STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW

NATIONAL REPORT
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SCOTLAND

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INTRODUCTION

The object of this Report is to explain, with suitable citation of authority, the domestic and conflicts rules of Scots law on the property of married and unmarried parties, and associated topics.

Much of the Report comprises matters in respect of which the law can be stated with confidence; at times, we have been conscious that the questions posed are not especially, or at all, applicable to our system; in some areas, mainly in Chapter 4, law and policy must be regarded as uncertain, but where this is so, the language of the Report makes this clear.

Our view is that conflict of laws regulation of unmarried partnerships is redolent of difficulty, which is not to say that we have not enjoyed attempting to address the difficulties.

This is a joint work, to the entirety of which we each subscribe. We acknowledge with thanks the assistance given to us in the preparation of this Report by Marion A MacInnes, Honours Student, School of Law, University of Glasgow.

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CHAPTER 1

MATRIMONIAL PROPERTY. INTERNAL LAW

1.1 GENERAL ISSUES

1.1.1 Sources

1.1.1.1 General legislative sources

There is no general statute narrating in full the legal consequences of marriage.

Several statutes, however, deal chiefly or incidentally with particular proprietary effects of marriage. Relevant statutes include:
- Married Women’s Policies of Assurance (Scotland) Act 1880 (as amended);
- Succession (Scotland) Act 1964;
- Matrimonial Homes (Family Protection) (Scotland) Act 1981; and
- Family Law (Scotland) Act 1985

1.1.1.2 Court decisions and customary law

Cases which are illustrative of particular obligations arising from the marital relationship will be cited in paragraph 1.2, below.

1.1.1.3 Any law reforms

Reforms proposed in relation to particular obligations arising from the marital relationship will be outlined in paragraph 1.2, below.

1.1.2 Historic development

1.1.2.1 Stages of historic development

A leading textbook of the nineteenth century describes the early situation in Scots law as being one of communion of all the moveable property of the spouses, subject to the administration thereof by the husband alone, as dignior persona. The fund “doth resolve into an equality”, but the Institutional (source) writers of Scots law had difficulty denying that the right of ‘sole and unaccountable administration’ was not rather a power of property. The husband might use the fund at his discretion, and it was subject to his creditors’ claims. In desertion and cohabitation, her capital, earnings and savings became his to dispose of, and on his bankruptcy, passed to his creditors. It was a dowry, in effect. The only exceptions to the transfer were the paraphernalia (extra-dotem: things pertaining to the wife’s ‘world’ – of clothing, jewels [provided they were not heirlooms] and receptacles for these) and the peculium (money given by the husband for the purchase by the wife of a gown). In addition, the wife was entitled to ‘alimentary’ (maintenance) provision made ante-nuptially by her husband and thereby free from creditors, or by a third party. (Non-paraphernal gifts by husband to wife during marriage were revocable; and attachable by creditors.)

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1 FRASER, Husband and Wife According to the Law of Scotland 2nd ed. (1876-78) I, 648.
2 STAIR, Institutions of the Law of Scotland (1693), 1.4.9.
3 Fraser v. Walker (1872) 10 Macph. 837.
However, as time went on, it became clear that the *jus mariti* could be excluded by contract, and this was effective against creditors.

The heritable (immoveable) property of the wife remained her property, but all acts of administration with regard to the property required the husband’s consent *jure administrationis*.

Where the *jus mariti* had been excluded by contract, the *jus administrationis* arose *quoad* the wife’s moveable property, but the wife (though she required her husband’s consent for all acts of management) could insist that all her property be applied ‘for her own behoof’. By 1745, it was accepted that by agreement the *jus administrationis* could also be excluded. There would then be a reciprocal obligation on the spouses to maintain each other, the family and to meet the household expenses. However, in the general case, throughout most of the nineteenth century, married women remained under the curatory of their husbands, and could not perform legal acts alone. They had neither freedom nor liability.

Statutory reform began in 1855 with the abolition of the claim by representatives of a predeceasing wife to her share of the goods ‘in communion’. The incidence of resort to marriage-contract revealed the deficiencies in the law, and gradually, by Acts of 1861, 1874 and 1877, the ambit of the *jus mariti* was reduced. By the Married Women’s Property (Scotland) Act 1877, the husband’s liability for the wife’s ante-nuptial debts was limited to the property received from her before or at marriage. By the Married Women’s Property (Scotland) Act 1881, section 1(1), the wife’s whole moveable estate acquired before or after marriage, was to vest separately in her, and was not subject to the *jus mariti*. provided the husband was domiciled in Scotland, and the marriage took place after 18 July 1881. The final step was taken by the Married Women’s Property (Scotland) Act 1920, which abolished the right of administration. A wife thereafter has full capacity to sue and be sued, and is fully liable for her debts. Gifts between husband and wife by section 5 of the 1920 Act became irrevocable, except upon the sequestration of the donor within a year and a day of the gift, in which event it was revocable by the donor’s creditors.

Before 1964, a surviving widow or widower enjoyed legal rights (‘terce’ and ‘courtesy,’ respectively) in the heritable (immoveable) estate of the predeceaser, in the form of a right to one third of the income thereof. This was exigible also on divorce, provided the claimant was the innocent party and the ground of the divorce was not insanity. But legal rights in heritate were abolished by the Succession (Scotland) Act 1964, section 10(1) in respect of deaths occurring after 10 September 1964.

1.1.2.2 Actual situation

There was created by 1920, therefore, a system of separation of property. This has continued to be the Scots system, subject to minor amendment, which, in

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5 Fraser, *op.cit.* I, 797.
6 *Dalrymple v. Murray* (1745) M. 5842.
7 The claim which gave rise to the litigation *sub nom. Lashley v. Hog* (1804), *q.v.* paragraph 2.1.3.1, below.
8 See now Family Law (Scotland) Act 1985, section 28.
9 *E.g.* Married Women’s Property Act 1964 (superseded by Family Law (Scotland) Act 1985, section 26, to the same effect): savings made by wife from a housekeeping allowance provided by the husband to be shared equally between them (held to include shares in prize money where the stake money was averred to have come from the allowance: *Pyatt v. Pyatt* 1966 S.L.T. (Notes) 73). (Chapter 1, n. 43). Law Reform (Husband and Wife) (Scotland) Act 1984, section 7 abolished a husband’s liability for ante-nuptial debts of the wife, and the presumption that in domestic matters the wife was the husband’s
summary, may be described as one of separation of property, with compensation in capital upon the death of the predeceaser, and opportunity for capital and income compensation or redistribution upon divorce, all as described below.

1.1.3 Primary regime: fundamental rights and duties of spouses
This Report is confined to the proprietary consequences of marriage. The principal proprietary consequences of marriage relate to: - Aliment (Family Law (Scotland) Act 1985);
Ownership of property (Family Law (Scotland) Act 1985, section 24);
Particularities of ownership of moveable property – household goods (Family Law (Scotland) Act 1985, section 25);
Particularities of ownership of moveable property – housekeeping allowance (Family Law (Scotland) Act 1985, section 26);
Life insurance policies (Married Women’s Policies of Assurance (Scotland) Act 1880);
Ownership of heritable property, including the matrimonial home (Matrimonial Homes (Family Protection) (Scotland) Act 1981); and
Testate and intestate succession (Succession (Scotland) Act 1964).
A more detailed commentary is provided at paragraph 1.2.1.1, below.

1.1.4 Secondary regimes
1.1.4.1 Special rules on matrimonial property regimes
There are no special rules in internal Scots law regarding matrimonial property regimes.

1.1.4.2 Notion of matrimonial property regimes
Since internal Scots law applies a general rule of separation of property, this paragraph is not applicable.

1.1.4.3 Legal matrimonial property regime
It is not common practice for married couples in Scotland to enter into a marriage-contract.

Unless a marriage-contract has been entered into, Scots law applies a general rule of separation of property, subject only to the particular exceptions detailed in paragraph 1.1.3, above. The ‘default’ position, therefore, comprises a ‘system’ of separation, but it is artificial to describe the relevant area of Scots law in this way.

1.1.4.4 Marriage-contracts
Historically, marriage-contracts (usually ante-nuptial, but also less commonly, post-nuptial) were used, but only where family wealth existed in order to modify the proprietary effects of marriage.

By reason of changes to the general law of (matrimonial) property, and the proprietary consequences of marriage, marriage-contracts, though perfectly competent, are now seldom used.9

agent with authority to pledge her husband’s credit for goods of suitable quality for (his) household. But see modern position: paragraph 1.2.1.1.2, below. By section 4 of the 1984 Act any rule of law entitling a husband to determine the location of the matrimonial home ceased to have effect.

9 Professor Clive also attributes the declining use of marriage-contracts to changing social attitudes. (CLIVE, E M, The Law of Husband and Wife in Scotland, 4th ed. (1997), paragraph 17.007)
Parties might possibly enter into a marriage-contract, intending (or at least hoping) that it should operate in the event of separation or divorce. Professor Clive has advised that “Marriage contracts … have never been regarded as contrary to public policy in Scotland.”

Whilst the courts are not opposed, in principle, to the exercise of party autonomy regarding financial provision upon separation or divorce, in terms of the Family Law (Scotland) Act 1985 (the ‘1985 Act’), either spouse may apply to the court for an order setting aside or varying any term in an ante-nuptial or post-nuptial marriage settlement. In particular, it should be borne in mind that it is expressly stated that any provision in an agreement (or unilateral voluntary obligation) which purports to exclude future liability for aliment, or to restrict any right to bring an action for aliment, shall have no effect unless the provision was fair and reasonable in all the circumstances of the agreement at the time it was entered into. Any court order for financial provision will be made if it is justified by the principles laid down in section 9 of the 1985 Act, and only if it is reasonable having regard to the resources of the parties.

In terms of section 16 of the 1985 Act, where the parties have entered into an agreement as to financial provision to be made on divorce, the court may make an order varying or setting aside (a) any term thereof relating to a periodical allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or (b) the agreement or any term thereof, where the agreement was not fair and reasonable at the time it was entered into. But, if the agreement is deemed fair and reasonable, the court will not intervene.

1.1.4.5 Specific matrimonial property regimes

Since internal Scots law applies a general rule of separation of property, this paragraph is not applicable.

1.1.4.6 Changeability of regime

Where the parties do not enter into a marriage-contract, their proprietary rights and obligations are subject to the provisions of internal Scots law, from time to time, including any transitional measures.

Parties who entered into an ante-nuptial marriage-contract may, by mutual agreement, discharge/waive their proprietary rights and obligations thereunder at any time following the marriage. In the event of rights having vested under the marriage-contract, parties are free to equalise or redistribute their assets by means of ordinary conveyance.

It is competent for a married couple to enter into a post-nuptial agreement, thereby modifying the rules of internal law generally applicable.

Any ante-nuptial or post-nuptial agreement will, however, be subject to the tests outlined in paragraph 1.1.4.4, above.

1.1.4.7 Particularities of the national system

None, save for those already mentioned.

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10 Clive, op.cit., paragraph 17.012. Cf. paragraph 2.1.2.2.3 below.
11 1985 Act, sections 8(1)(c) and 14(2)(h).
12 1985 Act, section 7(5).
13 1985 Act, section 7(1).
14 1985 Act, section 8(2).
1.2 TYPES OF REGIME

1.2.1 Comments as to the primary regime

1.2.1.1 Law regulating fundamental rights and duties of spouses

The principal proprietary consequences of marriage are as follows:

1.2.1.1.1 Aliment

In terms of the Family Law (Scotland) Act 1985, an obligation of aliment is owed by (a) a husband to his wife, and (b) a wife to her husband.\(^\text{15}\) It is expressly stated that ‘husband’ and ‘wife’ include the parties to a valid polygamous marriage.\(^\text{16}\)

An obligation of aliment is “an obligation to provide such support as is reasonable in the circumstances”,\(^\text{17}\) having regard to the following matters, \(\textit{viz}.:\) (a) the needs and resources of the parties; (b) the earning capacities of the parties; and (c) generally to all the circumstances of the case,\(^\text{18}\) including any support, financial or otherwise, given by the defender to any person whom s/he maintains as a dependant in her/his household, whether or not the defender owes an obligation of aliment to that person.\(^\text{19}\) The conduct of the parties is not a relevant consideration, save in cases where “it would be manifestly inequitable to leave it out of account.”\(^\text{20}\)

A claim for aliment may be made independently in the Court of Session or the sheriff court or, alternatively, may be combined with, or incidental to, any proceedings for, \textit{inter alia}, divorce, separation, or declarator of marriage.\(^\text{21}\)

Defences to an action for aliment include the fact that the defender is making an offer, which it is reasonable to expect the claimant to accept, to receive the claimant into his/her household.\(^\text{22}\)

In an action for aliment, the court may order the making of periodical payments, for a definite or indefinite period, or the making of occasional alimentary payments, but not the payment of a lump sum.\(^\text{23}\) Any decree of aliment may be varied or recalled by court order in the event of a material change of circumstances.\(^\text{24}\)

It is expressly stated that any provision in an agreement (or unilateral voluntary obligation\(^\text{25}\)) which purports to exclude future liability for aliment, or to restrict any right to bring an action for aliment, shall have no effect unless the provision was fair and reasonable in all the circumstances of the agreement at the time it was entered into.\(^\text{26}\)

Where a person has entered into an agreement to pay aliment to another person, an application may be made to the court, by payer or payee, upon a material change of circumstances, seeking variation of the amount payable.\(^\text{27}\)

\(^{15}\) Family Law (Scotland) Act 1985 (the ‘1985 Act’), section 1(1).

\(^{16}\) 1985 Act, section 1(5).

\(^{17}\) 1985 Act, section 1(2).

\(^{18}\) 1985 Act, section 4(1).

\(^{19}\) 1985 Act, section 4(3)(a).

\(^{20}\) 1985 Act, section 4(3)(b).

\(^{21}\) 1985 Act, section 2.

\(^{22}\) 1985 Act, section 2(8).

\(^{23}\) 1985 Act, section 3.

\(^{24}\) 1985 Act, section 5(1).

\(^{25}\) 1985 Act, section 7(5).

\(^{26}\) 1985 Act, section 7(1).

\(^{27}\) 1985 Act, section 7(2).
1.2.1.1.2

Contractual Obligations
Marriage *per se* has no effect upon the contractual liability of individuals.
Save for the particular case of alimentary debts outlined below, neither spouse, merely by virtue of the marriage, shall be liable for the contractual obligations of the other; 28 general principles of agency apply.
One spouse may be liable for alimentary debts contracted by the other: “a spouse who is entitled to be alimented by the other spouse, but who is not being alimented, 29 can pledge the other spouse’s credit for necessaries.” 30

1.2.1.1.3

Delictual Obligations
Marriage *per se* has no effect upon the delictual liability of individuals.
There is no interspousal immunity from delictual liability. 31
Neither spouse, merely by virtue of marriage, may be held liable for the delictual acts or omissions of the other.
The fact of marriage may substantiate recovery of damages by an injured spouse under additional heads of loss. 32
Marital infidelity, *per se*, no longer gives rise to delictual liability. 33

1.2.1.1.4

Property
Scots law applies a general rule of separation of property.
It is expressly stated that marriage, *per se*, shall not affect the respective rights of the parties to a marriage in relation to their property. 34 (save in relation to the law of succession). 35 “During the marriage the spouses own, administer, acquire and transfer property just as if they were unmarried.” 36

1.2.1.1.5

Moveable property – presumption of equal shares in household goods
Section 25 of the Family Law (Scotland) Act 1985 deals expressly with the ownership of household goods, that is, “any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home 37 for the joint domestic purposes 38 of the parties to the marriage, other than – (a)

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29 Credit cannot be pledged where adequate aliment is being paid: Stair, *op.cit.*, 1.4.16; *McMullan v. Kerr* (1900) 16 Sh.Ct.Rep. 108.
30 Clive, *op.cit.*, paragraph 13.007.
31 Law Reform (Husband and Wife) Act 1961, section 2(1) (except where, in the view of the court, no substantial benefit would accrue to either party from the continuance of the action) (section 2(2).
32 E.g. In respect of ‘necessary services’ rendered to the victim by his/her spouse, and ‘personal services’ hitherto rendered by the victim to his/her spouse. Administration of Justice Act 1982, sections 8 and 9.
33 Divorce (Scotland) Act 1976, section 10.
34 1985 Act, section 24(1).
35 1985 Act, section 24(2).
37 For definition of ‘matrimonial home’, see paragraph 1.2.1.1.9 below.
38 The inclusion of the phrase ‘joint domestic purposes’ would exclude, for example, tools or equipment kept or used by one spouse for the purposes of his/her trade or profession.
money or securities; (b) any motor car, caravan or other road vehicle; (c) any domestic animal.”

It is presumed (rebuttable) that each spouse has a right to an equal share in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party. 39

The presumption cannot be rebutted by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone, or by both in unequal shares.40

In the case of assets which do not fall within the definition of ‘household goods’, general principles of property law apply.

Wedding presents (acquired by gift) do not fall within the section 25 presumption of equal ownership. The important factor is the intention of the donor; in the absence of proof of intention (express or inferred), there is a presumption of joint ownership.41

1.2.1.1.6

Moveable property – money and securities

Since money and securities are expressly excluded from the definition of household goods, ownership of these assets is regulated by general principles of property law.

Some difficulty may arise in relation to joint bank or building society accounts. Professor Clive has remarked that “the name or names in which an account stands will not be conclusive as to the ownership of the money in it.”42 The important question is, who contributed the funds? Where contributions have been made by one spouse only, it shall be presumed (in the absence of proof of donation) that the funds are owned by that spouse alone. Where contributions have been made by both spouses, it will be readily inferred that the funds are jointly (i.e. equally) owned.

Anecdotal ‘evidence’ suggests that many married couples in Scotland operate joint bank accounts.

1.2.1.1.7

Moveable property – presumption of equal shares in money/property derived from housekeeping allowance

It is presumed (rebuttable) that each spouse has a right to an equal share in any money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money. 45

1.2.1.1.8

Married Women’s Policies of Assurance (Scotland) Act 1880 46

39 1985 Act, section 25(1).
40 1985 Act, section 25(2).
41 Traill v. Traill 1925 S.L.T. (Sh.Ct.) 54; McDonald v. McDonald 1953 S.L.T. (Sh.Ct.) 36.
42 Clive, op.cit., paragraph 14.069.
43 See Pyatt v. Pyatt 1966 S.L.T. (Notes) 73, where football pools winnings which derived partly from application of the housekeeping savings, and partly from the wife’s gaming talent, were regarded as deriving from the housekeeping allowance. (note 8, above)
46 As amended by the Married Women’s Policies of Assurance (Scotland) (Amendment) Act 1980.
Section 2 of the 1880 Act enables a person to take out a policy of assurance on his/her own life for the benefit of his/her spouse in such a way that the policy is held in trust for the beneficiary as soon as it is effected, without (as is usually the case) the need for any delivery or intimation to the beneficiary.

‘Spouse’ includes a person, named in the policy as beneficiary, who later becomes the spouse of the person effecting the policy.

Professor Clive has explained that, “A policy does not need to state expressly that it is under the Act in order to come within its provisions. It is sufficient if it is ‘expressed on the face of it to be for the benefit of’ the beneficiaries named in section 2 or any of them.”

In the event of divorce, the court may grant an incidental order setting aside or varying any term in an antenuptial or postnuptial marriage settlement, which expressly includes a settlement by way of policy of assurance under section 2 of the 1880 Act.

1.2.1.1.9

Heritable property

As regards the ownership of heritable property, documentary title is conclusive.

The use of survivorship destinations (whereby title is taken in the joint names of H and W, and the survivor thereof) is common where a married couple purchases heritable property. A destination regulates the devolution of property upon the death of the predeceasing spouse; the effect of the device is automatically to transfer the predeceasing spouse’s one half share to the surviving spouse.

Where title to heritable property (other than the matrimonial home) is taken in the name of one spouse only, any question of recovery of contributions (financial or non-financial) made by the ‘non-entitled’ spouse towards such property would be determined according to principles of unjustified enrichment, rather than matrimonial property.

Matrimonial Homes (Family Protection) (Scotland) Act 1981


According to the SLC, the “basic policy objectives of the [1981] Act are to confer occupancy rights in the matrimonial home on the ‘non-entitled spouse’ who happens not to be the owner or tenant … and to provide increased protection against domestic violence.”

Definition of the matrimonial home

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47 Clive, op. cit., paragraph 14.114; Chrystal’s Trs. v. Chrystal 1912 S.C. 1003.
48 1985 Act, section 14(2)(h).
49 1985 Act, section 14(6).
50 Though in the event of financial provision on divorce, the making of contributions (financial or non-financial) by the non-entitled spouse may be taken into account under section 9(1)(b) of the 1985 Act. Cf paragraph 3.5.2.1.1, below.
51 Scot Law Com No 60 (1980).
The matrimonial home is “any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure but does not include a residence provided or made available by one spouse for that spouse to reside in, whether with any child of the family or not, separately from the other spouse.”

In 1992, the SLC recommended that it should be made clear that the term ‘matrimonial home’ does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not, separately from the other spouse. This recommendation has not been implemented. Therefore, doubt might be arise currently about whether a house gifted by the parent of one spouse for use by that spouse alone or with a child would attract protection as a matrimonial home since such a situation falls outside the strict terms of the Act. However, it is clear that the SLC would not so categorise such a house and there does not appear to have been any litigation on the point.

**Occupancy rights**

The 1981 Act confers occupancy rights (together with various incidental rights) on the non-entitled spouse.

Either spouse may apply to the court for an order declaring, enforcing, restricting, protecting, or regulating the exercise of, occupancy rights. In regulating the exercise of occupancy rights, the court has regard to the conduct of the spouses, the respective needs and financial resources of the spouses, the needs of any child of the family, the extent to which the home is used in connection with a trade, business or profession of either spouse, and whether the entitled spouse has made an offer to the non-entitled spouse of suitable alternative accommodation.

A non-entitled spouse may renounce his/her occupancy rights, but renunciation must be in writing, and its effect is limited to a particular matrimonial home.

**Dealings with third parties**

General protection of the non-entitled spouse is conferred by the inclusion of provisions against dealings (such as sale of the home) by the entitled spouse. The non-entitled spouse’s occupancy rights can continue to be exercised after such a dealing, and the third party acquiring the home or an interest therein is not entitled to occupy it. Accordingly, the third party dealing with the entitled spouse must ensure that no occupancy rights are extant, or that an appropriate consent or renunciation is

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53 Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 22.
55 Being the right, if in occupation, to continue to occupy the matrimonial home, and if not in occupation, to enter into and occupy the matrimonial home. (section 1(1))
56 1981 Act, section 2 (e.g. to make payment due in respect of rent or secured loan instalments, and to carry out essential repairs).
57 The ‘entitled spouse’ is that party entitled, or permitted by a third party, to occupy the matrimonial home, whereas the other spouse, the ‘non-entitled spouse’, is not so entitled or permitted. Section 13 of the 1981 Act extends its application to tenancies.
58 1981 Act, section 3.
59 1981 Act, section 3(3).
60 1981 Act, section 1(5).
61 1981 Act, section 6. The protection of occupancy rights applies also to leased property.
obtained. A *bona fide* third party purchaser is protected if the seller produces either an affidavit declaring that the subjects are not a matrimonial home in relation to which any spouse has occupancy rights, a renunciation of occupancy rights, or a consent to the dealing which bears to have been properly made or given by the non-entitled spouse. There is similar protection for heritable creditors.

Furthermore, the non-entitled spouse’s protection does not apply where the entitled spouse has permanently ceased to be entitled to occupy the matrimonial home, and at any time thereafter a continuous period of five years has elapsed during which the non-entitled spouse has not occupied the matrimonial home.

Section 7 of the 1981 Act enables a court to make an order dispensing with the consent of a non-entitled spouse to an actual or proposed dealing if, *inter alia*, the consent is being unreasonably withheld.

In 1992, the SLC made various recommendations, the most significant of which, for current purposes, are as follows:

Under section 6(1) of the 1981 Act, a person acquiring the home or an interest in it should not be affected by the occupancy rights of the spouse of a former owner (i.e. an owner prior to the person making the transfer to that acquirer) if the acquirer was (i) a transferee for value acting in good faith or (ii) someone who derives title from such a transferee.

The period referred to in section 6(3)(f) should be reduced from five years to two years.

A court should be able to dispense with consent to a proposed dealing under section 7, notwithstanding that no negotiations have yet been entered into or concluded, provided that the dispensation relates to a sale at not less than a specified price and within a specified period, or the grant of a heritable security for a loan of not more than a specified amount to be executed within a specified period.

The occupancy rights of a non-entitled spouse should terminate if the spouses have been separated for a continuous period of two years or more during which period the non-entitled spouse has not occupied the home.

In 1999, in *Improving Scottish Family Law*, the Scottish Office Home Department sought further responses to the 1992 SLC recommendations.

In 2000, the Scottish Executive indicated its intention to implement the 1992 recommendations relative to the matrimonial home. Draft legislation is not yet available.

*Exclusion orders, interdicts and powers of arrest*

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64 1981 Act, section 6(3)(f).
65 1981 Act, section 7(1).
70 1992 Report, recommendation 56.
The 1981 Act introduced various measures designed to offer protection against domestic violence, the most important being exclusion orders, and matrimonial interdicts with ancillary powers of arrest. In 1992, the SLC made several recommendations regarding these measures. Whilst the measures, and the substance of the recommendations (namely, improving protection from domestic violence) is not central to the subject matter of this Report, it is nevertheless relevant to note that, in 2000, the Scottish Executive endorsed the SLC recommendations, subject to the principle that, “... we must … intervene in family life and property rights no more than is necessary for the protection of the potential victim.” Draft legislation is not yet available.

1.2.1.1.10
Donation
The presumption against donation applies to transfers of property between spouses, but the presumption is more easily rebutted in the context of transfers between spouses, than between unmarried persons.

1.2.1.1.11
Succession
Marriage and divorce have no effect upon valid testamentary writings. The responsibility for changing the terms of the will after divorce rests, therefore, on the testator.

A consideration of the rules of testate and intestate succession is contained below at paragraph 1.6.2.

1.2.1.1.12
Taxation
Income Tax
The long established married couple’s allowance was withdrawn by the Finance Act 1999, for the tax year 2000-2001, and subsequent years of assessment, and substituted a children’s tax credit, with the aim of supporting families with children.

Where a husband and wife are living together, generally the income from assets held in joint names are treated as income to which they are entitled in equal proportions, and liable in like proportions for the tax thereon.

Capital Gains Tax

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75 1981 Act, sections 15 - 17.
77 Parents and Children, paragraph 3.9.
78 Parents and Children, paragraph 3.4.
80 WALTON, A Handbook of Husband and Wife According to the Law of Scotland, 3rd ed. (1951), p181. See paragraph 1.5.3.2 below.
81 Under Scots law, marriage does not have the effect of revoking an earlier made will (unlike the position, as we understand it in English law), but a will which makes no provision for children who may be born is presumed to be revoked by the birth of a child. The presumption is rebuttable. The right to found on it belongs only to the child (ren) after-born) Gloag and Henderson, op. cit., paragraph 45.08.
82 Income and Corporation Taxes Act 1988, section 282A.
Disposals between spouses are treated on a no gain/no loss basis. This benefit does not operate between cohabitants, and as far as spouses are concerned, the rule operates only so long as they are ‘living together’ at any time during the relevant tax year. The gains of each spouse are calculated separately and each is entitled to annual exemption.

**Inheritance Tax**

Generally, transfers between husband and wife are exempt from inheritance tax without any limit, both during lifetime and on death (and including settled property). There is, however, an exception as regards transfers by a UK-domiciled spouse to a non-UK domiciled spouse; in such cases, the exemption shall not exceed £55,000.

1.2.1.2 Obligations to contribute to household expenses

Save for the alimentary and contractual obligations outlined at paragraphs 1.2.1.1.1 and 1.2.1.1.2, above, spouses are under no obligation to contribute to household expenses. In this regard, however, note should also be taken of paragraphs 1.2.1.1.6 – 1.2.1.1.7, above.

1.2.1.3 Marital home

See paragraph 1.2.1.1.9, above.

1.2.1.4 Professional occupation

The professional occupation of spouses carries no significance under Scots law, save indirectly under particular provisions (e.g. Matrimonial Homes (Family Protection) (Scotland) Act, section 3 requires the court, in regulating occupancy rights in the matrimonial home, to have regard, *inter alia*, to the extent to which the matrimonial home, and furniture and plenishings, are used in connection with a trade, business or profession of either spouse; and Family Law (Scotland) Act 1985, sections 4(1)(b) and 11(3)(b) require the court to take into account the earning capacity of each spouse regarding the calculation of an award of aliment, and financial provision in divorce.).

1.2.1.5 Opening of bank accounts

See paragraph 1.2.1.1.6, above.

1.2.1.6 Representation by the spouses

General principles of the law of obligations and agency apply.

It is reiterated that one spouse may be liable for alimentary debts contracted by the other: “a spouse who is entitled to be alimented by the other spouse, but who is not being alimented, can pledge the other spouse’s credit for necessaries.”

1.2.1.7 Protection against acts of one spouse endangering family property

See paragraph 1.2.1.1.9, above, regarding dealings in respect of the matrimonial home by one spouse with a third party.

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83 Taxation of Chargeable Gains Act 1992, section 58.
85 Credit cannot be pledged where adequate aliment is being paid: Stair, *op.cit.*, I.4.16; *McMullan v. Kerr* (1900) 16 Sh.Ct.Rep. 108.
86 Clive, *op.cit.*, paragraph 13.007.
1.2.2 Matrimonial property regime provided by law (statutory regimes)

1.2.2.1 (Secondary) regime
There is no concept of secondary regime in internal Scots law.

1.2.2.2 Regime provided by law
Not applicable.

1.2.3 Marital settlements (contractual regimes)

1.2.3.1 Contents of matrimonial property regime
Parties who wish to enter into a marriage-contract are free to exercise complete autonomy regarding the terms and content of their agreement, subject always, however, to the setting aside or variation of any term, under the principles outlined at paragraph 1.1.4.4, above.

If parties should wish to import into their personal agreement the general rules or principles of a particular (foreign) regime (from time to time prevailing), the essential validity of that agreement (if the putative proper law were Scots) would still be subject to sections 8(1)(c), 14(2)(h) and 16 of the Family Law Act 1985 (see paragraph 1.1.4.4 above), at least as regards property in Scotland.

1.2.3.2 Marriage-contracts
In Scots internal law, there are no special rules regarding capacity to enter into a marriage-contract, the formal or essential validity of such a contract, or the interpretation thereof; general principles of the law of contract apply.

Many cases in this area are conflict cases arising between Scotland and England.\(^87\)

1.3 Change of Matrimonial Property Regimes

1.3.1 Principles

1.3.1.1 Changeability of regime during marriage
See paragraph 1.1.4.6, above.

The proprietary rights and obligations of spouses who have not entered into a marriage-contract are determined by the provisions, from time to time prevailing, of internal Scots law.

1.3.1.2 Justification
This is the natural corollary of a system of separation of property.

1.3.2 Modalities for change

1.3.2.1 Competent authorities
Insofar as is permitted by sections 8(1)(c) and 16 of the Family Law Act 1985, parties may enter into an ante-nuptial or post-nuptial agreement, thereby

\(^87\) See e.g. Chamberlain v. Napier (1880) 15 Ch. D. 614 (English law and Scots law found respectively to apply to different parts of the same deed), and generally remarks at paragraph 2.1.1.3.2.
displacing the general rule of separate property, and exceptions (outlined in paragraph 1.2.1.1, above) otherwise automatically applicable.

If parties are seeking to vary vested rights, it is likely that their contractual agreement or other document will require to be supported by an appropriate deed of conveyance.

1.3.2.2 Substantive and formal requirements

The formal and essential validity of any minute of agreement, revised minute, deed of discharge or variation of rights, and any formal conveyance supportive thereof, would be governed by general rules of contract and property.

1.4 **Publication of the regime**

1.4.1 **Principles**

Not applicable in the current situation of Scots law.

1.4.1.1 Possibility of publication

On enquiry, information *may* be had from the Books of Council and Session (in which any deed may be registered for preservation and execution), but generally there is no system of *mandatory* publication to third parties of private marriage-contracts, nor of the terms of divorce settlements.

1.4.1.2 Justification

The Scots rules are judged appropriate for a system of separation of matrimonial property. But modern legislation has disclosure mechanisms, as required in various areas (such as occupancy and third party rights in relation to the matrimonial home; and protection of creditors in the bankruptcy of a spouse), which are deemed adequate to protect parties to the marriage and strangers to it. 88

1.4.2 **Modalities for publication**

Parties have the option of registering deeds for preservation and execution in the Books of Council and Session, which are maintained by the Keeper of the Registers of Scotland.

1.4.2.1 Competent authorities

As *per* paragraph 1.4.2 above.

1.4.2.2 Substantive and formal requirements

Not applicable.

1.4.2.3 Publication of initial regime

Not applicable.

1.4.2.4 Publication of initial regime

Not applicable.

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88 See, *e.g.*, paragraphs 1.2.1.1.9 (heritable property), and 1.5.3.2 (gifts between spouses).
1.5 ADMINISTRATION OF ESTATES

1.5.1 Under the regime provided by law (statutory regime)

1.5.1.1 Management of property

There are no special rules governing the management of matrimonial property, except such as the court might care to impose, to regulate use and enjoyment of the matrimonial home.\(^{89}\)

Generally, however, normal rules of property law apply, subject to paragraph 1.2.1 above.

1.5.1.2 Intervention by spouses

As per paragraph 1.5.1.1 above.

Attention is directed to paragraphs 1.2.1.1.1 (aliment), 1.2.1.1.2 (contractual obligations) and 1.2.1.1.9 (dealings with third parties).

Combined action is only necessary where the parties are joint owners, in the normal way; and in those few areas of Scots law where a distinction is drawn between the property relations of spouses and the property relations of strangers (e.g. occupancy rights in the matrimonial home and liability for household debts).

1.5.2 Under marital settlements (contractual regimes)

Normal rules of property and obligations apply, save that the terms of any marital settlement are subject to sections 8, 14(2)(h) and 16 of the Family Law (Scotland) Act 1985. (paragraph 1.1.4.4 above)

1.5.2.1 Management of property

The court would give effect to the terms of the parties’ agreement, subject to amendment in terms of sections 8, 14(2)(h) and 16 of the Family Law (Scotland) Act 1985. (paragraph 1.1.4.4 above)

Where the contract is silent as to management issues, the normal rules of property apply.

The terms of the contract would be adhered to subject to any provisions judged mandatory in Scots law. The number of provisions which would be judged to be mandatory would be small: indeed, perhaps only the inalienable entitlement to aliment would meet the criterion. If a modern protective legislative provision can be renounced,\(^{90}\) then it can be argued that parties can contract out of it; the normal contractual rules of reduction for coercion would, of course, apply.

1.5.2.2 Intervention by spouses

The court will enforce the terms of the contract in matters requiring joint action, subject to sections 8, 14(2)(h) and 16 of the Family Law (Scotland) Act 1985. (paragraph 1.1.4.4 above)

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89 E.g. 1985 Act, section 12(2) (date at which a property transfer order is to come into effect); or 1981 Act, section 3 (regulatory orders).
1.5.3 Contracts between spouses during marriage

1.5.3.1 Sales between spouses

General principles of the law of property and obligations apply, but attention is directed to the modern development in English and Scots law concerning the necessity for each spouse to obtain independent legal advice in the matter of dealings relating to matrimonial home (e.g. the grant of a further security over the home). See paragraph 2.3.2.1.2 below.

1.5.3.2 Gifts between spouses

As regards engaged persons, where the gift of an engagement ring is intended to be conditional upon marriage taking place, the ring is thought to be returnable should the contemplated marriage not take place (condictio causa data causa non secuta).\(^91\)

The presumption against donation applies to transfers of property between spouses,\(^92\) but the presumption is more easily rebutted in the context of transfers between spouses, than between unmarried persons.\(^93\)

Gifts between spouses which are intended to defraud the donor’s creditors in the event of the donor’s bankruptcy may amount to gratuitous alienations.\(^94\) As such, the court is empowered to grant a decree of reduction in respect of the donation/conveyance, and/or an order for restoration of the property gifted to the debtor’s estate.

Although property acquired by either party before or during the marriage by means of gift from a third party is excluded from the definition of matrimonial property under section 10(4) of the 1985 Act, it should be noted that gifts from one spouse to the other are not so excluded. Hence, although gifts between spouses, as with any other gifts, are irrevocable,\(^95\) the property gifted may nevertheless become matrimonial property (in respect of which the donor spouse retains an interest).

1.5.3.3 Companies between spouses

General principles of company law (or, if relevant, partnership law) apply.

1.5.3.4 Employment contracts between spouses

General principles of the law of property and obligations apply. The fact that the parties are husband and wife does not affect the operation of the highly specialised area of employment law.

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\(^92\) Logan v. Logan 1920 S.C. 537; Smith v. Smith 1933 S.C. 701.

\(^93\) Walton, op.cit., p181.

\(^94\) Bankruptcy (Scotland) Act 1985, section 34. Cf. Family Law (Scotland) Act 1985, section 18: transfers of property made by one spouse to a third party, in the five year period prior to any claim by the other spouse for aliment or financial provision, may be set aside or varied, if it is shown that the transfer to the third party had the effect of defeating, in whole or in part, the claim for aliment or financial provision.

\(^95\) The common law rule that inter-spousal gifts were revocable during the lifetime of the donor was abolished by section 5 of the Married Women’s Property (Scotland) Act 1920.
1.6 DISSOLUTION, LIQUIDATION AND DIVISION OF THE MATRIMONIAL PROPERTY REGIME

1.6.1 Following dissolution of the marital bond (divorce).

1.6.1.1 Proof of ownership

In a system of separation,\(^{96}\) proof of ownership presents no great difficulty. As to immoveables, ownership will be as revealed by title. Similarly, there will be evidence of title to shares, bank accounts and motor vehicles.\(^ {97}\) The insurance documents will indicate title and value of furniture, paintings, jewellery and other moveable items of value. However, unless the item has been given or bequeathed by a third party, there is a presumption,\(^ {98}\) which can be rebutted, that household goods bought during the marriage or in anticipation of it, are owned in equal shares. Further, the presumption shall not be rebutted by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.\(^ {99}\)

Presumptions of ownership with regard to property held in joint names is treated above.\(^ {100}\)

Section 14(2)(c) of the 1985 Act authorises the court to pronounce declarator as to the respective property rights of spouses thereby resolving any dispute between them on such point.

1.6.1.2 Methods for division

Parties may make their own financial arrangement by private agreement; a joint minute to this effect may be lodged during the divorce litigation, and if so parties will be bound thereby,\(^ {101}\) unless it can be shown that the agreement was not fair and reasonable when entered into.\(^ {102}\) If so, the court will set aside or vary the agreement.\(^ {103}\)

Otherwise, the court may make any or all orders for capital provision, transfer of property, order for periodical allowance and for any ‘incidental order’,\(^ {104}\) such as an order for the sale of property, valuation of property or occupation of the

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\(^ {96}\) Confirmed by Family Law (Scotland) Act 1985, section 24.

\(^ {97}\) The registration document, and insurance documents may not be conclusive as to title: Scanlon v. Scanlon 1990 G.W.D., 12-598.

\(^ {98}\) 1985 Act, section 25.

\(^ {99}\) 1985 Act, section 25(2). The meaning of ‘household goods’ is as defined at paragraph 1.2.1.1.5, above.

\(^ {100}\) At paragraph 1.2.1.1.6, above. The conflict case of Dinwoodie’s Exr. v. Carruthers’ Exr. (1895) 23 R. 234, in which the executors of each of a deceased brother and deceased sister (both of Scots domicile) disputed the share which each estate should receive from a bank account opened in joint names by the siblings in a bank in London, reveals a difference in the domestic laws of England and Scotland, on the effect of a deposit receipt purporting to confer a special destination. By Scots law, the deposit receipt had no testamentary or dispositive effect, and there was no evidence otherwise of gift, contract or will. Under English law, the destination was effectual to carry the whole sum deposited to the survivor. Scots law applied to the effect that the property of the predeceased did not devolve upon the survivor, and the pursuers could only recover the contribution made by the brother.


\(^ {102}\) Young v. Young (No 2) 1991 S.L.T. 869. Parties may not exclude by contract the right to apply for court order to set aside or vary. (section 16(4))

\(^ {103}\) 1985 Act, section 16. The court may set aside or vary an agreement on periodical allowance upon the bankruptcy of the payer. (section 16(3))

\(^ {104}\) 1985 Act, section 14.
home, under authority of the Family Law (Scotland) Act 1985. Among the ‘incidental orders’ which the court is empowered to make under the 1985 Act, is an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement.

The same provisions apply in actions for declarator of nullity of marriage, superseding any rule of law entitling either party to a declarator of nullity to require restitution of property upon the grant of declarator.

1.6.1.3 Possibilities for compensation

The court must make such orders as are reasonable, applying the principles set out in section 9 of the 1985 Act.

In brief, the principles are: of fair division of the net value of matrimonial property; taking account of economic advantage derived by one party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family; fair sharing of any economic burden of caring, after divorce, for a child of the marriage aged under sixteen; the award of such financial provision as is reasonable to enable the adjustment, over a period of not more than three years from the date of divorce, of loss of financial support of the other party, in the case of a party who has been dependent to a substantial degree thereon; and relief of serious financial hardship over a reasonable period.

According to section 10(1) of the 1985 Act, equal division, or division in such other proportions as are justified by special circumstances, shall be taken to be fair division.

The ‘matrimonial property’ which is to be shared means all the property belonging to the parties or either of them on the earlier of the date on which they ceased to cohabit, or the date of service of the summons in the action for divorce, under exception of property acquired by gift or succession from a third party. But that which is purchased for the home out of funds gifted to one will become matrimonial property, though its provenance might be noted under section 10(6)(b) ‘special circumstances’. It will include property belonging to the parties before marriage (but) used by them as a family home or as furniture or plenishings for such home, and the proportion of rights under a life policy or pension scheme...

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105 An incidental order may be made only on or after the granting of decree of divorce: section 14(3), 1985 Act.
106 1985 Act, section 8.
107 1985 Act, section 14(2)(h).
108 1985 Act, section 17(1).
109 1985 Act, section 17(3).
110 1985 Act, section 9(1)(a) – (e).
111 Section 10(4). The net value of the matrimonial property shall be the value of the relevant property at the relevant date, under deduction of debts incurred during the marriage, and ante-nuptial debts so far as they relate to the matrimonial property (section 10(2)).
114 Not a house bought as a home for one – where that one is later joined by his wife (MacLellan v. MacLellan 1988 S.C.L.R. 399); contrast Jacques v. Jacques 1997 S.L.T. 459 and Buczynska v. Buczynski 1989 S.L.T. 558. Edwards and Griffiths, op.cit., paragraph 13.09: the 1985 Act does not appear to envisage the application of its provisions to a house which ‘becomes’ a family home. Where a gift to one party has been used to buy the home, this home has been held not to be matrimonial property: Latter v. Latter 1990 S.L.T. 805. Contrast definition of matrimonial home for the purpose of occupancy rights, at paragraph 1.2.1.19 above.
referable to the relevant period (ending with cessation of cohabitation or service of summons).\textsuperscript{115}

‘Special circumstances’, potentially justifying unequal division include terms of agreement between the parties upon ownership or division; source of funds used to acquire matrimonial property where not derived from the income or efforts of the parties; the use made of matrimonial property and the extent to which it is reasonable to expect it to be realised or divided or used as security.\textsuperscript{116}

In applying the principles set out in section 9, the court shall have regard to factors set out in section 11. This type of legislative guidance to the court might be described as ‘fettered discretion’, but it is apparent from the wealth of case law that reality produces contention.

It is notable that the court is directed not to take account of the conduct of either party, unless it has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision, or, in relation to section 9(1)(d)\textsuperscript{117} or (e),\textsuperscript{118} it would be manifestly inequitable to leave the conduct out of account.\textsuperscript{119}

To repeat, the court may order payment of a capital sum or transfer of property.\textsuperscript{120} On application by either party on a material change of circumstances, the court may vary the date or method of payment, or date of transfer. The court shall not order periodical allowance unless the order is justified by a principle set out in section 9(1)(c) (economic burden of caring for a child of the marriage under sixteen years of age), (d) (dependence) or (e) (serious financial hardship) and it is satisfied that a capital sum or property order would be inappropriate or insufficient to satisfy the requirements of section 8(2) (‘justified’ and ‘reasonable’).\textsuperscript{121} Such an order may be varied or recalled on material change of circumstances. If still in force at the payer’s death, it shall continue to operate against the estate (without prejudice to the power of the court to vary or recall on material change of circumstances), but shall cease to have effect on the remarriage or death of the payee.\textsuperscript{122}

The court has power under section 18 to set aside or vary avoidance transactions made by the defender within five years of the making of a claim on this ground by the other party; and to interdict (forbid) the defender from effecting such transaction.

But such an order shall not prejudice any rights of a third party in or to the property when the third party has in good faith acquired the property or any of it or any rights in relation to it for value, or derives title from any such person.

Finally, section 15 protects third parties: an order for property transfer shall not be made if the consent of a third party, necessary under any obligation, enactment or rule of law, has not been obtained; property subject to security shall not be transferred without the consent of the creditor, unless he has been given an

\textsuperscript{115} 1985 Act, sections 10(4) and (5).
\textsuperscript{116} 1985 Act, section 10(6).
\textsuperscript{117} A party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce.
\textsuperscript{118} A party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.
\textsuperscript{119} 1985 Act, section 10(7).
\textsuperscript{120} 1985 Act, section 12.
\textsuperscript{121} 1985 Act, section 13(2).
\textsuperscript{122} 1985 Act, section 13(7).
opportunity of being heard by the court; an incidental order shall not prejudice any rights of a third party existing immediately before the making of the order.

1.6.1.3.1

Topical subjects of difficulty are (i) pension rights and (ii) increases in the value of the matrimonial home. As to the former, the Pensions Act 1995 has added a new subsection (8) to section 10 of the Family Law (Scotland) Act 1985, to enable regulations to be made123 in order to elicit more easily a valuation of the amount due. It is competent for the court on divorce to award to the other party a whole or part of the sum when at a later date, e.g. on the pension holder’s death, it becomes payable (‘earmarking order’). Alternatively, the pension-holder can ‘buy out’ the creditor spouse’s interest by means of transfer of assets. This is a win for the ex-wife over any future wife. Of course, the ex-spouse will not then normally be entitled to a widow’s pension under the pension arrangements. It is significant in itself that the pension rights (more commonly acquired by the husband – or principal earner) are counted as matrimonial property.124125

The non-pension holder’s position has been improved further by a modern development of permitting the splitting of pension rights at divorce, conferring upon the non-member an independent pension. Such a development tends to reinforce the view that something approaching community of property becomes visible at dissolution. This new power has been conferred by the Welfare Reform and Pensions Act 1999, which allows pension sharing as an alternative to an earmarking order (now called a ‘pension attachment order’); these provisions came into effect in relation to divorce petitions commenced on or after 1 December 2000.126

As regards increases in the value of assets, matrimonial property is valued at the relevant date.127 Hence, the value of assets – particularly of the house – may vary (upwards) between the ‘relevant date’ and the date of divorce. If this is not recognised, an inequitable result can ensue.128 In principle, there should be equal sharing.

To avoid difficulty, the matter could be taken out of the divorce arena, and settled as a matter of property of co-owners, by means of one buying out the other’s share, or by an order for ‘division and sale’ of the property, in each case the house being valued at date of divorce.129 Alternatively, a sale and division order could be made as an ‘incidental order’130 to avoid the parties having to undertake independent litigation. The Scottish Office Home Department consulted public opinion in 1999.131

124 1985 Act, section 10(5).
125 An excellent example founded on English law and predating the most recent statutory provisions is Brooks v. Brooks [1994] 4 All E.R. 1065, in which the House of Lords treated as a postnuptial settlement, variable judicially on divorce, a pension set up by the husband’s company specifically for the benefit of his spouse. It is thought the Scottish courts could follow this example.
126 WHITEHOUSE and NARAIN, Revenue Law – principles and practice, 19th ed. (2001), p943. “Pension sharing enables the court to split a pension into any percentage at the time of divorce so that, for example, the wife may either become a member of the husband’s scheme in her own right or, as an alternative, may take a transfer of an amount into her own pension scheme.”
127 1985 Act, section 10(2).
on the question whether and if so, how, the 1985 Act should be amended to permit the court to value property by reference to its market value at the date of order. Concern has also been expressed that it may be unfair to exclude from computation the increase in value over the period of the marriage of non-matrimonial property (such as a business acquired by one just before the marriage).

It can be seen that the process of property division on dissolution of the marriage is not only modern and sensitive to the property implications of gender roles in marriage, but also is under close scrutiny with the aim of refinement. Scots domestic family law has been and continues to be an area of active interest for law reformers.

1.6.1.3.2

The above is an outline of current Scots statutory law on division of property upon divorce. It is relatively modern, and judged reasonably successful. The philosophy is that of clean break, after recognition and implementation of due compensation for the economic realities of married family life. Generally, there is no financial penalty for misconduct (in causing the marriage to break down). Parties are expected to regain financial independence, but not immediately, if that is unreasonable in the circumstances. We conclude that current Scots law of financial provision on divorce affords considerable discretion to the judges to deal equitably between the spouses, and to redistribute wealth. There are of course problems of proof and of non-disclosure of assets, and valuation, and the legislative provisions outlined above are now studded with interpretative case law. Nice distinctions have been made. Cases where there is a disparity of wealth between the spouses are worth litigating. But Professor Thomson summarises thus – “[A]rmed with this plethora of powers, the court can make orders for financial provision which can be tailor made for the particular couple concerned.”

1.6.1.4 Competent authorities

Divorces and annulments in the United Kingdom must be pronounced judicially.

Property adjustment at dissolution, if effected by the parties, must be approved by the court; if effected by the court, must be done within the parameters set down by the Family Law (Scotland) Act 1985, as above outlined.

The use of notaries is limited to a verification role. No other ‘authorities’ are required, except for experts in various fields of valuation (shares in private companies, insurance, pensions etc.)

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132 Distinguishable from the English position, which is not averse to a maintenance approach, one evidence of which is manifested in the power of an English court to grant an earmarking order (in respect of pensions) taking into account post-divorce increases in the value of the pension. See Cooke, op.cit., p297.

133 Edwards and Griffiths, op.cit., paragraph 13.02.

134 E.g. A gift of shares from one side was held to have become matrimonial property through company reconstruction (Latter v. Latter 1990 S.L.T. 805). But Lord Osborne in Whittome v. Whittome (No 1) 1994 S.L.T. 115, at 125, held that an increase in the value of gifts does not constitute matrimonial property. Gifts between spouses, which we have noted are irrevocable, are computed nevertheless as matrimonial property.


1.6.2 Following the death of one of the spouses

1.6.2.1 Proof of ownership

See paragraph 1.6.1.1 above; the remarks made there apply with equal force in the event of the death of one of the spouses.

It may be taken that, on death, as opposed to divorce, the survivor rarely queries the title of the deceased to the goods itemised as part of the estate in the Inventory which is prepared for Inheritance Tax and distribution purposes.

1.6.2.2 Methods for division

There being no matrimonial regime (apart from separation), there is no bringing to an end of a regime with accompanying division of property, by consent, or under judicial superintendence or control.

Rather is the estate of the predeceaser administered and distributed in accordance with the will, or with the Scots rules of intestate succession. The process – unless disputed – is not ‘judicial’, in the sense of contentious, but it is formal, in that between the estate and the beneficiaries, and responsible for the winding up (making inventory; taking title; paying tax, funeral expenses and other debts; thereafter implementing the terms of the will or the rules of intestacy, and obtaining discharges) of the estate, is interposed the executor\(^{137}\) (usually the solicitor): the procedure is overseen and authorised by the court. The executor cannot deal with the estate without court authorisation, termed ‘confirmation’. There is mutual recognition of ‘confirmation’ and the English equivalent, ‘probate’, between England and Scotland (and Northern Ireland).\(^{138}\) In the case of small estates, a simpler procedure is available by means of obtaining confirmation from the sheriff clerk.\(^{139}\)

The estate, heritable and moveable, listed in the confirmation thereby vests in the executor:\(^ {140}\) the executor may transfer the heritage to the party entitled thereto by having endorsed on the confirmation a statutory form of docket.\(^ {141}\)

The method of conveying property to those entitled to it is well established, therefore, and relatively simple.

1.6.2.3 Possibilities for compensation

The substantive law of succession in Scotland has always favoured family protection – which, in the context of this Report may be regarded as (equitable) compensation.

\textit{Testate succession}

At common law, the testator spouse may freely dispose only of one third of his/her net moveable estate (or of one half, if s/he leaves a spouse only, or children only). If, therefore, the provisions of the will are less generous to the surviving spouse, s/he may claim legal rights against the will of one third or one half, as the

\(^{137}\) Who, if not nominated by the will, may be appointed by the court. See generally, SCOBIE, E M, ed., Currie on Confirmation of Executors, 8\textsuperscript{th} ed. (1995).

\(^{138}\) Administration of Estates Act 1971, section 1.

\(^{139}\) Small Testate Estates (Scotland) Act 1876, as amended by Confirmation to Small Estates (Scotland) Act 1979, section 1. Confirmation to Small Estates (Scotland) Order 1989 (S.I. 1989/289). Applicable on testacy and intestacy.

\(^{140}\) Succession (Scotland) Act 1964, section 14(1).

\(^{141}\) Succession (Scotland) Act 1964, section 15(1). Gloag and Henderson, \textit{op.cit.}, paragraph 46.06.
case may be, of the net moveable estate, but will not be entitled to take both the bequest and the legal rights: s/he will be ‘put to his/her election’, on the principle of approbate and reprobate that is, that a party cannot both repudiate and accept the same instrument.

These rules apply where the deceased died domiciled in Scotland and cannot be avoided (where there are moveables in Scotland for distribution) except by proved acquisition of a different domicile at death. Such different domicile would require to be established in the usual (difficult) way by residence in another legal system with intent to remain so far as can be seen ahead (animo et facto). Ultimately, determination of domicile is a matter for the court, which is unlikely to lay great store on declarations by the testator in his own will upon the question of his domicile; on the other hand, the fact that an individual’s motive in changing domicile was to disinherit his family will not bar a change of domicile, if in the court’s view, the prerequisites are present: “intention is not compromised by the reason for entertaining the intention.”

Rarely, nowadays, the surviving spouse may be found to have discharged the claim to legal rights by accepting, by marriage-contract, provision in lieu.

**Mutual wills**

Early and mid twentieth century case law reveals resort to – and the undesirable complexity of – the ‘mutual will’ of co-testators, seeking to order the devolution of their separate and joint property not only after the death of the predeceaser, but after the death of the survivor. These wills had the potential to be used in a quasi-marriage-contractual manner, but proved justifiably unpopular when the difficulties of interpretation (could the survivor revoke, or was s/he contractually bound?) became obvious. They remain competent, but are rarely found. Often in the United Kingdom spouses’ wills will be mirrors of each other, since, even in a system of separation, each desires to provide for the survivor, and common children. In a more complex family, (relative) freedom of testation permits the testator to ensure that property derived from one side of the family remains within that side.

