, baptism, eucharist and penance. Later he withdrew the sacramental nature of penance and based his theory exclusively on the scriptural sacraments[26]. It was however the Calvinist theory which was established in Scotland by the Reformers; thus the First Book of Discipline reads:-

"To Christ Jesus his holy Gospell truely preached of necessity it is that his holy Sacraments be annexed and truely ministered as seales and visible confirmations of the spirituall promises contained in the work and they be only two, to wit Baptism and the Holy Supper of the Lord Jesus".

This rejection of the sacramental nature of marriage did not, of course mean to the Reformers that marriage was not of importance to the Christian. It was, as has been stated, a blessed ordinance, it also was counted amongst the "Benefits of the Kirk"[27]. In 1564 at Saint Andrews an interdict was issued because it was alleged that one of the parties to the marriage could not 'receive any benefits of the Kirk'.

It is also stated in the Saint Andrews Register that as a penalty for crime 'al benefit of the Kirk is lost to wit mareage, baptism and communion'[28]. It is obvious that whilst matrimony was formally declared not to be a sacrament the importance spiritually as well as theologically was very much respected.

The importance had by no means decreased by the end of the following decade when the Kirk Session of Perth[29] ordained that those giving up their banns who are ignorant of the true causes of marriage were to compear before the reader to be instructed.

The special nature of the blessed ordinance led to great control being exercised by the ecclesiastical authorities in an effort both to emphasise the importance of the benefit and also to control the sometimes undesirable celebrations which were a concomitant feature of the social contract. Many such regulations strove to suppress the ever present danger of clandestine marriages and will be dealt with under that head. Others are less easy to understand unless it be that the withholding of the benefit of marriage came to be seen in the eyes of the ecclesiastics as a means of social control.

Thus the benefit could be lost for fornication with one's betrothed[30], for fleshing on a Sunday[31] failing to obtain confirmation on the testament of a defunct[32] and for having 'pyperis and fidlayeris' play to the great dishonour of God[33].

The ordinance therefore was of great importance to the Reformed Church. It is noticed as the 'Holy Band' in at least one Act of Parliament[34] and was of immense spiritual value to the congregation of the faithful. The essential difficulty which the Reformers faced, in circumstances of alternating secular approbation and denigration, was in requiring in the words of the First Book of Discipline, 'that the law may be now and hereafter so established and execute that this ungodly impunity of sinne have no place within this Realme'. It was a difficulty which, as will be further illustrated, the Reformers failed to surmount.

The Role of Consent in Marriage

Consent was the keystone of the pre and post Reformation law of Marriage.

Hay defines marriage as "the outward sign in which a true consent to the mutual giving of the body for matrimonial acts is expressed"[35].

Thus the three requirements for marriage were:-

(a) personal capacity

(b) mutual consent

(c) an 'outward sign' of consent.

The first requirement will be discussed later. The latter two requirements are more entwined and their important nature demands that attention be now paid to them.

Mutual Consent

The doctrine of the Church had over the centuries swung between two poles, on the one hand the supporters of the view that consent alone was sufficient to create marriage on the other those who adhered to the copulatheoria.

The copulatheoria, revived in the Middle Ages by Hincmar of Rheims held that marriage was contracted by carnal copula, or if begun by consent was perfected by copula.

The concept of marriage by consent alone was based in the Roman Law where affectio maritalis was essential as expressed in the sponsiones[36], but not necessarily so[37]. This rule had been adopted by the Church from the earlier times. Hay gives as his authority, St John Chrysostom, "Matrimonium non facit coitus sed voluntas"[38]. Marriage is made by will not coitus.

Ambrose quoted from the Concordia of Gratian which is now fully given:

"From the moment that marriage is contracted, it truly bears the name marriage. It is not made by deflowering a virgin but rather the conjugal agreement, the marriage exists from the time of the union, not the time of carnal copula"[39].

Hay does not quote the Rescript of Nicholas I to the Bulgarians quoted in Esmein[40] and De Smet[41].

"Sufficiat secundum leges solus eorum consensus de quorum conjunctionibus agitur. Qui consensus si in nuptiis solus defuerit caetera omnia etiam cum ipso coitu, celebrata frustrantur".

"Let consent alone of those who seek to marry suffice, if it accords of Law. If consent alone is missing from a marriage the celebration is frustrated even though everything else including coitus is there"[42].

This requirement of consent being the only one demanded of parties by the Church, led to the unrestricted acquisition of collateral formalities which will be examined later, but also allowed the Church's regulations to slip easily into the barbaric practices of some nations in early Christendom.

As the consent-only theory was emerging in the developing Canon Law of Gratian's Concordia, the opposing theory also arose. The opposing theory[43] stated that carnal copula was an essential element of complete marriage. Consent alone was insufficient and only after carnal copula could the man and wife be considered as unitas carnis, one flesh, the true symbol of the unity of Christ and the Church, and thus establish the sacramental and thus indissoluble nature of the union.

Such a theory attacked the nature of marriage between Our Lady and Saint Joseph and as such was strongly criticised by Saint Augustine.

The modern theory of copulatheoria emerges in the writings of Archbishop Hincmar of Rheims, the ninth century prelate, who headed the resistance of the Frankish Metropolitans against the Bishop of Rome[44]. According to Hincmar's theory marriage was contracted by carnal intercourse, or rather if it is begun by consent it is perfected by the copula. In this light the exchange of consent future or present is creative only of betrothal which is dissoluble, and marriage, is created only by the subsequent coitus which brings to the consent the symbolism of the sacrament and the consequent character of indissolubility.

The theory gained popularity in Bologna and Gratian (c 1140) supports it in the Concordia. In support of his conclusions in favour of the theory he quotes a rescript by Leo I to the Bishop of Narbonne which through the humanist efforts of Migne and Friedberg, the editor of the standard edition of the Corpus Juris Canonici, is shown actually to have a meaning completely the reverse of that which Gratian founded on[45].

The intellectual attack on the theory was headed by Peter Lombard and the School of Paris. Peter Lombard distinguished the symbolism of marriage and vindicated the sacramental nature of the union. He spoke of corporeal and spiritual union and saw both these aspects in the union of Christ and the Church, he also attributed a spiritual union between husband and wife by exchange of consent along where there had, as yet, been no corporeal union.

It is in this effort to suppress the troublesome theory that one sees the origins of canonical desponsationes de futuro and de praesenti.

To combat Gratian's reasoning and to explain the circumstances where marriages of consent only had been dissolved Lombard attributed such dissolutions to desponsationes per verba de futuro but he denied dissolution for any cause in the case of desponsatio per verba de praesenti.

The argument was laid to rest by Alexander III[46] who as Roland Bandinelli taught Canon Law and Theology at Bologna[47] and who developed with the characteristic flair of one educated in the Sic et Non of Abelard, a via media.

The distinction between sponsalia per verba de futuro and desponsatio per verba de praesenti was admitted, as was the sacramental nature of marriage by consent alone without any copula. Absolute indissolubility was accorded only to marriage ratum et consummatum. Marriage ratum non consummatum was capable of being dissolved only by a solemn vow or papal dispensation.

It was therefore established that at the heart of the pre-Reformation practice, consent was the prime consideration. The consent had to be free not the result of force or fear[48]. There are some four cases dealing with force and fear in the Liber Officialis Sancte Andree. The case of Creichtone and Hering[49] in 1515-16 narrates that Elizabeth Creichtone widow of John Crawford of Bonytoun was abducted by force and violence by Edward Hering and forced to participate in sponsalia per verba de futuro upon which carnal copula followed. The Court held that the pretended sponsalia was null and invalid and celebrated contrary to the sacred canons. As a result of the impediment of force and fear, impediments listed as diriment and showing dissensus between

the parties the Court separated the parties and divorced them (sic). The abductor was found liable in expenses.

The other cases will be dealt with under the head of diriment impediments.

Consents of others than the parties were not required under the Canon Law. Hay however, does quote a rescript of Pope Evaristus which indicates that permission to marry a woman should be sought from her parents and those who have power over her, in a feudal society her overlord, but that this is a matter of propriety only[50]. The later law of the Catholic Church in this regard is shown by the XXIV Session of the Council of Trent[51] which condemns with anathema those who assert that marriages contracted by children without consent of the parents are invalid. The chapter goes on to underline the Church's disapproval of such marriages.

The doctrine of the consent of parties as constitutive alone of marriage was inhibited by the double edged nature of the affirmation of consent solo verba on the one hand, for to do anything else would as has been shown be theologically dangerous, and the desire to control, for equally obvious reasons on the other hand which led the church to the position of <u>having</u> to recognise as valid consensual relationships between parties whilst condemning any clandestinity which arose from the secrecy of the exchange of the consents.

The Council of Trent changed the law relating to clandestinity, by rendering that circumstance a diriment impediment -

"Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorised by the parish priest or by the ordinary and in the presence of two or three witnesses the Holy Council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null as by the present decree it invalidates and annuls them"[52].

In the post Reformation era there was some change of emphasis in relation to the question of consent as indeed there was in relation to the rest of ecclesiastical jurisdiction and juristic concepts.

For the Reformers the period immediately following the Reformation Parliament was one of consolidation. This consolidation culminated in the restatement of reformed ideals contained in the First Book of Discipline[53].

In the specific regard of marriage, Cameron[54] is correct in indicating that 'the authors of the Book of Discipline considered it necessary, as Calvin had done in his Ordinances of 1541, to set forth their judgements on this topic'.

It is the case that the section of the Ninth Head of the First Book of Discipline, "Concerning the Policie of the Kirk" represents the statement of the Reformers 'ideal' law for marriage in conformity with scripture and also in conformity with the conclusions in respect of marriage found by Calvin and Bucer[55].

It can be ventured that this section of head nine represents a code of marriage law which was approved by the "new Kirk" and used by the new

courts, the superintendent's or Kirk Session in the decision of cases. The necessity of the Kirk providing a native and Reformed statement of marriage law indicates, one can believe that this section is of an earlier date rather than a later. Whilst Professor Cameron provides some evidence indicating an early date, he shies from dogmatism, considering that such legalistic details would not be forthcoming in such revolutionary times as Summer 1560. However the alternative hypothesis would leave the newly established Church Courts deciding either on the basis of their own intuition or on the only available appropriate law viz the Corpus Juris Canonici. These alternatives are unrealistic. On the one hand idiosyncratic matrimonial decisions, even in a state in uproar could not be tolerated, on the other the prospect would be so repulsive to the elders and ministers that it cannot be treated as a viable option. It should be noticed however that upon the establishment of the Commissary Court in 1564 it was this contemporary law which was exercised by the mingled jurisidiction.

The section shows quite clearly the Reformed attitude to consent between the parties:-

"The work of God we call when two hearts without filthinesse before committed are so joyned and both require and are content to live together in the holy band of Matrimony"[56].

Consent appears to be paramount. The parties must be touched with the desire for marriage. They also must require and be content to cohabit in marriage. There was a prohibition attached to fornication with one's betrothed whereupon one lost the benefit of marriage[57]. There

was also, following the example of Bucer[58] and Calvin[59] the requirement of parental consent[60].

In characteristically Roman legal terms children, or any one under the power of another requires parental counsel and assistance[61]. This requirement is clearly based upon civilian legal prescriptions, thus Justinian's Institutes provide:-

"Dum tamen filiifamilias et consensum habeant parentum quorum in potestate sunt".

Provided that in the case of those who are dependent, they have the consent of the parent in whose power they lie[62].

If however the parent was unreasonably withholding his consent the child could declare his intention to the minister or the civil magistrate. Under the Book of Discipline, the minister or magistrate was empowered to investigate the matter and if the parent did not comply they could "enter the place of parents and be consenting their just requests may admit them to marriage.

Parental consent or the lack of it features in ecclesiastical cases from the Reformation till the mid seventeeth century. It appears to be a purely ecclesiastical prescription. In the early case of Russell v. Kynnmouth[64] lack of parental consent was seen as an indicium of clandestinity. The First Book of Discipline was referred to in the case of Ramsay v Smith[64] where a father was questioned as to his consent to the son's marriage. The son was advised to attempt to obtain his father's consent or to use the liberty of the Kirk in

obtaining eccesiastical or magisterial saction. In the later case of Walker v Stewart[65] parental consent was required and was given retrospective effect following upon a clandestine exchange of consents with carnal copula. In the end the father would neither assent nor refuse the sons marriage on the grounds that his son was a spendthrift and disobedient prodigal.

The attitude of the Kirk seems to have been variable, ranging from continuations of cases in order to obtain consent as in Walker v Stewart, through satisfaction in penance being done[66], for proceeding without consent to nullity upon refusal[67] to grant consent as in the late case (1605) of James Watson before the Kirk Session of Aberdeen[67] where due to the child's minority and apprenticeship he was found to be incapable of marrying without consent.

Stair however looks upon the requirement as a merely impedient impediment not a cause of the nullity of the contract. He states[68] "though by human constitution such marriages may be disallowed, and the issue repute as unlawful; but the marriage cannot be annulled". He quotes two passages from the Digest[69] which suggest nullity as the pain for failure to obtain parental consent, this he discounts, "which human constitutions cannot reach".

However it must be recalled, that particularly amongst the propertied classes, lack of parental consent would leave a party unable to bring dos, donatio ante nuptias, dower or morning gift to the church door on the wedding day. Here in truth is parental consent an essential element for often such matters would be the cause of love between the parties, and their absence would prompt some mental reservation to say

the least on the part of a prospective son in law or daughter in law.

The Constitution of Marriage:- the Form of Consent

Having discussed consent as the basis for marriage it is necessary to turn to the ways in which this consent was expressed. In the period before the Reformation there were three recognised ways in which consent between parties was expressed. By -

1. Matrimonium Initiatum, known variously as, sponsalia per verba de futuro, betrothal, handfasting or affiancement[70].

2. Matrimonium per verba de praesenti, ratum sed non consummatum.

3. Matrimonium per verba de praesenti ratum et consummatum.

Matrimonium Initiatum - Betrothal prior to the Reformation

Hay describes Matrimonium Initiatum as the "contract (of marriage) is made by words referring to the future, and means the same as betrothal"[71].

Betrothal normally preceded marriage, it was a sponsio or promise of future marriage by exchange of present consents:

Sponsalia que futurarum sunt nuptiarum promissio[72].

It was in truth a contract and promise between parties, however it was not an indissoluble union nor strictly speaking a part of marriage nor

a necessary antecedent thereto. This however does not mean that the institution was unimportant, it was an incomplete marriage and could form with copula a marriage by presumption of law.

As in marriage by exchange of present consents, matrimonium initiatum whether termed de futuro, handfasting or betrothal depended on the valid exchange of consents to future marriage by both parties, or as will be shown by their guardians.

The betrothal ceremony at which parties made their sponsalia per verba de futuro was variously described as simple betrothal, plighting one's troth or handfasting.

Simple betrothal consisted of only a promise of future marriage, plighting one's troth required the exchange of pledges, hankering back to the origin of Germanic beweddung[73], handfasting was simply betrothal where both parties having concluded the contract of future marriage clasped hands, as Anton points out "the ceremony of joining hands became so closely associated with betrothals in Medieval times that in Scotland ... the ordinary term for a betrothal was a handfasting".

The essential of the betrothal ceremony was the contracting between the parties of a binding obligation to marry one another within a certain period of time[74] or with 'all reasonable haste'[75].

Failure to implement the contract wilfully was a mortal sin according to Hay[76], quoting Acquinas, Hostiensis[77] and other noted Canonists.

Betrothal in Canon Law like later Roman Law[78] required no prescribed words in contradistinction to earlier civilian sponsiones forming sponsalia[79].

Anton[80] describes a sponsal ceremony of July 1556 between Robert Lawder and Jane Hepburn where the following formula was used, "I, Robert Lawder tak thow Jane Hepburn to my spousit wyf as the Law of the Holy Kirk schaowis and thereto I plycht thow my trewth, and syklyk I the said Jane Hepburn takis you Robert Lawder to my spousit husband as the Law of the Holy Kirk schaowis and thereto I plycht to thow my trewth". The ceremony was completed by handfasting.

The sponsalia of David Boswale of Auchynflak and Janet Hamilton[81] in 1531 narrates that "the sponsus and sponsa" appeared before the Priest Dom Henry Louk, curate of Linlithgow and several eminent witnesses including the Earl of Arran, James Hamilton Sheriff of Linlithgow, and the Sheriff Clerk. David was asked by Father Louk if he resolved to take Janet as wife and to complete marriage with her in the form of the Church. He replied that he was ready to take her as wife pro perpetuo. She replied in a similar fashion whereupon the curate joined both their hands and betrothed them. The promise was enforced by an oath, which emphasised its contractual nature.

There is also the elucidating case of Johnstone v Elder before the Official of Saint Andrews in 1522[82]. In this case a validly solemnised marriage contracted in church and followed by copula was held to be null and invalid because of a prior sponsalia, described as 'de futuro quam de presenti', as much of the future as of the present contracted between the pursuer and Margaret Abirnethy in the following

words:-

"I promytt to zow Begis Abirnethy that I sall mary zow and that I sall nevere haiff ane uther wiff and thereto I giff zow my fayth".

Margaret replied in similar terms whereupon copula followed and the parties cohabited in one house at bed and board. Obviously the parties could exchange the sponsalia in the vulgar and any words expressive of the intention were sufficient.

Hay discusses this particular question and a formula which seems to cover all objectives is, "I shall not marry anyone but only you"[83].

The consent could be exchanged by the parties or by their guardians as shown in the case of Sir Alexander Olifant v Catherine Lesley[84] (1550) where the marriage contract had been entered into between Lord George of Rothes and John Olifant de Kelly to the effect that when Alexander Olifant, then a pupil reached puberty he would contract marriage with the legitimate daughter of Lord Rothes and Margaret Chreichton, and have the marriage solemnised. Hay accepts the possibility of parental arrangements. It is difficult to imagine the Church opposing such practices in a feudal society, and imports mortal sin to those parents who break faith in the marriage contract[85] without good reason.

The distinguishing feature of plighting one's troth was the traditio of arra sponsalica. This is found in the late Roman Law[86] though arra, a form of surety of future performance in emptio venditio is found as evidence of the conclusion of the contract in Gaius[87] and in unwritten contracts of sale in Justinianic law[88]. Following the

hiatus of unenforceability in the Classical law under Justinian betrothal attained once again legal recognition and provision was made for the twofold forfeit in the event of breach of promise[89].

The gift of a ring given in respect of arrhis sibi sponsam sponsio per dignitatem fidei is found in Gratian's Concordia[90]. There is mention of an "annulum aureum sponsalitium ... de tribus libris monete Scotie" given at the Church door in lieu of dowry, in the case of Agnes Anstruther v David Howieson[91] (1542), this case also makes mention of 'morning gift'.

Where the betrothal was unjustifiably broken, or where an impediment to betrothal or the subsequent marriage was found the arra was restorable at the instance of the judge hearing the case. Thus in the case of Halyday v Makesone[92] (1534) before John Weddell, a licentiate of both Laws, Official of Lothian and Rector of Flisk[93] and Thomas Melville, Commissary and Rector of Miltoune[94] it was ordered that, where sponsalia per verba de futuro followed upon a valid matrimonium per verba de presenti, and was consequently null, "quicquid alier alieri dederit propter pretensa sponsalia dotis aut donationis causa fore", that which the one gave to the other by way of dowry or gift on account of the pretended sponsalia is to be restituted. A similar order is found in the case of Buchanan v Knollis (1520) although the ground of reduction in that case was affinity due to the sponsalia being perfected by carnal copula.

Often the marriage contract entered into between parties or parties and their parents, provided amongst its stipulations some express statement as to liability in the event of non implement.

One such case is that of John Quhitt v John Pitcairn of Drimgy[94] (1543) which appears to be the subject of an entry in the Protocol Book of Sir Alexander Gaw[96].

There appears to be much discrepancy between these accounts of the one contract[97], but what is important to notice is the enduring principle of in effect damages for breach of contract.

In August 1541 John Pitcairn of Drimgy had Sir Alexander Gaw, Notary Public execute a minute to the effect that if one of his sons does not marry Mirabel Quhitt, daughter of John Quhitt of Lumboyne he or his sons will pay the sum of £40 to the said John. The £40 was declared to cover the skaiths and expenses of the contract. Subsequently in 1543 John Pitcairn is cited before Martin Balfour[98] to answer for his non implement of the contract, which is narrated in the sententia in the following terms:-

"That Henre Pitcairn sone to the said John sall marye and haiff to wiff Mirabill Quhitt dochter to the said John Quhitt and the said mareage to be completit sasone as beis seyn expedient be the said Johnne Pitcairne and his frendis and the saidis Maister Henie Quhitte and Johnne Quhitt and thair freindis to the parte falzeand to utherise suay that the mareagecum nocht to effect sall pay to the parte observand the sowme of one hundredth pundis usuale money of Scotland ... etc".

The contract was annulled and Johnne Quhitte underwent the supreme ecclesiastical sanction: excommunication[99], and in addition to the penalty of £100 imposed by the contract John was ordered to pay the

expenses of action as taxed at the decision of the court.

Obviously the penalties for non-compliance with a marriage contract, or for unreasonable or unjustfied repudiation could be severe, and in the case of Quhitt one sees a tendancy for penalties to be punitive rather than restitutive. In later law as Balfour[100] shows the character of arra and the restitution thereof and additional penalty payments take on more of the colour of damages for non implement. In the title on Marriage[101] chapter III Balfour discusses the restitution of arra and "the pane of ane certaine sume of money" where a party, bound to complete the band of matrimony fails. Under the scheme shown by Balfour the party in breach of the obligations arising from the contract of marriage is to pay "the pane" to the King's Highness and to the other innocent party, "for the cost, skaith, damage and interest" sustained by virtue of the default. Apparently the defaulting party may also do any "uther gude deed" in name of pain, almost by way of penance[102].

Balfour further advises that any part of tocher given before the marriage should be returned to the innocent party in the event of default. He does not, interestingly enough, state whether an innocent party may retain gifts given in anticipation of marriage although the buyer's right of retention of earnest given in sale was recognised[103].

Witnesses were advised by the Church to be present at the contracting of betrothals, as part of the general drive against clandestinity. Whilst their presence was required their absence did not nullify betrothal. They were purely evidential, as the early Constitutions of Bishop David (1242) show[104]. Such injunctions and local legislations

were quite ineffective as is shown by their frequent re-enactment, for example the fourteenth century synodal statutes of Saint Andrews prescribe that "Espousal be not contracted without the presence of a priest and witnesses". Banns and solemnisation were to follow the sponsalia 'as quickly as is conveniently possible'[105]. This local legislation is reinforced once again in the sixteenth century by yet further provision against clandestine marriage.

Promises of betrothal, handfastings or matrimonia initiata were enforceable in the Courts Christian. This was not seen in the canonists' eyes to be contrary to consent being the basis of marriage as the Church would merely be insisting upon the implementation of a promise freely made[106].

Balfour supports this view, upon pre-Reformation authorities, and states "gif ather of the parteis refusis or delayis the completying of the marriage he may be callit before the Judge Ordinar and chargit to solemnizat the said matrimonie within ane certane day"[107]. He also narrates the penalties for non-implementation as the payment of a fine, to the King[108] and the same amount as 'interesse conventum to the partie quha is willing and reddie to obey and fulfill the said contract and appointment for his part".

The ways in which the contract could be broken off without sin or incurring an order from the ecclesiastical forum to solemnise were where the parties agreed to bring the betrothal to an end or where a lawful impediment arose.

The contract of betrothal could be dissolved by the common consent of

the parties, provided no copula had occurred between the parties metamorphosing the handfasting into matrimonium ratum et consummatum. Hay recognises this ground of dissolution, and observes that it is permitted only in betrothal, the human bond rather than matrimony, the divine bond[109]. This is in general accord with the Liber Extra -

"Sponsalia de futuro dissolvuntur si sponsi se dissolvuntur etiamsi fuerint iurata"

Sponsalia de futuro are dissolved if the parties dissolve them themselves even if they are sworn on them"[110].

There are two recorded instances of such dissolutions.

The earliest, occurring in 1549, is recorded in the Protocol Book of Sir John Cristisone[116] where Duncan Davidson and Elizabeth Malcum appear before the Dean of Garioch with compurgators who on oath swear that no carnal intercourse had occurred between the parties thus certifying that this was the temporary contract of betrothal or affiancement and not the perpetual vinculum of marriage. The parties then exonerate one another of the contract and state that neither wish to complete the bond.

The later case (1555) is a discharge of a bond of handfasting by the female party alone, whereby Isabel Hamilton states that, of her own free will she renounces the bond with William Campbell[112].

The lawful impediments which permitted the reduction of the sponsalia without sin were (1) fornication, (2) desertion, (3) expiry of time

limit, (4) reception of sacred orders, (5) entry into religion, (6) serious illness or deformity subsequent to the sponsalia, (7) subsequent affinity, and (8) nonage.

Those impediments which allowed dissolution of the previous sponsalia but not without committing sin were, (1) subsequent marriage contracted per verba de presenti, (2) subsequent betrothal followed by carnal copula and (3) subsequent betrothal with a relative of the other party[113].

1. Fornication This impediment had two aspects, physical and spiritual. Physical fornication which could engender fear of repetition in married life is obviously a breach of faith. However, spiritual fornication, i.e. heresy, is not so much a breach of faith with the other party but an offence against God and by implication against the Church[114]. In essence, therefore, as Hay[115] shows, the underlying concept behind this impediment is an 'ante' marital offence as distinct from the post reformation concept of marital offence.

2. Desertion This formed a valid impediment to betrothal if one of the parties stayed furth of the realm for a period of two years[115]. One could seek lawful dissolution on the basis of the party's absence even if the period of desertion had not yet reached two years, but this was a matter at the discretion of the ecclesiastical judge. The Concordia does not mention any period of time but merely states the fact of desertion

"ex urbe egrediens trans marina petit".

"He travels out of the city, across the sea"[117].

3. Expiry of Time Limit Time limits for completion of marriage were very often set in marriage contracts. As already shown these could be specific[118] or detail no particular date or event whatsoever. The time limit could resolve on a date[119] or a saint's day[120] or within a period of a year and a day[121], but, notwithstanding Hay's opinion[122] it could devolve upon a party's idea of 'all gudely haist' or 'alb sone as the lauch of Halykyrk showis without ony obstakyll or dolaye"[123].

The parties had the duty of organising the wedding by the date concerned and failure to complete the band involved the party, whose obligation it was to organise the celebration, in sin, for breaking his word, for which he ought to undergo penance.

4. Reception of Sacred Orders This also constituted an impediment to betrothal. If a man entered Holy Orders the betrothal was annulled ipso jure, without the necessity of any declarator[124]. The wider topic of clerical celibacy will be dealt with infra.

5. Entry into Religion In spirit similar to that expressed in the foregoing impediment of the reception of holy orders, as celibacy was seen as a more perfect state, the entry into religious life broke, again ipso jure the temporal bond[125].

6. Serious illness or subsequent Deformity The illness or deformity had to be of such a nature that the healthy party could not reasonably be expected to cohabit in marriage with the sick

party[126]. This provided a catchall clause which permitted the reduction of the sponsalia for several reasons. The truly dangerous diseases were for the medieval mind of course, madness, plague, bewitchment and leprosy. With some logical foresight Hay includes cruelty and illtreatment amongst such illnesses[127]. This rationale for dissolving betrothal in Canon law is noticed by Stair[128].

7. Subsequent Affinity The seventh impediment to betrothal occurred by carnal copula being committed between a party to the betrothal and a relative of the other party. The problem of relationship which will be discussed in connection with the impediments to matrimonium consummatum et ratum. It could annul betrothal and could be proved by hearsay evidence[129].

8. Nonage If parties to the sponsalia were below the age of seven, the betrothal was annulled[130]. However this rule could be circumvented by the tutor or parent making the contract on behalf of the impubes. This was often done as the proprietorial matters contained in any contract would in many instances be of greater importance to the clan or family than the individual match. Thus the Liber Extra provides[131]:-

"Pater pro filio impubere sponsalia contrahit"

"The father contracts sponsalia for his underage son".

It was obviously this provision upon which John Olifant was relying when he made the contract with Lord George of Rothes for

the marriage of Alexander Olifant[132].

Provided arnal copula had not occurred between the parties the parties could call off the betrothal, petition for dissolution and contract a new contract upon reaching puberty.

The method of constituting marriage by a sponsalia per verba de futuro followed by carnal copula was clandestine i.e. not being solemnly celebrated in church following upon Banns. The point at which the sponsalia changed to matrimonium perfecta was in lecto. Thus whilst frowned upon by the Church and inductive of sin sponsalia followed by copula was a valid and true marriage. Clandestinity and the effects thereof will be discussed further, but what is important to note is that by the Twenty-fourth Session of the Council of Trent (11 Nov, 1563) marriages not celebrated in accordance with the prescriptions of the Session were null and invalid. This of course included sponsalia per verba de futuro, matrimonium initiatum or whatever term one cares to use and effectively closed to Catholic Europe or at least to those parts of the Continent where the Decree was promulgated.

The Council of Trent, however, did not affect the law affecting betrothal in Scotland. By the time that the Twenty-fourth Session's decreets and canons were promulgated Scotland had been divorced from the Roman tradition for some three years. Therefore, the Reformed church in Scotland became the inheritor of a theory of the constitution of marriage which in the respect of betrothal as in other matters still to be examined, was fraught with legal and theological difficulties and of which as soon as was practicably possible the Roman tradition divested itself. It may well be that the Session of

the Council of Trent in its decision to invalidate clandestine marriages, an aim which the Reformers also strove though never achieved, forced the Reformers to retain sponsalia per verba de futuro as a means of constituting marriage from political reasons and against the Reformers' better judgement.

Betrothal subsequent to the Reformation

The Reformers recognised that before marriage young men and women whose hearts were "touched with the desire of marriage"[133] should take the advice of their parents or tutors or curators. The provision for the eldership to fulfil this function has already been examined[134]. However whilst the First Book of Discipline provides the basic code of Reformed matrimonial Law it makes no mention of betrothal, sponsalia per verba de futuro, or handfasting. This may appear strange as this area of Canon law was most productive of clandestine marriage and fornication, both faults of which the Kirk was very aware and very anxious to stamp out, in an effort to create "the flock of Christ Jesus".

Efforts were made to control the making of contracts of marriage from the earliest days of the Reformed order. In Saint Andrews 'all Banns of those who contracted or have made marriage' were to be received by the scribe to the Session[135]. In April 1560, the Session dealt with the case of Tweedale v Ramsay[136] where Catherine Tweedale alleged that she gave her body to Walter Ramsay on the faith of his promise, "in the presence of God ... that he suld fulfill the bond of marriage in faice of the congregation of Holy Kirk ... by giving me his right hand". Walter was ordained to complete the marriage.

Another case Millar v Adie[137], the sententia of which is lost, consisted of a claim of impediment of ligamen (previous marriage) preventing a handfasting which had not yet been solemnised although the Banns had been called, from being completed. The General Assembly also saw the danger of slander to the Church at an early date and in 1560 ordained that in order to avoid fornication there should be public repentance for those who copulate between the promise of marriage and the solemnisation of marriage[138].

The problem of parties contracting to marry and failing to solemnise the 'Holy bond' grew to intolerable levels in the years immediately subsequent to the Reformation. Thus Aberdeen Kirk Session in 1562 issued a decreet narrating that "many are handfast and made promise of marriage as they call it a long space bygone, seven or six years syne and as yet will nocht mary and compleit that honorabil bond nather for fear of God nor lyff of party" and ordered all such parties to complete the bond. Doubtless some of the parties to whom this decreet refers entered their handfastings in 1555 or at other times before the Reformation and thus whilst some marriages would form sponsalia per verba de futuro subsequente copula and therefore be valid if unlawful marriages at Canon law the Reformed Church could hardly be seen to be condoning even if by silence a situation which according to Reformed opinion represented "manifest fornication and whoredom"[139].

If however the copula followed upon a promise of marriage the Kirk would be obliged to accept the union as valid although sinful. Thus in the case of Budge v. Jak a promise which had been followed by intercourse was sued upon, and an interdict obtained which prohibited the defender from marrying until it was decerned that he was free to

marry[140].

On other occasions if a promise had been made upon which the parties had set up home and cohabited as man and wife, the Kirk Session ordained satisfaction for fornication and ordinary banns to be read, thus ignoring any matrimonial quality in the promise and copula[141]. The presence or absence of witnesses to the promise would apparently swing the balance and thus in 1563 the General Assembly issued an Act regarding this problem. The act provided that no contract of marriage alleged to be made secretly and followed by carnal copula, would be upheld until the parties had undergone punishment as breakers of good order and slanderers of the Kirk. Furthermore the promise would only be considered as marriage if either there were 'famous and unsuspected' witnesses or a confession from the parties. Failure of witnesses or confession caused the parties to be condemned as fornicators[142]. This ambivalent attitude of the Church made for a confusing and bewildering state of affairs for couples intending marriage.

Gradually the pattern of consistently striving to solemn celebration as the only acceptable method of marriage appears. Several decisions on the point of promise followed by copula decern solemnisation as the decision of the Session. Thus in the cases of Mokcills and Angus (1564)[143] Lokaird v Tholland (1565)[144] at Saint Andrews and Brown v. Wallis (1565)[145] at the Cannongait, solemnisation is sought as the conclusion though in Edinburgh the pursuer was advised to seek her decision from "the competent judges" (the Commissary Court)[146].

Such decisions were enforced by appropriate ecclesiastical legislation

both local and general. An example of local legislation is given by an act of the Kirk Session of Aberdeen, where in 1568 it was ordained that neither minister or reader be present at contracts of marriage making "as thai call thair handfastnis"[147].

The General Assembly provided the general legislation and recommended admonition or a decree from the competent judge ordering solemnisation for those who do not adhere to their promise, the pain for non compliance being excommunication[148].

In 1570 a method of ensuring completion of a promise was found and given approval by the General Assembly. The act declared that only promises of marriage per verba de futuro could be made in church before solemnisation; the celebrant is advised to take caution for performance which was of course forfeit upon non performance[149]. This idea had been used in the Kirk of the Canongait in 1564 where one Alexander Spot was required to find surety for his performance of promise of marriage[150], it is also found in Saint Andrews in 1576[151], and at Stirling in 1586 where the caution (£20) was lodged with the local Commissary Court at Stirling[152].

In 1575, the Assembly was asked the following question, "Should the Contract of Marriage formerly made before the proclamation of banns be made by present words for example, I take thee to be my wife and I take thee to be my husband or should there be no contract or promise made before the solemnisation of the Marriage". The reply made, that the parties should come before the local assembly and give in their names in order that their banns made be read, and "no farther (cermonies usit) should be here"[153] clarified the issue to some

extent.

Local legislation of a similar kind was promulgated at Saint Andrews[154].

To say however, as Smout does, that "no ceremony was used to mark a betrothal and that the notion of a "handfast" marriage passes into the twilight of fokelore" is not entirely accurate[155]. For example, in 1577 a protocol is recorded noting that Thomas Glennay has bound himself to handfast and marry Janet Ryle in face of Holykirk[156]. Again, in 1578 Henry Scot alias Kylman makes, before the seat "promise of marriage to Agnes Messen by deliverance of his hand to Agnes and to solemnise ... in a year and a day or sooner when required"[157]. Anton notices at least one later usage[158]. In any case people still made promises of future marriage irrespective of whatever name by which these promises were called and no matter what attendant ceremonies were performed[159].

That the practice of promising of future marriage continued is certain and that it opened the route for 'sinful abusis' is just as sure in the seventeenth century as in the sixteenth. Thus in 1622 the Kirk Session of Stirling issued an act reiterating the sixteenth century acts of the General Assembly that the parties who wish banns read consign £10 ad pios usos upon failure to complete the marriage in 40 days[160]. There are also instances of actions for breach of promise, for example in Dingwall in 1663 the Presbytery requested investigation of such a matter[161].

The attitude of the Kirk then was substantially that of the pre

Reformation Church. Sponsalia were to be tolerated as consents per verba de futuro. It was upon these consents de futuro having pretensions to marriage that the prospect of sin, scandal and clandestinity arose. The efforts of the Kirk were not to outlaw betrothals or espousals or handfastings. They were directed only at extending the control of the Kirk by requiring a solemn act in church expressing present consent.

It is upon this concept of present consent that the law of marriage turns and the Reformers could not reconcile it to mean only a de presenti declaration but were forced from historical reasons based, to a certain extent on flawed rationale to see in the copula, or in cohabitation the very essence of the consent or at least of a presumed consent. Consensus, non concubitus was just as much a criterion of the Reformers as it was of the Catholic legal theologians. The concubitus however led to a presumption of consent. Therefore, Stair, writing from an advanced stage of juristic development can state:

"So that the matter (marriage) itself consists not in the promise, but in the present consent, whereby they accept each other as husband and wife, whether that be by words expressly or tacitly by marital cohabitation ... or by natural commixtion ... espousals preceding ... is presumed a conjugal consent de presenti"[162]

This is the only explanation for the attitude of the Church, for only in such circumstances i.e. admission of promise and copula as a valid if clandestine marriage could it prefer a marriage by promissio per verba de futuro subsequente copula to a prospective solemn marriage per verba de praesenti[163].

Betrothal could be reduced, as in the Canon law upon incurring an impediment or upon agreement provided there was no copula had occurred between the parties[164]. The breaking of a marriage contract without agreement or impediment could have unpleasant consequences. The ultimate sanction of excommunication was seldom used but did exist. More often the penalty was commuted to caution and the undergoing of discipline[165], "for slandering the Kirk". The impediments of the Canon law, reception of Holy Orders, entry into religion and subsequent affinity failed to be accepted by the Reformers because they represented the rules of a misguided ecclesiastical ruler, and because according to the Reformed opinion there was a lack of spiritual justification for such prescriptions.

A prior formal marriage prevented betrothal[166] as did a prior promise followed by copula[167]. Fornication unless purged by satisfaction or penance before the Kirk impeded marriage[168]. Nonage operated as an impediment to marriage itself and there is no reason to hold that Stair in accepting dissensus by reason of impuberty does not represent the Reformed position[169]. Indeed all forms of dissensus, vis, metus and insanity could be applied to betrothal as equally to marriage de praesenti due to the underlying rule that parties be habiles matrimonii[170].

A question not authoritatively dealt with was whether error impeded betrothal. In the Saint Andrews case of Lokaird v Tholland (1565)[171], the defender claims that she should not be obliged to complete the contract with him because she had subsequently discovered him to be "a thief, and unclean in his body". So far as this objection constituted an error of condition the minister held it did not impede the

marriage, however the Kirk felt that the error ran deeper and upheld the objection and did not order banns.

Matrimonium Ratum and Matrimonium Ratum et Consummatum

Valid Marriage in the Pre Reformation Period

It has already been noticed that whilst many marriages were de facto preceded by betrothal and indeed whilst this was as Hay[172] states, a normal practice, betrothal was by no means universal and was never a requirement of a valid marriage.

Valid marriage is described by Hay[173] as 'true marriage by words referring to the present which can exist without subsequent copula'. This is the matrimonium ratum which has already been described as part of the explanation of copulatheoria[174]. The essential element here, as throughout the canonical theory of marriage, is lawful consent, thus, Hay can state, "Consent is sufficient for marriage which is expressed by verba de presenti and is not invalidated by any law"[175].

Matrimonium ratum et consummatum represented the extreme Bolognist theory of copulatheoria whereby consent of itself was insufficient for marriage and required to be 'perfected' by carnal copula. Hay with the deftness of a theological lawyer admits to a certain extent that matrimonium ratum was developed to accommodate the marriage of the Blessed Virgin and Saint Joseph within the canonical theory of marriage, and whilst being careful not to proffer any criticism of the theory he appears to be at pains to dispel any heretical doubts which his pupils may acquire as the validity of the sacred union, by explaining some embarrassing statements of Augustine, who, it must be remembered, was writing some time before the via media of Alexander

III relieved the uncertainty on this matter.