**Intestate succession**

Here a significant change was wrought by the Succession (Scotland) Act 1964. By this Act, the surviving spouse, provided not divorced or (judicially) separated from the deceased, is entitled to ‘prior rights’ out of the estate. The

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143 Gloag and Henderson, *op. cit.*, paragraph 44.33 et seq.
149 In 1990, the Scottish Law Commission refrained from making any recommendation in relation to mutual wills, largely on the ground that the complexity of such wills had led to their general disuse. (Scot Law Com No 124, *Report on Succession*, paragraph 4.84)
150 Prior to 1964, Scots law upheld the principle of male primogeniture, drawing a distinction between land and moveables, and giving special status to the heir-at-law. See Meston, *op.cit.*, pp7 and 8.
151 Conjugate Rights (Scotland) Amendment Act 1861, section 6 provides that a separated husband loses all rights in the intestate succession of his wife (but not vice versa). Section 6 gives rise to an anomaly: a wife who has left her husband may petition the court for decree of judicial separation, thereby
survivor ranks first after the creditors of the deceased, and prior rights are taken first out of the estate before legal rights (legal rights being exigible both in testacy and intestacy). In partial intestacy, prior rights are exigible only out of the intestate part of the estate.

In terms of section 8, the survivor is entitled to a ‘qualifying’ dwelling-house, and to furniture and plenishings, each claim being exigible up to a certain monetary limit, which is amended by statutory instrument from time to time.\textsuperscript{152} The latter right is independent of the former: the survivor need not choose the furniture etc. in the qualifying dwelling-house, but if, e.g. the deceased left three houses, the survivor must within six months of the date of death of the intestate choose the contents of one of the houses.\textsuperscript{153}

\textit{Quoad} the house, the deceased must have had a ‘relevant’ interest therein (as owner or tenant),\textsuperscript{154} and the survivor must have been ordinarily resident there at the predeceaser’s death.\textsuperscript{155}

Currently, the survivor is entitled to succeed to the deceased’s interest where the value thereof does not exceed £130,000, and otherwise to £130,000 in cash. Alternatively, s/he will be entitled to the cash equivalent even if less than £130,000 if the intestate’s interest was as a tenant of a larger unit of which the house formed only part; or if the deceased was the owner thereof, but the house was used as business premises in circumstances where the value of the estate as a whole would be diminished if the business could not be sold as a whole with the house.

A most important conflict point to note is that, since Scots law uses a split rule of choice of law in succession, referring questions of immovable succession to the \textit{lex situs}, the prior right to the house does not arise unless the qualifying dwelling-house is situated in Scotland.\textsuperscript{156}

When claims under section 8 have been met, the survivor is entitled under section 9 to a monetary payment of £35,000 if the intestate is survived by issue, and £58,000 if there are no surviving issue. In a partial intestacy, the value of any bequest to the spouse is deducted from that sum.

If the remainder is less than the sum specified by section 9(1), as from time to time amended, it follows that the surviving spouse will succeed to the entire estate.

Although more could be said, it is inappropriate in a Report of this length to do so. We trust that we have made it clear that in Scots law the surviving spouse of an intestate is likely to succeed to the entire estate (in smaller estates), satisfaction of prior rights having exhausted it; in larger estates, the survivor is entitled, in addition, to one half or one third of the moveable estate remaining. Thereafter, the order of extinguishing his rights of succession in her estate, but retaining her rights of succession in his estate. (Clive, \textit{op.cit.}, paragraphs 19.049 and 30.006) In its Report on Succession, the SLC recommended that separation (\textit{de facto} or judicial) should have no effect on the succession rights of spouses in each other’s estates, and that section 6 should be repealed (but without prejudice to the effect of existing decrees of separation). (\textit{Report on Succession}, Scot Law Com No 124, 1990, recommendation 39) There has been no implementing legislation.

\textsuperscript{152} The ceilings are fixed from time to time by statutory instrument; the current figures are in accordance with The Prior Rights of Surviving Spouse (Scotland) Order S.I. 1999/445.

\textsuperscript{153} 1964 Act, section 8(3).

\textsuperscript{154} 1964 Act, section 8(6)(d).

\textsuperscript{155} 1964 Act, section 8(4).

\textsuperscript{156} Crawford, \textit{op.cit.}, paragraph 17.13, where is discussed briefly the question of classification of the nature of property where, e.g. the survivor must receive a cash \textit{surrogatum} in lieu of immoveables.
succession to the free estate begins with surviving children and issue of predeceasing children.\textsuperscript{157}

Hence, it seems fair to conclude that the widow (say) is ‘compensated’, ‘equitably’ at the end of a marriage in which ostensibly strict separation of property has prevailed. The size and components of the ‘compensation’, if compensation it be, is able to be predicted. It is ‘equitable’ in a general sense; if by use of the term ‘equitable’, the meaning ‘discretionary’ is intended, then that does not describe the Scots rules, which, though discretionary on dissolution by divorce, confer fixed rights on dissolution by death.

\textit{Life Assurance Policies}

The authorities are old and the area is not often visited, at least in connection with life policies. Yet life policies are commonly taken out in Britain, and should be regarded as part of family provision. The policy proceeds may be payable on the death of the life assured (to persons designated by him/her) or on an earlier event, such as retirement from employment (‘term assurance’, payable to the policyholder) Some policies have a destination to children, in trust, payable on the death of the second spouse (‘joint life second death’ policy). Should divorce intervene in the first type, presumably the policyholder in most cases would wish to change the destination (\textit{e.g.} from former wife, to children).

Where the deceased has taken out a life policy on his/her own life (with the proceeds payable to his/her executors), or on a third party’s life (with the proceeds payable to the deceased), the proceeds form part of the deceased’s estate and must be included in confirmation.\textsuperscript{158}

Where the policy proceeds are payable to a third party beneficiary, they are excluded from the deceased’s estate. Accordingly, they will escape inheritance tax and will not comprise part of the legal rights fund.\textsuperscript{159}

A policy written in trust under the Married Women’s Policies of Assurance (Scotland) Act 1880 (as amended) should not be confirmed to by the deceased’s executors, although it should be reported on the inventory of the deceased’s estate.\textsuperscript{160}

1.6.2.4 Competent authorities

The State, in the form of the administrative (commissary) arm of the courts, has an overseeing function. Notaries public (solicitors) have a verifying function. Of course, the courts (Sheriff; Court of Session) have a substantive adjudicatory function, being used, not infrequently, in matters of disputed succession (form and essentials of wills; undue influence; status; interpretation \textit{etc.}).

1.7 OTHER REMARKS

None.

\textsuperscript{157} 1964 Act, section 2.
\textsuperscript{158} Currie, \textit{op.cit.}, paragraphs 10.157 and 10.158.
\textsuperscript{159} \textit{Cf.} MACDONALD, D R, Succession, 3\textsuperscript{rd} ed. (2001), paragraph 5.40.
\textsuperscript{160} Currie, \textit{op.cit.}, paragraph 10.162.
CHAPTER 2

MATRIMONIAL PROPERTY. PRIVATE INTERNATIONAL LAW

2.1 GENERAL REMARKS

2.1.1 Sources

2.1.1.1 Principal international sources

None, except that maintenance obligations have been classified as falling within the Brussels Convention 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (‘matters relating to maintenance’ – Article 5(2); Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [hereinafter ‘BIR’]). But these awards, to fall within BIR must be in the nature of support rather than capital redistribution. Reciprocal enforcement of maintenance orders is governed (otherwise and principally) by the Maintenance Orders (Reciprocal Enforcement) Act 1972 (giving effect in Part I thereof to the Hague Convention 1973 on Recognition and Enforcement of Decisions relating to Maintenance Obligations; and in Part II thereof to the New York (UN) Convention 1956 on the Recovery Abroad of Maintenance). The United Kingdom is not party to the Hague Convention 1976 on the Law Applicable to Matrimonial Property.

2.1.1.2 Principal statutory sources

There are no statutory sources on matrimonial property per se, except in so far as a marriage-contract involving a trust will be regulated by the Recognition of Trusts Act 1987. There are statutes which affect the subject tangentially. The property rights of persons recently divorced – where the divorce is worthy of recognition in Scots law, in terms of the Family Law Act 1986 (or, now, where applicable Brussels II) – may be altered by order of the Scots court in terms of the Matrimonial and Family Proceedings Act 1984, where in the view of the Scots court inadequate provision has been made in the foreign court for the applicant, and provided that stringent jurisdictional tests have been met. The Scots forum in a suitable case shall exercise its powers so as to place the parties in the financial position in which they would have been if the application had been disposed of, in an action for divorce in Scotland, on the date on which the foreign divorce took effect.


165 Section 29.

166 Section 28.

167 Section 29(2).
Commissions in the United Kingdom were anxious that the courts in England and Scotland would not over-use this remedy, and different jurisdictional ‘gates’ were set up in each jurisdiction\(^{168}\) to achieve this end. There have been few applications in England, and those not infrequently unsuccessful, and fewer still in Scotland.\(^{169}\) The provision will be particularly useful with regard to questions of title to immovable property in Scotland which otherwise might have remained unresolved.\(^{170}\) In the matter of devolution of property on the death of a spouse, the Succession (Scotland) Act 1964 contains certain provisions of conflict of laws implication.\(^{171}\)

2.1.1.3 Principal sources in case law and in customary law

2.1.1.3.1

This area of Scots conflict law is furnished therefore mainly by case law. The body of authority is long established – indeed, harks back to an earlier, nineteenth century age, when marriage-contracts were more commonly found in Scotland – and is only of moderate size. This is not an active area of the law at present.

The leading cases are: -

- *Lashley v. Hog\(^{172}\)*
- *De Nicols v. Curlier\(^{173}\)*
- *Callwood\(^{174}\)*
- *Chiwell v. Carlyon\(^{175}\)*
- *Shand-Harvey v. Bennet Clark\(^{176}\)*

upon the general stance or principle, viz.: that the House of Lords will give effect to (foreign) matrimonial property rights, whether acquired by virtue of a foreign code, by choice or default (*De Nicols*), or by private arrangement, despite change of domicile by the parties (to English, or Scots domicile). Hence, the initial statutory or contractual regime will govern the rights of parties in moveable property brought to England (or Scotland) or acquired/amassed here. The regime will be regarded as having conferred vested rights.

In the case of immovable s, the burden of proving that the statutory or contractual arrangement was intended to include land situated beyond the legal system of the code or the legal system which governs the contract, lies on the party so averring:**\(^{177}\) and, if this is established, the devolution of immovable property in accordance with a law other than the *lex situs* will be by acquiescence of the *lex situs*.\(^{178}\) The early case of *Lashley* insofar as it may be thought to support *mutability* will be treated later.

2.1.1.3.2

\(^{168}\) Matrimonial and Family Proceedings Act 1984, Part III (England); Part IV (Scotland).

\(^{169}\) Crawford, *op.cit.*, paragraph 10.23 (Financial Relief After Foreign Divorce).

\(^{170}\) As demonstrated in *Torok v. Torok* [1973] 3 All E.R. 101, which was the impetus for the legislation.

\(^{171}\) See Meston, *op.cit.*, Chapter 9.

\(^{172}\) (1804) Paton 581.

\(^{173}\) [1900] A.C. 21 (moveables); [1900] 2 Ch. 410 (immovable s).


\(^{175}\) (1897) 14 S.C. 61 (S.A.): see Cheshire & North, p874.

\(^{176}\) 1910 1 S.L.T. (Sh.Ct.) 133.

\(^{177}\) *Callwood*, above.

\(^{178}\) *De Nicols* (No 2); and *Chiwell*, above.
Scots conflict rules concerning marriage-contracts (formal and essential validity; capacity to make/to revoke) are established by a number of nineteenth and early twentieth century cases, to the following effect.

In form, the deed must comply with either the *lex loci contractus*\(^{179}\) or the proper law of the contract.\(^{180}\) In essence, the governing law is the *lex situs* in respect of immovable\(^{181}\) and the proper law in respect of moveable.\(^{182}\)

Capacity to enter a marriage-contract is governed by the *lex situs* as regards its provisions in respect of land. As regards moveable, the matter is not entirely clear; precedent directs the question of capacity to the domicile of the granter at the date of the grant,\(^{183}\) but many prefer the view that capacity is a matter to be referred to the putative proper law, as is generally thought to be the rule in English and Scots law in relation to capacity to enter a commercial contract (subject to the Rome Convention on the Law Applicable to Contractual Obligations 1980, Article 11).

2.1.1.3.3

Where the parties have made no marriage-contract, and are not subject to the provisions of a Code, rights in immoveable are governed by the *lex situs*.\(^{184}\) The rule with regard to moveables is not beyond doubt, but it seems most likely that parties’ rights will be governed in the first instance by the matrimonial domicile (which if not established at marriage must be established within a reasonable time thereafter\(^{185}\)) and that rights in property later acquired will be regulated by the parties’ domicile at acquisition. However, rights which have vested in earlier acquired property will not be disturbed by later changes of domicile.\(^{186}\)

The approach taken in this category of ‘absence of contractual regulation’ cases may be said, tentatively, to be that of the middle way between mutability and immutability of matrimonial property rights. But authority is scarce, and instances are few.

2.1.1.4 Principal reforms of the law which are currently considered

We are not aware of any current project within Scotland or the United Kingdom which is specifically concerned with the reform of the conflict rules of matrimonial property. However, reform of domestic family law is an active area, and with the advent of the Scottish Parliament there is an opportunity for ‘lawyers’ law reform’. Family law is a devolved area. The Scottish Executive has published proposals for improving Scottish Family Law. Sections 6 and 8 (‘Tidying Up the Law

\(^{179}\) Guepratte v. Young (1851) 4 De G & Sm. 217.

\(^{180}\) Van Grutten v. Digby (1862) 31 Beav. 561; Re Bankes [1902] 2 Ch. 333.

\(^{181}\) Black v. Black’s Trs. 1950 S.L.T. (Notes) 32.

\(^{182}\) Countess of Findlater & Seafield v. Seafield Grant Feb. 8, 1814 F.C.; Earl of Stair v. Head (1844) 6 D. 904; Sawrey-Cookson v. Sawrey-Cookson’s Trs. (1905) 8 F. 157.


\(^{184}\) Welch v. Tennent (1891) 18 R. (H.L.) 72.

\(^{185}\) Re Egerton’s Will Trusts [1956] Ch. 593. ‘Matrimonial domicile’ is often used as a term of art, when perhaps it should not be. In this connection, its original meaning would be ‘husband’s domicile’, the assumption being that the parties would set up home in his legal system: probably now it must mean ‘common domicile’. But it can fairly be said that the place of settled matrimonial home may not be, in Scots law, the common domicile.

on Marriage’) are worthy of note for the purpose of the current exercise in other aspects thereof (e.g., cohabitation), but it is noted here that no change is proposed at present in the Family Law (Scotland) Act 1985 (courts’ powers in relation to division of property on divorce), but that criticisms of the current rules (in particular regarding the treatment of windfall gains received by the spouse after separation but before divorce) would be kept in view and ‘will be considered in any future comprehensive review of the law on matrimonial property rather than in isolation.’ It is proposed that the effect, if any, which marriage has on parties’ immoveable property should be determined by the lex situs; and on moveable property, by the law of the spouses’ common domicile.

These proposals could be said to reflect the current situation but the third statement, viz., that where the spouses do not have the same domicile marriage should have no automatic effect on their moveable property, adds a note of confusion, in the authors’ view. Certainty is desirable and there is no reason why ‘matrimonial domicile’, signifying place of matrimonial home, should not continue to apply as a first (or constant) connecting factor. If no matrimonial home is ever set up, and the parties never cohabit – an exceptional situation, seemingly not envisaged by existing authorities – then no doubt there is a case for saying that each party’s rights in moveables should be determined by the law of his/her domicile.

2.1.2 Historic development

2.1.2.1 It is assumed that this question pertains to the evolution of Scots conflict rules in the area of property of married persons.

There is little to note except that.

2.1.2.1.1

This area does not display the usual characteristics or staging posts of development, because it has been excluded from the ambit of Convention (Rome Convention; Brussels I and BIR), and has not been the subject of domestic (conflict) legislation.

2.1.2.1.2

The subject matter has not been regarded as one of pressing interest because in domestic law the Scots system is one of separation of property, with adjustment at the end of the union upon death or divorce. The validity of (domestic) marriage-contracts was last of legal interest about a century ago, and the rules of recognition of foreign marriage-contracts and statutory codes have rarely been called in aid. It is essential to note that Scots conflict rules in this area tend to be reactive, that is to say, questions will usually be as to the recognition or not of foreign matrimonial provisions. It should also be noted that case law upon marriage-contracts (form, essence, capacity) is often intra-U.K.

2.1.2.1.3

Perhaps the only change to note has been the realisation that, upon the breaking of the unity of domicile rule, and in deference to the principle of equality of the sexes, it is no longer assumed that the *lex causae* (proper law of marriage-contract) shall be the law of the husband’s domicile at marriage (*qua* ‘matrimonial domicile’). Similarly, it is now recognised that if the principle of mutability of rights in property is admitted, the change of domicile must be effected by both parties. Hence, though domicile remains the principal connecting factor in Scots Private International Law of Persons, the domicile of the husband is no longer the domicile of the married pair; the spouses may each have different domiciles, and neither domicile is pre-eminent.

2.1.2.2 Current Private International Law rules

An outline of Scots rules is given above at 2.1.1.3.

Problems to which the passage of TIME may give rise

2.1.2.2.1 Where statutory code or private marriage-contract exists:

It is thought that Scots law will give effect to the provisions thereof, despite change of domicile by parties. The matter is classified as one of vested rights under contract, and NOT as one of succession: under Scots law, were the classification in favour of succession, the survivor’s rights would be referred to the last domicile of the deceased and/or the *lex situs*. However, if the question is whether the survivor has the option to choose the rights conferred by the will, and the matrimonial property rights conferred by the code or marriage-contract – and *a fortiori* whether he must elect (cannot take both) – the English courts have characterised the point as one of succession law.

The leading case is the House of Lords decision in *De Nicola* (1900), where the wife’s rights conferred upon her by the French Civil Code on marriage in France without a contract, upon the death testate, domiciled in England, of her husband. The House of Lords, to reach this decision, was required to distinguish its earlier decision of *Lashley v. Hog* (1804), which appears to support the principle of mutability of spouses’ property rights. *Contra*, the point in *Lashley* may be regarded as one of succession, but, for our purposes here, harmony between the authorities can be achieved by differentiating between the fixed system of property rights existing in France (which was not to be displaced by later events), and the absence of any system of matrimonial property in England when Hog married there (permitting property rights under Scots law *qua communio bonorum* or *qua* succession to arise and to be exigible by his children upon Hog’s death, a widower domiciled in Scotland).

It can be stated with confidence that fixed rights under Code or contract will transcend change of domicile by parties, if the matter arises in a Scots court.

2.1.2.2.2 Where no matrimonial property provision whatever has been made:

Rights in immoveables will be governed by the *lex situs* at the relevant time (usually divorce or death).
Temporal problems may arise in regard to moveables.

It is necessary first to establish the initial connecting factor: whether that factor can be supplanted will be considered below. It is thought that, in the absence of express agreement between the parties on this point (rare, if there is no marriage-contract), the connecting factor will be the legal system of ‘matrimonial domicile’, where the parties set up home immediately after the marriage; but an inference of implied intention to have another system govern will be drawn by an English (or Scots) court if, within a reasonable time, and in accordance with intention, the parties set up home elsewhere. The latter approach would depend on that (later) system admitting ‘late entry’.

The second question – whether parties’ rights are regulated forever by that first legal system (‘frozen’ in its content at the marriage?) – is one in respect of which there is little direct authority in Scotland and England.

We are aware of course of the differing civilian and American approaches. In the United Kingdom, leading writers differ, but we take the view that a fair degree of support can be found for the mutability approach, subject to the protection of vested rights, and to the proviso that changes in property rights allegedly arising through change of domicile can occur only if the domicile change was made by both parties.

2.1.2.2.3 The eventuality of divorce:

The question whether the divorce court must adhere to the terms of the marriage-contract is one which now occasionally arises, despite the rarity of such contracts.

The conflict rules in Scotland concede that the divorce forum will choose its own law in the matters of substantive divorce law (grounds, consequences) and the domestic law of Scotland confers upon the court power to make a variety of property awards, including competence to set aside or vary any term in an antenuptial or postnuptial settlement.

But the courts are unlikely to depart from an agreed settlement without good reason. There are indications that the divorce court in Scotland might be more ready that the divorce court in England to adhere to the contract provisions made by the parties at marriage, preferring to uphold their earlier expressed intentions that to utilise the modem remedies and wide discretion now available to the court in modern Scots and English domestic law. In principle, the contract should be upheld and

195 Welch v. Tennent above.
198 Dicey and Morris, op.cit., Rule 150; Cheshire and North, op.cit., pp1020-1021; Clive, op.cit., p257.
199 But see contra, Briggs, op.cit., p218, citing GOLDBERG, ‘The Assignment of Property in Marriage’ (1970) 19 I.C.L.Q. 557 (advocating that spouses be taken to acquiesce in the continuing application after change of domicile of the set of rules imposed by the matrimonial domicile at marriage).
202 R. v. R. [1995] C.L.Y.B. 2303 (English court took jurisdiction where there were conflicting proceedings in Sweden, noting [rightly or wrongly in terms of approach to conflicting jurisdictions] the significance in financial advantage to the wife of suit there. The English forum, it would appear, intended to substitute English lump sum and property adjustment orders for the rights available to the wife under two Swedish marriage-contracts, an outcome arguably contrary to principle, and to the noted precedent of De Nicols).
parties held to their bargain, but in practice, the cases are few. The point may become more important in view of the increasing economic independence of wives, and the high incidence of divorce in the United Kingdom.

2.1.2.3 We have no knowledge of this in Scots law.
Not applicable.

2.1.3 General notions of private international law

2.1.3.1 Problems of characterisation

The principal problem of characterisation in the area under review is that between matrimonial property law and the law of succession. This is a famous question.\(^{203}\) It arose in *De Nicols* (1900) and it lies at the root of the confusion which surrounds *Lashley v. Hog* (1804).

The significance of the characterisation in Scots and English law is that questions of moveable succession, testate or intestate, are referred to the last domicile of the deceased, whereas matters of matrimonial property law are referred to the relevant Code or marriage-contract; or to the matrimonial domicile (whatever that may mean).

In *Lashley*, the deceased, when of English domicile, married in England. Upon the predecease of his wife, he returned to Scotland and in the view of the House of Lords reacquired his Scots domicile of origin and died domiciled in Scotland. His daughter claimed not only the fixed portion of the estate which is due to a child under Scots succession law, but also to stand in her dead mother’s place to receive a share in what was termed the *communio bonorum* to which at that date (*i.e.* until a change in the law in 1855) the representatives of a predeceasing wife could lay claim. She succeeded in her claims. Litigation arose only between Rebecca, the daughter, and Thomas, the son, because the other issue (of whom at the date of the action, only one, Alexander, survived) had received advances from their father in his life, and were satisfied in name of legitim and otherwise. Thomas’ interest was in a finding of English domicile and therefore a finding that English law had not been displaced.

*Lashley*’s case has been much discussed in England and Scotland. As Scots lawyers, we can contribute the background information that at common law, the whole moveable estate of the wife at marriage and subsequently acquired passed to the husband, in the absence of contractual provision to the contrary.\(^{204}\) The moveable estates of both spouses “were said to form a communion”,\(^{205}\) but this was a misleading term, for the husband as administrator might squander the whole; on his death the wife *jure relictæ* then as now was entitled to one third of the moveable estate if there were children of the marriage and one half if there were not (as a right of succession/family provision). But if the wife should predecease, her representatives (children, whom failing, other kin) might claim that further share, called ‘dead’s part’ which otherwise would fall into intestacy, or would be within the discretion of the testator to dispose of by will. Viewed in this light, the claim of Mrs Lashley can be seen as a claim on her dead mother’s behalf for a share in the goods in the so-called ‘communion’; a compensation or recognition. It may be said that the predeceasing wife’s share created a debt owed to her next of kin, but suspended until the death of

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\(^{204}\) See above.

\(^{205}\) Walton, *op. cit.* p197.
the surviving husband since he was entitled *jure mariti* to the use of the property during his life.

Lord Kinloch in *Fraser v. Walker*²⁰⁶ said that, to call any part of the property the wife’s own (during the subsistence of the marriage) “is a legal solecism”. It follows that the main purpose of (domestic) Scots marriage-contracts was to avoid the operation of the domestic law.²⁰⁷ Otherwise, the right, of which we speak, of the representatives to claim in the place of the deceased wife, was the only means of compensation. While in a marriage which had produced children, the proprietary effect would be diluted, it can be seen that in a childless marriage, the right can be seen as ensuring that one half of the property returned to the wife’s side whence perhaps it had originated. It may not be unreasonable to conclude that Lashley’s case, properly construed, concerns a right which essentially was a matrimonial property right, and that it may be taken to support mutability of rights, in the absence of statutory, express or implied contract between the parties.

The difficulties of the characterisation between marriage and succession can be found in other conflict problems e.g. the rule of domestic English law that marriage revokes a will has been held, in England and Scotland, to pertain to marriage law.²⁰⁸ The point is of importance for in Scotland there is no such rule of automatic revocation.

2.1.3.2 Renvoi

The attitude of Scots law to *renvoi* is a matter of speculation.²⁰⁹ In English conflict law, *renvoi* reasoning has been used in the context of status, marriage and succession. Both for England and Scotland, its use is precluded in contract²¹⁰ and delict.²¹¹ It is not impossible that it could be employed in property cases.²¹² We hazard the guess that its use in problems of matrimonial property would be acceptable to Scots law.

2.1.3.3 Public policy

We are not aware of public policy being raised as an issue in any matrimonial property question, but we see no harm in the insertion of a public policy defence in any new legal instrument on the subject.

2.1.3.4 Fraud

As above at 2.1.3.3.

2.1.4 General problems of private international law

2.1.4.1 Connecting factors

In Scots law, the connecting factors are: -

*lex situs* (jurisdiction, and choice of law, in respect of immovable

²⁰⁶(1872) 10 Macph. 837, at 847-8.
²⁰⁷In the early case of *Rollo v. Ramsay* (1832) 11 S. 132 Lord Mackenzie commented that creditors were not entitled to assume that a wife had been married without a marriage-contract.
²⁰⁸*Re Martin* [1900] P. 211; *Westerman v. Schwab* (1905) 8 F. 132.
²⁰⁹Anton with Beaumont, *op.cit*, p76.
domicile (of each; of both; of the granter of a marriage-contract)
‘matrimonial domicile’

sed quaere lex situs (moveables) in absence of regulation otherwise.
‘Domicile’ must be identified by reference to time.
Nationality and habitual residence do not feature, except in the matter of recognition of consistorial decrees (i.e. identification of status, possibly with accompanying property order.)

2.1.4.1.1 Matrimonial regimes

It is thought that Scots law will follow the rules of applicability of any foreign Code of matrimonial property provided that there is adequate and timeous proof of the foreign rule. Hence, “Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time.”

In the adversarial system of Scots and English law, onus of proof of foreign law lies on the party averring the applicability and content of foreign law, which is a matter of fact to be proved. It may be surmised therefore that some cases with a conflict dimension proceed as domestic cases; and that even if proof of foreign law is attempted, an accurate understanding cannot be guaranteed. However, if the condition be, say, celebration of marriage in the country the application of whose Code is in issue, between parties at least one of whom is a national of that country, Scots law would give effect to that condition.

Otherwise:

2.1.4.1.2 No matrimonial regime, statutory or private

As outlined above, the modern position would seem to be to apply the common domicile, if there is one, of the couple immediately after marriage.

2.1.4.1.3 Where there is a private marriage-contract

The Scots court will apply to the essential validity of the contract the putative proper law of the contract, which in absence of choice of law will be the law of closest connection: since the contract belongs to the law of persons and property, the law(s) of domicile of the contracting parties will be of greater weight than is the case with domestic contracts.

As noted above, the law governing contractual capacity is somewhat in doubt. The older view, possibly still current, is that capacity to grant is governed by the domicile(s) of the granter(s) at the date of granting; and capacity to revoke a contract sua natura voidable, is governed by the domicile of the purported revoker at

213 De Nicols, above, per Lord Macnaghten at 33. Cf. Re Egerton, above, and further (the other side of the coin) His Lordship in De Nicols, quoted an expert on French law to the effect that change of domicile and naturalisation in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community.
214 And see Anton with Beaumont, op.cit., p586.
215 Or possibly within a reasonable time: Egerton, above Corbet v. Waddell (1879), above: but see doubts expressed in Anton with Beaumont, op.cit., p586, on the ground that these cases long pre-date the removal of the spousal unity of domicile rule.
216 But see Re Bankes (1902), above (noted below at 2.3.1.1.1).
the date of purported revocation. But the authorities are old, and the better view may be that the putative proper law applies.

By ‘Domicile’ in all cases except possibly one will be understood domicile in its classic meaning in Scots and English conflict law. Nationality is not used in this area, in jurisdiction or in choice of law though, in recognition, as above explained, we might require to accept nationality or habitual residence as a connecting factor. We have no experience of problems in this area arising from dual or multiple nationality.

2.1.4.2 Problems encountered

There is no authority.

But in a non-unitary state, such as the U.S.A. or Australia, Scots law would choose the state or province of domicile of *propositus*, noting that, in Australia, for example, it is sometimes acceptable to speak of ‘Australian domicile’, in a matter (such as divorce) which has been placed on a federal basis.

The Scottish Law Commission has proposed that a person who is present in a federal or composite state with the intention to settle in that state for an indefinite period should, if he is not held under the general rules to be domiciled in any country within that State, be domiciled in the country with which he is for the time being most closely connected.

But these proposals have not been implemented and at the time of writing it seems unlikely that they will be implemented. This state of affairs should be noted for the larger purposes of this Report, viz., Scotland is wedded to the use of domicile as a connecting factor in the area of the personal law under discussion, and the content of the Scots and English rules of domicile seems unlikely to be changed.

There are few examples of the impact of religion in this sphere. But where the religious law is synonymous with the personal law, Scots law, it is thought, would be prepared to apply the religious law, provided that its content was not contrary to public policy. The English court, in *Shahnaz v. Rizwan*, was willing to enforce a deferred dowry (‘mehta’) under an Indian marriage-contract, exigible upon termination of the marriage on death or divorce, on proof that the marriage and the divorce were valid i.e. that the qualifications had been fulfilled and the right vested. The court noted— in 1965 – that a broad view should be taken in an increasingly multi-cultural society.

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218 Viditz v. O’Hagan [1900] 2 Ch. 87.


220 It is arguable that ‘matrimonial domicile’ may denote something less than full domicile: the setting up of the matrimonial home in a legal system may suffice as the first touchstone in cases where parties have made no regulation of their property rights. (Inference of Egerton, above). Cf. note 25, above.

221 As well as in cases where a property order is part of a divorce decree emanating from a court in the European Union, and entitled to recognition in terms of Brussels II.


2.2 **INTERNATIONAL JURISDICTION OVER MATRIMONIAL PROPERTY ISSUES**
(JURISDICTION OF COURTS AND OF OTHER AUTHORITIES)

2.2.1 The general rules on international jurisdiction as applied to matrimonial property regimes

Such questions cannot be regarded as a *genus* in British courts; indeed they scarcely arise.\(^{224}\) Property disputes which occur in course of a matrimonial cause will be heard by the court(s) which has/have jurisdiction in consequence of Brussels II where that is applicable. Where Brussels II does not apply, the case is an ‘excluded action’ and Domicile and Matrimonial Proceedings Act 1973, section 7 applies.

Where a dispute over property arises in isolation, or as part of the winding up of an estate on death, the usual rules of personal jurisdiction will apply. Further, the Scots court will have jurisdiction in a matter of succession, if there are assets which have to be dealt with within Scotland (though as to choice of law, Scots law will distribute the assets in accordance with the law of the last domicile of the deceased [intestate], or the terms of the will [assuming them to be valid by the law of the last domicile of the testator]). If the property is immovable, Scots law *qua lex situs* will claim jurisdiction.

2.2.1.1 Summing up

The content of Brussels II will be taken as given.

In non-Brussels cases, the Scots court will take jurisdiction in a divorce case if: \(^{225}\)

Either party is domiciled (classic sense) in Scotland on the date the action is begun; or

Either party has been habitually resident in Scotland for one year prior to the raising of the action.

If the cause is annulment, there is the additional ground that if one party has died, s/he either

was domiciled in Scotland at death, or

had been habitually resident in Scotland throughout the period of one year ending with the date of death.

At common law, jurisdiction in questions of moveables, rested on the basis of situation within the jurisdiction (*ratione rei sitae*)\(^{226}\). Scots rules of jurisdiction are now to be found in the Civil Jurisdiction and Judgments Act 1982-1991, section 20 and Schedule 8. These rules apply against defenders ‘domiciled’ in a Contracting State to the Brussels or Lugano Conventions where – as here – the subject

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\(^{224}\) There is, though, a well known English example: *Re Bettinson’s Question* [1956] Ch. 67, in which Wynn-Parry, J., in the English forum, was prepared to afford to a Californian-domiciled husband, who claimed that his rights of possession and administration of goods in community under the Californian matrimonial property Code had been flouted by his Californian-domiciled wife when both were resident in England, the use of the appropriate remedy under English law where a property dispute arises between spouses, *viz.* Married Women’s Property Act 1882, section 17. The case has been variously attributed to the application of the Vested Rights Theory or The Local Law Theory. For our purposes here, it demonstrates the English court’s willingness to take jurisdiction on the basis of presence of parties and location of things; as to substance, it suggests support of the *De Nicols* approach fifty years on.


matter/nature of the action falls outside the Conventions: where the defender is not ‘domiciled’ in a Contracting State; in purely internal cases.227

2.2.1.2 Application of rules
See comment at 2.2.1 above.

2.2.2 Rules on international jurisdiction particular to matrimonial property law issues

2.2.2.1 Competent courts in (or of) Scotland are the Sheriff Court, the Court of Session and the House of Lords

The Sheriff Court is a widely used court of civil and criminal jurisdiction. Scotland is divided into six Sheriffdoms, and a Sheriff Court is to be found in all Scottish cities, and in every sizeable town. Since 1983, the Sheriff Court has jurisdiction to grant divorce (including divorce with an international component).228 A matrimonial property issue might equally be initiated before a Lord Ordinary in the Outer House (first instance) of the Court of Session in Edinburgh, the supreme civil court in Scotland, and from his/her judgment appeal may be had to the Inner House (appellate function) of the Court of Session, before a bench usually of three judges, and thence to the House of Lords.

Conceivably, the parties might choose to go to arbitration or alternative dispute resolution.

2.2.2.2 – 2.2.2.5
Not applicable. These matters do not arise, but if any question were to occur, the relevant court would be as indicated at 2.2.2.1.

As these brief answers indicate, we do not believe the questions are apt for the Scottish legal system internally or in its international experience. But insofar as we can identify with the problem, we suggest that, while substantive disputes would be dealt with judicially, in matters of safekeeping/preservation of documents229 and of change of contractual terms,230 there would be no judicial involvement.

2.3 LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIME

2.3.1 Determination of the law applicable to the matrimonial property regime

2.3.1.1 In case spouses have entered into a marriage-contract

2.3.1.1.1 Main choice-of-law rules:

A noteworthy feature of the rules which follow is that they are all rules of common law.

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228 Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.
229 In Books of Council and Session. See paragraphs 1.4.1.1 and 1.4.2, above.
230 By agreement negotiated between parties and drafted by their lawyers, no further or higher approval being necessary.
Formal validity: as noted above, it is sufficient that the deed comply in form with the requirements of form of the *lex loci contractus* or the proper law of the contract.\(^{231}\)

Essential validity: is governed by the *lex situs* with regard to immoveable property;\(^{232}\) and otherwise by the proper law of the contract. There is no bar to party choice of proper law. ‘Essential validity’ will include the question of what property is included in the contract and the revocability of the contract.\(^{233}\)

Proper law in the absence of choice: will be determined by the court using the common law criteria for ascertaining the proper law of a commercial contract, but paying more attention to personal factors such as domicile of granters.\(^{234}\) Sometimes, the use of legal language of one system may be significant,\(^{235}\) though, as with wills, a distinction must be drawn between the proper law of the deed and the law governing the interpretation of the deed.

It may happen that part of a deed is held to be governed by one law, and part by another.\(^{236}\)

Most authorities concern contracts drawn up for a marriage between a Scots and an English domiciliary.

A review of cases in the area\(^{237}\) reveals that the subject of litigation has been identification of the governing law rather than the resolution of characterisation problems such as those between form and essence; or essence and interpretation. A few cases, noted above, have concerned capacity to make or to revoke. Cross-category (matrimonial property/succession) cases are also rare, though the leading cases of *De Nicolos* and *Lashley* concerned that problem.

There seems little doubt that any such problem of characterisation would be resolved by the forum, most likely without the use of *renvoi* reasoning.

### 2.3.1.1.2 General problems of choice-of-law:

Thus, for example, in *Re Bankes* (1902), the English forum referred the matter of the invalidity of contractual terms to the proper law of the contract, which it found to be English.

Problems of characterisation and of public policy are potentially never far away: in *Bankes*, the provisions of the marriage-contract offended Italian law in that they altered the Italian rules of succession.

The most common clashes would seem to be between the privately agreed terms of the contract and the rules of testate or intestate succession (in our view, of the legal system of domicile at death); and between the contract and the domestic rules of property distribution on divorce of the divorce forum. But it cannot be said

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231 Guepratte v. Young (1851); Van Grutten v. Digby (1862); Re Bankes (1902), all above.


233 Sawrey-Cookson v. Sawrey-Cookson’s Trs. (1905), above.

234 A notable, exceptional case is *Re Bankes* (1902), above, in which an antenuptial settlement in English form was executed in Italy by a man domiciled in Italy and a woman domiciled in England. The terms of the settlement were valid by English law, but not by Italian, nor was the settlement formally valid by Italian law. The substantive objection was that it altered Italian rules of succession. *Prima facie* (*per* Buckley, J., at p343), the contract should be ‘construed’ by the law of the matrimonial domicile (here, Italian), but there was sufficient reason to the contrary (preponderance of English elements) to find it governed by English law. And see comment at paragraph 2.3.1.2.

235 *In re Fitzgerald* [1904] 1 Ch. 573.


237 Cases listed at paragraph 15-07, Crawford, *op.cit.*
that these have arisen often in Scots experience. Power would lie with the forum to classify or, consciously or unconsciously, to circumvent.

2.3.1.1.3 Particular problems of the marriage-contract:

These questions, we suspect, are not for us to answer. Scots domiciliaries have not been accustomed in recent times to enter into marriage-contracts, whether domestic or with a conflict aspect. In the nineteenth century, the aim of many contracts would be to exclude the otherwise applicable Scots domestic law. A second group concerned property rights and possibly trust settlements for future generations where Scots domiciliaries married, or where a Scot married an English domiciliary.

In theory, Scots law would favour freedom of choice of law; would have no objection to dépeçage; would expect ante-nuptial settlement, but would not object to post-nuptial settlement … but in practice, we have found no instance of choice of a particular type of property regime as found in a certain State. Parties simply made particular terms to suit particular circumstances. There is no evidence of adoption of specific type(s) of matrimonial regime. This is not surprising as systems of community of property of any kind are not part of the lay or legal mindset in Britain.

2.3.1.2 The spouses have not entered into a marriage-contract

2.3.1.2.1 Main choice-of-law rules

As explained above, the only connecting factor with regard to immovable is the lex situs; with regard to moveables, the common domicile of the parties at marriage (if there is one), or if it can plausibly be argued that one has been established within a reasonable time of marriage by the setting up of the matrimonial home, as intended, in a particular legal system.

Beyond that, all is unclear, not least because there appears to be no authority postdating 1974, when the legal unity of domicile of spouses was removed from our law. The setting up home in the husband’s domicile can no longer import the consequence that his domicile is the lex causae. It is true that our conflict rules refer day to day matters stante matrimonio to the matrimonial domicile (i.e. in this context, residence), and that this would include the reciprocal duties of aliment (if Scots law were the lex causae), but it is not thought that rights in capital can depend on residence. Principle suggests that the Scots court would assume separation of property, rights in property being determined by lex situs.

‘Own nationals’; this is taken as meaning, in the United Kingdom context, ‘own domiciliaries’. The domestic courts have jurisdiction, and these courts will apply first the Scots conflict law, if pleaded, but if no foreign land is involved, and the parties are and always have been, Scots domiciliaries, then Scots domestic law, which, as explained in Chapter 1, is a system of separation of property, with the addition of certain safeguards during marriage, and adjustment/protection on dissolution by divorce or death.

‘Foreigners’; if the Scots court has jurisdiction qua lex loci rei sitae, or as court of residence of one or both, and the parties have made no property regulation,

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238 The leges situs are not ‘designated’ by the parties so much as assigned by the forum to determine questions of substance (and capacity) in relation to various parcels of land Black v. Black’s Trustees Bank of Africa v. Cohen [1909] 2 Ch. 129.
239 Paragraph 2.1.1.3.3.
240 Domicile and Matrimonial Proceedings Act 1973, sections 1(1) and 1(2).
241 Crawford, op. cit., paragraph 9.27.
Scots law would apply the *lex situs* and/or common domicile at marriage, subject perhaps to mutation, with the consequence that the court might require proof of content of law of later common domicile on the subject of *e.g.* acquisitions, inherited property or windfalls.

Nationality plays no part, nor, so far as we are aware, is there any instance of implicit choice of law except insofar as a change of domicile could be regarded as a tacit choice. It could be argued that the ‘matrimonial domicile’ connecting factor is not far removed from ‘matrimonial residence’.

**Refugees/stateless persons:** as *per* foreigners.

Hierarchy of connecting factors: we suspect that these questions may be directed to systems operating matrimonial property regimes (scope thereof; conditions for entry; late entry). We can see that there might be questions of applicability of succeeding regimes, but we have no experience of situations more complex than those represented by *De Nicols* and *Lashley*.

### 2.3.1.2.2 Problems in applying the choice-of-law rules

No particular problems attend the determination of domicile. Habitual residence, which has proved difficult to define in Britain, is not used in the sphere of matrimonial property except so far as, to-day, matrimonial domicile could be said to resemble matrimonial residence, and in the matter of consistorial decree recognition and jurisdiction.

**Dual/multiple nationality; statelessness; refugees** (whose personal law is difficult to ascertain, whatever the connecting factor sought to be identified): no application in our own conflict rules.

In the matter of scope and applicability of a foreign Code, a Scots court would require to be guided by proof of the rules of the foreign law concerned.

The advantage of a reference to domicile is that only one law can be selected. It is clear, for example, that we would seek the State of domicile of a U.S. citizen. Domicile would be preferred to religious personal law, unless the latter exactly coincided with the former.

It is possible that, when we refer to the domicile of each, or to the common domicile, our reference could be to that law in its entirety, but this is unprecedented. We suspect that in a suitable case, Scots law would be receptive to this approach, if it would be likely to produce a positive effect, but this is mere conjecture in the absence of any Scots *renvoi* authority. Since 1926, English law has preferred the ‘Foreign Court’ theory of *renvoi*, but so far as we are aware, there is no instance of its use in a matrimonial property case.

We have noted above the classification problem between matrimonial property and succession matters. In the absence of regulation by Code or contract, we think distribution on death will be done in accordance with the *lex ultimi domicilii*, unless the survivor avers and proves that certain property has vested in him/her in terms of an earlier domicile. Where the deceased dies domiciled in Scotland, the survivor is well provided for, whether the deceased died testate or intestate.

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243 *Re Annesley* [1926] Ch. 692.

244 At paragraph 2.1.3.1.
In theory, any foreign law in any area of private law may be refused effect on policy grounds.\textsuperscript{245} But the public policy challenge is held in particular check in conflict of laws (‘external public policy’), and such a challenge is unlikely.

### 2.3.2 Scope of the law applicable to the matrimonial property regime

#### 2.3.2.1 During marriage

##### 2.3.2.1.1 Matters governed by the lex causae

As explained above,\textsuperscript{246} essential validity and effect of a marriage-contract will be referred to its proper law: interpretation of its terms (which are likely to include composition of estate and powers of disposal and administration) will be referred to the law governing interpretation, which, in the absence of express provision, may be the proper law of the deed or some other law by inference from the language or other circumstances. But where the effect of a statutory code is in issue, the onus lies on the party relying on the code to prove its content, effect and extent.\textsuperscript{247} Similarly, where there is no regulation, a Scots court must rely on proof of content of applicable law, once identity of applicable law has been decided.

##### 2.3.2.1.2 Matters governed by another law

As explained above,\textsuperscript{248} capacity to make and to revoke a marriage-contract may be governed by the domicile of the granter or revoker, at the time of purported grant or revocation, or by the putative proper law. But with regard to immoveable property, the \textit{lex situs} will apply.\textsuperscript{249}

Inter-spousal obligation to maintain (existence; extent) will be determined by the law of the matrimonial domicile: the relevance of any community of property provision, state or private, will be for that law to determine.

**Consent of the spouse to legal acts of the other:**

From domestic law, Scots law can offer two examples, from which a conflict of laws implication can be inferred.

**Matrimonial home:** In terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the ‘non-entitled’ spouse\textsuperscript{250} has a right to live in the matrimonial home: “Occupancy rights arise by virtue of the marriage”,\textsuperscript{251} and there

\textsuperscript{245} \textit{In the estate of Fuld (No. 3)} [1968] P. 675, per Scarman, J. at p698: “… an English court will refuse to apply a law which outrages its sense of justice and decency. But before it exercises such a power, it must consider the relevant foreign law as a whole.”

\textsuperscript{246} At paragraph 2.3.1.1.1, above.


\textsuperscript{248} At paragraphs 2.1.4.1.3 and 2.3.1.1.1, above.

\textsuperscript{249} \textit{Black v. Black’s Trustees} 1950 S.L.T. (Notes) 32; \textit{Bank of Africa Ltd. v. Cohen} [1909] 2 Ch. 129 (though this case has been criticised for its failure to distinguish the personal from the proprietary e.g. Collier, \textit{op.cit.}, p267). \textit{Ogilvy v. Ogilvy’s Trs}. 1927 S.L.T. 83.

\textsuperscript{250} The ‘entitled’ spouse is the one who has a right to occupy, as owner or tenant, or on some other ground. SUTHERLAND, E E, \textit{Child and Family Law} (1999), paragraph 12.9.

\textsuperscript{251} Sutherland, \textit{op.cit.}, paragraph 12.12.
are provisions to protect the non-entitled spouse from the effects of transactions relating to the matrimonial home entered into with third parties by the entitled spouse, and authorising the non-entitled spouse to order repairs to be done etc. The court may apportion liability for expenditure. Hence, when a house is sold, the purchaser must receive a declaration from the seller that the house is not a matrimonial home in respect of which the spouse of the owner has occupancy rights; or consent of that spouse to the sale; or a renunciation of occupancy rights. Further detail cannot be given here: what concerns us is the scope and applicability of the statute. For the Act to apply, the ‘matrimonial home’, as defined by the Act, must be in Scotland. The quality, and recording, of consent will be governed by Scots law qua lex situs, not qua personal law. Similarly, upon death intestate of a spouse, the survivor will have a ‘prior right’ to the dwelling house provided it is situated in Scotland.

**Possibly prejudicial transactions:** It has recently been decided by the House of Lords in a Scottish appeal that there is a duty upon solicitors to ensure that a potential guarantor’s consent is an informed consent, given after independent advice, where the guarantor and the guaranteed stand in a close relationship to each other (the usual example being that of spouses). Otherwise, the creditor may not be able to enforce the contract of guarantee against the (wife) guarantor, and must have recourse against the professional adviser.

While this decision may be regarded as an intrusion into Scots law as a result of an English law train of thought, its effect of course is to protect that spouse who might be regarded as weaker, in the sense of less well informed, and it deserves inclusion here because of its matrimonial property implication. There are many interests involved, among them that of ensuring that the matrimonial home does not become an unacceptable security.

Smith v. Bank of Scotland has imposed a duty of care upon solicitors (delict), which, if not discharged, will render a contract unenforceable against the granter thereof, leaving open to the creditor (usually the bank) the option of suit against the solicitor. The law has developed in England through the House of Lords decision in Royal Bank of Scotland v. Etridge (No.2), which has set standards for the solicitor in this scenario, which Russell describes as a core minimum and rather less stringent than that which had been imposed by the Court of Appeal. The Bank having directed the wife to take independent advice will have discharged its duty and

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252 Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 6(1)(a) and (b). Sutherland, *op.cit.*, paragraphs 12.23 et seq. And see above.

253 But see 1.2.1.9. above.

254 Succession (Scotland) Act 1964, section 8.


256 Might this be extended to cohabitants, and if so, would it be necessary that there be registration of the relationship? The law with regard to both aspects is in a state of active development.


is entitled to rely on the solicitor delivering advice to the standard currently expected in light of *Etridge*.

Out of this contractual/delictual scenario, we conclude that a deed may be reduced by a wife who can prove that she was inadequately advised by a bank; or more likely, by a solicitor. The creditor who has lost his contractual remedy must seek redress against the party who has shown lack of care.

The Scots conflict rule in delict finds the *lex causae* to be the law of the country in which the events constituting the tort or delict in question occur, subject to a rule of displacement where it appears to the (Scots) forum, in all the circumstances, that it is ‘substantially more appropriate’ for another law to apply.

Hence, the rule in *Smith* would appear to apply in any case where, applying the 1995 Act, section 11 or section 12, the forum found the harm to have occurred in Scotland, or the *lex causae* to be Scottish. The putative applicable law of the contract would not, at least in the first instance, be relevant. But where, for example, the same transaction was concluded in Spain, in circumstances where section 11 indicated that Spanish law applied, it is possible that a Scots court might displace Spanish law in favour of Scots law if the factors connecting the alleged delict with Scotland substantially outweighed those connecting it with Spain: in that calculation, the Scots domicile of husband and wife and the putative applicable law of the contract could be taken into account, in our submission.

The unenforceability of the contract against the granter for failure of advice could be regarded as a matter of (lack of) capacity, or possibly, lack of consent, or more generally under essential invalidity. Hence, the *rationes* outlined, derived from *Smith* and *Etridge*, will only apply if Scots (or English) law qualifies as putative applicable law, or under Rome Convention, Article 8(2) or 11.

In the United Kingdom, the consequences of a null contract are a matter of regulation at common law, outside the Rome Convention.

**Registration of mortgages, mortgage rights attributed by law to the other spouse, inalienability of marriage settlements:**

Personal rights (and liabilities) in regard to mortgages will be regulated by private agreement. As conflict issues, we would apply the proper law of the regime as the law governing its interpretation, according to classification of the point at issue by the forum.

All real rights of ownership and security must comply, as to form and essentials, with the *lex situs*.

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265 Or England, for after *Etridge* we expect the law to develop in a similar way in the neighbouring jurisdictions since it would be undesirable for the rules and standards to be different north and south of the border.
266 Referred, under Scots common law conflict rule, to *lex loci contractus*, or putative applicable law (Crawford, *op.cit.*, paragraph 12.44), subject to the applicability of Rome Convention, Article 11.
267 Rome Convention, Article 8. Note that Article 8(2) would permit a guarantor spouse, habitually resident in a country other than that of the putative applicable law, to seek to rely on that law of habitual residence to establish lack of consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the putative applicable law of the contract.
268 Rome Convention, Article 10.
269 Following U.K. reservation in respect of Rome Convention, Article 10(1)(e).
270 But see *In re Anchor Line (Henderson Bros) Ltd* [1937] Ch. 483: a security right which does not comply with the *lex situs* might nevertheless confer a valid personal right upon the creditor.
The forum retains a discretion to disapprove and refuse to enforce any or all of the terms of the primary regime, on the grounds of public policy, but we can adduce no example.

A note on the law(s) which govern form and interpretation of marriage-contracts is to be found above.\footnote{At paragraph 2.3.1.1.1, above.}

2.3.2.1.3 Matters of which it is disputed by which law they are governed

Sales, gifts and partnerships between spouses during the subsistence of the marriage:

In modern Scots domestic law, onerous or gratuitous transactions, and commercial partnerships between spouses, are subject to the same rules as obtain between strangers, in view of the ‘system’ of separation of property. This was not always so. Until 1921,\footnote{Married Women’s Property (Scotland) Act 1920, section 5.} donations between spouses were revocable (on the \textit{ratio}, following Roman law, that the gift was “presumably for temporary enjoyment, and not intended to pass out of the family”\footnote{Walton, \textit{op.cit.}, p173.}); until the enactment of the Married Women’s Property (Scotland) Act 1920, even though a wife by contract had separate property, she could not enter into a commercial partnership with her husband.

It follows now that the normal conflict rules governing sale, gift and partnership will apply, \textit{viz}., Rome Convention as enacted in Contracts (Applicable Law) Act 1990 with regard to sales; \textit{lex situs} with regard to the proprietary aspects of gifts (personal rights between donor and donee being governed perhaps by the proper law of the gift); with regard to partnerships (separate \textit{persona}; joint and several liability of partners \textit{etc}.), the governing law will be that of the place of inception/creation, in the same way that in the United Kingdom, with regard to incorporated associations, place of incorporation rather than ‘seat’ is the governing law.

Obligation to maintain is governed by the law of the matrimonial domicile.

Pension Rights

The question of claims to a share of pension funds by the non-contributing spouse against the other spouse, or against the administrator of the fund is an important question in domestic divorces,\footnote{TRAVERS, J, \textit{Money Matters on Separation and Divorce} (1996).} and potentially so as a conflict matter, although as we have pointed out Scots domestic law alone applies in divorce cases heard in Scotland (grounds; financial and other consequences), subject to contrary provision made by a regime proved to be applicable. We should expect that the existence and extent of claims in the fund by the non-contributing spouse would be referred to the Code or contract. In the absence of contractual provision, we suspect the Scots divorce forum would use its own law, which of late has become more developed (and ‘equitable’).\footnote{COOKE, A J, \textit{Pension Rights on Divorce in Scotland}, 1999 J.R. 291. See paragraph 1.6.1.3.1 above.} Only if the question arises as an isolated matter would it seem likely that Scots law would apply the \textit{situs} of the pension fund.\footnote{See Crawford, \textit{op.cit.} Incorporeal Moveables, paragraph 14.18 \textit{et seq}.}

Life Insurance Policies

The normal rules (as between strangers) will apply.

\footnotesize{\textsuperscript{271} At paragraph 2.3.1.1.1, above.\textsuperscript{272} Married Women’s Property (Scotland) Act 1920, section 5.\textsuperscript{273} Walton, \textit{op.cit.}, p173.\textsuperscript{274} TRAVERS, J, \textit{Money Matters on Separation and Divorce} (1996).\textsuperscript{275} COOKE, A J, \textit{Pension Rights on Divorce in Scotland}, 1999 J.R. 291. See paragraph 1.6.1.3.1 above.\textsuperscript{276} See Crawford, \textit{op.cit.} Incorporeal Moveables, paragraph 14.18 \textit{et seq}.}
The assignability of rights under a policy is governed by the proper law of the right. Since contracts of insurance covering risks situated in the European Union do not fall within the scope of the Rome Convention, we are concerned here with common law. Formal validity of an assignation from spouse to spouse of rights under a policy of assurance will be governed by the lex loci contractus or the proper law; and essential validity by the proper law of the contract of assurance. Capacity to assign may be governed by the proper law of the assignation or possibly of the right; the rule on capacity to take we would assume to be the same, though it is true that, in succession, capacity of a beneficiary to take is referred to the domicile (of beneficiary or of deceased, depending on which allows the beneficiary earlier to succeed). We expect the domicile to be less strong a contender in assignations inter vivos than mortis causa, however.

Competitions between a transferee spouse, on the one hand, and a transferor’s creditor, on the other, will be determined by the lex situs of the fund (which will usually be the proper law of the debt), unless both claim under the same law, when the Scots court will be prepared to apply that law.

Questions such as the validity of destinations (including, we think, capacity to change the terms of the contract) in Scots law will be referred to the proper law of the policy/contract of assurance; whether life assurance funds form part of the matrimonial property under regulation by a particular regime, and whether they can be removed from such fund by unilateral act of the marital partner, we would expect to be governed by the proper law of the regime.

2.3.2.2 At the time of dissolution of marriage

2.3.2.2.1 Dissolution during the life of spouses

As explained above, a Scots court will apply Scots domestic law of financial provision (capital; maintenance) in any divorce litigation where it is properly seised, no matter the extent of foreign elements therein, subject to the implementation of statutory or private provisions proved to be applicable in the particular case. Hence, domestically, the effect upon the settlement of (bad) behaviour during the marriage (fault) will depend on the content of the law of the forum at any given time.

In terms of recognition, Scots law (in cases outside the ambit of ‘Brussels II’ and to a more restricted extent, within) has a policy discretion not to recognise a

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278 Rome Convention, Article 1(3).
280 Re Hellman’s Will 1866 L.R. 2 Eq. 363.
281 Kelly v. Selwyn [1905] 2 Ch. 117.
283 At paragraph 1.6.1.4, above.
284 At paragraph 1.6.1.3, above.
286 Brussels II, Article 15; but see Article 18 and 19.
foreign decree of divorce, in whole or any part thereof, but we know of no instance in which a divorce has been refused recognition because the financial consequences appended by the foreign court as a result of its substantive law and/or in implementation of statutory or private provisions proved to be applicable in the particular case offended our sensibilities. Thus, in principle, the fact that a Belgian divorce or regime on termination punishes in the bank account a ‘guilty’ spouse, but a Dutch divorce or regime on termination does not, is not of concern to us in the matter of recognition, except in so far as the other spouse can establish that jurisdiction in the Scots court to make additional financial provision exists in terms of Matrimonial and Family Proceedings Act 1984.

In sum, a Scots court will use its own law in its own cases; and will not object to a foreign court doing the same, whatever financial consequences, whether as a result of general law, Code or contract are thereby attached to whatever concept of guilt. But it must be emphasised that in non-Continental Europe, we do not have experience of the interaction of the forum’s divorce law with the statutory or private property provisions put in place for the couple at the start of the marriage.

2.3.2.2.2 Dissolution upon the death of one of the spouses

The provisions of the regime which are to operate on death will be respected. Provisions relating to immoveables will be subject in the Scots view to any overriding rules of the lex situs (as e.g. may be found in small jurisdictions such as Switzerland, Bermuda or Jersey, Channel Islands to ‘control’ their inhabitants, in the matter of e.g. nationality), but where the lex situs is a legal system within the United Kingdom there are instances of acquiescence by the lex situs in the provisions of a Code.

Problems of classification arise where the deceased has acquired a Scots domicile at death. In principle, if he dies intestate, his moveable estate will be distributed in accordance with domestic Scots law; and if he dies testate the essential validity of his Will will be tested according to domestic Scots law (which requires that one third of moveables – one half if the deceased left no children – be allocated to the surviving spouse). However, following the House of Lords decision in De Nicols (1900), above, it is accepted that domestic Scots law will yield to contrary provisions of the regime if it can be shown that the regime applies in the instant case. Three conflicts which may occur are – (a) that the testator flouts the regime provisions; (b) that he purports to dispose of what in terms of the regime is not his; (c) that he contravenes the succession law of his last domicile. Whether the regime rights are classified as (vested) contractual rights, or the will is viewed as contravening agreed succession rights, a Scots court, in our view, would uphold the regime against the will, whether or not the will ex facie complies in substance with the Scots ultimate domicile of the testator.

Such an approach may be thought to short-circuit the classification problem: if we are agreed that the terms of the regime must be adhered to, this avoids the choice between a matrimonial property (first common domicile?) and a succession (last domicile) classification. The regime should if possible be seen as a regulatory regime for the entirety of the marriage, including distribution on dissolution by death.

Practical problems of liquidation and division


288 See above, paragraph 2.1.1.2.
We doubt if Scots practitioners have experience of this. However, in Scotland, an estate is wound up and distributed through the agency of one or more executor(s), who must take title to all moveable and immoveable estate in Scotland by means of a process known as confirmation before he/they can deal with the property. In order to obtain authority to deal with property outside Scotland (or England for, within the United Kingdom, there is mutual recognition of confirmation and the English equivalent, probate), he/they must complete title according to the *lex situs*.

### 2.3.3 Law applicable in case of changes in the matrimonial property regime

#### 2.3.3.1 Modifications of the connecting factor

##### 2.3.3.1.1 Assumptions to as to conflit mobile

The view of the Scots court is that change of nationality or of domicile effects no change in property rights conferred by Code or contract, provided that such were the terms of the Code or contract. Hence, in *Shand-Harvey v. Bennet-Clark*,\(^{289}\) where parties were married in Mauritius, choosing at marriage by private marriage-contract a system of separation of property, and later moved to Scotland, acquiring Scots domicile, the question of the competing rights of creditors of the husband, on the one hand, and the wife, on the other, in property which had been the subject of gift from husband to wife, was determined by the conditions of the marriage-contract; that is to say, the wife’s title was determined thereby, and *not* by the domestic law of Scotland (which, at that time, held gifts between spouses to be revocable).

But, if ‘matrimonial property regime’ (*per* paragraph 2.3.3) includes the situation of *absence* of regime, then the situation is quite different, and, subject to rights earlier vested, we are inclined to think that rights in property later acquired will be governed by the common domicile at the date of acquisition.

##### 2.3.3.1.2 Laws applicable in case of conflit mobile

In those cases where change in the personal law may be significant, we mean a change of (common) domicile; change of nationality would not be relevant. We have noted above\(^{290}\) that for this purpose a change of matrimonial residence for a substantial period of time might suffice as ‘matrimonial domicile’ (and might be held to regulate property rights in acquisitions, even though the parties were of different domiciles, each domicile being different from the matrimonial one — *sed quaere* where one party’s domicile was the same as the legal system of the matrimonial home\(^{291}\)). Where there is no matrimonial home, and parties live apart, with different domiciles, there is no authority on applicable law, except that the matter then seems to us to be one of pure property law, regulated by each *lex situs*, subject potentially to the terms of any marriage-contract then extant and applicable and in which, with regard to immoveable property, the *situs* acquiesces.

#### 2.3.3.2 Modifications of the applicable law

##### 2.3.3.2.1 Assumptions as to transitory conflicts of the internal law

**Change in the content of the applicable law:** We think it likely that a choice by parties of a particular system of matrimonial property rules would be

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\(^{289}\) 1910 S.L.T. (Sh.Ct.) 133.

\(^{290}\) At paragraphs 2.1.1.3.3, 2.1.2.2.2, and 2.3.1.2.1, above.

\(^{291}\) Dicey & Morris, *op.cit*, Rule 148 (and also Rule 150). See note 25 above.
understood in Scots law as meaning a choice of the rules of that system, as they may exist from time to time, in the same way as a choice of applicable law for a commercial contract denotes that law as from time to time prevailing.

We note the South African case of *Sperling v. Sperling*[^292] in which the court adhered to changes, including retrospective changes, in the *lex causae*. Retrospective changes would be subjected to a policy test by a Scots court since retrospective changes in property rights are not usually viewed favourably.[^293]

### 2.3.3.2 Law applicable to transitory conflicts

Only changes in content of the *lex causae* identified by the conflict rules of the Scots *lex fori* in the instance case (of Code; of proper law of marriage-contract; of *lex situs* and/or first or later matrimonial domicile) will be relevant.

There is clearly a potential inconsistency between our position on vested rights and our suggested amenability to recognition of change in content of matrimonial property law of first or later *leges causae*. Resort to policy might be required to resolve problems of purported retrospective changes, but we lack guidance from precedent or from Convention. Such matters are treated in the Hague Convention on the Law Applicable to Matrimonial Property (1976), but the United Kingdom is not party thereto.

### 2.3.3.3 Changes in the matrimonial property regime by consent of spouses

#### 2.3.3.3.1 Law governing admissibility

We suggest that Scots law would permit change of regime selected by private marriage-contract, by consent of both parties, and that change of statutory regime would be permitted on proof that the foreign law governing the original statutory regime and that of the proposed statutory regime allowed change. But we have neither rule nor practical experience to contribute.

#### 2.3.3.3.2 Law governing the marriage-contract

The essential validity and effect of a later marriage-contract would be governed by the proper law thereof, and the form by the proper law or the *lex loci contractus*.[^294] Capacity to revoke, and to make a substitute, may be referred to the domicile of each at the date of revocation[^295] and substitution respectively, or, arguably, by the putative proper law. Consent, we suggest, would be referred to the putative proper law. Clearly, questions might arise concerning the continuing validity of rights earlier acquired, and/or rights of third parties[^296], but we have no experience to offer.

All we can say is that the intrinsic revocability of a marriage-contract is governed by the proper law of the deed[^297] and capacity to revoke (possibly) by the domicile[^298] of the party purporting to revoke at the date of purported revocation.

[^294]: At paragraph 2.3.1.1.1, above.
[^295]: *Viditz v. O’Hagan* (1899), above.
[^297]: *Sawrey-Cookson v. Sawrey-Cookson’s Trs.* (1905), above.
[^298]: *Sawrey-Cookson v. Sawrey-Cookson’s Trs.* (1905), above.
It is more likely in the Scots or United Kingdom context that a spouse would regret entry into any marriage-contract at all, and would wish to renge and thereby to revert to the separation of property normally prevailing, with hope of substantial benefit upon the other’s predecease.

In the well-known instance of Cooper v. Cooper’s Trs., an Irish domiciliary aged eighteen years married a Scots domiciliary in Ireland and upon marriage entered into a settlement in Scots form in which she agreed to accept an annuity in lieu of the legal rights which would arise by Scots law on her husband’s death. Upon his death, she wished to have the contract reduced on the ground of ‘minority and lesion’ (that she had been prejudiced by youth and inexperience); ultimately, the House of Lords purported to apply to this question her Irish domiciliary law at contracting and held that the contract was void by Irish law. No proof was led of the content of Irish law. It should be explained that the House of Lords is deemed to have judicial knowledge of the laws of all constituent parts of the United Kingdom (which, then, included Ireland), but the decision is unsatisfactory, not least because it is arguable that the substance of the law applied was more Scots than Irish, though their Lordships denied that they were applying Scots law. The case remains a precedent in Scots law.

The authorities cannot be said to be in a satisfactory state, and there are no modern instances. Instances from the commercial sphere suggest that capacity should be referred to the putative proper law; one reason for reduction of an anterior contract, and one test of the validity of a new one, would be referred therefore to the putative proper law(s) of each.

2.3.3.4 Other possible changes in the matrimonial property regime

2.3.3.4.1 Automatic changes in the regime
Not known.

2.3.3.4.2 Consequential changes in the regime
Not known.

2.3.4 Law applicable to the publication of the matrimonial property regime

2.3.4.1 Law applicable to the publication of the initial regime

2.3.4.1.1 Can the regime be relied upon against the parties?

This question is not meaningful in Scots law. There is no mechanism for making a public record of the matrimonial regime which governs parties’ property relations, because, in the modern era, the making of private marriage-contracts is, we believe, very rare indeed in the population domestically; nor is there any mechanism

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299 (1888) 15 R. (H.L.) 21. See commentary in Anton with Beaumont, op.cit., pp 577 – 579. See also Maitland v. Maitland (1843) 6 D. 244. A settlement of the settlor’s whole moveable estate on death on his spouse will exclude legal rights by implication: Fisher’s Trs. v. Fisher (1844) 7 D. 129. See Gloag and Henderson, op.cit., paragraph 43.08. Post-nuptial acceptance by a spouse of a liferent will exclude a claim on the other’s predecease for jus relicti/ae out of the fund providing the liferent, on the reasoning that “the acceptance of a liferent is inconsistent with a claim to carry off part of the fee.” (Gloag and Henderson, op.cit., citing e.g. Smart v. Smart 1926 S.C. 392)

300 Though see Rome Convention 1980, Article 8(2) (habitual residence).
for recording the property regimes of incomers. Hence, in theory, third parties dealing in Scotland with a spouse may be disadvantaged.\textsuperscript{301}

2.3.4.1.2 \textit{Which law is applicable to the system for publication?}
This question is not meaningful in Scots law. See paragraph 2.3.4.1.1, above.

2.3.4.1.3 \textit{Which law governs the obligation to register?}
This question is not meaningful in Scots law. See paragraph 2.3.4.1.1, above.

2.3.4.2 Law applicable to the publication of a modified regime

2.3.4.2.1 \textit{Can the regime be invoked against third parties?}
This question is not applicable or answerable in Scotland.

2.3.4.2.2 \textit{Which law is applicable?}
This question is not applicable or answerable in Scotland.

2.3.4.2.3 \textit{Which law governs the obligation to register?}
This question is not applicable or answerable in Scotland.

2.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND ‘PUBLIC’ ACTS IN RESPECT OF MATRIMONIAL PROPERTY REGIMES

2.4.1 The general rules on the effectiveness of foreign ‘public’ acts and court decisions as applied in the area of matrimonial property regimes

2.4.1.1 Overview of sources
Not applicable in Scotland.

2.4.1.2 Application in matrimonial property regimes
Not applicable in Scotland.

2.4.2 Rules on the effectiveness of foreign ‘public’ and private acts and court decisions specific to the area of matrimonial property regimes
Once again, our remarks are general. We do not believe that our system can yield much useful evidence.

2.4.2.1 Recognition of marriage-contracts concluded abroad
There is no formal procedure for recognition. The validity or terminological meaning of a marriage-contract will not arise in Scotland unless the matter is raised in an individual case, perhaps in relation to the propriety of actings of trustees.

2.4.2.2 Recognition of modifications
The Scots court would give effect to modifications concluded abroad, in our view, though we can cite no instance, provided the modification complied in form

\textsuperscript{301} \textit{Shand-Harvey v. Bennet-Clark} (1910), above. See remarks at paragraphs 1.4.1.1 and 1.4.2.
with the *lex loci contractus* or proper law of the deed. Only if either of those laws required special ‘public’ procedure would the Scots court require such a formality.

2.4.2.3 Enforcement of foreign court decisions

A foreign court decision on distribution under a property regime would be regarded as a decree *in rem* if the property concerned was situated within the territory of the foreign court at date of decree; but otherwise would be a decree *in personam*. The method of enforcement of a decree *in personam* depends on the source of the country of decree.

Essentially, decrees from Commonwealth countries are ‘extended’ by means of discretionary registration in terms of the Administration of Justice Act 1920: those from non-EU countries and of some Commonwealth countries such as Canada and Australia, by means of registration as of right (subject to possibility of later setting aside) in terms of the Foreign Judgments (Reciprocal Enforcement) Act 1933. Judgments in this (matrimonial) area from EU countries will *not* be governed in the matter of enforcement by the Brussels Convention 1968 as amended (now B.I.R.), since the scope of the Convention encompasses and is limited to *civil and commercial matters*, and ‘rights in property arising out of a matrimonial relationship’ are specifically excluded from the Convention’s ambit. On the other hand, enforcement of judgments within the United Kingdom under the Civil Jurisdiction and Judgments Act, 1982–1991 (Schedules 6 [money] and 7 [non-money] judgments) suffers no such (matrimonial property) exclusion.

Hence, decrees from an EU member state which is not party to the Act of 1933, and decrees from countries outside the current reciprocity agreements (most notably the United States of America) must be enforced by the common law procedure of seeking in the Court of Session action for *decree conform* to the foreign decree.

In all the cases above cited, a defence to enforcement can be made out on one or more of a number of grounds (e.g. lack of jurisdiction, fraud, breach of natural justice etc.) At common law, and under the Acts of 1920, 1933 and Civil Jurisdiction and Judgments Act 1982–1991, Schedules 6 and 7, enforcement may be refused on the ground of public policy. While it is true that such cases may concern alleged procedural unfairnesses, the English courts have also refused to enforce a judgment when the substance of the decree offends, and we have no doubt that the Scots court can do likewise. So far, in the area under review in this Report, this challenge remains in the realm of theory, not practice.

Enforcement of property orders which form part of a divorce or annulment which falls under regulation by Brussels II will be governed thereby.

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302 *Cf.* Generally (decrees *in rem*) *Castrique v. Imrie* (1870) L.R. 4 H.L. 414. Contrast *McKie* [1933] I.R. 464 (in which a Californian divorce court sought to have consigned into the court’s custody the proceeds of a win by the husband in the ‘Irish Hospital Sweepstake’ (an Irish lottery), as part of the goods falling into community of property under Californian law. The order was a *brutum fulmen*, since at date of decree the money in question was in Ireland.


304 Article 1(1); Regulation 44/2001, Article 1(2)(a).

305 *Re Macartney* [1921] 1 Ch. 522 (Maltese award of ‘perpetual’ aliment against deceased putative father).

306 Brussels II, Chapter III, Articles 14, 15, 17, 18, 19, 23, 24, 25, 26, 27 and 29.
2.4.2.4  Co-operation between courts and public authorities  
Not applicable.

2.4.2.5  Problems concerning international effectiveness of contracts  
A Scots court will enforce contracts of sale, or employment, or gifts, between spouses, if the contract or gift is valid by its applicable/proper law, and according to its terms. If the circumstances are special by reason of statutory or private marriage-contract, this will emerge in the ascertainment of capacity to give/to contract.

Thus, for example, if contracts of loan are prohibited between spouses, not by the law(s) of the domicile, nor by the applicable law of the loan, but by the terms of community operating between the contracting parties, who are husband and wife, neither would have capacity to lend or borrow. Realistically, this would only emerge if litigation arose between them, and, legally, only if – contrary to what has been argued above – capacity was referred to the personal law and any regime prescribed or permitted thereby or adopted by option of the parties thereunder.

If spouses have capacity to lend and to borrow from each other, by their personal law or regime, the loan might yet be struck down if it contravened the rules of the putative applicable law; 307 or the public policy of the forum. 308 An ingenious solution would emerge if by process of Incidental Question reasoning the forum found the parties not to be husband and wife.

2.4.3  Practical significance of the rules set out under 2.4.1 – 2.4.2.

2.4.3.1  Frequency of decisions  
Not applicable.

2.4.3.2  Frequency of application of rules on effectiveness  
Not applicable.

2.5  OTHER REMARKS  
None.

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307 Rome Convention, Article 8(1) (or 8(2)?).  
308 Rome Convention, Article 16.
CHAPTER 3

UNMARRIED COUPLES. INTERNAL LAW

3.1 SOURCES OF THE LAW ON UNMARRIED COUPLES

3.1.1 General legislative sources
Cohabitation, *per se*, and the legal consequences thereof, are not specifically or independently regulated by legislation.

Various statutes refer, incidentally, to cohabitation and to the rights of cohabitants *e.g.* Damages (Scotland) Act 1976, sections 1 and 10(2), as amended by the Administration of Justice Act 1982, section 14(4); Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 18; Mental Health (Scotland) Act 1984, section 53(5); Social Security Act 1986, section 20(11); Housing (Scotland) Act 1988, section 31(4); Finance (No 2) Act 1988, section 42; and Adults with Incapacity (Scotland) Act 2000, section 87(1).

3.1.2 Court decisions and customary law
There is no distinct, or developed, body of law which regulates the rights and obligations of unmarried, cohabiting couples.

3.1.3 Any reforms
See Scottish Executive proposals at paragraphs 3.3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.5.2.1.2, 3.6.1, 3.6.2.1, and 3.6.2.2, below.

3.2 HISTORIC DEVELOPMENT OF THE LAW ON UNMARRIED COUPLES

3.2.1 Historic development
In 1990, a comprehensive examination of the legal effects of cohabitation was carried out by the Scottish Law Commission (‘the SLC’), in their Discussion Paper, *The Effects of Cohabitation in Private Law*. 309

For the purposes of the Discussion Paper, the SLC defined cohabitation as, “the relationship of a man and a woman who are not legally married to each other but who are living together as husband and wife, whether or not they pretend to others that they are married to each other.” 310 The definition does not include a minimum qualifying period of living together.

Whilst certain statutes apply not merely to heterosexual couples (*e.g.* members of same-sex couples are included within the definition of ‘nearest relative’ in the Adults with Incapacity (Scotland) Act 2000, section 87(1) 311), in this Report,

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309 Discussion Paper No. 86.
311 Professor Norrie has remarked that “… this is the first time that legislation anywhere in the United Kingdom has expressly and intentionally given recognition, for civil law purposes, to the existence of same-sex family relationships.” (NORRIE, K McK, ‘Sexual Orientation and Family Law’ in SCOULEAR, J (ed.), *Family Dynamics: Contemporary Issues in Family Law*, (2001) p151) “There are other statutes, such as … the Rent (Scotland) Act 1984 and the Children (Scotland) Act 1995 … … in
unless the contrary be expressed, ‘cohabitation’ should be taken to mean heterosexual cohabitation; it is the view of the SLC that, “[I]t is this type of cohabitation which is statistically more important and in relation to which there is currently the greater demand for reform.”

Although there is no distinct body of law which regulates the rights and obligations of unmarried, cohabiting couples, nevertheless, Scots law recognises the existence of cohabiting couples, for various purposes including social security, tenants’ rights, taxation, occupancy rights, delictual damages, criminal defences, and mental health.

### 3.2.2 Actual situation

At present, the legal consequences of cohabitation, per se, are very limited, and few rights and obligations attach to cohabitants by virtue of cohabitation. In short:

- No obligation of aliment is owed by a cohabitant to his/her partner.  
- There are no special presumptions regarding the ownership of household goods purchased during the period of the cohabitation, or regarding the right to savings from a housekeeping allowance or property acquired with such savings.  
- Upon termination of cohabitation, a cohabitant has no statutory entitlement to seek financial provision, or redistribution of property.  
- A cohabitant has no rights of intestate succession in the estate of his/her partner, and no claim for legal rights upon that party’s death.

The purpose of the SLC Discussion Paper, *The Effects of Cohabitation in Private Law*, was to elicit views on the various possibilities for changing the law regarding the effects of cohabitation in private law.

The provisional view of the SLC, as expressed in the Discussion Paper, was as follows:

- The mere fact of cohabitation does not justify imposing a legal obligation on one cohabitant to support the other.  
- It would not be justifiable to introduce a norm of equal sharing of property acquired during the cohabitation, or any obligation of support (unrelated to childcare).

In 1992, the SLC published its *Report on Family Law*, in which it made various recommendations regarding the regulation of cohabitation. The basic view was that “… there is a strong case for some limited reform of Scottish private law to enable certain legal difficulties faced by cohabiting couples to be overcome and to enable certain anomalies to be remedied.”

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Discussion Paper No. 86, paragraph 1.1.
Discussion Paper No. 86, paragraph 1.9.
*Contra* married couples: *Family Law (Scotland)* Act 1985, section 1(1).
*Contra* married couples: *Family Law (Scotland)* Act 1985, section 1(1).
*Contra* married couples: *Family Law (Scotland)* Act 1985, sections 8 – 16.
*Contra* married couples: *Succession (Scotland)* Act 1964, sections 2, 8 and 9.
*Contra* married couples: *Succession (Scotland)* Act 1964, sections 2, 8 and 9.
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*Contra* married couples: *Succession (Scotland)* Act 1964, sections 2, 8 and 9.
recommendations was that “[Legal intervention] … should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage.”  

Family law is a devolved matter, and any change to the existing law in this area is a matter for the Scottish Parliament. In March 1999, the Scottish Office Home Department issued a consultation paper, Improving Scottish Family Law, in the hope that consultation would stimulate further debate, and help to inform consideration of the subject by the Scottish Parliament. The proposals contained in Improving Scottish Family Law are based largely upon the 1992 recommendations of the SLC.

In 1999, the Scottish Executive indicated that it does not seek to equate the legal effects of cohabitation and marriage: “The Executive does not plan to set up a regime of property sharing on separation or on succession which is equivalent to that applying to married couples. Couples who cohabit are making an active choice not to marry, or are not free to marry. That difference must be acknowledged and respected by appropriate differences in the legal consequences of cohabitation.”

In general terms, it is the view of the Executive that “… the arrangements recommended by the Scottish Law Commission provide a fairer property regime for cohabitants than exists at present.” In sum, the Executive believes that the 1999 recommendations “… will provide a fair regime of property rights for cohabitants without replicating the arrangements that exist for sharing of matrimonial property on divorce.”

In 2000, in response to Improving Scottish Family Law, the Scottish Executive published a white paper entitled ‘Parents and Children’, which outlines the substance of prospective reform in this area. Draft legislation is not yet available, but specific reforms are detailed in paragraphs 3.3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.5.2.1.2, 3.6.1, 3.6.2.1, and 3.6.2.2, below.

3.3 THE LEGAL CHARACTER OF RELATIONS OTHER THAN TRADITIONAL MARRIAGE

3.3.1 ‘Legal’ marriage

The traditional definition of marriage is: “… the voluntary union for life of one man and woman, to the exclusion of all others.”

There are two types of marriage under Scots law, namely, regular marriage and irregular marriage.

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323 From 1 July 1999, legislative responsibility for Scottish civil law, including family law, devolved to the Scottish Parliament. The Scottish Executive assumed administrative and policy responsibility for these matters. (Scottish Office Home Department consultation paper, Improving Scottish Family Law, March 1999) (Parents and Children, paragraph 1.8)
324 Improving Scottish Family Law, paragraph 4.3.
325 Parents and Children, paragraph 7.1.
327 Parents and Children, paragraph 7.4.
328 Parents and Children, paragraph 7.5.
329 Hyde v. Hyde & Woodmansee [1866] L.R. 1 P&D 130, per Lord Penzance, at p133. See Crawford, op.cit., paragraph 9.01. See also Clive’s ‘modern’ definition, viz.: “a subsisting legal relationship between a man and a woman who have gone through a legally approved marriage ceremony, or the legally recognised equivalent, with each other.” (CLIVE, E M, Marriage and Cohabitation’ in Scoular, op.cit., p133)
330 Clive, op.cit., Chapter 4.
3.3.1.1 Regular marriage

The law on the constitution of a regular marriage is statutory: Marriage (Scotland) Act 1977 (hereinafter the ‘1977 Act’), and Marriage (Scotland) Act 2002. Objections to marriage are set out in section 5 of the 1977 Act. In particular, section 5(4) states that there is a legal impediment to marriage where:

- The parties purporting to marry are within a forbidden degree of relationship;
- One or both parties is/are already married;
- One or both parties will be under the age of 16 on the date of solemnisation of the intended marriage;
- One or both parties is/are incapable of understanding the nature of a marriage ceremony or of consenting to marriage;
- Both parties are of the same sex; or
- One or both parties is not domiciled in Scotland and, on a ground other than one mentioned in paragraphs (a) to (e), a marriage in Scotland would be void ab initio according to the law of the domicile of the party or parties as the case may be.

In 2000, the Scottish Executive advised (in line with the SLC 1992 recommendations), inter alia, that:

- It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, already married.
- It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.
- It should continue to be a ground of nullity of marriage that both parties are of the same sex.

Legislation should be introduced to remove the restrictions on marriage between a person and the parent of his or her former spouse. Legislation should be introduced to give effect to the SLC recommendation that the question whether a marriage is essentially valid should be governed by the law of that party’s domicile immediately before the marriage. This is intended to resolve the uncertainty under existing law as to whether a party must also have capacity by the lex loci celebrationis.

The Scottish Executive has also proposed to legislate to implement the following recommendation of the SLC, viz.: a marriage entered into in Scotland

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331 Clive, op.cit., Chapter 5.
332 Schedule 1, Marriage (Scotland) Act 1977.
333 See Marriage (Scotland) Act 1977, section ‘1. - (1) No person domiciled in Scotland may marry before he attains the age of 16; (2) A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void.’
335 1992 Report, recommendation 43; Parents and Children, paragraph 6.4.1.
337 1992 Report, recommendation 45; Parents and Children, paragraph 6.4.2.
338 1992 Report, recommendation 46; Parents and Children, paragraph 6.4.3.
340 Parents and Children, paragraphs 6.4.15 and 6.4.16.
341 Parents and Children, paragraphs 6.4.17 and 6.4.18. The Executive has explained that “These exceptions to the general rule that capacity to marry is governed by the law of each party’s domicile are fundamental to the nature and basis of marriage, and are justified for reasons of public policy.” (paragraph 6.4.18)
will be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into:

- The parties were within the forbidden degrees of relationship;
- Either party was already married;
- Either party was under the age of 16;
- The parties were of the same sex; or
- Because of mental incapacity, error or duress, either party did not effectively consent to the marriage but, without prejudice to the law on error or duress, will not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

**Same-sex relationships**

In 1990, and again in 1992, the SLC endorsed the policy enshrined in section 5(4)(e) of the Marriage (Scotland) Act 1977, namely, that it is a ground of nullity of marriage that both parties are of the same sex. The SLC noted that “… the existing law can operate in an inhumane way in certain situations”, but concluded that, “… we would clearly not be justified in recommending any change in the law on such a highly controversial matter in this report.”

In 1999, in *Improving Scottish Family Law*, the Scottish Executive invited views on the SLC recommendations in relation to same-sex marriages. In 2002, in *Parents and Children*, the Scottish Executive advised that, “While we fully recognise that a same-sex partnership may have similar characteristics to a partnership between opposite sex cohabitants, it is not the Executive’s policy to introduce same-sex marriage into Scotland.”

**3.3.1.1.1 The formalities of regular marriage in Scotland**

The Marriage (Scotland) Act 1977 deals, *inter alia*, with the preliminaries to a regular marriage in Scotland, permitted celebrants, religious marriages, and civil marriages.

There are two types of regular marriage in Scotland: religious and civil. The formal difference concerns the celebrant. The celebrant in religious marriages must be authorised in terms of sections 8 and 9 of the 1977 Act, whereas the celebrant in civil marriages is the district registrar.

**3.3.1.1.2 The preliminaries to a regular marriage**

The parties must submit to the district registrar a ‘marriage notice’, being a notice of intention to marry; the district registrar notes the particulars of the marriage notice in the marriage notice book.

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345 1992 Report, paragraph 8.5.
346 *Improving Scottish Family Law*, paragraph 4.6.3.
347 *Parents and Children*, paragraph 6.4.2.
348 Clive, *op.cit.*, Chapter 4.
349 Section 17, 1977 Act.
350 Section 3(1), 1977 Act.
Written objections to the proposed marriage may be submitted to the district registrar, or if relating to capacity to marry, to the Registrar General. If no objections are made, or if the objections are unfounded, the district registrar issues a ‘Marriage Schedule’, which is the celebrant’s ‘licence’ to marry.

3.3.1.3 The procedural requirements

Both parties must be present; Two persons professing to be 16 years of age or over must be present as witnesses; The parties must declare that they accept each other as husband and wife; The celebrant must declare the parties to be husband and wife; The Marriage Schedule must be signed by the parties, the celebrant and the witnesses, and delivered to the district registrar within three days of solemnisation of the marriage (religious marriages), or retained by him (civil marriages).

3.3.1.2 Irregular marriage

Marriage by cohabitation with habit and repute

The law concerning marriage by cohabitation with habit and repute is not statutory, but rests upon the common law.

“If a man and a woman who are free to marry each other cohabit as husband and wife in Scotland for a considerable time and are generally regarded as being husband and wife they are presumed to have consented to be married, even if only tacitly, and, if the presumption is not rebutted, will be held to be married by cohabitation with habit and repute.”

Although such a marriage exists independently of a court decree, a decree of declarator will normally be sought in order to demonstrate that the prerequisites for this type of marriage have been established. Parties must prove a sufficient period of cohabitation (and it should be noted that the requisite cohabitation must be in Scotland), and sufficient reputation.

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352 Section 5, 1977 Act.
353 Section 6(1), 1977 Act.
354 Section 23A, 1977 Act, provides that where the particulars of any marriage at the ceremony in respect of which both parties were present are entered in a register of marriages by an appropriate registrar, the validity of that marriage shall not be questioned on the ground of failure to comply with a requirement or restriction of the 1977 Act.
355 Sections 13(1)(b) and 19(2)(b), 1977 Act.
356 Sections 13(1)(c) and 19(2)(c), 1977 Act.
357 Section 15, 1977 Act.
359 Irregular marriages by declaration de praesenti, or by promise subsequent copula, are no longer available: Marriage (Scotland) Act 1939.
361 Discussion Paper No. 85, paragraph 2.2.
In practice, this type of marriage is generally used as a means of conferring rights of succession on a surviving ‘spouse’, following the death of the first ‘spouse’, but it might also be employed as a means to secure occupancy rights or financial provision on ‘divorce’.  

The SLC has emphasised that this form of marriage is “… not available to couples who have lived together without ever pretending to be married or acquiring the reputation of being married.”

Although the SLC recommended, in 1992, that marriage by cohabitation with habit and repute should be abolished as from the date of the implementing legislation (i.e. abolition would be without prejudice to the validity of any such marriage contracted before that date), the Scottish Executive has indicated that it does not intend to implement the SLC recommendation. Accordingly, this type of irregular marriage shall “be retained for the foreseeable future.”

3.3.2 Marriage of fact

Save for marriage by cohabitation with habit and repute, this concept is not part of internal Scots law.

3.3.3 Partnership registration

This concept is not part of internal Scots law.

3.3.4 Contract to cohabit

There is no statutory regulation of cohabitation contracts, per se. Such contracts are subject to general principles of contract law.

It is thought possible that the policy of the law may be to refuse to give effect to cohabitation contracts, on grounds of immorality:

“Sexual immorality is not in general illegal in the sense of being criminal or even delictual, but the courts have always treated as contrary to public policy contracts having sexual immorality as their object, or intended to be preparatory or ancillary to immorality …”

In 1990, the SLC stated that, “… it is to be hoped that a court today would not regard a contract between cohabitants relating to aliment, property or other such matters as contrary to public policy. Given that cohabitation is already recognised for various legal purposes … such a view would be highly questionable.”

In 1992, the SLC recommended that a contract between cohabitants or prospective cohabitants relating to property or financial matters should not be void or unenforceable solely because it was concluded between parties in, or about to enter, this type of relationship. This recommendation has been accepted by the Scottish Executive. It should be borne in mind, however, that the Executive’s proposals relate to heterosexual couples only. Contracts between homosexual cohabitants may still be held unenforceable on grounds of public policy.

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366 Discussion Paper No. 85, paragraph 2.5.
368 Parents and Children, paragraphs 10.4 and 10.5.
372 Parents and Children, paragraph 7(4)(j).
It is not thought to be necessary to supplement the general law of contract in order to deal with the particular instance of cohabitation contracts.\textsuperscript{373}

Professor Clive has advised that “Autonomous arrangements are not confined to cohabitation contracts. Property can be taken in joint names or transferred between the partners so as to achieve a running equality of assets. Insurance policies can be taken out. Wills can be made. Any enterprise carried on by both parties can be carried on in an ordinary commercial partnership.”\textsuperscript{374}

### 3.3.5 Other relationships

None.

### 3.4 Property in relations other than traditional marriage

Cohabitation, \textit{per se}, has no effect upon the property of cohabitants. General principles of property law apply.

#### 3.4.1 Aliment\textsuperscript{375}

There is no statutory obligation of aliment between cohabitants.\textsuperscript{376} One view is that a couple may have deliberately chosen not to marry each other, in order to avoid being burdened by obligations of financial support.

The SLC has not recommended that there should be any obligation of aliment between cohabitants,\textsuperscript{377} and no such obligation has been proposed by the Scottish Executive.

#### 3.4.2 Household goods\textsuperscript{378}

Unlike the presumption which applies to married persons, there is, at present, no presumption that each cohabitant has an equal share in any household goods obtained (other than by gift or succession from a third party) in prospect of, or during the cohabitation. Ordinary principles of property law apply in determining who owns property.\textsuperscript{379}

In 1992, the SLC recommended that the presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 should be applied, with modifications, to cohabitants. It was recommended that the presumption should apply only to goods acquired during the cohabitation, and not to goods bought ‘in prospect of’ cohabitation,\textsuperscript{380} and that the presumption should be rebuttable by proving that the goods belonged to one party alone or to both in unequal shares.

\textit{Proposal}

Accepting the SLC recommendations, the Scottish Executive has proposed that the presumption of equal shares in household goods in section 25 of the Family Law (Scotland) Act 1985 will be applied, with modifications, to cohabitants.\textsuperscript{381} Draft legislation is not yet available.

\textsuperscript{373}Clive (Scoular), \textit{op.cit.}, p142.
\textsuperscript{374}Clive (Scoular), \textit{op.cit.}, p142.
\textsuperscript{375}Discussion Paper No. 86, Part II.
\textsuperscript{376}See Family Law (Scotland) Act 1985, section 1.
\textsuperscript{377}1992 Report, paragraph 16.5.
\textsuperscript{378}Discussion Paper No. 86, Part III.
\textsuperscript{380}1992 Report, recommendation 80.
\textsuperscript{381}Parents and Children, proposal 12.
3.4.3 **Savings from Housekeeping Allowance**

Unlike the presumption which applies to married persons, there is, at present, no presumption that certain savings from housekeeping allowances are to be treated as being owned in equal shares.

In 1992, the SLC recommended that the presumption of equal shares in money and property derived from a housekeeping or similar allowance made by one spouse to the other in section 26 of the Family Law (Scotland) Act 1985 should be applied, with the necessary modifications, to cohabitants.

**Proposal**

Accepting the SLC recommendations, the Scottish Executive has proposed that the presumption of equal shares in money and property derived from a housekeeping or similar allowance in section 26 of the Family Law (Scotland) Act 1985 will be applied, with the necessary modifications, to cohabitants. Draft legislation is not yet available.

3.4.4 **Occupancy Rights and Protection from Violence**

A cohabitant who is not the legal owner or tenant of the family home has no automatic rights of occupancy therein. Under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, a cohabitant can apply to the court for a grant of occupancy rights for a period not exceeding, in the first instance, six months. This period can be extended on a rolling basis, but for no longer than six months at a time.

In determining whether a man and a woman are a cohabiting couple for the purposes of section 18, the court has regard to the circumstances of the case, including the time for which it appears they have been living together, and whether there are any children of the relationship.

Having secured a grant of occupancy rights, a cohabitant may obtain an exclusion order (in terms of which either cohabitant may be excluded from the family home) under section 4 of the 1981 Act, if the requirements of that section are met.

The 1981 Act extends the application of section 13 (which enables a court to transfer a tenancy from one spouse to another, or from both spouses to one) to cohabitants, but only where the parties are joint tenants, or where one has been granted occupancy rights by the court.

The protection of a matrimonial interdict, with power of arrest attached, is available only if a cohabitant has obtained a grant of occupancy rights from the court, or if both cohabitants are entitled, or permitted by a third party, to occupy the home. In 1992, the SLC recommended that matrimonial interdicts should be available to cohabitants, whether or not they have occupancy rights, and without the need for any qualifying period of cohabitation.

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382 Discussion Paper No. 86, Part IV.
385 Discussion Paper No. 86, Part VII.
386 Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 18.
387 Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 18(2).
388 Discussion Paper No. 86, paragraph 7.9.
390 Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 14(2).
391 1992 Report, recommendation 84.
Proposal

In 2000, the Scottish Executive expressed the aim to “… provide protection to vulnerable cohabitants, as well as to spouses. It should be their need for protection which determines matters, not whether they are married to their abuser or not.” Accordingly, the Executive has proposed that interdicts with a power of arrest should be available to divorced partners and present and former cohabitants, and should be renamed ‘domestic interdicts’. Draft legislation is not yet available.

3.5 PROPERTY ISSUES IN CASE OF SEPARATION OF UNMARRIED COUPLES

3.5.1 Separation of the couple

There is no legal procedure or mechanism by which a cohabiting relationship is brought to an end. The cohabiting relationship is a voluntary one, which subsists from time to time and only for as long as the parties will.

Upon separation of the cohabitants, general principles of property law and, where appropriate, child law, are applied so as to resolve outstanding property, custody and child maintenance issues.

3.5.2 Effects of separation upon property

Cohabitation, per se, has no effect upon the property of cohabitants. General principles of property law apply.

3.5.2.1 Financial Provision on Termination of Cohabitation

3.5.2.1.1 Current position

At present, there is no statutory provision whereby a cohabitant may claim financial relief from his/her partner upon termination of the cohabiting relationship.

A ‘cohabitant’ is able to claim the statutory relief available to married persons only where s/he is able to establish (irregular) marriage by cohabitation with habit and repute.

In 1992, the SLC advised that trust law has not been used in Scotland to provide remedies for cohabitants, principally due to the difficulty of proving the existence of a trust. The view was expressed that, “There is little or no prospect of the law on resulting trust or constructive trust, as those concepts are understood in Scotland, being used to provide a remedy for cohabitants.”

A cohabitant might be able to make a claim based on principles of unjustified enrichment, but the law on unjustified enrichment is not easy to discover or to apply, and the result of such a claim will usually be unpredictable.

The most recent authority in this respect is the case of Shilliday v. Smith, in which the pursuer attempted to recover funds which she had spent in renovating her

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392 Parents and Children, paragraph 3.4.
393 Parents and Children, proposal 6.
394 Discussion Paper No. 86, Part V.
395 But see now Requirement of Writing (Scotland) Act 1995.
396 Discussion Paper, No. 86, paragraph 5.5.
fiancé’s house. The critical factor, which justified Mrs Shilliday recovering approximately £10,000 from Mr Smith, was the fact that she had expended the funds ‘in contemplation of their marriage’. When the parties’ relationship broke down, and the contemplated marriage failed to materialise, Mr Smith’s enrichment was held to be unjust because Mrs Shilliday would not have acted as she did, had the parties not been engaged with a view to being married. Had the parties not intended to marry, Mrs Shilliday would not have contributed to the cost of renovating Mr Smith’s house.\(^\text{400}\)

If the doctrine of unjustified enrichment is to be successfully employed by separating cohabitants, as a means of equalising the parties’ financial positions upon termination of the cohabitation, we are of the view that such parties would require to lead evidence as to the specific factor which rendered the defender’s enrichment unjust (\textit{i.e.} the misapprehension or the failed consideration in contemplation of which the claimant expended funds). For engaged couples, the consideration (namely, the contemplated marriage) may be obvious, but for cohabitants (even long-term cohabitants) who have never contemplated marriage, the ‘unjust’ factor may be less apparent. In the case of cohabitants, it is likely that an element of error on the part of the claimant (for example, error as to the title position\(^\text{401}\)), would be essential in order to found a successful enrichment action.

In short, while the law of unjustified enrichment may be a possible means of securing financial recovery, or property redistribution, the principles are not easy to ascertain, or to apply.

3.5.2.1.2

Proposed reforms

In 1990, the SLC concluded that, “It seems clear that to leave the law as it is would be to leave most cohabitants without effective claims for financial provision or redistribution of property on the termination of their relationship.”\(^\text{402}\)

In 1992, the SLC recommended that where a cohabitation has terminated otherwise than by death, a former cohabitant should be able to apply to a court, within one year after the end of the cohabitation, for a financial provision on the basis of the principle in section 9(1)(b) of the Family Law (Scotland) Act 1985, namely, that fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family. The recommendation is that the Court of Session and the sheriff courts should have jurisdiction to entertain an application if they would have had jurisdiction to entertain an action for divorce between the parties. Furthermore, it is recommended that the court should have power to award a capital sum (including a deferred capital sum and a capital sum payable by instalments) and to make an interim award.\(^\text{403}\)

Proposal

In 2000, the Scottish Executive approved the regime recommended by the SLC, and advised that a cohabitant whose relationship has terminated will be able to apply to a court for financial provision from the ex-partner where there has been

\(^{400}\) 1998 S.C. 725, at p733 H-I.
\(^{402}\) Discussion Paper No. 86, paragraph 5.6.
\(^{403}\) 1992 Report, recommendation 82.
economic disadvantage.\footnote{Parents and Children, proposal 14} Draft legislation is not yet available, but the proposed regime will be in accordance with the SLC recommendations.\footnote{Parents and Children, paragraphs 7.4(e) – (i).}

3.5.3 \textbf{Effects of separation with regard to third parties}

During the subsistence of the cohabitation, and upon termination thereof, liability for debts and household expenses is determined according to general principles of obligations and agency.

In terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, a non-entitled partner’s\footnote{i.e. A cohabitant who does not have legal title to the family house, or to the tenancy thereof, but who has been granted occupancy rights by the court under section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.} occupancy rights are \textit{not} protected from dealings relating to the home by the entitled partner with third parties.\footnote{Section 6, Matrimonial Homes (Family Protection) (Scotland) Act 1981.}

3.6 \textbf{Property Issues in Case a Member of the Unmarried Couple Dies}

3.6.1 \textbf{In relation to the surviving member}

Cohabitation, \textit{per se}, has no effect upon the property of cohabitants, or upon succession thereto. General principles of property law and succession apply.

\textbf{Intestate Succession and Legal Rights}\footnote{Discussion Paper No.86, Part VI.}

The cohabitant of a deceased person has no entitlement to inherit his/her estate in the event of the deceased person having died intestate,\footnote{Succession (Scotland) Act 1964, sections 2, 8 and 9.} and has no automatic legal right to a proportion of the deceased’s net moveable estate.

In 1992, the SLC recommended that where a cohabitation is terminated by death, the surviving cohabitant should not have automatic rights of intestate succession or fixed rights to a legal share of the deceased’s estate, but should be able to apply (within six months from the date of death of the deceased) to the court for a discretionary provision out of the deceased’s estate.\footnote{1992 Report, recommendation 83.}

The recommended ground of application is that the disposition of the deceased’s estate was not such as to make such financial provision for the applicant as it would be reasonable to expect, having regard to all the circumstances of the case, including in particular: -

The length of the cohabitation;
The existence of any children of the relationship;
The size and nature of the deceased’s net estate;
Any benefit received by the applicant on or as a result of the deceased’s death, otherwise than out of his/her net estate;
The nature and extent of any other rights/claims against the deceased’s estate;
The nature and extent of any contributions made by the applicant from which the deceased has derived economic advantage; and
The nature and extent of any economic disadvantage suffered by the applicant in the interests of the deceased or of their children.\footnote{1992 Report, paragraphs 16.32 – 16.35.}
The SLC recommendation is that the court should have power to make such order, if any (including payment of a capital sum and/or a transfer of property), for financial provision out of the deceased’s net estate, as it considers reasonable (extending, if appropriate, to the whole net estate). 412

Proposal

In 2000, the Scottish Executive advised that provision will be made for cohabitants whose partners have died to claim a share out of their partner’s estate. 413 Where a cohabitation is terminated by death, the surviving cohabitant will not have automatic rights of intestate succession or fixed rights to a legal share of the deceased’s estate, but will be able to apply to a court for a discretionary provision out of the deceased’s estate along the lines recommended by the SLC. 414 Draft legislation is not yet available.

Testate Succession

Assuming mental and legal capacity, a cohabitant is fully able to make provision in his/her will or other testamentary writing, in favour of his/her partner, subject only to the legal rights of the testator’s surviving spouse and/or children (if any). 415

3.6.2 In relation to third parties

Cohabitation, per se, has no effect upon the property of cohabitants in relation to third parties. General principles of property law apply.

3.6.2.1 Life Assurance – Insurable Interests 416

At present, it is not wholly clear whether a cohabitant has an insurable interest in the life of his/her cohabitant.

In 1992, the SLC recommended that it should be made clear by statute that a cohabitant has an insurable interest in the life of his/her cohabitant. 417 No minimum qualifying period of cohabitation was recommended for this purpose.

Proposal

In 2000, the Scottish Executive noted that the SLC recommendation in respect of insurable interests would impact upon matters which are reserved, and which would, therefore, have to be implemented by the United Kingdom Government. The Scottish Executive has expressed the hope that this recommendation will be taken forward by the UK Government. 418

412 1992 Report, paragraph 16.34.
413 Parents and Children, proposal 15.
414 Parents and Children, paragraph 7(4)(i).
415 There are two legal rights, jus relictæ/jus relict/i (right of the widow/widower) and legitim (right of the testator’s children). The jus relictæ/jus relict/i fund comprises one third of the deceased’s net moveable estate (in the event of there being surviving children, or direct descendants of surviving children), or one half (in the event of there being no surviving children or direct descendants). Similarly, the legitim fund comprises one third (in the event of a surviving spouse), or one half (in the event of no surviving spouse).
416 Discussion Paper No. 86, Part VIII.
418 Parents and Children, paragraph 10.23.
3.6.2.2 Life Assurance – Married Women’s Policies of Assurance (Scotland) Act 1880

The Married Women’s Policies of Assurance (Scotland) Act 1880, which enables a married person to hold a policy of assurance in trust for his/her spouse without the need for delivery or intimation does not presently apply to cohabitants; in the case of cohabitants, delivery of the policy, or intimation, is required in order to confer a vested right upon the assured party’s cohabitant.

In 1992, the SLC recommended that the benefits of the 1880 Act should be extended to cohabitants. No minimum qualifying period of cohabitation was recommended for this purpose.

Proposal

In 2000, the Scottish Executive noted that the SLC recommendation in respect of the Married Women’s Policies of Assurance (Scotland) Act 1880 would impact upon matters which are reserved and which would, therefore, have to be implemented by the United Kingdom Government. The Scottish Executive has expressed the hope that this recommendation will be taken forward by the UK Government.

3.7 OTHER REMARKS

None.

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419 Discussion Paper No. 86, Part VIII.
420 As amended by the Married Women’s Policies of Assurance (Scotland) (Amendment) Act 1980.
421 Discussion Paper No. 86, paragraph 8.2.
422 1992 Report, recommendation 86.
423 Parents and Children, paragraph 10.23.
CHAPTER 4

UNMARRIED COUPLES. PRIVATE INTERNATIONAL LAW

4.1 GENERAL ISSUES OF PRIVATE INTERNATIONAL LAW

4.1.1 Public policy/Characterisation

It seems to us that there may be problems of (non) recognition of a status unknown to, or currently actively disapproved by, the Scottish legal system; and of segregating the (say, property) incidents of a status from the status itself. It is more likely that we would be prepared to recognise the property incidents of a status to which we have no objection, whether or not we are prepared to recognise the status itself. Precedent shows that a status may be recognised for certain purposes, but recognition of some of its incidents may be withheld; recognition of the incidents without acceptance of the relevant status is also possible.

Further, we think that these problems will arise close to home quite shortly, as it is expected that the registration, in England and Wales, of civil partnerships with attendant property consequences will soon be an option for persons domiciled in England and Wales (whose partners, by inference of current proposals, need not be domiciled in England and Wales, a questionable basis in conflict of laws terms).

It is possible that similar legislation will follow in Scotland.

Some guidance can be obtained from a short review of the ‘British’ approach to the conflict requirements for recognition of a marriage, namely, that its nature correspond with the generally agreed essentials of marriage in the British view: “the voluntary union for life of one man and one woman, to the exclusion of all others”.

Voluntariness, and that the parties be of opposite sex remain essentials, but we accept that a substitution of ‘potentially for life’ may be made, that potentially and actually polygamous marriages may be recognised if competent by the law(s) of the domiciles of the contracting parties (while remaining incompetent for English and Scots domiciliaries: exclusivity remains an essential of marriage in our domestic law, for the time being at least proof of adultery [one evidence of irretrievable breakdown of marriage, which is the sole ground of divorce under the Divorce (Scotland) Act 1976] being an irrefutable ground of divorce. Scots domestic law requires that

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424 E.g. Of a re-marriage prohibition, judged too harsh, which is among the terms of a divorce judged worthy of recognition. Watter (1890) 16 P.D. 152; contrast Scott v. AG (1886) 11 P.D. 128.
425 Though rarer. There is a substantial example, however, in the treatment of polygamous marriages in English and Scots conflict law: Crawford, op.cit., paragraph 9.05 et seq. For full discussion of the Scottish approach to recognition of a status and/or its incidents, see Crawford, op.cit., Chapter 8.
427 Hyde v. Hyde & Woodmansee 1866 L.R. 1 P&D 130, per Lord Penzance at 133.
428 Mahmoud v. Mahmud 1994 S.L.T. 559; Mahmood v. Mahmood 1993 S.L.T. 589; very recently Sohrab v. Khan, unreported, Court of Session, 23 April 2002 (decree of nullity of pretended marriage due to pursuer’s lack of consent. Appeal believed to have been lodged.)
430 Crawford, op.cit., paragraph 9.05 et seq. But see Private International Law (Miscellaneous Provisions) Act 1995, section 7 (capacity to enter potentially polygamous marriage).
431 Though it may be inferred that the forces for reform would prefer more use to be made of the non-behaviour related grounds (2 years separation with consent; 5 years separation without consent – SLC recommending that these periods be reduced to 1 year and 2 years respectively). (Improving Scottish Family Law, paragraphs 2.4.3 – 2.4.6)
parties to a marriage be of opposite sexes, and the Scottish Executive has recently expressed the view that no proposals for change on this matter are envisaged.\footnote{Paragraph 3.3.1.1, above.}

In the past, we have differentiated between polygamy and concubinage, the view of the forum prevailing,\footnote{\textit{Lee v. Lau} [1967] P. 14.} and it is not thought that we would recognise a ‘marriage’ where the status, as a spouse, of one partner was inferior.\footnote{\textit{Crawford, op.cit.}, paragraph 9.01, note 5.} With regard to polygamy, we recognised many incidents long before we recognised the status itself by empowering our courts (in 1972)\footnote{Matrimonial Proceedings (Polygamous Marriages) Act 1972, section 2.} to grant matrimonial relief, notwithstanding that the marriage in question was entered into under a law which permits polygamy.

We suggest, therefore, that recognition of ‘civil registered partner’ will be a matter of policy for the Scots forum. In principle, status conferred by the domicile of a party(ies) will be recognised by Scots law, subject to a policy discretion. The particular problem here, of course, is that the status may purport to have been conferred by a legal system other than the domicile – perhaps only of the short-term residence.