The consent whereby valid marriage was created should be as the meaning would betray, 'per verba de praesenti' by words of the present tense, which Peter Lombard termed as the expression of the effective cause of marriage -

"Efficiens causa matrimonii est consensus, non quilibet sed per verba expressa, nec de futuro sed de presenti"

"The efficient cause of marriage is consent, only through express words in present tense not the future"[176], which so far as the forum externum is concerned creates a valid and binding marriage. Difficulties could possibly arise if persons consented for other motives, e.g. for the satisfaction of lust or as a result of force and fear. In such instances the question of proof is of a matter lying within the forum internum and only upon clear proof could the Church absolve a party from his sin, but his marriage would not be dissolved:- the only basis of dissolution a vinculo being the existence of a lawful impediment.

The expression of consent in words such as "I take you as my wife" and a similar reply amount to a consent as Hay puts it to "the conjugal acts, to the mutual giving of their bodies"[177]. In this a sociological view of marriage as providing controlled generation, a remedy for concupiscence and a vehicle for the education and upbringing of children is quite clear.

The consents could be exchanged by proxy if the parties were absent,

the conditions of valid proxy being a special mandate subsisting at the time of contract. The matter of proxy consents, whilst based on the application of civilian principles of agency in consensual contracts, was approved in the Decretal of Innocent III "mediantibus internunciis" and by way of a nuncius[178]. Later canonists were to insist upon formal procuratory.

The consents could also be subject to conditions. Hay deals to some extent with the matter of conditional consents, commenting to some extent on the Decretal 'De conditionibus adpositis in desponsationibus et in alis contractibus"[179]. The element of civilian consensual contract in this area of Canon law is most marked. There were many conditions which were of no effect or so struck at the concept of Christian marriage that they rendered the consents null. Conditions could only relate to suspensive future events, neither certain nor necessary[180].

In this respect canonical conditions are close in nature to modern conditions precedent and although there is some evidence of a misappreciation of the civilian distinction between condicio and dies incertus[181], the overwhelming impression given by Hay is that condicio in the strict Roman sense is the forerunner of the canonical condicio[182]. Many rules, of course, were introduced to take account of the particular canons applicable to marriage and betrothal. Thus the effect of carnal copula or consents de praesenti nullifying a condition[183] are of canonical invention, as is also the requirement that a condition should not strike at the primary uses of marriage as sketched above[184]. Rules of the inadmissibility and ineffective nature of illegal, immoral or impossible conditions are well known.

In order that the condition be fulfilled the circumstances at the time of making the condition must still obtain, thus, one party could not found upon a conditional consent, if by the time the condition was purified the other party had concluded another unconditional marriage with a third party.

One exception existed to the prima facie rule of illegality of a condition striking at the essence of marriage namely the Josephesehe, or Joseph's Marriage i.e. mutual consent subject to a mutual vow of chastity. The matrimonium was ratum but incapable of becoming consummatum by virtue of the vow of chastity[185].

It is important to observe the proximity of the relationship between conditional marriage and betrothal, indeed some marriages initiata could be described as merely conditional upon the passage of the time stated in the marriage contract. Even more startling is the possibility of presumption of marriage de jure arising upon carnal copula occurring between the parties consenting per verba de futuro and those consenting per verba de praesenti sub conditione[186].

The effect of consent is to produce that vision of Christian marriage drawn by Hay[187] quoting Peter Lombard[188], viz:-

"Matrimonium est viri et mulieris maritalis conjunctio inter legitimas personas individuam vite consuetudinem retinens".

"Marriage is the marital union of man and woman, both lawfully capable, entailing their living together permanently".

This statement describes the primary requirements of a valid canonical marriage. The parties must be male and female, with full legal capacity. They must also consent to the indissoluble contract of marriage.

The capacity of parties to contract marriage is a corollary of the essential nature of consent in Canon Law marriage. The debilitating factors and circumstances which rendered this consensus nugatory are termed impediments. These impediments were subdivided into impedient or prohibitive impediments and diriment impediments. Of these more will be said. It suffices to state that impedient impediments rendered the marriage unlawful but maintained its validity, whereas diriment impediments, when incurred brought nullity to any union.

The history of the development of impediments is not entirely clear. Certainly those stated by Hay either as impedient or prohibitive were not always considered as such. Esmein[189] links the development of the theory of impediments to the development of marriage as a sacrament. As the concept of marriage being a sacrament became clear, the Church could only pronounce as null those marriages contracted under diriment impediments so declared by the church. Ivo of Chartres found two impediments on the basis of scripture; bigamy and incest[190]. It is certain, however, as the mnemonic rhyme of Hostiensis shows, that by legislation the Church could create or define other impediments and thus, as will become clear, the Church could also dispense from those impediments of ecclesiastical invention.

As Esmein[191] shows, the distinction between impediments diriment or impedient was late in developing and was a subject of some discussion

and disputation.

Thus the gloss of Decretum C.XXVII qu 1 rubric runs -

"Impedimenta matrimonii sunt XVI, scilicet votum, ordo habitus, dispar cultus, error personae, error conditionis, cognatio, ligatio publicae honestatis justitia, enormitas delicti, impossibilitas coeundi, tempus feriarum, interdictum Ecclesiae, coactio, aetas. Verum tamen quidam ex his impediunt contrahendum sed non contractum dirimunt".

"The impediments of marriage are 16 in number thus:- vow, order, character, other religion, error of person, error of condition, relationship, prior marriage, the justice of public honesty, serious delict, impotence, ferial time, ecclesiastical prohibition, threats, age, madness. But even so some of these impede contracting marriage but do not annul the contract".

By the 13th century the content of diriment impediments became more settled. Esmein[192] shows this by comparing the list of impediments given by Bartolomaeus Bruixiensis[193] (died 1258) with that of Hostiensis[194], whose statement from his Summa is the basis of Hay's[195] treatment of the question. Bartholomew's list contains only two impedient impediments namely ferial time and interdict, in the other respects it is the same as that of Hostiensis -

"Error, conditio, votum, cognatio, crimen, Cultus disparitas, vis, ordo, ligamen, honestas, Si sis affinis si forte coire nequibis. Hec socianda vetant connubia iuncta retractant"

"Error, condition, vow, relationship, crime, disparity of worship, force, order, marriage bond, propriety, if there is affinity. If perchance you cannot come together these forbid marriage and make it void".

The diriment impediments, which will be examined in more depth, thus formed circumstances whereupon the parties were incapable of consenting to marriage or where the consent was defective. It is probably over complicated to maintain, as does Scanlan[196] following Esmein[197] that the diriment impediments can be conveniently classified according to (1) general incapacity, (2) defect of consent, and (3) relationship presupposing incapacity.

The third classification in particular is quite false and it can be contended, does not appreciate the psychology of the medieval mind nor indeed the attitude of the theologian-jurists who created many of the impediments. Dissensus is therefore the key to understanding the Roman-Civil-Canonical structure of impediments, as marriage was made by consensus, it was broken by dissensus.

This theory is plain in respect of the diriment impediments of vis or error. It may appear less so to the mind of the twentieth century that an impediment like cognatio spiritualis or spiritual relationship is of the same category as force or error.

Force and error if used to induce consent, obviously, in canonistic terms, contravene 'common and indemonstrable principles' of Natural law, viz consensus facit matrimonium. This theory of Natural law when adhered to, as Aquinas sketches in his Summa Theologica leads the

medieval canonists to conclusions, within their own scope, strictly logical. Thus the impediment of spiritual relationship is a provision of human law definitively stated by Boniface in his Sext[198]. Aquinas[199] states that the human law is a particular disposition derived by the application of reason from the common and indemonstrable principles of Natural laws, which is in itself the participation by rational creatures in the Eternal law of God. Clearly the medieval theologian jurist would see in spiritual relationship the ecclesiastical extension of the relationship of consanguinity, based on the scriptures of the revealed law, the revealed expression of the will of God, and therefore in keeping with the Natural and Eternal laws. In such circumstances no one could consent to the breach of such a law, by contracting marriage in spite of the prescription. Therefore at least in the forum externum, dissensus alone could provide a basis for understanding the impediment, by virtue of the inability of the parties to consent to such a marriage. And if there was no consensus there could be no marriage. Any marriage would be de facto only and not de jure, and therefore void from the beginning. This being the case the Church could separate the parties a vinculo matrimonii, from the bond of marriage, grant absolution from sin, and permit the lawful remarriage of the parties[200].

The impedient impediments represent as it were ecclesiastical penalties exacted for an offence against the Church or against the community at large[201]. In these respects the Church formed a policy of social control for its own protection and for the protection of the faithful. Just as the Reformed Church was to withhold the benefit of marriage from offenders of specific general laws, the pre Reformation

Church withheld marriage, in many respects to protect the institution of the Church. However it must be remembered that many of the impedient impediments were instituted over a long period of time, when dangers for the Church were very real, and when the ecclesiastical estate had to use every opportunity to protect its members against barbarism and untimely martyrdom.

The impedient impediments merely impeded marriage but did not invalidate any consent exchanged. If disregarded the parties were deemed to have sinned having disobeyed the Church's laws. The marriage was valid but the parties required to obtain dispensation in order to cure the mischief and gain absolution and penance to restore their spiritual health.

The impedient impediments were again, according to a rhyme from Hostiensis, quoted in Hay -

"Incestus, raptus sponse, mors mulieris, susceptus proprie sobolis, mors prisbiteralis Vel si peniteat solemniter aut monialem accipiat Prohibent hec conjugium sociandum".

"Incest, abduction of a spouse, death of a woman, standing for one's own child, death of a priest, being a penitent or marrying a nun, these impede the marriage bond"[202].

Hay does not include in his list of impedient impediments parental consent, improper time, or interdict of the Church. In the general Canon law these were recognised as impedient impediments, at least at some stages of their development. Certainly by the time Hay was

writing as has been shown[203] parental consent was not an impediment and indeed only became a requirement of the Church after the Reformation. It never passed into the secular law as an impediment although on a practical point as parents would often be providing the endowment of the daughter the upshot of the matter was that lack of parental consent led to a poor marriage which in many cases at least would cool the desire of parties for the connubial bond.

The Impedient Impediments

Incest

The incest is that occurring subsequent to the marriage[204], thus reflecting its origins as a diriment impediment[205]. As Hay states prior incest is a diriment impediment. It is envisaged by Hay that one who has intercourse with his wife's relative cannot marry that relative even after his wife's death. It also impedes the guilty party from seeking intercourse with his wife as it was considered a grave sin against marriage[206].

In quoting certain texts from the Decretum of Gratian, Hay shows the acceptance of the Canon law of the Western Church in Scotland, thus D.G.C.32, VII, 21 states:

"Anyone who has intercourse with firstly his wife, then her daughters or with two sisters ... they are to be separated and we direct that they are not again to have carnal intercourse".

The attitude of the church authorities is summed up in one brocard

from a text of the Concordia. "Incestus est consanguinearum vel affinibuim abusus"[207].

Raptus

In the violent, medieval society of the 13th, 14th, 15th and 16th centuries it is difficult to imagine that rules against abduction held any sway with those inclined to commit such acts. However, the Church acting in defence of innocents, Ratione personae, could not conscience the abduction of someone else's wife or betrothed. Thus raptus, the illicitus coitus occurs in the following circumstances:-

"Raptus admittur cum puella a domo patris violenter ducitur ut connupta in uxorem habeatur".

"Abduction is committed when a girl is violently taken from her father's home in order to live as a wife"[208].

The claim of abduction could be personally barred by a virgin or unmarried woman accepting the situation[209].

Mors Mulieris

Again an element of social control enters the reasoning of the Church in upholding the prohibition against a man from marrying upon killing his wife. However, any marriage of course is valid, this impediment being merely impedient. Hay[210] quotes a decreet from the Concordia:

"Conjugia penitus interdicantur his qui suas uxores occidunt".

"Marriage is prohibited to those who kill their wives"[211].

If however the murder was committed in rixa following upon the husband finding his wife committing adultery there was no prohibition on his subsequent marriage[212]. On the other hand, if he killed her from hatred in order to contract an adulterous marriage then that marriage was null, as was, according to the Decretal De Divortiis, any other marriage of the adulterer's paramour[213].

Susceptus proprie sobolis

To receive one's own son from the baptismal font or from the Bishop upon confirmation creates a spiritual relationship or cognatio spiritualis which prohibited the act of intercourse between husband and wife. Thus if done in bad faith the taking of a child from these sacraments destroyed the basis of marriage.

Hay does not quote the Decretum dealing with the matter which is a fourth century decreet of the Carthaginian Council[214]. Again the Church by its action is here attempting to fulfil a social role in regulating the occasions where a husband is attempting to create a legal bar to marital relations.

Mors Presbyteralis

Whilst there was a substantial proportion of clandestine marriages, at all epochs, evidenced by the repeated legislation against such activities, the priest always held a special position as the celebrant of the sacrament[215]. Again as a matter of self protection the Church

used the sanction of withholding marriage from those of a sufficiently anti-clerical disposition to murder a priest, thus the Liber Extra declares:-

"Qui presbyterum, occidet ... absque spes conjugii maneat""Whoever kills a priest, ... remains without hope of marriage"[216].

Peniteat solemniter

There had been, as Scanlan[217] states, in the early Church a general prohibition upon those who had undergone public penance, which prohibition subsisted for the whole of the penitent's life. It became recognised however as Scanlan[218] quoting Esmein[219] notes that the severity of such a rule was unworkable. Esmein describes the history of the development of the impediment. Particularly it should be noticed that penance had figured as a diriment impediment and that certain decretists, especially Huguccio[220] (died 1210), master of Innocent III, Bishop of Ferrara restricted the operation of the diriment aspect of the impediment to penance for uxoricide, raptus, and incestus[221]. However as these grounds became recognised impedient impediments themselves the prohibitive nature of penance became apparent. The corollary of the independent grounds of impediment becoming settled was that public penance which could be incurred for relatively minor sins had a more stringent effect than serious sins or crimes. Gradually therefore it was seen to be an impedient impediment only and eventually to subsist only for as long as the penance existed and not subsisting for the penitant's whole life. Thus Hay introduces some more comment on the nature of the prohibition[222].

Monialem accipiat

Marrying a nun is the final impedient impediment which Hay[223] recognises. Following the Concordia[224] those "who marry a nun or a religious" were to be penitent and thus were inhibited from contracting marriage on that ground[225]. However this impediment, again as a matter of self protection attained independent status.

There are two impedient impediments which Hay does not deal with in the same section dealing with the other impediments noted above. These are, the impedient impediments of spiritual relationship and of ferial time.

Spiritual Relationship

This is linked quite clearly with the impedient impediment of susceptus proprie sobolis where the spiritual relationship of godfather is created in mala fides by a husband attempting to prevent himself from asking the marriage debt and thereby removing the cause of marriage. It is mentioned by Hay in his treatment of the diriment impediment of cognatio spritualis and relates to the relationship of persons in exorcism and catechising[226]. This was recognised so far as catechism is concerned by Boniface VIII[227] and then suppressed at Trent[228]. Hay states that the relationship arising between persons involved in exorcism and catechism prevents the contracting of marriage but does not nullify the contract[229].

Ferial Time

The impediment of ferial time is not truly an impedient impediment and therefore it is clear why Hay does not deal with it in conjunction with the other impediments. In so far as it is an impedient impediment it restricts the solemnisation of marriage. In this way it can only relate to non clandestine marriages or those celebrated in facie ecclesiae. Hay does not however make this absolutely clear thus he says:

"Cur nuptie sunt prohibite quibusdam certis temporibus".

"Why it is prohibited to marry at certain times"[230].

Clarification that the impediment relates to solemn marriages follows:

"Tria sunt tempora in quibus non licet solemnizare matrimonia. Tamen si solemnizata fuerunt ipsa tenent quamvis contrahentes peccant".

"There are three periods during which it is not lawful to solemnize marriage, but if it is solemnized then, it is valid, but the parties commit sin"[231].

If, of course, the marriage is clandestine this impediment cannot apply.

Marriage was forbidden according to the Liber Extra, as quoted by Hay, from the first Sunday of Advent until the octave of the Epiphany, from Septuagesima[232], (three weeks before Lent) until the octave of Easter, and from the Rogation days[233] until the feast of the Trinity. The primary reason for this prohibition was to turn the attention of the

faithful from carnal matters, in these holy times, to spiritual ones[234].

The Diriment Impediments

Error

Hay defines error in Augustinian terms whereby error is a mistaken belief in that which appears to be true, as true but which is, in reality false[235]. He identifies five species of error, namely, error personae, error conditionis, error fortunae, error qualitatis, and error dationis.

Three of these species impeded marriage and nullified the contract, error of person, error of condition which formed of itself a diriment impediment and error of consent which in representing general dissensus represents the underlying rationale of all diriment impediments. Error of fortune, i.e. thinking a prospective spouse was rich when in fact poor did not reduce the consent to marriage. Similarly error of quality where one believes the spouse to be noble when in reality she was lowborn, error fortunae et qualitatis conjugii consensum non excludit[236]. It is interesting that Hay in distinguishing error dationis, error of consent draws a distinction not contained in the authors from whom he drew his major theory, Peter Lombard[237] and Gratian[238] perhaps as a matter of clarification. Error of person therefore constituted the ground of error by which one mistook the identity of the other party. As Esmein narrates there were difficulties as to the interpretation of error of person being understood as the error of identity of the person. Hay gives the

biblical example of Jacob, Leah, and Rachel[239].

Conditio

Particularly in the earlier times the Christian Church often had to compromise its position in particular when dealing with secular matters.

Thus whilst the New Testament showed clearly that the distinction of slave and free was not of relevance to the Christian,

"Non est Judaeus, neque Graecus, non est servus neque liber non est masculus neque femina, omnes enim vos unum estis in Christo Jesu".

"There is neither Jew nor Greek, neither slave nor free, nor man or woman for you are all one in Christ Jesus"[240].

The Church had to accept that in the Roman world the slave was an essential element in the economic scheme. All that could be done initially was to convince the Emperors and this of course became easier from Constantine onwards, that legislation should be introduced to alienate the servile status[241].

Whilst in Civil law the slave could not contract marriage because he did not have connubium, his alliances, perhaps contubernium, were monogamous and permanent and in the eyes of the Church could represent a valid marriage resting upon the exchange of consent. The history of servile marriages and their recognition is not relevant to the present work. However the examination of the problem by eminent jurists

working on the decreets of early Synods and Councils in respect of the problem under consideration evolved into the following Law. If a free person married a slave knowing the status the marriage was valid. If however a free person who was ignorant of this condition married a slave the marriage was null. Nullity was subject of course to the following conditions:- that the parties were indeed of unequal status, that the one party was ignorant of the other's status, and that no carnal intercourse had followed upon the discovery of the disparity of status thereby perfecting the marriage[242].

Hay does not deal much with the question principally because slavery as such did not exist in Scotland during the sixteenth century. However there were some instances of quasi servile status during varying epochs e.g. necessary service of salters and colliers and tenants adscripti glebae.

Votum

The vow was in medieval society possibly the most important method whereby one acknowledged oneself to be bound to do or give something, to perform some deed or to abstain from doing something. The vow had many purposes, to lend ecclesiastical weight to obligations, to impress upon one the serious nature of an undertaking, to enter an order, and as in the present instance, to abstain from intercourse, to be chaste or continent.

It was a wholly voluntary way of incapacitating oneself from contracting marriage. As an impediment it had taken a long time to develop, as Esmein says it exercised Christianity 'from the earliest

times'[243] and was only rendered definitive in the Sext of Boniface VIII. The earliest decisions regarding vows did not bring marriages contracted in the face of vows to nullity, but tinged the union as being illicit[244].

Then upon the action of Gratian and Lombard a distinction arose as a means of explaining the Church's attitude of disapproval yet coexistent validity, that of the difference of effect on a subsequent marriage of solemn vows and simple vows. As has been stated Boniface's Sext definitively set the law:-

"Nos igitur attendentes quod voti solemnitas ex sola constitutione est inventa ... praesentis declarandum duximus; vincillo sanctionis, illud solum votum debere dici solemne quantum ad post contractum matrimonium dirimendum quod solemnizatum fuerit ... per professionem expressam vel tacitam factam alicui de religionibus per sedem apostolicam approbatis".

"We therefore considering that the solemnity of vows is only a creation of law. We think that we are bound to declare by these effective presents that the vow alone when it is said to be solemn and diriment of marriage contracted hereafter, which is taken solemnly, by profession, express or tacit into one of the religious orders approved by the apostolic seat"[245].

The settled law therefore was that the solemn vow only was a diriment impediment is supported by Hay[246], who also states that simple vows, i.e. those made in private constitute only an impedient impediment.

Cognatio

Cognatio or relationship formed such an important area of the law of the constitution of marriage that some commentators[247] have viewed it as representing a separate category of impediment distinct from those based on dissensus and incapacity. Fundamentally, the essential aspect of the diriment impediments is their character to render consent null, though this be attained by the way of several agencies. Any categorisation must recognise this basic and inherent nature in respect of impediments otherwise the pre-eminence of consent in forming marriage becomes diluted.

Hay devoted a large part of his lectures to the subject of relationship. This is not surprising when it is considered that the topic encompassed three separate yet entwined elements, viz consanguinity, legal relationship and spiritual relationship.

Consanguinity

The Church from the earliest times recognised a diriment impediment arising from the blood relationship of the parties. This was primarily based upon scriptural prescription in Leviticus and principally chapter 6:-

"Omnis homo ad proximam sanguinis sui non accedet ut revelet turpitudinem eius, Dominus Sum"

"No man shall approach to her that is near of kin to uncover her nakedness, I am the Lord"[248].

Roman law had restrictions upon marrying relations by blood, though the scope of prohibited union was relatively narrow. If a marriage contravened the rules of relationship it was void and if the parties knew of the impediment it was deemed incestuous and punished as such[249].

Justinianic law narrates prohibitions on marriage between parent and child, in the direct line, and between certain collateral relations, i.e. where persons were married one of whom was only one degree removed from the common ancestor[250]. Development of the Roman law continued and the Codex Theodsianus contains some interesting provisions[251].

Adopting the Roman framework the Canon law developed along an independent line enlarging the prohibited degrees from six to seven. However, it was upon the adoption of the Teutonic rules of computation that the prohibition became fixed at the seventh degree[252]. The provisions of the Lex Romana Visigothorum were in part influential upon Isidore of Seville[253] and also exercised the mind of Alexander II[254].

The law as applicable when Hay writes is that as revised by the Fourth Lateran Council (1215) in a famous decree of Innocent III:-

"Prohibitio quoque copulae conjugalis quartum consanguinitatis et affinitatis gradum de caetero non excedet, quoniam in ulterioribus gradibus non iam potest absque gravi dispendio huiusmodi prohibitio generaliter observari".

"The prohibition on matrimony shall not henceforth exceed the fourth degrees of consanguinity and affinity, since it is not now possible to observe the general prohibition on the more remote degrees without grave inconvenience"[255].

It is probable that the grave inconveniences referred to in the Decree were those of certain noble families. Such influences were major factors in the development of this branch of the law in particular. The wide-ranging effects of this and the other aspects of the impediment of cognatio caused the now famous letter from the Archbishop of Saint Andrews to the Pope in 1554 whereby we learn that because of the relationship between noble families it was hardly possible to match men and women of equal status in such a way as to keep within the prohibited degrees of consanguinity and hence people married promising to obtain a dispensation but did not and used this ground to reduce the marriage[256].

Similarly the pressure on the Pope to grant powers to a Legate a latere to dispense in cases of the third degrees of consanguinity and affinity was maintained by Mary the Queen Regent in 1556. In February of that year she wrote to the Holy Father and the Cardinal Promoter of Scottish Affairs, Cardinal Sermonete, and Cardinal a Caraffa with the aim of obtaining these powers:-

"Nam cum multa quotidie contrahantur inter consanguineos illicita et in gradibus prohibitis matrimonia ... cum maximo ecclesie scandalo et animarum suarum periculo".

"For since illicit marriage is contracted every day between those

related by consanguinity and within the prohibited degrees ... with the greatest scandal to the church and danger to their souls"[257].

The description of this aspect of cognatio as given by Hay represents the developed Canon law. Thus he defines consanguinity as unity of the blood, a bond formed by descent from a common ancestor or because of unity of blood[258].

Hay categorises consanguinity in terms of direct lines of ascendancy and collateral and transversal degrees. It is noticeable that the fundamental cause of cognatio is carnal connection forming a relationship, this relationship is calculated by either the civilian or canonical methods[259].

Degrees in the direct line were calculated by civilians and canonists in the same way. The difference however occurred when consideration is given to the collateral degrees. In collateral lines, because the canonical calculation is based on blood relationship, there are as many degrees as there are generations between a person and the common stock, whereas in Civil law each person constitutes a degree[260]. Hay goes on to examine the Aristotelian[261] basis of the argument for the existence of such an impediment and to cite the various sources of the Canon law of consanguinity drawing on the Bible[262], and the Canons and Decreets culminating in the Decree of the Lateran Council[263].

The question of whether the Pope can dispense parties to contract within the second, third and fourth degrees is also considered. Hay concludes that it is possible for such dispensations to be granted particularly for altruistic reasons of peace and concord in the same

way as it is for dispensations to be granted for marriages governed by the chapters of Leviticus, provided those prohibitions are not of Natural law.

There is a wealth of extant case law to support the propositions of consanguinity as a diriment impediment and also many earlier Papal decisions dispensing the prohibition and permitting the marriage[264].

An example from the Liber Officialis is the case of Jonet Brown who was sued in the Court of the Official of Saint Andrews in 1551 before Abraham Chreiton, for divortium a vinculo matrimonii on the grounds of consanguinity.

"Sententia contra Brown.

... Chreichtoune in causa simplicis divorcii mota inter ... et Jonetam Brown eius sponsam putativam ream partibus ab altera. Decernimus pretensum matrimonium inter prefatos Edwardum et Jonetam contractum et solempnizatum de jure ab inicio nullum. Ex et pro eo quia tempore contractus et solempnizationis prefati pretensi matrimonii inter prefatos Edwardum et Jonetam ipsi invicem attingebant et prout de presenti attingunt in tercio et quarto gradibus consanguinitatis et eo pretextu prefatos Edwardum et Jonetam ab invicem divorciandos et simpliciter separandos fore prout ipsos divorciamus et separamus ac licenciam in domino alibi matrimonium contrahendi concedimus Et quiquid alter alteri dederit dotis aut donationis causa propter nuptias iterum restitutendum fore et proles inter prefatos Edwardum et Jonetam procreatas stante prefato pretenso matrimonio legitimas fore decernimus".

"Sentence ... against Brown.

... Chrichton in the cause of Divorce simpliciter moved between ... and Janet Brown his putative spouse as defender of the other part. We decern that the pretended marriage between the said Edward and Janet contracted and solemnised by Law was null from the beginning.

From and because of at the time of contracting and solemnising the said pretended marriage between the said Edward and Janet they were each related and even at the moment they are related in the third and fourth degrees of consanguinity and for this reason so that Edward and Janet are to be mutually divorced and separated, we hereby divorce and separate them with our permission to both to contract marriage in the Lord, And that which the one gave the other as dowry or gift on account of the marriage is to be restored and we decern that any children born of the said Edward and Janet in the course of the said pretended marriage to be legitimate"[265].

It should be noted that in conformity with the accepted Canonical position divorce a vinculo is not stated in this case. The marriage bond is certainly dissolved, but on the ground of nullity, through the incurring of a diriment impediment. It is interesting that this case is a marriage supposedly solemnised in Church, as in which case banns would have been read and yet the impediment which publication of banns is designed to bring to light failed abysmally to avoid an unlawful and null union from taking place. This, from the extant cases, was the rule rather than the exception.

An example of dispensation from the rules of consanguinity at the same

degree as the case of Brown, is the petition of Douglas and Graham which occurred more than a century earlier in 1423.

"That for certain reasonable cases they desire to be joined in matrimony but as they are related in third degrees of consanguinity on one side and fourth degrees on the other side they are unable to fulfill desire without apostolic dispensation. Therefore said nobles petition that the Pope would dispense them that notwithstanding above degrees of consanguinity they may contract and freely remain in matrimony and declaring offspring to be legitimate"[266].

The interesting question is why did Edward and Janet Brown not take the course sketched by the Douglas and his consort? Perhaps it is of parties like those in Brown that Archbishop Hamilton writes that -

"propter itineris longinquitatem et difficultatem ... propter pecuniarum inopiam"

"On account of the long and difficult journey ... and the lack of money"[267].

they do not take steps to obtain a dispensation. It is worth noticing that the parties obtaining the dispensation are described as 'nobles'. The characteristic of nobility and therefore the wealth of some litigants recurs in those cases where the parties seek expensive and lengthy remedies, rather than taking a chance upon not being discovered and bringing scandal to the Church or imperilling their souls through sin in not complying with Canon law.

The answer of course to such problems particularly for the poor was the granting to the Legatus Natus, the power to dispense in such cases. There had, of course, always been the possibility of obtaining ad hoc powers of dispensation as in the case of Brown v Chancellor where a dispensation was granted by the Archbishop of Glasgow following on letters obtained from the Penitentiary at Rome[268].

Cognatio Legalis

The impediment of cognatio legalis or legal relationship arose only from adoption. Adoption was used by the canonist as in Roman law and, whilst it constituted part of the general jus commune of Europe it was not effective as law in Scotland[269]. Hay notices this circumstance yet for the sake of dealing with all aspects of the topic acknowledges the diriment impediment.

It appears to have been accepted as part of Canon law by Gratian[270] in his Concordia who in commenting on a Rescript of Nicholas I on cognatio spiritualis also extended the prohibition on marriage to those connected by the adoptive relationship.

Originally the canonists had attempted to extend the prohibition on marriage to those related by adoption to the seventh degree, however by the sixteenth century it was settled that marriage was prohibited only between the adopted person and the natural brothers and sisters, and the direct line[271].

Hay's treatment speaks for a total acceptance of the general Canon law even though there is no native institution. It also speaks for a high

level of acquaintance with the Civil law with direct quotations from Justinian and an analysis of the civilian distinction between adoptio and adrogatio[272] the corresponding Canon law distinction being imperfect and perfect adoption. This having been said it must also be noticed that the understanding of the distinction is defective, given that it lacks historical perspective and does not appreciate the original bases and methods of the distinction, e.g. the imperial and magisterial institution and the original effects of the change from the sui juris status of the adoptee to the new status of alieni juris.

It is interesting however that the later classical distinction or rule of adoptio naturam imitatur[273] is mentioned by Hay in terms quite similar[274] to the civilian provisions and it is probably in this observation of the canonical appreciation of Natural law that one finds the origin of the canonical assumption of this ineffective area of Civil law.

It should also be noticed that there were no cases on this matter before the Courts of the Officials at Saint Andrews.

Cognatio Spiritualis

Hay defines cognatio spiritualis as a bond of love resulting from the fact that one has baptised confirmed or received another at baptism or confirmation.

As an extension of the prohibited degrees, it caused a multiplication of the occasions upon which a marriage could be annulled. It was purely an institution of the Church and arose only from the sacraments

of baptism and confirmation. As has already been noted the prohibitive or impedient impediment of catechism was of a similar nature, but of course being only impedient could not vitiate consent and nullify the marriage but only impede marriage.

The development of the impediment was very restricted and fell to be determined by fixed principles which did not allow scope for extension[275].

The relationships which were productive of the impediment found their origin essentially in baptism, the spiritual birth of the soul, confirmation, as the consolidation of baptism naturally followed thereon. As Panormitanus in his Commentary on the Liber Extra states[276]:-

"Haec cognatio spiritualis imitatur naturalem seu carnalem cognationem quantum potest".

"Cognatio spiritualis imitates natural and carnal relationship as much as possible".

Mention is made in Justinian's legislation of the relationship, where certain prohibitions were imposed[277].

The definitive statement of the impediment is made by Boniface VIII in the Sext:-

"Inter baptisatum et eum qui illum suscepit de baptismo ac inter eundem baptisatum et suscepientis filios et uxorem ante susceptionem

carnaliter cognitam ab eodem ymmo etiam inter suscipientem parentem que baptisati et matnem cognationem spiritualem in baptismo contrahi iure constat".

"Between the baptised and the one who receives him from baptism and between the baptised and the receiver's children and wife, if there is carnal intercourse between them before the baptism but also between the parents of the baptised and the receiver"[278].

Hay[279] analyses the relationship in terms of paternitas, compaternitas and fraternitas relating to the spiritual fatherhood of the baptiser and the relationship with his spiritual son; the relationship between godparents and the natural parents; and finally the relationship between the children of the sponsor and the baptised.

There is one reported case of cognatio spiritualis before the Court of the Official Principal of Saint Andrews in 1548, that of Forret v. Yngles before John Spittal[280].

"Nos Joannes Spittall prepositus ecclesie collegiate dive virginis Marie de Campis prope Edinburgum in utroque jure licenciatus, almeque universitatis Sancti Andree rector, officialis Sancti Andree principalis, in quadam causa matrimoniali per honestam mulierem Marjoriam Forrett sponsam putativam probi viri Davidis Ynglis actricem ab una contra prefatum Davidem reum partibus ab altera nata et adhuc pendente indecisa. Decernimus matrimonium pretensum inter dictos Marjoriam et Davidem de facto et non de jure contractum ab inicio fuisse et esse nullum Ex eo quod Joannes Forrett de Fingask pater dicte Marjorie sponse putative dicti Davidis eundem Davidem de sacro

sponte levarit. Stante igitur huiusmodi impedimento cognationis spiritualis inter dictos Marjoriam et Davidem huius modi pretensum matrimonium de facto et non de jure contractum nullum et invalidum ... propterea eosdem Marjoriam et Davidem simpliciter divorciandos fore prout eosdem ab invicem divorciamus dantes utrique alibi in domino nubendi facultatem. Et quiquid alter ab altera causa donationis vel dotis receperit eidem restituendum fore decernimus".

"We, John Spittall, provost of the Collegiate Church of the Holy Virgin Mary in Edinburgh, licentiate in both laws and Rector of Saint Andrew's University official principal of Saint Andrews, in the matrimonial cause by the honourable woman Marjory Forrett putative spouse of the noble David Inglis, pursuer of the one part against the said David defender of the other part, and awaiting undecided.

We decern that the pretended marriage betwen the said Margory and David was contracted only de facto and not de jure and was and is from the beginning null. From and because John Forrett of Fingask, father of the said Marjory putative spouse of the said David, carried the said David from the Holy fount. Therefore in this way there was an impediment of cognatio spiritualis between the said Marjory and David in this way was the pretended marriage contracted only de facto not de jure, null and invalid. On account of this Marjory and David are simply divorced and just so we divorce them, and grant the capability to both to marry in the lord. We decern that which the one received from the other as a gift or dowry to be restored[281]".

Changes were in the air and the Church at the Council of Trent issued a decree concerning the question of cognatio spiritualis. The net

effect was to limit the effect of the prohibition, retaining only paternity and direct compaternity.

This was done by limiting the number of sponsors at baptism to one person or at least only one man and one woman and prescribing that the relationship will be contracted only between the baptised and the sponsors, and also between the baptiser , the baptised and the natural parents of the baptised.

The relationship arising from confirmation was to be similarly restricted to the confirmer, the confirmed, the mother and father of the confirmed and the sponsor.

Regulations were made to ensure that the fundamental reasons for the incurring of the impediment namely ignorance of the nature of the impediment and superficial acquaintance with the degrees of relationship were not farther incurred. Thus the parish priest was to enquire of the natural parents and the sponsors and would allow them to act only after having recorded their names and after having instructed them in their relationship and duties[282].

Crimen

The diriment impediment of crimen or qualified adultery nullified any contract of marriage between the adulterous spouse and the paramour.

Initially at least adultery alone was an impediment merely of the impedient nature[283]. The diriment nature of qualified adultery was settled at the Council of Tribur[284] (895) quoted by Gratian where a

diriment impediment occurred where an act of adultery was qualified with a promise of marriage. The other qualification was the arrangement of the murder of the wife or husband in conjunction with the adultery[285].

Hay recognises these distinctions, the adultery which, depending upon whether only one or both parties are married is classified as simple or double, can be committed for lust or for the forming of an agreement to contract marriage after the death of the other spouse or spouses concerned[286].

The basic principle behind the impediment is that of social control i.e. withdrawing the benefit of marriage from those who contrive through fornication and murder to overturn their original match and form a new marriage[287].

Thus Hay can state that a married person who contracted marriage with a married or unmarried person, and commits carnal copula could not contract marriage with the paramour even after their lawful partners are dead. Similarly if a man commits adultery, promising to marry after his spouse's death, he cannot conclude the marriage notwithstanding his spouse's death[288].

Adultery alone had changed its character to the extent that it produced no impediment; diriment or impedient. Following Pierre de la Palu, Hay states that a promise and adultery creates an impediment this is to be understood as being complementary to the diriment impediment produced by adultery and the plot of conjugicide[289].

There is no case of nullity for the diriment impediment of crimen extant in the existing court records of the Official's Court in Saint Andrews. The cases concerning adultery all relate to divortium a mensa et thoro being a ground for repudiation for the matrimonial offence not divorce for inherent nullity, and will be farther discussed under the head of separation[290].

Cultus Disparitas

Hay writing for a country that was for the most part Catholic does not dwell for long on the problem of disparity of worship. Disparity of worship, that is where one party was a baptised Catholic and the other was an infidel formed a diriment impediment, both preventing and nullifying any marriage[291].

Like cognatio spiritualis this impediment was of ecclesiastical institution yet unlike the other impediments was substantially based on customary canon law not on any decreet, rescript or constitution.

Gratian writes a little on the topic in the Concordia where he clarifies that the marriages of Christian and infidel were to be null[292]. It is, for example, heresy to marry a jew or a gentile other than a Christian[293].

The requirements for the impediment were therefore that one party was a baptised Christian and the other an infidel. Infidel in this sense is a non Christian, therefore the reasons for the impediment become clear.

As always the theory of sacramentality lies deep below the legislative prescriptions of marriage. The sacrament of marriage, like all others is an outward sign of inward grace and, unless one has received the initial grace of baptism the farther grace which is given in matrimony cannot be received and therefore the sacramental aspect is reduced.

Marriage between a Christian and a heretic or a Catholic and a Protestant was valid but unlawful for such a matter fell under the head of spiritual fornication which was an impedient impediment[294].

Vis

As has been mentioned before the essential element of consent was central to the canonical scheme of marriage. Perhaps no other diriment impediment displays so clearly dissensus as the root of nullity in marriage as vis or force. It is also to be observed that probably no other impediment was of such practical value as that of vis, particularly in the turbulent times of the sixteenth and seventeenth centuries.

Hay draws, in some respects finely the distinction between a slight and a grave fear. Only a just or grave fear would annul any consent exchanged, and examples are cited as death, ruin, bodily harm or some grave and appalling outrage[295].

A less pressing or slight fear is insufficient to affect the consents exchanged. Upon fear being alleged and proved the marriage could be annulled by the Ordinary:-

"Si timetur inferri violentia puellae, de cuius matrimonio agitur debet judex sibi providere locum tutum et honestum donec causa terminetur".

"If a girl is afraid by the application of violence and marriage is made, the judge may allow himself a secure and honest ground that the cause be ended"[296].

There are some four extant cases of nullity or divortium a vinculo spanning the years 1515-1523 in the book of the Official of Saint Andrews. Two relate to forced sponsalia per verba de futuro[297] and at least one of the remaining relates to a marriage per verba de praesenti[298]. All are cases where the female party is applying for the annulment on the grounds of vis.

The example of Boyis and Morton (1522) seems to contain all the relevant points:-

"Nos Willelmus Prestoune[299] in causa mota inter Isabellam Boyis actricem ab una et Johannem Mortoune reum partibus ab altera. Decernimus pretensum matrimonium inter dictos Isabellam Boyis et Johannem Mortoune contractum ab inicio fuisse et esse nullum et invalidum nullumque de jure fortiri debere effectum ac contra constitutionem sacrorum canonum celebratum causante impedimento subscripto. Ex et pro eo quia dicta Isabella fuit rapta et per vim metum et violenciam qui possent cadere in constantem mulierem per dictum Johannem et suos complices armatos eandemque secum absulit secumque cohabitare matrimonium contrahere illudque carnali copula consummare coegit prout libellatur et probatur in processu coram nobis

desuper deducto. Propterea dictos Isabellam Boyis et Johannem Mortoune abinicem divorciandos fore prout divorciamus dictamque Isabellam in integrum restituendam fore prout restituimus per presentes ac sibi licenciam in domino nubendi alibi licenciamus. Lata die prescripta.

"We William Preston, in the cause moved between Isabella Boyis the pursuer of the one part and John Morton the defender of the other part decern that the pretended marriage between the said Isabella Boyis and John Morton is and was since the contracting thereof null and invalid and to have even more so no effect by law and was celebrated contrary to the constitutions and holy canons causing the impediment underwritten. From and because the said Isabella was abducted and by such force fear and violence which could affect a strong minded woman executed by John and his armed accomplices and by the same she was carried away and forced to cohabit and to contract marriage and to consumate with carnal copula just as libelled and proved in the process before us as above. On account of this the said Isabella Boyis and John Morton initially divorced just as we divorce them and we restore the said Isabella as she was before and we permit her to marry again in the Lord. Given on the aforesaid day[300].

Two aspects of the above case reflect the law as stated in Hay and that contained in the Liber Extra.

On the one hand the fear which annuls consent is as grave and serious as to affect a strong minded woman:-

"Mulieri quae negat, se in matrimonium consensisse non creditur marito

probantur contrarium, secus si probat se consensisse per metum qui potest cadere in constantem virum".

"Women who deny that they have consented to marriage are not to be believed, the husband proving the contrary, it be otherwise if it is proved that they have consented through a fear which could affect a strongminded man"[301].

The significant use of similar phraseology in the sententia as in the canon displays a concern for relevancy. By Hay's time the inherent equality of status as recognised in Canon law between husband and wife allowed a strong minded woman also to be the standard of the person to be swayed by fear[302].

The other aspect which is reflected in this sententia is the restitution of the abducted party to the unmarried status with the right to marry[303].

This aspect of dissensus represents quite clearly a civilian concept of dolus dans causam contractui and in that respect betrays something of the basic origins of the Canon law of marriage.

Ordo

The reception of sacred orders constituted a diriment impediment. Hay examines the matter and referring to his lectures on order[304] where the distinction of sacred or major orders is more fully described. Only the sacred orders were prohibited from contracting marriage, namely the subdiaconate, the dioconate and the priesthood[305].

The problem of married priests had beset the Church since the earliest days. As Hay narrates, it was once permitted to be both married and cleric. However, as Esmein recounts in the late ninth and early tenth centuries the Councils of the Church formulated the impediment and through Gratian and Lombard, Alexander III was able to issue the decretal which regulated the matter clearly[306].

The essential problem was that the Church viewed continence as of a greater worth than that of marriage, and whilst recognising this also saw marriage as a solution to sins to which some pastors were subject and thus it could not completely condemn such activities. The attitudes hardened however by the 16th Century and by then the rule of unmarried priests was settled.

As an impediment, being of purely ecclesiastical constitution it must appear as solely a matter for the Church. However, the activities of married or cohabiting priests affected the entire parish and brought scandal, to such an extent that numerous Scottish provincial councils issued decrees striking at this sin[307]. Indeed one of the major effects of the Reformation was that the priest was released from the restriction on marriage. It was this fact which the peasantry was to notice as delimiting the new order and breaching with the old. No other action, for the poor majority would spell out the Revolution more thoroughly than the priest living with his wife.

Ligamen

Christian marriage was always monogamous, and a valid and subsisting marriage, which in Canon law was dissolved only by death, prevented

either party from contracting a new marriage in the lifetime of the other spouse[308]. Thus the status of being already married operated as a diriment impediment.

The Old Testament provides many instances of polygamy but this was explained by the Fathers of the Church as being before the New law of Christ and as Esmein[309] indicates that often such marriages were considered as a special dispensation from God by reason of the time and the needs.

A clear expression of the New Testament view upon which the Canon law was built under the similarly monogamous Roman ethos, was the passage, quoted in Hay[310] from Saint Paul's First Letter to the Corinthians:-

"A woman is bound by the Law as long as her husband liveth but if her husband die she is at liberty; let her marry to whom she will, only in the Lord"[311].

Fundamentally Hay bases his thesis in this respect on the Natural law, applying reason to the conditions of monogamy and polygamy. Thus he speaks of the ability to procreate, the ability to chastise and of the problems of a relationship between a man and several wives.

In 1551 Parliament took it upon itself to legislate on the matter against "persounis that ar maryit and ar oppin, manifest commoun and incorrigibill adulteraris".

It imposed the secular equivalent of excommunication on such unfortunates. They were denounced as rebels or outlaws and put to the

horn, their moveable goods were seized and no appeal to the sentence was allowed. This is an extraordinary example of temporal and ecclesiastical power working to extinguish a social evil with every means at their disposal[312].

There were essentially six instances in which the impediment of ligamen could arise, namely:-

1. a marriage per verba de praesenti solemnised in church voided a subsequent marriage per verba de praesenti in church.

2. a marriage per verba de futuro subsequente copula voided a subsequent marriage per verba de praesenti in church.

3. a marriage per verba de praesenti solemnised in church voided a subsequent marriage per verba de futuro subsequente copula.

4. an unsolemnised marriage per verba de praesenti voided a subsequent marriage per verba de futuro subsequente copula.

5. a marriage per verba de futuro subsequente copula voided a later marriage per verba de futuro subsequente copula.

6. a marriage per verba de futuro subsequente copula voided an earlier marriage per verba de futuro without copula.

Each of these circumstances helps to demonstrate the wider theory of consent as the sole basis of marriage, as will be shown and also presents the litmus test of the validity of a union. If one union

will bar a subsequent union it must be a valid and unobjectionable marriage. The fact circumstances can be illustrated by the following cases:

1. The case of Chreichtoune v. Lyntoun[313] provides an example of a solemn prior marriage per verba de praesenti which voided a subsequent marriage per verba de praesenti in church. In this case a declarator of nullity and divorce a vinculo matrimonii was granted by William Meldrum the Commissary of the Official (1547-1551), because:-

   "dicta Joneta longe ante dictum pretensum matrimonium inter ipsam et dictum Jacobum contractum erat matrimonialiter conjuncta cum Johanne Young eius sponso et matrimonio inter eosdem solempnizato adhuc superstiste. Et propterea dictum pretensum posterius matrimonium inter dictam Jonetam et prefatum Jacobum contractum ab inicio nullum et invalidum".

   "The said Janet, a long time before the said pretended marriage contracted between herself and the said James, was matrimonially conjoined with John Young, the sponsalia and marriage solemnised between them subsisting till now. And on account of this the pretended subsequent marriage contracted between the said Janet and the said James was from the beginning null and invalid".

2. The case cited in support of proposition two states succinctly the relationship between matrimonium initiatum followed by copula and a subsequent de praesenti declaration. It is clear that when copula occurs between the parties this translates a simple

promise of future marriage into a firm and binding union thus in Nesbet v Hog[314] (1543) it was held that:-

"Ex et pro eo quoniam tempore contractus dicti pretensi matrimonii idem Gilbertus affidatus fuit cum quodam Joneta Duncane adhuc superstite et cum prefata Joneta idem Gilbertus longe ante dicti matrimonii contractum seu consummationem contraxit sponsalia per verba de futuro carnali copula subsecuta in signis cuius dicta Joneta Duncane eidem Gilberto peperit quandam prolem femineam post contractum dictorum sponsalium".

"From and because at the time of contracting the said pretended marriage the same Gilbert had been betrothed with a certain Janet Duncan who was still alive and Gilbert had, a long time before the said marriage was contracted or consummated, contracted a betrothal by words of the future tense followed by copula, as evidence of which the said Janet Duncan presented the same Gilbert with a female child after contracting the said betrothal.

Consequently, as a result of the previous betrothal followed by copula, the marriage between Nesbet and Hog was rendered null. It had been solemnised in church and as such the impediment should have been detected by the declaring of banns. In this instance and in five other recorded instances spanning these years 1522-1543 the banns failed to show up the pre-existing marriage. However, as such marriages were often clandestine it would be difficult for them to be brought to the notice of the priest, although in the case of Nesbet the existence of a child would suggest that the earlier sponsalia should be known.

That the marriage between Nesbet and Hog was truly annulled is proved by two other statements in the sententia namely (1) the freedom granted to Nesbet the pursuer to marry again and (2) the ordaining to the defender to adhere to the party Duncan with whom he had entered the sponsalia followed by copula.

3. The third fact circumstance shows that sponsalia per verba de futuro followed by copula was a true matrimonium initiatum. It requires a sententia to reduce it. It also shows that a prior solemn marriage created a diriment impediment which defeated any subsequent union.

In the case of Brewhouse v Bonar[315] (1536) John Weddell declared sponsalia null and invalid and contrary to the canons where the defender, Bonar had:-

"Longe ante celebrationem dictorum pretensorum sponsalium inter ipsam et dictum Jacobum contraxit matrimonium in facie ecclesie celebratum cum quodam Willelmo Mowbray longe post celebrationem dictorum pretensorum sponsalium inter dictam Agnetam et prefatum Jacobum superstite".

"A long time before the celebration of the said pretended sponsalia between her and the said James, she contracted marriage celebrated in church with William Mowbray which subsisted for long after the said pretended sponsalia between the said Agnes and the said James".

4. The fourth circumstance displays the acute difference between

words of the present tense and words of the future tense. As the central theme of consent is paramount this instance is perhaps the most clear expression of the theory.

The occurrence of de praesenti exchange in church or as shown here even outwith church whether followed or not by copula[316] created at the exchange a matrimonium ratum, sufficiently valid and lawful to defeat any subsequent exchange whether de praesenti or de futuro. Therefore it appears quite clear that even a clandestine marriage would be favoured and indeed upheld in face of a subsequent union.

The clearest instance in the Liber Officialis is the case of Halyday v Makesone (1534)[317]. There a sponsalia de facto per verba de futuro, apparently without subsequent copula was declared null due to a pre-existing exchange of consents per verba de praesenti, again unconsummated.

5. As a corollary of the fact situation under subhead four a sponsalia per verba de futuro followed by copula will present a diriment impediment of ligamen to a subsequent sponsalia per verba de futuro again followed by copula, and thereby render null the subsequent sponsalia.

In the case of Neilson v Broune[318] (1534) a sponsalia per verba de futuro which had been followed by copula, thus forming a matrimonium ratum et consummatum was dissolved, even though its solemnisation had been ordered by the Official of Lothian in 1534 because the defender had previously entered into a sponsalia upon

which copula had followed with a third party who was still alive. Again the pursuer was allowed to marry another 'in the Lord'. However no order for adherence between the defender and the third party was made but the defender was found for expenses.

6. The final example of the operation of ligamen is also an example of the dissolution of matrimonium initiatum by virtue of the impediment of a subsequent matrimonium initiatum followed by copula, i.e. a matrimonium ratum et consummatum, this impediment necessarily involved sin on the part of those a party to the sponsalia and was not an excusive impediment.

It clarifies that the promise of future marriage when followed by copula formed a binding and valid marriage by presumption of law.

It also shows that a sponsalia without copula was merely a promise of future intent and constituted no binding arrangement, and that it could be disregarded certainly with sin in some cases but also, as has been shown, in other cases without sin.

In the only reported case in the Liber Officialis, Blak v. Robertsone[319] (1516) a sponsalia per verba de futuro expressly nulla carnali copula subsecuta was dissolved by reason of preceding sponsalia which had been followed by copula. The party breaking her oath was obliged to undergo penance, and the second sponsalia was dissolved, the innocent party being absolved.

Publica Honestas

The diriment impediment of public propriety arose from betrothal and was closely linked in theological and canonical theory with the following impediment of affinity, to such an extent that it was, as Esmein terms it, 'quasi affinitas'[320], Hay gives some indication of the connection between the two impediments[321]. Hay speaks of it as derived from true betrothal i.e. matrimonium initiatum, which impedes subsequent marriage and betrothal and nullifies same to the fourth degree[322].

Public propriety is a sort of affinity established only by an act of will, i.e. the exchange of future consent. Affinity properly so called is a result of copula, not so with propriety. The impediment is concerned with that which is becoming in society and not productive of scandal[323].

The impediment could operate in respect of marriages per verba de futuro or in respect of de praesenti marriages where no copula had occurred, in which case had copula occurred affinity would be the appropriate impediment.

There is no case in the extant records where public propriety has been pled in bar of a marriage in either pre or post Reformation cases and it appears that the impediment died in Scotland at the Reformation being part of the contaminating influence of the Catholic Church. It should be remembered that the diriment impediment of publica honestas was of statutory invention and had substantially no scriptural basis. The decretal of Boniface VIII provides the law which states that betrothal does not involve public decency except when absolute, determinate and in no way invalid through lack of consent[324].

It is obvious that public propriety cannot occur where the betrothal is conditional, nor where it has not been established as being between two certain persons. It is important to note that public decency or propriety cannot arise unless there is a valid exchange of consents. Hay[325] amplifies this by defining the consents as true or presumptive. If consents are exchanged then the basis of the impediment occurs no matter what other impedimental bases occur. In effect the basis for the impediment occurred in betrothment that was for any reason other than want of consent, invalid. This would appear to work against the unified theory of consent and impediment sketched supra, however, it is explainable on the grounds that public dcency or propriety must proceed on a public declaration of consent and cannot proceed on a public dissensus. The dissensus which is inherent in the other impediments is essentially, to borrow a canonical term, of the forum internum.

This view is borne out by the Decree of the Council of Trent's (1563) twenty-fourth Session[326] (1563) which removed the impediment of justice arising from public honesty where the betrothals are for any reason invalid. The impediment was also restricted from the fourth to the first degree of relationship.

In Scotland as has been said the impediment appeared to disappear but the idea of the unbecoming nature of marriage with certain persons persisted and was most clearly shown as will be explained[327], in the impediment of adultery. A certain confusion arose with the concept of adultery and public honestas, thus in an Act of 1592[328] relating to adultery Parliament enacted:-

'the Marriage of Paramours was ... contrary to the Law of God and Public Honesty'.

This usage exhibits a debased understanding of the concept and it can be concluded that this is a fair example of the mistaken appropriation and usage of Canon law terms by legal administrators unschooled in the discipline or forgetful of laws which by then were of foreign application.

Affinitas

Related to publica honestas insofar as being a narrower basis of relationship, affinitas in Canon law bore quite a different meaning from that of the Roman law.

In the Civil law marriage was forbidden in the Classical law between the less extended degrees of direct ascendants and descendants[329] and a party to the marriage. The later Empire saw an extension by the Codex Theodosianus to brothers in law and sisters in law[330]. The Civil law included elements of public propriety but the essential difference between the two systems, certainly in the sense of the developed Canon law was that affinity in the Civil law was based on justa nuptia whereas affinitas in the Canon law was an impediment based on carnal copula.

Hay[331] can state quoting John Duns Scotus'[332] commentary on the Sentences that 'affinity is a kind of bond between person and person produced by carnal copula with somebody related to the other person'.

The copula can be lawful or not, i.e. either within marriage or as a result of fornication, or rape[333].

The canonical theory of affinity was in essence based on the 18th Chapter of Leviticus[334] where most prohibitions on the basis of relationship originated, as commented upon by Saint Augustine who in formulating his theory of unitas carnis arising from copula imported not only the conjunction of the flesh but also that of the personalities.

This conception of affinity had, as has been shown, the result that copula alone produced the relationship. However, it also, through the analogy with consanguinity rendered affinity subject to the same philosophy and legalism. Therefore affinity was considered as a diriment impediment and extended to the same degrees of relationship i.e. initially the seventh degree and, after the Fourth Lateran Council (1215) to the fourth degree[337].

Affinity was calculated in reference to consanguinity. Thus if one was related to another in the second degree of consanguinity and that person had intercourse with a woman the woman became related in the second degree of affinity[76]. Dispensation could be obtained from the Pope to permit marriage between collateral affines of the first degree, but not direct affines[77].

There are over sixty cases of nullity on the basis of affinity in the records of the Official of Saint Andrews[338] during the period 1515-1551. As such it represents the ground of nullity most often pled in that court. This is probably again because the system of

banns was inefficient in detecting impediments which were not notorious or instantly cognisable and also because of the nature of affinity in being based upon copula which was of itself a private and secret affair.

An example of affinity is the sententia of Robert Boswell v. Christine Awery[339] (1551):-

Nos Patricius Scott[340] vicarius de Carcarht Glasguensis diocesis ac officialis Santi Andree commissarius generalis in quodam causa divorcii per providum virum Robertum Bosuele actorem ab una contra et adversus providam etiam mulierem Christinam Awery eius sponsam putativam ream partibus ab altera. Decernimus pretensum matrimonium inter dictos Robertum Bosuele et prefatam Christinam Awery contractum et in facie ecclesie solemnizatum ab initio fuisse et esse nullum et invalidum nullumque de jure debuisse sortiri effectum. Ex eo quia ante huiusmodi pretensum matrimonium contractum dictus Robertus Bosuele carnaliter cognovit Christinam Ramsay sororem germanam Mariote Ramsay matris dicte Christine Awery prout ex deductis coram nobis legitime probatum existit et ea propter eosdem ab invicem simpliciter divorciandos fore prout divorciamus licenciamque et facultatem in dominie nubendi impertimur specialem ubi eiisdem placueret dotemque et donationes propter nuptias hincinde restituendas fore decernimus per presentes.

'We Patrick Scott, vicar of Cathcart in the Diocese of Glasgow and Commissary General of Saint Andrews in the cause of divorce between the honourable Robert Boswell pursuer of the one part against Christine Awery that honourable woman his putative spouse defender of

the other part. We decern the pretended matrimony between the said Robert Boswell and Christine Awery which was contracted and solemnised in church was from the beginning and is null and invalid and is even more so of no effect at law. From and because before the said pretended marriage was contracted the said Robert Boswell carnally knew Christine Ramsay the full sister of Mariot Ramsay the mother of the said Christine Awery which was legitimately proved to have occurred before us and on account of that they were from the beginning divorced, just as we now divorce them. Permission and ability to marry in the Lord whenever it is pleasing is prescribed and we decern that the dos and the donationes propter nuptias are restored whence they came'.

Impotentia Coeundi

Impotence as a diriment impediment was of fairly late definition in Canon Law.

Hay quotes Hostiensis and Petrus de la Palu, in the initial definition as a 'lack or defect, natural or accidental whereby one is prevented from having carnal intercourse with another[341]'.

As preventing intercourse, impotence struck at the major reason for marriage, namely the procreation of children. The existence of this impediment does not mean that the ability for copula ruled the dissolubility or indissolubility of marriage. This had been well settled in the development of the copulatheoria of Hincmar of Rheims and the reply of Peter Lombard.

There had been early indications in the Church that dissolubility may be the appropriate remedy[342]. When studied by Hincmar, marriage was only a sacrament, and thus indissoluble, upon the occurrence of carnal copula. If carnal copula could not take place there could be no sacrament therefore the 'marriage' could be dissolved. This was difficult to reconcile with the theory of Lombard where marriage came into sacramental and physical being with the exchange of consents and was then truly indissoluble[343]. In which case copula being incapable of occurring, the marriage could only be null on the ground of the impediment of impotence. In many respects the impediment was akin to an error of condition, and in such a way it should be analysed. The question to be asked in relation to a consent to a marriage with an impotent person should be, if one knew of the impotence in one's partner would one have consented to marry? If the answer was no then there is a true defect of consent, and any consent given is nullified by the non-fulfilment of an essential condition of the contract, i.e. the ability to perform sexual intercourse.

The impotence in order to nullify the contract had to be incurable and perpetual. If the impotence was temporary, i.e. that it would pass with time or curable i.e. that surgery could restore potency, it was insufficient to render a marriage null[344].

The impotence also, in order to negate consent, had to be antecedent to the exchange of consents could arise from physical or psychological sources.

Thus the recognisable instances of impotency e.g. castration, frigidity, physical incapability, arcitudo, and vaginism are confused

in the medieval treatment with other grounds which are clearly of the nature of dissensus thus madness[345], nonage[346] and witchcraft[347] are also listed as bases of impotence.

In the respect of treating madness and nonage as branches of impotentia Hay departs from the treatment given by Hostiensis to these impediments and also that given by Bartholemeus Brixiensis. In Hostiensis there is found a particular impediment of dissensus listed and the work of Bartholemew lists 'aetas and habitum conjuge furori' as separate diriment impediments[348].

Hay then represents a rationalised theory recognising a fundamental connection between various forms of impediment and leaving the forms of impediment to be examined not as separate impediments but as different aspects of the one impediment.

It had been well settled that a furiosus could not exchange consents and therefore madness presented itself as a diriment impediment to any marriage contracted in face of the inability to consent[349]. If however a person contracted during a lucid interval the marriage was valid, on the other hand a person contracting whilst mad could ratify his consent by subsequent actings upon his recovery[350].

In examining impuberty or nonage the canonist is thrown back on the Civil law. Once again, 'ecclesia vivit jure Romano' is the appropriate maxim.

In Roman law the matrimonial institution involved in many cases the acqusition of potestas thus Justinian states:-

'qui secundum praecepta legum coeunt masculi quidem puberes feminae autem viripotentes'

"those who join together according to the requirements of law, the male being over puberty and the female capable of child bearing[351]"

The ages at which the male became over puberty was fourteen and the woman capable of child bearing twelve[352]

The Canon law adopted these ages as is told by Hay not for their own sake "but also in relation to capacity for intercourse"[353]. Again, the emergence of the impediment diriment of marriage is clouded by the Copulatheoria debate. Suffice it to say that under the theory nonage presented an opportunity for the dissolution of matrimonium initiatum, i.e. betrothal, whereas with the recognition of Lombard's theory of de presenti consents, it could not be a ground of dissolution and could only be a ground of nullity[354]. There was of course the noted canonical exception of a marriage between impubes which was held valid where "malitia supplet aetatem" malice supplies age, i.e. that a person below 12 or 14 was presumed to have approached consent in full knowledge of the matter and making up for the lack of years in experience[355].

There are illustrations of the impediment of impotentia in the Liber Officialis both in the respect of sexual impotency and in that of nonage. The latest example of sexual impotence was that of Millar v Watson (1544)[356].

Nos Martinus Balfour[357] in quodam causa matrimoniali per Elizabeth

Millar sponsam putativam Davidis Watsoun contra eundem Davidem de facto et non de jure contractum ab inicio fuisse et esse nullum matrimonium. Ex et proce quia dictus David tempore dicti contractus matrimonii cum dicta Elizabeth propter impotentiam provenientem ex frigiditate nature ipsius Davidis adeo impotens fuit prout de presenti est quod omnino cum eadem Elizabeth coire nequiebat nec de presenti nequit nec ullam copulam carnalem cum ea habere potest quamvis sepe et diversis vicibus pro hiusmodi copula carnali inter ipsos habenda operam dantes solus cum sola nudus cum nuda in uno lecto iacuerunt post solemnizationem dicti pretensi matrimonii stante igitur huiusmodi impedimento impotentie et frigiditatis nature dicti Davidis huiusmodi pretensum matrimonium inter eosdem Elizabeth et Davidem cassamus et divorcamus ipsosque abinvicem separamus dantes dicte Elizabeth alibi in domino nubendi facultatem et quicquid alter ab altera causa donationis vel dotis seu ex quacumque alia causa receperit eidem restituendum fore decernimus.

'We Martin Balfour in this matrimonial cause between Elizabeth Millar putative spouse of David Watson against the same David. We decern that the pretended marriage between Elizabeth and David is contracted only de facto not de jure and is and was from the beginning a null marriage. From and because the said David was at the time of the said contract of marriage with the said Elizabeth, on account of an apparent impotence arising from a natural frigidity, impotent just as at the moment he is impotent with all persons and he was not able and is not able to copulate with the same Elizabeth and that he can not have any carnal copula with her because of separate and diverse failings in this way, working at carnal copula they have been alone and naked in the one bed after the solemnization during the currency

of the marriage. In this way because of the impediment of natural impotency and frigidity between the said Elizabeth and David we split and divorce them and separate them from the beginning, giving to the said Elizabeth, the right to marry again in the Lord and that which the one received from the other as a gift or dowry we decern is to be returned'.

This case illustrates much of the law as shown above; the marriage is truly null. This is not dissolution of a valid marriage: the marriage has never in law existed, although in fact it had been solmenized. This is shown because both parties are permitted to remarry.

In Millar v. Watson the man suffered from frigidity. There are two other cases of sexual impotence heard before the Official of Saint Andrews which provide other examples of grounds for nullity. Both of these cases relate to female instances of impotence.

In the early case of Mailvail and Hepburne (1516-1520)[358] the impotence arose from:- "arctitatem in membro secreto dicte Margarete" "a narrowness in the secret member of the said Margaret". Similarly in the later case of Myrton de Cambo v. Forsyth (1543)[359] before Andrew Traill[360] Capellanus of Saint Michael's Church in Saint Andrews and Commissary of Martin Balfour, Official Principal of Saint Andrews, the impotency is on the part of the female party:-

"Margareta ... omino inhabilis et inidonea habens in interioribus partibus membri sui genitalis impedimentum ... et ad carnalem copulam provus inidonea".

"Margaret ... for all men is unable and unsuitable having an impediment in the internal parts of her genital organs ... and is certainly unsuitable for carnal intercourse".

It also narrates that the parties had attempted to consummate their union, indeed this is explained with an unambiguity of statement to say the least descriptive. In short, all the elements of the Canon law had been fulfilled and consequently there was no other decision which the Official could make but to grant the nullity.

A case based on madness is unfortunately not to be found in the Liber Officialis. However there are three cases dealing with the impotency arising from nonage. One case has already been examined in relation to matrimonium initiatum[361]. The other cases show clearly the operation of the impediment:-

'Nos Joannes Spittall in causa divorcii per Alexandrum Ogistoune contra Jonetam Irrevyny suam sponsam putativam ab una et altera partibus Decernimus quoddam pretensum matrimonium inter dictos Alexandrum et Jonetam de facto et non de jure contractum ab inicio fuisse et esse nullum matrimonium. Ex es primo quod idem Alexander Ogistoune actor tempore contractus et celebrationis dicti matrimonii fuit impubes minime attingens decimum quartum sue etatis annum et sic minor minime potens de jure ad contrahendum matrimonium. Tum secundo quia iidem Alexander et Joneta mutuo attingebant et attingunt de presenti sibi invicem in tertio et quarto gradibus affinitatis prout de deductis coram nobis clare extat probatum huiusmodi pretensum matrimonium annullamus ipsosque Alexandrum et Jonetam dantes utrique alibi in domino nubendi facultatem omnimodam. Et quicquid alter ab

altera causa donationis vel dotis recepierit eidem restituendum fore decernimus'.

'We John Spittal in the cause of divorce by Alexander Ogiston against Jonet Irving his putative spouse of the one part and of the other. We decern that the pretended marriage contracted between the said Alexander and Jonet is only de facto and not de jure and is and was from the beginning null. From on the first count because Alexander Ogiston the pursuer at the time of contracting and celebration of the said marriage was in impuberty being less than 14 years of age and as such younger than the youngest able by law to contract marriage. Then on the second count because both Alexander and Jonet were mutually related and are so related in the third and fourth degrees of affinity just as it appears clear to us from the proof led before us and so we divorce the said Alexander and Jonet from the conjugal bond and mutual servitude, giving both permission to marry again in the Lord and we decern that which the one or the other has received by way of gift or dowry is to be restituted'.

This case of Ogiston v Irving (1548)[362] is based upon two impediments disclosed in the course of the proof, i.e. nonage and affinity. Again nonage in the sense of being younger than fourteen is the criterion, as would be expected, for the nullity of the match. In the other case of nonage Leitht v Elphinston[363] occurring twentyfive years earlier in 1523 centres around a young girl who was only ten years of age or thereabouts when the consents were exchanged:-

'in qua etate nullum prestare potuit consensum'

'at which age no consent can be given'.

True nullity is the result of such a pretended marriage and both parties are released with the ability to remarry.

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311 I, Corinthians 7, 39

312 1551, II, 486, C.12

313 Liber Officialis No. 125

314 Liber Officialis No. 119

315 Liber Officialis No. 90

316 Liber Officialis No. 80 where the words Carnali Copula deinde subsecuta are deleted

317 Liber Officialis No. 80

318 Liber Officialis No. 77

319 Liber Officialis No. 19

320 Esmein, 159, For an interesting treatment see Scarisbrick; Henry VIII

321 Hay, 163, 211

322 Hay, 57

323 L. 197, D; L, 19 De Smet 2, 155

324 Cap. unic in VI IV, 1

325 Hay, 57

326 C.III, Sess XXIV

327 See infra

328 1592 C 11, III, 543

329 Inst. 1, X, 6

330 C.Th. 3, 12.2

331 Hay, 211

332 Died 1308

333 Hay, 213, 219

334 Leviticus Ch. 18, 16

335 C.8, X, IV, 14

336 Hay, 215

337 Hay, 221

338 Liber Officialis, passim

339 Liber Officialis No. 167

340 Commissary General of Saint Andrews 1551

341 Hay, 103

342 D.G. C.33, 1, 2

343 Esmein 226 et seq

344 Hay, 107, 117

345 Hay, 105-111

346 Hay, 111

347 Hay, 121-129

348 D.G. C.27, 1, 1

349 D.G. C.32, 7, 26

350 Hay, 111

351 Inst. 1, X, pr

352 C.5, 4, 24

353 Cup. IV, 2, in VI; C.3, X, IV, 2

354 Esmein 236 et seq

355 Hay, 156, C.3, X, IV, 2

356 Liber Officialis, No. 139

357 Official of Saint Andrews (1540-1545)

358 Liber Officialis, No.13

359 Liber Officialis, No. 137

360 Commissary of Saint Andrews (1545, 1550, 1552)

361 Liber Officialis, No. 165, Oliphant v. Lesley

362 Liber Officialis, No. 152

363 Liber Officialis, No. 41

CHAPTER IV

Valid Marriage in the Post Reformation Period

This chapter deals with the post Reformation equivalents of matrimonium ratum non consummatum and ratum et consummatum. Betrothal in the post Reformation epoch has already been dealt with for the convenience of comparison.

It is difficult to ascertain any 'reception' of Canon law as a viable set of rules, by the Reformers, for the regulation of the relationship of husband and wife after the Reformation. This having been said does not mean necessarily that the thoughts of the Reformers were not turned to the question of whether some or all Canon law should be maintained after the abrogation of Papal authority and jurisdiction.

Certainly much of the previous law did not conform with "Goddis Word" but much did so conform and indeed as has been shown whilst some Canon law was of a self interested nature, much was concerned with social control and even more was firmly based on scriptural prescriptions which could not without fear of self contradiction be usefully denied by the Reformers.

Therefore rather than state those elements of Canon law which were deemed so pernicious to the Reformed cause the Reformers were content to single out certain limited causes of grievance and attack these in an attempt to define their policy. This expedient treatment accounts for the equivocal dealing of the Reformers with marriage in the ninth

head of the First Book of Discipline. Desirous to keep marriage as a social institution and indeed to strengthen the Church's control over the institution the Reformers were loath to condemn Canon law and therefore imprecise and deliberately conciliatory language is used in the First Book of Discipline. Thus the authors write:-

"Because the marriage, ... in this cursed Papistry, hath partly bene contemned and partly hath bene so infirmed that the parties ... could never be assured if the ... Prelates test to dissolve the same[1]."

The difficulty facing the Reformers was obviously how to separate wheat from chaff. Would it be possible to divide the law on matrimony into that which was contaminated and infirmed by Papal law and that which remained 'good' law i.e. consonant with Reformed opinion?

The success of the Reformers in this endeavour can only be measured by the extent to which innovations were introduced. Many innovations would indicate a high level of dissatisfaction with the earlier law. Few innovations would conversely show that the bulk of the earlier Canon law accorded with the broad conceptual framework of the emerging marriage law of the Reformed society.

Therefore it comes as little surprise that there is no Reformed restatement of the law and much must be understood as being subject to the earlier law without express import or statement.

To speak therefore of marriage per verba de praesenti is somewhat difficult as the phrase hardly enters into the Reformed vocabulary. However, there are enough references and indications which show that

the Reformers are dealing with the same mode of institution of marriage.

It is clear from the First Book of Discipline that mutual exchange of consent in present words made as valid a marriage as was formed by this mode in the pre Reformation era, "both require and are content to live together in that Holy Bond of Matrimony"[2].

Consent is the keystone of the post Reformation law of marriage as it was in the pre Reformation time, and there are several cases before the Kirk Sessions to enforce the solemnisation of private mutual contracts of marriage. Thus an act relating to banns stated that "all who contracted or have made a promise (of future marriage)" should give notice to the scribe of the consistorial court of the ministers and elders of the city[3]. The requirement of a public ceremony[4] did not detract from the essential validity of a clandestine marriage. In the case of Oliphant v. Morton (1562)[5] a couple who were accused of living at bed and board but not being married answered that they had contracted marriage. They were ordained to solemnise same and it is shown from the Act that a distinction in the terminology of the Reformers had arisen corresponding closely to the canonical distinction of matrimoniam initiatum or promise to marry and matrimonium ratum per verba de praesenti, valid marriage contracted by words of the present tense.

The terminology is however not always distinct and the difference between 'promise' and 'contract' is often confused if indeed it was recognised by the user of the phrases.

Canonical phrases had a certainty to which centuries of legal development had contributed. It comes as no surprise that the Reformed Church recognised this and thus in 1565 the General Assembly in considering a complaint against a minister, John Frude, hears that he told "lady Kilconquhar and John Weymes to contract per verba de praesenti"[6].

Other examples are equally valid as examples of solemnly contracted marriages or by attempts to interdict subsequent marriages on the basis of a prior clandestine mutual exchange of consents[7]. It must be said however that most suits for the solemnisation of marriage follow upon promises to marry which in most cases are to be equated with the sponsalia per verba de futuro. It nevertheless remains the case that a solemn exchange de praesenti was a valid method of constituting marriage and could defeat an earlier de futuro declaration not on the basis of inherent invalidity of the early future promise but rather because such promises were not of their nature made in church, although they could be before witnesses[8]. Thus for a woman wishing to protect her considered position as a 'wife' under a future promise even if supported by subsequent copula, the best course to follow would be to inhibit the 'husband' from any intervening marriage and obtain a decree of solemnisation, based upon the promise[9]. Thus in the process of Synton and Robertson (1561) the pursuer Thomas Syntoun sues the defender Margaret Robertson to solemnise the promise of marriage between them, which had been made before the reader of Fergondyn and some 'famous' witnesses. The promise was held by the superintendant and elders to be lawfully made and solemnisation was ordained.

This insufficiency of the promise of future marriage even with following copula is a phenomenon already noticed in the treatment of sponsalia per verba de futuro. The Kirk desired to control marriage even as did the Catholic Church. Thus whilst feeling itself unable to issue a decree 'Tametsi'[10] instituting clandestinity as a diriment impediment, it tried to wean the faithful towards a solemn ceremony, and certainly away from the idea that a promise to marry in the future if followed by copula made a marriage[11]. Thus the copula even if following on a promise often was punished as fornication, adultery or whoredome, "sinnes most common in this realme"[13] which the First Book of Discipline ordained should be punished as according to Leviticus;

"If any man commit adultery with the wife of another, and defile his neighbour's wife, let them be put to death, both the adulterer and the adulteress[14]"

following upon the general injunction;

"But a widow or one that is divorced or defiled or a harlot he shall not take, but a maid of his own people[15]".

Even so neither the concepts of the validity of sponsalia followed by copula nor private mutual consents could truly be suppressed without an abrogation of the maxim consensus non coitus facit matrimonium[16]. There remained a distinction between fornication and copula following on a promise or a private consensual contract. Although the General Assembly in 1563 attempted to withhold validity from sponsalia and copula until the parties had undergone punishment as 'breakers of good order' and slanderers of the Kirk. Faith could only be given to the

promise if witnesses would speak to it[17], failing proof of the promise the offenders were to be punished as fornicators. This re-inforced the earlier decreet of the Assembly which ordained the penalty of public repentance for those who commit copulation between the promise and solemnisation[18]. Yet with this decreet the copula was not equated with fornication, the distinction is significant. It does however appear that in Stirling in 1597 a couple were ordained to make public repentance for "fornication under promise of marriage" and that cohabitation was to cease lest the parties fall into fornication again. At such a point there is a departure from the canonical idea of valid marriage being created upon the presumed consent at copula following on a promise of future marriage[19]. The secular power was enlisted to control fornication and the Act of 1567 established a scale of penalties ranging in severity from the moderate fine of £40 Scots or imprisonment for 8 days for a first offence to the rather harsh fine of £100 and 24 days imprisonment and a threefold ducking and banishment[20].

The terminology of Canon law, like the concept of consent, survived, therefore the distinction between per verba de futuro and per verba de praesenti sponsalia can be commented on by the General Assembly in 1570[21] and although the classic phraseology does not feature in other sources, it is retained in the Commissary Court, and Stair can acknowledge the distinction between espousals and consents exchanged per verba de praesenti, stating that it is "not every consent to the married state that makes matrimony but a consent de presenti and not a promise de futuro matrimonio[22]".

In the 1560's at least the basis of post Reformation marriage was

clearly exactly the same as the canonical system, and whilst the theory may have undergone modification at the hands of inexpert or legally ignorant or untrained elders and ministers, when it came to rendering the law, Stair was forced back to the Canon law which as he himself acknowledged as containing many "equitable and profitable laws[23]" and was to quote from the Concordia in his principal proposition[24].

The Impedient Impediments

That consensus was the efficient cause of marriage is also to be deduced from the impediments acknowledged by the Reformers as displaying either dissensus by way of inability to consent or by way of initiating the consent.

The general scheme of impediments as regulated by the Canon law survived the acts of the Reformation Parliament. That the concept of impediment survived and was well known is clear[25]. There is a case in 1565 before the Kirk Session of Saint Andrews to discuss an 'impediment proponed' but the impediments themselves if not the theory behind them, to prevent illegal, immoral or bad marriages, were subject to some revisal by the Reformers.

As has been described, the canonical system had two types of impediment; impedient impediments, which rendered a marriage unlawful but not null and diriment impediments which struck at the consent showing either dissensus or removing the ability to consent. Stair confirms the survival of the theory by quoting the canonistic dictum:

'multa impediunt matrimonium contrahendum quae non dirimunt contractum'

'many things impede the contracting of marriage which do not nullify the contract[26]'.

and whilst from the decided cases this distinction was operated in practice there is remarkably little recognition of so legalistic a conceptualisation by institutions like the Kirk Session which were operating as courts.

In the earlier section on impedient impediments in the Canon law it was shown that many of the impediments had been introduced as a method of firstly, social control and secondly, of protecting the Church and its ministers.

The impediments lost from the categories of impedient and diriment impediments are clear examples of how the Reformers considered the Canon law under the Popes to have contaminated marriage. Therefore, incest as an impedient impediment is forsaken as are wife murder, reception of one's children from the font, priest murder, penitance and the marriage of a nun.

The impedient nature of incest appears to run contrary to the reformed interpretation of Leviticus[27] which defined the degrees of propinquity for the Reformer and as there was little scriptural authority for the impediment, it disappeared. The impediments of wife murder, priest murder and penitance were each unsupported by scripture and ran to an extent contrary to at least some Reformed ideas, penance for example

was rejected by the Reformers in Scotland who retained only two sacraments, namely eucharist and baptism[28]. This was in contra-distinction to the Calvinist subordinate role for penance. The Reformers were in such instances prepared to withdraw specific benefits of the Kirk including marriage from recognised wrong-doers[29], however even in an anti-clerical age the removal of presbytericide is somewhat of a surprise.

More curious is the removal of any impedient, or for that matter diriment, impediment based on the spiritual relationship. Certainly confirmation was not a sacrament in the Reformed tradition but baptism was, and it could be that the only explanation behind the removal of the impediment was a gradual weakening of the concept of spiritual kinship. Thus the subordination of the godparent to the role of witness, whilst explaining to an extent the usage at the baptismal ceremony whereby the natural father presents the child and holds him at the font, does not take account of the effect of the removal of the legal rights and restrictions of cognatio spiritualis[30].

Little can be said about the removal of the impediment relating to the marriage of a nun except that female religious communities were gradually dying out and from this and the evidence provided by Sir David Lindsay's "Thrie Estatis", i.e. the impediment was in any case ineffective.

Some impedient impediments were retained by the Reformers for example unlawful time, and at least one new impedient impediment was added, that of religious knowledge. Parental consent has already been discussed as an impediment and whilst its character was similar to an

impediment it remained merely a counsel or precept and did not become a requirement of law[31]. It is also possible to classify clandestinity as an impedient impediment particularly in comparison to the diriment impediment introduced for Catholic Europe by the Decree of Tametsi at Trent in 1563[32].