Novelty of status is not in itself a bar to recognition, either of the status or its incidents\footnote{E.g. \textit{Bumper Development Corp. Ltd. v. Commissioner of Police for the Metropolis} [1991] 4 All E.R. 638 (temple having legal personality in the \textit{situs} – India – permitted to sue in England); \textit{Shahnaz v. Rizwan} [1965] 1 Q.B. 390.} – though our procedure may not be suitable for giving effect to the latter\footnote{\textit{Phrantzes v. Argenti} [1960] 1 Q.B. 390.} – and we accept that the governing law shall be that of the domicile.\footnote{\textit{Ogilvy v. Ogilvy’s Trs} 1927 S.L.T. 83; \textit{Re S} [1995] 4 All E.R. 30.} We pay lip service to the theory of the universality of status, while noting its deficiencies in complex cases.

These pointers would indicate the likelihood of recognition in Scotland of the status of civil partner and incidents thereof, provided that the parties had legal capacity to enter the ‘civil partnership’ (by whatever name\footnote{We query whether this matter has yet been fully addressed in either of the draft English Bills. Relationships (Civil Registration) Bill 2001, in clause 1(1) states that “Two persons, at least one of whom is resident in the United Kingdom, may register a relationship.” [with a registrar – \textit{where}?] The Schedule directs that a party to a registered partnership shall be treated in the same manner as a spouse for the purpose of the Inheritance (Provision for Family and Dependents) Act 1975 (part of the English domestic law of succession). Defects and omissions are obvious, but we may take it perhaps that a more likely vehicle for change will be the Civil Partnerships Bill 2002. This more fully worded Bill provides in clause 2 that at least one of the partners must be domiciled in England and Wales on the date of application for registration of the civil partnership or must have been habitually resident in England and Wales throughout the period of one year ending with that date. We assume the silent proviso that the other has capacity by his/her personal law (of domicile? of residence? of nationality?) to enter such a partnership.\footnote{Where a marriage is celebrated in Scotland, the effect of the Marriage (Scotland) Act 1977 is to require capacity by the Scots \textit{lex loci celebrationis} as well as by the personal law(s) of domicile.} and that the formal requirements of the \textit{lex loci contractus} (or proper law) were satisfied.

One of the main aims of regulation of this type of partnership is, we presume, to provide certainty in the parties’ property relations. Where the incidents of a partnership purport to affect rights in immoveable property, acceptance thereof would depend on acquiescence by the Scots \textit{lex fori qua lex situs} or \textit{lex successionis}.

Hence, we expect Scots law to recognise a civil partnership constituted under a law which provides such a status, if the essentials and forms of that law are followed; that recognition would extend in principle to such incidents as do not offend the Scots forum. However, since Scots domestic law requires that the parties be of opposite sexes to marry in Scotland whatever the domicile of the parties,\footnote{Where a marriage is celebrated in Scotland, the effect of the Marriage (Scotland) Act 1977 is to require capacity by the Scots \textit{lex loci celebrationis} as well as by the personal law(s) of domicile.} and since recently the Scottish Executive has made it clear that no change
is proposed in an area perceived to be controversial,\textsuperscript{441} we submit that a same-sex relationship which calls itself a marriage will \textit{not} be recognised as such in Scotland, because public policy would militate against it.\textsuperscript{442}

A plausible view has been expressed, however, that the main justification for the introduction of civil partnerships into our law is to provide a structure within the law and regulated by the law, for homosexual partnerships. Opposition to the recognition of registered homosexual partnerships would be less strong, we think; and indeed would not be tenable if they became part of English (and Scots) domestic law. However, at present, \textit{ex facie} indications are against extension of regulation of cohabitation to cohabitation by same-sex couples.\textsuperscript{443} Nevertheless, if the parties by their personal law(s) have capacity to enter into a same-sex registered partnership, perhaps the policy of the Scots court would be to recognise the consequences between the parties \textit{inter se} (\textit{i.e.} rights \textit{in personam}), but the approach is likely to be different in the event of a competing claim by a third party such as a spouse (on the assumption that by the personal law, registered cohabitants need not be of single status), child(ren) or creditors.

Meeting the reasonable expectations of creditors is another grave problem inherent in the consequences of expansion of the categories of legally regulated relationships.

But if a relationship which we would regard as a registered partnership finds no equivalent in a foreign system (\textit{i.e.} would not be regarded by the foreign law in the same way); if by that foreign (Dutch) law, there is ‘only one marriage’, capable of being entered by same-sex parties (even non-Dutch nationality; domicile; habitual residence), then there is a problem of characterisation as well as of policy. The nearest analogy we can draw is that of the distinction between marriage and annulment. Until 1986, in the United Kingdom, statutory rules governed the question of recognition of foreign divorces while common law conflict rules governed the question of recognition of annulments. Where a foreign court had granted divorce, on the same facts, where Scots law would grant annulment, or \textit{vice versa}, the Scots forum took it to itself to decide the nature of the termination of the marriage, and then would apply the recognition rules accordingly.\textsuperscript{444}

Hence, we tentatively suggest that while in the current state of opinion a Scots court would refuse to recognise a Dutch [homosexual] marriage \textit{per se}, it might be prepared to recognise certain of the property incidents, at least between the parties. But we think there would be grave difficulties if this were potentially to involve a claim by a same-sex spouse on land in Scotland, even if s/he were the only claimant, but especially if the claim was in competition with other relations of the deceased.

The process of \textit{renvoi} would gain a new significance in the case of a British national who dies domiciled in Holland leaving there a same-sex spouse, moveables in Scotland, and aggrieved blood relations in the United Kingdom. Whether using the Internal Law theory (which is more likely, given that Scotland has no history of \textit{renvoi} cases), or the Foreign Court theory, the Scots court would be confronted with a substantive rule of the succession law of the \textit{lex causae}, with which it might have serious policy difficulties. Policy difficulties with the content of a foreign \textit{lex causae} are rarely encountered.\textsuperscript{445} And if these Dutch domiciliaries should be resident in Scotland in a house which would be regarded as a qualifying dwelling house under the Succession (Scotland) 1964 for prior rights, then the Scots court would be faced squarely with the question whether it

\textsuperscript{441} \textit{Parents and Children}, paragraph 6.4.2.

\textsuperscript{442} Paragraph 3.3.1.1. above.

\textsuperscript{443} See below, paragraph 4.3.1.

\textsuperscript{444} Crawford, \textit{op. cit.}, paragraph 10.27, note 3. Cheshire & North, \textit{op. cit.}, pp 796-797.

\textsuperscript{445} \textit{Gray v. Formosa} 1963 P. 259. The succession case of \textit{Lynch v. Provisional Government of Paraguay} (1871) L.R. 2 P&D 268 is within the area of discussion, but nor entirely apt, because it concerned a purported confiscation of property in England after the death of a party domiciled in Paraguay. The retrospective nature of the decree renders the case special.
would recognise the same-sex spouse as a surviving spouse for the purpose of the 1964 Act. These are all interesting and unprecedented questions. At the current time we are inclined to think that the same-sex spouse would not be entitled \textit{qua} spouse to prior rights. We acknowledge, however, that this would be a stance which would be opposed to the rules of Dutch law, \textit{qua} marriage law and also \textit{qua} succession law (in our view, where the deceased died domiciled in the Netherlands), and might be rather harder to maintain where no other third party interests are involved. With regard to the first point (succession to moveables in Scotland), the outcome might depend on the circumstances and on an analysis of family interests (rather than on Interest Analysis). But it is of course the undeniable privilege of the \textit{lex situs} to refuse to give effect to foreign laws of which it disapproves; privilege carries its own responsibilities, and an occasion might present itself in which it is right to defer.

Perhaps it has to be conceded that ‘liberalisation’ of the family law content of many domestic laws will continue.\textsuperscript{446}

\subsection{4.1.2 Recognition of the relation between an unmarried couple}

Recognition of marriage abroad is governed by well-developed private law rules at common law. The conditions for recognition are that each party shall have legal capacity to marry in general, and to marry the other in particular, by the ante-nuptial domicile (or possibly, in a minority approach, by the law of the intended matrimonial home), and that the rules of form of the \textit{lex loci celebrationis} are complied with, provided that, broadly speaking, these are reasonable. (There are statutorily governed exceptions concerning marriage at embassies, and marriages of persons in the armed forces.\textsuperscript{447})

Where registered partnership is provided for in the place of registration, and the rules of that legal system are complied with as to essentials and form in the instant case, we can only speculate whether the registered relationship would be accepted in Scots law. We have suggested above that recognition is probable.

The partnership may be said to alter status if it requires some formality to bring it to an end, is an exclusive relationship during its subsistence, and if it imports significant differences from the single state in terms \textit{e.g.} of contractual capacity and property rights. Clearly, however, in the absence of re-wording of Brussels II, it is not such a status as to merit its termination being judged by that Regulation. We have suggested above, and now repeat, that we are inclined to think that recognition of heterosexual registered partnerships contracted abroad would be subjected to the same requirements for recognition \textit{mutatis mutandis} as are marriages contracted abroad, in essence and form.

Where the \textit{lex/leges causae} governing legal capacity differ markedly in content with those of Scotland (as, for example, rules of consanguinity), there is a policy discretion permitting the court to reject the marriage. But the blood relationship would require to be close indeed before

\textsuperscript{446} Consider, for example, Norrie (in Scoular, \textit{op.cit.}, p154 \textit{et seq.}, and the Scottish approach to ‘gay parenting’. \textit{Cf. Early v. Early} 1990 S.L.T. 221 (father with two previous convictions for child neglect awarded custody in preference to the lesbian mother). Contrast \textit{T, Petr} 1997 S.L.T. 724 (in which the Court of Session concluded that there was no objection to the [single] adoption of a child by a homosexual male; this decision was taken in the knowledge of the adopter’s long-term, stable homosexual cohabitation. A further factor in this case was the particular suitability of the adopter, in that he, as a nurse, would be well able to care for the handicapped child). In May 2002, the Westminster Government indicated that it approves of proposals to change the Adoption and Children Bill to extend capacity to adopt to unmarried couples, including homosexual couples, viewing this as a means of having more children adopted. It is understood that the Scottish Executive takes the same view. But reference is made to more cautious comments at paragraph 4.1.2 below, and at 3.3.1.1 above.

\textsuperscript{447} Crawford, \textit{op.cit.}, paragraphs 9.17 – 9.23.
rejection would occur. In Cheni v. Cheni,448 the English court accepted a marriage between uncle and niece, upon proof that that relation did not operate to prevent marriage by the Egyptian common domicile of the couple. We have speculated about the attitude of the Scots court if it should be asked to judge the validity of a French posthumous marriage.449 We have noted450 that Muslim polygamous marriages are recognised in our courts. Proxy marriage has been accepted.451 But we still think, speaking personally, and speculatively, and as at this date of 2002, that a Scots court would not recognise a foreign purported marriage between parties of the same sex: this refusal would rest not only on policy grounds of conventional morality (encompassing what many consider to be a fundamental feature of marriage, namely, the possibility of procreation as a result of the physical communion of those two married parties452), but also because none of the variants mentioned above concern same-sex relationships.

We think public opinion in Scotland would demand a debate on the meaning of the word ‘marriage’ before any spokesperson would be entitled to attempt to summarise the Scots view of ‘same-sex marriage’, since the term itself begs the question. If the matter of a Dutch [homosexual] ‘marriage’ were to arise sub nom divorce (jurisdiction or recognition) in a Scots court under Brussels II, the court would entertain the question only if both parties by their common Dutch domicile – or other domicile conferring legal capacity so to ‘marry’ – had capacity to ‘marry’; and even then policy might require the view that there was ‘nothing to divorce’453 or that a divorce granted by a Member State should be refused recognition on the ground of ‘ordre public’.454 But it is impossible and unwise to be dogmatic about this, and attitudes may change as time passes.455

4.1.3 Admissibility of the ‘celebration’ of a same -sex ‘marriage’

4.1.3.1

Parties to a valid marriage celebrated in Scotland must be of opposite sexes.456 Any countervailing rule of the domicile(s) of the parties will not be given effect because the provisions of the governing statute (Marriage (Scotland) Act 1977) are mandatory. Same-sex ‘marriage’ cannot be validly celebrated in Scotland. The statutory provision is clear and public policy has no role to play.

4.1.3.2

There has been recent press coverage of so-called same-sex ‘marriage’ in England, but in truth, the ‘ceremonies’ are not tantamount to legal marriage.

448 [1965] P. 85. “I believe the true rule to be that the courts of this country will exceptionally refuse to recognise and give effect to a capacity or incapacity to marry by the law of the domicile on the ground that to give it recognition and effect would be unconscionable in the circumstances in question.” per Sir Jocelyn Simon, P, at p98, after a useful review of authority.

449 Crawford, op.cit paragraph 9.01.

450 Below.


452 The fact that procreation obviously can take place outside marriage, and that through medical intervention one party to a same-sex union can have a biological input to a child subsequently brought up by both parties, does not alter the argument. See however Clive, op.cit., pp108-109. But in our view, a distinction must be drawn between marriage, and ‘household’/’family’ which we readily admit may take a number of forms.

453 Cf. Hyde, above.

454 Brussels II, Article 15.


456 Marriage (Scotland) Act 1977, section 5(4)(e) (‘Objections to marriage’).
The rule with regard to transsexuals may be about to change. Till now, in England and Scotland, the gender allocated at birth by means of a chromosomal test has been accepted by law as the sole test. Hence a person who has undergone a sex-change operation cannot ‘marry’ in the new persona someone of the (apparently) opposite sex. But doubts have been expressed about the rightness of this approach, in the recent case of Bellinger: however, the court has left it to Parliament to make any change.

4.2 INTERNATIONAL JURISDICTION

4.2.1 Separation of unmarried couples – International jurisdiction

There are no special rules – of jurisdiction or of recognition – pertaining to the separation of unmarried couples.

On Travers v. Holley reasoning, if the registration of civil partnerships becomes possible in Scots law, as may shortly occur in England, with provision for court order bringing the partnership to an end and allocating property, then provision for taking jurisdiction in cases with foreign elements, and according recognition of foreign awards, will sooner or later have to be put in place in Scotland.

In the absence of EU Regulation, it is suggested that the Domicile and Matrimonial Proceedings Act 1973, section 7, as amended in the light of Brussels II, could be extended to include jurisdiction to make cessation orders. Such a provision may already be in train. The Civil Partnerships Bill 2002, in its jurisdiction clause (42) simply confers jurisdiction upon the High Court or a County Court (i.e. is a purely internal provision). We note that in the Bill no application for a cessation order may be considered before the end of the period of twelve months commencing with the registration of the partnership.

Jurisdiction would be vested in the Court of Session and in the Sheriff Court. The proposed English legislation reveals that the termination process will be regarded as judicial not administrative. We do not think other ‘public’ officers (such as administrative staff of the court) would be vested with jurisdiction, but our comments are made at a time when Scots domestic law knows no such institution as a civil registered domestic partnership.

4.2.2 Property aspects of the separation – International jurisdiction

There are no special rules of international jurisdiction to deal with this problem.

In the cases of divorce, annulment and judicial separation, the Scots court would assume jurisdiction to deal with moveable property, pension rights etc. if it had jurisdiction to deal with the principal issue of status, and would deal with immoveable property situated in Scotland. Jurisdiction rests on the Domicile and Matrimonial Proceedings Act 1973, section 7, as amended in light of Brussels II.

The ‘Scottish rules’ of jurisdiction permit the Scots court qua situs of moveable property to assert, declare or determine proprietary or possessory rights therein or rights of security

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460 Civil Partnerships Bill 2002, clauses 31-34 (‘cessation order’).
461 Civil Partnerships Bill 2002, clause 31(4).
over it, and *qua situs* of immoveable property it will have jurisdiction in the courts for the place where the property is situated. Then there are the exorbitant grounds to the effect that, where a party is not domiciled in the United Kingdom, he may be sued in the court for any place where any moveable property belonging to her/him has been arrested; or where any immoveable property in which s/he has a beneficial interest is situated. These grounds are expressly disapproved in the Brussels and Lugano Conventions, and therefore, not only must the defender not be domiciled in the United Kingdom, he must not be domiciled in any Member State to the B.I.R, or Lugano. Many potential defenders, therefore, will escape this jurisdiction; but if it can be established, it will confer on the Scots court jurisdiction in all actions of a patrimonial character, and is not confined to actions relating to the moveables themselves. The same applies to jurisdiction founded on a beneficial interest in immovable.

It would seem that, subject to the above *caveats* concerning domicile of defender, the property disputes of unmarried persons who have entered into no registered partnership, by whatever name, can be adjudicated by a Scots court as property disputes between strangers. Indeed, these remedies are open to married persons who, as has been explained, during marriage, subject to certain exceptions set out in Chapter 1, above, are strangers to each other in property.

But where a property dispute between the unmarried relates to the terms of a registered partnership, statutorily imposed or by private arrangement permitted by statute, the court would have to consider the incidental question of the validity of the registered partnership.

We suggest that any jurisdiction which is to be conferred on a Scots court to bring to an end a registered partnership will contain a jurisdiction to deal with attendant property disputes, and it is desirable that the same court at the same time should deal with the whole issue.

That court should be the Court of Session of the Sheriff Court. Currently, we see no role for a ‘public officer’; conversely, we appreciate that on present speculation, no very great difference is visible between marriage and registered partnership.

### 4.2.3 Relation between 4.2.1 and 4.2.3

We deal with this above.

The matter is one of speculation, except to the extent that at present Scots law has no difficulty in treating the unmarried ‘couple’ as strangers in law, and dealing accordingly with any property disputes between them. We do not think it desirable that property issues be dealt apart from status, although, if agreement has been reached about property, the status issue could stand alone.

### 4.3 Applicable Law

Classification of the legal nature of the relationship presented is for the forum. Our response is based on the understanding that, with regard to unmarried couples, there may be found:

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463 Schedule 8, Rule 2(9).
464 Rule 2(11).
466 Rule 2(8).
469 Lee v. Lau, above.
(a) regulated partnerships (i.e. a civil partnership [or similar], registered or formalised according to the [internal] law of a particular state, imposing upon the cohabitants all the consequences prescribed by the statutory regime);
(b) regulated partnerships where some or all of the statutory consequences have been excluded by agreement of the parties;
(c) *de facto* cohabitation imposing upon the cohabitants all the consequences prescribed by the statutory regime;
(d) *de facto* cohabitation where some or all of the statutory consequences have been excluded by agreement of the parties; and
(e) *de facto* cohabitation unregulated by law.

But in relation to *de facto* cohabitation of types (c) and (d), we have many doubts and questions since capacity to enter a *de facto* cohabitation is, we would think, a matter beyond the control of the civil law. We imagine, therefore, that what is envisaged is a qualifying *de facto* cohabitation with attendant property and other consequences. For example, the Civil Partnerships Bill 2002, which admittedly deals with *registered partnerships*, requires (clause 2(2)) that a partner be over 18 years of age; not a party to a marriage; and not a partner in another civil partnership. What then is the remedy if one or more of these conditions is not fulfilled? Presumably the partnership is void, but does not require a cessation order to bring it to an end. Compare nullity of marriage in Scotland. We suspect many of these matters have not been thought through.

Is it envisaged that there may then be cohabitations which have no property or other consequences? Are we engaged in constructing a hierarchical framework of regulation of relationships? If so, we think this unwise. When this is mapped onto the international scene, the complexities are formidable.

Our response from here onwards, therefore, is offered not only with hesitation, but also with misgiving. Our comments are not to be read as endorsing the assumptions implicit in Chapter 4 of the questionnaire.

### 4.3.1 Determination of the law applicable to the property regime

It is submitted that a Scots court might require to consider the approach of Scots law to applicable law, in one of two situations: -

In determining whether, in its view, a Scottish domiciliary has capacity to enter into either a ‘regulated’ cohabitation, or an ‘unregulated’ cohabitation (*i.e. de facto* cohabitation), and thereby (under either system) to incur legal (personal and/or proprietary) consequences; or

In determining the legal effect of a regulated or *de facto* cohabitation upon moveable and/or immoveable property situated in Scotland.

The approach of the Scottish courts to the determination of applicable law in this context is entirely speculative; there are a number of variables, *viz.*:

- The nature of the cohabitation: whether it is ‘regulated’ or ‘unregulated’ (*i.e. de facto*);
- The personal law(s) of the cohabiting parties (*‘the cohabitants’*): a different rule may apply, according to whether:
  - one/both cohabitant is a Scottish domiciliary;  
  - both cohabitants are domiciliaries/nationals of the state in which the (regulated) civil partnership (or similar) has been registered, or the *de facto* cohabitation subsists;  

470 By which law should the capacity of the other be judged? If s/he did not have capacity, and assuming for the moment, first, that Scots law would apply a rule of dual reference, and secondly, that the Scots party had capacity (which is questionable), presumably the purported regulated or unregulated cohabitation would be of no effect in the eyes of Scots law; a limping relationship.
one cohabitant is a domiciliary/national of the state in which the (regulated) civil partnership has been registered, or the *de facto* cohabitation subsists, and the other partner is domiciled/national in a state under whose law the civil partnership or *de facto* cohabitation is recognised as valid (and incurring legal consequences).

The identity of the parties to the action (if any): whether the dispute (if any) arises between the cohabitants *inter se*, or between one/both cohabitant and a third party (*e.g.* the issue/parent(s)/spouse/creditor of one/both cohabitant).

The purported extra-territorial reach of any statutory and/or conventional regime which seeks to regulate the proprietary rights and obligations of cohabitants: whether the regime purports to affect property (moveable and immoveable) in Scotland.

In light of the views expressed by the Scottish Law Commission\(^{471}\) and the Scottish Executive,\(^{472}\) and comments made at paragraph 3.3.4, above, it is thought highly possible that statutory and/or conventional regimes which seek to regulate the proprietary rights and obligations of same-sex couples may be held unenforceable on grounds of public policy, at least as regards property situated in Scotland. Admittedly, however, the views of the SLC were expressed in 1992, and policy on this matter may change or may already have changed; if that is the case, it is not articulated in the most recent White Paper, and such an important change would require to be articulated and could not take place covertly.

For this reason, the remainder of this Report deals with heterosexual couples only; if it should transpire that there is no public policy barrier in Scots law regarding the statutory and/or conventional regulation of the proprietary rights and obligations of same-sex couples, it is submitted that there would be no disparity in the treatment, under Scots international private law, of heterosexual and same-sex couples, respectively.

4.3.1.1 In case the couple has entered into a ‘contract’

4.3.1.1.1 Regulated cohabitation (paragraph 4.3 (a) above)

**Capacity**

It is thought that capacity to enter into a regulated cohabitation would be governed by the personal law(s) (domicile) of the parties applied cumulatively. Furthermore, it is likely that a Scots court, if called upon to recognise a regulated cohabitation, would also uphold any proviso of the *lex loci contractus* requiring, in addition, capacity according to that law.

**Essential validity**

Matters of essential validity, except for capacity, would be referred to the *lex loci contractus*, or if different, the proper law of the cohabitation (being the law of the state under whose aegis the cohabitation is regulated or otherwise formalised: neither place or length of cohabitation is necessarily relevant\(^{473}\)).

**Formal validity**

Matters of form and procedure would be referred to the *lex loci contractus*, probably without need for any exception. Classification between essence and form would be for the forum, as usual.

**Proprietary consequences of regulated cohabitation**

\(^{471}\) Paragraph 3.2.1, above.

\(^{472}\) Paragraph 3.3.1.1, above.

\(^{473}\) This would suggest that we should not expect the rights agreed upon by the act of registration to change through change of place of cohabitation. Contrast mutability principle advocated at paragraph 4.3.1.1.2 below in the case of *de facto* cohabitation.
Concerning the proprietary consequences of a regulated cohabitation, and in particular, the effect, if any, upon moveable and immoveable property situated in Scotland, it is likely that, in the first instance, the Scottish court would apply the *lex loci contractus* (or proper law of the cohabitation) to determine whether the statutory regime imposed by that law purported to have extraterritorial effect upon property belonging to the cohabitants and situated abroad. If the statutory regime (say, of community of property between cohabitants) did purport to affect all property belonging to the couple, the Scottish *lex situs* would nevertheless retain absolute control over any property situated within Scotland, and would have an undeniable right to recognise, or not, the purported extraterritorial proprietary effects of the statutory regime, at least as regards property within its own jurisdiction. We think it is probable that the Scottish *lex situs* would recognise the purported proprietary effects of a regulated cohabitation, *inter partes*, but possibly not in the event of a competing claim – to property in Scotland – by a third party such as a creditor.\(^{474}\)

**Variation** *(paragraph 4.3(b) above)*

The question whether the statutory regime permits of its own variation by the parties is a matter for the proper law of the regulated cohabitation.

It seems to us that party autonomy in the matter of choice of the proper law of the regulated cohabitation is inappropriate, and for reasons of convenience, symmetry and policy, we think the same would apply to any contract by which the cohabitants purported to vary the terms of the statutory regime otherwise applicable to their relationship.

**Capacity to vary**

In cases where it is possible to vary the statutory regime which is applied to cohabitants by the proper law of the regulated cohabitation, it is submitted that the Scottish court might take the following approach:

- Capacity to vary the statutory regime would be governed by the personal law(s) of the parties at the date of variation (subject, possibly, to the *lex situs* as regards the effect of the contract upon moveable and immoveable property);
- Formal validity of such a variation would be governed by the *lex loci contractus*, or the proper law of the contract of variation.
- Essential validity (including revocability) of the variation would be governed by the proper law of the contract of variation, subject, however, to the *lex situs* as regards the effect, if any, of the contract upon moveable and immoveable property;
- Capacity to revoke such a contract of variation would be governed by the personal law(s) of the parties at the date of revocation.\(^{475}\)

It is submitted that the Rome Convention on the law applicable to contractual obligations would not apply to such contracts, by virtue of Article 1(2)(b), which excludes from the scope of the Convention contractual obligations relating to ‘rights and duties arising out of a family relationship’.

4.3.1.1.2

**De facto cohabitation** *(paragraph 4.3(c) above)*

**Capacity**

\(^{474}\) At least where the third party, say, the creditor, is relying on *Scots* law. If, however, the proper law of the debt between the creditor and the debtor (i.e. the cohabitant) were, say, Dutch law, it would not be contrary to the reasonable expectations of the creditor to apply Dutch law rather than Scots law, and therefore, to prefer the claim to moveable property in Scotland of, say, the Dutch cohabitant. *Cf. North Western Bank v. Poynter, Son & Macdonald* (1894) 22 R. (H.L.) 1; *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733

\(^{475}\) *Cf. Viditz v. O’Hagan*, above.
It is thought that capacity to enter into a de facto cohabitation (including, for example, conditions as to minimum age) would be governed by the personal law(s) (domicile) of the parties, subject to any proviso of the proper law of de facto cohabitation requiring, in addition, capacity according to that law, and compliance with the criminal law thereof.

**Formal validity**

*Ex sua natura*, questions of formal validity would not arise, save perhaps in relation to a minimum qualifying period of cohabitation. Such a matter must be referred to the law of the place of cohabitation. In our view, the proper law of cohabitation must be the place of cohabitation from time to time, the rationale being fluidity, which leads us to conclude that mutability must apply. We do not underestimate the difficulties of proof of commencement and duration of cohabitation, and the complexities imported by concepts such as prescription.

**Essential validity**

Questions of essential validity would be referred, it is thought, to the proper law of the cohabitation.

**Proprietary consequences of a de facto cohabitation**

Concerning the proprietary consequences of a de facto cohabitation, and in particular, the effect, if any, upon moveable and immovable property situated in Scotland, it is likely that, in the first instance, the Scottish court would apply the proper law of the cohabitation to determine whether the statutory regime imposed by that law purported to have extraterritorial effect upon property belonging to the cohabitants and situated abroad. If the statutory regime (say, of community of property between cohabitants) did purport to affect all property belonging to the couple, the Scottish *lex situs* would nevertheless retain absolute control over any property situated within Scotland, and would have an undeniable right to recognise, or not, the purported extraterritorial proprietary effects of the statutory regime. We think it is probable that the Scottish *lex situs* would recognise the purported proprietary effects of a de facto cohabitation, *inter partes*, but possibly not in the event of a competing claim – to property in Scotland – by a third party such as a creditor.

**Variation** (*paragraph 4.3(d) above*)

The question whether the statutory regime permits of its own variation by the de facto cohabitants is a matter for the proper law of the cohabitation.

It seems to us that party autonomy in the matter of choice of the proper law of the de facto cohabitation is inappropriate, and for reasons of convenience, symmetry and policy, we think the same would apply to any contract by which the cohabitants purported to vary the terms of the statutory regime otherwise applicable to their relationship.

**Capacity to vary**

In cases where it is possible to vary the statutory regime which is applied to de facto cohabitants by the proper law of the cohabitation, it is submitted that the Scottish court might take the following approach:

Capacity to vary the statutory regime would be governed by the personal law(s) of the parties at the date of variation (subject, possibly, to the *lex situs* as regards the effect of the contract upon moveable and immovable property);

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46 Walker v. Roberts, above.
47 At least where the third party, say, the creditor, is relying on Scots law. If, however, the proper law of the debt between the creditor and the debtor (i.e. the cohabitant) were, say, Dutch law, it would not be contrary to the reasonable expectations of the creditor to apply Dutch law rather than Scots law, and therefore, to prefer the claim to moveable property in Scotland of, say, the Dutch cohabitant. *Cf. North Western Bank v. Poynter, Son & Macdonald* (1894) 22 R. (H.L.) 1; *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733)
Formal validity of such a variation would be governed by the *lex loci contractus*, or the proper law of the contract of variation.

Essential validity (including revocability) of the variation would be governed by the proper law of the contract of variation, subject, however, to the *lex situs* as regards the effect, if any, of the contract upon moveable and immoveable property;

Capacity to revoke such a contract of variation would be governed by the personal law(s) of the parties at the date of revocation.\(^{478}\)

Equally, it is submitted that the Rome Convention on the law applicable to contractual obligations would not apply to such contracts, by virtue of Article 1(2)(b), which excludes from the scope of the Convention contractual obligations relating to ‘rights and duties arising out of a family relationship’.

4.3.1.2 In case of no contract

4.3.1.2.1 Regulated cohabitation
These matters have been dealt with in paragraph 4.3.1.1 above.

4.3.1.2.2 De facto cohabitation
These matters have been dealt with in paragraph 4.3.1.1 above.

4.3.2 Scope of the applicable law

4.3.2.1 During the ‘existence’ of the couple
So long as each cohabitant had capacity by virtue of his/her personal law to enter into the cohabitation, and the cohabitation is formally and essentially valid according to the proper law of the regulated or *de facto* cohabitation, as applicable, it is thought that a Scottish court would apply the statutory regime (if any) laid down by the proper law of the regulated cohabitation, or the proper law of the *de facto* cohabitation, during the subsistence of the cohabitation, subject to the undeniable right of a foreign *lex situs* to disregard or modify the regime, as regards property within its own territory.

4.3.2.2 At the time of separation

4.3.2.2.1 While the members are alive
Since the Scottish court would not exercise (subject-matter) jurisdiction over separation or termination of cohabitation proceedings (there being no relevant power or procedure yet in domestic Scots law), the question of applicable law would arise only in the context of recognition: would a Scottish court recognise (a) the cohabitation; (b) any foreign cessation order; and/or (c) the financial consequences of any foreign cessation order, or relief upon death,\(^{479}\) upon moveable and/or immoveable property situated in Scotland?

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\(^{479}\) If and/or when regulated and/or *de facto* cohabitation bearing legal consequences become part of Scots domestic law, a question will arise as to the extent of the Scots court’s jurisdiction over the cohabitants’ foreign assets upon termination of their relationship by separation or death.
So long as each cohabitant had capacity by virtue of his/her personal law to enter into the cohabitation, and the cohabitation is formally and essentially valid according to the proper law of the regulated or de facto cohabitation, as applicable, it is thought, in an inter partes dispute, that the Scottish court may recognise the consequences thereof (whether statutory or by agreement of the cohabitants), in respect of moveable property situated in Scotland. It is difficult to predict the approach of the courts as regards immovable property situated in Scotland. The Scottish lex situs would, in any event, prevail over the foreign regime, statutory or conventional.

Part IV of the Matrimonial and Family Proceedings Act 1984 confers jurisdiction upon the Scottish courts to entertain an application for financial provision only following divorce, annulment or legal separation in an overseas country; there is no statutory basis for the exercise of equivalent jurisdiction following overseas termination of cohabitation. Accordingly, if an overseas order for financial relief following termination of the cohabitation made no reference to property in Scotland, the Scottish court would not be empowered to make a supplementary order, taking into account the circumstances of the cohabitation, in relation to any assets situated in Scotland. The court in subsequent proceedings in Scotland, concerning property there, would resolve questions of ownership and use of such property according to general principles of domestic property law.

If a dispute in a Scottish court were not inter partes, but, say, between one/both cohabitants and a third party (e.g. the issue/parent(s)/spouse/creditor of one/both cohabitants, claiming rights conferred by domestic Scots law), it is suggested that the Scottish court would be more reluctant to recognise such proprietary consequences of the cohabitation as are conferred by a foreign law, where those consequences (at least insofar as they purport to affect property situated in Scotland) would prejudice the third party’s claim according to Scots law (e.g. a child’s right to aliment from his/her parent, or a creditor’s right to execute diligence in respect of assets in Scotland, versus the parent’s cohabitant’s claim to, say, funds in the parent’s bank account in Scotland). The Scottish lex situs would prevail over the foreign regime, statutory or conventional, and would retain always a public policy discretion.

A raft of difficulties present themselves in relation to the claims of an existing spouse of one or both partners where that person has domestic or conflict rights under Scots conflict law as explained in Chapters 1 and 2 hereof. It may be, of course, that the lex/leges causae governing capacity to enter into a regulated or a de facto cohabitation exclude(s) parties who are already married – but it/they may not. Moreover there is another level of difficulty in that an incidental question may present itself on the issue of who is married and who is not: by which law is status to be determined? Even if that can be overcome, there may well be claims of issue, to compete with the claim(s) of the cohabiting partner, and with the issue (if any) of the cohabitation.

4.3.2.2.2

Upon the death of one of the members

In the case of testate and intestate succession of the predeceasing cohabitant, normal choice of law rules of succession would apply.

Special consideration may, however, require to be given to claims by the predeceasing cohabitant’s surviving spouse and/or issue (if any) for legal rights, and (regardless of the predeceasing cohabitant’s domicile) to a claim by the predeceasing cohabitant’s surviving spouse for prior rights in respect of the deceased’s (qualifying) dwelling house situated in Scotland. In short, it is thought likely that any claims extant under Scots law will be preferred by the Scottish court (qua lex fori, or qua lex situs).

4.3.3 Applicable law and changes of the property regime

4.3.3.1 Modifications of the connecting factor
Scotts law has no experience of conflit mobile in the context of disputes concerning the property of unmarried persons. Accordingly, it can only be anticipated that, subject to paragraphs 4.3.1.1.1 and 4.3.1.1.2 above, a similar approach would be taken, mutatis mutandis, to that set out in paragraph 2.3.3.1, above, and subject always to the control of the lex situs.

4.3.3.2 Modifications of the applicable law
Scotts law has no experience of conflit transitoire in the context of disputes concerning the property of unmarried persons. Accordingly, it can only be anticipated that, subject to paragraphs 4.3.1.1.1 and 4.3.1.1.2 above, a similar approach would be taken, mutatis mutandis, to that set out in paragraph 2.3.3.2, above, and subject always to the control of the lex situs.

4.3.3.3 Changes in the property regime by consent of the couple
Scotts law has no experience of such changes. Accordingly, it can only be anticipated that, subject to paragraphs 4.3.1.1.1 and 4.3.1.1.2 above, a similar approach would be taken, mutatis mutandis, to that set out in paragraph 2.3.3.3, above, and subject always to the control of the lex situs.

4.3.3.4 Other possible changes of the property regime
None.

4.3.4 Law applicable to publication of the property regime of an unmarried couple
There is no mechanism in Scots law for making a public record of the regime which governs the property relations of cohabitants. See also paragraph 2.3.4.1.1, above, and paragraphs 1.4.1.1 and 1.4.2 above, regarding registration of deeds for preservation and execution in the Books of Council and Session.

4.3.4.1 Publication of the initial regime
This question is not meaningful in Scots law.

4.3.4.2 Publication of a modified regime
This question is not meaningful in Scots law.

4.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND ‘PUBLIC’ ACTS IN RESPECT OF PROPERTY OF UNMARRIED COUPLES

4.4.1 The general rules on the effectiveness of foreign ‘public’ acts and court decisions as applied in the area of property of unmarried couples

4.4.1.1 Overview of sources and contents of those rules
Not applicable in Scotland. Cf. paragraph 2.4.1.1, above.

4.4.1.2 Application in the area of unmarried couples
Not applicable in Scotland. Cf. paragraph 2.4.1.2, above.
4.4.2 Rules on the effectiveness of foreign ‘public’ and private acts and court decisions specific to the area of property of unmarried couples

4.4.2.1 Recognition of contracts between unmarried couples abroad
There is no formal procedure for recognition. Cf. paragraph 2.4.2.1, above.

4.4.2.2 Recognition of modifications agreed abroad
We consider that the Scots court would give effect to modifications concluded abroad (though we can cite no instance), provided (a) the parties had capacity to vary by their personal law(s); (b) the modification complied in form with the lex loci contractus or proper law of the deed of variation; and (c) the modification complied in substance with the proper law of the deed of variation, which would coincide with the proper law of the regulated cohabitation; or the proper law of the de facto cohabitation, which the deed of variation would inevitably take as its proper law. Only if either of those laws required special ‘public’ procedure would the Scots court require such a formality. Cf. paragraph 2.4.2.2, above.

4.4.2.3 Enforcement of foreign court decisions
As per paragraph 2.4.2.3, above.

4.4.2.4 Co-operation between courts and public authorities
Not applicable.

4.4.2.5 Problems concerning international effectiveness
Scots law accords no special significance to contracts between cohabitants. General principles of the law of property and obligations will apply.

4.4.3 Practical significance of the rules set out under 4.4.1 – 4.4.2

4.4.3.1 Frequency of court decisions
Not applicable. Scots law has no practical experience of these matters.

4.4.3.2 Frequency of application of the rules on effectiveness
Not applicable. Scots law has no practical experience of these matters.

4.5 Various Matters
Not applicable.
ANNEXES

Copies of the following documents are annexed to this Report:

Cases

Bankes, Re [1902] 2 Ch. 333
Callwood [1960] A.C. 659
De Nicols v. Curlier [1900] A.C. 21 [1900] 2 Ch. 410
Egerton’s Will Trusts, Re [1956] Ch. 593
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Succession (Scotland) Act 1964
ALL STATUTES AFTER AND INCLUDING 1988 MAY BE ACCESSED VIA:
www.legislation.hmsp.gov.uk/acts.htm

Miscellaneous

REPORTS CAN BE ACCESSED VIA:
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NATIONAL REPORT – SCOTLAND

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TO

REPORT SUBMITTED TO T.M.C. ASSER INSTITUTE, THE HAGUE

BY

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AND

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MAY 2002

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ANNEXES

Copies of the following documents are annexed to this Report: -

• **Cases**
  
  *Bankes, Re [1902] 2 Ch. 333*
  
  *Bellinger v. Bellinger [2002] 1 All E.R. 311*
  
  *Callwood [1960] A.C. 659*
  
  *De Nichols v. Curlier [1900] A.C. 21 [1900] 2 Ch. 410*
  
  *Egerton's Will Trusts, Re [1956] Ch. 593*
  
  *Lashley v. Hog (1804) Paton 581*
  
  *Sawrey-Cookson v. Sawrey-Cookson's Trs. (1905) 8 F. 157*
  
  *Shand-Harvey v. Bennett Clark 1910 1 S.L.T. (Sh.Ct.) 133*
  
  *Shilliday v. Smith 1998 S.C. 725*

• **Legislation**
  
  *Family Law (Scotland) Act 1985*
  
  *Matrimonial Homes (Family Protection) (Scotland) Act 1981*
  
  *Succession (Scotland) Act 1964*

  **ALL STATUTES AFTER AND INCLUDING 1988 MAY BE ACCESSED VIA:**
  
  www. legislation.hmsp.gov.uk/acts.htm

• **Miscellaneous**
  
  **REPORTS CAN BE ACCESSED VIA:**

  www.scotland.gov.uk/justice/familylaw/pac-oo.asp
  
  www.scottlawcom.gov.uk
In re BANKES.
REYNOLDS v. ELLIS.

[1902 B. 284.]

Settlement—Covenant to Settle After-acquired Property—Request to Separate Use—Restraint on Anticipation—Marriage with Foreigner—Domicile—Law applicable.

Under a gift to a woman by will of a legacy payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture shall be paid to her for her separate use when and as the same shall become due and payable, and so that she shall not have power to deprive herself of the benefit thereof by anticipation, the legatee is at the date of payment entitled to have the legacy paid to her, and the restraint on anticipation then ceases to operate; and a covenant by her, contained in an ante-nuptial settlement executed before the death of the testator, to settle after-acquired property is effectual to bind the property when transferred to her.

In re Curregy, (1888) 32 Ch. D. 391, distinguished.

The matrimonial domicil was Italian. The settlement was in English form, and void under Italian law. The wife’s domicil had been English, and the settled funds were English:—

Held, on the facts, that the settlement was governed by English law.

In 1877 Kate Grunard Anderton, a widow, domiciled in England, became engaged to be married to Angelo Favaroni, an officer in the Italian army. At that time she was possessed of 4000l., and, in order to meet the requirements of the Italian Government with reference to the marriage of officers, she deposited 1000l. with the military authorities in that country. On March 28, 1878, she and Favaroni executed in Italy a marriage settlement in English common form, whereby it was agreed that the trustee should hold the remaining sum of 3000l. in trust after the marriage, to permit it to remain in its then state of investment or call in and invest it, and pay the income during the joint lives of herself and Favaroni to her for her separate use without power of anticipation; and after the death of either of them to the survivor, and then for the children of the marriage; and subject thereto, if Mrs. Favaroni survived her husband, upon trust after his death for her, her executors,
furniture and other chattels, to his wife for life, and after her death to Mrs. Favaroni; and he declared that moneys and personal estate by that will made payable or transferable to any female should during any and every coverture be paid and transferred to her for her sole and separate use, free from marital control, when and as the same money should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation, and so that her receipt alone, whether covert or sole, should be a good discharge for such moneys and personal estate.

On January 25, 1809, Mrs. Bankes died, having by her will bequeathed to Mrs. Favaroni a legacy of 1000l. The legacy given by Mr. Bankes to Mrs. Favaroni also became payable on the death of Mrs. Bankes.

Questions arose whether these legacies were caught by the agreement to settle after-acquired property contained in the settlement, or could be paid and transferred to Mrs. Favaroni on her separate receipt.

The trustee of the settlement commenced an action to determine these questions, and claimed a declaration that the 1000l. legacy was subject to the covenant, and ought to be paid to him; and that the property bequeathed by Mr. Bankes was also subject to the same. There was evidence that according to Italian law the settlement was void because it was not executed before a notary, and because it altered the order of succession under that law; that after marriage the husband and wife remained entitled to their respective fortunes as before; that this position could not be affected by a settlement unless it was attested by a notary; that the separation had no effect upon the individual rights of property; and that the marriage continued after the separation.

Mr. Favaroni was of unsound mind, and represented by the official solicitor as his guardian ad litem.

Buckmaster, K.C., and S. B. L. Druce, for the trustee of the settlement. The settlement is governed by English law, and should be enforced accordingly, with the result that both these legacies are caught by the provision for settling after-
BUCKLEY J.

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acquired property. It is admitted that in Italian law the settlement is altogether void, and the parties could not have intended that it should have no effect. They clearly meant, and the Court will hold, that it should be treated as regulated by English law: *Van Gratton v. Digby.* (1)

[BUCKLEY J. Is there any reason why two persons not English subjects should not contractually agree that a contract between them shall be governed by English law? Dicey’s Conflict of Laws, p. 662: Smallpage’s Case. (2)]

H. Terrell, K.C., and F. F. Stokes, for Mrs. Favaroni. That may be so, provided the contract is not void according to the law of the country where it is made: *South African Breweries, Limited v. King* (3); *Hamlon & Co. v. Talalaker Distillery.* (4)

[BUCKLEY J. referred to *In re Missouri Steamship Co.* (5)]

Buckmaster, K.C. The fact that an English woman is marrying a foreigner will not prevent the application of English law: *In re Mignot.* (6)

H. Terrell, K.C. The question is immaterial, for Mrs. Favaroni is entitled to have all these legacies transferred to her whether English or Italian law applies.

[It was agreed that this point should be argued first.]

By Italian law the settlement was altogether void, and Mrs. Favaroni continued to be entitled to receive these legacies.

If English law applies, the same result follows. The property derived from Mr. Bankes was bequeathed for her separate use without power of anticipation. That is equivalent to a restraint on alienation, and she could not agree to settle it in this way: *In re Currey.* (7) Therefore, if the settlement is English, these legacies are not caught by the covenant.

The 1000L bequeathed by Mrs. Bankes is not caught, because at the time when it became payable the operation of the covenant had come to an end or was suspended: *Dacresport v. Marshall.* (8)

(2) (1895) 30 Ch. D. 598. (5) (1899) 42 Ch. D. 321.
(3) (1899) 2 Ch. 173; [1900] 1 Ch. 273.
(6) (1900) 1 Ch, 32.
(7) [1902] 1 Ch. 53.
(8) [1895] 1 Ch. 32.

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By the law of Italy she was in the position of a feme sole in respect of her property after the marriage, and also after the separation; the rights of her husband were excluded, and the covenant was unnecessary and inoperative. The covenant was to be in force during the said intended coverture, not during the marriage, and it was inoperative during the separation: *Davies v. Cregge.* (1) This point applies to all the legacies.

Ashbury, K.C., and F. T. Methold, for Mr. Favaroni. There is no doubt that if Italian law prevails the settlement is void, and Mr. Favaroni takes nothing. But if the settlement is governed by English law, the first question is whether, under Mr. Bankes’ will, Mrs. Favaroni could, notwithstanding the restraint on anticipation, claim to have the legacies left by him paid to her when they became payable. We submit that she could, and therefore that she could agree to settle them; the agreement is good, and the legacies are bound by it. *In re Currey* (2) was only a question of construction, and does not apply to this case. It followed *In re Ellis’ Trusts* (3), which decided that anticipation was equivalent to alienation, but is not otherwise in point. Mrs. Favaroni was entitled on her mother’s death to receive the legacies given by her father and spend them; the restraint only applied till then: *In re Bown* (4); *In re Holmes.* (5) She was only restrained from anticipation during coverture. Therefore she could, before marriage and before the legacies became payable, execute a deed providing what should be done with them: *In re Wood.* (6)

The covenant applied after the separation. The words “during the said intended coverture” are equivalent to during the marriage: Blackstone’s Commentaries, vol. i. p. 442; Wharton’s Law Lexicon, “Coverture.” *Dacresport v. Marshall* (7) and *Davies v. Cregge* (1) have nothing to do with this case, for there has been no order under the Matrimonial Causes Act, 1857.

H. Terrell, K.C., in reply. It may be that if, as in the cases

(1) (1888) 30 Ch. D. 300. (4) (1884) 27 Ch. D. 413.
(3) (1874) L. R. 17 Eq. 409. (6) (1889) 61 L. T. 197.
(7) [1902] 1 Ch. 53.
and as the same money should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation, and so that her receipt alone, whether covert or sole, should be a good discharge for such moneys and personal estate. Upon words such as these the Court of Appeal has held in In re Bown (1) and In re Holmes (2) that the restraint on anticipation (or alienation) is effectual only while the interest remains reversionary, and that when the time comes at which the legacy or benefit is payable or transferable the legatee, whether under coverture or not, is entitled to ask for payment or transfer, notwithstanding the words that she shall not have power to deprive herself of the benefit thereof by anticipation. If the date for payment comes the lady is entitled under the gift to receive the money, and as matter of construction the restraint on anticipation enures up to the date of payment, but as from the date for payment is inapplicable. That seems to me to be the effect of In re Bown (1) and In re Holmes (2). But then it is said, and truly, that in In re Currey (3) Chitty J., following previous decisions, and in particular a decision of Sir George Jessel in In re Ellis' Trusts (4), held that a restraint on anticipation is equivalent to a restraint on alienation, and that therefore, when there is an effectual restraint on anticipation, the person so restrained cannot alienate because that is a form of anticipation. Now what took place here? In 1878 the lady, who was at that time not entitled to this property at all because it came to her under the will of a person who died in 1881, covananted that if she became entitled to money she would settle it. Under the will of 1881 she became entitled to property upon which, if my view as to the effect of In re Bown (1) and In re Holmes (2) is right, there was a restraint on anticipation until the date of payment, but not subsequently. As soon as the date of payment arrived, that was money which simply belonged to her. She could take it and spend it; and if she could take it and spend it I am unable to understand why she should not, by her ante-nuptial settlement executed in 1878,

(1) 27 Ch. D. 411.  
(2) 87 L. T. 332.  
(3) 32 Ch. D. 361.  
(4) L. R. 17 Eq. 409.
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have bound herself that that money which she might have spent she would not spend, but would settle. I do not think
In re Curley (1) applies to a state of things in which the clause is in the form of In re Bown (2) and In re Holmes (3),
and in the form in which it is here. Directly you find that under the operation of the gift she becomes entitled to the
to the money, so that under the form of the gift there is no longer any restraint on anticipation, or, which is the same thing,
restraint on alienation, I do not know why it should not be bound by her covenant to deal with it in a particular way. It seems to me, therefore, that as regards this property the covenant is operative as from the date when the interest under the father's will became payable.

The other property was property which she derived under her mother's will, and that was simply a legacy of 1000l. which
was given her by the mother. There is no clause of restraint on anticipation as regards this. It is money which came to her
during the marriage, and the question is whether the covenant to settle after-acquired property applies to it. As to this sum, and also, as a second point, as to the legacy given by the father's will, another argument is raised, and it is this—that there was in March, 1898, a decree of separation pronounced by an Italian Court, and that the covenant to settle after-acquired property became, as from 1898, a dead thing, because the covenant was to settle what came to her during any coverture, and the coverture was over. It is said that a decision of my own in Davenport v. Marshall (4) is applicable to that state of things. I do not think Davenport v. Marshall (4) has anything to do with it. The ground of that
decision was this: As from a decree of judicial separation pronounced by the Divorce Court in this country, a section of the Matrimonial Causes Act, 1857, enacts that the wife shall from the date of the order be considered as a feme sole with respect to property; and I thought that the covenant to settle after-acquired property was only intended, according to its true construction, to apply during such time as she was not in the

position of a feme sole with respect to property. The evidence as to this Italian order is that it has no such effect as a decree for judicial separation in an English Court; that neither the marriage of an Italian person, nor the separation order, as a separation order, has any effect on the wife's property; that she remains entitled to property as if she had never been married, and the separation order does not alter her rights in respect of property. The whole ground, therefore, of the decision in Davenport v. Marshall (1) is wanting. Under these circumstances, it is necessary to determine whether the English or the Italian law is applicable.

H. Terrell, K.C., and P. F. Stokes, for Mrs. Favaroni. The question has now to be determined whether the settlement is governed by English or by Italian law. In the absence of special circumstances, the law to be applied is the law of the matrimonial domicil, namely, Italy: Dicey's Conflict of Laws, pp. 632–6, rule 172, sub-rule 1. The fact that the settlement is in English form is not sufficient to avoid that general rule. There is no evidence of intention; but the facts show that the parties meant to be subject to Italian law: the matrimonial domicil was Italian; the settlement was executed, the marriage was solemnised, and they intended to reside, in Italy; 1000l. was deposited with the military authorities in Italy; and Mrs. Favaroni from the commencement of the engagement has not lived in England. In Van Grutten v. Digby (2), which has been mentioned, the property settled was English property. Here the money was invested on an English mortgage, but might have been called in and invested elsewhere.

[BUCKLEY J. referred to Chamberlain v. Napier. (8)]

Mrs. Favaroni has put herself under Italian law, and is bound

by it: Vittet v. O'Hagan (4). The covenant, therefore, is now ineffective.

T. T. Methold (Ashbury, K.C., with him). The facts show

that the settlement was to be regulated by English law. It
was in English form: *In re Barnard* (1); the trustee was English, the property settled was secured on a mortgage on English land, and if called in was to be reinvested in English securities; the settlement refers to the English Statutes of Distribution. *Van Gruiten v. Digby* (2) is recognised in *Vidits v. O'Hagen* (3), and is conclusive in our favour. The Court will not hold that the settlement is under Italian law if the result of that will be to make it entirely invalid. "It is a general rule, that whenever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken": Co. Litt. 42 a.

H. Terrell, E.C., in reply. The Court will not assume that Mrs. Favaroni knew that the settlement would be void under Italian law. If there had been no covenant and she endeavoured now to settle these legacies, she would be unable by Italian law to do so.

BUCKLEY J. The question I now have to determine is whether to this settlement, which was executed on March 29, 1873, the English law or the Italian law is to be applied.

The relevant facts are these: the document is in the English form; it contains this covenant to settle after-acquired property, which would be wholly inoperative if Italian law were applicable to the case. Beyond that the instrument as a whole would, according to the Italian law, have been perfectly invalid, for the evidence is that, inasmuch as it openly violates the legal order of succession established by Italian law, it can have no effect at all in Italy. The further fact is that the wife's domicil was English, and this document provides that the settled fund, which was an English mortgage, if realized and reinvested, should be reinvested in English investments. This is therefore an instrument dealing with the property of a lady who was English, dealing with property which was (1) *1887* 26 L. T. 5. (2) *1900* 2 Ch. 87.
collected and realized all the available assets of the partnership with the exception of some doubtful or disputed book debts; and it appeared that the assets were insufficient to meet the liabilities of the firm. On September 8, 1901, the receiver paid 300l. into court in the action, and retained in his hand the sum of 59l. 5s. These two sums were subject to the payment of his remuneration, fixed by the Court at 50l. 10s., and to his solicitor’s costs, which had been assessed in chambers at 34l. 11s. 6d. On June 24, 1901, upon the application of Henry Sandell & Sons, and upon the undertaking of their solicitors to deal with the charge thereinafter mentioned according to the order of the Court, an order was made that the assets of the firm in or to come into the hands of the receiver should stand charged with the payment to the said Henry Sandell & Sons of the sum of 56l. 14s. 2d. due to them upon a final judgment obtained by them against R. Bristow & Sons on May 10, 1901, and of the sum of 58l. 12s. 2d. due to them upon a final judgment obtained by them against the said R. Bristow & Sons on May 13, 1901, with interest and costs.

On June 24, 1901, a similar order was obtained by J. P. Ridd charging the assets in or to come into the hands of the receiver with the payment to the said J. P. Ridd of the sum of 211l. 6s. due to him upon a final judgment obtained by him against R. Bristow & Sons on June 15, 1901.

On February 12, 1902, a similar order was obtained by Farquharson Brothers & Co. charging the assets in or to come into the hands of the receiver with the payment to the said Farquharson Brothers & Co. of the sum of 107l. 0s. 2d., due to them on a final judgment obtained by them against R. Bristow & Sons on January 9, 1902.