Unlawful Time

The Reformers looked upon the Catholic ferial days as already described as contrary to the doctrine contained in Holy Scripture. By the First Book of Discipline the 'keeping of Holy days ... such as be all those that the Papists have invented[33]' were abolished.

The penitential periods of the Catholic Church, Advent, Lent, and the Rogation days were, at least formally swept away. Many attempts to expunge the Feast days were made but they survived in the common consciousness of the people, and the attempts of the General Assembly to abolish, for example, Christmas were doomed to failure[34].

If however it was difficult to abolish a popular feast it was popular to abolish the restrictions appending the various times of preparation before the feasts. Permission to marry on any day was not a corollary of the abolition of the ferial times. Following the Calvinistic[35] practice of Geneva, Sunday was ordained as the day for the celebration of marriage:-

"Sunday before noon we think most expedient for marriage and it be used no day else, without the consent of the whole ministrie[36]".

This injunction survived without modification until 1569 when, following upon the case of Zwill and Ogilvy[37] the marriage which was to be celebrated on a Sunday was permitted on a Wednesday because of illness on the part of the minister or parties.

The impediment of unlawful time was closely linked to the avoidance of clandestinity. In 1567 a minister, Patrick Craigh of Ratho was suspended for "marrying fornicators without banns on a ferial day[38]". Some two years later a decree of the General Assembly permitted marriage on "feriall days"[39] this relaxation of the restriction which allowed marriage only on a Sunday led to a more liberal attitude.

In 1580 marriage was permitted on any Wednesday providing that the banns had been read on the three preceding Sundays, again the spectre of the clandestine haunts the Kirk Session[40]. In Perth in 1583 it was permitted by the Kirk Session that marriage could be celebrated on a Monday[41] this was followed in Perth during the following year when both Thursday and Sundays were allowed[42]. An equally permissive arrangement was struck in Saint Andrews where the celebration was allowed in 1597 to be made on "a Wednesday and Friday before the Sermon[43]". In case of emergencies the right was extended to the remaining week days following the decision in Wod v. Englis[44].

Finally the impediment was removed in 1610 when the General Assembly permitted the marriage celebration on any day "when the samine shall be required"[45]. The development of the impediment of unlawful time from the canonistic ferial days through the early Reformation period of uncertainty and culminating in a release of restriction is interesting in itself and entirely logical as a progression, but can

probably only be explained as an effort to contain clandestinity. It may be that the loosening of the restriction of permitted times is merely indicative of the recognition of the failure of the rules against clandestinity. It acknowledges, as was the case in clandestine declarations, that marriages could be made at any time, in any place, to attack this rule would probably appear to the Reformed legal theoretician to be an attack on the absolute validity of de praesenti exchange of consents and the replacement of restrictive canonical rules with mere imitations under a reformed guise.

Religious Knowledge

It was an avowed intention of the Kirk in its exercise of policy to 'bring the ignorant to knowledge and to reteine the Kirk in good order'[46] and many prescriptions were set out in the First Book of Discipline in an effort to attain these aims. Amongst them is the requirement that those seeking to communicate by taking the Lord's Supper should know and be able to recite the 'Lord's Prayer, the Articles of Beliefe[47] and declare the summe of the Law[48]'. This prescription whilst applicable in the Book of Discipline to communicants also appears in the Saint Andrews Kirk Session Register in relation to those wishing to be married. In 1570 for example the minister, elders, and deacons ordained that none were to be received for marriage unless they could recite the Our Father, the Creed, and the Ten Commandments[49].

It is interesting that this requirement in marriage is the same as that in eucharist, certain equalities of treatment between the sacrament of eucharist and the 'Holy bond' of matrimony have already

been noticed. Once again the similarity of treatment betrays, perhaps a similarity of concept in the minds of the Reformers.

The requirement of sufficient education in the faith is not productive of a diriment impediment. Marriage was permitted if there was ignorance, subject to a fine for example in the case of Broun v. Pryde (1591)[50] a fine of 30s was imposed for ignorance but the marriage was permitted to be contracted, and not nullified. The marriage was valid and perhaps illegal but the fault or sin could be purged[51].

It is perhaps also indicative of the reliance on consent as the foundation of the relationship that the question of the ignorance or wisdom of the parties with regard to the married state arises. Thus in 1578 the Kirk Session in Perth ordains all who have put in their applications for banns to take instruction from the Readers, "in the true causes of marriage"[52]. The rationale is plain; one cannot consent to that which one does not understand. Of course the weakness in this and the preceding impedient impediment of unlawful time is that they can relate of their nature only to solemnly celebrated marriages in facie ecclesiae, and cannot have any relevance to clandestine contracts.

Thus whilst the impetus behind impedient impediments has swung from social control and ecclesiastical protection[53] to the assurance of the Godly Elect of the Church that the marriages amongst them do not offend God or slander his Kirk, the essential weakness in the Reformed scheme of impediments is that clandestinity itself is not a diriment impediment. This topic will be further discussed under the head of Formalities of Marriage.

The Diriment Impediments

The canonical scheme of diriment impediments, those which render a marriage void consent also survived the Reformation though in a reduced number and extent. That essentially lack of consent should remain the basis of nullity follows logically from consent remaining the basis of validity. It is clear that consent was still the essential element as the First Book of Discipline shows:-

"The work of God we call when two hearts ... are so joyned and both require and are content to live together in that holy band of Matrimony[54]".

This tenet is underlined in a later passage:-

"Marriage ought not to be contracted amongst persons that have no election for lack of understanding[55]"

This last statement notwithstanding its conformity with the general principle also seems to introduce a departure from that principle in the sense of a compartmentalisation which betrays a rejection of some sound Thomist philosophy on the matter of the relationship between Eternal law, Human law and Natural law, philosophy[56] which could be acceptable to the Reformers in many respects and which would have allowed the Reformers to retain an interconnected theory of impediment as an expression of dissensus rather than a theory of impediments each grounded on its own rationale.

But such philosophy buried as it was in more unacceptable bodies of

dogma was difficult to sift from the 'contrary doctrines' which the Reformers found in the 'Lawes, counsells, or constitutions[57]' imposed by the Pope without scriptural authority upon the consciences of men.

Some of the canonical diriment impediments are expressly struck at by the First Book of Discipline e.g. vows of Chastity, and foreswearing of marriage by taking Holy Orders[58]. These objections spring certainly from the Calvinist doctrine which viewed as absurd the prohibition on clerical marriage arising from the diriment impediment of order[59].

Public propriety appears to have disappeared altogether as an impediment although as has already been indicated was not to lose all effect.

Substantially the scheme of impediments, apart from these already mentioned which had ceased effectively to be impediments, if not through express revocation, then through desuetude, remained the same. To this proposition there was however the notable exception of relationship which although it remained as an impediment was, on the basis of scriptural authority, considerably reduced in scope.

The diriment impediments which remained as an expression of fundamental dissensus were error, relationship, adultery, force, prior marriage, affinity and impotence. Nonage emerged as a separate head of impediment.

Error

Stair gives the definitive post Reformation view that error in substantials voids any consent to marriage between people unless future consent with full knowledge supervenes[60]. He, like Hay gives the biblical example of Jacob, Rachel and Leah[61] in support of his proposition.

However Stair's treatment of error is not based on Canon law, as the later passage[62] on circumvention in contracts displays. He discusses the effect of dolus malus as the act of fraud inducing contract. Clearly, on the basis of the authorities quoted[63], the fraudulent inducement must be the effective cause of the obligation, and there must be error in substantials nullifying the consent and rendering the obligation void. He proposes a hypothetical case of marrying one thinking her to be another, which is void, and he distinguishes error qualitatis e.g. of virginity, wealth, or good nature which is not of the essentials and which does not effect the validity of the union[64].

The error of quality was a point of some contention in Saint Andrew's in 1565, where in the Case of Lokaird v. Tholland[65] where the woman Tholland was unwilling to solemnise the bond because she had discovered subsequent to the promise that her prospective husband was a thief and unclean in his body. The minister thought that an error in quality was no impediment but was overruled by the elders and deacons who were of a contrary opinion and who stopped any banns, effectively preventing the marriage. This decision was later overruled by the superintendent[66] who ordered that the marriage be solemnised, notwithstanding the error of quality, within 40 days under pain of excommunication. Thus the canonical position was restored probably on the basis of Canon law not the Roman law.

Stair however, certainly did not use the Canon law in his analysis but rather writing from the standpoint of 'received' Roman law could confidently quarry the Civil law upon which to build his view of the Municipal law of Scotland.

Relationship

The canonical restrictions upon marriage within certain degrees of relationship were manifold being based upon consanguinity, affinity, legal and spiritual propinquity. As such it has been already noticed that relationship was much argued and contested as being unduly prohibitive, inductive of sin or of sham marriages, and whilst possibly ameliorated by dispensation was productive of discontent particularly amongst the nobility and landed classes and also of legal argument and reforming agitation amongst the lawyers and the creators of ecclesiastical policy[67].

Calvin in his Institutes singled out the Canon law of relationship as confirmation of the Catholic Church's tyranny, being 'laws partly impious toward God partly fraught with injustice toward men[68]'. He complained further that no 'lawful marriages can be contracted between relations within the seventh degree and that such marriages if contracted should be dissolved. Moreover, they (the Canonists) frame degrees of kindred contrary to the laws of all nations ... that spiritual kindred cannot be joined in marriage[69]'.

In these objections apart from ignoring the provisions of the Fourth Lateran Council (1215) which reduced the prohibited degrees from the seventh to the fourth in consanguinity and affinity, Calvin puts the

Reformers' objections to the Canon law in this area fairly succinctly. It is curious however that the Scottish Reformers do not make mention of relationship in the First Book of Discipline. Allusions are only made to the fear which some married couples may have had in the time of 'Cursed Papistry' regarding arbitary dissolution of marriages of the Bishops and Prelates if they so desired[70].

However, it may be that the authors of the First Book of Discipline felt that the supplication made by the General Assembly on December 1560 to the Lords and Estatis to interpone authority to an act regarding relationship was sufficient to bring to the notice of the secular authority's notice the views of the reformed religion on this important matter[71]. The act narrated that the Pope had prohibited the solemnisation of marriage between those related within the second and 'uther degries of consanguinitie' and that on the contrary, by the Law of God, marriage may be celebrated betwixt parties 'beard of second, third and ferd degries of affinitie or consanguinitie and wheris sick as are not prohibited expressly be the Word of God'.

This supplication went unheeded by secular authority until 1567 when Acts of Parliament were passed regarding incest, consanguinity and affinity[72]. In the meantime the ecclesiastical authority was not adverse to supplying the deficiencies of the law and providing regulations to fill the hiatus between the Canon law and the reformed secular rule.

An example of the Session overturning a sententia of the 'Old Regiemine' is Cunninghame v. Wood[73] (1561) at Saint Andrews where a case of adherence was defended by claiming that a decree of nullity

had been granted by the Official's Court. The Kirk Session having examined the judgement ordered adherence because, (1) the papistical jurisdiction had been abolished, (2) the divorce on the grounds of consanguinity or propinquity did not accord with the Law of God, and (3) in any case there had been a dispensation permitting the marriage.

Another case in Saint Andrews in 1564/65 shows something of the Kirk's uncertainty in regulating such marriages particularly without any firm legal pronouncement or promulgation to be used as a guide. The case of Ment v. Scot[74] arose from the marriage of brothers and sisters children, i.e. cousins. Without pronouncement on the legality of the union the Kirk Session separated the parties pending advice from the General Assembly.

In 1565 the Assembly directed that the marriage between a man and his former brother in law's daughter was null on the ground of affinity[75].

However a strict adherence to the Law of God as contained in Leviticus would not prove to be completely workable. Thus it is found that the General Assembly was called upon to decide on a cause of consanguinity arising from a man's relationship with his cousins. The Assembly noted that this relationship was not contrary to the Law of God, yet it could cause much inconvenience in the Country and so some law should be clarified in the near future. In the meantime apart from the ad hoc declaration of validity, all other similar marriages were prohibited[76].

The parliamentary answers to the supplication of 1560 and the subsequent one of 1565 were made in 1567 by two Acts regulating the

crime of incest and the relationships of consanguinity and affinity. The confusion between the subject matter of the two Acts of 1567 has been often commented upon[77]. A recent article on incest notices that in basing the law on incest and consanguinity on Chapter 18 of Leviticus the Reformers were in danger of misinterpreting the Bible, 'creating' a specific crime of incest on the basis of a chapter which is determining the scope of marriage within a family.

No mention is made however on the emergence of the Reformed law as a reaction to the extremely wide prohibitions of the Canon law. Certainly it cannot be doubted that the contracting of the degrees of propinquity as shown in the 18th Chapter of Leviticus to the narrow extent of within the second degree creates a nuclear family or 'core' family in modern terminology, the 'patriarchal and submissive' grouping appropriate to the warlike family system of sixteenth century Scotland[78].

The Act narrates anent the lawful marriage of the one blood and prescribes that 'seconds in degrees of consanguinitie and affinitie and all degrees outwith the same contained in the Word of God and that are not repugnant to the said word micht and may lauchfullie marie at all tymes sen the viii day of March, zeir of God 1558 zeiris notwithstanding ony law, statute and constitution maid in the contrare'[79].

All marriages made in such terms since March 1558 were ratified and made lawful, furthermore all children born of such unions are declared to be lawful.

The 'seconds in degrees of consanguinitie and affinitie' were reckoned on the Canonical method of computation not that of the Roman Law.

'and all degrees outwith the same contained in the Word of God and that are not repugnant to the said word'.

The Word of God is Leviticus, Chapter 18[80] which by this statute and the immediately preceding Act regarding Incest[81] was imported into Scots law by reference in order to clarify these Acts. In particular those degrees outwith the second degree which were contrary to Gods Word and thus necessitated this restriction were ascendants and descendants. Further the relationships of uncle and niece or aunt and nephew although within the second canonical degree were prohibited by Leviticus[82].

'micht and may lauchfullie marie at all tymes sen the viii day of March, zeir of God 1558'.

The reference seems unclear. However, it can be ventured that this refers to the Provincial Council in Edinburgh held in 1558 where as Spottiswood records "the Clergy ... where professing to make reformation of abuses, they renewed some old Papist constitutions[83]". Needless to say events somewhat overtook such efforts.

One can only contend that the Reformers understood quite well the nature of consanguinity and affinity and were intent on two aims. Firstly, they wished the law then applicable to conform to the law of the Bible upon which their entire scheme was built, secondly, they designed to cure the mischief which the extended degrees of

relationship of the Canon law had caused, by allowing more people the ability to marry without having to obtain dispensation, i.e. freeing them from the 'papistical tyranny' and thereby extending the scope of marriagable persons which would lead to increased population, which itself would be of huge socio-economic importance. To say this however perhaps is to credit the Reformers with too much social insight, but certainly the increase in families and the patriarchal society thereby engendered brought some desired benefits and suited well the vision of society held by the Reformers.

Yet for all the certainty which the Act of 1567 was designed to provide questions still arose as to the legality or otherwise of marriages between relations. In 1586 a question arose in Saint Andrew's regarding the marriage of a man with his former sister-in-law's daughter which although not specifically mentioned in Leviticus was sufficiently inductive of slander to raise suspicion in the minds of the eldership[84]. Sometimes the questions were of course easily answered thus the Synod of Lothian and Tweeddale in 1589[85] entertained an enquiry regarding the marriage of a man and his aunt, which was clearly declared to be contrary to God's law[86].

The problem of marriage with a sister in law's daughter arose again before the Synod in 1648. The parties concerned there, had departed to England where such unions were legal but the Synod ordered that they be proceeded against as incestuous persons[87].

Activities against consanguinity and affinity continued, sometimes the broad and confusing label 'incestuous' was used without express reference to the crime of incest, thus an act of the Presbytery of

Edinburgh in 1649 must relate to consanguinity or affinity as the crime of incest was a capital offence, whilst the provisions of this Act require only penance in sackcloth[87]. An injunction was made ordering the printing of a table of degrees which would give information at a glance relating to the various degrees of consanguinity and affinity and thus the prescription that requests for testimonials of no impediment of relationship could be complied with easily[88].

The religious law was thus enforced in many respects by secular sanction and in the Confession of Faith marriage was expressly prohibited 'within the degrees of consanguinity or affinity forbidden in the Word'[89].

Such a prescription echoing the biblical basis of the now secular law is shadowed by Stair who writes:

"Marriage is also void and inconsistent when contracted within the degrees prescribed. Lev XVIII. Whereby the next degree collateral is only prohibited both in consanguinity and affinity: which makes those joined in affinity in the same degree, as being by marriage one flesh[90]".

The other aspects of relationship, affinity, legal relationship and spiritual relationship underwent similar or more drastic changes. Affinity as will have been noticed was subject to the same variation as the relationships from consanguinity and many of the same considerations affected this branch of relationship as had affected those arising from blood relationship.

Legal affinity which as Hay had already noted was somewhat of a legal anomaly in Scotland, springing as it did from adoption, an institution not in use in Scotland, and consequently it did not feature at all in the Reformed scheme. Stair indeed makes mention of the institution only once in a title of the book dealing with succession, and ends his comments with the following:-

"neither is adoption in use with us in any case[91]".

The decline of spiritual relationship has already been alluded to, godfathers and godmothers continued to be part of the ecclesiastical trappings. However godfathers seem to have featured more as the Reformed epoch progressed and often the office appears to have been filled by the natural father[92]. However, Calvin in his Institutes noticed that 'spiritual kindred cannot (under the Canon law system) be joined in marriage[93]" a law which he found to be somewhat contrary to the laws of all the Nations and even to the polity of Moses.

Stair put the matter a little more forcefully when he described the prohibitions on 'certain degrees of ecclesiastical affinity' to be an unlawful device which put parties in the Popes power to approve or disapprove as his avarice or interest leads[94]'.

Adultery

That adultery formed a ground of divorce a vinculo matrimonii after the Reformation cannot be usefully doubted. This will be discussed at further length infra. However, the idea of adultery as being productive of a diriment impediment requires some examination here.

From the beginning the Reformers were in two minds with regard to this matter, this 'so doubtsome a case[95]'. The First Book of Discipline reflects this uncertainty. In the first instance the Kirk would have adulterers executed by the civil sword but recognising that this fate might not always be forthcoming and also recognising that sinners can repent, it is loath to deny the penitent the 'benefites of the Kirk'.

With regard to the specific point of whether an offender after reconciliation may remarry, the Reformers seeming torn between compassion and biblical obedience, eventually conclude that the remedy for incontinence, namely wedlock, cannot be denied[96]. This would of course imply that if the adulterer could live continently, i.e. without engaging in fornication then remarriage was to be prohibited. The capacity for exploitation of this equivocal attitude was restricted by the subsequent passage which broached the possibility that if there was an opportunity for the adulterer to marry the innocent then no other marriage should be allowed, except to the innocent party.

This ambiguous passage is insufficiently clear to allow much comment on the Reformers attitude to the general principle of the remarriage of adulterers. Certainly, the overwhelming impression of the Reformed attitude to adultery is that of horror at what was viewed as a 'sin-crime', indeed the vocabulary of matrimonial offence, echoing the canonical crimen is much in evidence for example the use of the words offender and offended. Adultery was condemned by the Reformers as a 'sin most commone in this realme[97]'.

In the end one is led to believe that the shadow of David and

Bethsheba[98] etched darker on the minds of the Reformers than at first it may have appeared. Therefore in the earliest cases of divorce a vinculo on the ground of adultery permission is given only to the innocent spouse to remarry in the Lord, which permission is withheld from the guilty spouse. Thus in Clark v. Scherez[99] (1560) where adultery was committed by a wife, the Session after taking probation awarded divorce and granted the right to remarry only to the pursuer.

Similarly in the case of Colland v. Alexander[100] held later during 1560 the permission to remarry was granted to the pursuer. This result was echoed in the case of Thecar v. Morton (1561)[101].

The minds of the secular authorities were exercised in relation to adultery and although in 1563 an Act was passed regulating the punishment for notour adultery, nothing however was forthcoming regarding the impedimental nature of the matrimonial offence. The Church however continued in the earlier attitude[102], and in December 1566 the General Assembly put in train the process for declaring marriages with paramours to be null, such a marriage was described as 'illegal' and ministers were warned against solemnising such upon pain of deposition from their charge[103].

The Commissary Court had to an extent anticipated the Kirk's formalised attitude with the decision in Stevenson and Pollock (1565)[104] where Stevenson's marriage with Pollock had followed upon the divorce for his adultery with her granted by the Session of Glasgow. The Assembly declared such unions to be unlawful in 1571[105] and this attitude may have had some influence in the Act of 1592 which narrated that:-

"By occasion whereof the crime of Adultery dayly increased ... the marriage of Paramours is ... contrary to the Law of God and Public Honesty"[106].

This legislation has already been discussed with reference to its unique mention of public honesty as a standard of post Reformation scandal. This secular declaration indeed went some way to striking at the root of the nuisance, particularly as it inhibited the rights of succession of spouses tainted by the maxim - 'Nemo ducat eam quam prius polluit adulterio' - 'None marries she who he has previously soiled by adultery'. However the Act did not nullify such marriages[107].

Echoes of the maxim are heard in the General Assembly's prescription of 1595 declaring that two kinds of marriage are unlawful; when one marries another whom one has polluted in adultery and where the innocent party is happy to remain with the guilty, but the guilty deserts and takes another spouse[108]. Later still, in 1600 the General Assembly resolved to make a supplication to the Convention of Estates that 'one act to be made dischargeand all marriages of such persons as ar convict of adulterie', which was to be ratified in the next Parliament[109]. This supplication resulted in the Act of 1600 which enacted that:-

"all marriages contracted between persons, divorcit ... for the crime of adultery and the paramours are in all time coming null and unlawful"[110].

Again this act was fenced by the penalty of disinheritance. Such

legislation cleared up some of the ambiguities in the attitude of the Church and that of the secular authorities. In particular, all marriages were rendered null and unlawful, not those of adulterers as distinct from adulteresses or vice versa, and the prohibition was expressly declared to be perpetual, and therefore it can only rest on the influence of crimen, not ligamen or the survival of the innocent spouse.

Notwithstanding these efforts adultery still continued to be a passion amongst the men and women of the realm much to the horror of the ecclesiastical and secular authorities. Thus in 1646, Parliament received overtures from the Commissioner of the General Assembly to revive and renew the acts against incest and adultery, because "these odious sins, yet so rife and growne to such a hight of abominatioun as is horrid to express"[111].

Stair presents as ever the developed view of the law and draws a distinction between the paramour and other parties thus strictly interpreting the Act of 1600.

"But though positive law, as a penalty upon adulterers may hinder their marriage with the adulteress or otherwise declare such marriages as to succession and civil effects void, yet can it not simply annul it, and with any other person the adulterer may marry. With us marriage betwixt the two committers of adultery is declared null, and the issue inhabilitate to succeed to their parents Parl 1600, c.20. But otherwise even the person guilty may marry again"[112].

Stair seems to recognised the character of impediment attaching to

adultery in his use of the word hinder, and in the reference to matrimonial penalty. There seems however to be a certain equivocation not unlike that of the earlier Reformers in stating that marriages between adulterers and others are not simply annulled, vitiation relates by one construction only to succession and the civil effects. Certainly, Stair clarifies some of this ambiguity by restricting the ambit of the Act of 1600 to marriages between the adulterous spouse and the paramour, thereby implying a strict interpretation of the legislation which one may state is not entirely supported by the earlier decisions.

It is clear from this survey that some authors[113] are incorrect in arguing that the prohibition on the marriage between adulterers and paramours existed at common law. Divorce for adultery did not exist in pre Reformation Scotland, it was prohibited by Canon Law and there is no example of a maverick or anomalous decision. It is however contended that the impediment of adultery is a post-Reformation adoption of the canonical crimen, a diriment impediment designed to prevent murder pacts between adulterers and paramours with the hope of marriage upon the death of the spouse and the concomitant dissolution of the marriage bond. Apart from the obvious analogy between the institutions the key to understanding the link is the concept of matrimonial offence, and the withholding of a 'benefit of the Kirk'[114] as punishment for a marital misdeed.

Force

Force in the post Reformation period seems to have fused the canonical impedient impediment of abduction and the diriment impediment of vis.

The Reformers divined the essential lack of consent as the basis of the impediment. Abduction is not mentioned after the Reformation as a prohibition of marriage, in either the Book of Discipline[115] or the Kirk Session Registers. However force is recognised as a cause of nullity, vitiating consent.

Thus in the early case of Beynston and Hepburn (1565)[116] the parties were called before the superintendent to explain why their promise of marriage had not been solemnised.

The woman, Joanna Hepburn averred that she should not be decerned to marry because she was constrained by a 'just fear and dread' of death by drowning at the hand of her brother. She was at the time of this threat 13 or 14 years of age. For the other part the 'husband' alleged that he too had been forced to consent upon fear of being deprived of his inheritance.

Obviously the eldership were concerned at the prospect of collusion between the parties, conspiring to obtain a reduction of the marriage. In particular this case is notable for the use of the oath of calumny. However, after a lengthy proof, with the testimony of six witnesses and the parties the minister and elders were satisfied that the marriage was 'not free or lawful nor by willing consent but made through fear of threats'.

There is just detectable here a lowering of the standard of fear from the canonical one of affecting a person of 'constant mind'. The standard however did not fall much. It could be ventured that either the Eldership took cognisance only of the woman's evidence in which

case the standard did not fall at all. If however it only took the man's testimony into account the standard had certainly dropped considerably.

The later case of McKay and Read (1574)[117] represents that where compulsion to marry is alleged it must also be proved, otherwise as in this case reduction of the promise would be refused and the parties ordained to join in marriage.

Sometimes politics could cloud the issue. Thus in 1592 the Presbytery of Linlithgow placed a case before the Synod regarding the marriage of John Stewart and Dorothy Stewart[118] the daughter of Lord Mephen, where despite claims of ravishing and of collusion in abduction the marriage was merely stayed, not forbidden or declared null, until the Queen granted her consent.

The possibility of collusion seems to have exercised the energies of the Kirk more than would at first have been thought. For example in 1668[119] the Synod of Aberdeen enacted that young ladies who allow themselves to be 'carried away' under the pretence to marry are if truly collusive to be punished for adultery.

Stair does not treat of force as diminishing consent in relation to marriage but does write at some length on the topic in relation to conventional obligations, sub voce "Extortion" which 'signifies the act of force or other mean of fear whereby a person is compelled to do that which of their proper inclination they would not have done'[120].

Not surprisingly perhaps, canonical references are not to be found in

this title as the Roman law is much more appropriate. The substance of the discussion devolves on the conclusion that by the Praetor's edict[121] and therefore by Scots Municipal Law and by 'the custom of this and other nations' such deeds and obligations made through force and fear, are utterly void.

On the standard of compulsion Stair does quote a familiar maxim -

'quae cadit in virum constantem'

'which affects a strong minded man'[122]

noting however that the standard is not absolute and can vary with the instant situation.

The existence therefore and the character of post Reformation vis is clearly of a very compatible nature with that of the pre Reformation epoch, and once again underlines the essential nature of marriage as a consensual contract.

Pre existing Marriage

Christian marriage remained for the Reformers in Scotland a monogamous union. Certainly some continental Reformers examined polygamy e.g. Theodore Beza in 1567 composed a Tract on Polygamy which discussed the matter in some depth[123].

In marrying, parties became bound to one another. That this was indeed the attitude is displayed by the use of the 'free' in

connection with dissolution[124].

Consequently it can be stated that a valid pre existing marriage which had not been terminated by death, dissolved on the grounds of nullity arising from an impediment vitiating consent nor dissolved by judicial declaration on the ground of adultery and subsequently desertion barred a subsequent marriage and therefore invalidated and nullified any subsequent marriage.

It appears that although the Act[125] condemning bigamy and punishing it as a form of perjury survived the Reformation it fell foul of the fate of most secular legislation namely desuetude and non-compliance. It appears that no actions were taken on the Act, certainly after the Reformation. The major reason for this inactivity is probably because the Kirk's policy towards clandestine marriage and the publication of banns would tend to root out the instances where there was a pre existing marriage. However, such a method of detection only was of use in solemn marriages and was of no effect in irregular unions.

An example of banns not disclosing a possible pre existing marriage was that of Leslie v. Forest (1561)[126] where the petitioner Elizabeth Leslie brought a case of nullity before the Session at Saint Andrews to reduce her marriage with John Forest, on the basis that some time before his marriage to her he had promised marriage to another woman and followed that promise with copula and cohabitation. The defender entered no useful plea and upon proof being led for the petitioner the decree of nullity was granted showing that a promise followed by copula was considered by the Reformers as much as by the canonists as a valid marriage.

A case which occurred the following year was Lindsay and Schewes (1562)[127] which displays the Kirk's attitude and also sheds some light on the validity of pre Reformation Canon law before the reformed Church Courts. The facts of the case were that the parties wished to have their banns read and approached the minister. It was known however that the woman Christen Schewes had been married to a man called Lyell who was not dead. Christen claimed that they had been divorced by "the ordo"[128] of the Catholic Church, by reason of his impotence.

Upon being called to satisfy the Kirk for the doubt of divorce the parties led the canonical process of divorce which had been heard before William Cranston[129]. The process was examined and found by the Session to be according to Canon law, formally correct, and furthermore the lawful cause of impotence was proven and confessed. Therefore there was no pre existing marriage, it having been a nullity and the parties were free to marry.

How does this treatment of the Canon law decree display the attitude of the Reformers? Most clearly one believes when contrasted with the case of Cunninghame and Wood (1561)[130] already discussed under the head of consanguinity. The similarities are startling with regard to the treatment of the cases and betray the origins of the development of International Private law. The essential problem was the recognition of the decree of a foreign jurisdiction, in this recognition Canon law as lex causae was applied to the decree and then the result was tested against the lex fori, the law of the forum i.e. Reformed ecclesiastical law. Therefore in each case the decree is tested for validity in its canonical context, on the one hand in

Lindsay's case the validity was agreed on the other Cunninghame's decree was declared to be null by the Reformed forum as it was promulgated in a private house and decided in face of a dispensation removing the ground of nullity of the marriage.

The validity or not of a decree led to its testing against the lex fori. If it was invalid at Canon law one would not think a second test was legally necessary. However, it must be remembered that technically the Court of the Superintendent did not have jurisdiction to adjudicate the validity of a canonical decree. It could only legally adjudicate with reference to the lex fori, and therefore to bolster the decision on Canon law the lex fori was also applied and the decree upheld or quashed against that legal prescription, thus the decision in Cunninghame declares that in any case, notwithstanding the invalidity of the canonical decree the decision was contrary to the new law and therefore null, the divorce was invalid and non adherence unlawful. Similarly in Lindsay the divorce was valid and upheld at Canon law and furthermore was in accord with the Reformed law which as will be seen on the matter of impotence did not differ much from the old Canon law, and therefore it was recognised and the new marriage was allowed.

The Kirk's attitude towards prior marriage remained consistent with the Canon law. As already shown a promise followed by copula invalidated a subsequent union. It was also the case that a clandestine marriage even though unlawful rendered invalid a subsequent marriage to be celebrated in facie ecclesiae. Thus in the case of Beton v. Arnot[131] (1566) where an inhibition on banns was ordered due to a promise followed by intercourse which rendered the

defender 'guilty of fornication and to have taken her for his wife'.

Some later cases see a slight change in emphasis from a consideration of the second marriage to the unlawful fornicating union and the appropriate change in penalty therefore. There is the interesting case of Katherine Brown in Crawford in 1644 brought before the Synod of Lothian and Tweeddale by the Presbytery of Edinburgh[132]. Katherine Brown had been married to one William Scot who departed to Ireland. For some time nothing was heard and she did not know if he was still alive. She therefore married James Reid in Church before a minister, whereupon her first husband returned.

It was held by the Synod, who did not refer the case to the Commissary Court, that the only lawful marriage was that between Brown and Scot. Both Brown and Reid were adjudged adulterers and fornicators and 'abusers of God's Ordinance'.

The change in emphasis from bigamy to adultery indicates a level of consciousness of sin-crime which is, in many respects, almost paranoic. In this case there is little evidence of matrimonial offence. Indeed the marriage between Brown and Reid only proceeded upon an order from the Bishop of Edinburgh, Bishop Lindsay. However as this case took place at a time when adultery and bigamy were increasing, e.g. in 1647 the Justice General and James Robertson and Alexander Colvill the Justice Deputes were ordained by Parliament to consider bigamy, adultery and the attendant crimes of concealing pregnancy and abortion[133]. It may be the case that this is evidence of a moralistic backlash. After all it was worse in the Reformer's eye to be an adulteress than a bigamist.

A slightly earlier case before the Synod of Lothian and Tweeddale in 1642[134] also bears out this analysis where a woman who was discovered to be married to two husbands was condemned for adultery against the first husband, and not for bigamy.

Stair does not treat of the matter in great depth stating only that marriage cannot exist where either party is married before[135] although he notices that only the just causes of divorce for adultery or desertion free a party for valid remarriage[136].

Impotence

Impotence, or the inability to perform sexual intercourse was looked upon by the Reformers as an impediment to marriage as much as in the Canon law.

However, the impediment fell subject to a minor reanalysis by the Reformers possibly following the continental influences of Bucer and Beza which resulted in the canonical concept of impotence which included not merely the sexual inability by reason of physical or psychological inhibition but also inability by nonage and by mental deficiency being restricted to the physical and psychological aspects, and possibly also mental deficiency. Nonage conversely becomes, in the eyes of the Reformers a distinct and independent diriment impediment.

The Reformed tradition recognised the importance of copula. As in the Canon law, the occurrence of copula following upon a promise to marry created a valid and subsisting marriage which, as has been noted,

could defeat a later solemn marriage. Copula was not necessary to create a valid de praesenti marriage. However, as the theory progressed it was recognised that capacity for intercourse was an implied essential contractual condition attaching to the contract of marriage. This analysis relates to a more rationalistic view and it is possible that at the time of the Reformation, marriage was still looked upon as having the 'purpose' of lawful and controlled procreation and that the inability to procreate simply subtracted from a union its Lebensgrund.

As the sixteenth century progressed the idea of impotence as an impediment became subject to the jurisprudential analysis which was to lead to the development of the theory of impotence as a resolutive condition which if incurred induced nullity. This is a result of the supposed knowledge of the parties at the time of marriage and whether one could found for nullity if it was known before the marriage that the other party could not engage in intercourse.

The leading post Reformation case is that of Gib v. Hillok (1562)[137]. The pursuer alleged that she and her 'husband' had cohabited for two years without consummation. The Superintendent fearing collusion ordained a further period of 9 months[138] cohabitation. After such a period the evidence of parties and witnesses was heard. Both parties were advised to lie together naked in bed. However, this tactic similar to the description in the canonical case of Miller v. Watson (1544)[139] was of no avail and no intercourse occurred between the parties. The deposition of the defender stated that he was impotent only quoad his wife and in fact he desired another. The pursuer was equally adamant that there had been no sex and no stimulation in her

husband's part. As a consequence however of doubts arising in the evidence, the Superintendant found that there was no impotence, and refused the petition for nullity.

It appears that some litigants looked upon impotence as the perfect way out of a bad match, consequently the vigilance of the Courts was always heightened when impotence was in the offing and acceptance of the plea would only occur on the most explicit evidence of inability to engage in sexual relations.

Thus proof septima manu was often engaged as has been shown, and was generally preceded by a period of cohabitation which provided access and opportunity to the parties. Thus in the Commissary case of Stewart v. Stewart (1580-87)[140] physical examination and compurgatorial proof by seven witnesses were all viewed as valid proof. As alternative methods there were however evidentia signa impotentiae or the parties could cohabit and provide proof septima manu.

These exacting standards were, as already stated, designed to prevent or at least hinder collusion and any mere allegation unsupported by evidence would be repelled without much consideration, as in the later case of Tilliry v. Tailyeour in 1601[141].

Stair recognises the impediment and basing his analysis principally on Canon law tries to distinguish the essentially mental element of consent from the ability to complete the matrimonial act. This is one believes, executed successfully and the copulatheoria is not accepted by Stair although some imprecision of language is responsible for a

little doubt as to what is stated by him.

"Yet the opinion of the Canon Law is true, consensus non coitus facit matrimonium. But this consent must specially relate to that conjunction of bodies as being in the consenter's capacity; otherwise it is void. So the consent of persons naturally impotent ... doth not make marriage"[142].

Any doubt in this passage which seems to imply that the consent must have an implied condition of capacity for intercourse is dispelled by the later statements, "it is not the consent to marriage as it relateth to the procreation of children, that is requisite;... but it is the consent whereby ariseth that conjugal society which may have the conjunction of bodies as well as minds"[143].

Under Stair's treatment of marriage which is essentially that of a later Natural lawyer, the consensual contract element, whilst expressly stated by him to be a divine contract[144], is subject in Stair's mind to the 'common essentials of consent'. In effect the Natural law which provides these common essentials of consent is the same Natural law which when the reason of man is applied thereto discloses the Divine Law by which the contract of Marriage is governed. The scheme of Natural law, Divine law and Human law which Stair was working in was much more fragmented than the essentially Thomist Natural law which produced the maxims of the Canon law with which Stair agrees, and to an extent a canonist looking at Stair would think his commentary on the essentials of consent slightly redundant.

The rationalist departure from the Thomist analysis is shown by the

emergence of nonage as an independent diriment impediment on its own account, not considered as an aspect of impotence.

Nonage

The Canonical proscription on the marriage of children remained as part of the matrimonial law, notwithstanding the Reformation.

The ages of capacity for girls at twelve years and boys at fourteen display the similarity. The First Book of Discipline affirms the canonical concept on the basis that children "have no election for the lack of understanding"[145]. Any promise made by children under such years was deemed by the Reformers to be, in God's presence no promise at all - total nullity was the consequence - the 'promise' was a non-promise. However, the possibility of ratifying the incohate promise remained, following upon cohabitation in majority, the so-called 'yeares of judgement'[146].

The similarity between the Reformed attitude and the canonical has been noticed as the following passage from Peter Lombard's[147] Sententiae displays:-

"Hoc etiam sciendum est quod pueri ante 14 annos et puellae ante 12 annos secundum leges matrimonium inire nequeunt. Quod si ante praedicta tempora copulam inierint, separari possunt quamvis voluntate et assensu parentum juncti fuerint. Qui vero in pueritia copulati post annos pubertatis nolunt se delinquere sed in conjunctione permanere jam ex hoc efficuntur conjuges et deinceps nequeunt separari".

'It is already known by law a boy under 14 and a girl under 12 cannot marry. Because if they copulate before the said years they can be separated howevermuch they were joined with the wishes and assent of their parents. Those who copulated in their youth and in the post pubescent years and do not wish to leave one another but wish now to remain in conjunction are to be man and wife in turn and are not to be separated[147].

It is noticeable that in the First Book of Discipline the canonist maxim, Maltitia supplet aetatem does not appear. However as canonistic doctrine was being adopted in such a widespread fashion in this regard perhaps there is an oblique 'reception'.

Nonage is discussed in only one recorded case before the Kirk Session. In 1568 the case of Alexander v. Wishart (1569)[148] was brought before the Session where the marriage was inhibited by the Superintendent until the boy Robert Alexander, who was then 13, became 14.

There is also one case extant before the Commissary Court that of Gillespie and Marshall (1565)[149] where the parties had been forced into an impubertious engagement by their parents and remained thus engaged until the age of 15. However they had not accepted one another after puberty and as no coitus or cohabitation had occurred there was no ratification of the null marriage.

The next formal mention of the impediment was before the General Assembly in 1600 where it was complained that in this regard the Kirk had no law. This was remedied to the effect of entrenching the First Book of Discipline's proscription and thus vicariously adopting the

Canon law[150].

Stair enforces this view and also imports the oblique canonical reference to intent supplying the defect of age, in more direct terms, and goes on for as to say that in such cases where copula has occurred between 'pupils or infants', 'regard must be had, whether the parties be truly come to discretion and capacity, whereof the commixtion of bodies is sufficient evidence'[151].