This was a summons taken out by the solicitor employed by the plaintiff in the prosecution of the action, asking that it might be declared that he was entitled to a charge upon the assets of R. Bristow & Sons, represented by and being the 300l. cash in court and the 59l. 5s. in the hands of the receiver, and any further moneys coming to his hands as receiver, for the taxed costs, charges, and expenses of the applicant or in reference to the action, and that such charge should constitute

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BELLINGER v BELLINGER  

[2001] EWCA Civ 1140

COURT OF APPEAL, CIVIL DIVISION
DAME ELIZABETH BUTLER-SLOSS P, THORPE AND ROBERT WALKER LJ

23, 24 MAY, 17 JULY 2001

Marriage – Validity – Declaration – Marriage void if parties not male and female – Appellant correctly registered at birth as male but undergoing sex-change operation – Appellant marrying man and seeking declaration that marriage was valid – Whether gender of person fixed immutably at birth for purposes of marriage – Matrimonial Causes Act 1971, s 11(c).

The appellant, B, was correctly classified at birth as male, but underwent gender reassignment surgery which was completed in 1981. That year B went through a ceremony of marriage with a man who was at all times aware of her background and was entirely supportive of her. The couple had thereafter lived together as husband and wife, although B had undergone a sex change. B subsequently petitioned the court for a declaration, opposed by the Attorney General but not by her husband, that the marriage was valid at its inception and was subsisting. The judge refused to grant the declaration, holding that B was male at the time of the marriage ceremony and remained so. In so concluding, the judge followed a longstanding first instance authority which had held that chromosomal, gonadal and genital criteria determined whether a person was a woman in the context of marriage; that those biological criteria were fixed at birth; and that accordingly, if congruent, they determined a person’s sex for the purpose of marriage regardless of any subsequent operative intervention. B appealed, contending that it was no longer the case that the biological constitution of a person was fixed at birth. The Court of Appeal was therefore required to determine at what point, if any, a court could hold that a person had changed their gender status.

Held – (Thorpe LJ dissenting) Although it was for the court to determine whether a person was male or female by assessing the facts of the individual case against a clear statutory framework, it was for Parliament to determine the point at which it would be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the sex opposite to that which had been correctly assigned to that person at birth. The legal recognition of marriage, like divorce, was a matter of status and was not for the spouses alone to decide. It affected society and was a question of public policy. For that reason, even if for no other, marriage was in a special position and was different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death had to be registered. Each child born had to be placed into one of two categories for the purpose of registration, and the chromosomal, gonadal and genital criteria remained the only basis for determining the gender of a child at birth. Status was...

a

Section 11(c) re-enacted s 11(c) of the Nullity of Marriage Act 1971. Section 11(c) is set out at [146] below.

Appeal allowed.

Celia Fox Barrister.
not conferred only by a person upon himself. It had to be recognised by society. The propriety of requiring pre-conditions for recognition of acquired gender was a matter for public policy and public consultation, not a matter for imposition by the courts on the public. When considering social issues in particular, judges were not to substitute their own views to fill gaps in the legislation. Accordingly, the appeal would be dismissed (see [43], [97], [99], [105], [106], [108], below).

Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33 applied.

Notes
For the requirement for a marriage to be between a male and a female, see 29(3) Halsbury's Laws (4th edn reissue) paras 34, 378.
C

Cases referred to in judgment
A-G v Ouwakhu Family Court [1995] 1 NZLR 603, NZ HC.
Cowan v Cowan [2001] 2 FCR 331, CA.
Dart v Dart [1997] 1 FCR 21, CA.
Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 1115, HL.
Hyde v Hyde and Woolmansee (1866) LR 1 P & D 130, [1861–73] All ER Rep 175, Con Ct.
Lindo v Belsario (1795) 1 Hag Con 216, [1775–1802] All ER Rep 293, Con Ct.
Littleton v Prange (1999) 2 SW 3d 223, Tex CA.
MT v JT (1970) 3SS A 2d 204, NJ SC (AD).
Reeman v UC [1993] 2 FCR 49, [1986] 9 EHR 56, 6C HR.
S v S (otherwise WJ) (No 2) [1962] 1 All ER 55; sub nom ST v ST (otherwise WJ) [1963] P 37, [1962] 3 WLR 526, CA.
Sheffield v UK (1998) 3 EHRC 83, ECI HR.
Van Oosterwijk (2d) v Belgium (1980) 3 ECHR 557, E Com HR.

Appeal
Elizabeth Ann Bellinger appealed with permission of the Court of Appeal from the decision of Johnson J on 2 November 2000 (2000) 3 FCR 733 dismissing her petition under s 55 of the Family Law Act 1996 for a declaration that the marriage celebrated between her and the respondent to the petition, Michael Jeffrey Bellinger, on 2 May 1981 was valid at its inception and was subsisting. Mr Bellinger had not opposed the petition, but it had been opposed by the respondent to the appeal. The Attorney General, who had intervened in the proceedings under s 59(2) of the 1986 Act. The facts are set out in the judgment of Dame Elizabeth Butler-Sloss P and Robert Walker LJ.

Laura Cox QC and Ashley Boyston ( instructed by Law for All) for the appellant.
Andrew Moylan QC and Timothy Amos ( instructed by the Treasury Solicitor) for the Attorney General.

17 July 2001. The following judgments were delivered.

C

DAME ELIZABETH BUTLER-SLOSS P AND ROBERT WALKER LJ.
[1] This is an appeal, with leave of the Court of Appeal, by the appellant, Mrs Bellinger, from the refusal of Johnson J on 2 November 2000 (2000) 3 FCR 733 to grant her petition for a declaration that the marriage celebrated between Mr Bellinger and herself was valid at its inception and is subsisting. The reason for the judge's refusal to grant the declaration was that the appellant was at the time of the marriage ceremony, and still remains, male. Mr Bellinger was the respondent to the petition, which he did not oppose. The Attorney General intervened, filed an answer and opposed the granting of the declaration.
[2] Behind those bare facts lies a human problem, which deeply affects a small minority of the population. In considering the difficult medical and legal issues facing this court, admirably encapsulated in the written and oral submissions of Mr Cox QC for the appellant and Mr Moylan QC for the Attorney General, we are very much aware of the plight of those who, like the appellant, are locked into the medical condition of transgenderism, within the group described as gender dysphoria or gender identity disorder.

f

THE HISTORY
[3] The appellant was born on 7 September 1946 and was at birth correctly classified as male. However, from as long as she could remember, she felt more inclined to be female. Despite her inclinations, and under some pressure, at the age of 21 she married a woman. The marriage broke down and they divorced in 1971. After the divorce she began to dress as and live as a woman. She went through the various stages of treatment, and finally underwent gender reassignment surgery which was completed in 1981. On 2 May 1981 she went through a ceremony of marriage with Mr Bellinger, a widower. He was at all times aware of the appellant's background and was entirely supportive of her. The appellant was described on her marriage certificate as a spinner but apart from that she was not asked by the Registrar of Marriages, nor did she volunteer any information, about her gender status. The couple have lived together ever since as husband and wife. The appellant petitioned for the declaration under s 55 of the Family Law Act 1966. The Attorney General intervened under the provisions of s 59(2) of the Act.

j

MEDICAL CONDITION OF THE APPELLANT
[4] There is no suggestion now that the appellant was incorrectly assigned to be male at birth, nor that she falls within the group described as inter-sexed. From the medical evidence it is clear that the appellant was correctly assigned at birth as male. The appellant felt an increasing urge to live as a woman rather than as a man. She first consulted Dr Randall, a consultant psychiatrist at the Charing Cross Hospital, with special expertise in this area of medicine. She had a long
Petitioner petitioned for nullity based on the ground that the respondent was male. The judge granted a decree of nullity.

[11] Nine medical experts gave evidence at the hearing and the judge said:

"All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are—(i) Chromosomal factors. (ii) Gonadal factors (ie presence or absence of testes or ovaries). (iii) Genital factors (including internal sex organs). (iv) Psychological factors. Some of the witnesses would add—(v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc, which are thought to reflect the balance between the male and female sex hormones in the body). It is important to note that these criteria have been evolved by doctors for the purposes of systematising medical knowledge, and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed "We do not determine sex—in medicine we determine the sex in which it is best for the individual to live". These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination." [See [1970] 2 All ER 33 at 44, [1971] P 83 at 100].

[12] Earlier in his judgment, Ormrod J considered the aetiology of transsexualism and he referred to:

"The alternative view is that there may be an organic basis for the condition. This hypothesis is based on experimental work ... which suggests that the copulatory extrinsic sexual desires of the human beings may be affected by the influence of certain sexual hormones on particular cells in the hypothalamus ... At present the application of this work to the human being is purely hypothetical and speculative ... The use of such phrases as "male or female brain" in this connection is apt to mislead owing to the ambiguity of the word "brain" ... In my judgment, these theories have nothing to contribute to the solution of the present case." [See [1970] 2 All ER 33 at 43-44, [1971] P 83 at 99-100].

[13] He said:

"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation." [See [1970] 2 All ER 33 at 47, [1971] P 83 at 104].

[14] The finding by Ormrod J that the biological sexual constitution of an individual was fixed at birth is said by Mrs Cox no longer to reflect the true position.

[15] Ormrod J concluded:

"Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman. I think, with respect, that this is a more
precise way of formulating the question that took up para 2 of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less, but the distinction may not be without importance, at any rate in some cases. The question then turns into what is meant by the word “woman” in the context of a marriage, for I am not concerned to determine the “legal sex” of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors’ criteria, i.e. the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows the so-called marriage of 10th September 1965 is void.” (See [1970] 2 All ER 33 at 48-49, [1971] 1 P.83 at 106.)

THE LEGISLATION

[16] The judgment of Orme J was not appealed and its conclusions were put on a statutory basis in the Nulity of Marriage Act 1971, s 1 of which stated:

“...A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say (c) that the parties are not respectively male and female.”

[17] Section 1(c) was re-enacted in s 11(c) of the Matrimonial Causes Act 1973, which applies to the present proceedings.

Male and female—gender

[18] The words ‘male and female’ have not been interpreted either in the statute or in subsequent decisions of the courts. Mrs Cox at one stage suggested that the words ‘male’ and ‘female’ were deliberately left undefined so that they were capable of being interpreted more broadly than ‘man’ and ‘woman’, and ‘female’ might, therefore, encompass the position of the appellant. There was some slight support for that proposition in the judgments of Ward J and Sir Brian Neil in S-T v J/J [1998] 1 All ER 431, [1998] Fam 103. Ward J said:

‘...It is suggested that the Act has made a subtle but perhaps important change to the terminology. What governed Orme J in Corbett, based as it was on ecclesiastical principles, was whether the parties were “a man and a woman”. It may be— but I express no view about it—that the choice of the words “male and female” has left the way open for a future court, relying on the developments of medical knowledge, to place greater

emphasis on gender than on sex in deciding whether a person is to be regarded as male or female. There is a body of very respectable academic opinion making that point: see, for example, Cremey and Mason Principles of Family Law (5th edn, 1990) pp 46-48, Sebastian Poulter: “The Definition of “Marriage” in English Law” (1979) 42 MLR 409, 421-423 and Anthony Bradley “Transsexuals and the Law” [1987] Fam Law 350. (See [1998] 1 All ER 431 at 449-450, [1998] Fam 103 at 124.)

[19] Sir Brian Neil said:

‘It is not necessary for the purpose of this appeal to consider whether the decision of Orme J in Corbett v Corbett ... requires re-examination in the light of modern medical advances and in the light of decisions in other jurisdictions, or whether it is distinguishable because the words used in s 11 of the 1973 Act are “male and female” which, I suppose it might be argued, indicate a test of gender rather than sex.” (See [1998] 1 All ER 431 at 476, [1998] Fam 103 at 153.)

[20] Allowing for the possibility of some ambiguity in the use of the words ‘male’ and ‘female’ in s 11(c), both Johnson J and this court were invited to look at the relevant extract from Hansard during the passage of the Nulity of Marriage bill through the House of Commons (314 HC Official Report (9th series) cols 1827-1834. 2 April 1971). This did not seem to us to elucidate the meaning of the words, but it did demonstrate that the decision to include the issue of gender within the law governing nulity, rather than to provide for it by way of a declaration as to status, was a humane one designed to provide for the possibility of applications for financial relief by either party to the nullity decree. This approach was of some significance in the light of the definition in Jackson The Formation and Annulment of Marriage (2nd edn, 1969) p 131:

‘If two persons of the same sex contrive to go through a ceremony of marriage, the ceremony is not matrimonial at all: it is certainly not a void marriage, and matrimonial principles have no application to such an “union” ....’

[21] The requirement that the issue, as to whether a person was male or female, was to be decided within the framework of the law of nulity was made crystal clear by S-R/S/5(a) of the Family Law Act 1996, which stated that no court may make a declaration ‘that a marriage was at its inception void’.

[22] The words ‘male’ and ‘female’ are obviously broader than ‘man’ and ‘woman’ and includes those who are not yet adults. It does not, however, appear to us necessary to delve deeper into the extended meaning of ‘male and female’ in this judgment, since Mrs Cox does not now seek to rely strongly upon it. The words ‘sex’ and ‘gender’ are sometimes used interchangeably, but today more frequently denote a difference. Mrs Cox submitted that gender was broader than sex. Her suggested definition was that “gender” related to culturally and socially specific expectations of behaviour and attitude, mapped to men and women by society. It included self-definition, that is to say, what a person recognised himself to be. See also Sir Brian Neil in S-T v J/J [1998] 1 All ER 431 at 476, [1998] Fam 103 at 153. It would seem from the definition proposed by Mrs Cox, with which we would not disagree, that it would be impossible to identify gender at the moment of the birth of a child.
THE MEDICAL EVIDENCE

[24] The aetiology of the condition of transsexualism appears to be uncertain. Professor Green, consultant psychiatrist and Research Director of the Gender Identity Clinic at the Charing Cross Hospital, identified transsexualism as follows: 'Gender dysphoria is discontinuance being a person of the sex to which one was born and discontinuance in living with the gender role consistent with that birth sex. Gender dysphoria when profound is popularly known as transsexualism. In the current version of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders IV, this condition is known as gender identity disorder.'

[25] Omrod J in Corbett’s case described the condition: 'The transsexual ... an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible ... This goes on until they come to think of themselves as females imprisoned in male bodies, or vice versa ...' (See [1970] 2 All ER 35 at 42, [1971] P 83 at 98.)

[26] Three eminent consultants provided reports to the court, Professor Gooren, Professor Green and Mr Terry.

Professor Gooren

[27] The evidence of Professor Gooren, Professor of Endocrinology at the Free University Hospital, Amsterdam, was provided in a report on transsexualism, dated 20 June 1999, an undated affidavit, a medical report on the appellant dated 18 February 2000 and a subsequent letter of 11 October 2000. He was clear that transsexualism was a medical condition:

'Traditionally it is assumed that sexual differentiation, the process of becoming man or woman is completed with the formation of the external genitalia, the criterion used to assign a new-born child to the male or female sex. From the beginning of this century it has become clear in laboratory animals that this is not the endpoint of the sexual differentiation process but that the brain undergoes a sexual differentiation process into male and female, largely predictable/correlating with future sexual and non-sexual behaviour. The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia and finally the differentiation of the brain into male or female. Normally all steps in the process of sexual differentiation are concordant (in men an XY chromosomal pattern, testis, male internal and external genitalia and a male brain development being the substrate of male-type behaviour; in women an XX chromosomal pattern, ovary, female internal and external genitalia and a female brain development being the substrate of female-type behaviour). Nature is not free of errors and the process of sexual differentiation is no exception. There are human beings in which not all the traditional criteria of sex are concordant. They may have some biological characteristics of one sex and some of the other, a condition known as inter-sexed. The human condition requires that new-born children be assigned to one sex or the other. The social and legal systems have left no room for inter-sexed subjects. If a new-born child presents with an inter-sexed condition a medical decision must be made to assign this baby to the male or female sex. It is now a generally accepted medical practice to assign an inter-sexed new-born child to that sex in which the unlucky creature, on the basis of medical expertise and reasonable expectation, will function best. It is of note that biological characteristics are not imperative in this decision process. The decision is based on protracted future sexual and non-sexual functioning. The legal system registers these new-born children in accordance with the medical decision. So it is no longer tenable to claim the genic or gonadal criterion determines one’s status as male or female. Some of our fellow human beings live lives of women with a male-type XY chromosomal pattern or tests or vice versa ... Sexual and non-sexual brain differentiation is now accepted as part of the process of becoming male or female of the mammalian species to which humans belong. In animal experimentation it is easily possible to induce a female type of sexual and non-sexual behaviour in animals that have, up to that final stage of sexual differentiation, a completely male pattern and vice versa. Depending on the type of manipulation applied in the animal experiment, in-between types of behaviour can also be observed. On the basis of the findings of these experiments it has been hypothesised that in human subjects with gender identity problems the sexual differentiation of their brains has not followed the pattern predicted by their earlier steps in the sexual differentiation process (such as chromosomis, gonadal, genitalia) but has followed a pattern typical of the opposite sex in the final stage of that differentiation process, as indicated above, a situation that can be induced in laboratory animals by experimental manipulation ... The validity of extrapolation of the sexual differentiation process of the brain in other mammals to the human has been corroborated by findings of anatomical and functional brain differences between males and females, including the human species.'

[28] Professor Gooren said that the findings based on research into the human brain structure carried out post mortem showed that a biological structure in the brain distinguished male to female transsexuals from men (see Zhou, Hofman, Gooren and Swaab ‘A Sex Difference in the Human Brain and its Relation to Transsexuality’ (1993) 378 Nature 68, 2 November).

In conclusion: there is now reason to believe that transsexualism is a disorder of sexual differentiation, the process of becoming man or woman as we conventionally understand it. Like other subjects afflicted with errors in this process, these subjects need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in inter-sexed children where assignment takes place to the sex in which they in all likelihood will function best. In them the decision most of the time takes place shortly after birth ... Similarly it is the case in transsexualism, since there is evidence that the sexual differentiation of the brain in humans occurs (also) after birth. As such it is unavoidable that in subjects with errors of the sexual differentiation of the brain, sex reassignment takes place after birth, sometimes much later in their lives since it requires a large amount of life experience to discover the predicament of being born in the wrong sex, in other words having sexual and non-sexual brain patterns that are in contradiction with the other sex characteristics.

The established diagnostic and therapeutic approach to transsexualism is that it is a stepwise procedure: the decision to treat hormonally is contingent upon the outcome of the psycho-diagnostic process, the decision to recommend
surgery is contingent upon the successful outcome of hormone treatment and the real life test. If both appear to resolve the subject’s gender problems, it is imperative to recommend sex reassignment surgery.

[29] In his paper he made it clear that there are significant health risks in refusal of sex reassignment to those who qualify for it as a result of careful and thorough psycho-diagnostic process. The risks include suicide as not uncommon.

[30] In his letter of 11 October, Professor Green said:

‘The process of becoming man or woman is not complete with the formation of the external genitalia, the common criterion to label someone male or female is extremely expedient in that regard. But the brain is also sex-dimorphic, and is an organ that becomes sex-dimorphic in the course of normal female/male development. Both the paper in Nature and Journal of Clinical Endocrinology substantiate the hypothesis that transsexuals are inter-sexed at brain level and deserve the same medical care as other inter-sexed patients...’

Professor Green


[32] In his 5 October report he said:

‘Over the past four decades, gender identity disorder, or transsexualism, has been acknowledged as a psychiatric disorder requiring unique therapeutic interventions. Severe gender dysphoria cannot be alleviated by any conventional psychiatric treatment, whether it be psychoanalytic therapy, electro-convulsive treatment, aversion treatment, or by any standard psychiatric drugs. Consequently, the strategies of therapeutic intervention include, firstly, clinical exploration of the extent of the patient’s gender dysphoria. When it is considered that a transition to living in the other sex and gender role could result in a better psychological, psychosocial and psychosexual functioning, an extended trial transition period is initiated. Treatment stages include reversible steps before those that are irreversible. Early on, there may be name change, and clothing style change. This is followed by cross-sex hormone administration. If during the next one to two years the individual can demonstrate to self and health care professionals that life is more successful in the new gender role, consideration can be given for referral for sex reassignment surgical intervention ... The onset of gender dysphoria is typically dated by patients to the earliest years of life. It is reported to have begun “as far back as I can remember” ... The criteria for designating a person as male or female are complex. They are not simply an outcome of chromosomal configuration, genital configuration, or gonadal.”

[33] He set out a number of situations in which the patient’s chromosomal pattern did not fit the gender assignment given to the patient. This applied both to those within the male grouping and female grouping. In such cases the criteria set out in Corbett’s case are not concordant with their designation. Such patients are inter-sexed. Professor Green instanced the condition of androgen insensitive syndrome. Those with that condition are psychologically female and appear to be normal women, but two of their three sexual criteria under Corbett’s case are male.

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[34] Professor Green then said:

‘The Corbett criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or a woman.’

[35] Mrs Cox placed great reliance on that passage as showing that the advances in medical knowledge made the Corbett criteria dated and inadequate. Mr Moylan, however, pointed to the previous passages of Professor Green’s report which were dealing with those who came within the definition of inter-sexed and not transsexuals.

[36] Professor Green referred to the research relied upon by Professor Green:

‘In recent years there has been a widely publicized finding from the Netherlands indicating, in a small series of male-female transsexuals studied post-mortem, that the bed nucleus of the stria terminalis region of the brain was similar in size to that of typical females and different in size from typical male. The interpretation of this finding is that it provides evidence of a biological central nervous system basis for male transsexualism. Because of the difficulties in replicating such a study which must be conducted after death this report remains neither refuted nor confirmed.’

[37] In his letter of 12 October, Professor Green agreed that the Zhou et al paper on sexual differentiation of the brain should not be considered a preliminary report but he underlined that the research was conducted on a small sample of male transsexuals. In his letter of 2 November 1999, Professor Green wrote in a reply to a request to consider the Corbett criteria:

‘The four criteria, even the potential fifth criterion of hormonal factors or secondary sexual characteristics, noted by medical experts nearly thirty years ago, are derived from the landmark studies of the anatomically inter-sexed, the work of Dr John Money and additionally Drs John and Joan Hampson in the 1950s at The John Hopkins Hospital. There has been no substantive alteration in considering the criteria for the last three decades. There are medical experts who would value the psychological factor as the most important criterion particularly when psychological factors, or the person’s gender identity, is at variance with any of the other factors. In fact, in the pioneering studies of the anatomically inter-sexed the psychological factor was most commonly the overriding one in determining psychosexual development of the individual.’

[38] In his final report of 20 December 2000, he answered specific questions asked by the Treasury Solicitor. He set out the criteria applied to determine the sex of a child at birth and the problems in assigning the sex of an inter-sexed individual. He said:

‘Psychological factors cannot be considered at birth because they do not yet manifest. They may become an overriding consideration subsequently as the individual develops. Physical differences in the brain are as yet not measurable at birth, if at all later in life. They may ultimately override all other criteria. Thus, though not apparent at birth, this would influence the ultimate developmental outcome with respect to a new-born.’

[39] In the management of those who are born inter-sexed he said:
... there is considerable sentiment for delaying any surgical modification of the genitalia which had been thought to help pre-set the evolving gender identity. Now there is more of a wait and see approach until the individual is old enough to express its own wishes ... There is growing acceptance of findings of sexual differences in the brain that are determined prenatally. They are seen as influencing sex-typed and sexual behaviours. I do not know how much of an international consensus exists on this or just what a reasonable body of medical opinion would constitute here. However, there is a growing momentum in that direction.

[40] He was asked how the sex of the petitioner's brain could be determined during her lifetime:

'At present there is probably no method within neuroscience to make such a determination. Rather it may be best to abide by the person's gender identity, which is the psychological manifestation as mediated by the brain ... If a biological sexual condition of an individual is conceptualized to include psychological sex, perhaps reflective of brain sex differentiation, this status does not express itself until several years postnatally. Therefore it is not possible to say that the biological sexual condition of an individual is fixed at birth in that not all of the bases of the biological sexual condition can be determined at birth ... As a psychiatrist I am biased towards psychological factors. I would argue that with a transsexual the psychological sex has been contrary to other somatic factors for many years, if not the great majority of the person's life. Taking that position gender reassignment treatment and surgery would align the somatic features with the psychological features ... By the standards applied at the time of the patient's birth it would be considered that the infant was male. However, current considerations with respect to determining the correct sex of an individual at birth, such as psychological and brain sex, might render that designation less certain ... the hormonal sex and genital sex have been changed by medico-surgical intervention. Gonadal factors have been modified in that they have been eliminated. Chromosomal factors have not been altered so far as XX or XY is concerned, but within the chromosones there may be genes that determine that the petitioner was psychologically female. At present the patient is functioning as a woman, not as a man. From that perspective the petitioner's sex could be judged to have changed.'

Mr Terry

[41] Mr Terry, consultant urological surgeon at the Leicester University Hospitals, which have a gender identity disorder group, provided a report dated 21 October 1999 to the Treasury Solicitor and a letter of 14 March 2000 to Professor Green. He supported the reports of Professor Gooren and Professor Green. He referred to the Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders (5th version, 1998), which classified gender identity disorder either under the ICD-10 (The International Classification of Diseases-10) or the DSM-IV (Diagnostic and Statistical Manual of Mental Disorders (4th edn)). He set out the required stages before a patient was accepted for genital reconstructive surgery; the patient had to be over 18, having had 12 months of continuous hormonal therapy, 12 months of successful, continuous full-time real life experience, and full understanding of the consequences of surgery and the possibilities available. He was aware of the study of the interaction between the developing brain and sex hormones in Zhou et al. He said:

'This study, although composed of small numbers of patients, shows a significant difference in the size of the central subdivision of the bed nucleus of the stria terminalis between groups of men and women and male to female transsexuals. This paper therefore lends credence to the view that the formation of external genitalia which is currently the criteria to assign a new-born child to the female or male sex is not the end point of sexual differentiation and that sexual differentiation of the brain may be more important in predicting or correlating future sexual and non sexual behaviour ... With further research into the neuro-anatomy/neuro-pharmacology of brains of transsexual patients the pathogenesis of transsexualism may become more clearly understood.'

[42] In an addendum to his report he said:

'The psychological profile of male to female transsexuals is female by medical definition. The only biological factor which has not changed in such individuals is their chromosomal makeup. The paper reported in Nature in 1995 would suggest this in itself may be irrelevant in the sexual development of transsexuals. Accepting that transsexualism is a medically recognised condition and that such patients undergo appropriate medical and surgical treatment to achieve their chosen sexual orientation it seems to me irrelevant to consider the chromosome makeup of an individual as the critical factor when determining the rights of that individual in the society in which he/she lives.'

Conclusions on the medical evidence

[43] In our judgment the gender assignment at birth of a transsexual in accordance with the Corbett criteria cannot be challenged. There are at present no other criteria that can be applied to a new-born child.

[44] The next question is whether the assignment made at birth is immutable, other than for those with uncertain sexual characteristics, or whether there is a point at which it can be said that the gender which was correct at birth is no longer applicable.

[45] The significant difference between the three consultants, despite their general agreement, was their approach to the classification of the diagnosis of transsexualism. Professor Gooren was clear that it was a medical condition with an organic basis, 'a disorder of sexual differentiation' and, based upon the research described in the paper of Zhou et al, went so far as to say that the research substantiated 'the hypothesis that transsexuals are inter-sexed at brain level'.

[46] Both Professor Green and Mr Terry considered that the Zhou et al research was important, but based upon a small sample, and its findings could not at present be refuted or confirmed—it has not been so far widely accepted.

[47] Professor Green placed transsexualism within the category of psychiatric disorder, as did Mr Terry who referred to its categorisation by the Harry Benjamin International Gender Dysphoria Association, within the manual of mental disorders.

[48] Transsexualism is, therefore, according to the present accepted medical knowledge, recognised as a psychiatric condition, coming within gender dysphoria or gender identity disorder. There is the possibility that it is a medical condition
with a biological basis by reason of sexual differentiation of the brain after birth. Another disorder within the same group is the condition called inter-sex, which has certain similarities to transsexualism but is recognized as a distinct disorder.

An inter-sexed person is someone whose biological criteria at birth are not congruent, and is, therefore, of uncertain sex and, as Professor Gooren and Professor Green described, would be assigned to the sex the medical profession considered most appropriate for psychological reasons rather than biological reasons. By contrast the transsexual would be born with congruent biological criteria and would be appropriately assigned to one sex, but would become seriously discontented with that ‘label’ as he/she grew up. At some stage a transsexual would be likely to seek medical advice. As Professor Gooren said, it would be a stepwise procedure.

The identification and treatment of transsexualism can be divided into four stages: (a) psychiatric assessment; (b) hormone treatment; (c) a period of the real life test (living as a member of the opposite sex); and, in suitable cases, (d) gender reassignment surgery.

After diagnosis, the purpose of the treatment is to deal as effectively as possible with the psychological problems of being born into the gender with which the person is profoundly unhappy. The diagnosis, as Mr Moyal pointed out, is based upon the correct assignment at birth, determined by the existing biological criteria which subsequently turns out to be psychologically incorrect.

The three possible additional factors not taken into account by Omoreg J in Cerbott’s case are: (a) psychological; (b) secondary sexual characteristics; and (c) brain differentiation.

(a) Psychological

Omoreg J, of course, recognised the psychological factor and disregarded it for the purpose of assignment of the biological sex of the baby. If he was correct that assignment of sex has to be fixed at birth for all whose biological criteria are congruent, then the psychological factor has to be disregarded. For those who are inter-sexed, since the assignment is uncertain, provision is made for a real life test, eg W v W (physical inter-sex) (2001) Fam 111, [2001] 2 WLR 674. Professor Green considered that psychological factors might become an overriding consideration in the individual development. Those factors would clearly have to be recognised at a later stage in the life of the individual.

(b) Secondary sexual characteristics

None of the medical evidence suggested that the secondary criteria should be a primary factor in assignment or reassignment.

(c) Brain differentiation

Professor Gooren’s evidence on the recent research on animals, and post-mortem on the brains of transsexuals, shows the developments in medical science since this hypothesis was discredited by Omoreg J in Cerbott’s case. The size of the brain in men is significantly larger than in women and in the group of post-mortem on transsexual male to females the size of the brain corresponded to the gender assumed. The research may potentially be of great significance in guiding the medical profession and the courts in a reassessment of the correct gender of transsexuals.

There are however, at present, a number of formidable obstacles. The research is on a limited basis. It has not yet been generally accepted, and clearly more research will have to be carried out to demonstrate that the biological factor which causes brain sexual differentiation in men and women is to be found congruent with the transsexual’s preferred gender.

A much larger obstacle is the present impossibility of recognition of brain differentiation in living people. The possible psychological or other signs of such brain differentiation are at such an early stage that, in our judgment, a court could not accept them as clear indications. No one in this case has asked us to do so. Consequently, the work on brain sexual differentiation, which may become of great significance in the future, cannot at present be one of the relevant criteria for the purposes of assignment of the sex of a transsexual in court.

There was no medical evidence, other than the psychological, upon which the court could come to a conclusion different from the criteria set out by Omoreg J. Although the psychological factor was strongly relied upon by Professor Green, it did not suggest a clear point at which the psychological changes had reached a stage, with or without hormonal treatment and reassignment surgery, at which a person should be seen to have become a member of the sex into which he/she was not born.

THE CASE LAW

There has been no decision, since Cerbott’s case, on the validity of the marriage between a transsexual and a person of the same sex as that in which he/she was assigned at birth. Cerbott’s case was a decision of first instance and this court is, therefore, bound by its conclusions, but it undoubtedly has much persuasive authority. There are only a few English cases which can throw any light upon the modern position. None of them departs to any marked extent from the approach of Omoreg J in Cerbott’s case.

In R v Tan [1983] 2 All ER 12 at 19, [1983] QB 1053 at 1064, the criteria in Cerbott’s case were applied to the criminal law. The Court of Appeal rejected a submission that a person who had become philosophically or psychologically or socially female, that person should be held not to be a man. In the judgment of the court, Parker J said:

In our judgment, both common sense and the desirability of certainty and consistency demand that the decision in Cerbott’s case should be applied for the purpose, not only of marriage, but also for a charge under s 30 of the Sexual Offences Act 1956 or s 5 of the Sexual Offences Act 1967.

In S-T (formerly J) v J [1998] 1 All ER 431, [1998] Fam 103 the defendant was born female but lived as a male. He underwent reconstructive surgery. He met and married the plaintiff without informing her of his history. Upon discovering the truth, the plaintiff obtained a decree of nullity and, upon the defendant applying for ancillary relief, she challenged his right to do so upon the ground of public policy, in that the defendant had committed an offence under the Perjury Act 1911. Hollis J dismissed the defendant’s claim.

In this court, Ward LJ reviewed the position of transsexuals and the matrimonial law. He considered decisions from other jurisdictions, and was impressed by the reasoning of Judge Aspin in the New Zealand Family Court in M v M (marriage; transsexual) [1991] NZLFR 337, and of Ellis J in the High Court of New Zealand in A-G v Oatashi Family Court [1995] 1 NZLFR 603, neither of whom followed the criteria in Cerbott’s case. Each held that there was no lawful impediment to the marriage of a transsexual. Ward J stated:
He pointed out, however, that the correctness of the decision in Corbett's case had not been challenged in the Court of Appeal (see also Sir Brian Neill [1998] 1 All ER 431 at 476, [1998] Fam 103 at 155). In our view, this court in S-T's case raised the question in so far as whether the developments in medical knowledge provided the basis for a reconsideration of the criteria in Corbett's case. We agree with them that it is appropriate to review those criteria, but are not persuaded that the judgments of Ward LJ and Sir Brian Neill did more than draw a marker for a future court to reconsider the whole issue as we are now doing.

In W v W (physical inter-sex) [2001] Fam 111, [2001] 2 WLR 674, Charles J had this effect to it. It is, we respectfully agree, a living witness to the marriage on a petition for nullity by the petitioner. It is clear from the tragic facts that the respondent's sex at birth was uncertain, and that the parents chose to register her as a boy.

As a child and a young woman she dressed as, appeared as, and acted as female. At 17, she finally ran permanently away from home and thereafter lived as a woman. Charles J held that he was not concerned with a transsexual. He was concerned with the question in which the biological test set and applied in Corbett's case was not satisfied, and did not provide the answer to the question as to whether the respondent was a female for the purposes of marriage. The judge found that there was a correct diagnosis of the respondent of partial androgen insensitivity, with ambiguous external genitalia, and came within the convenient shorthand definition of physical inter-sex.

He held that she was a female for the purposes of her marriage to the petitioner. He said [2001] Fam 111 at 145, [2001] 2 WLR 674 at 708 that, on the true construction of the 1973 Act, greater emphasis could be placed on gender rather than sex. Although we respectfully agree with the judgment in W v W, Charles J made it entirely clear that he was dealing with a different disorder within gender dysphoria, and not with a transsexual.

Mrs Cox argued that the appellant and Mrs W were, after surgery, physically the same. That similarity does not change the essential fact that Mrs W was, at birth, of uncertain sex, and assigned by the choice of her parents to male, whereas the appellant was indisputably male at birth. We cannot see how W v W helps the appellant's case.

In Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705, [2001] 1 AC 27 the House of Lords grappled with the consequences of the death of one partner in a longstanding homosexual relationship, upon the right of succession to a statutory tenancy under Sch 2 to the Rent Act 1977. The House of Lords held that the extended meaning of the word 'spouse' in para 2(2) of Sch 2 did not apply to same sex partners. By a majority the House held that a same sex partner was capable of being a member of the original tenant's family for the purpose of para 3 of the same Schedule. The House of Lords was, therefore, considering a situation, which was in all respects entirely different from the present question before this court. None the less, Mrs Cox relies on observations made by
striking the requisite balance, the positive obligations arising from Article 8 cannot be held to extend that far. (See [1993] 2 FCR 49 at 60-61, [1986] 9 EHRR 56 at 67 (para 44).)

[74] The court dealt with art 12 much more shortly and simply, concluding that the right to marry guaranteed by the article ‘refers to the traditional marriage between persons of opposite biological sex’. The decision on art 12 was unanimous. The decision on art 8 was brought by a majority of twelve to three. The views of the minority appear from the joint dissenting opinion:

‘There is obviously no question of correcting the register by concealing the historical truth or of claiming that Mr. Ress has changed sex in the biological sense of the term. The idea is merely (as already happens in the United Kingdom in other cases—for example, with adoption) to mention a development in the person’s status due to changes in his apparent sex—what we have called his sexual identity—and to give him the opportunity to obtain a short certificate which does not disclose his previous status. This would better reflect the real situation and to that extent would even be in the public interest.’ (See [1993] 2 FCR 49 at 63, [1986] 9 EHRR 56 at 70.)

[76] Four years later in Casey v UK [1993] 2 FCR 97, [1990] 13 EHRR 622 the European Court of Human Rights reached the same conclusions, but only by majorities of ten to eight in relation to art 8, and 14 to four in relation to art 12. The applicant was a male-to-female transsexual who had received reassignment surgery in 1974. In 1984 she complained of the Registrar General’s refusal to alter her birth certificate. While the complaint was pending she went through a marriage ceremony at a London synagogue in 1989 but she later obtained a decree that the marriage was void. The commission concluded, surprisingly in view of Ress’s case, that there had been no violation of art 8 but that there had been a violation of art 12.

[77] The court, in its majority judgment, asked itself whether it should follow Ress’s case. Its general practice was to follow precedent, but a departure might be warranted to reflect scientific and societal developments. But there was no evidence of significant scientific advances and (despite some changes in the law of member states of the Council of Europe) this was still an area in which there was a wide margin of appreciation. Nevertheless the court said:

‘In the context of the seriousness of the problems facing transsexuals and the distress they suffer, since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.’ (See [1993] 2 FCR 97 at 109, [1990] 13 EHRR 622 at 641 (para 41).)

[78] Again, the majority judgment dealt quite shortly with art 12 (despite the contrary view taken by the commission).

[79] In Casey’s case there were several dissenting opinions, most notably the long and eloquent opinion of Judge Martens. The whole opinion merits study, but its central thesis appears from para 2.7 ([1993] 2 FCR 97 at 114, [1990] 13 EHRR 622 at 648):

‘The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems
best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In time he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly possible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognize the fait accompli he has created. He demands to be recognised and to be treated by law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons. . . .

(80) Rees and Coeby's cases were distinguished in B v France [1993] 2 FCR 145, (1992) 16 EHRR 1, in which the only complaint was under art 8. The applicant, a French national born in Algeria, was a male-to-female post-operative transsexual who complained of the refusal by the Sûreté’s Medical Board to make an order recodifying her birth certificate or declaring that she should bear female forenames. Although it was argued that in Coeby’s case the court had erred in discounting scientific and societal developments, the decision in B v France seems to have turned on the applicant’s sexual orientation and not on the roles he assumed in British society.

(81) The next case in chronological order is a decision of the High Court of New Zealand, A v G (Family Court) [1991] 1 NZLR 603. In applying s 23 of the New Zealand Marriages Act 1955 Ellis J declined to follow Cerber’s case and preferred the reasoning in the New Jersey decision in M v JT and the New Zealand decision in M v M (marriage: recognition) [1991] NZLR 337. The essential point of the decision appears at [1995] 1 NZLR 603 at 606:

’Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfill that desire, then it ought also to allow such persons to function as fully as possible in their re-assigned sex, and this must include the capacity to marry. Where two persons present themselves as having the apparent genitalia of a man or a woman, they should not have to establish that each can function sexually . . . There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of re-assignment. It would merely confirm the factual reality.’

(82) P v S Case C-13/74 [1996] All ER (EC) 397, ECR 3-1143 is a decision of the Court of Justice of the European Communities on a reference by the Truro Industrial Tribunal raising a question on the Equal Treatment Council Directive (76/207/EEC). P was a manager employed by the county council at an educational establishment. In 1992 P told S, the principal of the establishment, of her intention to undergo male-to-female reassignment surgery. At first S was supportive, but while P was on sick leave after the surgery she was dismissed. The question referred by the industrial tribunal was whether the directive’s prohibition of sex discrimination extended to dismissal of a transsexual on account of gender reassignment. The Court of Justice answered that question in the affirmative:

‘Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.’ (See [1996] All ER (EC) 397 at 419 para 21-22.)

(b) (83) P v S led to the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/102, enacted under s 2(2) of the European Communities Act 1972. These regulations have amended the Sex Discrimination Act 1975.

(84) The most recent of the line of cases in the European Court of Human Rights is Sheffied v UK [1998] 5 BHRC 83. The two applicants were both male-to- female transsexuals who had undergone surgery for gender reassignment. Miss Sheffield put forward detailed evidence of the embarrassment which she had suffered, especially in connection with legal proceedings, in having to disclose her original gender. Miss Horsham described herself as living in exile in the Netherlands because she could not (if domiciled in England) marry her male partner in any jurisdiction.

(85) The court, held by a majority of eleven to nine, that there had been no violation of art 8; and by a majority of eighteen to two, that there had been no violation of art 12. As to art 6, the majority judgment noted the applicants’ contention that there was new scientific evidence, especially in the work of Professor Gooren (although his thesis does not seem to have been correctly summarised in para 43 of the judgment). It also referred to P v S and to the pressure group Liberty called an ‘unmistakably clear trend in the Member States of the Council of Europe towards giving full recognition to gender reassignment’. But the court regarded the scientific evidence as inconclusive and noted that Liberty’s survey—

‘does not indicate that there is yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, children, property or protection, the consequences in which a transsexual may be compelled by law to reveal his or her pre-operative gender.’ (See [1998] 5 BHRC 83 at 95 para 57.)

(86) Nevertheless the majority noted that the United Kingdom had failed to legislate in this area, despite previous observations by the court, and it repeated the same warning in stronger language:

‘Even if there have been no significant scientific developments since the date of the Coeby judgment which make it possible to reach a firm conclusion on the antithesis of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it is clear that there is not the same need for legislative action as there was in the late 1970s, it is quite clear that more needs to be done to ensure that the rights of transsexuals are upheld . . . .’ (See [1998] 5 BHRC 83 at 95 para 56.)

(87) On art 12 the majority did not move perceptibly from Rees and Coeby. The concurring opinion of the United Kingdom judge, Sir John Freeland, said (at 100) that he had concurred in the vote on art 8 only ‘after much hesitation and even with some reluctance’. Of the various dissenting opinions, the most notable
is that of Judge Van Dijk which follows on from that of his predecessor, Judge Martens. He too emphasised that the individual's right of self-determination is an important part of the content of the rights enjoyed under art. 8.

[88] The dissenting judgment of Lopes J pointed out that gender was determined at birth in a summary and not always in a manner which was always wise. The 'declaration of the obstetrician or midwife after a quick visual inspection' is then mediated by a certificate. It is necessary to choose the gender of a child immediately. There are reasons for assigning the sex of the child and those reasons are the matter of status. Other than in the case of a person who is inter-sexed, the biological criteria point at the stage conclusively to a decision whether the child is male or female. At birth therefore the Court criteria remain valid today.

[97] Mrs Cox suggested that there was no reason to fix the gender of a person immediately at birth. On the present state of medical knowledge the only possible criterion to be added to the existing three criteria would be the psychological factor. The possibility of brain sexual differentiation is, for reasons already set out above, not yet possible to take into account. The medical evidence in this case shows the enormous increased recognition of, and reliance upon, the psychological factor in the assessment of a person diagnosed as suffering from gender disorder. There is, in informed medical circles, a growing momentum for recognition of transsexuals for every purpose and in a manner similar to those who are inter-sexed. The current approach recognises changes in social attitudes as well as advances in medical research. Those social changes are well exemplified in the recent judgments of the Court at Strasbourg and in the lectures given by Lord Reed. They cannot be ignored.

[99] How are the social changes to be given legal recognition? In matters other than marriage, the report of the working party sets out steps which have been taken. This court is not concerned with the question whether those steps meet the criticisms levelled by members of the European Court at Strasbourg. We are however concerned with legal recognition of marriage which, like divorce, is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy. For that reason, even if for no other reason, marriage is in a special position and is different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death have to be registered. Each child born has to be placed into one of two categories for the purpose of registration. Status is not conferred only by a person upon himself; it has to be recognised by society. In the absence of legislation, at what point can the court hold that a person has changed his gender status?

[100] The point at which a change of gender should be recognised is not easily to be ascertained. The line could be drawn at a number of different points from the initial diagnosis of gender disorder to the completion of reconstructive
surgery. It is clear from the report of the working party that the point at which people feel they have achieved their change of gender varies enormously from the research it can be seen how much more difficult it is to undergo successful female-to-male reconstructive surgery than male-to-female but the self-identification in the preferred male gender can be as strong as in a post-operative male to female transsexual.

[101] Mrs Cox submitted that, since the surgery at the fourth stage was irreversible unlike the previous stages, it would be correct to recognise the transsexual as re-assigned to the opposite sex once she became a post-operative male to female transsexual, or preferably vice versa. Mr Moyal asked why the court should arbitrarily choose the point of completion of the fourth stage of treatment by successful gender reconstructive surgery.

[102] We agree with Mr Moyal that the fourth stage, although irreversible, is the completion of the last stage of the treatment. The diagnosis of gender disorder is not revisited after the successful completion of any part of the treatment. The successful completion of all stages of the treatment permits the transsexual to live in his/her preferred gender role. To choose, however, to recognise a change of gender at a change of status would require some certainty and it would be necessary to lay down some pre-conditions which would inevitably be arbitrary. So, on Mrs Cox's hypothesis, for instance, if a patient started but failed to complete such surgery for whatever reason, he/she would remain in the birth-registered gender, whereas further surgery would permit him/her to be recognised for the purposes of s 11(1c) as having changed his/her gender.

[103] Anon 3 of the report of the working party sets out with clarity the problems of gender re-registration. The German approach, for example, in its legislation provides for recognition by a court of acquired gender under certain conditions. The requirements are: (i) a person has lived for three years as belonging to the sex the person feels he or she belongs to; (ii) the person is unmarried; (iii) of age; (iv) permanently sterile; and (v) has undergone an operation by which there is the closest resemblance to the opposite sex has been achieved.

[104] The propriety of requiring pre-conditions, such as these, are matters for public policy and, no doubt, public consultation, not for imposition by the courts on the public. The absence of pre-conditions would leave the applicability of the law to an individual diagnosed as suffering from gender disorder in complete confusion.

[105] It seems to us that two questions arise. The first question is for the court. What is the status of the applicant? Is the male or female? That question should, in our judgment, be answered by assessing the facts of the individual case against a clear statutory framework. The second question is for Parliament. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that to which he/she was correctly assigned at birth? The second question cannot properly be decided by the court.

[106] As Lord Slynn said in Fitzpatrick v Sterling Housing Association Ltd [1999] 4 All ER 705 at 710, [2001] 1 AC 27 at 33, when considering social issues in particular, judges must not substitute their own views to fill gaps. In Re F (minors) [1988] 2 All ER 193, [1984] Fam 122 the Court of Appeal (in a wholly different context), had to consider the legal position of the father in a wardship application designed to make the unborn child a ward of court. Balcombe LJ said:

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a [107] Those observations, we would respectfully suggest, are equally apposite to the present appeal.

[108] We would therefore dismiss the appeal.

[109] We would add, however, with the strictures of the European Court on Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the Inter-Departmental Working Party for public consultation merits action by the government departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later.

THORPE LJ.

The judgment below

110 I have had the advantage of the judgment in draft of Dame Elizabeth Butler-Sloss P and Robert Walker LJ. Although I differ from them in my conclusion I gratefully adopt their summary of the relevant facts.

[111] Two criticisms are made of the judgment below, the first of which is in my opinion insubstantial. Johnson J [2000] 3 FCR 733 at 739 seems to conclude that the decree in Corbett v Corbett (otherwise Ashley) [1971] P R 83 was pronounced under s 1 of the Nullity of Marriage Act 1971 rather than under r 4 of the common law. But that is a chronological confusion of no importance.

[112] However more significant is his erroneous citation of Professor Green at the conclusion of his judgment (at 747) to support the proposition that the three Corbett factors remain 'the only criteria for determining the gender of an individual'. The words of Johnson J relied on were not a statement of opinion but only the summary of a question for his opinion posed by the Treasury Solicitor in his letter of 29 October. In reality Professor Green's position was that the three Corbett factors were in present times 'too reductionistic'. Despite Johnson J's skilful summary of the expert evidence in his judgment (at 717-738), his ultimate conclusion that the medical opinion that guided Ormrod J remained unchanged might be said to erode the validity of the conclusion.

[113] However overall Johnson J's judgment is characteristically careful and understanding. In my opinion the key to this appeal lies not so much in a scrutiny of his judgment as in a fresh appraisal of the extent to which the passage of 30 years requires the revision of the propositions of law, of medical science and of social policy upon which Ormrod J founded his judgment in Corbett's case.

[114] The decision of Charles J in W v W (physical intersex) [2001] Fam 111, [2001] 2 WLR 674 coincidently emerged during the hearing before Johnson J. In those circumstances it is not surprising that it did not receive much attention, particularly since counsel before Johnson J agreed that it had no bearing on his decision. However since the issues considered in these judgments are so inter-related I have found it helpful to reflect on both judgments in attempting to resolve the difficult issues raised by this appeal.
Although Johnson I found support from my judgment in Dart v Dart [1997] 1 FCR 21 for his conclusion that the issues raised by the petitioner were better left to Parliament, I differ from him on this issue for reasons which I will explain later in this judgment.

The expert evidence

Since the expert evidence at the trial was all agreed none of the three experts was called to give oral evidence. It follows that this court is in as good a position as the trial judge to assess its impact. Clearly the parties sought advice from experts of the greatest distinction. Dr Louis Gooren is Professor of Endocrinology at the Free University Hospital of Amsterdam. His unit serves 93% of a Dutch population of 15 million. His experience extends over 23 years. Over this period his clinic has treated an average of 150 new patients per annum, approximately 60% of whom proceeded through the various stages of treatment to genital reassignment. Professor Richard Green is the Research Director of the Gender Identity Clinic at the Charing Cross Hospital. It is perhaps the largest such clinic in the world. As well as offering treatment it conducts research into the origins of transsexualism. Mr TR Terry is consultant urological surgeon at Leicester University Hospitals where he specialises in the surgical treatment of male to female gender dysphoric patients. Since each of these three experts agreed with the written opinions offered by the others and since some provided supplemental answers to specific questions raised by the lawyers, their attendance at trial became unnecessary. I would therefore draw from their reports the opinions and conclusions which I have found particularly influential.

(i) There are various stages in the development of the sex of the human being, some pre-natal and some post-natal. As Professor Gooren put it:  

The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia and finally the differentiation of the brain into male or female… this process of brain sexual differentiation takes place after birth… one brain structure, that is different between men and women, becomes only sex-dimorphic between the ages of two and four years…

To the same effect is Professor Green who wrote:  

If a biological sexual condition of an individual is conceptualised to include psychological sex, perhaps reflective of brain sex differentiation, this status does not express itself until several years post-natally. Therefore it is not possible to say that the biological sexual condition of an individual is fixed at birth…

(ii) Since 1970 there has been some research into brain differentiation. Professor Gooren was co-author of a paper published in 1995 (see Zhou, Hofman, Gooren and Swaab ‘A Sex Difference in the Human Brain and its Relation to Transsexuality’ (1995) 378 Nature 68, 2 November) that demonstrated that in one of the human brain structures that is different between men and women, a totally female pattern was encountered in its male-to-female transsexuals. In Professor Gooren’s words: These findings showed that a biological structure in the brain distinguishes the male-to-female transsexuals from men.’ I also cite Professor Green’s evaluation of this research. He says: The interpretation of this finding is that it provides evidence of a biological central nervous system basis for male transsexualism.’ Because the finding is based upon a small sample and because research can only be conducted post mortem the finding remains neither confirmed nor refuted. A subsequent publication in April 2000, of which Professor Gooren was again a co-author, provided only slight corroboration since it relied largely on the original sample. Because of the obvious difficulties in examining the brain for differentiation Professor Green has conducted research on four proxies which might reflect pre-natal biological influences associated with transsexualism. The research has shown significant differences which Professor Green evaluates tentatively:

These indirect measures may reflect differences in pre-natal brain organisation leading to manifestations of gender dysphoria beginning in early childhood and culminating in the need for sex reassignment surgery.

Whilst scientific proof for the theory is far from complete, Professor Green’s assessment is that there is a growing acceptance of findings of sexual differences in the brain that are determined pre-natally. Mr Terry in his commentary on Professor Green’s opinion said:

Although the current scientific literature arguing for a biological causation in the development of gender dysphoria is not irrefutable, it is certainly compelling to my mind.

(iii) It follows from the preceding paragraph that medical opinion no longer accepts the three Corbett factors for the determination of sex. Professor Gooren states: It is no longer tenable to claim that the genetic or gonadal criterion determines one’s status as male or female. More specifically, Professor Green rejects the Corbett criteria, stating:

The Corbett criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or as a woman.

He also states:

The criteria for designating a person as male or female are complex. They are not simply an outcome of chromosomal configuration, gonadal configuration, or gonadal configuration.

(iv) The essential limitation of the Corbett criteria lies in the exclusion of psychological factors, whether or not further research will prove such factors to be mediated by brain differentiation. As Professor Green put it:

Psychological factors cannot be considered at birth because they do not yet manifest. They may become an overriding consideration subsequently as the individual develops.

Later in his opinion Professor Green succinctly expresses his position:

‘As a psychiatrist I am biased towards psychological factors. I would argue that with transsexual the psychological sex has been contrary to other somatic factors for many years, if not the great majority of the person’s life. Taking that position, gender reassignment treatment and surgery would align these somatic features with the psychological element. The correct designation of sex would be the outcome.’
Professor Green also shows that these psychological factors cannot be averted by psychoanalytic or other therapies. Nor can outcomes be achieved by consistent psychological socialisation as male or female from very early childhood. He therefore states in relation to inter-sex patients:

'More evidence is available for a pre-natally determined biological bias towards maleness or femaleness in gender identity that may overrule efforts at contrary socialisation as female or male. There is considerable current sentiment for delaying any surgical modification of the genitals which had earlier been thought to help correct the evident gender identity. Now there is more of a wait and see approach until the individual is old enough to express its own wishes.'

(v) The three experts reflect their huge understanding of transsexuality in their compassionate feelings for transsexuals. Professor Gooren wrote:

'One of the serious obstacles to understanding gender dysphoria is that it is an unimaginable and inconceivable problem to those who do not have it. This distinguishes it from other forms of human suffering for which it is much easier to generate empathy and sympathy.'

More specifically on the issue raised by this appeal Mr Terry speaks for these experts when he writes:

'To argue that in the case of a male to female gender dysphoric patient who has undergone rigorous psychological and psychiatric counselling, prolonged hormone treatment and usually several major surgical procedures and who has successfully adapted to a female existence both socially and professionally should not be allowed a legal marriage seems to me brutally insensitive and is diametrically opposed to what we as clinicians, who manage gender dysphoria, are trying to achieve.'