NOTES

1 Cameron, 191

2 Cameron, 195

3 RStAKS (Maitland) 240

4 To be discussed infra

5 RStAKS, 149

6 B.U.K., i, 65

7 RStAKS, ii, 681-685

8 RStAKS Moreis v. Tullis (1583) loc. cit.

9 RStAKS i, 30, Millar v. Adie

10 See infra

12 Beton v. Arnott, loc. cit

13 Cameron, 193

14 Leviticus 20, 10

15 Leviticus 21, 14

16 D.G. C.27, q 1, C.1.; Stair I, 4, 6

17 B.U.K., i, 32

18 B.U.K., 27.12.1560

19 Kirk Session Register of Stirling, 128

20 1567 C.14, III, 25

21 B.U.K. 6th Session 1570 passim

22 Inst I, 4, 6

23 Inst I, 4, 14

24 D.G. C.27, q 2, c1 & 2

25 RStAKS, i, 255

26 Inst I, 4, 6

27 Leviticus 18-20

28 Cameron, 90-91

29 See ultra

30 I.B. Cowan, Scottish Reformation, 152

31 See infra

32 Canons and Decrees of the Council of Trent Session 24, Ch.1

33 Cameron, 88

34 B.U.K, 334, 387

35 J. Calvin, Inst IV, 19, 37

36 Cameron 182, 196

37 RStAKS; 332

38 B.U.K. 30.12.1567

39 B.U.K. ii, 1569

40 RStAKS 452

41 Kirk Session Register of Perth, 247

42 Kirk Session Register of Perth, 249

43 RStAKS, ii, 830

44 RStAKS, ii, 860

45 B.U.K. iii, 1101

46 Cameron, 180

47 The Apostles Creed

48 The Ten Commandments

49 RStAKS, i, 439

50 RStAKS, ii, 838

51 RStAKS, ii, 794

52 Kirk Session Register of Perth 235

53 These aims could of course be achieved by an ad hoc withholding of the benefit

54 Cameron, 193

55 Cameron, 194

56 See ultra

57 Cameron, 88

58 Cameron, 88

59 J. Calvin, Institutes, IV, 19, 36

60 Inst I, 4, 6

61 Gen, 29, 25-28

62 Inst, I, 9, 9

63 D, 4, 3, 1, 3; C.2, 4, 34

64 Inst I, 9, 9; I, 4, 6

65 RStAKS; 247

66 John Winram 1561-1574 Superintendent of Fife, Fotheringhame and Strathern formerly sub-prior of St Andrews

67 See ultra

68 J. Calvin, Institutes, IV, 19, 37

69 J. Calvin, loc. cit

70 Cameron, 191

71 B.U.K., i, 21.12.1560

72 See infra

73 RStAKS (Maitland) 24

74 RStAKS, 220

75 B.U.K., 1, 66; 67

76 B.U.K. 1, 62; 63

77 J.K. Mason '1567 and all that' 1981 S.L.T. (notes) 307

78 Mason, op. cit. 303

79 1567C.16, III, 26; Balfour, 196

80 Especially vv. 6-18

81 1567 C.15 III, 26

82 Leviticus 18, vv. 12-14

83 Spottiswoode III, 1

84 RStAKS; 566

85 Synod of Lothian and Tweeddale, 2

86 Leviticus 18 v. 12-14

87 Synod of Lothian and Tweeddale, 288

88 Synod of Lothian and Tweeddale, 288

89 1690 cl, IX, 117

90 Inst, 1, 4, 6

91 Inst III, 4, 34, pr

92 I.B. Cowan, Scottish Reformation passim

93 J. Calvin Inst IV, 19, 37

94 Inst, I, 4, 6

95 Cameron, 198

96 Cameron, 197

97 Cameron, 194

98 2 Kings II, 1 et seq

99 RStAKSi, 60

100 RStAKS (Maitland) 260

101 RStAKS, 77

102 Gib v. Dorkie RStAKS (Maitland) 311

103 B.U.K. i, 91

104 Commissary Court Records 1, 7, 1565

105 B.U.K. i, 98

106 A.P.S. C11, III, 543

107 Riddell; 390 et seqq

108 B.U.K.

109 B.U.K.

110 1600 C.29, IV, 233

111 1646, C.167 S.4 VI 1562

112 Inst 1, 4, 7

113 Riddell, i, 391 et seq

114 Riddell 1, 392; Whytelaw v. Ker

115 Cameron, passim

116 RStAKS i, 234

117 RStAKS ii, 405

118 Synod of Lothian and Tweeddale, 40

119 Synod Records of Aberdeen, 290

120 Inst, 1, 9, 8

121 D. 4, 2, 1

122 D. 4, 40, 25

123 T. Beze, Tractatio de Polygamia, passim

124 Cameron, 196

125 A.P.S. II, 486 C.11

126 RStAKS i, 128

127 RStAKS (Maitland) 300

128 This is an interesting reference to the solemnis ordo

129 Official Principal of St Andrews 1553-1558

130 RStAKS (Maitland) 287

131 RStAKS i, 278

132 Synod Records of Lothian and Tweeddale 162

133 1647 VI, 763, C.341

134 Synod Records of Lothian and Tweeddale, 136

135 Inst. 1, 4, 6

136 Inst. 1, 4, 7

137 RStAKS, i, 151; Maitland, 304

138 Presumably to account for a gestation period

139 See page supra

140 Commissary Court Records; Riddell 494 et seqq

141 Presbytery Records of Aberdeen, 175

142 Inst. 1, 4, 6

143 Inst. 1, 4, 6

144 Inst. 1, 4, 1

145 Cameron, 194

146 Cameron, 194

147 Cameron 194, n.56, Sentences IV, 36, 4

148 RStAKS, i, 299

149 Commissary Court Records 15.8.1565

150 B.U.K. 3, 953

151 Inst, 1, 4, 6

CHAPTER V

The Formalities of Marriage 1516-1581

The question of consent and its expression was of the essence of the law of marriage. The Church was very concerned about the problem of the expression of this consent. Consequently a large body of Law built up around the formalities required for a valid marriage in both Roman and Reformed epochs.

The reasons for this concern are varied. Partially at least the concern was caused by the Gothic canonical superstructure which hedged the free exchange of consent with impediments of complexity and difficulty which were sufficiently incomprehensible as to dupe learned canonist theologians let alone the unschooled European peasant.

The principal evils which the canonist perceived in clandestine marriages were

1. the dissolution of valid marriages, by parties denying that consents had ever been exchanged,

2. the change of consents in face of valid impediments, resulting in illegitimacy and scandal[1].

Papal policy had determined at an early date, c 1200, that the Church should exercise more control over the institution of marriage and,

particularly under the influence of Pope Innocent III the control became tighter:-

"Clandestina conjugia penitus inhibemus, prohibentes etiam, ne quis sacerdos talibus interesse praesumat".

"We prevent clandestine marriage even prohibiting the penitent unless he takes himself with such interest to the priest"[2].

This displays the attitude of the Church and the Canon law; it condemned both the practice of clandestine marriages and (if there was one) the officiating cleric.

The nature of the Clandestine Marriage

What was a clandestine marriage? Hay[3] describes a non-clandestine marriage in the terms of the Summa of Angelus de Clauasio[4].

"Matrimonium contractum secundum consuetudinem patrie et in facie ecclesie dicitur matrimonium non clandestinum. Matrimonium dicitur contrahi in facie ecclesia quando contrahitur coram aliqua multitudine testium. Nam ecclesia in proposito dicitur congregatio fidelium".

"A marriage contracted according to the custom of the country and in the presence of the Church is called a non clandestine marriage. Marriage is said to be contracted in Church when it is contracted before a number of witnesses, for the Church is, in this context a gathering of the faithful".

It appears that the non clandestine marriage is contracted by compliance with the custom of the place or contracting marriage before witnesses. It has to be stated that in Catholic Europe prior to the Reformation the custom in respect of marriage was roughly the same, there were of course regional variations but the quintessence of marriage was uniform i.e. consent and in this can be perceived the origins of the theory of universality of status which has much effect on the modern Private International law[5].

There are many examples of the Scottish formulation of this custom in the Synodal and other statutes promulgated in Scotland, each with the aim of avoiding clandestine marriage.

The medieval canonists noticed that clandestine marriage could be concluded in the following ways:-

1. Where there were no witnesses[6]. The Decretal dealing with this aspect states that if a marriage is contracted in secret and there appears to be no legitimate proof, the Church will not compel adherence.

   The Aberdeen Statutes require the presence of a priest and of three or four trustworthy witnesses summoned together for that express purpose[7]. Similar prescriptions appear in the Constitutions of Bishop David of Saint Andrews in 1242[8] showing a certain ineffectiveness in respect of the laws against clandestinity. A practical example of the use of witnesses occurs in the protocol book of Dom Thomas Johnson[9] where at the marriage of David Boswell and Janet Hamilton, daughter of the

Earl of Arran, a total of seven witnesses were in use.

2. Where there was no solemnity. The Decretum of Gratian sets out in some detail the solemnities which were required. Perhaps no area of matrimonial law has been more vexed than that relating to solemnities. It is indeed the point at which the most regional variation comes into play; the conjunction of custom and law, the essential difficulty being the expression of legally valid consent within the customary context of a wedding ceremony.

The Decretum[10] lays down the minimum standards for a solemnly celebrated marriage in force before the Council of Trent. A man was obliged to seek the society and custody of his bride from her parents and those who had power over her. He was also to seek the blessing of the priest to the union, and was obliged to accept the woman as his wife.

3. Where there were no banns proclaimed. From the Fourth Lateran Council (1215)[11] the proclamation of banns had been prescribed as the primary method of publicising the forthcoming marriage and avoiding the possibility of incurring an impediment. Failure to have banns proclaimed on three successive occasions prior to the marriage rendered the marriage clandestine and unlawful.

The conciliar decreet was well known in Scotland and enforced by local legislation. In the Aberdeen Statutes[12] for example the celebration of any marriage not preceded by banns was prohibited. Not only was a duty imposed on the faithful to disclose, upon the Banns being read, any known impediment but the priest was also

obliged to investigate the position. The banns were to be read in the parish where the parties lived and if they lived in different parishes, in both parishes[13].

Such attempts to prevent clandestine marriages seem to have been of limited effectiveness. In the 14th century the Synodal Statutes of Saint Andrews also prescribed banns, and prohibited priests from celebrating at weddings where no banns had been proclaimed because of "the great scandal which has arisen in the Church of God"[14]. The same Synod denoted that Sundays and Festivals were appropriate days for the publication of banns, and also legislated that the nuptial blessing was not to be given in private chapels or at night[15].

The general ineffectiveness of such statutes is finally shown by, for example instances of marriage at dawn in private chapels in blatant contravention of the acts[16], the ratification and re-enactment of similar statutes at later provincial councils[17] and the extant records of suits for the solemnisation of marriage arising from clandestine unions. The number and character of the cases show that clandestinity was a problem, when it came to having parties live up to their obligations. For example there are fourteen[18] cases of suits for the solemnisation of marriage in the Liber Officialis between the years 1516 and 1551. Of these five were initiated by the male party and five exhibited a disparity of status between the male and the female, where the man was of a higher social status than the woman. The vast majority (ten) resulted in a decernment to solemnise the marriage in facie ecclesiae, of the remaining four three of the promises were voided because of affinity, and one was solemnised before judicial determination.

The overwhelming impression is therefore that some young noblemen or gentlemen of good family were not adverse to promising marriage in consideration of their lady friends' favours, exhibiting a cynical view of the matrimonial law which permitted but which did not endorse clandestine exchange of consents.

A fairly typical example is the case of Ramsay v. Macklayn (1539)[19]:-

"Nos Johannes Weddell in causa mota inter Margaretam Ramsay actricem ab una et Johannem Macklayn de Lochbaye suum sponsum affidatum reum partibus ab altera. Decernimus ex deductis coram nobis prefatum Johannem ad solempnizandum matrimonium in facie ecclesie cum praedicta Margareta Ramsay sua sponsa affidata carnali copula. Subsecuta compellendum fore pariterque compellimus"

"We John Weddell in the cause moved between Margaret Ramsay actrice on the one part and John McLean of Lochbaye her plighted spouse on the other part. We decern from that evidence led before us that the said John is to be compelled to solemnise marriage in Church with the said Margaret his spouse with whom he has had copula and we compel them equally".

For all the prohibition on clandestine marriages, these unions were valid on the basis of simply being exchange of consents de praesenti. The parties to a clandestine marriage had sinned and were required to undergo penance[20] and the children of such a marriage where an impediment was discovered were illegitimate[21]. Indeed ratification of the union and ecclesiastical recognition could be obtained by the Decretals which provided that if contracting parties wished to declare

the marriage, then unless there is an impediment the Church will receive and approve the marriage as if it had been originally contracted in conspectu ecclesiae[22]. Punishments were also visited on the offending clergy who celebrated at such a marriage, to the extent of one year's imprisonment on bread and water, and three years suspension from office.

Clandestine marriage could also arise where there was cohabitation following upon the betrothal or de praesenti exchange[23], or where there was impuberty[24] or where the marriage was contracted during ferial time[25]. However it could be dispensed by the Ordinary where the parties were notorious, although this was contrary to a local statute, where the parties were of great disparity of age and finally where there was likely to be unwanted intervention on the part of the parties' families[26].

The clandestine marriage which occurred, following upon the betrothal or exchange of consent, by way of cohabitation became recognised as a route to patrimonial rights by the secular authority at a fairly early stage by the Act of 1503[27].

This Act was essentially a method of providing a life partner of a deceased with an alimentary provision analogous to a wife. To institute such a right to a mere concubine would, of course, have resulted in a dilution of the marriage bond and, consequently, the only logical conclusion was to provide equality of status. The Act had important implications in respect of property and in an evidential presumption providing proof of entitlement to terce.

The substance of the Act was that where a woman pursued a right to terce and it was argued that she was not a wife, she could obtain a right to the terce by proving that she was held by repute as his lawful wife. Valid marriage must have been possible between the parties and there must have been no valid impediment between the parties which would have prevent their marriage. Were it proved, by any interested party that no valid marriage were possible between the parties then the right to terce would be lost. The point of this Act was therefore not to declare marriage but to provide proof of entitlement to terce.

Hay makes no mention of marriage by 'habit and repute'. However an indication of the canonist attitude is shown in the Liber Extra[28] which states that the proof of marriage is held by long cohabitation, and by repute (fama) of marriage and other supportive evidence to the contracting of marriage.

Three cases are shown by the Liber Extra, firstly, where a woman cohabited for ten years no marriage was found because the sponsalia were not witnessed. Secondly, where a man could show the transfer of nuptial gifts by a public instrument sufficient inference was made. The third case dwelt on the effect of the 'common bruit' of the neighbourhood, a not insignificant factor in the largely rural village society of sixteenth century Scotland.

It is of some importance that this Decretal is contained in a book of principally procedural decretals. At which point the Act of 1503 ceased to be treated as a procedural guideline under canonical influence and became a substantive provision is difficult to say but

the problem will be examined in further depth.

After the Reformation the Reformed Kirk expended nearly as much energy as the Catholic Church in attempting to restrain clandestine marriages and exercise ecclesiastical control over marriage.

The Reformed attitude is clearly spelt out in the First Book of Discipline:-

"In a Reformed Church marriage ought not to be secretly used but in open face and publyck audience of the Kirk, and for avoiding of dangers expedient it is that the bond be publicly proclaimed 3 Sondayes unlesse the persons be so knowne that no suspicion of danger may arise; and then may the time be shortened at the discretion of the ministry. But no wayes can we admit marriage to be used secretly how honourable soever the person be"[29].

There was a welter of legislation, both local and national by the particular elderships and the General Assembly, in an attempt to enforce this provision which was in effect a decree of the Fourth Lateran Council.

As if to emphasise the importance of the clandestine marriage question the eldership at Saint Andrews, in one of its first quasi legislative acts[30] ordained that all the banns of those who have contracted or made promise to be married were to be received by the scribes of the Consistorial Court. If the parties were parishioners of another Kirk a testimonial statement of no impediment had to be presented thereby certifying that the parties were free to wed.

The General Assembly added its voice to the condemnation of the clandestine marriage. In 1563 it enacted that 'no contract of marriage alleged to be made secretly ... shall have fayth in judgement in time cuming until ... the contractors suffer as breakers of good order and slanderers of the Kirk'. If witnesses could not be produced to the "marriage" or if the parties did not confess to the "ceremony" then they were to be held as fornicators[31].

This legislation was swiftly followed in 1565 when the General Assembly required that no minister receive any party for marriage without a testimonial which certified that the banns had been read and that no impediment had been found[32].

Old arguments regarding the patently ambiguous stance of the Church regarding the sufficiency of de praesenti consent yet requiring the solemnity of celebration in facie ecclesie vexed the councils of eldership and General Assembly alike. Thus a minister and parties were ordained to answer to the Assembly why a marriage had been celebrated without banns and parental consent[33]. The same minister was also guilty of advising parties to contract a de praesenti marriage notwithstanding a claim of prior marriage[34].

Such difficulties as described in the foregoing required that eventually the General Assembly should require that parties deliver their names for banns and that no other prior ceremonies e.g. betrothal be used, thus leaving the field clear for solemnisation in facie ecclesie[35].

In some parts of the country at least the policy of the Kirk was

working and there are comparatively few suits for the solemnisation of clandestine arrangements during the period 1570-1581 and in Perth in 1579 the Kirk Session was confident enough to ordain that Monday should be the day used for the reception of bnns[36].

In 1581-82 there appears to be a small revival of the clandestine marriage, possibly linked to a lessening of presbyterian church control in certain areas and the attendant troubles, ecclesiastical, political and social concerned with the fall of Regent Lennox and the Ruthven Raid[37].

It comes therefore as little surprise that an act of the Perth Eldership narrates that because of great abuse and slander, fines were to be introduced for those who did not notify their contracts of marriage and solemnise the bond within forty days of the banns[38].

In Saint Andrews in 1584 there was legislative activity which required parties to compear at the Council House and have their union registered in the band book[39]. Requirements were also made that parties and their parents verify the contract, notwithstanding the proclamation of banns[40].

The General Assembly finally legislated in 1597 that no persons be lawfully coupled unless their banns were proclaimed thrice at their own parish church according to the consuetude of the realm. The penalties for non compliance with this prescription were deprivation of the Minister and public repentance for the parties [41].

By 1597 of course much of Catholic Europe had experience of the

diriment impediment of clandestinity established by the 24th Session of the Council of Trent (1563) which in its Decree 'Tametsi' declared, approving of the Fourth Lateran Council decree of Innocent III[42], that "those who shall attempt to contract marriage otherwise than in the presence of the parish priest or by the ordinary and in the presence of two or three witnesses, the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null as by the present decree it invalidated and annuls them"[43].

The Reformed Church never went so far as to declare clandestinity a diriment impediment. It did however frown upon the abusive and scandalous practice of clandestine marriage which was inductive of sin and creative of impediment. The following examination of the decided cases will show exactly the attitude of the Reformed Church and its measures against the problem of clandestine marriage and will show how the church tried to secure notoriety for marriage and enforce its nature in ecclesiastical thinking as a public act in which the community and church should share.

The Reformed Church took a dim view of clandestine promises, due to the dangers of scandal, uncertainty and sin. The case of Syntoun and Robertson (1561)[44] is a good example which displays the serious nature of the clandestine promise and the harsh attitude of the Church in regard to this problem.

In that case the parties had promised marriage in the presence of witnesses and before a reader, whereupon their banns were read. However, Margaret Robertson proved recalcitrant in solemnising the

union. After the proof which involved John Row, Minister of Perth, a learned canonist, the eldership found that a promise had been made and that the bond should be solemnised. The eldership also directed that the penalty for non implementation of the decree would be excommunication.

If parties had entered into a clandestine marriage and one party wished to marry a third party solemnly, the wronged spouse could obtain an interdict on any interim marriage pending determination of his suit for solemnisation[45] which if breached could be enforced by a decree of separation on the ground of prior marriage.

Occasionally, as the case of Lokaird and Tholland (1565)[46] shows, the Kirk Session could call upon parties and enquire as to their reason for failing to solemnise the contract, almost on an ex proprio motu motion. This appears as a demonstration of the Church's concern arising from a denunciatio evangelica. It also appears that the Church was prepared to excommunicate the offender for this sin, a much harsher penalty than subsisted in the canonical epoch[47].

The banns were required to be called in the parish of each party and the place of the wedding ceremony was also determined by the parties' domicile. However sometimes the Session would relent on such a rule and permit a marriage of parishioners outwith their native parish. In such cases the Session would grant a licence permitting such a ceremony[48], sometimes under payment of a pecunial pain[49].

The penalties imposed upon parties to such a marriage were reflected in the punishment of celebrants at an irregular marriage. Thus Master

Andrew Kirkaldy was required to seek forgiveness for the 'great transgression' of marrying a couple 'by all good order' but without banns[50]. Ecclesiastical discipline would be exercised also against those performing ceremonies in private houses[51] or using rites other than those prescribed by the Book of Common Order (1562) i.e. in papistical fashion[52].

The Kirk would at least during the sixteenth century accept penitance from a wrongdoer and a testimonial of satisfaction showing no impediment. Prior to issuing banns it would also sometimes require caution to be deposited with the Session pending solemnisation[53]. Whilst it appears that the policy of the Kirk was effective in reducing the number of clandestine marriages, there being only some twenty recorded cases at Saint Andrews between 1560 and 1600, after 1600 in some parts of the country at least there was a slight upsurge in clandestine marriages. Therefore in Stirling in 1615 the Session legislated regarding the many suits for completion of marriage[54] and in 1622 enforced a requirement for caution of £10 in all applicants for banns[55] who reside in the parish with an obligation to complete the bond within 40 days.

These ecclesiastical activities were supported by the secular authorities which in 1649 legislated on the matter because it was "necessary that there be no marriage without the Kirk's laudable order and by authorised persons". The Act[56] narrates the reasons why persons may choose to perform and participate in a clandestine marriage, through disaffections, through false marriage, with the desire of deceiving the census, to avoid parental interference and to be married according to the recusant rites of Jesuits and other

catholic priests. The punishment for parties involved was three months imprisonment and a fine on sliding scale according to social status. For the celebrant banishment on pain of death was deemed to be a sufficient deterrent.

The problem of recusancy and hidden Catholicism increased during the seventeenth century, particularly with the appointment of William Ballantyne in 1653 as Prefect Apostolic which served to provide Scottish Catholicism with an ecclesiastical organisation. Scots Catholics were not subject to the Decree 'Tametsi' which was not promulgated for Scotland until the twentieth century. As the Catholic organisation began to be more established the problem of Clandestine and irregular marriages also increased. Therefore in 1661 the Act of 1649 was substantially re-enacted with modifications in the fines which could be imposed. There was also a specific restriction upon the marriage of parties in England or Ireland without Banns[57].

It is noticeable however that there is no indication that clandestine or irregular marriages could ever be considered as anything but valid. Illegal the marriage was but invalid it certainly was not. Stair endorses this view where he states that 'public solemnity is a matter of order:... but not essential to marriage'. He goes on to state that such marriages cannot be declared void or annulled[58].

NOTES

1 Hay, 31

2 C.3, X. IV, 3

3 Hay, 29

4 Summa casum conscientiae s.v. Clandestinum Matrimonium

5 See Morris, Conflict of Laws passim

6 C.3, X, IV, 2

7 Patrick, 39

8 Patrick, 63

9 Protocol Book of Dom Thomas Johnston

10 D.G. C.1, 35, q1

11 C.3, X, IV, 3

12 Patrick, 39

14 Patrick, 39, 44

14 Patrick, 71

15 Patrick, 72

16 Protocol Book of Dom Thomas Johnston, 41

17 Patrick, 124

18 Liber Officialis Sancte Andree passim

19 Liber Officialis, 109

20 Patrick, 143

21 Hay, 31

22 C.3, X, IV, 2

23 Hay, 29

24 C.2, X, IV, 3

25 See ultra

26 Hay, 31; 33

27 A.P.S. II 243, C.23; A.P.S. II 252, C.22

28 C.11, X, II, 23

29 Cameron, 195

30 RStAKS; 42

31 B.U.K., i, 32

32 B.U.K., i, 66-67

33 B.U.K., i, 66

34 B.U.K., i, 66

35 B.U.K., ii, 6.8.1575, sess 6

36 Kirk Session Records, Perth, 236

37 Donaldson, Ch. 10

38 Kirk Session Records, Perth, 247

39 RStAKS, 4.11.1584

40 RStAKS, ii, 562

41 B.U.K., iii, 937

42 C.3, X, IV, 3

43 Decrees and Canons of the Council of Trent, 184

44 RStAKS, i, 143

45 RStAKS, i, 148

46 RStAKS, i, 247

47 RStAKS, ii, 423; ii, 563

48 RStAKS, ii, 498

49 RStAKS, i, 293

50 RStAKS, i, 319

51 RStAKS, i, 84

52 RStAKS; 1564

53 RStAKS, ii, 418, Records of the Synod of Lothian and Tweeddale, 44

54 Kirk Session Records, Stirling, 453

55 Kirk Session Records, Stirling, 460

56 1649 VI, C.165, 184

57 1661 VII, C.246, 231

58 Stair 1, 4, 6

CHAPTER VI

Relations Stante Matrimonio 1560-1690

The law which governed relations stante matrimonio, that is during the subsistence of the marriage was much more diverse than that which ruled the constitution and dissolution of the holy bond. The legal effects of marriage had great social implications, particularly with regard to the status of women, the creation and dissolution of property rights and obligations, and the inherent obligations between a man and woman which form a marriage, namely adherence and aliment. Consequently the importance of this area of the connubial relationship is clear for the feudalist, the civilian, the natural lawyer and of course the canonist. It is not the purpose of this chapter to examine the sociological effects of marriage but merely to view the legal matters which arise from marriage and from life in connubio.

The law governing such an area of socio-legal relations is diverse and varied. There is of course a substantial element of Canon Law though its effect is much more indirect. More important is the reliance placed upon the Civil law, even to the extent of direct adoption of Digest texts or senatusconsulta, and upon the body of customary European Law known as Feudal Law.

The Married Status

The independent status of a woman, if she were of full age substantially ceased, with a few exceptions upon her marriage. The

personality of the wife was almost completely absorbed into that of her husband. If the canonists spoke of unitas carnis, the one flesh, that flesh was male.

There are many reasons for this socio-legal phenomenon which with very little variation was almost universal throughout Europe. Some reasons are connected with the Feudal System of land holding which with its militaristic basis was productive of a male dominated and male dominating society, even if by the sixteenth century this concept was beginning to be an anomaly. Nevertheless concepts such as primogeniture and the superior's right of marriage owe much to the masculine elements of feudal theory. Other reasons are related to primitive understandings of the Civil law and concepts such as potestas and tutela perpetua. Mistaken interpretation of legislation such as the Senatusconsultum Vellaeanium served to cloud the issue. Whilst yet other reasons owe their existence to primeval ideas of Germanic male potestas, as the dignior persona, the better person.

With a few minor exceptions the woman lost all independent powers and became 'cled' with the personality of her husband[1]. This attitude towards women was of great antiquity. Regiam Majestatem, the early manual of substantive Feudal Law contains much which serves to enshrine this attitude and give it the rigidity of law. Craig, one can argue, points to the Feudal Law as being the prime source of the disability as he speaks of such a disability, in respect of vassalage, which he maintains could not be held by a woman due to the miltary element in reddendo, but explains that by his time women could hold land indiscriminately in feu due to a diminution in the importance of military holding[2].

The overwhelming notion of a defined power which emerges with Regiam Majestatem is that of the husband's potestas. The wife is spoken of being "in potestate viri"[3] in the husband's power and under his authority, and was definitely regarded as being of an inferior personality:-

"Habita quoque distinctione semper observata superius posita inter ... masculas et feminas".

"Regard must always be had to the distinction above and to the preference of males to females".

The potestas can be analysed in many ways. There are indications that the husband should be regarded as the curator or tutor of his wife. However there were important distinctions between the curatory or tutory of women in medieval Scotland and the tutela perpetua mulierum[4] of the Roman law, for one thing the powers of a married woman in Scotland were much more restricted than those of a Roman woman. The husband's purpose as tutor in Scotland was more than merely to interpose authority to her acts. The Roman woman was not in the power of her husband but in the power of her pater (who could of course be her husband) or was sui juris. Property belonging to the woman if sui juris remained her own, and the patrimonial rights were unaffected, although she could transfer her non-dotal property to her husband's custody and management[5]. This is in contradistinction to the complete assignation of moveable property from the wife to the husband saving some small exceptions which occurred upon marriage in Scotland which was known as the jus mariti.

The husband's power could also be looked upon as a species of universal mandatory[6]. However, this attitude could be explained in terms of exactly the opposite, by virtue of the husband being the principal and the wife a restricted agent. Thus Balfour can state that the husband is 'principall and heid' of the wife[7], and one can point to the agency of necessity[8] and praepositura as examples of the agent's powers.

In reality the analysis of Stair is closest to an accurate representation of the status of married women. He states that the "rights arising from marriage are the jus mariti or conjugal power of the husband over the wife, her person and goods". Further, he distinguishes between two meanings of jus mariti firstly in the narrow sense of the power which a husband has over his wife's goods and secondly in the wider sense of the power over her person "which stands in that economical power and authority, whereby the husband is Lord, head, and ruler over the wife" which power he attributes to biblical authority[9].

This jus mariti is later stated by Stair to be "a legal assignation to the wife's moveable rights needing no other intimation but the marriage".

Admittedly this is in apparent relation to the narrow interpretation of jus mariti only but one can consider that it presents a satisfactory legal rationale for what happened to women at marriage. A woman who was of full age and unmarried had no restriction upon her rights of property or action, there was inherent in her all the capacity and power of a natural person, it is this personality and all

that flows from it which the woman assigns to the husband. The personality in Stair's analysis must exist de jure naturae being evident upon the application of reason to the nature of natural persons[10]. When this personality of woman is applied to the three first principles of equity to obey God, to be free and capable of disposing of herself and all her things and to restrain this freedom by engagement[11] it is clear that the jus mariti as a right inherent in the woman is an attribute, being her personality as well as her property and that she has the freedom to dispose of this and that she has the power to engage herself accordingly in marriage.

Stair however does not accurately represent the matrimonial status by discussing it in terms of society and communion of goods and by stating that it is in effect through the husband's economical power of government, that the administration of all the wife's assets during the marriage lies with the husband alone[12]. This would in effect reduce the analysis of the jus mariti to that of a relationship of truster and trustee, which the above plainly shows to be erroneous, the ownership of the husband is not that of a partner nor is it the mere administrative title of a trustee but rather is an absolute right of dominium. It is now the task to show the extent of this dominium and to examine any exceptions thereto.

The Property of Married Women

It is proposed to examine the effect of marriage on married woman's property, heritable and moveable, and to investigate whether the Reformation had any effect on this area of the law of husband and wife.

Heritable Property

The married woman could own heritable property, as this was not assigned by virtue of the marriage and was unaffected by jus mariti, in its narrow sense but subject to the wider power of the husband which was to become distinguished in this particular as the jus administrationis, or right of administration which required the husband's consent to each disposition by the wife, a function of the husband's curatory of the wife. It should be remembered that according to Balfour the husband could 'correct hir as ane bairn within age, be ressoun of hir ignorance, and doing without his counsall and advice"[13].

Regiam Majestatem provides:-

"Quia cum mulier plene in potestate viri sui de jure sit non est mirum quod tam dos quam ceterae res omnes intelliguntur esse in dispositione viri eiusdem".

"Since the woman is in the power of her husband, it is not strange that her dos and everything also belonging to her should be at her husband's disposal[14]".

This right of the husband to be required to consent to validate any heritable deed of his wife extended to those proceeds from heritage and any acquirenda e.g. by virtue of succession. Therefore if a heritrix sold or disposed of her right, title or claim in any heritable property the disposition following upon such a sale was of no avail and was null if it was done without the consent of her

husband[15].

The essential reasoning behind the difference in treatment between the heritable and moveable relates to the nature of marriage. As marriage is a institution of limited duration, i.e. by the lives of the parties or by the possibility of divorce, it was reasoned that it could not be permitted to affect perpetuities such as heritable rights. Thus a wife's right of non entry decerned to be a tractum futuri temporis did not fall under her husband's jus mariti, whereas the profits of the future right did fall into the (misconceived) communion of goods[16].

The wife was obliged to obtain her husband's consent for her intromissions with her heritable property. This requirement was of some ridiculous application, thus in the case of Melvill v. Dunbar (1566)[17] a lady executed a renunciation which her husband subsequently ratified. This however was found to be insufficient and therefore the wife was required to execute a new renunciation which had been ratified prior to her granting.

But nevertheless the principle that heritable property adhered to the wife was enshrined by cases which exemplified that ferocious period of judicial activity during the mid-seventeenth century. Heritable property as has already been shown extended to the ficticiously heritable, therefore a bond of annual rent and obligation to infeft fell into heritage and did not become part of the property administered under the jus mariti[18].

However, the distinction of capital and income when applied to heritable and moveable property dictated that the current annual rents

of heritable subjects which fell due during marriage accresced to the husband jure marito[19] in distinction to a bond bearing annual rent which did not come under jus mariti.

Stair[20] notices these distinctions and points to the Act 1661[21] which provided that bonds bearing annual rent were heritable vis a vis the treasury and the widow, as the saving legislation. Similarly a heritable bond which was assigned to a woman was heritable in her succession and therefore unaffected by the husband's jus mariti[22].

Very often a woman's major heritable estate would be that given to her as dos or dower. This ancient form of grant is examined in some detail in Regiam Majestatem and Balfour's Practicks. The dower represented the third part or terce of the husband's heritable property with which the husband endowed the wife at the wedding, in front of the church door, ad ostium ecclesie. Regiam Majestatem provides that the dowry given by the man to the woman, strictly speaking the dower, was required under both civil and canon laws[23].

The dower could be specified or not specified. If not specified it was deemed by law to be one third of the heritage which the husband accrued at marriage. For various complicated feudal policy questions it was impossible to dispose of more than one third of the heritage in this way - which was in effect to provide a liferent estate for the wife in her widowhood. The wife was incapable of disponing any of the dos during the husband's life, whereas the husband could so dispone by virtue of his headship arising in the jus mariti and its lesser sibling the jus administrationis.

The dower, often incorrectly termed dowry[24] which was a totally different marriage gift coming from the wife's relations to the husband, was a provision of an alimentary nature to the wife at marriage which would provide an area of ground and thus a liferent income for the wife after death during the pre Reformation epoch and also after dissolution by divorce in the post Reformation time.

There are indications that the transfer habitually took place at the church door. In the case of Anstruther and Beaton v. Howeson[25] (1542) there is mention of endowment 'ad fores ecclesie in lie dowry'. Such activities were outside the church, literally and figuratively, the church took little to do with this matter which represents an inter vivos disposition from husband to wife, suspensive upon a certain event i.e. the husband's death but in other respects it is the same as a conveyance inter vivos only lacking in the trappings of formality of conveyances at that time.

Balfour records that a husband was obliged to give a reasonable dowrie (dower) and terce to her wife at the time of marriage. He defines the terce as a reasonable third of the fee and heritage in which he is vest at the time of the marriage. This is in accordance with an act of Alexander II ordaining that every widow shall have a third of her husband's lands as dower[26].

The alimentary nature takes a secondary position to Balfour's reasoning for this terce which he claims is to enable the widow obtain a new marriage; the fundamental concept of provision after death however remains[27]. The widow could also take possession of the terce and if necessary could have used the Brieve De Recto to protect her

holding[28].

According to Balfour the wife had no power to sell her terce during her husband's lifetime, because it 'like with all uther things that may pertaine to hir' is under the disposition of the husband, and farther unless the consent was forced she should consent to any dealing which her husband took with the terce[29].

A woman could lose her terce through several occurences, e.g. where the marriage was null by nonage; where the husband did not own the land where terce was granted, where she dies before him having a child, a subsequent wife can claim terce, where his lands were escheat and where there was dissolution or separation[30] for adultery or desertion[31] showing a post Reformation extension of a canonist idea.

The character of terce as a quasi liferent does not become totally clear until Craig in his Jus Feudale explains the right from the point of view of the Feudalist[32]. Craig, like the author of Regiam and Balfour, recognises its essentially alimentary character, saving a widow from destitution.

He also discusses, drawing the analogy for the first time, reflecting the increased knowledge of Civil law during his time, together with his own humanist tendancies, the relationship of terce to husband's property as a type of usufruct. Terce is considered fully by Craig as a jus in re aliena, a right in another's property resting on the essentially perilous ground of a mere personal obligation, without infeftment[33].

Quite importantly Craig specifies that no terce is exigible if either spouse dies within the year, without issue[34]. It is also clear that terce only was exigible from feudal land. Burghal tenure gave none[35]. Terce was important as an institution with regard to the constitution of marriage in a most unusual way.

By the Act 1503 c 77[36] it was ordained that where a woman pursued a brieve of terce and it was proposed against her that she was not the lawful wife of the husband whose terce was sought, if she could prove that she was held by repute as his wife and that the marriage had not been challenged, she could have a right to the terce. Repute alone did not suffice of course to show undisputed right and it was further ordained that parties must have been capable of lawful solemn marriage, i.e. that there was no impediment.

It is an Act which purports only to permit proof of entitlement to terce and this was surely how it was viewed and interpreted by the Canonists in Scotland. For example, Hay makes no mention of the Act and Balfour discusses it only in the context of terce. However, it is clear that when combined with certain canonical tests the possibility of a marriage being constituted by habit and repute was very real.

It shows once again the equivocal position of both secular and spiritual authorites on the one hand both trying to encourage solemnisation in facie ecclesie as a means of control whilst on the other having to recognise the clandestine arrangements on the basis of de facto consent and further being incapable of excluding from terce those who believed themselves to be and in fact by Canon law were, man and wife, simply because of a lack of formality which would result in

the poverty and destitution which a legal system, conscious of its obligations under natural law[37] and the morality which flowed therefrom, could not abide.

Moveable Property

The broad rule of the jus mariti required as a result of the submergence of the woman's personality in that of her husband that her rights of property in moveables should likewise be submerged.

Regiam Majestatem[38] in a passage already discussed spoke of the almost 'usual' consequence spoken of above that the wife's ability to own and deal in moveables be restricted. There was no real communion of goods, the wife's right in respect of the moveables was a shadowy reversionary right except for those petty personal items which were hers in toto.

Therefore in Regiam following upon the broad scheme, and because of those petty exceptions to the rule, there is a definitive statement of the property rights of a wife with regard to moveables.

"Nulla femina virum habens potest sine licencia viri sui dare vel vendere aliquid de bonis suis ultra valentiam quatuor denariorum excepta elemosina moderate et caritative facienda et exceptis etiam vestibus suis in robas, scissis et formatis et omnibus parafernalibus sibi datis. Tamen illa debent dari cum licencia viri sui au donatio nullius sit valoris".

"No married woman may, without her husband's consent give or sell any

part of her goods of more than four pence value except moderate alms, apparel cut and fitted for her wear and her paraphernalia. Even these excepted items require the husbands consent or the gift is null[39]"

It was often the case that the marriage contract would provide the wife with a separate moveable estate. Thus in 1550 Thomas Orlie discharged a debtor of his contract stating that he had received 'on behalf of his spouse' 3 ells of black cloth, some bolls of bear and some oatmeal. It is clear that even when the property was a donation to a wife in implement of an antecedent obligation the husbands jus mariti intervened[40].

There would sometimes be an express traditio of the wife's personal property contained in the contract, thus signifying the loss of her status sui juris and the absorption into the husband's dominium. Therefore in 1553 a daughter was bound to bring with her the bed and the comptir, (chest of drawers) in addition to the maritagium[41]. Whereas in 1563 a much less specific disposal of all 'goods and geir' is made by the wife-to-be to her future husband[42].

Balfour in his Practicks is quite clear as to the rule subsisting in his day, where the jus mariti had undergone some refinement and a little more definition.

However, in a passage of Balfour one can perceive some evidence which explodes the 'communion of goods' theory. Balfour speaks of the wife's inability to sell or dispose of any of 'hir husband's geir' and from this he excepts only the following 'almons (alms) gevin mesaurablie, and all hir claithis and abulzeamentis of hir bodie,

togiddir with all giftis, gudis, geir or jewellis gevin unto hir (dona parapherna)' which he explains may only be disposed of with the husband's consent[43].

Furthermore, if there was a communion of goods it was a very uneven communion for, according to Balfour the husband may dispose the wife's moveables at any time. Further to put the lie to any idea of society, the wife is prohibited from objecting to such disposition[44]. A husband who intromitted with his wife's goods was not in the status of a vitious intromitter[45].

The jus mariti was to be avoided in the following ways (a) by the property falling within one of the recognised exceptions, (b) by the husband renouncing the jus mariti, (c) by an item of property changing its character from moveable to heritable.

(a) The recognised exceptions of matrimonial property from subjection to the jus mariti were the wife's clothes, and all the gifts and jewels given to her by way of paraphernalia[46]. Thus in the case of the Mistress of Gray v The Master of Gray (1582)[47] the wife's paraphernalia was held not to fall sub communione (sic). The later decision in Davidson v. MacCubun (1610)[48] showed clearly that such items as were included in paraphernalia were unattachable by the husbands creditors.

Stair acknowledges this category of married woman's property and in this connection observes that "all her moveable goods and sums became his by the marriage except her paraphernalia[49]"

(b) The husband could, of course, volunarily resign the jus mariti, at least to an extent. In the case of Foulis v. Tennants of Innertyle (1667)[50] it was held that a husband could renounce the jus mariti so far as it affects the jus mariti but not to the extent of denying his position as paterfamilias. This was obviously a decision connected with social policy, limiting the retrocession of the jus mariti as an assigned right to that of which the husband could usefully dispose, yet leaving the residual potestas in the husband. Again this puts doubt on the partnership idea of marriage, because its logical conclusion would bring this doctrine to a recognition of some quality of paterfamilias in a husband notwithstanding that there were no goods owned by the married couple.

(c) Obviously the alteration in character from moveable to heritable property would effect a substantial change in the nature of the husband's control bearing in mind that jus mariti related only to moveables, whereas the heritage was controlled by virtue of the jus administrationis. It must be borne in mind however that all transactions by the wife were subject to the overriding control exercised by her husband.

Donations between Husband and Wife

The area of the law of husband and wife dealing with gifts between spouses owed much to Roman law provisions.

There was a general prohibition on the gift of property from husband to wife and vice versa. This prohibition is shown by the passage in

Regiam Majestatem which struck at such donations because they might lead to a mutual impoverishment:-

"ne mutuo amore se spolient"

"lest mutual love cause mutual poverty"[51]

This rule had been derived from the Roman Law as did much of this area of the law[52]. Although almost certainly the source of that particular passage is to be found in the Summa of Azo[53]. However it was recognised that, whilst the gifts between husband and wife may be invalid they were not null, and if they subsisted for the length of the marriage without revocation, they became final and irrevocable[54].

Stair writes at some length on the point of revocation of donations between husband and wife. The basic rule was that donations inter virum et uxorem were revocable. There is fairly early authority for the view which conforms with the medieval concept[55]. The donation had to be stante matrimonio, a donation occuring between the marriage contract and the ceremony was irrevocable[56]. Stair examines several cases, mostly of the mid-seventeenth century an example of the enormous judicial activity in this epoch[57]. The majority concern the disposition to heirs or children subsequent to that to the wife, implying a revocation of the first donation. Some cases however do concern express de facto revocation[58]

Stair cites the case of the Children of Wolmet v. the Countess of Wolmet (1662)[59] where a posterior gift to children defeated an earlier gift to a wife, and Kinloch v. Raith (1674)[60] where, without express

revocation, the creation of an annual rent from given lands, revoked the donation to the wife.

The right to revoke had to be thus expressly or impliedly exercised by the husband. A donation to a wife was as much an absolute gift as if it were made to any other, and simply because it was to a wife did not mean that the gift reverted naturally to the husband by reason of the jus mariti[61].

The grounds upon which the donations were irrevocable were a source of much contest and it is difficult to decern anything but the broadest principle of quasi contractual recompense. The categories of gifts which are irrevocable seem to be those which are truly a form of consideration in respect of benefits received or in implement of an obligation, or as a form of security.

Thus a donation was irrevocable where because there was no provision in a contract of marriage it was to be considered as the provision for terce[62]. Stair cites Lauriston v. Dunipace, in which case a liferent donation to a wife was held irrevocable as it was a remuneratory donation in respect of the tocher brought by her to the marriage and the non existence of any contract of marriage making provision[63].

The provision for the wife representing a gift in consideration of aliment, had to be suitable for the parties, and any excess could be revoked[64]. Gifts were also irrevocable if they fell into the paraphernalia[65].

Donations could be reduced and revoked on the grounds of

ingratitude[66] and fault on the part of the donor[67]. Thus in the case of Murray v. Livingstone (1575) the marriage was dissolved for adultery and the adulterous party was prohibited from revoking the gift. Similarly, if the marriage was dissolved within a year and a day of being instituted all items were restored hinc inde[68].

There were two essential exceptions to the rule against the donation of moveables and heritage between husband and wife; the tocher or maritagium and the donatio propter nuptias. There was also the minor exception of morning gift which does not seem to have truly been used in Scotland.

Balfour notices the exceptions of tocher and donatio and declares;

"All uther kind of donatiouns is forbidden be the law to be usit betwixt the husband and wife ... because gif ather of thame, desyrit ony gift of the uther and war refusit thairof, the samin refusal wer ane occasioun to stop and quenche mutuall love betwixt thame"[69].

This obviously is quite a different state of affairs from those existing when Stair writes, or perhaps the same caution regarding the possibility of donations stante matrimonio being productive of matrimonial discord resulted in a more liberal interpretation of the grounds of revocation and a stricter limitation of the character of irrevocable gifts.

Tocher-gude or Maritagium

The institution of tocher-gude or maritagium was a contribution by or

on behalf of the wife to the husband[70]. There were many reasons for the gift, it served to compensate the husband for the donatio propter nuptias, it provided a sum from which the wife could be alimented, it could be used as a security for the good husbandship of the bridegroom, and could also help to cement the alliance between the family of the wife and that of her spouse.

The tocher was similar to the Civil law dos[71] and as in the Civil law was not an essential element in a marriage. It was, however, a usual and customary donation. Craig states that the barbarian conquerers knew nothing of the institution. The similarity between the Scottish and the Roman forms of donation is shown by Regiam Majestatem:-

"Dos id quod cum muliero datur viro, quod vulgariter dicitur maritagium"

"Dos is that which is given to the man with the woman which is called in the vulgar maritagium"[72].

The terminology attached to the gift has produced more confusion than any other similar institution. The tocher is called as has been noted in the vulgar maritagium. In more learned circles, it was also known as dos[73]. Craig, confusing the terminology but not the concept, calls it dower[74], and there is at least one case where it is referred to as a 'dot' reflecting perhaps the fundus dotalis of the Civil law or even more likely the pactum dotalium[75].

The most usual method which parties chose to arrange the nature, content and extent of any tocher was by marriage contract. This could

be drawn between the parties themselves if they were sui juris[76], or between the parties' parents[77], or between a parent and one of the couple[78] or between the guardians and one of the couple[79]. A contract between a prospective mother-in-law and her son was capable of execution[80].

The subject of tocher could consist of heritage or of moveable goods or of money, or of a combination of all three elements.

Thus in the contract between Thomas Davidson and James Mill (1550)[81] Robert Davidson Thomas' son was contracted to marry Katherine Mill, daughter of James, the tocher being rights to lands and feedings. Balfour notes that, "it is leasum (lawful) to ony havand landis to give a part thairof in name of tocher with his son, or his dochter or with ony uther woman"[82].

In the post Reformation contract between Bruss and Hamilton (1563)[83] Janet Hamilton was to bring to the marriage all her goods and geir.

Money, of course, was very often the common currency of tocher as in everything else. It comes as no surprise that the majority of recorded marriage contracts are for a money consideration, particularly when one considers that the majority of these recorded contracts relate the arrangements of fairly wealthy families. However, the majority of arrangements have not been recorded and it is possible that if it was not worth having a notary record it, the passage of tocher would either only involve a small amount of money or money's worth.

Therefore many contracts contain amounts as low as 20 marks[84] or as costly as 60 pounds (Scots)[85]. Sometimes the amount would be paid in instalments[86] sometimes on the morning after the wedding. Fulfilling a security role, occasionally a cautious father would wait for a period of a year and a day before paying over[87].

Of course it would sometimes happen that a monetary tocher was insufficient and augmentation was necessary. Therefore it is possible to see all kinds of assets being passed including clothing, a spes successionis[83] part expenses of the wedding[89] or an obligation to pay the expenses of any possible action for dispensation i.e. an indemnity[90].

Restitution of Tocher

The concept of restitution of tocher spanned both pre and post Reformation epochs. It could occur upon two occurrences; death and solutio matrimonii.

(a) Death

Balfour quotes the case of William Gyle v. Henrie Cant (1517)[91] as his authority for the view that if a woman deceased within a year and a day after the completion of the marriage, then all the tocher-gude paid by or on her behalf should be restored to the payer. Further any unpaid balance could not be recovered by action against the tocher-gude debtor.

This remained the broad state of the law throughout the post

Reformation epoch. In the case of Gordon v. Inglis[92] it was reiterated that a husband was obliged to repay the tocher of a wife who died within a year and a day of marriage, under deduction of funeral expenses. As it was in the mid-seventeenth century, so it was with Stair writing towards the end of the seventeenth century. Stair, commenting on the dissolution of marriage by death within a year and a day of the marriage, tells that 'in this our custom agrees to the civil law' and so the tocher returns back to the wife, or "those from whom it came"[93]. If however, children were born in this period they were entitled to their succession and tocher could not be returned[94].

(b) Solutio Matrimonii

The Liber Extra[95] gave provision for the termination of marriage in circumstances which have already been examined. It also provided for the devolution of dos or tocher to the wife or her family upon the marriage being declared null. The Decretal ordains the division of common goods, if any.

In accordance with Capitulum 1 of the Decretal[96] where a sententia divortii was pronounced the dos[97] had to be restored. Thus in many cases contained in the Liber Officialis Sancte Andree there is a clause in the sententia restoring the dos. An example is the case of Boswele v. Awery (1551)[98] where the marriage was annulled for affinity:-

"dotemque et donationes propter nuptias hincinde restituendas fore decernimus".

"And we decern that the dos and the donatio propter nuptias are to be restituted whence they came".

With modification of the grounds of dissolution which followed the Reformation so also the tocher was capable of restitution in circumstances other than that originally envisaged.

Therefore where divorce for adultery or desertion was granted the tocher was also returnable to the innocent wife, donation propter nuptias to the innocent husband. The theory here was that the innocent party should have the same benefits as if the delictual party were dead, as in Murray and Tennants v. Livingstone (1576)[99] Similarly the case of Lord Innerwick against Lady Innerwick (1589)[100] brought the same reasoning that an heiress who was guilty of adultery loses the conjunct fee and tocher ... as if she were naturally dead.

Again in the earlier case of Auchinleck v. Stewart (1584) where a decree simpliciter of divorce for adultery was granted by the Judge Ordinar, the whole tocher gude reverted[101].

Stair approves of the reversion to innocent parties upon the same basis of deemed natural death of the guilty party. This theory is quite important as it lies deep at the whole concept of Reformed divorce and this treatment of tocher exhibits a pragmatic, quasi-English propensity for legal fiction[102].

The Husband's right of Courtesy

Where the wife had terce as her primary alimentary provision from her

deceased husband's estate, the analogous provision for husband was courtesy.

Where a wife was infeft in land whilst married and children were born of the marriage, and the wife died, her husband had a right to possess and enjoy that land[103]. The husband was however, not permitted to alienate the land. The right of courtesy was similar to a usufruct[104]. Indeed Craig[105] attributes its origin as an institution to an imperial rescript dealing with usufruct, or to a liferent as the analogous English right of tenancy per legem anglicae or courtesy of England[106].

The husband was only entitled to this liferent if he could prove by two witnesses that a child had been born of the marriage and that child had been heard to cry. There was no restriction on the witnesses; either men or women could give evidence[107]. It is here possibly that the theory behind courtesy may be found as the provision of a fund from the wife's heritage which would give her son or daughter aliment throughout their life and which their father could administer for their benefit. The father's holding is limited to that of a liferenter, and as a consequence of this the father was required to find caution to guarantee his holding[108]

If however there were no children of the marriage the courtesy was not be exigible from the wife's heritage and it will devolve to the wife's heirs[109].

By Craig's time the analogy, with English law was lessening because of the increased estrangement between English and Scottish Law.

The wife's total heritage was due to provide courtesy, unlike the limited terce. Craig whilst recognising the similarities between English and Scottish law, is applying Scottish law as he makes quite clear[110]. Balfour notes that a woman's second husband could obtain the benefit of courtesy which would accrue to her first husband[111]. This is supported by a later decision, that of Spens v. Lord Durie (1610)[112] where a husband who married a woman infeft in heritage and procreated a child was held to be entitled to courtesy even though he was her second husband.

Stair notices mostly what Craig wrote on courtesy including the curiality which limits courtesy to the land into which wives succeed as heirs and not as purchasers[113].

Courtesy, like terce was lost by the dissolution of the marriage by divorce for adultery and by desertion following the principal effect of the Reformation divortium a vinculo matrimonii, and generally by any atrocious crime on the part of the husband[114].

The Husband's Donatio Propter Nuptias

The donatio propter nuptias was a gift given by the husband to the wife. Originally it was derived from the donatio ante nuptias of the Byzantine Empire.

Under Justinian the gift was allowed both before or after the marriage. By the Justinianic legislation, apart from the change of name from donatio ante to donatio propter nuptias, it was prescribed that it should be an equivalent of dos, and subject to similar rules.

It did however, whilst representing the converse of dos being a gift from husband to wife, remain under the jus mariti of the husband, a situation which obtained into the Scottish municipal law of the sixteenth century[115].

The donatio propter nuptias was designed to recompense the wife for tocher and the other dotal outlays which may have been incurred. It also served to provide some restitution where the tocher failed to be returned following upon the nullity of the marriage.

The Regiam Majestatem[116] brought the Liber Extra into Scots law with the already cited canon,

"Sane soluto matrimonio sicut dos ad mulierem, sic et donatio propter nuptias redit and virum".

"Just as on dissolution of the marriage the tocher goes to the woman so the donatio goes to the man"[117].

Whilst the donatio as with the other elements of the wife's moveable estates was subject to the jus mariti, it could not be alienated by the husband. Stair observes that a wife's consent to a disposition of donatio by her husband was presumed null by virtue of fear and reverence of her husband[118].

However, it may be that Stair was overstating the position as there is a decision to the contrary in the case of Hepburn v. Naismith (1613)[119] where the metus reverentialis of a wife for her husband was found insufficient for reduction of a deed, verus metus alone was

sufficient. Balfour notices that if the donatio is in truth ante nuptias it may exceed the value of the tocher, if made after the marriage it may not.

Linked to the donatio propter nuptias was the conjunct fee, an element which is perhaps too deeply entrenched in the law of conveyancing for the present purposes. Suffice it to say that although a conjunct fee was given to a wife she had no warrant to intromit with it, which function pertained solely to the husband. If however the husband died within a year and a day of the marriage the conjunct fee would have to be restored by the wife if the tocher had not been paid[120]. Restoration also was required of donatio in the circumstances of dissolution of marriage otherwise than death. In the event of divorce for nullity or for any other reason in both the pre-Reformation[121] or post-Reformation era restoration[122] was required.

Morganatic Marriage - the Morgengabe

An institution which involved a gift from the husband to the wife, but which is insufficiently documented in Scotland is the morganatic marriage.

This was a legally valid marriage between parties of different social rank, whereby a wife did not require her husband's status and her children did not succeed to his status, dignity or property. The name is of a 13th century origin and means a marriage on the morning gift being the present given to a wife on the morning after the marriage. It therefore probably represents a stylised bride price.

An early sixteenth century act notes that "The ... sovreign Lord approved ... the gift of our sovreign Lady's the Queen's Dowry and mornwyngift." (A.P.S. II 1503, 240). As has already been noticed there is one statement of morning gift and lie dowry in the Liber Officialis Sancte Andree.

Two later sixteenth century Acts (1592 c 46 III 565 and A.P.S. c 24 IV.24) confirm the morrowing gift contained in the marriage contract between James VI and the King of Denmark. It should be noted that whilst morning gift, the essential indicia of morganatic marriage appears the actual phrase, matrimonium ad morganaticum does not.

Craig in his Jus Feudale notices the institution and relates it somehow to second wives and their children. It is clear however that the Germanic institution applied originally to all marriages contracted under the above conditions.

The last mention of morganatic gifts is the case of Craig v. Menteith (1684) Mor 6095 where "ornamenta morganatica" gifted during the marriage were not revocable by the husband's will. They fell under paraphernalia and were thus unattachable.

It appears that the institution never really applied in Scotland. In the first instance because the Germanic influences were insufficiently strong and as the law developed native and other sources provided alternative institutions.

The Married Woman and the Law of Obligations

It is intended to briefly describe the rights and duties of a married woman in relation to her obligations arising from contracts and from delicts.

1. Contracts

As in every other field of legal relationship the jus mariti had a severely limiting effect on the ability of women to oblige themselves and to contract with others. However, to the generally restrictive prescription there were some fairly important exceptions.

The primary rule is found in Regiam Majestatem thus:-

"Nulla femina virum habens potest sine licencia viri sui dare vel vendere aliquid de bonis suis ultra valentiam quatuor denariorum excepta elemosina moderate et caritate facienda et exceptis etiam vestibus suis in robas, scissis et formatis et omnibus parafernalibus sibi datis. Tamen illa debent dare cum licencia viri sui aut donatio nullius sit valoris".

"No married woman may without her husband's consent give away or sell any part of her goods above 4d value excepting moderate charitable gifts apparell cut and fitted for her wear and her paraphernalia. Even these excepted items require her husband's consent or the gift is null[123]".

Thus the wife's ability to sell or donate her personal property was restricted to charitable gifts, her paraphernalia, and her clothes, remembering that her husband's consent, by virtue of the jus mariti

was always required. A disposition sine consensu could, according to Balfour be recalled and was 'of none avail'[124] which one can interpret as voidable; it appears however from the Practicks that the fourpenny value of goods above which the husband's consent was required had disappeared rendering all the wife's goods subject to this rule, regardless of value.

Similarly no married woman could act as cautioner:-

"Nulla femina virum habens potest esse plegia de re aliqua data vel vendita nec prosequi querelam de aliqua ne nec defendere querelam viri sui nisi cum licencia et auctoritate viri sui. Et si quid factum fuerit in contrarium illud irritum fore volumus et irare. Vidua tamen potest esse plegia cuiuislibet ac libere facere et disponere de bonis suis quammodo cunque voluerit secundum quod justum fuerit sine licencia et impedimento alicujus".

"No married woman can act as a cautioner in respect of anything given or sold nor can she institute any action nor defend an action against her husband without his consent and authority. Anything done contrary to this rule we wish to be regarded as null and void. But a widow can act as cautioner for any debtor, and may freely act and dispose her property in any way she please according to the law without let or hindrance from any man[125]"

As an extension of the jus mariti all the wife's moveables fell under her husband's potestas including the right to action. Thus Balfour states that the wife cannot 'persue or defend ony action, querrel or cause in judgement'[126]. The wife was immune from prosecution for

spulzie which had been committed by her husband whilst he was alive and in which she had assisted him, by virtue of a rule which Balfour gives and which can only amount to respondeat superior, apparently in contravention of culpa tenet suas actores. The wife was also excepted from diligence taken on her husband's property simply because of her status as praeposita negotiis mariti[127]. The reasoning behind such a sweeping immunity was apparently that the husband in having potestas was solely responsible for his wife's deeds. Thus whilst the husband could obtain benefit from the jus mariti, the total assignation also included liabilities.

The wife was thus almost completely restricted in her contractual capacity. For example money lent by a wife was repayable to her husband[128]. Her personal bond was not binding[129]. The husband was not liable for anything which his wife contracted for without his consent except for those items converted to his own use, items purchased by the wife in her capacity as an ordinary agent or an agent of necessity and finally, items purchased by the wife in exercise of her praepositura rebus domesticiis. Thus in the case of Eustacius Wise v. Lady Holyroodhouse (1610)[130] a bond was given by a wife whose husband did not subscribe. The action for recovery was sustained but the relief was obtainable from the husband or executors only to the extent that the items had been used by them.

The wife as an ordinary agent and an agent of necessity was not liable for items furnished to her, the liability for the expense of such items fell upon her husband. Thus in the case of Howison v. Lady Lauriston (1631)[131] where an action was raised against a widow for payment for supplies made to her whilst her husband was at court it

was held that she was not burdened notwithstanding the alleged factory.

The agency was well recognised as falling firmly within a relatively well developed law of agency, at least that is by the latter half of the seventeenth century, when in the case of Wilson v. Deans (1675)[132] where a woman kept a shop and trafficked as a merchant. The husband being aware of this, was held liable for debts contracted by her on account of her business on the basis of an actio institoria.

The actio institoria has a most interesting history[133]. In Civil law it was originally an action whereby one who had contracted with the manager of a business (the institor) could take action against the person who had granted the agency. This action helped to allow the law of partnership to develop and it may be that in choosing this action in the case of Wilson v. Deans the Court was cementing the myth of quasi-society which caused such confusion with the law of matrimonial property. The Court could have chosen some other basis of liability e.g. quasi contract, and thereby attach the husband.

If however the husband were dead and no executors were extant[134] or he were abroad[135] the action against a wife would be upheld. In such circumstances one can see something of a quasi-contractual equitable element in the ratio decidendi.

The wife had an agency of necessity which entitled her to oblige her husband for necessaries supplied to her in emergency, without his consent. Thus in the case of Acton v. L. Halkerton (1629)[136] the wife was found not to be liable for money which had been furnished for her

aliment in great necessity, though this had been advanced on her own credit. This could be attributed to a logical extension of the obligation of aliment which was owed to a wife by her husband as well as upon the basis of quasi contract. Thus Balfour states that "The husband may be compellit to sustene his wife in ... necessaries"[137].

The wife also had an implied agency arising from the cohabitation between her and her husband; the praepositura rebus, or negotiis domesticis. It is difficult to ascertain at which stage the praepositura was recognisable as a distinct element in the wife's power of agency. It is not mentioned in Balfour or in Craig, however, it is recognised at least to some extent by 1520 where in the case of Kincaid v. Sanderson (1520)[138] the husband had inhibited his wife's ability to pledge his credit.

The most clear statement of the praepositura is the case of Darling v. MacKenzie (1675)[139] where it is defined in the following terms, that a wife may take, for the provision of her house what is necessary from a flesher or baker, and her husband is rendered liable. Further it is interesting to note that in that case it was determined that those who supply her are not obliged to inquire into her authority because her husband has the remedy of inhibition if he fears abuse[140].

The praepositura was not a carte blanche permitting a prodigal wife to escape liability for contracts upon invocation. It was restricted in less drastic ways than inhibition, for example it did not cover items outwith the supply of ordinary household goods. Thus it covered only the extent of a wife's expense at home, not in London[141]. A wife was not held to be acting as her husband's agent in the discharge of terce

without her husband's express consent[142], nor to her uplifting of rent[143] or a bond[144] all deeds which required the husband's act as delectus persona.

The wife could not use the praepositura where she was contracting with her personal aliment or property, in such circumstances she was personally bound[145].

The praepositura was also excluded where the wife was acting outwith her husband's authority, express or implied; e.g. where she had committed spulzie[146].

In much of Stairs' analysis the concept of agency does not figure largely, he mentions praepositura only twice[147] he maintains that much of this liability is imposed on the husband because;

"From this communion of goods it follows that there is a communion of debts, whereby it follows that the husband is liable for the wife's debt, though it should exceed her and his moveables and the profits of the wife's land or of her other heritable debts"[148].

However if the analysis of marriage as productive of a communion of goods is in error and there is not quasi-partnership, then a 'communion of debts' if there can be such a concept, is also in error. The only explanation for the circumstances of a husband becoming obliged and for a wife's heritage being attachable by her husband's creditors is that of agency, constituted by the marriage and the implied nature of the praepositura.

Obligations inter virum et uxorem

The obligations between husband and wife are recognised as twofold; adherence and aliment.

Adherence

The obligation of adherence between husband and wife is most conveniently, discussed under the heading of divorce for desertion.

Aliment

The obligation placed upon the husband to aliment his wife was second only to the obligation of adherence in its importance as one of the poles of conjugal relations. As a concept the alimentation of the wife lay fundamentally at the basis of terce and donatio propter nuptias. The chapters of Balfour make this quite clear. The terce was clearly a disposition, inter vivos providing for the day when the husband cannot sustain his wife and she must seek a new husband[149]. The donatio is expressly given that the wife may be 'sustenit and helpit' with the gift[150].

In addition to these provisions for after death or dissolution, the obligation to aliment was primarily an obligation stante matrimonio of which the agency of necessity and praepositura rebus domesticis were merely the legalistic and conceptual manifestations.

Therefore according to Balfour quoting an early case, Hamilton v. Eglington (1561)[151] the husband could be compelled to provide meat,

clothes and other necessities, befitting her status as a wife, thus discouraging ladies with ideas above their station. This obligation to aliment subsisted for as long as the marriage notwithstanding estrangement even for cause, until reconciliation or divorce[152].

The husband was thus liable for goods purchased by his wife notwithstanding an inhibition of her praepositura unless he could prove that she was provided for adequately[153]. He was also found liable for clothes bought by her for her own use after their marriage as in Nelson v. Guthrie (1672)[154].

There is an interesting decision of Parliament sitting as a court in 1641, in causa Anna Inglis, Lady Aichet to William Cunninghame of Aichet[155]. The supplication had been promoted by Lady Aitchet desiring payment of her "bygone modification and ane constant allowance in time coming from her husband" for her aliment. Parliament and the King decerned the husband to pay 200 marks to the supplicant, letters were granted to her to warn him at Paisley market cross and the Kirk of Dunlop to answer her and to implement the decreet.

Stair acknowledges the husband's obligation, which he lists in speaking of the rights and obligements arising in marriage. The obligation of aliment is an outward obligation "of the husband to aliment and provide for the wife in all necessaries for her life, health and ornament, according to their means and quality"[156]. He considers it as a natural obligation and gives a biblical quotation to support his contention; surprisingly he does not make comment on the canonist concept of cohabitatio mensa et thoro. There are of course

built-in restrictions; extravagance is not encouraged and the husband is bound only quoad potest. Stair does also point to carry the obligation beyond the grave rendering the husband liable for his wife's funeral expenses and mournings, a somewhat unwarranted extension of the obligation of aliment. One would contend that if anything this obligation is completely extraordinary and innominate.

Formal Marriage Contracts in Seventeeth Century Scotland

The general effects of both the jus mariti and the jus administrationis led to evasive measures which resulted in the ante and post nuptial marriage contracts.

These variations on the devolution of property and rights therein were well suited to the ecclesiastical framework of espousal followed by solemnised ceremony, and whilst almost exclusively dealing with the purely secular matter of matrimonial property again it must be noticed that the obligation to aliment in truth lies at the bottom of such provisions.

The late but useful compendium of styles by John Spottiswoode, "An Introduction to the Knowledge of the Stile of Writs" (1707) is able to provide a fairly complete picture of the type and style of documents used and the express terms thereof which elucidate the attitude of the mid to late seventeenth century legal mind to the question of matrimonial property.

The Spottiswoode collection of styles postdates that of Sir George Dallas of St Martin's but notwithstanding the outstanding success of

Dallas' "System of Stiles" (1697) the author believes Spottiswoode's commentary to render his account more useful for the present purposes.

As will have been noticed both these books of styles are printed after 1690. This however, does not invalidate these works as indications of the attitude and practice of lawyers and lay people alike during the seventeenth century. It is also clear from a comparison of these marriage contracts with those described in the notary protocol books as examined ultra that in the area of proprietorial matters marriage law was not greatly effected by the Reformation, except of course in the provision of hitherto unheard of grounds of solutio matrimonii which affected the patrimonial obligations of the parties.

The purpose of marriage contracts is described by Spottiswoode[157] as a human provision which supercedes the provisions of law, 'provisio hominis tollit provisionem legis'.

He goes on to state that such contracts express the conditions of marriage and he stresses the economic importance of such arrangements.

Spottiswoode indicates something of the attitude of lawyers to solemn marriages calling them the 'most honorable way of marrying', and he favours what is known as the antenuptial marriage contract because this avoids the difficulties of provision in a postnuptial arrangement.

Spottiswoode only deals with contracts which do not concern land[152] whereas Dallas provides examples of two contracts which do give form to agreements regarding heritage.

In all these contracts the ordinary law applicable to the raising of actions by married women and against that class of person and concerning donation between spouses is observed. Therefore notwithstanding an inductive clause which generally narrates the names and designations of the parties to the contract and a dispositive or operative clause which sets out the essential terms of the agreement the contract is mostly subject to a clause which details the names of those at whose instance execution is to pass for implement of the obligations contained in the contract[159].

The notes appended to Dallas' treatment of marriage contracts testify to their infinite variety, being capable of great flexibility in view of the different types of proprietorial settlements which could occur on marriage including the creation of liferents, fees, tacks and investments as well as providing for direct donations, excambions, provisions for children, assignations of tocher and all the multitude of obligations between husband and wife which could possibly occur. This having been said the basis framework of a marriage contract was a provision by the husband in favour of his wife of either land or a sum of money invested in land with a provision for liferent in favour of he and his wife and fee for the children of the marriage which provision sometimes was in satisfaction of terce followed by the provision by the wife for the obligation concerning her tocher being a formal assignation by her or those providing the fund.

The following is a text of an ante nuptial contract from Spottiswoode's Introduction:

At ____ ____, &c. In Contemplation of the which Marriage, the said A.

Binds and obliges him, his Heirs, Successors and Executors whatsoever, to provide and secure the said B. his promised Spouse in Liferent, during all the Days of her Lifetime, in all and whole an Annualrent or yearly Duty of 900 Merks Scots Money Yearly, free of all Burdens whatsoever, and that by employing Money upon well holden Land, or in the Hands of sufficient responsible Persons, and taking the Securities thereof to her in Liferent, at the Sight and by the Advice of C. And if the same shall be employed upon Land, to procure sufficient Confirmation by the Superior, upon his own Expences, for her Security thereanent; and if the Money employed to that Purpose shall happen to be uplifted, as oft to reimploy the same, by the Advice and to the Effect above mentioned. And for further Security, the said A. binds and obliges him and his foresaid, to make due and thankful Payment to the said B. of the foresaid Annualrent or Yearly Duty of 900 Merks free of all Burden, as said is, at two Terms in the Year, Whitsunday and Martinmas in Winter by equal Portions, beginning the first Term's payment thereof at the first Whitsunday or Martinmas next, and immediately following the said A. his Decease, for the Half Year preceeding that Term, and so forth Termly thereafter during her lifetime, with 40 Lib. Money foresaid of liquidate Penalty for each Term's failie, toties quoties. And also, it is agreed betwixt the said Parties, that if it shall happen the said B. to survive the said A. in that Case, he hereby dispones to her his whole Houshold plenishing and Moveables within his House, as well what now belongs to him, as what shall hereafter be iether acquired by himself, or what shall come by her, to be intromitted with, used and disposed upon by her at her Pleasure, free of all Debt and Burden; excepting only his Books and some Silver-plate, which shall be at his disposing, notwithstanding of this Disposition, whereof a particular Note is to

be made and subscribed by both Parties. And likeways the said A. binds and obliges him, and his above specified, to make Payment to the Children, one or more to be procreate of this Marriage, of the Sum of 10000 Lib. Scots Money, to be divided, if there be more than one, as the Father and Mother shall agree; and failing of any such Division, to be divided equally; allowing to the eldest, if a Son 2000 Merks more than to any of the rest; and if there be only Daughters, allowing as much to the eldest Daughter; and those Proportions to be payable to the said Children and their respective Ages of 16 Years complete. And in the mean Time, he binds and obliges him and his foresaid, to aliment, educate, and sustain the said Children, according to their Quality, in all Necessaries for Maintenance, Abuliments and Education, till their Portion be payable. And in like Manner, the said A. binds and obliges him and his foresaid, to provide the just and equal Half of all and whatsoever Lands, Tenements, Annualrents, Wadsets, Adjudications, Apprisings, and Sums of Money, both heritable and moveable, that shall be conquest or acquired by him, or which shall fall to him during the Lifetime of his said promised Spouse, to himself and her, the longest Liver of them two in Liferent, and the said whole Conquest to the Children to be procreated betwixt them, in Fie. And also, to provide all Sums of Money and others, that shall fall to his Wife during the Time of their Marriage, to him and her, the longest Liver of them two in Liferent, and to the Children to be procreate betwixt them; which failing, to his nearest Heirs whatsoever; except only her own Cabinet, with such Pearls, Diamonds and Jewels as now belong to her, which she has Power hereby reserved to dispose of in favours of any Person she pleases, without his Consent, in case there shall be no Children. And he obliges himself and his foresaid to ratify, and, if Need be, to renew any Right that

shall be granted by her thereanent. Which Provisions above mentioned in favours of the said B. she, by these Presents, accepts in full Satisfaction of all Terce and Third of Lands, or Third or Half of Moveables that may fall to her by her Husband's Death, or which her nearest in Kin can claim by her own Death, in case he survive her. And on the other Part, the said B. by these Presents, assigns and dispones to the said A. his Heirs or Assignies, (secluding his Executors) the Sum of 5000 Merks Scots Money of Principal, with 500 Lib. of liquidate Expences, and the Annualrent of the said principal Sum, during the not Payment after Lammas in this instant Year, contained in a Bond granted to her by ____ as Principal, and ____ as Cautioner, conjunctly and severally, of the Day ____ ____ with the Bond it self, and all that has followed, or may follow thereupon: Surrogating and substituting the said A. in her full Right and Place of the same forever. Which Assignation she binds and obliges her, her Heirs and Executors, to warrant from all Facts and Deeds done, and to be done by her or her foresaids prejudicial hereto allenarly: Likeas, she hath instantly delivered to him the Bond unregistred to be kept and used by him and his foresaid, as their own proper Evident at their Pleasure in Time coming. As likewise, she assigns to him and his foresaids, the Plea and Process depending, at her and the rest of her Sisters and Brothers Instance, against ____ ____ Merchant in Rotterdam, for the Number of 8000 Rix Dollars, and that in so far as concerns her Part and Proportion thereof; and all Acts, Decreets, and Interlocutors past, or to be pronounced and past in her favours, and all Benefit that may redound to her thereby, be always bearing a proportional Part of the Expences debursed, or that shall be debursed in that Process. And further, she assigns to him and his foresaids her Part and Proportion of all other Means and Monies to which she has

Right from her said deceast Father, or umquhile ____ her Mother, and to all Bonds and Securities granted to her by her deceast Father and Mother conform to the Law of Holland, in Manner mentioned in her Mother's Testament, and other Writs granted by her Father to her for that Effect. And for Payment whereof, she may affect any Lands or Estate belonging to her said Father; and all Writs and Rights made and conceived, or which may be interpret in her Favours thereanent, dispensing with the Generality; and which she obliges her and her foresaids to warrant in Manner above written. Nevertheless, that what shall be recovered of her Proportion of the Debt due by the said ____ and of any other Means to which she has Right from her Father or Mother, or wherewith she may affect her Father's Estate, shall be secured by the said A. to the said B. in Liferent, during all the Days of her Lifetime, and the Fie thereof to the Children of this Marriage; which failing, to the said A. his Heirs and Assignies whatsoever, and that over and above the Provisions above specified. And lastly, it is agreed, that Execution shall pass on this Contract, at the Instance of the said C. for Implement thereof, in favours of the said B. and the Children of the said Marriage. Registration, &c.

NOTES

1 Balfour, 93 - a late example of this is Russell v. Paterson (1629) Mor. 5955

2 Craig, Jus Feudale 2.14, 1-3

3 A.P.S. II C 29; R.M. II, 16

4 G.1, 144, 190 et seqq

5 D. 23, 3, 9, 3

6 Balfour, 93 cl

7 Balfour 94, CX

8 See infra

9 Stair 1, 4, 9

10 Stair 1, 1, 4

11 Stair 1, 1, 18

12 Stair 1, 4, 9

13 Balfour, 93 cl

14 R.M. II, 16, 13

15 Balfour, 95 cl

16 Pennycook v. Cockburn (1582) Mor. 5764

17 Mor. 5993

18 Scrimgeour v. Murray (1663) Mor. 5775

19 Pitcairn v. Edgar (1665) Mor. 5775

20 Stair, 1, 4,17

21 A.P.S. vii 230: 244

22 Gordon v. Ogilvy (1684) Mor 5777

23 R.M. II, 16

24 Protocol Book of Sir John Cristisone, 203, where the word Dowry is used quite incorrectly

25 Liber Officialis, 29

26 A.P.S. I, 401

27 Balfour, 105, c.1

28 Balfour 109, CXV

29 R.M., II, 17, Balfour, III, CXXIII

30 4, X, IV, 20

31 Balfour, 111-113

32 Jus Feudale, 1, 11, 7

33 2, 22, 25, 2, 22, 32

34 2, 22, 34

35 A v. B (1612) Mor. 15536

36 A.P.S. II, 243, c.23

37 Craig, Jus Feudale, 2, 22, 25

38 R.M. II, 16

39 R.M. IV, 32; Supp, 15

40 Protocol Book of Sir John Christison, 100

41 Protocol Book of Dom Thomas Johnson 720

42 Protocol Book of Dom Thomas Johnson 683

43 Balfour, 93 c.111

44 Balfour, 9, C.IV

45 Allans Executor v. Lawder (1623) Mor. 5931

46 Para-pherne is Greek for outwith the dowry

47 (1582) Mor. 5802

48 (1610) Mor. 5802

49 Stair, 1, 4, 17

50 (1667) Mor, 5828

51 R.M. II, 15

52 D, 24, 1, 1, 2, 3, pr

53 Summa, 112, 119, 121

54 R.M. II, 15

55 Lady Hotterball v. Croustens (1631) Mor. 6151

56 Gordon (1688) Mor. 6097

57 Stair 1, 4, 18

58 Earl of Angus v. Countess of Angus, Hope's Major Practicks Pr II, 17, 35

59 (1662) Mor. 1730

60 (1674) Mor. 11345

61 Harvey v. Lumisden (1683) Mor. 6095

62 Stair, 1, 4, 18

63 Lauriston v. Dunipace (1635) Mor. 6132

64 Short v. Murrays (1677) Mor. 6124

65 Craig v. Monteith (1684) Mor. 6095

66 Stair, 1, 4, 18

67 Murray v. Livingstone (1575) Mor. 6144

68 Maxwell v. Hairstanes (1634) Mor. 6160

69 Balfour, 101, C.1

70 Balfour, 99 C.1

71 D. 23, 3, 75

72 R.M. II, 18

73 Protocol Book of Dom Thomas Johnson, 378

74 Craig Jus Feudale, 1, 15, 20

75 Protocol Book of Mark Carruthers 76, 23, 4, 6

76 Protocol Book of Gilbert Grote, 357

77 Protocol Book of Sir Alexander Gaw, 63

78 Protocol Book of John Christison, 431

79 Protocol Book of Gilbert Grote, 320

80 Protocol Book of Gilbert Grote, 279

81 Protocol Book of John Cristison, 431

82 Balfour, 99, C.1; 161, C.1

83 Protocol Book of Dom Thomas Johnson, 683

84 Protocol Book of Gilbert Grote, 357

85 Protocol Book of Dom Thomas Johnson, 659

86 Protocol Book of Alexander Gaw, 189

87 Protocol Book of Gilbert Grote, 320

88 Protocol Book of Gilbert Grote, 357

89 Protocol Book of Gilbert Grote, 320

90 Protocol Book of Dom Thomas Johnson, 224

91 Balfour, 100 C.6

92 Mor. 5924

93 Stair, 1, 4, 19

94 Craig, Jus Feudale, 2, 22, 23

95 2, X, IV, 29

96 1, X, IV, 20

97 Roman Law usage

98 Liber Officialis, 167

99 (1576) Mor.