The law

[117] In my opinion the focus must be upon the development of our domestic law. The decisions of the Strasbourg Court and of judges in other jurisdictions have been comprehensively reviewed by Dame Elizabeth Butler-Sloss P and Robert Walker LJ in their judgment. As far as the Strasbourg decisions are concerned, all the evidence has been in the appraisal of the rights under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as now set out in Sch 1 to the Human Rights Act 1998). I accept Mr Moylan’s submission that, since the right to marry is the very subject of art 12, it is impermissible to introduce the right to marry as an ingredient of art 8 rights.

The consistent judgments of the Court in relation to art 12 do not demonstrate the same evolution in approach as do the judgments in relation to art 8. Member states are accorded a wide latitude in defining the right to marriage and it remains permissible for states to restrict the definition to the conventional union between man and woman. In my opinion the judgments in the Strasbourg cases only assist the applicant to the extent that they may demonstrate shifts in social attitudes and values.

[118] In domestic law the landmark decision is, of course, the judgment of Ormrod J in Corbett v Corbett (otherwise Ashley)(1970) 2 All ER 33, [1971] P 83. Few judgments in family law have had a longer reign. It defined the common law. It informed the subsequent statutory codification of the law of nullity. The statutory

provision has since been consistently interpreted and applied in accordance with the decision in Corbett’s case. It has been followed in allied fields: see R v Tan (1983) 2 All ER 12, [1983] QB 1053 and R v Registrar General, ex p P and G (1996) 2 PCR 588. However recently judicial comments have questioned its continuing legitimacy. Thus a fundamental question raised by this appeal is whether this court in 2001 should approve and apply the reasoning in Corbett’s case. To answer the question it is first necessary to analyse the propositions on which Ormrod J founded his conclusion. I will therefore emphasise those passages of his judgment that seem to me to be critical to the question. Note first that in his review of the phenomenon of transsexuality Ormrod J describes sex reassignment surgery at what now seems a comparatively early stage of development (see [1970] 2 All ER 33 at 42–43, [1971] P 83 at 98–99). Equally his summary of the expert evidence as to the aetiology or causation of transsexuality reveals the comparatively significant extent to which medical knowledge has progressed in the last 30 years (see [1970] 2 All ER 33 at 43–44, [1971] P 83 at 99–100). However all the experts agreed that there were:

- at least four criteria for assessing the sexual condition of an individual. These are: (i) chromosomal factors; (ii) genital factors (e.g. presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); and (iv) psychological factors.

[119] Of these Ormrod J held at the conclusion of the following paragraph:

'These criteria are, of course, relevant to, but do not necessarily dictate, the legal basis of sex determination.' (My emphasis.)

[120] Another area of expert agreement was recorded:

'Ve see little ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.' (See [1970] 2 All ER 33 at 47, [1971] P 83 at 103.)

[121] The essential rationale for Ormrod J’s conclusion is where he said:

'The fundamental purpose of law is the regulation of the relations between persons, and between persons and the State or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship (see also the section on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex). Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question than that adopted in para 2 of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less, but the distinction may not be without importance.
status a variety of legal incidents during the lives of the parties, and induce
definite rights upon their offspring. What, then, is the nature of this
institution as understood in Christendom? Its incidents vary in different
nations, but what are its essential elements and inviolable features? If be of
common acceptance and existence, it must needs (however varied in different
countries in its minor incidents) have some pervading identity and universal
basis. I conceive that marriage, as understood in Christendom, may for this
purpose be defined as the voluntary union for life of one man and one
woman, to the exclusion of all others.’

[128] But the world that engendered those classic definitions has long since
gone. We live in a multi-racial, multi-faith society. The intervening 130 years
can have seen social and scientific changes. Adults live longer, infant mortality
has been largely conquered, effective contraception is available to men and
women as is sterilisation for men and women within marriage. Illegitimacy with
its stigma has been legislated away; gone is any social condemnation of
cohabitation in advance of or in place of marriage. Then marriage was terminated
d by death: for the vast majority of the population divorce was not an option. For
those within whose reach it lay, it carried a considerable social stigma that did not
evaporate until relatively recent times. Now more marriages are terminated by
divorce than death. Divorce could be said without undue cynicism to be
available on demand. These last changes are all reflected in the statistics
establishing the relative decline in marriage and consequently in the number of
children born within marriage. Marriage has become a state into which and from
which people choose to enter and exit. Thus I would now redefine marriage as a
contract for which the parties elect but which is regulated by the state, both in
its formation and in its termination by divorce, because it affects status upon
which depend a variety of entitlements, benefits and obligations.

[129] Of course the changes which I trace are most dramatically drawn by a
contrast between the age of high Victorian moral confidence and our uncertain
present. But even in the last 30 years there has been some shift in the status of
marriage within our society that has some relevance to the question of whether a
minority group should be denied the election to marry.

[130] Because of its close relationship to the second proposition it is convenient
to consider next the fourth, namely marriage depends on sex not gender. The
proposition seems to me to be now of very doubtful validity. The scientific
changes to which I have referred have diminished the once cardinal role of
procreative sex. The reluctance of Ormrod J to acknowledge the validity of the

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The position or status of "husband" and "wife" is a recognised one throughout Christendom. The laws of all Christian nations throw about that

at any rate in some cases. The question then becomes what is meant by the
word "woman" in the context of a marriage, for I am not concerned to
determine the "legal sex" of the respondent at large. Having regard to the
essentially heterosexual character of the relationship which is called
marriage, the criteria must, in my judgment, be biological, for even the most
extreme degree of transsexualism in a male or the most severe hormonal
imbalance which can exist in a person with male chromosomes, male gonads
and male genitalia cannot reproduce a person who is naturally capable of
performing the essential role of a woman in marriage. In other words, the
law should adopt, in the first place, the first three of the doctors’ criteria, i.e.,
the chromosomal, gonadal and genital tests, and, if all three are congruent,
determine the sex for the purpose of marriage accordingly, and ignore any
operational intervention. (See [1970] 2 All ER 13 at 48, [1971] P 83 at 105-106.)

[122] In this rational it is to be noted that Ormrod J rejected the last of the
four criteria agreed by all the experts to determine sex medically, namely
psychological factors.

[123] In rejecting submissions on behalf of the respondent he enunciated
another proposition thus:

I have dealt, by implication, with the submission that, because the
respondent is treated by society for many purposes as a woman, it is illogical
to refuse to treat her as a woman for the purpose of marriage. The illogically
would only arise if marriage were substantially similar in character to
national insurance and other social benefits, but the differences are obviously
fundamental. These submissions, in effect, confuse sex with gender. Marriage
is a relationship which depends on sex and not on gender.” (See [1970] 2 All ER
33 at 49, [1971] P 83 at 106-107.)

[124] So let me question each of the four following propositions drawn from
the passages that I have cited: (i) "The biological sex constitution of an
individual is fixed at birth (at the latest); (ii) The relationship called marriage ...
remains unplaced has been attacked as the union of man and woman... (ii) The
criteria which should adopt ... the first three of the doctors’ criteria ... and ... determine the sex
for the purposes of marriage accordingly; and (iv) 'Marriage is a relationship
which depends on sex and not on gender.”

[125] The first is a scientific proposition then agreed by all the experts but
which, 30 years on, is rejected by the three experts in the present case (see my
review of the expert evidence at [116], above).

[126] The second is an echo of eighteenth and nineteenth-century authority.
In Lindo v Biliaris [1795] 1 Haw 216 at 230, [1777-1802] All ER Rep 293 at
296 Sir William Scott rejected the classification of marriage as either a civil or a
sacred contract, holding:

It is a contract according to the law of nature, antecedent to civil
institutions, that may take place to all intents and purposes wherever two
persons of different sexes engage, by mutual contracts, to live together.

[127] In the second half of the nineteenth century in Hyde v Hyde and Woolmanoe
(1866) LR 1 P & D 130 at 135, [1861-73] All ER Rep 175 at 177 the Judge Ordinary,
later Lord Penmance, said:

The position or status of "husband" and "wife" is a recognised one throughout Christendom. The laws of all Christian nations throw about that
1950s. The Oxford English Dictionary notes under the use of the word ‘gender’ as an alternative to ‘sex’, a second and modern usage thus:

‘A euphemism for the sex of a human being, often intended to emphasize the social and cultural, as opposed to the biological, distinction between the sexes. In my opinion, plainly not.

Perhaps the third proposition has the most direct bearing on the outcome of the appeal. Can the legal definition of what constitutes a female person be determined by only one of the criteria which medical experts apply? Are judges entitled to leave out of account psychological factors? For me the answer is no. It does not depend on scientific certainty as to whether or not there are areas of brain development differentiating the male from the female. In my opinion the test that is confined to physiological factors, whilst attractive for its simplicity and apparent certainty of outcome, is manifestly incomplete. There is no logic or principle in excluding one vital component of personality, the psyche. That its admission imports difficulties of application that may lead to less certainty of outcome is an inevitable consequence. But we should prefer complexity to superficiality in that the psychological self is the product of an extremely complex process, although not fully understood. It is self-evident that the process draws on a variety of experiences, environmental factors and influences throughout the individual’s development particularly from birth to adolescence, and also beyond.

In summary, therefore, the foundations of Ormrod v J’s judgment are no longer secure. It remains as a monument to its mastery.

However I would first like to consider in some detail the recent decision of Charles J in W v W (physical intersex) [2001] Fam 111, [2001] 2 WLR 674. Although not directly in point, since the case dealt with an intersex male-to-female and not a male-to-female transgender, there are obviously such clear areas of common ground that it is important to consider the modern approach in that territory. I will focus on the essential conclusions but it is necessary first to note the judge’s findings as to the respondent, who consented her husband’s medical petition in which he asserted that at the date of marriage she had not been female (see [2001] Fam 111 at 120-121, [2001] 2 WLR 674 at 683). Whilst finding that Mrs W was correctly labelled ‘physical intersex’, he found that at birth (i) her chromosomal sex was male; (ii) her gonadal sex was male; (iii) her genital sex was ambiguous, but more male than female; but that subsequently (iv) her psychological development was female.

Although different medical labels are attached to Mrs W and Mrs Bellinger, their subsequent state post-operatively is remarkably similar. It is principally in the detail and degree of surgery that their paths to that state have differed.

On those findings Charles J ruled that Mrs W was female at the date of marriage. In reaching that conclusion he applied six factors, namely:

(i) chromosomal factors; (ii) gonadal factors (in respect of presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); (iv) psychological factors; (v) hormonal factors; and (vi) secondary sexual characteristics (such as distribution of hair, breast development, physique etc). Dr Conway had regard to all these factors. Another way of putting this is that the decision as to whether the person is male or female for the purposes of marriage can be made with the benefit of hindsight looking back from the date of the marriage or if earlier the date when the decision is made. (See [2001] Fam 111 at 146, [2001] 2 WLR 674 at 709.)

This last consideration he had amplified in the preceding paragraph, where he said:

‘As Dr Conway explained, and I accept, people with partial androgen insensitivity can develop physically and socially in a range of ways. The assignment to a sex or gender in which they are to be brought up and live is a difficult one and it seems to me that in such cases (and in other cases where the sex or gender in which a child should be brought up falls to be determined by doctors and others) there is considerable force in the argument that it would be best to “wait and see”. How long it would be appropriate to wait, and what tests would be appropriate, would vary from case to case.’

It is also relevant to note his finding that Mrs W post-operatively had the capacity to individualize the marriage as a female and that that was a factor (although not a decisive factor) in considering whether that person was male or female for the purposes of marriage.

The findings and conclusions are in my opinion sound and are relevant in the sense that it would be hard to justify a significantly different approach and outcome for the post-operative physical inter-sex male-to-female and the post-operative male-to-female transgender.

Those being the most relevant decisions in the Family Division, it remains to consider the statutory provisions and their development. The Marriage Act 1949 established the prohibited degrees within which a marriage is void, the minimum age which the parties must have attained in order to contract a valid marriage and what constitutes a valid ceremony. The Supreme Court of Judicature (Consolidation) Act 1925 had established three other grounds of nullity: (i) prior existing marriage; (ii) insanity at the time of marriage; and (iii) lack of consent.

That was the state of the statutory provisions in relation to void marriages at the date that the Law Commission issued for consultation its working paper of 14 June 1968. The view of the Law Commission expressed in the working paper was that there was no case for extending those grounds. However in its subsequent 1970 report Family Law: Report on Nullity of Marriage (Law Com No 33) the Law Commission considered two possible additional grounds of nullity in the light of the responses which it had received to the working paper. The first was parties of the same sex. However again the Law Commission concluded that that would be an unnecessary addition. Implicitly rejecting Ormrod v J’s preference for a decree of nullity rather than a declaration as to status, the commission considered that the only consequence of the decision would be to allow or to bar applications for financial relief. It left to Parliament
the decision as to whether the draft bill professed with the report should be extended to include same sex parties as a ground of annulment.  

[142] An amendment to add as a ground of annulment 'that the parties are not respectively male and female' was moved by Mr Lyon MP, the promoter of the bill. He did not propose any statutory definition of 'male' or 'female'. In Hansard's report of the debate on 2 April 1971 (814 HC Official Report (5th series) cols 1827-1835) Mr Lyon is recorded as follows:  

'The way that a judge decides the sex of a particular person is always and will remain a question of fact. It will be a question of fact which will change with the change in medical opinion which will ensue in the coming years. If medical opinion were that the mere sex change operation was enough to change a person from a man to a woman or a woman to a man, that would be the end of the case; but because the medical evidence is not so clear cut the judge in the Corbett case took the view which he did and courts will continue to take the course which he took. I urge upon those who have written to me and are anxious to have in the statute further definition to appreciate that this is not a matter about which Parliament can legislate. In the final analysis it must depend upon the state of medical opinion. If in the end medical opinion is able to state with greater certainty who is male and who is female than the Corbett case then new court can apply those tests because the evidence will have changed and the question of fact, therefore, will also have changed. If the amendment is accepted we shall not be making a rule about one determines who is male and who is female. We are saying is that once one has come to the conclusion that the parties are not respectively male and female, then one can grant a decree of nullity.'  

[143] Thus emerged s 1(3)(c) of the Nullity of Marriage Act 1971, subsequently consolidated as s 1(3)(c) of the Matrimonial Causes Act 1973.  

Conclusions  

[144] The arguments for the Attorney General might be summarised into three principal propositions. (i) Expert medical evidence does not demonstrate that Mrs Bellinger is and always was female or that her medical treatment has changed her from male to female. (ii) The complexity of the issues surrounding transgender demand that the legislature bears the responsibility for introducing change rather than the judges. (iii) To accede to this petition would create enormous difficulties, even in the context of the transsexual's right to marry.  

[145] I will begin to express my conclusions on the present appeal by reviewing those three propositions.  

[146] The first may only be made good if regard is restricted to biological factors and physiological criteria. But in my view such a restricted approach is no longer permissible in the light of scientific, medical and social change. Leaving aside the possibility that one area of the appellant’s brain may not be congruent with the other three biological factors that established her original sex, there can be no doubt that she suffered from gender identity disorder (within the DSM-IV and ICD-10 classifications) and has for many years been a psychological female. Her only remaining male feature is chromosomal. Post-operatively she has functioned sexually as a female having the capacity to consummate within the definition of sexual intercourse established by this court in S v S. My approach reflects the views expressed in the sections above devoted to the expert evidence and the judgment of Ormrod.'
to re-register (see terms of reference: ‘To consider, with particular reference to birth certificates, the need for appropriate legal measures ...’). The report when delivered in April 2000 identified (at para 5.3) three options for the future: (a) no change, (b) revise birth certificates with new name and gender, (c) full legal recognition of the new gender) and continued: ‘We suggest that before taking a view on these options the government may wish to put the issues out to public consultation.’

[131] However although the report has been made available by publication, Mr Moylan said that there has since been no public consultation. Furthermore when asked whether the government had any present intention of initiating public consultation or any other process in preparation for a parliamentary bill, Mr Moylan said that he had no instructions. Nor did he have any instructions as to whether the government intended to legislate. My experience over the last ten years suggests how hard it is for any department to gain a slot for family law reform by primary legislation. These circumstances reinforce my view that it is not only given to the court but it is the duty of the court to construe [116(c)] either strictly, alternatively liberal, as the evidence and submissions in this case justify.

[152] I turn to Mr Moylan’s third proposition, namely that any relaxation of the present clear-cut boundary would produce enormous practical and legal difficulties. I grant at once that to give full legal recognition to the transsexual’s right to acquire (perhaps not irreversibly) his or her psychological gender gives rise to many wide-ranging problems, some profoundly difficult. That territory is surveyed by the Inter-Departmental Working Group in their report at a most distinguished paper written by Lord Reed ‘Splitting the Difference: Transsexuality and Human Rights Law’ (subsequently presented to the Anglo-German Family Law Judicial Conference in Edinburgh in September 2000). Indeed, in reality such a development would almost certainly throw up additional problems as yet unforeseen. But we are not contemplating or empowered to contemplate such a fundamental development. That indeed can only be for Parliament. All we consider is whether the recognition of marriage should be denied to a post-operative male-to-female transsexual applying the decision in Corbett’s case. In that context difficulties are much reduced. We need concern ourselves only with those that arise from recognising marriages already celebrated and permitting the future celebration of marriage between parties one of whom is a transsexual seeking to satisfy the requirements of a 116(c) in his or her post-operative gender. The principal difficulty seems to me to stem from the emphasis that such a person will inevitably place on his or her psychological gender. If that, the fourth factor in the Corbett classification, is admitted to the decision making process, does it immediately become the trump factor? If so, why does it not operate immediately? Without the reinforcement of medical treatment? While conceding that any line can be said to be arbitrarily drawn and to lack logic, I would contend that such difficulties are manageable and acceptable if the right is confined by a construction of 116(c) to cases of fully achieved post-operative transsexuals such as the present appellant. In assessing how formidably the difficulties postulated by Mr Moylan, we can surely take some comfort from the knowledge that within wider Europe many states have recognised the transsexual’s right to marry in the acquired gender. Although different jurisdictions have adopted a widely differing range of responses (as to which see Lord Reed’s paper at pp 18–20) there seems to be no evidential indication that they have encountered undue difficulty in applying liberalised provisions. Furthermore we have the example of a common law jurisdiction, New Zealand, which has often legislated innovatively in the family law field. In his judgment in A v Oahuka Family Court [1995] 1 NZLR 603, Elias J confirmed the right of marriage in the acquired gender to a transsexual who ‘has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex.’ He continued (at 608):

b Submissions were directed to the practical aspects of any declaration, when the Registrar may be in doubt. In such cases a medical examination can be arranged and opinions obtained to enable the Registrar to reach his own conclusion.

[153] In our family justice system declarations as to existing marriages would be the subject of the existing statutory procedures provided by ss 55 and 59 of the Family Law Act 1986. In the case of an intended marriage, if the registrar were not satisfied on the evidence submitted by the parties, then an application would have to be made in the Family Division in advance of the ceremony for a declaration that the transition had been fully achieved by all available medical treatments.

d My responses to Mr Moylan’s submissions partially express my conclusion that this appeal should be allowed. But in view of the importance of the appeal, not only to the appellant but also to the minority in similar circumstances, I wish to amplify the reasons for my conclusion.

[155] Ormrod’s monumental judgment in Corbett’s case was undoubtedly right when given on 2 February 1970. It is only subsequent developments, both medical and social, that render it wrong in 2001. The major relevant medical developments are as follows. (i) In 1986 DSM-III introduced the diagnosis of transsexualism for gender dysphoric individuals who demonstrated at least two years of persistent gender identity confusion and a persistent discomfort with his or her sex or a sense of inappropriateness in the gender role of that sex. A similar classification is to be found in ICD-10. Gender identity disorder is a mental disorder that is to say a behavioural pattern resulting in a significant adaptive disadvantage to the person causing personal mental suffering. The use of the term ‘disorder’ is an important step in offering relief, providing health insurance coverage, and generating research to provide more effective future treatments. All the above is derived from, and in the main directly quotes, the Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders (fifth version, 1998) and provided for us in the Attorney General’s bundle. (ii) The research of Professor Louis Coenen published in 1995 and 2000 suggests that gender dysphoria is not a purely psychological condition. His research suggests, but does not prove, that gender dysphoria has a physiological basis in the structure of the brain. The expert evidence in the present case suggests that support for the premise is growing in specialist medical circles.

e Mr Terry in his report says of the 1995 Nature study:

f In my opinion this medical report diminishes the view that chromosomal makeup is the critical factor in determining the sexual orientation/behaviour for any individual ... Accepting that transsexualism is a medically recognised condition and that such patients undergo appropriate medical and surgical treatment to achieve their chosen sexual orientation it seems to me
irrelevant to consider the chromosome make-up of an individual as the critical factor when determining the rights of that individual in the society in which he/she lives.’

To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth.

[156] The major relevant social developments are—(i) For the purposes of this appeal we consider only gender identity disorder within the context of the right to marry. Accordingly it is necessary to recognise changes to the institution of marriage over the past 30 years. I have addressed that issue at [124-127] above. (ii) There have been highly significant developments throughout Europe since the year 1970. Sweden led the way in 1972 by legislation enabling transsexuals to change their legal sex and to marry a person of their former sex. In the mid-1970s Denmark followed suit followed by West Germany in 1980, Italy in 1982 and the Netherlands in 1985. Of course the legislative provisions varied from state to state. In other jurisdictions similar results were achieved through administrative or court practice. The transsexual’s right to legal recognition to some extent had been achieved in at least 23 of the member states of the Council of Europe, according to the judgment of the court in the most recent case of Shepherd v UK (1998) 5 BHRC 83. In the same judgment it is also said that the only member states whose legal systems do not recognise a change of gender are the United Kingdom, Ireland, Andorra and Albania. Furthermore in 1989 the Parliamentary Assembly of the Council of Europe and the European Parliament adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible. In 1990 we introduced the European Convention for the Protection of Human Rights and Fundamental Freedoms into our law. The convention is founded upon the concepts of human dignity and human freedom. Human dignity and human freedom are not properly recognised unless the individual is free to shape himself and his life in accordance with his personality, providing that his choice does not interfere with the public interest. In 1990 Judge Martens, in his dissenting judgment in Case v UK (1993) 2 FCR 97 at 123–124, (1990) 13 ECHR 622 at 680 (para 5.5), expressed social developments as he then saw them in these words:

‘There is an ever growing awareness of the essential importance of everyone’s identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered “normal”. With that also goes a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one’s own life as one chooses. The tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years.’

[157] Of course social developments are scarcely capable of proof but judges must be sensitive to these developments and must reflect them in their opinions, particularly in family proceedings, if the law is to meet the needs of society. It is also, in my opinion, important that in this field law and medicine should move together in recognising and responding to disorder. In 1990, in his dissenting judgment in Case’s case, Judge Martens summarised medical perception in these words:

‘...medical experts in this field have time and again stated that for a transsexual the “rebirth” he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognized by law. This urge for full legal recognition is part of the transsexual’s plight.” (See [1993] 2 FCR 97 at 112-113, 13 ECHR 622 at 645 (para 2.4).)

[158] Is there not inconsistency in the state which through its health services provides full treatment for gender identity disorder but by its legal system denies the disinterested individual the right to change his gender? As Judge Van Dijk, pointed out in his dissenting judgment in Sheffield v UK (1998) 5 BHRC 83 at 106:

‘Among the member states of the Council of Europe which allow the surgical re-assignment of sex to be performed on their territories, the United Kingdom appears to be the only state that does not recognise the legal implications of the result to which the treatment leads.’

[159] I would like to conclude by adopting this passage from Lord Reed’s paper. I could not equal its clarity of thought and language:

‘In those societies which do permit it, it seems to me to be difficult to justify a refusal to recognise that successful gender reassignment treatment has had any legal consequences for the patient’s sexual identity, although the context in which, and conditions under which, a change of sexual identity should be recognised is a complex question. But for the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully and possible in their new gender. The key words are “as fully as possible”: what is possible has to be decided having regard to the interests of others (so far as they are affected) and of society as a whole (so far as that is engaged), and considering whether there are compelling reasons, in the particular context in question, for setting limits to the legal recognition of the new gender.’

[160] That citation formulates and clarifies the essential issue for decision in this appeal. The range of rights claimed by transsexuals falls across the divisions of our justice system. The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual’s private life.
One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal.

Appeal dismissed. Permission to appeal refused.

Kate O’Hanlon Barrister.
having considered them with care, I have formed a decided H. L.
preference for the opinion of the Lord Justice-Clark, whose views, M.
as therein expressed, substantially accord with my own. H.

For these reasons I would allow this appeal. M.

Appeal allowed.

Solici tors: O. H. Parsons for Simpson & Marwick, W.S., M.
Edinburgh; D. H. Haslam for G. F. Grosset. H.

F. C.

CLIFFORD W. L. CALLWOOD M.

AND

ELSE E. CALLWOOD M.

APPELLANT: J.

RESPONDENT: M.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE WEST INDIAN.

Conflict of Law — Immovable property — Devolution — Will — Danish community of property law — Whether applicable by Danish law extraterritorially to immovable property — Whether Danish law or lex situs to be applied by English law.

Evidence — Foreign law — One of proof — Agreement with United States Court on point not in issue.

The question whether the system of community of property between spouses in force in a given country is regarded by the law of that country as applying to immovable situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned.

In re De Nicola, De Nicola v. Currier (No. 2) [1900] 2 Ch. 410; M.
16 T.L.R. 661 (H.L.) and Chisolm v. Overlun (1897) 14 S.C. 61 H.
(Cape of Good Hope) considered.

The testator at the date of his marriage to the respondent in 1908, and thereafter down to his death in 1917, was domiciled in the Danish Island of St. Thomas in the Virgin Islands where (after cession of the Danish Virgin Islands to the United States of America in 1917) Danish law remained in force until 1921. The marriage had the effect under Danish law of subjecting the property of either spouse to the Danish system of community of property between spouses, and by a joint will of the testator and the respondent the latter was, inter alia, given the right, if she survived the testator, of retaining their joint estate undivided with their children. There was vested in the testator at the time of his death

*Present: LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GRAF.
Great Thatch Island in the British Virgin Islands, and the appellant, the only son of the testator and the respondent, was in 1848 granted a lease of that island by a man purporting to act as agent for the respondent. Although the lease was admittedly invalid as not having been executed in compliance with the formalities required by law, the appellant remained in possession.

The respondent thereupon began this action claiming a declaration that by virtue of the joint will the island was her property. The appellant pleaded that the will was ineffective so far as it related to real property in the British Virgin Islands, that the testator died intestate as regards Great Thatch Island, which devolved on the appellant as his heir-at-law. The only evidence of Danish community of property law, which was given by affidavit by an attorney practising in the Island of St. Thomas, was to the effect that the law as stated in the opinion of a court in the United States of America on a question between the same parties was "the law on this question" (Callwood v. Kean (1851) 159 F. 815 (565)).

Held, that that mode of providing evidence of foreign law was to be strongly deprecated. The discussion of the Danish law of community in Callwood v. Kean (supra) was not concerned with the question in the present case, namely, whether the property of spouses to which the rules of community attached included immovable property not situated in Danish territory but in that of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community.

The onus of proving that the Danish law had that extra-territorial effect was on the respondent, and there was nothing in the judgment in Callwood v. Kean (supra) which could be regarded as evidence that the Danish system of community in force in the Island of St. Thomas applied in the eyes of Danish law to land situate in foreign territory. The respondent had, accordingly, failed to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law (post, p. 663).

Queris, whether, had the respondent proved that, it would have been proper in the circumstances of this case to resolve the conflict between English and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule (post, p. 663). Judgment of the Federal Supreme Court of the West Indies reversed.

Appeal (No. 16 of 1899), by special leave, from a judgment of the Federal Supreme Court of the West Indies (Appellate Jurisdiction) (Hallinan C.J., Rennie and Archer J.J.) (July 22, 1908), dismissing, save as to the quantum of damages, an appeal from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Lewis J.) (June 14, 1907).

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands. The rival claimants were the plaintiff (now respondent) Else E. Callwood, the widow of Richard Edward Clifford Callwood (hereinafter called the testator), and the defendant (now appellant) Clifford W. E. Callwood, the only son of the plaintiff and the testator. The testator was born in 1852 in Tortola, one of the British Virgin Islands, and was accordingly a British subject by birth. He retained his British nationality all his life, but at the age of 14 he went to live in the Island of St. Thomas in the Virgin Islands, which was then a Danish colony under Danish law, and lived there until 1913, when he went to live in Germany, where he remained until his death in 1917. He married the plaintiff in London in 1906, and it was common ground that at the time of his marriage and thereafter down to his death he was domiciled in St. Thomas.

Great Thatch Island had formerly belonged to the testator's father, on whose death intestate in 1903 it devolved upon the testator as his heir-at-law under the English law of inheritance then in force with respect to freehold land. At the time of the testator's death Great Thatch Island was still (to use a neutral expression) vested in him.

There were two children of the testator's marriage to the plaintiff, namely, a daughter Waldfriede, who was born in 1906 and died in 1939, and the defendant, who was born in 1908, and who as the only son of the testator became on the testator's death entitled as his heir-at-law to any freehold property devolving on the intestacy of the testator under the English law of inheritance then in force.

No settlement of the property of either spouse was made on their marriage, and in view of this and of the testator's domicile in the Island of St. Thomas it was common ground that (it might be with exceptions not relied on before the Board as material in the present case) the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses (which appeared to have been wholly or partially codified by a Danish Royal Ordinance of May 21, 1840) all movable property wherever situate, and all immovable property situate in St. Thomas, belonging to either spouse at the time of the marriage or subsequently acquired during, or in certain circumstances after the termination of, the marriage.

It was also common ground that, with the important qualifications mentioned below, the application of the Danish system of community in any given case had the effect of making the joint
property divisible on the death of either spouse between the surviving spouse and the children of the marriage. But this general proposition was qualified under the Ordinances of 1845 (a) by the reservation to the husband, should he be the survivor, of the right to retain the whole of the joint property undivided until his death or remarriage, with power to dispose (within certain limits) of capital as well as income, thereby postponing and (to the extent of any legitimate expenditure of capital) defeating the interests of the children; and (b) by the reservation to the husband of a power to confer by will on the wife if she survived him the same right to retain the whole joint property undivided until her death or remarriage.

By way of assertion and exercise of the right and testamentary power so reserved to the testator by the Ordinances of 1846 he and the plaintiff on April 25, 1111, made a joint will which provided (inter alia) as follows:

"Paragraph 1"

"I, Richard Edgar Clifford Callwood, reserve the right accruing to me as husband in accordance with Royal Ordinance of 21st May, 1845, Paragraph 19, Section 1, to retain, if I am the survivor, our whole joint estate undivided with our joint children, as long as I do not marry again."

"Paragraph 2"

"I, Richard Edgar Clifford Callwood, do hereby give and grant to my said wife, Mrs. Elise E. Callwood, if she is the survivor, the same right as mentioned in Paragraph 1 of retaining our joint estate undivided with our joint children as long as she does not marry again."

"As however both of us consider it to be the benefit and welfare of all concerned, that the said right of retaining our joint estate undivided should be given to, Mrs. Elise E. Callwood, under certain restrictions, I Richard Edgar Clifford Callwood and I, Mrs. Elise E. Callwood do hereby decide, that the said right is given with the following restrictions.

"It shall be obligatory for me, Mrs. Elise E. Callwood, immediately at the death of my husband to deposit all cash money, bonds, shares and securities, belonging to the joint estate and only to draw the interest of same. In case of unforeseen events, which will make it necessary to withdraw the money or to make a change of the securities, this can only be done with the consent of Mr. Jakob Peiffer, living at Bielbrich of Rhein, or in the case of his death with the consent of Mr. Otto Zwanziger of Bielbrich of Rhein or the person to whom the surviving of these gentlemen may transfer the said authority."

Paragraph 2 went on to require the plaintiff to pay or provide for certain annuities as therein mentioned and concluded as follows: "Finally, if Mrs. Elise E. Callwood's retaining of our joint estate should cease only I say one third part of our whole joint estate should accrue to me, Mrs. Elise E. Callwood, while the balance of I say two third parts shall accrue to our joint children share and share alike, as their paternal inheritance."

Paragraph 3 contained provisions with respect to 18 properties in the town of Charlotte Amalie on the Island of St. Thomas, all recorded in the name of the testator's sister Mrs. Peiffer "but if which the greater part belongs to us" (ex. to the testator and the plaintiff as part of their joint estate). According to a list of these properties given in paragraph 3 one of them, known as No. 29 Dronningensgade, Charlotte Amalie, belonged beneficially to the testator and Mrs. Peiffer in equal shares, two others belonged beneficially to one-third to Mrs. Peiffer and as to two-thirds to the testator, and the whole beneficial interest in the remaining ten belonged to the testator, but it was clear that the beneficial interests attributed to the testator were regarded by paragraph 3 as part of the joint estate. Put very shortly, the effect of the provision of paragraph 3 with respect to these properties was that Mrs. Peiffer should convey the legal title to the plaintiff but should take a beneficial life interest in all of them upon certain conditions.

It was to be observed that the will contained no specific reference to Great Thatch Island, and therefore only purported to deal with it if it could be considered as included in the general references to "our whole joint estate" and "our joint estate" contained in the will.

The Danish Virgin Islands were ceded to the United States of America on March 31, 1917, but Danish law remained in force there until July 1, 1921. On or about August 14, 1945, one Osmond Keen purporting to act as agent for the plaintiff granted to the defendant a lease of Great Thatch Island for 25 years from that date at the yearly rent of $50. This lease was admitted invalid because (assuming that Osmond Keen had authority to grant such a lease) it was not executed under seal and was not recorded in the Register of Titles of the Presidency of the Virgin Islands as required by law. The
defendant, however, entered into possession of Great Thatch Island on the strength of that invalid lease and had remained in such possession ever since without payment of rent.

In those circumstances the plaintiff by writ dated April 5, 1955, commenced the present action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was by virtue of the joint will of herself and the testator the property of the plaintiff; possession of Great Thatch Island; and damages for use and occupation.

The trial judge ordered the defendant to give possession of Great Thatch Island to the plaintiff, and to pay damages of $2,880.

The Federal Supreme Court affirmed that decision, but reduced the damages to $840.

1960. Feb 1, 2, 3, 4, 8. J. G. Foster Q.C., Mark Littman and C. A. Brodie for the appellant. The respondent claims Great Thatch Island under the joint will on the ground that it is part of the community property under Danish law, although it is in British territory. The appellant claims the island on the ground that it was not disposed of by the joint will—it is not mentioned in it—and on the ground, therefore, that the testator, his father, had not disposed of it by his will and that English law, the lex situs, not Danish, applies to the question of the ownership of British territory. There is no evidence that the Danish law of community covered property outside the Danish jurisdiction. The will here only applies to community property; it was not purporting to deal with separate estates. Danish community property law is a conception quite foreign to English common law, and its incidents could not be applied to English law; no application of it is possible because of the general rule that the lex situs governs.

The first proposition is that there was no evidence that the island was part of the community property under Danish law. Evidence of Danish law of community of property was given by Mr. J. A. Bough, an attorney in St. Thomas, who stated that the law was as stated in the opinion of Maris J. in the United States Court of Appeals in Callwood v. Keen, which was in effect a dispute between the parties to the present appeal. There is, however, it is submitted, nothing in Maris J.'s opinion which gives any evidence as to Great Thatch Island being part of Danish community property. There is no evidence that the community property covered land outside the jurisdiction, and the probability is that that is in fact not so, because it would be realised by the Danes that their system of community property was a very peculiar one. Callwood v. Keen was not directed to the situation of foreign land outside Danish jurisdiction.

In the absence of any proof as to Danish law including foreign land as community property the basic rule is that real property is exclusively subject to the law of the State within whose territory it lies—the lex situs: Maxwell on Interpretation of Statutes, 10th ed., p. 162. What is said in Dicey's Conflict of Laws, 7th ed., p. 512, rule 85, and pp. 516 and 524 et seq., is basic to most of the argument for the appellant here.

Great Thatch Island is not included by Danish law in Danish community property; but, even suppose it were, that would not be recognised by English law. Danish law will not be recognised as including the island in the community property, for the reason that the lex situs governs the devolution of English real property; English law will not recognise the inclusion of the island in Danish community property because English law only recognises such inclusion if it is the result of an express contract or the contract established by the marriage is equivalent to an express contract, but in Danish law the husband is the absolute owner of the property while he is alive and there is no contractual right in the wife.

If, as is submitted, the island was not part of the joint property, the will does not operate on or affect it. If, on the other hand, it was part of the joint estate, then the way it is part of the joint estate is not recognised by English law if it is not a contractual right. Either way, English law does not recognise Danish law, whatever it may be—there is no evidence of it. [Reference was made to De Nicola v. Cuerer (No. 1).] There is no evidence that Danish law is like French law and that it gives a contractual right; in fact, what evidence there is shows that it is like Scottish law, namely, that the wife has a hope of succeeding. For it to be a type of community property recognised by English law there must be something in the nature of an express contract. The Danish system will not be recognised by English law—it creates an estate which does not exist in and is not recognised by English law. The United States case (Callwood v. Keen) does not even begin to prove that there was either an

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3 369 F. 2d 555.
express contract or the legal system equivalent to express contract. The whole ratio of De Nicola (No. 1) is that French law prescribed a contract which is equivalent to an express contract. (Reference was made to Dicey’s Conflict of Laws, 7th ed., p. 530.) In In re De Nicola, De Nicola v. Curtier (No. 2) there is a special contract—to be found in the Code; the Danish law is not like the French law; the present case does not come within De Nicola (No. 2), assuming that that case is right; it is submitted that it is wrong. Even if that case is correct, the present case is not a type of case where there was a special contract in the terms used by Kekewich J. Marriage in the Danish case, like marriage in England, established status and some incidents of succession; the contract as regards status does not become a contract as to property unless, like the French, it spells out the rights and obligations of the parties.

There are many instances of the operation of the lex situs—British wills affecting foreign land and foreign dispositions affecting British land—but they are all part of the general rule regarding the lex situs in rule 85 of Dicey. The general principle is laid down in Nelson (Earl v. Bridport (Lord), a very strong example of the rule that the lex situs governs: see also In re Hoges and Duncan v. Lawson. The respondent is inevitably driven to the will as the source of her claim. She is faced with the difficulty that the will does not purport to give anything; it assumes that the Danish law of succession is operating on the immovable. But the Danish law of succession will not apply as being that of the domicile of the testator; it is only the lex loci. In In re Miller the question is the same—the essential validity and effect of the will to be decided by the law of the place where the land is, or is it to be decided by the law of the domicile of the testator?—and it was held there to be the former. Two further cases of the same nature are In re Borch- teld 10 and Chisolm v. Carlows. 11 The latter decision was that in South Africa, community covers foreign land, and change of domicile under South African law would not affect the community of property; that case has no direct bearing on the present case. (Reference was also made to Baudot v. Tedgel 12; to Dicey, 13 [1902] A.C. 21. 14 [1889] 41 Ch. D. 294, 296; 5 491.

10 [1900] 3 Ch. 410, 413; 15 T.L.R. T.L.R. 406.
11 [1914] 1 Ch. 311, 317.
12 [1926] 1 Ch. 390.
13 [1897] 1 S.C. 63, 65 (Cape of Good Hope).

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7th ed., p. 524. Exception 2; p. 647; and to the passages from Story on the Conflict of Laws, s. 108, cited by Kekewich J. in De Nicola (No. 2). In considering the effect of marriage on a woman’s real estate, regard must be had to the lex situs, which here was English law in the case of real estate: Welch v. Ten- nent. 16 The reasoning in that case is inconsistent with that of Kekewich J. in De Nicola (No. 2). 17

Summarising the first two propositions: (1) Great Thatch Island is not part of the joint estate under Danish law. (2) If it is part of the joint estate under Danish law, then it is not part of the joint estate under English law for the following reasons: (a) Great Thatch Island is subject to the lex situs, namely, Eng- lish law. (b) If (a) is correct, English law does not recognise the Danish law of marriage as affecting a British immovable unless there is a special contract which is either an express contract or one created by the Code or law of the land. (c) There is no evidence of any special contract. (d) The evidence there is seems to indicate that the Danish law of community is a law of succes- sion and not of contract. (e) Even if there is a special contract, British law does not recognise the Danish law of community, since it creates interests in land unknown to British law. (f) Marriage of itself does not create a special contract; there must at least be a De Nicola (No. 2) 18 type of special contract. If the proposition were right that marriage is a contract affecting immovables, the decision of the House of Lords would not have been correct; and it would make rule 85 subject to an exception which would be much wider than the present Dicey exception.

The third point of the argument is that De Nicola (No. 2) 19 was not rightly decided for a number of reasons. It is contrary in principle to the rule about lex situs. In that case the context was between the matrimonial domicile and the lex situs. The validity of a marriage contract affecting an immovable is decided by the lex situs, and the matrimonial domicile of the parties is not the governing law. English law does not recognise the marriage contract, which refers to specific provisions of the foreign Code, as affecting an English immovable because of the rule that the lex situs governs the transfer and devolution of land. That rule is founded on the doctrine of convenience; to hold otherwise would be to subject English land to the transfer and creation of interests and estates which, even if they were not contrary to what English law recognised, would be of impossible application.
Lastly, Great Thatch Island is not mentioned in the will; there are no words of devise of the joint estate in the will, and there is nothing to show that the joint estate was devised. Even if the respondent is right on all the above points, she must still fail because there is no claim possible under the will because the joint estate is not given to the wife.

Litman following. If it is sought to say that a foreign law affecting title to land operates outside its jurisdiction, it should be proved specifically. On the general principle of private international law as to what extent English law would recognize foreign law which had purported to affect real property in the United Kingdom, see Freke v. Lord Carbery,14

If the disposition in the joint will was a contract, an interest disposed of would not be effective unless it complies with the provisions of the Wills Act: Jarman on Wills, 8th ed., p. 32, and In the Goods of Morgan,15 which show that a devise is not effective even though not in form. It is submitted that the finding of the courts below, that this joint will had been executed in accordance with the provisions of the Wills Act, is not supported by the evidence.

There is no evidence to suggest that this was a partnership; it is a little artificial to apply the cases, Oluseko, J. referred to in De Nicola (No. 2)16 to the present case.

J. G. Le Quesnay and Mercrey Heald for the respondent. On the question whether Great Thatch Island is part of the joint estate which is affected by the will—that is quite apart from any question of conflict of laws and is merely a question of construction of the will—that the fact that the will does not mention Great Thatch Island is of no importance. There is in the will a description of property and that is just as effective as bringing that property within the terms of the will as is a specific mention.

The impact of the will on Great Thatch Island was to give to the respondent a right to retain the joint property undivided with the children of the testator after her husband's death. The will must be interpreted according to Danish law, so the question comes down to whether by Danish law the island was included in the joint estate. That leads to what was proved to be the Danish law by the evidence in this case. Under South African law the foreign land did fall within the community right; also, according to the expert evidence of French law which was accepted in De Nicola (No. 2),17 the same thing is true of the law of France.

14 (1872) L.R. 16 Eq. 461.
15 (1900) 2 Ch. 410.
16 (1905) L.R. 1 P. & M. 114.
17 This.

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It was said for the appellant on this point that there was no evidence that Danish law of community property applied to land outside Danish territory. That was a question of fact on which there are concurrent findings of the two courts below. In both judgments there are findings that Great Thatch Island was by Danish law part of the joint property. One finds here some evidence that joint property by Danish law included foreign land. That being so, this Board will not conduct further investigation into the evidence. In the United States case (Calwood v. Keas18) the court was making a general statement of the Danish law and not confining it to the law applicable to the property there in question; the judgment said that "under the Danish law from very early times husband and wife held their property in community"; that is the most important statement in that judgment for the purposes of the present respondent. It means all the property. There are exceptions mentioned in the judgment, not applicable here, e.g., property acquired by inheritance or by marriage settlement; there is, therefore, no room for speculating that separate property might also arise in some other way. By Danish law the rule of community property apply to all the property, not simply to property within the Danish jurisdiction, and therefore to Great Thatch Island.

Next, assuming that the respondent has by Danish law an interest in the island, is that interest one which the law of the Leeward Islands recognizes? Mr. Foster relied on the general rule of English law that title to real property is governed by the lex situs. That general rule is not disputed, but it is submitted that it is rather different from that for which Mr. Foster argued. Nelson (Exr.) v. Bridport (Lord)19 is only authority for the proposition that there cannot be any interest in or disposition of English land which is prohibited by English law. In the other cases cited by Mr. Foster as examples of the application of the lex situs one finds that that is what is happening over and over again: In re Hopkins20; Dunlop v. Lawson.21 The whole question argued in In re Berchik22 is not the one with which this Board is concerned. Beaudoin v. Trudel23 does not really touch the present matters. There is nothing in the above cases to show that the general rule goes further than to prevent the creation of any interest in or disposition of land foreign by the lex situs; and see Dicey, 7th ed., p. 512.

18 139 F. 24 565, 573.
19 1 Ch. D. 354, 355.
20 1862 396, 397.
21 1898 396, 397.
22 1911 1 Ch. 179.
23 1917 1 D.L.R. 216.
The application of the lex situs may itself lead one to a different system of law. The question is left open by the general rule whether English law will recognise an interest arising by foreign law and not prohibited by the law of England. English law will recognise such rights: Chitty v. Carlysle **; Cheshire's Private International Law, 5th ed., pp. 507, 554-557. English law does recognise certain interests arising by foreign law which are not prohibited by English law, and among them is that of spouses in joint property on marriage. One may say that that is an exception to the general rule. The true effect and extent of Nelson (Earl) v. Bridport (Lord) *** is stated in Cheshire at p. 507. In re Millar **** does not touch the question whether English law will recognise an interest in English land provided for by foreign law; and whether English law will recognise community property in English land arising on a foreign marriage either by contract or by operation of foreign law did not arise in Wilck v. Trenant *****; the vital question here was conceded in that case, which is no authority for it.

The right claimed by the respondent here is one arising by foreign law and not prohibited by English law, and the general rule does not provide the answer to the present problem. All that is necessary for the respondent to establish is that when one has community of property arising on marriage by foreign law, then English law recognises rights so arising even in application to English land. There are only two cases—Chitty v. Carlysle ****; and De Nicolò (No. 1) ******—in which that question has come before the English courts, and in each right arising by foreign law were in fact recognised. Mr. Foster said that those two cases were exceptions to the general rule, and were exceptions depending essentially on contract. It is submitted in answer:

(1) Those cases are exceptions to the general rule, but are cases falling outside it. (2) When examined, they do not really depend on contract in the proper sense of that word at all. (3) Conversely, and alternatively, if they do depend on contract, then in the sense in which contract was present in those two cases it is also present in this case. Those appear to be the only cases in which English courts have had to consider rights arising under a foreign community property law; there are in both cases rights which arose by operation of foreign law, rights which were not prohibited by English law and rights which were recognised in the rules of English law. Those authorities are not confined to rights arising by express contract, or a marriage which is equivalent to express contract, or by special contract; there is no reason why recognition should be limited to rights which arise in a particular way.

It was also said for the appellant that the respondent did not get any rights in the property because the husband was the absolute owner of it while he was alive, with complete power of disposal. The answer is that in De Nicolò (No. 1) there was an exactly similar right in the husband.

In summary on the main point: it appears from the evidence that by the sole fact of marriage the respondent obtained certain rights in property arising by foreign law, including Great Thatch Island. Those were not rights prohibited by English law; therefore both on principle and by authority those rights are recognised by English law.

As his third point Mr. Foster said that De Nicolò (No. 1) was wrongly decided. It is submitted that it was rightly decided.

Lastly, as to the effect of the will: what was done by clause 2 was to give to the respondent the right to this property which otherwise she would not have had. As a result of the will she was solely entitled to Great Thatch Island. The statute was one which gave the husband power to confer such a right by will; he was nonetheless making a devise. English law will not recognise an interest in land prohibited by English law, but there is no general rule that English law will not recognise an interest unknown to English law and not a prohibited right, and, being no such general rule, the right which the respondent claims here is one which the English law does recognise.

Foster Q.C. in reply. The argument for the respondent involves rewriting many chapters of Dicey, and involves approximating the law of immovables to movables in the case of marriage and saying that the law of the domicile and not the lex situs applies. The only exception to the general rule that the lex situs governs, which has even been faintly indicated, is Rekehrich J.'s decision. The general proposition of law for the respondent that an interest under foreign law will be given effect to, unless prohibited by English law, begs the question; the proposition was, apparently, that any interest in any land in any circumstances to anybody would be given effect to; to follow that to its logical conclusion.

** 14 R.C. 61, 63 (Cape of God Hope).
*** 1441 A.C. 623, 645.
**** 14 R.C. 61.
***** 2 Bux. 597.
****** [1862] 2 Ch. 451.
would mean that the capacity of somebody to transfer English land would be decided by the law of his domicile. Dicey says that the lex situs governs except where there is an express contract; and that is a completely understandable rule which is supported by the whole trend of authority and by every textbook writer: Dicey, 7th ed., pp. 514, 517, 519, 520. The South African case of Chisholm v. Carter, 24 relied on for the respondent, does not advance either side’s argument any further, because it cannot be said what the reasons were which impelled Stirling J. to make a decree. [Reference was also made to Wolff’s Private International Law, 2nd ed., sections 234 and 236.] English courts will not give effect to an interest in foreign land which is not recognised or known to English law.

In conclusion, the following propositions derive from the argument: (1) The appellant is claiming English land as heir under English law; he is in possession. (2) The respondent is claiming the right to English land under Danish law, namely, to retain Great Thatch Island. (3) It is not proved that Danish law does comprise Great Thatch Island. (4) To establish the right claimed by her in an English court the respondent must comply with rules (1) and (2) of Dicey—the basic rules; that is, the respondent must apply an English rule of conflict of laws making Danish law applicable; a rule of foreign law is not applicable unless there is a rule of English conflict of laws making such laws applicable. (5) The question in this case is one of title to the island. (6) The applicable rule is rule 85 of Dicey, which applies English law to English land. That should be contrasted with rules 127 and 128 (pp. 647 and 655 respectively). Rule 128 shows that the respondent’s argument is approximating immovable and movable. (7) The relevant English law, that is, the lex situs, is English domestic law, not, as the respondent argued, foreign law applied by English law. (8) The only relevant exception to the general rule is exception (2), at p. 524 of Dicey. (9) The present case does not come under that exception, because there is no marriage contract or settlement. (10) The term “marriage contract” is an express contract and does not apply to rights implied by the foreign law of the marriage notwithstanding that those rights may be treated by the foreign law as contractual or quasi-contractual. It was said for the respondent that De Nicola (No. 1) 26 was not a contractual case. (11) If the De Nicola (No. 2) case is rightly decided, it is only right if the contract is treated as covering a case where the marriage under the foreign law is proved to result in a suit contract equivalent to an express contract as to land in England. (12) The fallacy in the present case is that such a contract follows from the use of the word “community” in the judgment, or from the existence of Danish community which in reality appears to be right of succession on the death of a spouse. (13) There is no reason on principle or authority for making a new rule or exception. It was said for the respondent: (a) where one has a right under foreign law, it is applied to English land unless it is prohibited by English law. It is submitted that that is contrary to Dicey’s first rule, because one has to find a rule of English conflict of laws which applies a right under foreign law to English land. It was also said for the respondent: (b) where one has a right under the law of the domicile of the foreign marriage to English land, the right is applied. It is submitted that if that rule were accepted it would have to be extended to the law as to intestacy and other matters, because that rule would cover all rights of succession upon marriage followed by the death of one of the spouses. This is contrary to rule 85, is without authority and not right in principle, as it confuses the law of succession and the law of marriage. It was further said for the respondent: (c) where one has a right over English land under foreign law creating community on marriage, that will be applied by English law. That, it is submitted, is not correct, as there is no reason to restrict this rule of community, and it is contrary to rule 85 that English land is governed by English law. It also, of course, conflicts with the rules on intestacy. (14) The will does not operate on English land; it is only carrying out under Danish law an incident of Danish community property law; it is not purporting to, and does not, devest English land.

March 21. The judgment of their Lordships was delivered by Lord Jowitt, who stated the facts set out above and continued: The question whether so far as immovable property is concerned the Danish system of community in the eye of Danish law extended also to immovable property (such as Great Thatch Island) belonging to one of the spouses but situated outside St. Thomas, and in the territory of a foreign sovereign state, whose own laws did not include the Danish or any other system of community of property between spouses, is a cardinal issue in the present appeal. On April 30, 1921, judgment was given in the United States Court of Appeals in Callwood v. Beaz, 27 which was an action

24 14 S.C. 61. 26 [1900] 2 Ch. 619. 27 (1921) 269 P. 339. 28 [1900] 2 Ch. 415.
originaly brought by the plaintiff against her former agent, Osmond Kean, for an account of the proceeds of the sale of No. 38, Droneningensdæle, but which, on the intervention of the present defendant, developed into a contest as to the title to such proceeds.

It appears that after the testator's death Mrs. Peiffer as contemplated by paragraph 3 of the will (and with the concurrence of her husband who predeceased her) made over to the plaintiff all the 15 properties in Charlotte Amalie, and in particular No. 38, Droneningensdæle, retaining in all of them a life interest which she continued to enjoy down to her death on July 11, 1947. It further appears that No. 38, Droneningensdæle was sold in 1940 by Osmond Kean, purporting to act as attorney for both the parties to the present action. In these circumstances the question which was raised for decision between the present plaintiff and defendant in the United States Court of Appeals (on appeal from the District Court of the Virgin Islands) was in effect whether the entire net proceeds of sale of No. 38 were, as contended by the plaintiff, her absolute property, or, as contended by the present defendant, belonged as to the half-share acquired by the plaintiff from Mrs. Peiffer to the plaintiff absolutely, and as to the other, half-share formed part of the joint estate and were subject, accordingly, to the provisions of the Danish law of community and of the joint will made by the testator and the plaintiff under those provisions. The United States Court of Appeals decided this question in the sense contended for by the present defendant, in substance affirming the decision of the District Court. Their Lordships have thought it right to refer at some length to the subject-matter of this earlier litigation in view of the use which, as will shortly appear, was made in the present action of the exposition of the Danish law of community contained in the judgment of the Court of Appeals, directed though it was to the destination under that law of the proceeds of sale of immovable property admittedly situated in territory subject to that law, and in no way concerned with the question whether in circumstances such as those of the present case the Danish system of community in force in the Island of St. Thomas at the material time was in the eye of Danish law applicable to immovable property situated in British territory and subject to English law.

By her statement of claim in the present action the plaintiff alleged (inter alia) (1) that she was the widow of the testator; (2) that the testator was the owner (on the death of his father intestate in 1902) of Great Thatch Island, and continued as such owner until the date of his death in 1917; (3) that by the joint will it was agreed by the plaintiff and the testator that she should have the right to retain their joint estate in accordance with the Royal Danish Ordinance of May 21, 1846, Chapter 18, section 1, under the Danish laws then in force in the Island of St. Thomas; and (4) that the plaintiff had elected in accordance with the said law to retain Great Thatch Island as her property, and not to divide the same with her son, the defendant. The plaintiff went on to allege the facts already mentioned concerning the invalid lease, and concluded by claiming the relief already described.