100 (1589) Mor

101 (1584) Mor

102 Stair, 1, 4, 20

103 Balfour, 100, C.IV

104 It is described as such in Balfour 100 C.V

105 Craig; 2, 22, 40, et seq

106 J.H. Baker, Introduction to English Legal History 230 et seq

107 Balfour 100, C.IV

108 Craig; 2, 22, 44

109 Balfour 100, C.111, IV, V; Stewart v. Irving (1632) Mor. 3112

110 Craig, 2, 22, 41; 2, 22, 42

111 Balfour, 100, C.3

112 (1610) Mor. 3111

113 Stair II, 6, 19

114 Stair II, 6, 19

115 C. 5, 3, 19; Buckland, Textbook of Roman Law III

116 R.M. II, 15

117 8, X, IV, 20; Balfour 101, c.1

118 Stair, I, 17, 13

119 (1613) Mor. 6075

120 Balfour 101-105

121 Liber Officialis, 167

122 Balfour 105, c. XV

123 R.M., IV, 32

124 Balfour, 93, C.III

125 R.M. IV, 33, cf. Senatusconsultum Vellaeanum, J.A.C. Thomas Textbook of Roman Law 243

126 Balfour, 93, C.III

127 Balfour, 94, C.X

128 Fenton v. Carnegy (1664) Mor. 5801

129 L. Ulysseshaven v. Lady Bonnington (1611) Mor. 5957

130 (1610) Mor. 5952

131 (1631) Mor. 5954

132 (1675) Mor. 6021

133 P. Stein, 'The mutual agency of Partners in the Civil Law' Tulane L.R. 33, 595

134 Russell v. Paterson (1629) Mor 5955

135 Hay v. Corstophin (1630) Mor. 5956

136 (1629) Mor. 5952

137 Balfour, 95, C.XI

138 (1520) Mor. 6021

139 (1675) Mor. 6005

140 The Register of Inhibitions was established in 1581

141 Allan v. Countess of Southesk (1677) Mor. 6005

142 L. Boyd v. L. Airth (1582) Mor. 6013

143 Pittarow v. Tenant (1587) Mor. 6014

144 McWatis v. Home (1622) Mor 6014; Nairn v. Buchanan (1680) Mor. 6016

145 Robins v. Count of Southesk (1688) Mor 5955

146 Weill v. Banks (1628) Mor 6015

147 Stair I, 4, 16; I, 4, 17

148 Stair, I, 4, 17

149 Balfour, 105, C.1

150 Balfour, 101, C.1

151 Balfour, 95, C.XI

152 Logan v. Wood; Balfour 95, CXI Mor. 5877

153 Auchinloch v. Monteith (1675) Mor. 5879

154 (1672) Mor. 5878

155 A.P.S. 1641, V, C.55

156 Stair, I, 4, 10

157 Spottiswoode, An Introduction to the Knowledge of the Stile of Writs (1707) (3rd edition), 343

158 Spottiswoode, op. cit. 346

159 Spottiswoode, op. cit. 246, Dallas, op. cit. 731

160 Spottiswoode, op. cit. 246.

CHAPTER VII

Divorce and Separation in Sixteenth Century Scotland

No topic in the consistorial law is more fraught with confusion and misconception than that of divorce and separation. The confusion arises from the indiscriminate misuse of technical legal terms, from a misappreciation of ancient usage and from difficulties of interpretation. The misconception arises from a mistaken understanding of the doctrinal similarities and differences between the universal and the Reformed traditions of the Christian religion.

For the purposes of clarity it is useful to set out the terminology in use when divorce is spoken of by Canonists and Reformers alike.

As has already been shown the Catholic concept of the sacramentality of marriage had as a direct consequence the theory of indissolubility of marriage. This theory found expression in law by (1) a prohibition on divorce, rendering the marriage dissoluble only on the ground of nullity by incurring a diriment impediment and (2) a restricted ability by the innocent spouse to be separated at law from his or her spouse upon the commission of certain specified matrimonial offence.

Indissolubility

Valid Christian marriage, ratum et consummatum was considered by the Canonists only to come to an end upon the natural death of one of the

parties[1].

This doctrine was claimed by the Canonists to be supported by scripture[2]:-

"Therefore they are not two but one flesh. What therefore God hath joined together let no man put asunder"[3].

and farther:

"And he saith to them, whosoever shall put away his wife and marry another committed adultery against her"[4].

This scriptural authority is supported by similar passages in the Gospel of Luke[5] and the First Letter of Saint Paul to the Corinthians[6]. Hay quotes them to some extent but largely without commentary[7].

Dogmatically the Council of Trent defined the Catholic tradition thus:

"The perpetual and indissoluble bond of matrimony was expressed by the first parent of the human race, when, under the influence of the Divine Spirit he said, This now is bone of my bones and flesh of my flesh, wherefore a man shall have father and mother and shall cleave to his wife, and they shall be two in one flesh' ... Christ the Lord taught more plainly when referring to those last words as having been spoken by God, He said "therefore now they are not two, but one flesh" and immediately notified the firmness of the bond so long ago proclaimed by Adam with these words, "What therefore God has joined

together let no man put asunder"[8].

This reiteration served to define the interpretation of scripture which had subsisted substantially unchanged from the foundation of the Church until the Reformation.

There was however some alleviation of the strident nature of this rule in the allowance particularly by Alexander III and later Innocent III of the dissolution of marriages ratum non consummatum e.g. where there was impotence, a vow or supervening affinity[9].

However, apart from these rather exceptional grounds of dissolution which can be referred at least in respect of impotency to the existence of a diriment impediment, it is clear from the almost contemporary Catechism of Archbishop Hamilton that the "bond of matrimony ... may not be dissolved and loosed again by any divorcement or partising but only it is loosed by the death of the one of them; for truly the partising and divorcing, ... should be understood only of partising from bed and board and not from the bond of matrimony".

This separation from bed and board is the divortium a mensa et thoro mentioned in Hay thus:

"Divortium scilicet a mutua cohabitatione etiam nonobstante consummatione matrimonii"

"By divorce is meant divorce from cohabitation even in spite of the consummation of the marriage"[10].

It was also sometimes called separatio quoad thorum.

The circumstances in which this separation was granted by the Official's Court were fairly limited, adultery, spiritual fornication, or heresy, and danger to body or soul (saevitia).

Separation for Adultery

Hay looks at separation for adultery in some detail. He considers that the person who sins against marriage may be legitimately deprived of the benefit of marriage[11].

Spiritual authority is provided by a passage from the New Testament which provided for the Reformers important ammunition in the struggle to allow divorce for adultery namely Matthew, Chapter 19:-

"And I say to you that whosoever shall put away his wife, except it be for fornication and shall marry another committeth adultery"[12].

Importantly, it is pointed out that according to the Liber Extra the innocent party to a marriage whose spouse has committed adultery was obliged to seek a separation in order to avoid scandal i.e. an occasion of spiritual ruin, or opportunity for sin, the fault of course was brought to the notice of the Church by a denunciation. Reasons for the obligation are given as a quest for justice, the correction of the wrongdoer, the punishment of crimen and to certify the parentage of the children[13]. It has already been noticed that secular legislation outlawed adulterers[14].

There are several examples of the decree of separation in the Liber Officialis. Twelve cases arise between 1520 and 1550 a good example is the late case of Janete Trumbule against John Hay (1550)[15]:

"Nos Joannes Spittal officialis Sancte Andree principalis in quodam causa divorcii intentata per probam mulierem Jonetam Trumbule actricem ex una contra Johannem Hay burgensem in Kirkauldy eius sponsum putativum reum partibus ab altera. Decernimus dictos Jonetam Trumbule et Johannem Hay causante adulterio per dictum Johannem cum quodam Agnete Horne commisso stante matrimonio inter eosdem Jonetam et Johannem celebrato prout legitime coram nobis probatum existit a mensa, thoro, et mutua cohabitatione absque facultate alterutri convolandi ad secunda vota durante vita alterius divorciandas fore prout divorciamus in contrarium pro parte dicti Johannis allegatis non obstantibus dictumque Johannem in expensis in lite factis et flendis condempnantis quarum, taxatione nobis imposterum reservamus".

"We John Spittal Official Principal of Saint Andrews in this cause of separation brought by the good woman Janet Trumbele pursuer, on the one part against John Hay, burgess in Kirkauldy her putative spouse defender of the other part decern that the said Janet Trumbule and John Hay, because of the adultery committed by the said John with Agnes Horne, during the marriage of Janet and John, and proved before us by every lawful means, be separated from table, bed and mutual cohabitation, without the ability to either enter into second vows with others during the life of the other, for the part of the said John as alleged and the said John is found in expenses of the cause as taxed".

Separation for adultery could be obtained by both man[16] and wife[17] an example of extraordinarily equal treatment in an age noted for its preference of the male. Similarly the defences of recrimination[18], that one's spouse had also committed adultery and lenocinium[19] or whoremongering and condonation[20] or passive acceptance of the adultery were admitted under Canon law.

The significant factor in the decreet is not that the adulterer was found liable for expenses, as usually was the case these followed success, but that there was the prohibition against subsequent remarriage. The marriage still subsists, the parties are both subject to ligamen, they are merely separated, not divorced a vinculo.

Hay expresses the opinions of Middleton[21] and De La Palu[22] when he vacillates between approval of the idea of private separation in clandestine marriages, and strict adherence to the judicial declaration of separation[23].

Spiritual Fornication

Because of the theoretical similarity to adultery, heresy, idolatry Judaism and the Gentile heresy were sufficient grounds in the Canon law for separation[24]. There were also similarities to the casus apostoli, where a convert was permitted to forsake his infidel spouse and contract a new marriage[25].

However, the analogy was not entirely quadrate. Spiritual fornication differed from carnal fornication in many respects. A heretic could abdure and purge his sin removing the ground for separation. The

faithful party's continued cohabitation with the heretic was an act of charity and could be productive of the salvation of the lost soul and consequently was encouraged. Further a faithful party could be compelled to receive back a penitant heretic[26].

Hay's information that such a cause of separation was rarely invoked is borne out by the Liber Officialis which records no cases of this nature. However, there are indications from the records of the Franciscan Friars who converted some of the Western Isles during the late sixteenth and seventeenth centuries that infidels were alive and thriving in the remoter islands. In terms of the Christian religion the Western Isles were no man's land, neither Catholic or Presbyterian.

Danger to Body or Soul

The third class of circumstances which permitted separation for cohabitation was that of physical or spiritual danger. The spiritual danger could arise if one spouse were attempting to lead the other to sin[27]. The physical danger could arise from a very large number of fact situations. Hay provides examples of leprosy or attempted murder as extreme heads of harm[28].

The Liber Extra provides the basis for the majority of cases of separation which are stated in the Liber Officialis under the broad denomination of saevitia. There are five cases of saevitia recorded in the Liber Officialis, four of which occurred within a period of five years, all of which, in respect of the claim of saevitia were pursued by the wife. There were sometimes severe disadvantages to

living in a male dominated society, even though none of the injuries seem to be so hurtful as those recorded by Helmholz[29].

An interesting case from the Liber Officialis is that of Broune v. Broune (1546)[30] not only from its sententia but also by virtue of it having been delivered by three delegated judges:

"Nos Patricius Scott vicarius de Cathcaytht, Valterius Fethy et Andreas Traill capellani commissarii deputati dominorum commissariarum generalium sedis Sancti Andree principalis cum illa clausula "vobis omnibus aut duobus vestrum conjunctim" specialite constituti judicesque cause et partibus infrascripts pro tribunali sedentes in quodam causa sevitie ad divorcium tendente per providam mulierem Mariotam Broune sponsam Alexandri Broun actricem ab una contra dictum Alexandrum reum partibus ab altera, Decernimus dictos Mariotam et Alexandrum a mensa, thoro, et mutua cohabitatione divorciandos, prout eosdem divorciamus".

"We Patrick Scott, Vicar of Cathcart, Walter Fethy, and Andrew Traill, Capellanus, commissary deputes of our masters the commissaries General of the Principal Seat of Saint Andrews, specially constituted judges in the cause, by virtue of the clause, "before all of you or two of your number sitting together", and for the parties within written, sitting as the tribunal in the cause of separation for cruelty held by the good woman Mariot Broun wife of Alexander Broun pursuer on the one part against the said Alexander on the other part, defender. We decern the said Mariot and Alexander separated from table, bed and mutual cohabitation and accordingly we divorce them".

The similarity of the wording of the Liber Extra to that used in some sententia displays a fairly close application of the law.

"Si tanta est viri sevitia ut muliere trepidanti non posset sufficiens securitas provideri non solum non habet illi restitui sed ab eo potius amoveri".

"If the man's cruelty is so bad that there can be no sufficient security given to the frightened woman, not only should she not be restored to him but instead she should be kept away from him"[31].

Passive harm also provided an occasion for separation. Thus if one's spouse had leprosy, then thought to be contagious, a separation could be granted[32].

Divorce a vinculo matrimonii - adultery

It is noteworthy that the word divorcium is used in the sententiae of the Official's court in respect of both separation a mensa et thoro and a vinculo matrimonii where marriage had been contracted in face of an invalidating impediment rendering the union only a de facto marriage not one constituted de jure. This unity of usage or indiscriminate usage persisted into the post-Reformation epoch. Thus Balfour in speaking of the restitution of property upon dissolution or separation employs the following terminology in respect of certain circumstances:-

"Quhen any man and his wife or simpliciter partit and divorcit be the authorite of the Judge Ordinar for adulterie or any other trespass

committit be the man"[33].

The use of the word 'divorcit' is interesting as from the context it is in use when there is 'adultery or any other trespass' and yet when Balfour wrote adultery and desertion alone would result in decrees of divorce a vinculo. Any other 'trespasses' could only result in separations a mensa et thoro.

This could mean that Balfour is using the word divorcit fully aware of its ambiguity as representing strands of two separate legal and theological traditions. It also points to the continued use of separation a mensa et thoro for non divorceable matrimonial offences, indicating that the post-Reformation jurists were capable of conceiving a two tier theory of separation.

This is made even more clear upon examination of Balfour's statement and upon examination of his authority the case of Agnes Auchinleck v. James Stewart (1540)[34] where the pursuer raised an action of removing against her husband from her jointure lands on the basis that "of the common law, when any man and his spouse are divorced simpliciter or frae bed and bind thro adulterie ... the tocher gude ... ought to be restored". The phraseology "divorced simpliciter" is, one contends, merely an alternative for "frae bed and board". The case is in relation solely to pre Reformation law, and only by a blurring of the distinction between the meaning of 'divorce' before and after the Reformation can Balfour attain the universality of application which he attempts.

One can submit that this is not a matter for which to criticise

Balfour[35] in not distinguishing between divorce proper and separatio, because divorce could be applied in the sense of separation where applicable only, as it could where referable to divorce a vinculo only. There was in his analysis no room for confusion as the matter was perfectly clear from context, as for example in the various meanings of solatium in the modern Scots law of delict.

There was perhaps no ground for confusion in Balfour's day because it may have been considered that only divorce a vinculo could be obtained for adultery or desertion and only divorce a mensa et thoro for the other matrimonial trespasses. However the possibility of confusion could arise if one could choose between divorce a vinculo and divorce a mensa et thoro on the ground of adultery, in such a circumstance confusion about the meaning of the word could conceivably arise.

Craig does not speak of separation a mensa et thoro in relation to Scots law but by inference he speaks in such a fashion to confirm that by his time the word divorce is in exclusive use in relation to divorce a vinculo matrimonii[36].

The confusion then swings in a different direction, possibly because there was no definitive legislative statement which related to divorce, although there were several noteworthy Acts which will be examined later in greater depth. Consequently, notwithstanding Stair's[37] clear and explicit examination of the topic, in 1697 at least some were under the impression that only divorce a vinculo matrimonii could be granted by the Commissaries for adultery. In the case of the Duchess of Gordon against the Duke (1697)[38], on appeal the Court of Session clarified that as separation was the lesser remedy it

was integral of divorce and consequently a court having the power to grant the greater remedy it could choose to grant the lesser, as accords of logic, majori minus inest.

Marriage whilst not considered to be a sacrament in Reformed theology was as has already been discussed a holy ordinance and although not dissoluble at will was rendered by virtue of this subtle and Augustinianic distinction and by some astute scriptural interpretation more open as regards the possibility of disolution by divorce on the ground of adultery.

The First Book of Discipline testifies to this attitude:-

"Marriage once lawfully contracted may not be dissolved at man's pleasure as our Master Christ Jesus doth witness unlesse adulterie be committed which being sufficiently proved in presence of the civil magistrate, the innocent (if they so require) ought to be pronounced free and the offender ought to suffer death as God hath commandeth"[39].

There are many points to notice in this passage which declare the theory behind the Reformed concept of divorce. Firstly it is to be noticed that the Reformers considered marriage to be a permanent and indissoluble contract almost as much as in Catholic times. The only possibility for divorce is provided by the matrimonial offence of adultery, which does not give an immediate right to dissolution and right to remarry, such matters are at the instance of the innocent party, thus separation a mensa et thoro could be retained and the matter had to be brought to court. Adultery was, in Stair's[40] language a just occasion for dissolution.

The remedy is ex facie based upon the scriptural passage in Matthew 19,9, which has already been examined. The Reformers in adopting this passage into their new matrimonial code appear to have ignored the parallel passage in the Gospel of Mark:-

2. And the Pharisees coming to him asked him, Is it lawful for a man to put away his wife? tempting him.

3. But he answering saith to them; What did Moses command you.

4. Who said Moses permitted to write a bill of divorce, and to put her away.

5. To whom Jesus answering said: Because of the hardness of your hearts he wrote you that precept.

9. What therefore God hath joined together let not man put asunder.

10. And in the house again his disciples asked him concerning the same thing.

11. As he saith to them; Whosoever shall put away his wife and marry another committeth adultery against her.

12. And if the wife shall put away her husband and be married to another she committeth adultery[41].

This attitude of reliance on Matthew and the rejection of Mark is indicative of Reformed thought throughout Europe. The primary

continental influences upon the Scottish Reformation Beza, Bucer and Calvin all adopted this course. Calvin also adopted desertion as a ground of divorce which was also considered by Beza[42].

The crowning interpretation in favour of Matthew was aided by the theory of presumed death arising from an interpretation of Leviticus which in ordaining death for adultery rendered any adulterer civilly dead[43] when applied in Scotland. Thereby his wife was in the position of a widow and was free to wed again:-

"If any man commit adultery with the wife of a neighbour and defile his neighbour's wife, let them be put to death both the adulterer and the adulteress"[44].

Of course these texts were available to the earlier canonists, and therefore it is useful to examine their view of the passage which founded the Reformer's theory of divorce for adultery.

The question of the possibility of divorce is examined to some extent by Hay. He displays the major attitudes to Mosaic divorce in the Pentateuch and eventually concludes that for certain specific reasons the Jewish code permitted divorce, particularly as the lesser of two evils, as prohibition would have resulted in wife murder.

Hay[45] deals specifically with the passage in Matthew Chapter 19 which was the basis of the Reformers' rationale. He finds the injunction that a husband who put away his wife when she has not committed fornication, committed adultery and that conversely if he put her away when she has committed adultery he committed no adultery was of the

new law and could be obeyed by Christians.

Hay concedes that this passage refers to a conversation which took place between Jesus and the Pharisees and the Jews who following Leviticus were accustomed to stoning adulterous wives and thereby freeing the husbands for remarriage. Hay points out that one could not contract a marriage whilst one's spouse was still in life. Hay also notes that simply because this appears in the Gospel is not a sufficient reason for following it out as it could be merely a repetition from the Old Testament and was in any case not imperative.

The Reformers noticed in the First Book of Discipline that their ideal implementation of the rather literal interpretation of the Old Testament which would result in several executions for adultery each year was not likely to be made by the civil authorities, particularly the ambivalent Marian authority of the period. Thus the First Book provides that "If the civil sword foolishly spare the life of the offender yet may not the Kirke be negligent in their office, which is to excommunicate the wicked and to repute them as dead members and to pronounce the innocent partie to be at freedome, be they never so honourable before the world"[46].

Even before the theory was presented in this way Kirk Sessions were providing a remedy for adultery which was approximately presumptive death. It is the case that the introduction of divorce by the Reformers was no mere "substitution of divorce a vinculo for divorce a mensa et thoro"[47].

Adultery as a social evil was viewed very seriously indeed by the

Reformers. The Kirk, from the earliest times took a grim view of the marital offence. As has been observed, before 1560 adultery could result in penal restrictions, after the Reformation there was an increase in the punitive aspects of the matter, and notwithstanding the institution of the Commissary Court the Kirk Session retained some jurisdication ad vindictam publicam[48] in addition to its penalties of excommunication and the attendant capital punishment for the crime.

The concern which the Reformed Church had in respect of adultery, a matter which was recognised as "so doubtsome a case", is exhibited by the early attempts to provide a remedy for the sin-crime, and by the attitude of the Church, which in its assumption of jurisdiction and its formation of remedies without secular involvement or legislative power, asserted itself ex proprio motu as the jurisdiction competent to grant a decree of divorce.

With the possible exception of the ability of ministers to marry, probably no other single doctrinal alternation to the law by the Reformers had as great an effect on the popular imagination as the granting of divorce.

To lose papal authority was revolutionary, but to find a method of breaking the marriage bond was inspired law-making of praetorian proportions. Therefore it comes as little surprise that as early as 1559, before the Reformation proper, those elderships which felt any permanence were granting decrees for the relief of their congregation's matrimonial problems.

One of the earliest examples of the new law is the case of Rantoun v.

Geddes (1559)[49] where the husband William Rantoun gave in a petition for divorce on the basis of adultery committed by his wife Elizabeth Geddes. It was held however that no adultery was proved and therefore a decree of absolvitor was granted.

Subsequent to this action by her husband, Elizabeth Geddes raised[50] a new action for divorce on the basis of his adultery. The adultery was proved and the sententia, granted by the minister and elders awarded divorce, and ordained that the civil authority execute the guilty party.

There were several cases heard before the Kirk Session at St Andrews during the period 1560-1563, before the institution of the Commissary Court. These are particularly informative because they represent the theologico-legal attitude of the Reformed Regieme before the more legalistic Roman-Civil-Canonical attitude of the Commissary Court interposed and set the mould of the consistorial law in Scotland until the considerable reforms of the nineteenth and twentieth centuries.

The interesting case of Alexander Lothrisk (1560)[51] represents the jurisdictional contest between secular and ecclesiastical courts and shows that whilst adultery did provide a lever by which the marriage could be dissolved, that dissolution could be granted in absence, and pronounced by public declaration. It also shows the significance of desertion as an adminicle of evidence and as an element to be taken into account in decerning guilt or innocence. It is worth noticing that the Session prescribed the death penalty to be executed by the Civil Power.

Adultery could be admitted by the defender[52] although this was, in view of the (nominal) capital nature of the offence not perhaps a frequent occurrence, but was a possibility, bearing in mind, as the First Book of Discipline points out, "If the life be spared as it ought not to be, to the offenders, and if fruits of repentance of long time appeare in them and if they earnestly desire to be reconciled with the Kirk, we judge they may be received to the participation of the Sacraments." Repentance was always possible and those absolved by penitance could be considered spiritually and morally rehabilitated[51].

The case of Thecar v. Morton (1561)[54] is interesting in so far as the alleged adultery was said to have taken place abroad, and witnesses' evidence was taken ad futuram perpetuam rei memoriam. Divorce was granted on the basis of this evidence. There is probably a little significance to be placed on the usage of the Session of the words "separated and divorced' in the sententia. In this case as in the case of Scrymgear v. Dundas (1561)[55] the right to remarry was specifically granted thereby putting to rest any confusion which could arise from the mere use of 'divorced'.

During 1562 the pressure from the Church to have its prescription regarding the capital nature of adultery adopted by the secular authority increased.

As part of this pressure certain stages of adultery were looked upon as being especially scandalous, particularly where a child was born as a result of the adultery. Therefore in the case of Kay v. Duncan (1562)[56] there was reference to the confession of adulterer and paramour, the inability of the parties to reconcile and the

'notourious' nature of the crime. This appears as an echo of the 'manifest and incorrigible' adulterers of pre Reformation times, but is nevertheless a distinct usage and was to become the basis for several Acts of Parliament which attempted to placate the Church partly by providing paper evidence of the secular resolve to stamp out this socially destructive misdemeanour.

On the fourth of July 1562[57] the General Assembly ordained that a supplication be made to the Queen to punish all, "vices commanded by the Law of God to be punished and yet not so commanded by law of Realme, viz ... Adulterie and fornication".

This accorded with the Reformed ideal. Calvin[58] approved of such a harsh penalty. However the Genevan Commonwealth was not so longingly sought by the Civil Sword in Scotland.

In 1563 an Act was passed which, on paper at least gave the Reformers everything they desired. Narrating that, "adulterie", was recognised as an 'abominabile and filthy vice and crime' which was perniciously and wickedly used in the Realm, the Act ordains that "all notour and manifest committaris of adulterie in any tyme to come after the dait hereof sall be punit with all vigour unto the deid ... bothe man and woman, after due monition to abstain"[59].

There appear to have been few executions for adultery under this act, in 1563 two executions are reported in Edinburgh and later farther executions were to take place.

In 1562 John Gibson[60] was called before the Session of the Canongait

he confessed to adultery and asked the mercy of God. The Kirk remitted him to the Civil Magistrate to be punished 'as accords of law'. Punishment for simple adultery in Edinburgh seems to have been a period of 'branketing for 6 hours at the Cross' then being warded for open repentance before the Kirk'.

The opportunity for penitance could sometimes provide an escape from the rigour of the ecclesiastical prescription and the stated civil penalty. Thus in 1566 John Miller who admitted adultery was remitted by the Kirk to the Civil Magistrate in Edinburgh who ordained that he remove himself from the Canongait and find surety till they be satisfied, under pain of the Royal Act[61].

It is submitted however that this case of Miller exhibits the social control and quasi criminal jurisdiction exercised by the Session in contradistinction to the civil consistorial jurisdiction which was by now regulated by the Commissary Court.

This is borne out by the entry for the 9th April 1567[60] in the Buik of the Kirk of the Canongait where John Miller and his paramour Beatrix Morris are displayed at the cross and thereafter imprisoned in the Tollbooth.

This criminal jurisdiction became the main way in which the Session maintained a presence in such questions as adultery, the divorce of the Commissary Court being painless and equivalent in respect of the ability to remarry[61].

In 1581[62] Parliament perceived some difficulty in the interpretation

of notour adultery and therefore an Act was passed specifically to explain the "Act touching adultery". The Act defined notour and manifest adultery as being where children are born between adulterers or where they keep bed together notoriously or where the adulterers give slander to the Kirk by suspicion and having been admonished are excommunicated for obstinacy. For clarification the act added succinctly that all such adulterers were to incur the penalty of death.

In 1592 Parliament commenced a programme of legislation to curb the occurrence of adultery, which was noticed in an act of that year to be a crime which 'dayly' increased and for the same a great number of married persons have been divorced for adultery[63]. Each of the Acts which followed during the course of the century to the mid-seventeeth century exhibit a surprisingly ad hoc remedy to a problem which, by the harsh nature of the penalty, one would have thought, died out. These Acts testify to the complete ineffectiveness of the secular power to impose its will on the population.

These secular activities and session decreets were assisted by the National Church, which in the General Assembly of 1570 legislated on several aspects of adultery, particularly lenocinium, which it found to reduce the petitioners claim just as in the canon law. Those who knew of adultery and did nothing to bring the sin-crime to light were to be punished to the same extent as the perpetrators[64]. An example of this discipline is the case of John Ker before the Synod of Lothian and Tweeddale in April 1589.

It appears that the Kirk's repressional arm came to play in a great

many cases during the mid-seventeenth century. At the Synod of Lothian and Tweeddale for example very many cases of adultery came before the elders for scrutiny. Hardly any concerned the reduction of a subsisting marriage. Thus in 1644, the Synod ordained the Presbyteries to compile lists of the adulterous and incestuous in the parish and give these names to the solicitor of the Kirk for prosecution[65]. Repentance by sitting on the penitent stool for many Sundays, and standing at the Church door on a Sunday in sackcloth may have been severe in terms of pride and self esteem but were better than death. Perhaps the Church recognised that an adherence to the capital policy would have resulted in an embarrassing number of executions. In practice therefore, penitants were better than dead adulterers although that did not stop the enthusiastic Session of Perth in its zeal for the Old Testament Law executing an adulterer by the name of Gray and his paramour in 1590[66].

Penitance was by and large encouraged. It may be significant that there is only one Session on record as having carried out the ultimate penalty (that of Perth). No other case of adultery appears before the session during the period 1584-1587, whereas in more lenient session areas adultery is a recurrent offence. Adultery thus figures in the Records of the Session[69] and Presbytery[70] of Aberdeen, the Presbytery of Inverness[71] and in the Records of the Synod of Lothian and Tweeddale[72].

All stages of process against adulterers are recorded, complaints could be made of adultery[73] testimonials could be received[74] commissions set up to examine the offence[75], penance ordained[76] sentences of excommunication granted[77], satisfaction of discipline

acknowledged[78], scandal purged[79], caution accepted[80], adultery tried[81], punishment administered[82] and generally all the types of function which would enforce discipline and dispose of wrongdoers and 'manifest sinnars'.

Occasionally glimpses of the old consistorial jurisdiction came to light. For example a decision can be made that the marriage of two husbands is considered adultery not bigamy[83], but there is in a record such as that of the Synod of Lothian and Tweeddale no decree of divorce on the ground of adultery although decrees on the basis of nullity may be granted[84].

A Kirk Session would sometimes refer adulterers to a Presbytery for punishment[85]. There appears however to have been no uniform punishment though the parading of the sinner clothed in sackcloth features widely[86] as an expression of enforced but contrite penitance.

A problem which exercised the minds of Church and State lawyers for some time was whether the adulterer was enabled to marry his paramour. This was obviously a fairly important policy matter, as the prospect of marriage to a paramour could be productive of collusion and wife murder.

The Church's attitude in the earliest times was open to varied interpretation. The First Book of Discipline provided the basic principles upon which the policy of the Church was built, "If any demand whether that the offender after reconciliation with the Kirk may not marry againe. We answer that if they cannot live continently and if the necessity be such, as that they feare further offence of

God, we cannot forbid them to use the remedy ordained of God. If the partie offended may be reconciled to the offender, then we judge that on no wayes it sall be lawfull to the offender to marry any other except the partie that before hath been offended and the solemnization of the latter marriage must be in the open face of the Kirk, like as the former, but without proclamation of bands"[87].

The general motivation of the Church in this question as in the pre Reformation times is to avoid scandal and the occasions of sin. If the guilty party could not live continently, i.e. without committing fornication then he was to be allowed the proper remedy for that sin, marriage. The precept could have been Pauline 'it is better to marry than to burn'. After all, of course, for the prevention of scandal, reconciliation was encouraged and marriage with one's former spouse was permitted, although this should be de facto a clandestine marriage as notoriety would compromise the aim of avoiding scandal.

Much legislation sacred and secular was enacted to control this question. In December 1566 for example, the General Assembly considered a marriage by the adulterous offender to be 'illegal' and decreed that ministers were to be warned away from marrying upon pain of removal[88].

In 1571 the question of a marriage between an absolved excommunicant adulterer and his paramour was deemed unlawful on the ground of affinity[89].

1592 saw the passing of the Act[90] anent adultery to which reference has already been made. The marriage of paramours was deemed to be

contrary to the Law of God[91] and public honesty[92] and as if to enforce this policy both paramour and her issue were disinherited; only the issue of the 'first lawful marriage' were entitled to succeed.

The Act is interesting on the basis of its reliance upon the pre Reformation species of affinity and publica honestas. The Law of God referred to could apply to the marriage of David and Bathsheba and to the passages of Mark which had been rejected for other purposes. This conclusion was based upon cases decided in the same way an interesting example of which is the case of Stevenson and Pollock (1565)[93] where a marriage betwen adulterer and paramour was declared null because Stevenson had been divorced in 1560 (by a church court) on the basis of his adultery with Pollock. The former spouse was still alive, thereby farther compounding the misdeed.

The later case of Duguid (1583) is, an anomaly, as the adulterer is allowed to marry a woman other than his wife, by virtue of a Royal dispensation[94].

The pressure was maintained to bring secular law into conformity with ecclesiastical pronouncement. In 1595 the Assembly defined its attitude on 'unlawful' marriages, being where one party marries the paramour and where the guilty party takes another spouse notwithstanding the aggrieved spouse's willingness to adhere[95].

As a result of strenuous supplication by the General Assembly to have 'ane act to be made dischargeand all mariages of such persons as are convict of adulterie and that the samin be ratified in the nixt

Parliament"[96], Parliament passed an act ordaining that 'All mariages contractit between persons ... divorcait ... for the crime of adultery and the paramours are in all time null and unlawfull"[97]. This Act seemed to create a new diriment impediment, in contradistinction to the Reformers' earlier zeal for a less human law in this field. In the fairly late case of Lyle and Douglas v. John Douglas (1670) the Act of 1666 was applied rendering a marriage unlawful between an adulterer and his paramour with whom the adultery had been committed[98]. However it appears that the framework was left intact for even adulterous couples to contract de presenti marriage, therefore the real sanction was oblique - the prohibition on the inheritance of any children of such unions. Thus a multitude of doctrinal and legal problems could be avoided should some party care to challenge the nullity of a union on the above basis.

This legislation an echo of previous prescriptions, was put into play in the case of Kennedy v. Ritchie (1601)[98] where the marriage between Kennedy and Ritchie was annulled, Mrs Kennedy having been divorced from her husband because of her adultery with Ritchie. The continued cohabitation of Kennedy with her paramour was seen as a continuation of the adultery. The punishment in adultery was not the divorce, nor indeed any aliment payable by the guilty party, but was rather the prohibition on fulfilling one's sinful desires in carrying out 'conversation' with the paramour.

The programme of legislation was resumed during the mid-seventeeth century. Adultery was rife as the many cases quoted from the various church courts signify and certain provisions were made in order to control and prosecute adultery more easily.

In 1644 two acts were passed in an attempt to clarify this vexed area. The proof of adultery had been in the commissary court by evidence given per testes scientes et videntes but by the Act 1644[100], this method of proof was permitted in addition to probation of bigamy, or that bairns were procreated or that persons under scandal of adultery kept frequent company and bed together.

During the same parliamentary session an Act was passed submitting all Acts on adultery and incest to the Justice Deputes for consideration[101]. In 1646[102] and the following year the pressure was maintained and adultery figured in the overtures from the Commissioner of the General Assembly to Parliament, that the Ordinary Judge may execute his judgement throughout the Kingdom. In 1647 the Justice General and two Justices Depute, James Robertson and Alexander Colvill, were ordained to consider amongst other crimes, adultery and bigamy[103].

Stair[104] does not comment greatly on the subject of divorce on the basis of adultery. He notices that the problem of infidelity was presented to both the pre and post Reformation ecclesiastical authorities and that each had its different way of dealing with it. He makes no mention of the theory of presumed death[105] upon which the Reformed tradition constructed its concept. He does however obliquely recognise the conflict between the idea of de praesenti consent and the diriment impediment of adultery thus:-

"With us marriage betwixt the two committers of adultery is declared null, and the issue inhabilate to succeed to their parents, but otherwise even the person guilty may marry again[106]"

The Confession of Faith (1690) section 5 is as definitive a statement of the ground of divorce as any earlier text.

"In the case of Adultery after marriage it is lawful to the innocent party to sue for a divorce and after the divorce to marry another as if the offending party were dead"[107].

At all times the nature of divorce for adultery was that was a common law or quasi customary remedy for a grave social ill. It was a compromise remedy sitting on the tightrope between a shaky scriptural foundation and a desire for social cohesion on the one hand and a recognition of the intolerability of a marriage where a spouse was being unfaithful on the other.

Therefore divorce or dissolution was never an automatic result of adultery it always had to be sought by the innocent party. The party seeking divorce always had to obtain dissolution on the ground of the wife's adultery. The so called defence of recrimination could thus come to play[108].

Of all the direct reforms which were made to the consistorial law the introduction of divorce for adultery was the most revolutionary and far reaching which had an effect much greater than that envisaged by the minister and elders of Saint Andrews when they granted the first such decree simply for the relief of what they perceived as a grave misjustice. It must be stated that the Reformers' strict theory did not truly admit of divorce, but rather was a quasi dissolution on the ground of presumed death and as a result of this theory there is an argument for stating that it was only with the introduction of the

secular Commissary Court with its apparent disregard of the theological rationale of the Reformers which moulded the law of divorce for adultery into the rules which covered this area of the law in Scotland from the mid-seventeeth century until the twentieth. It is in the Commissary Court one must contend that the divorce a vinculo was really introduced.

Divorce a vinculo matrimonii - Desertion

As a result of Reformed attitudes if not of the Reformation proper the second major innovation which occurred after the Reformation was the introduction of divorce for desertion.

The reason for stating that this alteration in the law was a result of Reformed attitude rather than the Reformation is that it appears that divorce for desertion did not enter the calculations of the Reformers at least in the formulation of the Policy of the Kirk in the First Book of Discipline.

On the Continent the prominent Reformers Theodore Beza and Jean Calvin were discussing desertion as a ground for divorce, particularly on the basis of Scriptural authority as contained in Paul's First Letter to the Corinthians.

14. "For the unbelieving husband is sanctified by the believing wife and the unbelieving wife is sanctified by the believing husband; otherwise your children should be unclean, but now they are holy.

15. But if the unbeliever depart, let him depart, for a brother or

sister is not under servitude in such cases, but God hath called us in Peace"[109].

However this was not the case in Scotland not because the Scots Reformers were prone to resting their reform on biblical authority but rather because of the personal inclination of John Knox.

Stair[110] and later commentators deduced a general rule from the passage of Corinthians quoted above based clearly on the concept of the Pauline privilege.

Innocent III had allowed a form of divorce where two unbaptized persons had contracted marriage and one of the parties embraced the Christian religion, the othere refusing to do such. This Pauline Privilege based as it was on a passage from Paul's Letter to the Corinthians was also called the Dispensation of the Apostle.

The Pauline privilege was viewed with suspicion by Knox who allowed only adultery as a valid ground for divorce in the First Book of Discipline[111]. The scriptural basis is admittedly weak if one is to attempt to extend the privilege to all married Christians. The theory appears to be that if desertion was good as a ground of divorce for pagans a fortiori it must be good for Christians who have had the benefit of the Word.

There would appear to be a conflict between Knox and the other authors of the First Book of Discipline, and the secular party in Parliament led at least during the early 1570's by James Stewart, Earl of Argyle and Chancellor of Scotland. This conflict and its fruits will be

examined in early course.

Because for the early Reformers desertion was not a ground of divorce this does not mean that it was not a significant factor in determining the marital relationship. There are at least two cases recorded in the Kirk Session Register of Saint Andrews where the ground of divorce is stated to be adultery but where desertion is deemed a sufficiently important aspect to warrant separate and fairly prominent mention.

The early case of Thomson v. Philip[112] (1562) where the pursuer Thomson sought divorce on her husband's adultery is interesting as his desertion is featured and is admitted by him. It is significant probably not for the desertion itself but rather that the desertion provided the opportunity for adultery.

This view of desertion as an adminicle of evidence or even leading to a rebuttable presumption of adultery is enforced by Ade v. Masoun (1590)[113] which if it were warranted could have been brought under the Act 1573 on the basis of desertion alone but is rather on the sought for ground of adultery.

There appear however to be no cases before any court in Scotland before the Act of 1573 where the possibility of divorce on the ground of desertion simpliciter was introduced.

There is one exception to the general proposition set out above: that is the process of the Earl of Argyle against his wife.

The discord between the Earl and his wife had subsisted from as early

as 1566 when an action of adherence had been raised against her.

Adherence had always been recognised as one of the primary obligations stante matrimonio. In 1525 the Earl of Angus[114] protested to Parliament that his wife, the Queen Mother should adhere to him as she was "bundin and obligit be the law of God and Holy Kirk", being as he was advised by men of religion that no one may desert without displeasing God and incurring sin.

Peter Lombard in his Sententiae emphasises the permanent cohabitation aspect when defining marriage[115], and this essential element in matrimonial relations was not altered by the Reformation to which the action by the Earl of Argyle testifies as does Stair's statement that adherence or cohabitation was one of the obligations 'naturally in the minds and affections of each to other'[116].

The law as regards divorce for desertion was not certain in Scotland obviously the question was exercised in the minds of some clerics and lay people particularly by reason of an extension of the Pauline privilege. Thus in 1566 the General Assembly was consulted as to whether a woman may marry again whose husband departed from her nine or ten years previous, which problem elicited the reply in strict conformity with adultery or death being the only methods of dissolution, that she would be required to produce a testimonial of his death[117].

In 1571 the Earl began a process of divorce for his wife's desertion notwithstanding the attempts by John Knox to reconcile the estranged couple.

The doubts as to the validity and relevance of such an action preyed on the minds of the Commissaries who appointed Thomas Craig[118] author of the Jus Feudale, who was already some eight years at the Bar, 'to inform of the laws allegit that the cause libelled, est causa divorcii'.

This uncertainty in the ranks of the professional lawyers is echoed and amplified by the activities of the General Assembly during the following year. The Assembly with his Lordship's concurrence appointed Robert Pont a Senator of the College of Justice, James Lawson of Edinburgh, David Lindsay of Leith, Clement Little Advocate and Commissary, Alexander Arbuthnot, John Row Minister of Perth, John Craig, and Robert Hamilton Minister of Saint Andrews or any five of them to reason the divorce between Lord Argyle and his wife[119]. Upon the result of this Commission the Assembly would have given its definitive decision.

However the Commission, so far as can be ascertained never submitted its deliberations to the Assembly. In between this meeting and the subsequent Convocation in August 1573 Parliament had in a pre-emptive action passed the Act 'anent them that divertis from utheris being joined of before in lawful marriage'[120].

Much has been written on the origin of this Act. It has been suggested that the Act bears some relation to a passage in Calvin's 'Projet d'ordannance sur les mariages' and suggests that it was this Reformed legislation which was in the minds of the Parliament[121], in effect discounting the theory of Riddell[122] as discussed by Fraser[123] that the act owes its existence to the influence of the Earl of

Argyle. One must consider that the origin of the act lies somewhere in between these diverse theories.

The Genevan legislation is instructive and should be examined and then the Act of 1573 should be compared and contrasted with its so called continental progenitor. The Project was designed by Calvin in 1545 and adopted in Geneva on 13 November 1561.

"Si ung homme estant alle en voiage pour quelque traficque de marchandise ou aultrement, sans estre desbauche ny aliene de sa femme, et qu'il ne retourne point de long temps et qu'on ne scache qu'il soit devenu, tellement que par coniectures vraysemblables on le tienne pour mort, toutesfois qu'il ne soit permis a sa femme de se remarier iusques apres le terme de dix ans passez depuis le iour de son partement, synon qu'il y eust certains tesmoignages de la mort d'iceluuy, lesquelz ouys on luy pourra donner conge, et encores que ladite permission de dix ans s'estende seulement iusques la, que si on avoit suspicon ou par nouvelles ou par indices que ledit homme fust detenu prisonnier ou qu'il fust empesche par quelque aultre inconvenient, que ladite femme demeurast en viduite.

Si ung homme par desbauchement ou par quelque mauvaise affection s'en va et abandonne le lieu de sa residence, que la femme face diligent inquisition pour debvoir ou il se sera retire, et que l'ayant sceu, elle vienne demander lettres de permission afin de le pouvoir evocquer ou aultrement contraindre a fair son debvoir, ou pour le moins luy notifier qu'il ayt a retourner en son mesnage sur poine qu'on procedera contre luy en son absence. Cela faict, quand il n'y auroit nul moyen de le contraindre a retourner, qu'on ne laisse pas de

poursuyvre comme il luy aura este denonce: c'est qu'on le proclame en l'esglise par trois dimenches distans de quinze iours, tellement que le terme soit de six sepmaines, et que le semblable se face par trois fois en la court du lieutenant, et qu'on le notifie a deux ou trois de ses plus prochains amys ou parens s'il y en a. S'il ne comparoist point, que a femme vienne au prochain consistoire apres, pour demander separation, et qu'on luy octroye, la renvoyant par devant Messieurs, pour en faire ordonnance iuridicque, et que celluy qui aura este ainsi rebelle soit banny a tousiours. S'il comparoist, qu'on les reconcilie ensemble, leur faisant commandement de tenir mesnage commun en bon accord et en la crainte de Dieu.

Si quelqung faisoit mestier d'ainsi abandonner sa femme pour vaguer par pays, qu'a la seconde fois il soit chastie par prison au pain et a l'eau et qu'on luy denonce avec grosses remonstrances qu'il n'ayt plus a fair le semblable. Pour la troiziesme fois qu'on use de plus grande rigueur envers luy. Et s'il n'y avoit nul amendement, qu'on donne provision a la femme, qu'elle ne soit plus liee a ung tel homme qui ne luy tiendroit ne foy ne compaignie.

Si ung homme estant debauche, comme dict a este, abandonnant sa femme, sans que ladicte femme luy en eust donne occasion ou qu'elle en fust coulpable, et que cela fust deuement congneu par le tesmoignage des voisin et familiers et que la femme s'en vint plaindre, luy demandant remede: qu'on l'admoneste d'en faire diligente inquisition pour scavoir qu'il est devenu, et qu'on appelle ses plus prochains parens ou amys, s'il en a, pour scavoir nouvelles d'eulx. Cependant que la femme actende iusques au bout d'ung an si elle ne pouvoit scavoir ou il est, se recommandant a Dieu. L'an passe, elle pourra venir au

Consistoire, et si on congnoit qu'elle ayt besoing de se marier, qu'apres l'avoir exhortee, qu'on la renvoye au Counsil pour l'adiurer par sement si elle ne scayt point ou il se seroit retire, et que le semblable se face aux plus prochains parens et amys de luy. Apres cela, qu'on procede a telles proclamations comme dict a este, pour donner liberte a ladicte femme de se pouvoir remarier. Que si l'abuseur retournoit apres, qu'il soit puny selon qu'on verra estre raisonnable.

Si une femme se depart d'avec son mary et s'en aille en ung aultre lieu, et que le mary vienne demander d'estre separe d'elle et mis en liberte de se remarier, qu'on regarde si elle est en lieu dont on la puisse evocquer ou pour le moins luy notifier qu'elle ayt a comparoistre pour respondre a la demande de son mary, et qu'on ayde le mary de lettres et aultres adresses pour ce faire. Ce faict, qu'on use de telles proclamations comme dict a este cydessus, ayant premierement evocque les plus prochains parens ou amys d'icelle pour les admonester de la faire venir s'ilz peuvent. Si elle comparoist dedans le terme et que le mary refusast de la prendre pour la suspition qu'il auroit qu'elle se fust mal gouvernee de son corps et que c'est une chose trop scandaleuse a une femme d'ainsi abandonner son mary, qu'on tasche de les reduire en bonne unyon, exhortant le mary a luy pardonner sa faulte. Toutesfois s'il perseveroit a faire instance de cela, qu'on s'enquiere du lieu ou elle a este, quelles gens elle a hante et comment elle s'est gouvernee, et si on ne trouve point d'indices ou argument certain pour la convaincre d'avoir faulse la loyaulte de mariage, que le mary soit contrainct de se reconcilier avec elle. Que si on la trouve chargee de presumption fort vehement d'avoir paillarde, comme de s'estre retiree en mauvaise compaingie et

suspecte, et n'avoir point mene honeste conversation et de femme de bien, que le mary soit ouy en sa demande et qu'on luy octroye ce que raison portera. Si elle ne comparoist point le terme escheu, on tienne la mesme procedure contre elle comme on feroit contre le mary en cas pareil. S'il y avoit parens ou amys en la ville qui eussent ayde a tirer une femme ainsi hors et qu cela soit bien verifie, qu'on les appeelle et qu'on leur recommende de la ramener sur le lieu, afin qu'en la presence d'icelle la cause soit congneue.

Si ung homme apres que sa femma l'aura abandonne n'en faict nulle plaincte, mais qu'il s'en taise, ou que la femme ainssi delaissee de son mary dissimule sans en mot dire, et que cela vienne en congnoissance, que le Consistoire les face venir pour scavoir comment le cas va, et ce affin d'obvier a tous scandalles, pource qu'il y pourroit avoir colusion, laquelle ne seroit point a tollerer, ou mesme beaucoup pis, et que ayant congneu la chose on y pourvoie selon les moyens qu'on aura, tellement qu'il ne se face point de divorces voulontaires, c'est a dire au plaisir des parties sans authorite de iustice: et qu'on ne permecte point aux parties conioinctes d'habiter a part l'ung de l'aultre. Toutesfois que la femme a la requeste du mary soit contrainct de le suyvre quant il vouldra changer d'habitation ou qu'il y seroit contrainct par necessite, moyennant que ne ce soit point ung homme desbauche qui la mene a le'esgaree et en pays incongnu, mais que ce soit ung homme raisonnable qui veuille faire sa residence en lieu honneste pour vivre en homme de bien et tenir bon mesnage.

Que toutes causes matrimonialles concernant la conioinction personnelle et non pas les biens soient traictees en premiere instance

au Consistoire, et que la s'il se peult faire appointment amyable il se face au nom de Dieu.

S'il est requis de prononcer quelque sentence juridique que les partis soient renvoyees au Counseil avec declaration de l'advis du consistoire pour la en donner sentence diffinitive.

'If a man has gone on a voyage to trade or for other reasons without being debauched or separated from his wife and if he does not return for a long time and if one does not know what has become of him so that by plausible conjectures one believes him to be dead, it is not permitted in all times for his wife to remarry unless at least a term of ten years has passed since the day of his departure, if there are no certain testimonies of his death or that he could have gone on holiday, and yet the said permission of 10 years can be extended only where one has suspicion or news or other indication that the said man is detained as a prisoner or is prevented by some other cause, the said woman lives on as if in widowhood.

If a man by debauchery or by some evil desire goes and abandons his place of residence, his wife is to make diligent inquisition to find out where he will be, and once this is known she should come to request letters of permission with the power to call or otherwise compel him to do what he ought to, or at least to notify him that he must return to his residence under pain of her proceeding against him in his absence. This being done when there is no way in which he can be constrained to return, one is not at this stage to pursue as he has first to be denounced:-

It is when one proclaims in Church on three Sundays at a distance of 15 days each so that the term is 6 weeks, and the same being done 3 times in the Court of the Lieutenant and that this is notified to two or three of his nearest friends or his parents if he has any.

If he does not compear and the wife comes to the next consistory thereafter to request separation and this is granted to her, it being placed before the Council to grant a judgement and those who are rebel are banished for ever. If he compears and they are reconciled together, command is made to them to keep a common household in good order and belief in God.

If someone makes ready to abandon his wife by journeying through the country, for the second time let him be punished by prison on bread and water and let him be denounced with great remonstrance so that he will not do the same thing again. For the third desertion one should use the greatest rigours against him. And if he has no proposal which provides for his wife, she need not adhere to a man who holds neither faith nor company with her.

If a man, being debauched as he is said to be abandoning his wife without the said woman having given him an occasion where she was culpable and which is well-known by the evidence of neighbours and family and that the woman comes to plead and demand a remedy from him: One admonishes her to make diligent investigation to find out what has become of him and one should call the parents and nearest friends, if there are any, to discover news of him.

However, the pursuer if she cannot find out where he is at the end of

one year is to recommend herself to God. This year having passed she can come to the Consistory and if one knows that she needs to remarry she should be exhorted to return to the Conseil to swear the oath that she does not know where he is or when he will return and that the same be done by his nearest parents and friends. After that one proceeds to such proclamations as there are said to be to give the said woman liberty to be able to remarry. Which if the abuser returns after that he will be punished in such a way as seems reasonable.

If a woman departs from her husband in flight or to another place and the husband comes to ask to be separated from her and put at liberty to remarry where one sees that she is in a place where one has jurisdiction to call or at least power to notify her that she has to compear to answer the petition of her husband and where one helps the husband with letters or other addresses which he is to do. This being so when one uses the proclamations above after having called the nearest friends and parents and one can admonish them to make her come if they can.

If she compears in the term and the husband refuses to take her back for the suspicion which he has that she has given her body badly and that it is a thing too scandalous for a woman to abandon her husband one should try to bring them back together again, exhorting the husband to forgive her her fault. In each case that the husband pursue to do instance on this matter, then one should enquire of the place where she has been with which people she has kept company and how she has used herself and if one does not find any indications or plausible arguments to convince one that she has betrayed her loyalty to the marriage then the husband is to be constrained to reconcile

with her.

However where one finds her burdened with a very strong presumption to have been immoral, as to have fallen into bad or suspect company and to have had no honest contacts or to have known honest women then the husband is right in his demands and should get that which right brings.

If she does not compear at the term fixed one uses the same procedure against her as one uses against the husband in the same case. If there are parents and friends in the town who have harboured the woman and this is well verified then one calls them and recommends to them to bring her back to the place, to the presence of those who know the cause.

If a man after his wife has abandoned him makes no plea, but keeps silent or a wife is left by her husband and says nothing and this comes to knowledge then the Consistory shall have them come in order to know how the case goes, with the end aim of avoiding scandals, because there could be collusion which is not to be tolerated or something very much the same and having known the matter one can perceive the remedies which one has such that at the will of the parties voluntary divorces are not granted without the authority of justice, and that one does not permit married persons to live separated the one from the other.

On every occasion the woman is constrained to follow the husband, at his request when he wishes to change his residence, or when he is forced to do such by necessity, on the condition that it is no

debauched man who leads her to (l'esgaree?) and an unknown country but rather a reasonable man who wishes to make his residence in an honest place, in order to live as a man of property and to keep a good household.

All matrimonial causes concerning the conjunction of man and wife and not with property are drawn in the first instance to the Consistory and if it can make an agreeable judgement it makes it in the Name of God.

If it is required to pronounce a juridical sentence, the parties are returned to the Council with a declaration of the advice of the Consistory for to give a definitive sentence".

There is much which is of note in this Project. It attempts to deal with desertion, and in doing so treats of presumed death, and innocent and malicious desertion with a surprising lack of cogent or rational treatment.

Therefore the first two passages try to provide an answer for the wife whose husband has 'disappeared'. And, provided the absence is for 10 years and the contention of presumed death could be proved by parole evidence then a dissolution could be granted.

The ordinance also deals with the instance of malicious desertion. In such a circumstance the wife should attempt to locate the deserter and then seek a summons for adherence from the Council equivalent roughly to the Burgh Council and principally a secular court. If this was ineffective a denunciation followed which was somewhat equivalent to

excommunication. Upon this denunciation a decree of separation could have been issued by the Council. The possibility of reconciliation is always borne in mind. The possibility however of subsequent desertion is also remembered and the penal consequences of the subsequent desertions points to the 'social control' jurisdiction which is seen very often in Kirk Session cases.

The Ordinance then proceeds to examine the specific remedy allowable to a wife who has been deserted namely; divorce a vinculo with the right to remarry. Firstly, it should be noticed that the pursuer must be innocent and that no occasion of culpability should have prompted the desertion.

Again attempts should be made to locate the deserter. This hiatus between the desertion and the commencement of proceedings should last for one year, during which further attempts to locate the party in desertion should be made and which certifies that he is not merely on holiday but truly in desertion.

Then the party deserted, upon the expiry of the year, swears on oath that she does not know where he is or when he will return. This is corroborated by his parents or friends and then following declarations in facie ecclesie, the woman is declared to be free to remarry.

The instance where the woman deserts is also examined and a similar procedure was exercised to discover if during the desertion there had been debauchery or adultery, and again desertion was penalised not only on the basis of being a matrimonial offence in itself but as representing an opportunity for further offences. If however no

evidence of such activities was forthcoming and she compeared at the court she was then reconciled with her husband. But if the converse was the case and there was evidence of immorality then a divorce should be granted to the husband, this is not strictly speaking a divorce for desertion, only for adultery or similar scandalous behaviour the opportunity for which was provided by desertion. If no compearance was made the same procedure was used against the wife as was used against the husband. The idea of desertion providing an occasion for greater sins is supported by the passage relating to the instance where parties keep silent about their spouse's desertion, which is looked upon as a form of collusion. The ordinance also takes the opportunity of commenting generally upon the husband's right to fix the matrimonial domicile.

Finally an indication is given of the interplay of roles between the secular Court and the ecclesiastical Consistory which was particularly applicable to the Genevan establishment and somewhat out of place if applied to Scotland. The secular authorities in Scotland did not automatically sanction everything ordered by the Session. Although very often because members of the Session would also as local worthies be involved in political and legal convocations automatic implementation would indeed occur.

D. Baird Smith argues that this ordinance is in many respects the original version of the Scots Act on desertion. It is now appropriate to set out the act and examine it in the light of the ordinance.

"It is fundin and declarit be oure sourane Lord His Regents Grace, and Three Estatis and haill bodie of this present parliament that in all

times bypast, sen the trew and christian religioun was publictlie preichit avowit and establisht within this realme, namelie sen the month of August the zier of God 1560, it hes bene, and in all tymes cuming sall be lauchfull that quhatsumever persoun or persouns joinit in lauchfull, husband or wife, divertis fra utheris companie, without ane ressonabill cause alledgit or deducit befoir ane judge and remanis in thair malicious obstanacie be the space of four zeiris and in the mene time refusis all privie admonitionis the husband of the wife or the wife of the husband for dew adherence, that then the husband, or the wife sall call and persew the obstinat persoun offendar befoir the judge ordinar for adherence, And in cais na sufficient causis be alledgit quhairfoir na adherence sould be bot that the sentence proceidis aganis the offendar, refusand to obey the samin, the husband sall meane themselves to the ordinar judge, the superior magistrate viz the Lordis of Sessioun, and sall obtene letteris in the four formis conforme to the sentence of adherence. Quhilk change beand contemnit and thairfoir bearn denuncit rebell and put to the horne, then the husband or the wife to sute the spirituall jurisdiction and powar and require the lauchfull Archbishop Bishop or Superintendent of the cuntrie, quhair the offendar remanis to direct privie admonitiounis to the said offendar admonishing him, or hir, as befoir, for adherence, Quhilkis admonitiounis gif he or scho contemptuouslie disobeyis that Archbishop, Bishop or Superintendent to direct chargis to the minister of that parochin quhair the offendar remainis, or in cais thair be nane, or that the Minister will not execute the samin, to the Minister of the nixt adjacent Kirk thairto, quha sall proceid aganis the said offendar with publict admonitiounis, and gif thay be contemnit to the sentence of excommunication. Quhilk aris beand pronouncit the malicious and obstinat defectioun of the partie

offendar to be ane sufficient cause of divorce, and the said partie offendar to tyne and lose thair tocher et donationes propter nuptias"[124].

There is much to be noticed in the act. Firstly, it is expressly declared to be of retrospective effect, stretching back to the Reformation Parliament of August 1560. The question of the validity of such a piece of legislation would necessitate an in depth study of the Scottish Constitution during the 16th century were it to be answered with any certainty. However, it is possible to adduce that the Scots King or Regency Council were not absolute in power nor indeed were the Three Estates. Always the Church, Roman or Reformed could present a bar to the supremacy or sovereignty of the King or to that of the King and Parliament. The problem was essentially one of strength. Competing powers restricted the sovereignty of any party. Scotland never developed a theory of constitutional unity or, as expressed as the King in Parliament, a government by consensus. A strong King could carry Parliament with him, a strong Parliament or convention could unseat a King, e.g. James VII[125]. Retrospective legislation was not in such a context necessarily taboo because of these doubts regarding sovereignty. Sovereignty during the sixteenth century was not to be equated with absolute power because no party had absolute power. One can approach the concept as referring to a limited competence. One is sovereign until another, more powerful, challenges what one has done.

Indeed as an example of this legislative and constitutional pragmatism one could point to the questionable legality of the Reformation Parliament and to that of the charter establishing the Commissary

Court. As these Acts were not effectively challenged they remained in effect - even without sovereign or royal or parliamentary approval. Acceptable declared custom might be the best way of describing such 'legislation' it certainly did not arise from a consensual debate and vote. Similarly the Act of 1573 was declared to be in existence even though the General Assembly had not completed its deliberations and was also declared to be of retrospective effect. The empirical test of whether it was law or not simply rested upon the question whether people would avail themselves of the ability to dissolve their marriage or not - as they did the question of the validity of the act was never called into question.

Why is the Act retrospective? There are, one can argue, three aspects of divorce for desertion which the promoters of the Act whether they included the Earl of Argyle or not would have in mind in bringing the act into force with retrospective effect.

(1) It is of doubtful scriptural validity, (2) The fact that divorce for desertion is not mentioned in the First Book of Discipline and (3) the opposition of John Knox to the concept of divorce for any other reason than adultery.

There would be a natural desire upon the Three Estates and the Regent not to be seen to be sullying the purity of the Reformed stream and back dating to the date of the Reformation Parliament would at least ex facie allow the act to fit in with the Reformed programme.

It is probably the death of John Knox in 1572 which prompted the Regent and Estates to legislate. The loss of this powerful figure

from the ecclesiastical scene stilled the conscience of the Church and at the very least removed the Church's centre of gravity and the point from which the criticisms of such an Act would have emanated from. This factor combined with the General Assembly's recess meant that concerted opposition to the Act was kept to a minimum.

Whilst not going as far as D. Baird Smith in attributing the Act's origin to the Ordinance from Geneva one can point to the continental Reformers and their apparent acceptance of the concept and muse upon the influence which they may have had in certain circles among the Reformers here in Scotland. It is known that Theodore Beza was in contact with Lord Guthrie and that Calvin's views were known to the 'whole bodie of the Kirk'. To such an extent that it has been stated, "In no other country did Calvinism mould so forcibly the powers and the limitations of a people"[126]. Surely the only explanation for the Calvinistic doctrine of divorce for desertion not being accepted by the Scots Reformers was the personal dislike of the doctrine of John Knox. The Act had to be composed following some consultation with the ecclesiastical establishment because of the involvement of the Session and Ministry in the execution of the Act. The likelihood is that there was a progressive element in Parliament substantially, lay yet including superior ecclesiastics like the Bishop of Dunkeld who was criticised by the Assembly for his complicity in the passing of the Act[127]. Thereby the Church in Scotland was brought into line with its Continental counterparts.

The Act is capable of application by virtue of desertion of husband or wife, like the Genevan Ordinance. The defence of reasonable cause is allowed under the act therefore where a woman leaves her husband

because of saevitia she is excused this desertion.

The period of desertion which qualified the innocent party for an application for divorce was four years. Two recorded cases before the ecclesiastical courts contain longer periods of desertion in Thornton v. Allan (1604)[128] the period of desertion was years, in the later case of John Philpe (1610)[129] 24 years desertion annulled the marriage, both in contradistinction to the one year period required in Geneva. It is worth noticing that the desertion must have been wilful and not merely absence for commercial or other purposes. Thus absence for a very long period will not qualify for the purposes of the Act unless there was a wilful or malicious element in the desertion. Stair mentions this distinction and points to the jus mariti of the husband fixing the matrimonial domicile as supplying the answer to a vexatious wife[130].

The desertion was required to be judicially declared following upon an action for adherence before the Judge Ordinar later said to be the Court of Session. The decree of adherence should be granted unless there was some reason for separation.

If the decree was granted and ignored the innocent party could obtain Letters in the four forms from the Court of Session compelling the defender to adhere. Letters in the four forms were a form of diligence possibly originating in the Literae formatae of the Canon law[131] which are discussed both by Craig[132] and Stair[133].

By Stair's time only two Letters remained in use, those of horning or outlawry and caption but during Craig's era the first and second

Letters of charge respectively without and with certification of horning were competent.

The ecclesiastical power was involved firstly, by 'privie admonitiounis' then by more direct measures in the event of contemptuous disobedience. The Superior ecclesiastics were empowered by the Act to direct charges to the minister of the offender's parish or if it was vacant or the minister did not execute it, the charge could have been directed to neighbouring compliant ministers. This again enforces the theory that there were conservative elements in the Church which did not approve of the Act. Public admonitions were then issued and completed by excommunication which reputed the offender as a dead member of the church, as in adultery[134].

The consequence of this procedure is stated by the Act to allow a sufficient cause of divorce. However in strict ecclesiastical theory the innocent party was as in the cases of decrees in respect of adultery in the shoes of a widow or widower and thereby fit to marry.

The normal matrimonial consequences of dissolution were mentioned for the avoidance of doubt.

A point to notice in the jurisdiction used in the Act, the Judge Ordinar is stated to be the person before whom the action for adherence should be brought. This was despite the later indications in the Act later declared to be the inferior Commissary. The action for divorce, of course, remained competent only at the Commissary Court.

NOTES

1 Hay, 117

2 Hay, 39

3 Matt, 19, 6

4 Matt, 10, 11

5 Luke, 16, 18

6 1, Cor, 7, 10

7 Hay, 39-45

8 Session 24, Pr, Canons and Decrees of the Council of Trent, 180

9 See farther De Smet 312-315; C7, X, III, 32

10 Hay, 61

11 Hay, 61

12 Matt, 19, 9

13 C.4, 5, X, 4, 19

14 A.P.S. 1551 II 486, c12

15 Liber Officialis, 164

16 Liber Officialis, 51, 107, 118, 140

17 Liber Officialis 1, 54, 93, 111, 128, 147, 148, 164

18 Hay, 61, C4, X, IV, 19

19 Hay, 63

20 Hay, 63 D.G. C.32, 1, 4, 5, et seq

21 In IV Sent D. 35, 1, 3

22 In IV Sent D. 33, 1, 4

23 Hay, 65

24 Hay, 81

25 C.7, X, IV, 19; Hay, 83

26 D.G. C.32, 1, 1, et sq

27 D.G. C.28, 1, 1

28 Hay, 69

29 Helmholz, Marriage litigation in Medieval England passim

30 Liber Officialis, 149

31 C.13, X, 11, 13

32 C.1, X, IV, 18; Hay, 69

33 Balfour, 99, C. VII

34 Acts of the Lords of Council XIV fo 58

35 Balfour, li

36 Craig, Jus Feudale 2, 18, 18

37 Stair I, 4, 7

38 Commissary Court Records 8.6.1697

39 Cameron, 196

40 Stair 1, 4, 7

41 Mark, 10, 2-12

42 T. Beza, Tractatus de repudiis

43 Murray & Livingstone (1576) Mor

44 Leviticus 20, 10; Deut. 20, 22

45 Hay, 101-103

46 Cameron 197

47 D.B. Smith, "The Reformers & Divorce" S.H.R. 9, (1911) 101

48 This work is not concerned with the penal aspects

49 RStAKS, 18

50 RStAKS (Maitland) 237

51 RStAKS (Maitland) 248

52 Clerk v. Scherez RStAKS 60, (Maitland) 257

53 Cameron, 197

54 RStAKS i, 77; (Maitland) 270

55 RStAKS 139, (Maitland) 293

56 RStAKS 140, (Maitland) 294

57 B.U.K. 1, 4, 7, 1562

58 J. Calvin, Institutes 4, 0, 37

59 1563 II 539, C10

60 Buik of the Kirk of the Canongait (S.R.S.) 9

61 Buik of the Kirk of the Canongait (S.R.S.) 55

62 Buik of the Kirk of the Canongait (S.R.S.) 12

63 Kyd v. Christie, Kirk Session Records of Aberdeen 13, William Seaton, Presbytery Records of Aberdeen, 164.

64 1581 II, 213, c.7

65 1592 III 543, c11

66 B.U.K. ii 5.6.1570

67 Synod of Lothian and Tweedddale (Stair Society) 11;165

68 Kirk Session Register of Perth, 242

69 Kirk Session Register of Aberdeen 11, 13

70 Presbytery Records of Aberdeen, 165

71 Presbytery Records of Inverness 330, 337

72 Synod Records of Lothian and Tweeddale, 2, 4, 5, 22, 24, 26 et seq

73 Synod of Lothian & Tweeddale, 2

74 Synod of Lothian & Tweeddale, 4

75 Synod of Lothian & Tweeddale, 49

76 Synod of Lothian & Tweeddale, 243

77 Synod of Lothian & Tweeddale, 22

78 Synod of Lothian & Tweeddale, 34

79 Synod of Lothian & Tweeddale, 79

80 Synod of Lothian & Tweeddale, 181

81 Synod of Lothian & Tweeddale, 206

82 Synod of Lothian & Tweeddale, 243

83 Synod of Lothian & Tweeddale, 136

84 Synod of Lothian & Tweeddale, 97

85 Kirk Session Register of Humbie, 444

86 Kirk Session Register of Humbie 444, Presbytery Register of Glasgow, 56

87 Cameron, 197-8

88 B.U.K. i, 91

89 B.U.K. i, 98

90 1592 III 543 C.11

91 Mark 10, 11

92 See infra

93 Commissary Court Records 1, 7, 1565

94 Riddell, Peerage Law 390

95 B.U.K. i, 171

96 B.U.K. iii 953

97 1600, IV, 233, c.29

98 (1670) Mor

99 Commissary Court Records 5.12.1601

100 1644, VI pt 1 c.184, 194

101 1644, VI pt 1, c.200, 199

102 1646, VI C 167, 54, 1552

103 1647, VI, c 341, 1763

104 Stair, 1, 4, 7

105 Except in relation to property rights, I, 4, 20

106 Stair, I, 4, 7

107 1690, IX, C1, 117

108 Logan v. Wood (1561) Mor

109 1, Cor, 7, 10-15

110 Stair, 1, 4, 8

111 Cameron, 196

112 RStAKS, i, 150

113 RStAKS, ii, 684

114 1525, II, 2936

115 Lombard, IV, Sent D. 27.2

116 Stair, 1, 4, 10

117 B.U.K. 1.80

118 Who probably been exposed to such concepts during his time as a student in Paris

119 B.U.K, ii, 262

120 1573 II, 81 C.1

121 D.B. Smith 'A note on Divorce for Desertion' J.R. 255

122 Riddell, I, 547

123 Fraser, Husband & Wife, I, 677

124 1689 IX, 38-39

126 Dickens, Reformation and Society in 16th Century Europe, 174

127 B.U.K. i, 270

128 Synod Records of Aberdeen, 26

129 Presbytery Records of Glasgow (Maitland) 417

130 Stair, 1, 4, 8

131 General Orders see Le Clerc, D.A.C.L.

132 Jus Feudale 3, 2, 4

133 Stair, 4, 47, 2

134 Cameron, 197

135 Instruction to Commissaries 1666, s2, Fergusson Consistorial Law, 175, 392

CONCLUSION

The foregoing analysis of the effects of the Reformation with regard to the law of Husband and Wife attempted to portray in as comprehensive a way as possible, the ways in which the events of the early 1560's altered the law and how the structures of the Law, Parliament and the Courts reacted to those changes.

Much could be written by way of linguistic disputation upon the use and meaning of the word 'Reformation'.

It has been argued that the Reformation in reality has its legal date as at the 7th March, 1559_1. Other writers could argue that the efforts of the last Catholic Synod before the triumph of the Protestant party was itself a "Reformation"$_2$.

On the other hand, the termination date of the Reformation could be equally vexatious. Was it accomplished with the Ratifications of 1567_3, the Act authorising Presbyterian Government in 1592_4 or only with Establishment and the Confession of Faith in 1690_5?

The date of the Reformation as occurring during August 1560 is however convenient because the Acts of the Reformation Parliament display what the aspirations of the Reformers were. They did not have, any more than any other visionaries, a particularly accurate insight into the future and could not have been aware that their actions would, one day, attract retrospective validity. It is also the case that the

reactions of the Queen, the Church and Parliament were all tailored to reply to the events of August 1560 and can only have logic if viewed in such a way.

There is however some difficulty in ascertaining the extent to which the Reformation as a declared and unitary event had influence on the law of husband and wife. It is probably the case that Reformed religion as a long term and continuing influence had an effect quite distinct from the Reformation itself. In other words the Reformation was causa causans in respect of some changes or amendments to the law whereas in respect of other changes it was a causa sine qua non.

At times the evaluation of the effect of the Reformation must be arbitrary, however, there are those amendments or changes in the law from which the Reformation was too distant or remote in causual terms to have had an effect.

The effects of the Reformation on the law of husband and wife, as has been noted were of both an adjective and substantive character.

The changes in the adjective Law were in some ways the most far-reaching, from certainty to flux, from order to confusion, from spiritual to secular. There was a fundamental restructuring of the judicial system.

The scheme of superintendents courts or kirk sessions and the interim measures of the Privy Council and Court of Session could only be, not expectedly, an attendant ill of a time of Reformation and Revolution. Litigants must have for some time been wary of proceeding to a court,

particularly if that court was so linked to a religious or political framework as to fail to provide a fount of equity. The courts themselves must have suffered a crisis of confidence, operating as they were without established secular or ecclesiastical authority, in a milieu which reeked of the old regieme even down to the procedure followed in these consistories.

The temporal creation, the Commissary Court was a judicial expression of the triumph not of Protestantism, but of secularism. It represents a final wresting from the grasp of the Church of a jurisdiction long sought by Royal authority.

Notwithstanding that the courts of the new ecclesiastical order being of a fundamentally different organisation and structure and that the Commissary Court was also a novel creation, it is noticeable that the procedure followed in both species of court was similar in many respects to that of the canonical court.

There are probably many reasons why the procedure stands out as the great lacuna in the Reformed scheme, and appears so resistant to change. Firstly, the innate conservatism of the lawyers who helped to create these new judicial structures, men like Henry Sinclair and John Row and that of the administrators appointed to work within the new scheme, James Balfour, Edward Henryson and Clement Little, was in no small part responsible for the survival of canonical procedure into the Reformed epoch.

Secondly, the procedural provisions of the Canon law offered rules of the least affront to those of the Reformed tradition, containing as

they did little which was contentious. It was also patent to the Reformers that the canonical system of procedure was efficacious and had as its objective the discovery of truth, an end with which the Reformers could not find fault.

The major effects of the Reformation on the substantive law can by and large be recognised without grave difficulty. The primary effect was the removal of Papal authority and the consequent denial of some aspects of Catholic theology and the dependent Canon law. For example the sacramentality of marriage was denied as a consequence of Reformed doctrine and therefore the twin effects of dissolubility and secular jurisdiction found an opportunity to hold sway.

In being separated from the Catholic tradition and the reforms of the Council of Trent the Reformers could not take advantage of the decree 'Tametsi' and accordingly had to struggle for some time with the problem of clandestinity eventually having to realise that the evil could not be abated without a similar legislation to that of Trent, and so the possibility of the creation of a valid marriage by the simple exchange of consents de praesenti survived in the civil law of Scotland along with the possibility of creating a valid marriage by promise subsequente copula, until 1 July, 1940[6]. Indeed the problem of clandestinity was only laid to rest with the nineteenth century legislation on the topic[7].

The essentials of marriage remained substantially unaltered by the Reformation. The consent of the parties, freely given was the keystone of both systems. There was some adjustment with regard to the scheme of impediments particularly those deemed to be merely of

ecclesiastical or human invention. The scriptural fundamentalism of the Reformers enabled them to re-define many impediments within their own sphere of reference as influenced by the Continental theoreticians Jean Calvin, Martin Bucer and Theodore Beza. The twofold scheme of impediments to valid marriage underwent some revision particularly the diriment impediments of relationship, or propinquity, spiritual relationship and adultery. Nonage emerged as a specific impediment and impotence retained its character as an impediment and as a condition precedent. Impotence only changed its character to that of a resolutive condition during the 20th Century.

The regulation of relations stante matrimonio remained substantially unaltered by the Reformation. The position of women and the attitude of a patriarchal society towards women did not change as a result of religious change. It was apparently more important for a woman to associate herself with her former clan, by retaining the use of her maiden surname than it was for her to adopt the relatively recent English heraldic import of taking her husband's name. Marriage represented in both pre and post Reformation epochs the great exception to Maine's theory of the progression from status to contract, it represented a regression from contract to status, which mutation was, for the woman at least, a species of capitis deminutio.

The scheme of property, the jus mariti and jus administrationis, the institutions of dower, dowry, terce, courtesy, donatio propter nuptias, dos and morrowing gift all remained unaffected by the Reformation except in so far as the new grounds of dissolution of marriage provided fresh occasions for the restitution of these forms of gift whence they came. Even this however fitted into the accepted

pre-reformation scheme where return of gifts had always followed upon the nullity of a marriage. The Reformation seemingly also had little impact on the law of obligations of the husband and the wife either inter se or in relation to third parties.

The real apparent change which occurred in the law of husband and wife as a result of the Reformation was the apparent introduction of grounds for the dissolution of the marriage bond other than by death, or nullity and the diminution in the importance of divortium a mensa et thoro as the major relief for matrimonial distress.

The indissolubility of Christian marriage was a value, the importance and necessity of which both the Catholic and Reformed traditions recognised. It was clearly shown in the Catholic tradition that a marriage could only be dissolved upon a declaration that it had been contracted in face of a diriment impediment and was, consequently a non-marriage, a total nullity. Parties who obtained such a decree of nullity were entitled to remarry. If however no such inherent nullity existed and a match was for one reason or another unsatisfactory or dangerous to one or both parties then the appropriate remedy was divortium a mensa et thoro, separation from board and bed, the marriage bond however remained unaltered by such a decree and remarriage was not possible without incurring the diriment impediment of ligamen or prior marriage.

The Reformed attitude to marriage was, as has been noticed, in some fundamental respects very different to that of the Catholic tradition. The denial of sacramentality, coupled with a scriptural fundamentalism and a humanist outlook enabled the Reformers to contemplate upon

divortium a vinculo matrimonii for adultery and for desertion. In order, however, to reconcile such a concept with the received theory of indissolubility which was itself supported by the same scriptural fundamentalism resort was had to a legal fiction in order to produce the required logical synthesis. The legal fiction adopted was of course the civil and ecclesiastical death of the adulterer. This development of a concept of divorce did not of course occur all at once, or on the heels of the Reformation. It was if anything a staged acceptance of the concept. There is evidence that divorce for desertion was not envisaged by the Reformers nor even sought by them.

Whilst scriptural authority could be found for divorce for adultery, even if the interpretation of that authority was open to disputation, there was no scriptural authority for divorce for desertion. The concept is not mentioned in the First Book of Discipline and it may be that the personal opposition of John Knox delayed action being taken to bring divorce for desertion into law. It certainly appears that those powers who desired such legislation seem to have waited until death had silenced the great motivator of the Reformation in Scotland.

It is important to notice that the divorce proceedings only proceeded upon the civil and ecclesiastical death of the wrongdoer. This fiction enabled the Reformers to grant a divorce with permission to the innocent party to remarry almost as it were on the ground of presumed death.

In that sense until the position was regulated by statute in the nineteenth and twentieth centuries the concept of divorce was based upon a technicality which was difficult to appreciate and was, perhaps

only the payment of lip service to form[8].

The Reformation then affected most of the areas of the law of husband and wife. It permitted the secularisation of law in the long term by breaking the immediate influence of the Roman Catholic Church. Canon law, of course, survived and was used by reformed Consistories, the Court of Session and the Commissary Court. Its influence ran too deep and it was in many respects an equitable and useful system of norms. But no longer were the canons and decreets of Rome noticed and development continued apace at home drawing increasingly on Roman Law and pre-tridentine Canon Law, and on other Continental influences from Holland and Nothern France. The net effect of the Reformation was to place jurisdiction and legislative power in the area of husband and wife in the possession of the Civil Sword.

Like all systems of moral norms the Canon law of the Catholic Church and the law of the Reformed Kirk could only in the final analysis appeal to the better senses of the congregation of the faithful. Without the sanctions of the municipal power these norms became matters of personal conscience. Canonical laws will provide a framework of precepts for a received and perceived version of a worthwhile Christian life but the onus is on the individual to follow these precepts.

For some time the Reformation caused the people and the institutions of the Church to seek a remedy and forgiveness for their faults. If nothing else the Reformation both Catholic and Protestant, in placing into the secular government's hands the administration and regulation of matters which, whilst they were in the medieval and to a certain

extent are in the modern mind part of the law of husband and wife, but had and have in morality little to do with the development in a Christian and moral sense of the relationship between husband and wife, thus perhaps pointed the way to a truer understanding of this vitally important religious, moral and social institution.

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3 1367 c.16, III, 26, Balf 196

4 A.P.S. iii 541-2

5 A.P.S. ix 196-7

6 Marriage (Sc) Act 1939, s.5

7 Marriage Notice (Sc) Act 1878

8 See now Divorce (Sc) Act 1976 whereby the ground of divorce is the irretrievable breakdown of the marriage.

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