By his defence (paragraph 2) the defendant made no admission of any right in the plaintiff to Great Thatch Island as her property and alleged: (i) that the will of the testator was ineffective in so far as it related to real property situated in the British Virgin Islands and, consequently, the testator died intestate as regards Great Thatch Island; and (ii) that on the death of the testator Great Thatch Island devolved on the defendant, who was the only child (or son) of the testator. By paragraph 3 he admitted the facts alleged concerning the invalid lease, but said he entered into it in the mistaken understanding that the plaintiff was entitled to Great Thatch Island for life.

The case was tried first instance by Lewis J. The only evidence of Danish law before the court consisted of an affidavit of a Mr. James Angus Bough, an attorney and counsellor at law practising in the Island of St. Thomas, and the judgment of the United States Court of Appeals already mentioned, to which reference was made in such affidavit. Omitting formal parts, the affidavit was in these terms:

"1. I am an attorney and counsellor at law, and have practised as such in the Virgin Islands of the United States of America from the year 1904, except between 1945 and 1944 when I served with the Department of Trusteeship of the United Nations, at New York City. The Virgin Islands of the United States of America were up to March 31, 1917, a colony of Denmark, and it was common practice for persons to be married there under the Danish law of community property. In my practice the question as to what is the Danish law as to community property has often arisen.

2. I have read carefully the opinion of the court delivered by Maury J. in the United States Court of Appeals for the Third Circuit in the case of Callwood v. Kean No. 10810, of January 30, 1951. I can state categorically that the law on this question is as stated in that opinion. The copy of the joint will of
"Richard Edgar Clifford Callwood and Elise E. Callwood, printed in said judgment is a true and correct copy of the joint will under which the plaintiff Elise E. Callwood claims in this action."

Their Lordships strongly deplore this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which at the material time was Danish territory and accordingly subject to Danish law. The judgment of the United States Court, accordingly, provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community. The judgment of the United States court was likewise not concerned with, and therefore expressed no opinion upon, the rights of spouses subject to the Danish system of community as regards the enjoyment or disposal of the joint property during the continuance of the marriage.

Their Lordships think it desirable to quote at some length from the discussion of the Danish law of community contained in the judgment of the United States court delivered by Maris J., inasmuch as the views therein expressed, as approved by Mr. Bough, provide the only evidence of the Danish law of community adduced in the case. The learned judge says this: "Since the "will involves the title to real estate in St. Thomas it is to be "construed in accordance with the rules of law in force in that "island when the will went into effect on January 17, 1917, the "date of the testator's death. At that time the law in force in "St. Thomas was that of Denmark. The Danish law in force "when the island was one of the Danish West Indies remained "in force, after the change of sovereignty, until July 1, 1921, "when it was superseded by the Code of Laws of the Munici-

pality of St. Thomas and St. John which substituted for the "Danish law rules of law based upon the common law of England "as understood in the United States.

"Under the Danish law from very early times husband and

wife held their property in community, unless otherwise pro-
vided by marriage settlement. Moreover one of the provisions "of the Danish law was that upon the death of a spouse the "surviving spouse could, under certain circumstances, continue "to hold their entire joint estate in community until his or her "death or remarriage, thereby postponing the rights of children "or other heirs in the community property. This right appears "to have been established by, and certainly was recognised by," the Ordinance of May 21, 1845, which was in force in the "Danish West Indies. Section 18 of that Ordinance, referred "to in the will here in question, provides that a husband after "the death of his wife is not obliged to divide the property "with their common children, whether they have attained their "majority or not, so long as he does not remarry unless marriage "contracts or other binding determinants create the necessity "for such a division. The section further authorises the husband "by testamentary disposition to confer on his wife the same "right to retain the whole property undivided. Section 19 of "the Ordinance stipulates that the right of the surviving spouse "to remain in community property as authorised by section 18 "ceases when the spouse remarries. "It will be observed that the right thus given by the Danish "law to a husband by his will to authorise his widow to remain "in possession of their community property or joint estate was "exercised by the testator here who, by paragraphs 2 and 3 of "the will, expressly authorised his wife, the plaintiff, to retain "the whole of their joint estate undivided and to the exclusion "of their children until her remarriage. It appears that under "the Danish law a surviving spouse who thus retained possession "of the community property was entitled to sell or mortgage it "or otherwise to deal with and dispose of it as absolute owner, "although perhaps under a duty to compensate their children as "heirs for any undue diminution in the aggregate value of their "inheritance. Accordingly, if the testator here had not imposed "upon the plaintiff the restrictions upon alienation to which "we have already referred, and the validity of which we will "presently discuss, she would unquestionably have had the right "to sell, mortgage or otherwise dispose of the real estate in St. "Thomas belonging to the joint estate of the testator and herself "and also the right to take possession of and invest or otherwise "dispose of the proceeds, being responsible at the most merely "to compensate their children for any undue diminution, as the "result of gifts made by her, in the value of their share of the
Joint estate upon her remarriage or death or the earlier division of the property.

The rights thus given by the Danish law to the surviving spouse who retains the joint estate in community cannot be described in terms of common law concepts since those rights are quite foreign to the common law. Specifically they cannot be described as those of trustees and beneficiaries, as the district court suggested in its opinion. Nor is it necessary for us to attempt to classify them under the common law. It is sufficient to note the rights which the Danish law conferred upon a widow under these circumstances and to point out that these rights vested in the plaintiff upon the death of the testator with respect to the property in St. Thomas which they held in community, subject only to such restrictions as the testator by his will validly imposed upon her.

And Maris J. says: “As we have said, under the Danish law, a surviving spouse retaining possession of the community property is ordinarily entitled to sell or mortgage it, or otherwise to deal with it as absolute owner. In the present case, however, as we have seen, the testator by his will placed definite restrictions upon the right of the plaintiff as surviving spouse to deal with the property. Thus he provided that it might only be sold or mortgaged with the consent of Jacob Pfeiffer or Otto Zwanziger and then only in case of unforeseen events which might make it necessary for the plaintiff to use principal or to make a change in the properties in which the joint estate was invested.”

Moreover he provided that she should deposit in banks to be designated by Jacob Pfeiffer or Otto Zwanziger all mortgage proceeds and securities belonging to the joint estate, including the proceeds of the sale of any property.

And again: “It appears that under the Danish law a husband who by his will conferred upon his surviving wife the right to possession of the community property had also the right to stipulate that she could dispose of that property only with the consent of an individual who in Danish is called a ‘tillager’ or ‘vaering’ which may perhaps best be rendered in English as ‘guardian.’”

And: “Accordingly when the testator named Jacob Pfeiffer and Otto Zwanziger in his joint will as persons whose consent was required to the sale or other disposition of the joint property by his widow he was exercising a right which the law then in

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force in St. Thomas gave to him. His appointment of these individuals successively to assume the duties of guardian for his widow was accordingly entirely valid.

Their Lordships have thought it sufficient to cite these passages from the text of the judgment, as representing the conditions drawn by the court from the sources referred to in the supporting footnotes, to which (and the full judgment as reported) reference may be made.

Before Lewis J., at first instance counsel for the plaintiff put the essence of his case in this way: he said (see Record, p. 9): “Plaintiff’s case briefly is that her rights arise under the joint will and that under that joint will Great Thatch Island was devised to her notwithstanding it was not specifically mentioned therein. Paragraph 1 of joint will refers to ‘whole joint estate.’”

Counsel for the defendant, on the other hand, stated his leading argument thus (Record, p. 10): “Plaintiff must satisfy court as to the meaning of the words ‘joint estate’ in Danish law, and secondly show that Thatch Island fell within this expression. Evidence as to what Danish law was at the relevant date in regard to community of property is insufficient. The affidavit of James August Bough is inadequate in this point.”

In the course of his judgment Lewis J. said (at p. 21): “... in the absence of any evidence by the defendant to contradict or put in issue Mr. Bough’s opinion I find as a fact that the plaintiff and the testator held their property in community when they were married as it has been admitted by both sides that there was no marriage settlement which provided otherwise.”

As p. 23 he said: “... it [i.e. Great Thatch Island] is property which accrued to the testator before his marriage to the plaintiff and would form part of the community property unless specifically excluded therefrom by a marriage settlement.”

At p. 24 he said: “Is it admitted that there was no marriage settlement and as Great Thatch Island was owned by the testator at the date of his marriage it would, in the absence of any evidence to the contrary, form part of the joint estate, and I accordingly hold that it does form part of the joint estate. Counsel for the defendant has argued that it is for the plaintiff to show that the words ‘our whole joint estate’ in paragraph 1 of the will included joint estate elsewhere than in St. Thomas. These words are in my opinion sufficiently comprehensive to include all property held by the testator and the plaintiff at the time of their marriage wherever it may be situate and I find
as a fact that the expression "our whole joint estate" included Great Thatch Island although it is not specifically mentioned in the will.

The learned judge went on to hold (at pp. 24 and 25) that the joint will was in a form apt to include land in the British Virgin Islands under the Wills Act, c. 20, there in force, and at p. 25 expressed his conclusion on the question of title in these terms:

"In the result I am of the opinion that the plaintiff is entitled under the provisions of the will to retain Great Thatch Island "as owner to the exclusion of the defendant and I accordingly declare that she is the owner thereof."

He accordingly made an order upon the defendant to give up possession of Great Thatch Island on September 30, 1907, and to pay mesne profits at the rate of $80 per month for the six years ending on that date.

On appeal by the defendant to the Federal Supreme Court of the West Indies (Sir Eric Hallinan C.J., Rennie and Archer J.J.) that court in a judgment delivered by Hallinan C.J. on July 21 and 22, 1908, in which the other members of the court agreed, accepted Lewis J.'s conclusions both as to inclusion of Great Thatch Island in the joint estate and the efficacy of the joint will, and dismissed the appeal, save that the mesne profits were reduced to a total of $840, representing $80 per annum for a period of 10 years. The learned Chief Justice (at p. 33) observed:

"I consider that the trial judge had sufficient evidence before him to hold that the joint will complied and destined the lands in question."

From that judgment the defendant has now appealed to this Board. Mr. Foster, appearing for the defendant, based his argument in support of the appeal primarily on the submission that there was no evidence on which it could be held that the property to which the Danish system of community attached was the same as that in which Great Thatch Island was included in the will. The learned judge, he said, committed several errors in his statement of law.

If that submission is well founded, the present appeal must, in our Lordships' opinion, clearly succeed. The plaintiff's case is that according to Danish law Great Thatch Island formed part of the joint property to which the Danish system of community attached on the marriage of testator and plaintiff, and devolved on the death of the testator in accordance with that system to the exclusion of the lex situs in the shape of English law. It is for her to prove that in this matter of community the Danish law as it stood in the Island of St. Thomas at the material time arrogated to itself this extraterritorial effect. The question is one of fact to be proved by evidence, and the onus is upon the plaintiff to prove it. As their Lordships have already observed, the only evidence of the Danish law of community adduced by the plaintiff consists of the judgment of the United States Court of Appeals as approved by Mr. Bough in his affidavit. Their Lordships are satisfied that there is nothing in this judgment which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situated in foreign, or, in particular, British, territory. It is true that in various parts of the judgment general references are to be found (for example) to "the property", "the entire joint estate" and "the community property" without qualifying words restrictivc of their locality; but this, in their Lordships' opinion, is not enough. The law of one country concerning the devolution of land cannot, and prima facie is not intended to, affect the devolution of land situated in the territory of another. The learned judges in the United States Court of Appeals were not directing themselves to the application of the Danish community system in the case of land situated outside Danish territory, and their Lordships find it impossible to assume that, if the question whether Great Thatch Island was according to Danish law to be regarded as part of the testator's and the plaintiff's joint estate under the Danish system of community had been before the United States court, it would have been answered in the affirmative.

It is to be observed that in De Nicola v. Curtier (No. 2),8 where Kekewich J. held that the contract imputed by the French system of community to spouses domiciled in France and marrying without any express contract (as to which see De Nicola v. Curtier (No. 1)),9 had the same effect as an express contract in like terms, and was enforceable in England against freehold and leasehold property situated there, the learned judge had before him expert evidence to the effect that the term "immovables" was not confined to immovables in France, but applied equally to immovables in other countries. He said: "The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if

8 [1902] 2 Ch. 430, 2 T.L.R. 101, 3 T.L.R. 461.
"it could be treated as an English instrument which the court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular case is beyond the competence of the court. It is a matter of fact with which the court can only deal according to the testimony of those qualified to give it."

If the learned judge’s view as to the construction which an English court would place on the French code if competent to construe it turned merely on the absence of any express restriction of its provisions to immovables situated in France, their Lordships take leave to doubt its correctness, but they entirely agree with the learned judge in holding that the question whether the French code did on its true construction include immovables outside France was a question of French law and as such a matter of fact with which the court could only deal according to the testimony of those qualified to give it."

Again, in Chiarelli v. Carlysle, the first question put by Sirling J. for the opinion of the Supreme Court of the colony was whether certain immovable property in England fell within the community created under the law of the colony by the marriage of spouses domiciled in the colony; and the Supreme Court of the colony held that this question should be answered in the affirmative.

These cases indicate that the question whether the system of community in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned. True it is that in De Nicola v. Oudrier (No. 2) the French system and in Chiarelli v. Carlysle the Cape of Good Hope system were proved to extend to immovables situated in another country, but this, of course, affords no evidence at all on the question whether the Danish system of community in force in the Island of St. Thomas during the period material to the present case purported to include immovables situated in other countries.

Mr. Le Queene, for the plaintiff, contended that there were concurrent findings of fact by both courts below to the effect that the community here in question included immovables situated in the territory of a foreign state, such as Great Thatch Island.

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Their Lordships cannot agree. It appears to their Lordships that both courts erroneously regarded the judgment of the United States court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish system of community in force in the Island of St. Thomas during the material period included Great Thatch Island notwithstanding that it was situated in the territory of a foreign country. For the reasons already stated, their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that basing themselves on this, as their Lordships think erroneous, view of the evidence, the courts below went on to hold that inasmuch as the community property according to the relevant Danish law included Great Thatch Island, the general references in the joint will to "our whole joint estate" and "our joint estate" must be construed, accordingly, as including Great Thatch Island, a conclusion from which, had there been evidence that according to the relevant Danish law the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the courts below appears to have been that inasmuch as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their Lordships are content to assume in favour of the plaintiff without deciding it) the joint will should be recognised by English law as effectually entitling the plaintiff to the beneficial interest it purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and granting the adequacy of the joint will, in point of form and execution, to create with respect to Great Thatch Island, as part of the joint estate, the beneficial interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule: see, for example, Welch v. Tennant.11 Their Lordships are much indebted to counsel for their full and careful arguments on this question; but as it appears to their Lordships that the case is concluded against the plaintiff by her
failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law, no useful purpose would be served by debating it further.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the Supreme Court of the Windward Islands and Leeward Islands and of the Federal Supreme Court of the West Indies should be set aside, and that the action should be dismissed.

The respondent must pay the costs in the courts below and the costs of this appeal.


C C.

J.C. HONG GUAN & CO. LTD. APPELLANTS:

AND

R. JUMABHOY & SONS LTD. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Sale of Goods—Exceptions clause—Contract “subject to shipment”—Construction—Sufficient goods shipped to fulfil contract—Ineasurant to meet all vendors’ other contracts—Allocation to buyers with “definite” contracts—Purported cancellation of “subject to shipment” contract—Whether effective.

Privy Council—Jurisdiction—Point of law not taken below—Alternative submission on construction of contract—Point which could not be met by further evidence (post, p. 702).

Damages—Market value—Proof—Evidence of compromises in other disputes relating to market value of similar goods (post, p. 703).

In November, 1950, the respondents, importers of cloves into Singapore, contracted to sell to the appellants 50 tons of second grade Zanzibar cloves, December shipment, “subject to force majeure and shipment.” The respondents did in fact ship in December a quantity of cloves sufficient to fill the contract, though not sufficient to meet all their commitments to other buyers. They allocated the cloves among the latter, and delivered none to the appellants, to whom they wrote “your shipment was not effected by the Zanzibar suppliers. Your contract was made subject to...”
same cause, is still a system which exists in our law. I am very clearly of opinion that it does not.

Our whole system has been changed, and I think the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly by Order xxxvi. r. 1, the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him.

The word "discontinuance" no doubt had, under a former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when once it comes into court and when the plaintiff offers no support to his action, there must be a verdict for the defendant. That is the course pursued by the Lord Chief Justice. I think it was entirely right, and I move your Lordships that this appeal be dismissed with costs.

LORDS MACNAUGHTON, MORRIS, and SHEARD concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 15, 1890.

Solicitor for appellant: J. G. Lincoln.

Solicitors for respondents: Harrison & Davies.
argument for the present to the personal property, Keeleworth J. made an order declaring that without prejudice to any question raised by the rest of the summons the change of domicil did not affect the respective rights of the spouses under the French or matrimonial domicil in and to the movable property acquired by them or either of them during their joint lives after such change. (1)

This decision was reversed by the Court of Appeal (Lindley M.R., Rigby and Collins J.J.). (2) The widow appealed.

June 28, 27; July 3, 10. Graham Murray (Lord Advocate) and Westgate Q.C. (Renshaw Q.C. and Ingle Joyce with them) for the appellant. Upon principle and reason the appeal presents little or no difficulty. It is admitted that if there had been an express ante-nuptial contract for community of goods the change of domicil would have made no change in the rights of property. Then why in the absence of an express contract should a contract be implied to change the rights? By French law the change of domicil did not dissolve the community or impair the wife’s vested right. No such effect of a change of domicil was contemplated by the husband or the wife. It would not be just that a change of domicil which lies in the husband’s sole power should deprive the wife of her rights.

A change of domicil can at the most affect only the right of succession to the husband’s property; it cannot touch the wife’s right of property. In the present case no question of succession arises. Neglect of this distinction leads to confusion and error; as it did in Laskey v. Hog. (3) There the point was one of succession; it has no bearing on the present point. Lord Elyon’s language and reasoning are at times inaccurate and confused; but so far as concerns the present point they are merely dicta. For the decision of this appeal the view taken by the French Courts of the French law is enough. [See Sirry’s summary, cited in Lord Macnaghten’s judgment.]

Dixey Q.C. and Whinney for the respondents other than the

(1) [1886] 1 Ch. 400. (2) [1886] 2 Ch. 60. (3) 4 Paton, 581.
rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.

The parties, as I have said, were married according to French law, and the first thing to do is to see how the matter would be dealt with in respect of such a marriage by the French law. There is no real conflict between the learned persons who have given evidence on this question. One of them indeed, besides giving evidence as to what the French law is, upon which he is an authority entitled to respect, has also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all; and indeed such a question is not the subject of evidence at all, but pure matter of English law for English Courts to decide.

The law of France as applicable to the matter now in debate is deposed to by M. Paul Lax, a Licenciate in Law in the University of France, an advocate who has practised in the Court of Appeal in Paris, and his evidence upon the subject is not really questioned by the gentlemen on the other side. M. Lax says: "2. According to the law of France and in particular arts. 1998 and 1401 of the Code Civil parties having intermarried without entering into a formal pre-nuptial contract are governed so far as their present and after-acquired property is concerned by the legal system of community of goods as defined by arts. 1401 to 1496 of Title V. of the same Code, which title is headed 'Du Contrat de mariage et des droits respectifs des époux.' 3. The husband and wife having so intermarried without entering into a pre-nuptial contract in writing are placed by the sole fact of the marriage and stand exactly in the same position in all respects as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and expressed covenants all and every one of the provisions contained in arts. 1401 to 1496 above referred to. 4. Subject to the exceptions specified in the next following paragraph the community of goods includes (1.) all personal property belonging to the husband and wife at
9. The community of goods when once constituted between husband and wife and whether created by an instrument in writing or by the operation of arts. 1308 and 1400 of the Code Civil cannot cease or be determined by mutual consent or by any cause or event whatever except the following that is to say: (1.) Decease; (2.) Divorce; (3.) Judicial Separation; (4.) Separation of estates decreed by a competent court of justice.

If this is the law by which the master is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing inter se should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any Court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicil, but that a change of domicile does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (Laslley v. Hoy (1)) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus: If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (2): "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate."

(1) 4 Peton, 581.
(2) 4 Peton, 617.
It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doublet is it true, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the jus maritii it is described as a legal assignation to the husband, and, in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2nd ed. vol. i. p. 677, says: "At a very early period of our law, the distinction between the two rights was recognised. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouse; while the jus maritii was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is asserted and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable comminio" . . . .

"The distinction is thus stated in argument in the Session Papers of Gowan v. Purcell: The jus maritii over the moveables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the moveables that fall under comminio." How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by s. 1443 of Code Civil, which enact that: "1443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The comminio honorum in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the moveable property in question.

Once it is admitted that the marriage gives a proprietary right and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract, the anomaly pointed out by the Master of the Rolls and sought to be explained becomes once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Brougham. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicil may bring with it the consequential change from such relation.

Here, however as I have endeavoured to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term jus locutum arising from a reference to a dispute that appears to have existed in the Scottish authors as
to whether those rights flowed from the commuion, whereas, to quote again from Mr. Fraser’s book, p. 671, where he says: “It has been found in accordance with the opinions of the French commentators, of Drilten, and other lawyers of our own country, that the jus relictum and legitem are in all respects the same, that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming into proper rights merely at its dissolution, that they are not rights of division of a fund already held in common, but rights of debt against the husband’s executors, constituting the widow and the children creditors, whose right comes into being by the husband’s death, and secondary creditors too, for all other debts must be paid before theirs.”

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

LOD MACKAGHY. My Lords, in 1854 Mr. De Nicola, the testator, and the appellants, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicola left Paris and came to London. They acquired an English domicil, and in 1865 Mr. De Nicola obtained a certificate of naturalization in this country. From that time forward their residence in England was continuous. Mr. De Nicola became a restaurant proprietor in London. He was successful in business, and amassed a large fortune consisting of both movable and immovable property.

Mr. De Nicola died in February, 1897, having made a will in the English form and language.

The question for your Lordships’ consideration is whether Mr. and Mrs. De Nicola continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicil from French to English destroyed the community altogether, and, therefore, that the testator’s will operated upon the whole of the property vested in him which, for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicil, and that Mr. De Nicola remained bound by the article of the Code Civil, which provides that a testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in Laskley v. Hog (1), which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside Laskley v. Hog (1) for the moment, the only question would seem to be what was the effect according to French law of the marriage of Mr. and Mrs. De Nicola without marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellants, that according to the law of France, a husband and wife intermarrying without having entered into an ante-nuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in arts. 1401 to 1496 in Title V. of the Code Civil, headed “Of Marriage Contracts and the respective rights of spouses.”

In support of this conclusion, M. Lax refers to the relevant

(1) 4 Paton, 561.
The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavours to minimise its effect by treating it as a self-evident proposition—as in fact being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicil or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicil. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicil and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicil the husband has 10,000£ of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley v. Hog* (1) compelled them to decide in favour of the executors. Mr. and Mrs. Roger Hog, an

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(1) 4 Paton, 581.
Englishman by domicil and an Englishwoman, intermarried in England without a settlement. Mr. Hog made a fortune in England, settled in Scotland and became domiciled there. After this change of domicil the wife died in the lifetime of the husband. Some years later the husband died a domiciled Scotsman. There was a good deal of litigation as to the administration of Mr. Hog's estate, and there were appeals to this House. In one of these appeals, among other things, this House determined that Mrs. Lashley, who was one of the children of the marriage, had "a claim in right of her mother the wife of the said Mr. Roger Hog, who at the time of her death had his domicil in Scotland, to a share of the movable estate of her father at the time of her mother's death."

No doubt if the law had not been altered by the Act 18 Vict. c. 53, s. 6, that decision would be binding upon this House in a similar case. But when you are asked to apply the decision to a case where the circumstances are different, it seems to me that the proper course is to ascertain, if you can, the principle of the decision, and then to see if that principle is applicable to the circumstances of the case under consideration. This is the case of a French marriage with a settlement prescribed and constituted by the law of the land and followed by naturalisation in a foreign country. Lashley v. Hog (1) was the case of an English marriage without a settlement and a change of residence to another part of the United Kingdom.

Now, what was the principle on which Lord Eldon proceeded? After a long discussion Lord Eldon comes to the point by asking this question: "Why should it be thought an unreasonable thing that where there is no express contract the implied contract should be taken to be that the wife is to look to the law of the country where she was domiciled for the right she is to enjoy, in case the husband thinks proper to die intestate?" Then his Lordship goes on to say (2): "This has been the principle, which it seems to me has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted, and not being aware that there has been any decision which will counteract this; thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me attending to the different sentiments to be found in the text-writers upon the subject that it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband whom by the marriage contract in this instance she is bound to obey."

I may observe in passing that in that passage Lord Eldon was referring to the difference of practice in the administration of intestates' effects then prevailing in the different provinces of York and Canterbury, and also to a previous decision in the case of Lashley v. Hog (1) on the question of legitim. It is not, I think, very easy to see how the principle which Lord Eldon selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicil be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next of kin of his wife. It seems to me that the result can only be reached by one or, other of two alternatives. Either it must be held that the implied contract on the part of the husband is that in case of a change of domicil the wife shall enjoy all the rights of a woman married in the country where the new domicil is established, and that he will surrender in her favour so much of his rights as may be inconsistent therewith; or else it must be assumed that marriage in Scotland is not required to create communion of goods, but that communion of goods is incidental to the status of married persons in Scotland; or, as Lord Eldon puts it, "the law of Scotland 'recognises' communion of goods 'in the married state.'"

Now, if that assumption be necessary in order to support Lord Eldon's conclusion in Lashley v. Hog (1), it is obvious that there is so wide a divergence between the law of Scotland, or

(1) 4 Paxo, 561.
(2) 4 Paxo, 617.
what is assumed to be the law of Scotland, and the law of France as to make the decision inapplicable to the present case. If, on the other hand, Lord Eldon’s conclusion is a legitimate extension or development of the principle on which his argument is founded, it seems to me that there is no room for the application of the principle in the circumstances of the present case. The principle, as Lord Eldon explains, is founded on the notion that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicile of the husband. Lord Eldon admits, and it was conceded at the bar, that, if there had been a written contract dealing with the whole property of the spouses present and future, the principle of Lashley v. Hog (1) could not apply. Now the effect of what took place on the occasion of the French marriage, so far as is amounted to a compact in respect of property, must, I think, be determined by French law; and it has been proved by the evidence in this case that what did take place was to all intents and purposes, according to the law of France, equivalent to a written contract.

It appears to me, therefore, that the case is not governed by the decision in Lashley v. Hog (1), and I think the appeal ought to be allowed.

LORD MORRIS. My Lords, I agree in the judgment proposed by the Lord Chancellor, and in the reasons assigned for it.

LORD MACNAGHTEN. My Lords, it is clear from the judgment of the Court of Appeal delivered by the learned Master of the Rolls that their Lordships’ opinion apart from the effect of the case of Lashley v. Hog (1) was favourable to the appellant on the ground that when her marriage took place in France, in the absence of any written contract, the provisions of the Code Civil of 1804, and particularly the provisions immediately succeeding s. 1400, established the system of community between the spouses, under which the right to one-half of the joint estate of the spouses as defined in these sections became vested in the appellant, and was not lost by the change of domicile.

The difficulty which weighed with their Lordships arose entirely from the judgment of this House in the case of Lashley v. Hog (1). With much deference to their Lordships, I agree in what I understand is the unanimous opinion of your Lordships in this House, that the present case is clearly distinguishable from the case with which Lord Eldon was then dealing, and, having had an opportunity of seeing the judgments of my noble and learned friends the Lord Chancellor and Lord Macnaghten, I shall content myself with stating shortly wherein I think the distinction consists.

It cannot be disputed that if at the time of the marriage the appellant and her late husband had executed a marriage contract by which the appellant had stipulated for precisely the same advantages as the Code, in default of any contract, expressly gave her, a change of domicile of the spouses thereafter would not have defeated the appellant’s contract right to the estate which she now claims. Lord Eldon indeed in his judgment in the case of Lashley v. Hog (1) appears to have made this quite clear. It seems to be beyond question that in entering into the onerous contract of marriage the appellant would have acquired an indefeasible right to the advantages for which she there stipulated, notwithstanding a subsequent change in the domicile of the spouses, unless indeed she had thereby agreed that in the event of such a change her rights should be varied. In my opinion, though a written contract was not entered into, the parties in respect of the special provisions of the Code were, on the completion of their marriage, substantially and for all legal purposes in the same position as if they had made their contract in writing. It must be presumed that they knew the provisions which the Code contained, and it seems difficult to suggest any possible reason which could induce them to make a contract in writing merely expressly to repeat or adopt the detailed provisions of the Code, when the Code itself had provided that in default of any written contract these provisions should take effect. The

(1) 4 Paton, 581.
only ground which it appears to me could be suggested is that according to the argument of the respondents such a question as the present could not in that case have been raised; but in my opinion, as the Code which is virtually statute law enacted expressly all that a written contract required to provide, this argument of the respondents fails.' On this subject I refer to the evidence of the legal expert, M. Paul Lax, in art. 3 of his affidavit, which so strongly accords with the view I have now stated. His evidence is to the effect that the parties having intermarried without a written contract were placed by the whole law of the marriage 'in the same position in all respects' as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and expressed covenants all and every one of the provisions contained in arts. 1401 to 1436 of the Code; and I do not find in the evidence of M. Astoul, examined for the respondents, any substantial disagreement with this view.

The case being thus clearly distinguishable from that of Laskley v. Hog (1), I have only to add that I agree with the views now stated by the Lord Chancellor as to the grounds of the judgment in that case.

Lord Brampton. My Lords, in the year 1854 the plaintiff, Mrs. De Nicola and her now deceased husband, both being natives of France, domiciled there from their birth and of full age, were duly married according to the law of that country at the mayor’s office in Paris under the system of community of goods contained in the Code Civil.

They remained so domiciled until the year 1863, when they came to reside in, and changed their domicile to, England; and in this country they remained until the husband’s death in 1897, the plaintiff, her widow, still continuing her residence here.

By means of such little capital as they were possessed of when they arrived in London, and their own united personal intelligence and industry, they accumulated in England a large fortune, consisting of both movable and immovable property.

(1) 4 Paton, 561.

A. C.

AND PRIVY COUNCIL.

To-day we are only concerned to deal with that which was movable.

At the time of his death the husband was in ostensible possession of the whole of the joint property; having in March, 1895, made his will purporting to dispose of every part of it as if it were all his own absolutely. The plaintiff alleges that he was not unjustified in doing so, claiming that as his surviving spouse she became on his death entitled, under art. 1474 of the system of community, to one-half share of his then available assets. The law of France relating to marriage contracts, and the rights of spouses, is contained in Title V of the Code Civil, passed and promulgated in February 1864, chapters 1, 2, and 3, comprising arts. 1857 to 1494 inclusive.

From the general provisions contained in chapter 1, I gather that one great object of the Legislation was to ensure, as far as possible, that, contemporaneously with every celebration of marriage in France, some definite and binding regulation or settlement of the property of the spouses respectively shall be brought into operative existence, leaving it however absolutely and without restriction open to the spouses mutually to determine and agree what shall be the character, substance and provisions of such regulation, provided only that it shall not be contrary to morality, and shall not derogate from certain marital and other rights in no way affecting this present case.

Another object was to provide as much facility as possible for ready, easy and inexpensive obedience to this requirement by those who are disposed to accept such aid. With a view to these ends, in chapters 2 and 3, the Code sets out in minute detail for the consideration and for the adoption, if they please, of those contemplating marriage, two systems—one called the system of community, for the regulation of all their moveables both present and future during the whole period of their coverture, the other, the "dotal system," to which I need not further refer.

In the event of the intending spouses not being willing that their properties shall be regulated by the system of community, art. 1887 provides that they may make a special agreement for themselves as they may deem proper; such special agreement,
as a "matrimonial agreement," is by art. 1394 required to be reduced into writing and executed before a notary prior to the celebration of the marriage. The reason for this requirement is very obvious. The system, which was framed with a view to embody such a regulation or settlement as would be acceptable and best adapted to the requirements of the great majority of French intending spouses, had already been carefully prepared and set forth in detail in the Code, so that it can easily be understood and readily and inexpensively adopted; but no draftsman, however skilful and ingenious, could possibly devise and frame by anticipation a form of settlement to meet the variety of views and caprices of those who preferred to make their own settlement; such could only be prepared when the wishes and intentions of the parties were made known to those whose duty it might be to prepare the instrument in each particular case.

A moment's consideration will suffice to show how absolute and unlimited is the freedom in choice of a settlement to spouses who desire to exercise it, and how erroneous it is to suppose that any particular regulation of their property is forced upon them against their will.

It will be convenient to bear in mind the general features of this system; I have therefore thought it may be useful at once to set out a short epitome of the most important articles. It is contained in chapter 2 of the Code, and in § 2 is described as a "conjugal partnership," an expression strongly savouring of contractual relations.

By art. 1401, the property to be administered under it, described as "community assets," is composed (inter alia) of all the movable property of which the spouses are possessed at the time of the celebration of the marriage, together with all the movable property which comes to them during coverture. By art. 1409 the liabilities include the personal debts of the spouses owing at the time of the marriage, the debts incurred by the husband during the coverture, or by the wife with her consent, the household expenses of the spouses, and the maintenance and education of their children.

The husband is constituted the sole administrator of the assets, and considerable powers of disposition are conferred upon him; but he cannot by a testamentary donation exceed his share (art. 1421, art. 1422, art. 1424).

Art. 1441 provides for the dissolution of the community by the death of either of the spouses and in several other events immaterial to the consideration of the present question.

On the dissolution of the community by the death of one of the spouses, after all legitimate claims upon the assets have been satisfied, the surplus is to be divided by halves between the surviving spouse and those who represent the deceased (art. 1474).

Art. 1400 declares that this system is established by the simple declaration that the parties marry under it or in default of a contract, meaning, of course, such an agreement as is contemplated in arts. 1387 and 1393.

I pause here to emphasise the fact that this system operates upon no spouses unless by their mutual assent.

It was under this system, which had been for nearly half a century a very familiar and approved form of settlement, of the nature and provisions of which the parties as French subjects must be presumed to have had knowledge, they were married, and upon the faith and under the belief that its provisions would regulate the property of both so long as their marriage continued, and that on the death of either it would be divided between the survivor and the representatives of the deceased, the wife placed in the possession of her husband as part of the capital of their "conjugal partnership" such little property as she could then call her own; and from that time until the death of her husband it was never suggested that with the change of domicile to England the rights of property the wife had acquired by her marriage in France vested in her husband as absolute owner, as if they had been married in England without any settlement at all.

The Married Women's Property Acts do not, in my opinion, affect the present case.

The case of Latchley v. Hoy (1) has all along been relied upon by the defendants as decisive in their favour. Bekewich J. (1) 4 Paton, 581.
thought that authority inapplicable, and gave judgment against them. The Court of Appeal, however, adopted the defendants' view, and reversed his judgment.

I have the misfortune to differ from the Court of Appeal, it appearing to me that the two cases are distinguishable in very material particulars, and that no part of Lord Eldon's observations in delivering the judgment of the House of Lords can be said to determine this matter. In order to make these distinctions apparent, I propose briefly to recapitulate the material facts of that case.

Roger Hog was a native of Scotland, he came to England to better his fortune, and in 1796, being then domiciled there, married Rachel Mising, an English lady. No settlement affecting this case was made on their marriage, but with his wife Mr. Hog received 1000L, which, according to the law of England, became his sole absolute property, upon the principle that in England a wife can by the common law have no separate legal existence.

They remained resident in England until 1792, when they removed to Scotland, where undoubtedly they became domiciled before 1790, when their coverture was dissolved by the death of the wife. The husband survived until 1799, when he also died, still domiciled in Scotland, possessed of considerable personal property. After his death Mrs. Lasheley, who was a daughter of the marriage, as representing the right of her deceased mother, made claim in the Scottish Courts upon her father's estate to a share of the personal property which, as she alleged, her father held in community, according to the then law of Scotland, at the dissolution of the coverture. For Mrs. Lasheley it was contended that the Scottish law of community of goods attached itself upon the property of Mr. Hog on his becoming domiciled in Scotland, notwithstanding the fact of his marriage to her mother in England without any settlement many years before. This absence of a settlement is a very important feature in that case, which, it is contended for the plaintiff, is absent from the one now before us.

The judgment of the House of Lords was in Mrs. Lasheley's favour. Lord Eldon in delivering it had to deal also with a

variety of other questions, which necessitated a lengthy and complicated discussion; but so far as regarded the matter now before us it is, to my mind, clear, intelligible and convincing. He held, first, that the Scottish law of community attached itself upon all the personal property of which Mr. Hog was or thereafter might become possessed during his domicil in Scotland; and, secondly, that on the death of Mr. Hog the distribution of his personal estate, including the share of the predeceased wife, which up to that event had not been severed, must be regulated by the succession law of Scotland, where his death occurred. As regards the first of these rulings, it had been contended for those who opposed Mrs. Lasheley's claim (1), first, that in the absence of a written contract the rights of husband and wife must be regulated by the law of the country where they were domiciled at the time of the marriage; and, secondly, that there was on the marriage an implied contract between the spouses that they would be bound to all those conditions and consequences which the law of the country made to follow upon their consent to the marriage itself, and that no change of domicil could alter this matrimonial law or implied matrimonial contract.

Both these contentions were overruled for reasons stated at length in the judgment. (2) The complete absence of any settlement affecting the property was evidently the basis of the decision. The law of England made none; it merely gave to the husband all his wife's property, placing upon him no restrictions. When, therefore, he thought fit to change his domicil to Scotland he took with him, as it were, all his movable property absolutely free and unfettered. The law of communi honorum would clearly have attached to it if his marriage had been celebrated in that country; but that law became equally attached upon spouses who "in the married state" became domiciled, at least for so long as that domicil continued, which, in the case of Mr. and Mrs. Hog, was continuously until they were both dead. (3) In the teeth of these circumstances it is difficult to suggest to oneself how

(1) 4 Paton, 599.
(2) 4 Paton, 600, 610 at seq.
(3) 4 Paton, 617.
No, not form of words was necessary, nor was any writing
required by the law of France. For there is to be clear
understanding the matrimonial agreements embodied in art. 997
of marriage and obligations towards each other. They were to the
agreement that they had agreed to be bound by the marriage, and
the obligations are those of the marriage. It was the marriage
which imposed the obligations. It is not necessary to have a written
agreement, but it is necessary to have a perfect marriage, i.e., one
of the parties must be of sound mind and of age, and the consent
must be voluntary. The marriage must be solemnized by a
priest or by a judge. The marriage is complete when the ceremony
is performed and the couple are married. The marriage ceremony
must be performed before a judge or a priest. The marriage is
considered valid when the ceremony is completed.

In the case of marriage, the consent of the parties is imperative.
The marriage must be solemnized by a priest or a judge. The
marriage is considered valid when the ceremony is completed.

When the marriage is solemnized, the couple are married and
the obligations as to each other are binding. The marriage is
considered valid when the ceremony is completed.

If the marriage is solemnized, the obligations as to each other
are binding. The marriage is considered valid when the ceremony
is completed. The marriage is considered valid when the ceremony
is completed.
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HOUSE OF LORDS

[1900]

H. L. (E.)

1900

De Nicola

v.

Cylinder.

Lord Bramston.

A. C.

AND PRIVY COUNCIL.

out the real wishes and advance the interests of the many
subjects of France whose properties in their own country are,
and in the future will be, regulated by it.

Thinking, as I do, that this case falls within the exceptions
engrafted by the counties of nations upon the strict rule of
the territorial law (Robertson, pp. 74-77), I am of opinion that
the judgment of the Court of Appeal should be reversed and that of
Kekewich J. restored, and that judgment should be entered for
the plaintiff with costs.

Order appealed from reversed and order of Kake-
wich J. restored: costs here and below to be
costs in the summons. (1)

Solicitors for appellants: Hicks, Arnold & Massey.
Solicitors for respondents: Tyrrell Lewis, Lewis & Broadbent.

(1) The order was not drawn up when this report went to press.

(1) 4 Paton, 581.
In re De Nicolas.

DE NICOLS v. CURLIER.

[1897 D. 968.]


A Frenchman and Frenchwoman married in France without any express marriage contract, so that according to the French law their rights as to property were subject to the law of community of goods. Subsequently they came to England and acquired an English domicile, and the husband amassed a large fortune, part of which he invested in real and leasehold property here. It is the question of the wife, having purporting to dispose of all his property by an English will. It has been held that he to movableis the wife was entitled notwithstanding the change of domicile to a one-half share under the law of community of goods, the question arose whether she was entitled on the same footing to a share of the real and leasehold property.

Held, (1) that there being here a special marriage contract defined by reference to the French Code, it had the same binding force as an express contract, and was enforceable against the real and leasehold property in this country, subject to the question whether the Statute of Frauds required the contract to be in writing, or creating an interest in land; (2) on the authority of Foster v. Hall, (1860) 5 Ves. 305; 4 B. R. 126, and Dale v. Hamilton, (1845) 5 Hare, 590, that the Statute of Frauds did not apply, inasmuch as this was in substance a contract of partnership, and the property required for the purposes of the partnership was by operation of law held for those purposes;

Held, therefore, that the real and leasehold property was subject to the community of goods.

The testator and his wife, both of whom were French, were married in France in 1854. They entered into no "contrat de mariage," so that according to French law their rights as to property were governed by the rules of "communaute de biens." In 1865 they came over to England with property amounting in the whole to about 4000. They became permanently domiciled here, and in 1869 the testator became a naturalized British subject. The testator started business in London as a restaurant keeper, and he ultimately became the proprietor of the Café Royal, Regent Street, and amassed a large fortune, part of which he invested in real and leasehold property in this country. He died in 1897, having by his will, made in English form, given his residuary estate to his executors and trustees upon trust for sale, and to hold the proceeds upon trust for his wife for life, and after her death upon trust for his only daughter and her husband and their children.

The widow took out an originating summons to ascertain her rights and interests in the property of the testator by reason of her marriage, while domiciled in France, married there without any contract. The question formulated in chambers for decision was, "Did the change of domicile alter the legal position of the parties to the marriage in reference to property?" It was arranged that the Court should first determine the effect of the change of domicile with reference to the testator's movable goods only. Upon that question Keewwich J. (1) held that the rights of the wife under the French marriage law as to communauté de biens were not affected by the change of domicile, and that she was entitled to a half-share of her husband's movables, and this decision, after being reversed by the House of Lords, (3) was restored by the House of Lords. (5) Some further evidence was adduced upon the present occasion as to the meaning of "immovalibles" in the French Code. Speaking generally, the effect of the evidence was that the term was not confined to immovables in France, but applied equally to immovables in other countries.

[1899] 1 Ch. 603.
[1899] 2 Ch. 60.

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(3) [1899] A. C. 21.
(4) Ibid. 24-26.
(5) Ibid. 1899, 24-26.
KEKEWICH of the widow on the ground that this is a contract conferring an interest in land, and as such must be evidenced in writing, but this is a contract by operation of French law, and the statute does not apply to a contract created by operation of law. It has been laid down by Lord Halsbury that this French marriage conferred an actual binding partnership proprietary relation fixed by law upon the persons of the spouses, and it is settled that a partnership contract may be proved by parol even though it deals with land. If the partnership is established, the land which is the subject-matter of the partnership is by operation of law held for the benefit of both spouses of the partnership: Forster v. Hale (1); Dale v. Hamilton (2); Lindsey on Partnership, 6th ed. pp. 89, 90. It is true that upon the appeal Dale v. Hamilton (2) took a somewhat different course, but Lord Cottenham L.C., is affirming the decision of Wigram V.C. upon a different view of the facts, said nothing which in any way threw any doubt upon the reasoning of the Vice-Chancellor.

Further, the land now in question represents the investments of money acquired by the husband during the marriage, and must for the present purpose be treated as personal estate. The widow is entitled to follow that money, however it is invested. Everything that has been acquired by the husband during the marriage has been personality, and it is a mere accident that at the time of distribution that personality has been invested in real or leasehold property. The husband cannot put money into land so as to affect the rights of the wife. He takes by a paramount title founded on a contract implied by law.

We do not dispute that the devolution of land is governed by the lex situs, but we submit that the law of England contains nothing which prevents the land in question from being affected by this marriage contract.

Warrington, Q.C., and Elgood, for the executors and trustees, P. O. Lawrence, Q.C., and Whinney, for the daughter and her children. This quasi contract will not be applied by the law of England to land in this country: Story on the Conflict of Laws, 8th ed. p. 250, s. 158; Westlake on Private International Law, 3rd ed. p. 192, s. 167; Foote's Private International Jurisprudence, 2nd ed. p. 212; Dicey's Conflict of Laws, 4th ed. p. 198. The principle that all rights over land are governed by the law of the country where the land is situate applies to land however and wherever acquired. If this personal property can be followed into its investment in land, as is contended, that is really applying the French law to land in England, and is acting contrary to the principle above stated. Further, we rely upon ss. 4 and 7 of the Statute of Frauds. Bynoe v. Webster (1) shows that the statute applies to every contract which effects a parting with an interest in land. We cannot in this Court dispute the validity of Forster v. Hale (2) and Dale v. Hamilton (3), which have been recognised by your Lordship in Gray v. Smith (4); but we say that those cases relate to a commercial partnership, and do not apply to this case. It is not right to say that this is a contract by operation of law in the sense that the Statute of Frauds does not apply to it. We protest against the attempt to import into this contract, which arises from the application of the French Code, the English law of partnership, whether as regards its effect upon the Statute of Frauds or as regards the following of assets.

Routh, Q.C., in reply.

June 22. KEKEWICH J. Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the absence of domicile, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on a broad principle that a contract operating by force of law is to be considered a contract by the parties as is complete and obligatory as a contract expressed, and must have effect even in the absence of their signature. Unless, therefore, there is

(1) (1865) 12 C. B. 388.
(2) 5 Hare, 369; 2 Th. 266.
(3) 5 Hare, 369; 5 Ves. 306; 4 H. B. 128.
(4) (1865) 48 Ch. D. 208.
some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the Code and the evidence given in explanation of it. On the present occasion the Court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England—that is what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is governed by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration—one of fact, namely, whether these estates are within the scope of the contract; the other of law, whether they can be affected by it.

The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit, and orally on the hearing of the present application, and additional evidence adduced after leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the Court. This evidence was directed to the proper meaning of “immovables” in the French Code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France some estates are, from their close connection with the land, treated as attached to it, and, therefore, immovable; but these exceptions do not impair the general description, and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the Code are, apparently, wide enough to cover all, whatever situate, and, if it could be treated as an English instrument which the Court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the Court. It is a matter of fact with which the Court can only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest, and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the Code as regards “immovables” are of universal application—that is, are applicable to immovable property situate in France and to that situate in a foreign country.

Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story on the Conflict of Laws, s. 158, the learned author says this:—

“The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract, the lex loci contractus (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries, it will govern movables, but not immovables, the former having no situs, and the latter being governed by the lex rei sitae.”

In the following section—159—he expounds this subject in a manner so opposite to the case in hand that it is worth while to quote it at length. It runs thus:—

Perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonises with the analogies of the common law, is, that in the case of a marriage where there is no special nuptial contract, and there has been
In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, *Forster v. Hale* (1) and *Dale v. Hamilton*. (2) In the latter case Wigram V.-C. applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership, 6th ed. p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick v. Skidmore*. (3) This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray v. Smith*. (4) Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the Court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt, that is also a contract of partnership; but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the Court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in *Forster v. Hale* (1) seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Wigram V.-C. in *Dale v. Hamilton* (2), and also, as it seems to me, of Lord Lindley, who cites the passage from the Lord Chancellor’s judgment in *Forster v. Hale* (1) which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then

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(1) 3 Ves. 696; 5 Ves. 208; 4 E. B. 193.
(2) 5 Hare, 569.
(3) (1879) 2 De G. & J. 62.
(4) 43 Ch. D. 206.
CHANCERY DIVISION. [1900]

In re HADLEIGH CASTLE GOLD MINES, LIMITED.

Companies Act, 1890 (35 & 36 Vict. c. 99), s. 51—Shareholders' Meeting—Evidence—Declaration of Chairman.

Apart from fraud, the declaration of the chairman of a meeting that a special resolution has been passed is conclusive.

At a meeting of a company duly convoked to pass an extraordinary resolution to wind up voluntarily, the chairman declared the resolution carried on a show of hands; a poll was not demanded by five members. On a petition by a holder of paid-up shares to wind the company up compulsorily, the Court refused to entertain the question whether the resolution was carried by the requisite majority.

Young v. South African and Australasian Exploration and Development Syndicate, [1895] 2 Ch. 268, not followed.

This was a petition by two holders of fully paid-up shares for an order to wind up their company compulsorily, notwithstanding the existence of a minute to the effect that an extraordinary resolution had been passed to wind up voluntarily, or, in the alternative, to continue the winding-up if there was a valid winding-up under the supervision of the Court. On January 31, 1900, a meeting of the company, duly convened, was held for the purpose of considering and, if thought proper, passing an extraordinary resolution to wind up voluntarily and appointing a liquidator. At the meeting an amendment to the resolution was proposed and seconded by persons opposed to winding up voluntarily. The amendment, on being put, was lost by a show of hands. The meeting was a stormy one, and there was considerable conflict of evidence as to what took place. His Lordship held, on the evidence, that the resolution had been duly put to the vote by a show of hands, and the chairman declared it carried, and no proper demand for a poll, signed by five members, had been made.

The petitioners sought to impeach the validity of the extraordinary resolution on the ground that it had not been carried by a majority of three-fourths of the members present.

Younger, Q.C., and Maunder, for the petitioners. If there was in fact a declaration by the chairman of the meeting that

Solicitors: Hicks, Arnold & Mosley; Tyrrell, Lewis & Broadbent.

E. B. H.
CHANCERY DIVISION.

1956

by the School Sites Act of 1841, and the fact that the reverter
was not discussed seems to me immaterial. In the present case
I care is taken not to deal with the reverter, because one does not
want to have anything to do with the successors of the Lords of
the Manor. The whole basis of the proceedings is that the
trustees have got a title, even though the right of reverter has
arisen, by virtue of the possession which they have had.

In the same way, Attorney-General v. Price4 avoided
the question of the reverter, though there was some argument as to
whether one particular scheme might not prevent the right of
reverter operating; but Lord Cozens-Hardy M.R., who considered
the question, said: "In the fourth place, whatever may be the "rids of some persons not before the court under the reverter
"cause in the Act (as to which it would be wrong for me to
"express any opinion), the trustees so long as they are in posses-
"sion under the deed are bound by the trusts declared in the
"deed as varied by any scheme made by the court." It seems
to me that the power of the court to make a scheme for the
cy-prs application of the property in question, which was what
was done in Attorney-General v. Price," must depend upon the
continuance of the trusts as binding on the trustees unless and
until varied by law, because if the charitable trusts immediately
came to an end on the operation of the reverter, there would be
(as, indeed, it was argued by Mr. Wigglesworth for his own
purposes) a complete determination of the trusts, so that there
would be no power to direct any cy-prs application. On the
footing that the court had power to direct a cy-prs application,
it must be inferred that the trusts would continue after the
closing of the school; that is, after the possible right of reverter
had arisen. Consequently, I find it impossible to come to any
other conclusion than that the closing of the school and the
arising of the right of reverter to the estates of the grantors does
not bring to an end the trusts which were created by the deed of
grant. If that be so, then the trustees, the vicar and church-
wardens and their successors who are named in the deed of
grant, must remain trustees upon those trusts; and, if they remain
trustees upon those trusts, it is not open to them to deny the
trusts and to claim either that they hold the property for their
own beneficial purposes or that they hold it upon some trusts
other than those which were operative under the deed of grant.
It is therefore quite plain that after the closing of the school in

4 [1919] 1 Ch. 667.
3 Ibid. 676.

1 Ch.

CHANCERY DIVISION,

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the present case the vicar and churchwardens for the time being
remained trustees on the trusts to maintain a school, and that
they could not hold the property on any other trusts unless and
until either the court or the Board or Minister of Education had
settled some scheme for a cy-prs application.

I will declare that on the true construction of the grant and
the School Sites Acts, and in the events which have happened,
the freehold property was, immediately before the conveyance or
purported conveyance thereof on sale in the year 1952 to the
Parkland Manufacturing Co. Ltd., held by the plaintiffs on trust
to apply the same for the purposes of education so as to
constitute the said property as an educational endowment within
the meaning given to that expression by section 5 of the Endowed
Schools Act, 1869.

That means that the conveyance to the purchaser is void, but
the charity cannot have both the land and the money, and I
suppose there will have to be a confirmatory conveyance, or
something of that sort; because, otherwise, any purchaser from
the company might take an objection.

Declaration accordingly.

Sollicitors: Ward, Rowie & Co. for Booth, Wade, Lomas,
Walker & Co., Leeds; Treasury Solicitor.

I. G. R. M.

In re EGERTON'S WILL TRUSTS,

LLODYS BANK LTD. v. EGERTON AND ANOTHER.

June 6, 1.

Rothwell J.

[1954 E. No. 1857.]

Conflict of Laws—Marriage—Property—Matrimonial domicile—Change
of domicile contemplated on marriage—Law governing widow's
rights to husband's property.

In 1832 the testator, domiciled in England, married a French-
woman domiciled in France. After his marriage he retired from
active service with the British army and went to live in France
with his wife. They did not actually settle there until 1934, but
the testator remained in France, with the exception of his residence in
England during the war, until his death in 1931, when he had
admittedly acquired a French domicile. His widow claimed that the
testator's estate should be administered in community of property

1 Ch. 1866.
according to the law of France on the ground that the evidence showed an intention on the part of the testator and his wife to live permanently in France immediately after their marriage, which they carried out and thus justified an inference that they intended the law of France to apply to all their personal property as from the time of their marriage.

The widow’s evidence was: “Neither before nor at the time of my marriage ... nor at any time afterwards, was there any discussion or express agreement between us as to community or separation of property. It was, however, agreed between us before marriage that as soon as possible we would settle in France and establish our permanent and only home there. We carried this intention into effect.”

Held, (1) that there was a presumption that the law of the husband’s domicile (in this case English) applied to the rights of husband and wife to each other’s moveables, which presumption could be rebutted by an express contract, or a tacit contract if the circumstances warranted the inference of such a contract.

(2) That, on the facts, so much inference could be drawn from the conduct of the parties as to justify an inference by the court that they had entered into a tacit contract that the law of France was to apply to their mutual property rights.

In re Martin [1900] P. 211; 16 T.L.R. 334 considered.


ACQUERED SURRENDER.

On May 6, 1933, the testator, Charles Hertel Egerton, married the first defendant, Alice Marie Germaine Egerton, as his second wife. She was at that time domiciled in France and a Frenchwoman. She survived him and he made provision for her in his will, which she regarded as unsatisfactory.

The father of the testator was born at Bunbury, Cheshire, on February 7, 1894, and he had an English domicile of origin.

There was no evidence of his ever being in France before the year 1989, though he had previously travelled. On April 10, 1988, a letter on a business matter to the manager of the trustee department of Barclays Bank Ltd. in which he said: “I will probably be settling shortly in the South of France for reasons of health.” His Lordship held that he did not actually settle in France until after that date, and that his earlier visits to France were of a more tentative character.

Having settled in France, the testator in due course built a house for himself called the “Villa Emenda.” The testator had to acquire land for the purpose of building the house, and he entered into three separate transactions in the purchase of parents lived in England in furnished accommodation. In 1908, when the testator was 19, his parents returned to France and lived at the Château de St. Antoine, which the testator’s mother had inherited, the testator’s father having some kind of business in France.

On January 19, 1904, the testator received a commission in the Royal Engineers, and served chiefly at foreign stations. In 1912 his parents gave up the château and came to England and set up a home at Great Bedwyn in Wiltshire. In 1913 his father died at Great Bedwyn. On December 14, 1925, the testator married his first wife at the Garrison Chapel, Ranger. On April 2, 1926, while the testator was on service in India, his first wife died at Great Bedwyn, at The Croft, her mother-in-law’s home. On July 15, 1930, the will of the testator’s first wife was proved. In that will she had given her address as Bolford Farm, Salisbury, and in the set of probate she was described as being of “The Croft, Great Bedwyn.” There was no suggestion anywhere that she had a French domicile. On February 29, 1932, the testator sailed for England from India. On April 16, 1932, he arrived in England to go on leave. Shortly afterwards, on May 6, 1932, he married the first defendant at the Paddington District Register Office.

On August 27, 1932, the testator asked to be placed on retired pay “owing to reasons of health and private affairs.” On September 18, 1932, his leave expired and he was then granted sick leave until June 20, 1933. Some time in 1932, but later than September 19, he went to France on sick leave pending his retirement. On July 19, 1933, he wrote from The Croft, Great Bedwyn, to the War Office asking for leave to retire from December 21, 1933, and said that on medical grounds he would take up his future residence abroad, probably in the South of France. In August, 1933, he gave a power of attorney to a certain bank to receive his pay from the War Office. On September 17, 1934, he wrote the testator’s father was married in France, and on September 22, 1884, the testator was born at Fécamp in France. His birth was registered at the British Consulate. Although the testator, many years afterwards, in 1937 and in 1968, alleged that he had been born in Kent, his Lordship found that that statement was untrue.

The testator lived at various places in France with his parents till 1891, when they brought him to England. He was educated at a school in Bedford; after which he went to the Royal Military Academy at Woolwich. From 1901 until 1903 the testator’s
that land. In one of the transactions appeared the statement that the testator was born in Kent, which was not true, and his Lordship was unable to believe that the testator thought that it was true. It was said that the purchase was effected as between the vendor and the first defendant, “acting with “assistance and permission of her husband.” There were three documents of different date, but of substantially the same effect. The document of July 9, 1937, was (according to the translation) as follows: “Sale. Mr. and Mrs. Delgude and Mrs. Larroqueau, widow, the appears hereby sell by binding them- selves jointly and severally amongst them to the widest ordinary “factual and legal guarantees, to Mrs. Alice Marie Germaine “Hertel, wife of Mr. Charles Hertel Egerton aforesaid ‘Here “present and who accepts, together with the assistance and “permission of Mr. Egerton her husband. Mr. and Mrs. Egerton “married in the district of London on May 6, 1982, “declare to be subject to the English régime and to make the “present purchase in the name and for the personal account “of Mrs. Egerton born Hertel, so that it may remain the “separate property of the said dame Egerton in application of “the régime and English law.””

On one or other of the sites comprised in these three documents, which were dated February 7, 1937, July 9, 1937, and December 20, 1938, the testator built the “Villa Emenda.”

His Lordship found that by this time the testator had undoubtedly acquired a French domicile. He and the first defendant lived in France until shortly before September 1, 1989. About September 1, 1989, the testator was called up as an officer on the reserve list, but on October 9, 1989, he was permitted to retire on account of ill-health. He returned to France, but came back to England later. On May 3, 1946, he left England, and went back to the “Villa Emenda,” which he found intact. The testator’s mother died in 1948 in England, but the testator did not go to her funeral, or to England at all on that occasion.

On October 16, 1951, he died at the “Villa Emenda” leaving a will dated July 19, 1946. Lloyds Bank Ltd., as executors of the testator’s will, took out the present summons asking the court to determine whether his estate should be administered on the footing that the régime of community of property as provided by the law of the Republic of France, with his widow, the first defendant, applied thereon.
1 Ch. CHANCERY DIVISION.

The proposition is accepted that the law of their rights as to property should be that of the husband’s domicile.

It is possible for parties to agree before marriage that their property rights should be governed by law other than that of the husband’s present domicile, and it may be that such an agreement can be implied, but it can only be implied on the evidence as a whole. It is not really a question of domicile, since the parties might not want to acquire French domicile, but merely want to submit to the property law of France. Although it can be inferred that parties intended the law of the new country to dominate their property, it must be clear that that is so, and merely saying, as in this case, that they were going to live in France is not such evidence. The court from that evidence can infer no more than an agreement between the testator and the first defendant to go and live abroad. No inference can be drawn on this evidence to displace the normal presumption. The date of any such agreement must be before the marriage, and the court must consider the conduct of the parties as a whole and what happened after the marriage. The spouses here married in this country and remained here some time after their marriage; it cannot be suggested on the mere evidence of an intention to live abroad that they intended their property rights to be regulated by foreign law as from the date of their marriage but while still in this country. The prima facie rule is not displaced, and the law of the husband’s domicile at the date of his marriage must apply.

ROXBURGH J., having stated the facts, continued: The first question which I have to determine is not what was his domicile at the date of his death but what was his domicile at the date of his marriage on May 6, 1922. I can find absolutely nothing in his record up to that date which would suggest that he had any domicile other than English. Faced with that problem, Mr. Wilberforce developed before me what was indeed a most ingenious argument, except that I think that the first part fails. He submitted that the testator’s father was a domiciled Frenchman. His domicile of origin was, therefore, French, and there was nothing to show that he had elected to acquire an English domicile, because in truth and in fact he had been here, there, and everywhere from the time of his birth until the date of his second marriage in 1922. I think that if the premise had been well founded, that argument, though I hardly feel that it savours much of reality, would have been
difficult to displace. But I think the premise is ill founded.

The testator's father was born in that, most English county of Cheshire as long ago as 1884. His domicile of origin was English, and there is, in my judgment, no evidence whatever that he had abandoned his domicile of origin in favour of a domicile of choice in France by the time the testator was born in the year 1884. There is no evidence of his ever having been in France before 1882. I have no account whatever of his previous life, which had already endured from 1884. All I can say is that I am not prepared to find that the testator's father ever had a domicile of choice in France, and, accordingly, that ingenious superstructure collapses.

But that is by no means the end of the case, because Mr. Wilberforce has propounded an argument which might almost be said to be the professors by the case. To start on a sound foundation, I will first read rule 171 in Dicey's Conflict of Laws, 6th ed., p. 795, which says: "Where there is no marriage contract or settlement, and where no subsequent change of domicile on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to the law of the country where the marriage is celebrated or where the wife resides."

"That is an indisputable rule. So that, prima facie, the law applicable in the present case, on the finding of fact which I have just made, is English law. I have deliberately used the phrase "prima facie." I can disregard the words of the rule "where no subsequent change of domicile on the part of the parties to the marriage has taken place." In truth there was a subsequent change in the domicile in the present case. But I need not pursue that question further because, for reasons connected with French law, which I need not elaborate but which Mr. Wilberforce found quite compelling, he did not base any argument on the subsequent change of domicile.

What Mr. Wilberforce did was to explore the problem which has been the subject of debate between Dr. Morris, the author of the note that I am going to read, and Mr. Cheshire. The particular note refers to a somewhat different position, namely, where there is a marriage contract, but for the present purpose that is not important because it is really a discussion of the phrase "matrimonial domicile." The passage in the text of
"This way of looking at the matter has the advantage of avoiding
the use of a term of ambiguous meaning which suggests either
that a change of domicile can be effected by the intention to acquire a new home or
that 'matrimonial domicile' means something different from
'domicile ' simpliciter.'"

Different, however, is the approach of Dr. Cheshire in Private
International Law. The passage is too long for me to read in
extempore, and I am only going to read extracts. It begins with
these words (4th ed., at p. 491): "Although there is no clear
and decisive authority, the prevalent view is that the
determining domicile is that which the husband possesses of
the time of the marriage. On the whole it is an unobjection-
able view, for in the vast majority of cases the parties retain
the husband's domicile immediately after the marriage. Never-
theless, a rule better calculated to function more justly and
more conveniently in every case is one which serves the country
of the intended matrimonial home. This is equivalent in the
normal case to the domicile at the time of the marriage, but
its merit is that it meets the not unusual case where the parties
intend to settle immediately after marriage in another country."

After leaving something out, I read again (at p. 492): "It is
's respectfully submitted, however, that the just and reasonable
view to take'—on the facts, which he had just mentioned—
is that the law of the country in which the parties intended to
settle immediately, in which in fact they did settle, and in
which so far as they could foresee, would remain for the
'rest of their married lives, should be allowed to govern their
mutual proprietary rights. The reasonable inference from the
circumstances is that they intended to submit themselves in
'loto to the matrimonial régime, proprietary as well as personal,'
'obtaining in their future home.' Then he says (on p. 493):
'The view that the matter should be governed by the law of the
'intended matrimonial home seeks neither doctrinal analogy nor
juridic support.' Then he adds later: 'It is undeniable, of
'course, that the practical application of the doctrine of the
'intended matrimonial home may in some cases encounter con-
siderable difficulties... How quickly must the intention to
'settle in the specified country be implemented?' What if
'there is unforeseen delay or some accident which frustrates
'the design? Will effect be given to the alleged intention if it
'remains a secret locked in the breasts of the parties? These
'difficulties are no more insuperable than those which often
attend the ascertainment of intention in a disputed case of

"domicil. Everything hinges on intention, but the dominion of
"the lex domicilii of the husband at the time of the marriage
"is not displaced unless the intention to acquire a new home is
"established by irrefutable evidence. In fact, the suggested
"rule goes no further than this: There is a strong presumption
"that the lex domicilii of the husband at the time of the
"marriage governs the mutual proprietary rights of the spouses.
"This presumption is rebutted if it is proved that they intended
"before the marriage to establish their home in some country
"other than the husband's domicile and that they have in fact
"carried this intention out. The presumption may be rebutted,
"though not lightly, if the question is one to which the
"intention has been carried out." If that suggested rule
is in fact a rule of English law, then I think there is no doubt
that Mr. Wilberforce's client would succeed in the present case,
because the first defendant has deposited in the following state-
ment in an affidavit, she has not been cross-examined on it, and
it is a statement which I accept. She says this: "Neither
"before nor at the time of my marriage to the testator, nor at
"any time afterwards, was there any discussion or express
"agreement between us as to community or separation of
"property. It was however agreed between us before marriage
"that as soon as possible we would settle in France and establish
"our permanent and only home there. We carried this intention
"into effect, and neither of us ever had a permanent home
"outside France after the date of our marriage.""

I have, therefore, to approach this controversy between Dr.
Morris and Dr. Cheshire with that caution and respect which
they both deserve. I think a good starting point is a passage
in the judgment of Vaughan Williams L.J. in the Court of
Appeal in In re Martin,1 where he says this: "In my opinion,
"the effect of the husband's domicile on the matrimonial
"property is based on the presumption that you must read the
"law of the husband's domicile into the marriage contract as a
"term of it, unless there is an express agreement to the
"contrary." I must respectfully differ from those last words
"unless there is an express agreement to the contrary," because
"I see no reason why, if the facts warrant it, an agreement which
"is sometimes erroneously called "a tacit agreement" might not be
"as effective as an express agreement. What I am referring to is
"consistently described in Anson's Law of Contracts (10th ed., p. 22),
which says: "The description which I have given of the possible

2 [1900] P. 211, 212.
forms of offer and acceptance shows that conduct may take
Hs of written or spoken words, in offer, in acceptance,
As in both. A contract so made is sometimes called a tacit
contract; the intention of the parties is a matter of inference
from their conduct, and the inference is more or less easily
drawn according to the circumstances of the case." For my
part, I see no reason why an appropriate agreement excluding
the presumption could not be inferred from the conduct of
the parties if the circumstances of the case justify such an inference,
and it is, I think, something of that kind which Dicey must have
contemplated when he used the somewhat wide phrase "in the
absence of reason to the contrary."
There is one point which I must consider which I do not
remember meeting before, and on which no authority has been
cited to me, and which is very material in this case. Mr.
Wilberforce has submitted that in deciding whether or not an
agreement is to be inferred from conduct, the only question
which can be considered is conduct earlier than or contemporaneous
with the date on which the alleged contract was made. I see no
reason for such a limitation, which I should have thought would
put the court into blinkers and preclude it from doing palpable
justice in some cases. I will give an example, though perhaps a
fantastic one. Supposing that it might be relevant to determine
whether there was to be inferred from the conduct of two parties
an intention to make a voyage to South Africa, and supposing
that the evidence before the date of the journey was that they had
consulted tourist offices, obtained particulars of fares,
possibly even booked some accommodation, had written
to friends and said that they were coming, and supposing that it
was quite uncertain at that date whether there was any reason
to go to South Africa other than what was to be inferred. Then
when the departure comes, they go to New Zealand. It would
be ridiculous to exclude from the circumstances from which the
inference had to be drawn the circumstances that in the end, at
any rate, they went to New Zealand. That is perhaps an extreme
case. But I certainly take the view that if it is a question of
inferring something from conduct, the court must look at the
conduct as a whole and not stop its investigation at any particular
data. That approach, as I think, gets rid of all the difficulties.
I would, first of all, like to consider—though it is obiter
in this case—the case where the parties agreed before the marriage
to change their domicile immediately. I can well conceive that
in certain circumstances that mere fact might be enough to lead
to the court to infer that the parties intended their proprietary
rights to be regulated by the law of the new domicile from the
moment of their marriage. Take, for example, the case of two
comparatively poor persons, one, the woman, having a few
National Savings Certificates, and the man being a weekly wage
earner. They both decide to emigrate to Australia. I can well
believe that the court might think that that was enough in those
circumstances to lead to the inference that they intended their
proprietary rights (which at that stage were nugatory, but which
might thereafter become of great value), to be regulated from
the beginning of their married life by the law of Australia. I
can well believe that the court might think that they would draw some such inference. However, take the case of an elderly
widower who was a director of half a dozen companies in England
and held shares and debentures and exchequer bonds and various
things in England. He marries a young wife, and being ill and
in need of a warm climate, agrees to leave immediately to take
up his home in South Africa. I cannot imagine that any court
would ever draw the inference from the mere fact that they had
decided immediately to leave for South Africa to make it their
permanent home, and did so, that he intended that all his
proprietary rights should, as from the date of their marriage, be
governed by the law of South Africa. I have only given those
illustrations to show that what inference the court might or might
not draw from the circumstances of an immediate change of
domicile would depend on all the circumstances of the case.
There does not seem to me to be any particular difficulty.
Indeed, I think that I am, roughly speaking, adopting the
solution which Dr. Morris has suggested, though in place of the
somewhat vague phrase "reason to the contrary." I should
prefer to put it that an inference was to be drawn from all the
circumstances of the case that the law of the new domicile was
intended to apply as from the date of the marriage.
But I am not really concerned with that case, because the
evidence of the first defendant is "We would settle in France"
as soon as possible." That very phrase, in my view, connotes
that circumstances might not make it possible to settle there
immediately, and indeed there were circumstances which did
stand in the way of an immediate departure. There were certain
circumstances connected with the testator's release from the
army, and there may have been—though there is no evidence of
that—financial and business reasons. The evidence is singularly
meagre in this case. I think that the difficulties of inferring
anything of that sort are very much greater because, if it is once conceded that the parties contemplated that a period of time is to elapse before they change their domicile, and that it is most improbable that they intend the new law, or rather, the law of the new domicile, to apply before they actually change their domicile. If, therefore, any inference of this nature is to be drawn, a dichotomy of property rights appears to result, so that they would have some property subject to the law of the matrimonial domicile, that is to say, the husband’s domicile at the time of the marriage, and some property subject to the law of the State in which they had a newly acquired domicile. Such an agreement could be made— I see no juristic difficulty—but it seems to me to be an improbable arrangement and, therefore, strong evidence would be required to justify any such inference merely from conduct and without any express agreement, written or oral.

In the present case there is no evidence of any intention to substitute the new law, that is to say, the law of the changed domicile, for the law of England. All the matters on which Mr. Wilberforce relies are equivocal and could not possibly be said to be evidence which would justify any such inference. I have deliberately said that, because, even if I am wrong in thinking that I am entitled to regard the declarations in the three documents to which I have referred, I should still hold that there was not enough evidence to justify the inference which Mr. Wilberforce asks me to make. But if, as I think, I am entitled to look at those documents, then there is strong evidence that no agreement between these parties is to be inferred from their conduct that the law of France was to apply as soon as they took up their residence in France. I myself should have thought that if any kind of change of that sort was in contemplation the testator would, at some stage, have been bound to have discussed it with the first defendant, and her evidence is that he never did. In my opinion, in the circumstances of this case, it would be quite fantastic to infer from what is merely the change of domicile that it was arranged at the time of the marriage, tacitly or by conduct, that French law should apply to their property rights as soon as they settled in France, and I decline to draw any such inference.

If that be the right basis in law, that is, of course, the end of the matter. If, however, Professor Cheshire’s view is to be adopted, then I think that Mr. Wilberforce would succeed, but I can find no foundation in the authorities for Professor Cheshire’s view. In my judgment, it is reasonably plain that there is a presumption that the law of the husband’s domicile applies to a marriage, and that the presumption can be rebutted. It can certainly be rebutted by express contract, and, in my judgment, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract. Therefore, in substance, I adhere to the view expressed by Sir. Moriz. The widow, the first defendant, is not entitled to have the estate administered under the regime of community of property in accordance with French law.

Declaration accordingly.

Sollicitors: Bell, Broadrich & Grey; Janson, Cobb, Pearson & Co.; Thompson, Quarratt & Megson for Bond, Pearce, Elliott & Knape, Taunton.

I. G. R. M.

CITY OF LONDON REAL PROPERTY CO. LTD. v. WAR DAMAGE COMMISSION.

[1955 C. 5842.]

War Damage—Cost of works payment—"Making good" damage—Such payments determined in respect of damage on 10 sites—Re-development of sites by construction of two large new buildings—Whether such re-development "making good" the damage—War Damage Act, 1945 (6 & 7 Geo. 6, c. 21), s. 8 (2) (3).

Ten small properties belonging to the appellant company suffered war damage, in respect of which the War Damage Commission determined that a cost of works payment was appropriate. The company redeveloped the sites of the premises by constructing therein two large new buildings. The commission withheld the cost of works payments on the ground that the re-development was of such nature that it could not be described as making good the damage by works which included alterations or additions to the hereditament, as required by section 8 (2) of the War Damage Act, 1945, to qualify for cost of works payment.

1 War Damage Act, 1945, s. 8: "(2) If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount.

Granted (1955) 2 W.L.R. 379.

Granted (1957) 1 Ch. 374.
GRIEVE & CUNNIGHAM, &c.

IV. PAID.

"hair or heirs of the said William Grieve who shall, at the end of the thirty-

eight years, have succeeded to, and then shall be in the possession of the

said lands;" and whether any rent has been received by or for the respon-
dent in this case, under such circumstances as ought to affect his right to
succeed in this process of removing, and how far such right may be affected
by any claim which the eldest son and heir of line of, the said William
Grieve may have to the possession of the farm, if the apppellant hath not right
thereto.

For Appellant, Samuel Bosville, Thos. W. Bridg.

For Respondent, Wm. Adam, Wm. Bridg.

Note.—Under this the result to the Court of Session, the Court, on weighing
the question, ordered memorials, and referred the case for a decree (21st N.
1803) adjourned to the next sitting for the interlocutors appointed from.

The eldest son then came forward to claim his right under the lease, and brought
a reduction of his father's will, and a declaration of his right to succeed to the lease. These
two papers having been conjuncted, the Court pronounced an interlocutor reducing the
nomination of his father, and in the declarer, decreed in favour of his right to
succeed. The landlady then entered into an arrangement with the two brothers, by
which the whole was to be continued in the possession of the lease, and an interlocutor was pronounced upon that arrangement.—Vide Mrs. App.
Task, No. 9.

[ Cf. V. Pat. 16; MacLock v. Mathew's Trustees, 1 M. 331.]

IV. PAID. 581 (M. App. "Legiti." No. 31.)

ELIZABETH HOG, otherwise LASLIE, spouse of THOMAS LASLIE, Esq., of London,

and him for his interest.—Appellants.

THOMAS LASLIE of Newington.—Respondent.

(Ret cont.)

16th and 12th July 1804.

Dissent—In Recluse, or Good in Consideration—Legiti.—Inducements—Bank

Stock—Transfer—Trust—Proof of—Confess or Oath, Appeal.—In the

former branch of this case, Mrs. Laslie was successful in claiming legitimation. She
also claimed a share of the goods in consideration, as due at the dissolution of the
marriage, in right of her mother, who died in 1700. This branch of the case was one of the questions resituated. In answer to this claim, the respondent contended
and therefore, as neither by the law of England, nor by the contract of marriage entered into there, any such claim could arise, she was not entitled to claim such.

In stating of the remaining points in the cause, the Court of Session held
1. That the domicile of Roger Hog, at the time of his wife's death, was in Scotland.

2. That there was no ground for Mrs. Laslie's claim for a share of the goods in
consideration, in right of her mother, as at the dissolution of the marriage by her
dehere. 3. That in accounting for the legitimation, the respondent was entitled to state
himself as creditor for the value of the Kingston property belonging to him
upheld by the father, as also for a bond for £1000, granted to him and his wife in
consideration, and his son to his children in fee, and was entitled to deduct
these from the amount of the movables; but was not entitled to deduct the
expense of confirmation in Scotland, and probate in England. 4. That Mrs. Laslie
could not claim both the voluntary provisions settled on her, and also her

legitimation; and therefore, what she had received of the house must be deducted,
along with the sum paid to her, and the head debt of £700 due by her
husband. 5. That the 150 shares of bank stock transferred to and vested in the
respondent's name, previous to his father's death, were not subject to Mrs. Laslie's
legitimation. In the House of Lords, the first point, as to the deceased's domicile at
the time of his wife's death, was affirmed. The second point was reversed; and hence
Laslie entitled to her mother's distributive share of the goods in consideration as at her death. The third and fourth points were affirmed; [508] ex-
cepting as to the expenses of confirmation. In regard to the 6th point (bank shares),
the House of Lords specially found, that these, in so far as it should appear they stood in the name of the respondent, under an agreement or under-
standing that he would invest the same on bond to be entitled; and also such shares, the dividend of which, notwithstanding the transfer in the respondent's
name, were uplifted and received by the deceased, were to be considered subject to
Mrs. Laslie's legitimation, and interlocutor reversed in so far as inconsistent with these
declarations, and affirmed, so far as agreed with the interlocutors; and remitted to
the Appellate Board to determine what part of her claim in right of her mother
should be allowed.

The standing orders of the House of Lords, St. March 1758, require cross appeals to be
presented within one month after the decree put into the original appeal; and this
not having been done, the cross appeal dismissed.

Mr. Roger Hog, a native of Scotland, settled in London as a merchant, and
married an English lady there in 1737. She had a portion, consisting of
personal estate of £3000; and, on marriage, an antenuptial contract was entered
into by the parties, whereby Mr. Hog, in consideration of this bequest, became bound to settle
£3000 of this sum in the purchase of lands, to be taken in the name of trustees
therein named, to be held by them for the benefit of his wife and life in-
feudal during her natural life, and after the several deceases of the said
Roger Hog and Rachel Missing, his intended wife, then to the use and behoof
of all his children or children of the body of the said Rachel Missing by the said
Roger Hog lawfully to be begotten; and for such uses, intents and purposes
only, and for such estate or estates, either in fee simple, tail, &c.

A power was reserved to the wife to make such disposals, appointments, &c.,
in the same, notwithstanding her coverture, by any deed or writing; and, in
default of such writing, it was to be equally divided between their children so
begotten, "share and share alike.

In terms of this contract, a property was purchased in Kingston upon
Hampstead, and conveyed to the said mentioned trustees for the foresaid purposes.

Hogg, being a considerable fortune, Mr. Hog resolved to retire to Scotland,
and, with that view, purchased near Edinburgh, in 1722, the estate of Newilton,
where, from that time, it was alleged by the appellant, he chiefly resided until
his death, in 1762.

But, in the interval, the Kingston estate was conveyed by [508] Mrs. Hog to her
respondent, as the said lease, the respondent, reserving his father's life-rent.

Mrs. Hog died at Newington in 1760, leaving Thomas, the respondent, Roger,
Alexander, Rebecca, the appellant, Rachel, and Mary, by whom event a dissolu-
tion of the marriage took place. At this period the bulk of Mr. Hog's personal
estate was in England, where he continued to carry on business, and had a share
in a banking-house. He renewed his partnership in July 1765 for a period of
twelve years, and assumed the same time his second son Roger as a partner. He
still retained his London house. About the same time the Kingston property
was sold, after the respondent, Thomas came of age, and the price, amounting to
£3000, was paid into the hands of his father.

Rebecca married Mr. Laslie in 1776, when her father proposed to give her
property to his father of Mr. Laslie would settle a similar sum.

It has been seen in a former case, that the issue all died except three,
Thomas, Rebecca, and Alexander. It has also been seen that Mr. Hog, previous
to his death, was in the habit of making large advances to his children, in name of portion, and which, in full assortment of all they could ask or "deceased, by and through his decease, or the decease of their mother, in name of legitim, or otherwise, but Mrs. Lasheley had not accepted such. Mr. Lasheley died at Newington in March 1799, leaving by settlement certain lands therein mentioned, together with all his personal property, (some of which was in Scotland, some in England, and some in France), to his eldest son, the re-sident, burdened with the payment of debts, legacies, and provisions to younger children; the residue to be employed in purchasing land to be entailed to him and a series of heirs, in the same manner as was already done in regard to the estate of Newington.

Mrs. Lasheley left a provision of £4000, but has already been explained in a previous case, she repudiated this provision, and successfully acquired her legitimate, and was found entitled to the whole, upon the principle that the other children had discharged their trusts. It was at once time (June 7, 1779), decided that the shares of the children who had remonstrated did not accrue to their father, but fell under the division in common with his other personal property. And it was further decided, that Government stock, or annuities in England, belonging to the deceased, were personal; but [594] the case was remitted to the Lord Ordinary to hear parties further as to the other annuities in the French funds, which point was superseded. They likewise remitted to the Lord Ordinary to hear parties upon the question, in right of mother, to a share of her father's personal property as at the dissolution of the marriage. An appeal was taken against these judgments, but the interlocutors were affirmed [IV. Pat. 247].

The present questions arose on a re-see of the case before the Lord Ordinary, in terms of the result of Court of Session; and, pending the dis-cession thereof, the appellant's brother, Alexander Hog, brought his action and claim for a share of the goods in communion as at his mother's death, and also for his share of the legacies of the estate of his father, which was finally dis-posed of by appeal, and the claim totally rejected [IV. Pat. 364]. The following questions were debated in the present case, 1. Whether Mrs. Lasheley had a good claim, in her mother's right, to a share of the personal estate of her father at the dissolution of the marriage? 2. What was the true amount of Mr. Hog's personal estate at his death, subject to the appellant's legitimate? In regard to the first point, the respondents contended, 1st, That Mr. Hog's domicile, at the dissolution of his marriage, was in England, whatever his domicile might have been at the time of his death. And, consequently, his domicile was a country where the right of jure recto could have no place. 2d. That Mr. Hog being confessedly domiciled in England when his marriage was contracted, the patrimonial rights of the contracting parties, and their heirs, at the dissolution of the marriage, must be regulated by the laws of that country. 3. That Mr. Hog's marriage settlement excluded his wife's jure recto virtually or by implication. In answer to these, it was maintained by the appellant. It was difficult to point out a criterion of general application for ascertaining the domicile of a person who dwells occasionally with his family and household in different places. In such a case, intention of permanent residence seems to be one of the chief characteristics. All the evidence of intention which can be collected from Mr. Hog's correspondence shows, that in 1760 he had taken his final resolve to remove with his wife and family in the country or district where he had principally resided for the six years preceding. In all his letters to his friends in business, and other friends from 1750 downwards, he speaks of his pure [585] home of settling there. In 1752 the estate of Newington is purchased. He disposes of his dwelling house in England in 1754, and they were residing at Newington. In 1759, at the dissolution of the marriage her husband's death. He was therefore domiciled in Scotland. 2. The status of parties during the subsistence of the marriage, depends indispensably on the laws of the place where they permanently reside. The wife, during her coverture, is subject to her husband's domicile, which changes with his domicile, wherever that may be. Here it was changed voluntarily and of free choice by both; and this change could not be acknowledged of the understanding of the wife, even on entering into marriage with a Scot, so that this domicile being changed, during the subsistence of the marriage, from England, the rights of parties must be determined according to the laws of their domicile at the dissolution of the marriage, which was undoubtedly Scotland. 3. That according to such a law, a wife who accepts a conventional provision, is excluded by express statute from her right of terce. Yet her jure recto still subsists, unless a re- nunciation be expressly stipulated.

The Lord Ordinary, on this branch, pronounced (July 2, 1799), this interlocutor: "Finds that the contract of marriage between the said Mr. Hog and his wife, is not so conceived as to her, either in England or Scotland, a claim to legal provisions; finds that Mr. Hog, at the time of his wife's death, had two domiciles, one in London, another in Scotland, and that the last was the principal; finds, by the law of England, in which country Mr. Hog and his wife married, and in which they were both domiciled at the time, a commonion of property does not take place in the same as it does in this, and that a claim is not competent thereto, as it is here, to the executors of the wife, for a portion share of the property, being belonging to the husband at the time of her death; finds that the transference of Mr. Hog's principal domicile to Scotland did not heretofore, nor to any alteration of the right of his and her wife, as apiece persons, pre-established by the law of the country in which they had resided; therefore finds the pursuer has no claim, in right of her mother, to any share of the movable estate belonging to her father at the time of her mother's death, and so far sanctions the defender from the action, and decrees." On the representations from [586] both parties, the Lord Ordinary (Mar. 5, 1794) pronounced an interlocutor to the same effect.

On re-appealing, the whole Lords (Nov. 25 and 26, 1794) pronounced the interlocutor: "Finds that Mr. Hog's domicile, at the dissolution of the marriage, had his domicile in Scotland; and, before answers as to the question, opens the cause for Mrs. Hog's executors, at the dissolution of the said marriage, had a right to a third of the goods in communion, and the petitioner's title to a pro-portion thereof with interest; appoint counsel for the parties to be heard thereon in their own presence, upon the day next ensuing."
of kin, were barred by the nature of her marriage settlement executed in England, from making a claim upon the personal effects belonging to her husband in Scotland, or wherever situated.

"Sir John Scott's opinion annexed to one of the papers, is, that she was not barred from making any legal claim competent to a widow by the law of England, i.e. that she was not barred from claiming a dowry, i.e. a third of the rents and profits of any estate or heritage belonging to the husband, or her paramour; for there are only two legal claims that she could have made upon her husband, and, by the same rule, it is presumed she would have had her (less the estate out of the Scots estate, in which Mr. Hog died intestate,) but she could have made no claim, by the law of England, for any part of his movable or personal estate on an account of the will; and, by the same law, the nearest in kin of the wife, in the event of her husband's death, have no claim at all.

"By the statute, therefore, of this contract, and by the legal effect and construction with the other wills, it would have been entitled to, had the marriage been nullified, or removed by the process of annulment; or, in the event that the question is to be judged of upon the construction of the marriage settlement, the latter will of which, according to the stipulation of the provision as a full compensation for any eventual interest that she or her nearest in kin might have in the movable estate; for although one of the English counsel says that the power was not thereby barred, she had a right to do so in this case, by the contract itself. By the terms of that contract, according to Sir John Scott's opinion, Mr. Hog shall have the special provision which the contract gives her over and above all other estates, vested in trustees, or her claims of dower and personalia entire, but we are unacquainted with what is called a jointure in Scotland, as belonging to the nearest in kin, and it is not the meaning of this contract to reserve to this a legal claim, or to say anything at all about it, as we do not know that such a right exists.

"It may be said, the question is not, whether this claim is reserved, but whether it is cut off, because, if it cannot be made out that it is expressly or virtually cut off, the law itself will reserve it as matter of course, in the same way as the legal, and not being cut out expressly or virtually, whether it was held to be entire, though in the marriage settlement contains a certain provision upon the children.

"The difficulty of the question lies here: and it is argued with some plausibility, that the clause of the widowship must be distinguished from that of the children, as being the especial provision which the contract gives her over and above all other estates, vested in trustees, or her claims of dower and personalia entire, but we are unacquainted with what is called a jointure in Scotland, as belonging to the nearest in kin, and it is not the meaning of this contract to reserve to this a legal claim, or to say anything at all about it, as we do not know that such a right exists.

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Whether the respondent was a creditor upon [590] his father's funds for the sum of £2000, 5s, as the price of the estate, near Kingston, left to him in fee by being the portion of the respondent's wife, which was put into the hands of Mr. Hog, the liferentor, and also for the sum of £600, 6s, 8d, which was granted a bond for it to the respondent, and his wife in life, and their children in fee? 2. Whether the respondent is entitled to a deduction of the expense incurred by him in obtaining a confirmation in Scotland, and a probate in England of his father's will? 3. While the same advanced by Mr. Hog, in his lifetime to the appellants, with interest, should be imputed as part of Mrs. Laslby's slave, in calculating the amount of her legacies? 4. In regard to the first point, Lord Dightsmore pronounced an interlocutor, (13th December 1791), finding—"it is competent for the pursuers to prove the alleged trust in regard to the thirty-nine bank shares only scripta non perante, re- serving consideration of the other bank shares, so there is not already some evidence of the trust, and the pursuers are entitled to prove, praejudicis, by any super introducitorum by the defendones of the late Mr. Hog, besides that it was on, and accords a conjunct probate." A proof was taken, from which it appeared, that with reference to thirty-nine shares of the bank stock, that the respondent had possession of them, twenty years before his death, in his son's name, and with the special view of making him a bank director, the son giving the father a back letter, stating that those were held in trust. At the time when he was to be appointed to a bank director, the son having stated that he could not take the oath that the property was his, in consequence of his back letter; the father then said that he would destroy the letter, and destroyed it accordingly, to allow him to be free to take the oath, and the son admitted this on oath. In regard to the other eighty-one shares, those had been purchased only some short time before the father's death. Mr. Bannatyne, the banker, deposed as to the eighty-one shares, that they were transferred absolutely to the son, "so that it became as much to all intents and purposes the sole property of the respondent, as if his father had given him the value in cash out of his pocket." He also deposed, that Mr. Hog afterwards told him, that he had made a transfer of his bank stock to his son, in (591) order to prevent the possibility of his being attached to the same degree that his father was; and that in regard to the bank shares, the deceased had all along, up to the period of his death, received the dividends, and granted discharges for the same; and had always dealt with the whole stock in making up state of his affairs in his books. (May 29, 1796) - The Lord Ordinary having considered these minutes of debate, finds, prises, That 129 shares of stock of the Bank of Scotland, transferred to and vested in the defender (respondent), by the late Mr. Roger Hog of Newtonstil, anterior to the death of the late Roger Hog, are not subject to the legacies, but part of his personal estate of the heir. Second, finds, That the late Roger Hog, by a general settlement, of date 15th February 1787, disposed his personal estate, and moveable, to the defender, his eldest son, and that he appears at one time to have intended to vest his property in Bank of Scotland stock, in trust, to be laid out in the purchase of lands, to be entailed upon the defender, though he afterwards changed his mind, and transferred the same directly and utterly to the defender; finds, therefore, that in the circumstances of this case, there is no room for the presumption of law devisor non praemunito dome; and, that the defender, in complying with this provision, is entitled, at the period of his father's death, to state himself a creditor upon this account, to the movables estate left by his father, for the price of the estate near Kingston in England, which belonged to the late Mrs. Hog, and left by her back letter to the defender, and which price was uplifted and unsecured for by the late Roger Hog; and that he is likewise a creditor at the period of his father's death, for the payment of £1000, sterling, contained in a principal bond granted by the said Roger Hog to his wife, and his wife, Lady Mary Hog, in conjunct fee and life, and to the children of the marriages in fee, being the tenant which the defendant received with his wife, and which was lost in those terms to the said Roger Hog; and finds, That the said bond, and the price of the said English estate, as well as the other debts consisting of the said Roger Hog at his death, must, in the first place, be deducted from the movables estate of the said Roger Hog; and that the claim of legates can only attach upon the remainder of said movable estate. Teres, finds, that the ordinary (592) express of obtaining confirmation in Scotland, or of obtaining a probate in England by the defender, in order to carry into effect the late Roger Hog's will, being expenses which some subsequent to the existence of the pursuer's right of legates, cannot be a deduction from or burden upon the late Roger Hog's movables estate, in computing the extent of the said claim, respecting to the defender's account, and the accounts, and while the accountants, any liquid guard of debt which he may, by decent of any Court, for expenses against the pursuers; and the pursuers their objection. Quoits, finds, that it is a bonafide act of that kind, in that the pursuer cannot claim both the voluntary provisions settled upon her by her father, and also her legates, by the interlocutor of date the 11th day of March 1779, acquiesced in by the pursuer (Mrs. Laslby); and if the point was still open, it is impossible that she can, in insisting on her right of legates, as she now does, lay claim to any part of the provisions granted to her by her father, which were qualified with the condition, that the acceptance thereof should be in full of the claim of legates; and, therefore, finds, That such sums as were paid or advanced, by the late Roger Hog, to the pursuer, and her husband, in part, and to account for the provision of £1000 sterling, which he intended for the pursuer, must be deducted in the present accounting, with interest from the respective dates of such payments, from the said pursuer's share of legates; finds, that such sums as were paid or advanced by the late Roger Hog to his son, Alexander Hog, must, in like manner, be deducted in the present accounting from the said Alexander's share of legates, and refers to Mr. John Buchanan, accountant in Edinburgh, to make a statement of the funds of the late Roger Hog, subject to the claim of legates, and to a separate account of each legatee respectively to Mrs. Laslby and her husband, and to those in the right of Alexander Hog, and to report the same to the Lord Ordinary. Four several representatives against this interlocutor were refused (June 8 and 26, July 11, 1798; Nov. 25, 1799) And, on rehandling a petition to the Court, the third March 1800, found, That the sum paid by Roger Hog to his children, Alexander Hog, and Mrs. Laslby, to account of their provisions, with interest due, from their respective dates of payment, must be considered as debts due to the movables estate, subject to the legacies, but that (593) the said sums due by them respectively, are to be deducted out of their respective shares of legates; and, that no interest is to be charged upon the annual payments to Mrs. Laslby of £65 a year; and, with disallowances, adhered to the interlocutors of the Lord Ordinary decreed remanded."
The appellant presented a bill of suspension pro foro, which (July 26, 1800) was refused.

The appellants brought an action against the above interveners, 2nd July 1798, 25th March 1798, 16th June and 7th July 1800, 12th December 1791, 23rd May and 26th June, and 11th July 1798, 12th November 1790, and 14th May and 26th July 1800, the present appeal has been brought.

And Mr. Hog, in an appeal put in for him, which the appellants consider to be in the nature of a cross appeal, pray a reversal of the interlocutor 2nd July and 14th November 1790, 25th March, 25th November, and 26th February 1794, and 25th June 1788, may be altered, in so far as they find [944] that the deceased Roger Hog, at the dissolution of his marriage, had his domicile in Scotland, and that the above issued interlocutor of 23rd May 1798 may be altered, is so far as it finds that the expenses of obtaining confirmation in Scotland, or a protest in England, by Mr. Hog, cannot be deducted from the recoverable estate.

Pleading for the Appellant (Mrs. Legatt).—As to the claim for a share of the executry, in right of her mother; at the dissolution of the marriage, it is clear that the right of property at that date, must be regulated by the law of the country where they were then domiciled, because not only their personal interest, but their status as married persons, is regulated by the law of the country in which they are domiciled.

As to the right of property, there is no foundation for the opinion that the distribution of property which takes place at the dissolution of the marriage depends upon an implied contract between the parties when the contract was entered into; on the contrary, that distribution seems to arise from the mere act of the law peculiar to the domicile at the time. But, admitting this rule of implied contract to be well founded, the removal of a married pair from one domicile to another, creates a presumption that they thereby tacitly consent to alter the laws by which the distribution is to be made, especially when a probable change of domicile was foreseen at the marriage. There is no reason to suppose that a husband will fraudulently take advantage of his wife by a change of domicile, because the law of every civilized country would interfere to redress the injury. At any rate, that is the converse of the premise, where a wife, charging her domicile to gratify her husband, is excluded from participation of all her property, peculiar to the jurisdiction within which he has chosen that she should reside.

Neither authority nor precedent justify the Conveyance Act, in Scotland, in regulating the interest of parties domiciled there at the dissolution of marriage, to determine these by a foreign law. It has been decided in this case, that children of a marriage contracted in England, but dissolved in Scotland, and who were themselves born in England, because entitled, by their father's change of domicile, to the provisions of the Scotch law in favour of the wife; and there is an absolute distinction in this respect between legal provisions in favour of the wife, and those in favour of her children. Besides, there is no express covenant in the marriage articles which would have excluded Mrs. Hog from her just relata, if they had been entered [956] into out of Scotland, nor the legatee. A father, when in hostile power, may lawfully order his affairs as not to leave any claim of legitim open, e.g., by lending upon bonds securing execution. He has very ample powers over the goods in commissmion.

The second point is with reference to the two debts of £1000 each, due by the son (Alexander) to the father. On this head, I think the interlocutor right, and there is no room for presumption.

As to the third and fourth points, namely, collision. The parties seem to agree as to the evidence, namely, that those advances must be brought back as to increase the whole executry, they being truly debts due to the executry; and then, when the amount of the petitioner's claims is ascertained, deducting the legal debts, the claim of Mr. Hog will be allowed of what he has got already. As to the annual payments of £55 Mr. Hog was in use to make to Mrs. Legatt, it is difficult to make any disposition about it.

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from receiving a share of his husband's personal property if the marriage had been dissolved in England; and, of consequence, those articles cannot be interpreted less favourably on account of his change of domicile.

With regard to the amount of the legatee, it is not entitled to claim deduction therefrom of the bank stock, as there is no evidence that Mr. Hog transferred the actual property of any such stock to the respondent. The respondent's trust acknowledgment, which he admits on oath to have granted, applied to 39 shares at least, standing in his name, and this is not proved to have been cancelled. Mr. Hog's books, and accounts of his business, show that he originally paid for these 39 shares; that he always considered them as his own, and that he exercised various acts of ownership and property over them, particularly in drawing the dividends which they yielded, to the period of his death.

It is proved by the clause in Mr. Hog's settlement, releasing the respondent from the trust obligation, and by his subsequent disposition to trustees, mentioned in the deposition of Mr. Ransay, which was afterwards cancelled, that they belonged to Mr. Hog. The direct evidence therefore obtained, the 39 shares to be the presumption that the transfer of the remaining 81 were equally fictitious, and made to defraud the legatee; and that presumption was converted into proof by the deposition of Mr. Ransay; and in regard to the price of the Kingston estate, this, as appears from his father's books, although uplifted by Mr. Hog, was again repaid to him in his father's lifetime.

On the cross appeal. By your Lordships' standing order of the 8th March 1803, it is ordered that a cross appeal shall not be received, unless it be presented within one week after the answer put in to the original appeal. The respondent put in his answer on 4th December 1800, and his appeal, (which must be considered as the cross of a cross appeal,) was not presented till 4th Feb. 1801; and, of course, not in due time, and that appeal, therefore, is incompetent.

But, upon the question of domicile at the time of the death, Mr. Hog was domiciled in Scotland at the dissolution of the marriage, because he died there at that time, had generally resided there for several years before, and did generally reside there afterwards, till the period of his death. His express intention of leaving England, and making Scotland his permanent abode, is proved by his letters, both before and after he [898] left England, and always gives it exclusively the appellation of his final home. His estate there he was at the time his chief one, and he had sold his residence in England, and received his business there on a partnership. As to the expense of management, Mrs. Legatt cannot be liable for this, because she does not claim to succeed on account of her husband's death. Mrs. Legatt is the legatee of Mr. Hog. On the cross appeal. 1. In considering the question of domicile when Roger Hog was domiciled at his wife's death? your Lordships will be pleased to keep in view, that Roger Hog's domicile was once clearly fixed at London; and London, Have the respondent proved that he had changed his domicile before his wife's death, by abandoning and relinquishing his former domicile in London, and fixing a new domicile in Scotland in its place, or in his sole or principal domicile? A domicile once established, may not be changed, but the change will not be presumed, and the domicile remains where it was once fixed, till there is proof of a clear indisputable change. "Non in dubio pestis domini nullius est et omnibus aliquo tamen rem factum esset minus."

Yoct. I. 90. 2. In considering therefore the alleged change of domicile from London to Scotland, the definition of the domicile given in the Code will be attended to, "Et in una legem singulas habere domicilium non amplius sustinebit ubi fuerit rerumque a fortunatarum eorum summas constituit, "qui ne promiscua secta non esse possit rem privatam amitter, quod sit ad persignaturam jam dictatur." Mr. Hog's purchase of Newfane cannot be said to constitute a change of domicile. A person residing in
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marri in England is also very different from what [500] is in Scotland, being more extensive in some respects, and narrower in others. Thus, debts upon bonds, contracts, and the like, are vested, by the law of England, so insensibly in the husband, that, unless he renounces that property in his own lifetime, they do not go to executors, but remain with the wife as her own property, whereas by the law of Scotland, they are vested absolutely in the husband by the marriage itself, and go to executors, whether he has recovered payment of them or not.

The rights of parties being thus settled by a legal, and also an implied voluntary contract, at the time of entering into the marriage, they cannot be altered by any change of domicile during the subsistence of the marriage, the original written contract, under which the marriage was entered into, must be of force to regulate the matrimonial rights of parties in all times and places, in the same manner as a written contract would do. A change of domicile during the marriage cannot alter the matrimonial rights of the married parties for several obvious reasons. 1. The legal matrimonial contract arising from the consent of the parties is domiciled at the time of the marriage has already taken its effect in every particular and as it cannot be undone or altered to any extent, it cannot be altered at all, without manifest injustice. 2. By removing his domicile to England, while he keeps his wife's estate he has acquired under the law of England, he might defeat the wife's claim under the same law. And, in like manner, a removal of the domicile from England to Scotland, as it ought not to have the effect of depriving the husband of his rights under the written contract, and of alienating the property originally due to her, which, by the law of Scotland, remained with her notwithstanding the marriage, so neither ought it to give her a right to a third, or half of the husband's moveables, to which by the law of England she could have no title.

But the consideration of the tacit agreement of parties that their rights shall be regulated by the laws of the country where they are domiciled at the time of the marriage, leads to the same conclusion. Such an implied contract can no more be defeated by their afterwards changing their residence, than a written contract of marriage or any other contract, can be set aside, merely by the parties thereto changing their place of abode; and as the law of England, where both Mr. H. and Mrs. H. were domiciled, is of equal force when they entered into the matrimonial contract, does exclude the compulsion of goods, and any claims by the representatives [501] of the wife, in the event of her predeceasing it, to operate to that effect, just as forcibly as a special proviso in a marriage contract would do; these principles, so manifestly just and conclusive, are established by the authority of Vose, seq. lib. 19, tit. 2, § 87, and Kayne's Principles of Equity, b. 3, ch. 8, § 3, and other authorities. The respondent has literally argued this question upon the supposition of a marriage having been made in England without a contract; but, in fact, not only was the marriage entered into by parties domiciled in England at the time, but marriage articles were also executed there between the parties. This circumstance, in the respondent's apprehension, greatly strengthens his argument. Where parties marry in any country without a contract, it must be presumed they wish their rights to be settled by the law of the country, so, where parties marry with a contract, it must be presumed they have the law of the country in view; both for explaining the terms of the contract and for ascertaining those rights not expressed in the contract. If the provisions settled in the contract by Mr. H. or Mrs. H., did de jure, exclude her from the legal provisions due to her by the law of England, it must be presumed that this was the meaning of the parties. If the reverse be the law of England, it must be presumed that the reverse was also the meaning of the parties. If a change of place takes place, such contracts must be con-
THE LORD CHANCELLOR (ELWES) said:—"My Lords,—This is an appeal by Rebecca Hogge, otherwise Lashley, her husband, Thomas Lashley, Esq., her husband, against several interceptors of the Court of Session, of the 3d of July, 1793, of the 5th of March and 25th of November, 1794; the 15th of June, 1795; the 18th of December 1791, the 23d of May, the 8th of June, the 26th of June, and the 11th of July 1790, the 12th of November 1790, and the 14th of May, and the 6th of July 1800. And also an application to your Lordships, on the part of Mr. Hog, in the nature of a cross appeal, against the interceptors in the course of the same proceeding. That cross appeal comprehends questions which I shall presently state, because, before it can be taken into consideration, your Lordships will have to decide whether it was presented consistently with the rules of your Lordships' House, and that you can, though it will not much affect the principal matters in the case, will certainly affect one part of it, that which relates to a claim with reference to the expenses of confirmation in Scotland, and probate of the testator's will in England.

This case comprehends a great variety of questions, including many points deserving of great attention, which have been very eloquently argued at your Lordships' bar. My purpose, if that shall meet with the pleasure of your Lordships, is to go through the statement of the case in order does not contain any declaration whatever that the points now, meaning to consider the conclusion of the whole in the course of this judgment.

The case, with reference to the questions between those parties, has been long, upon many points, or upon an issue in the court of Session in Scotland, as long as there have been the highest points of reference at your Lordships' bar, as counsel for one of the parties in this case. It has been, therefore, my duty to go through the part of your Lordships' bar, and to come to the conclusion on this petition by your Lordships, precisely to the consideration of the questions between these parties. But the circumstances of the absence of any noble and learned Lord (Lord Thurlow) not now present, and the circumstances of the occasion absence of another noble and learned Lord (Earl of Roslyn), when I am happy to see this day present in this House, have compelled me to discontinue my duty as well as I can; which I never feel any inclination, under such circumstances, to attempt to discharge when it is not necessary that I should take the discharge of it upon myself. Then I address myself to the decision of this case, far from matter of necessity than matter of choice. In the opinion, however, which I have formed upon the subject, I have reasons to think myself that your Lordships may be.will have had occasion, in different periods, to attend to the subject matter of this cause, and who, whether present or absent, and, whether in the course of the whole of the proceedings in the case, which enables me to collect (what is of very great value unquestionably) the judicial opinions of those who may possibly be here to express it—and I must, therefore, I must, therefore, in expressing my opinion in the presence of a noble and learned Lord, who has frequently had occasion to attend to the subject matter, and who, if I shall make any mistakes, will be able to set your Lordships right.

It appears, that prevous to the year 1737, a gentleman of the name of Hog, a gentleman of the name of Lashley, and the son of the present Mr. Hog, lived in that part of this island which is hereafter to be considered as the city of London. He was a native of Scotland, but he had unquestionably lost his Scotch domicile. His domicile was at all times and purposes a domiciled Englishman, if he was contracted, in 1737, in England a marriage with this lady. Upon that marriage, a settlement was made, and it is necessary to state particularly to your Lordships, what was the nature of that settlement; because it has been considered as affecting the questions in this case, both in the Courts below, and the arguments here at the bar; and because it applies to me, upon the third consideration, that the legal effect of it, it does not in any degree affect the legal consideration of this case. It appears, that Mr. Hog received with the lady he was to be able to enter into an engagement that he would, as soon as a purchase could reasonably be had, dispose of the sum of £5000, part of the £3000 in the purchase of a real estate in England, with an obligation to convey to estate to his own use for the publication., and, from Mr. Gurney's shorthand notes.
she is to be considered as the wife of a Scotishman, or whether she is to be considered the wife of an Englishman, it being evident, on the part of Mrs. Laslay, that she never had any husband, and that Mrs. Laslay was to be considered in 1670, as the wife of a Scotishman. The consequence of that is, that if she was the wife of a Scotishman, she was entitled, predessenting her husband, to what they call a "relict", that the husband could not deprive her of, but that she had that claim, and transmitted it to her next of kin. The appellants in this case, say that she was associated with her husband, and entitled to a share under the custom of goods with him, because he was a domiciled Scotishman, because the law of Scotland creates such an interest in the case of a domiciled Scotishman, his wife predessenting him, and therefore Mrs. Laslay, as one of the children claims to be entitled, according to her interest in that, according to the law at the dissolution of that association, goes to the children of the deceased wife.

On the other hand, it is said, in the cross appeal, (if it can be considered as such), that there is no fact which bears them out in the 1670" assertion, that Mr. Hug was domiciled in Scotland in 1670, and if they are not supported in the fact that he was domiciled in Scotland in 1670, there is no merit for further consideration, but that if he was domiciled in Scotland in 1670, he was domiciled in Scotland, and therefore entitled to the same rights as any other person domiciled in Scotland, so that the contract which would have existed between Scotch persons domiciled at the death of the wife in Scotland, when the marriage had been registered in Scotland, would be null, and void in this respect, though they are proved to have been domiciled in Scotland at this marriage, when the facts described in the contract were actually in Scotland, and that the law of Scotland you are not entitled to take the rights of a Scotch wife would be if she were domiciled with the character of a Scotch wife, under the effect of a Scotch marriage contract entered into in Scotland, but if, upon the question in Scotland, and the rights of the husband, the domiciled Scotish husband, and she is to be considered as a domiciled Scotish wife, or if, upon the wife's death, she is to be considered as a domiciled Scotish wife, and her husband as a domiciled Scotish husband, you are to apply, as between the estates of such a husband and wife, the law of England, if those parties were married in England.

And beyond that, they contend that, in this particular case, if that is not the just view of the law, that a marriage settlement having been made in England, it is not to be regarded as a conventional settlement, unless it is put in writing, and put into the right hand of the person who has the benefit of it.

It is necessary also to state to your Lordships, that the defendant, Mrs. Rebecca Hug, in the year 1776, married the other appellant, a gentleman of the name of Thomas Laslay, whose father was a physician, and he was the son of a physician, that upon that occasion no contract of marriage was entered into between them. Mrs. Hug's father made a proposal, which did not take effect, and the contract was received from him the sum of £700, which was advanced to Mrs. Hug, upon her bond in 1772; and upon the sum of £500 in 1772; and an annual sum of £50 from the year 1772, during the remainder of Mr. Hug's life. I state these circumstances because it was unquestionably a domiciled Scotishman, but I have reason to believe, as to the facts.

Mr. Hug's children received from him certain provisions, which are said severally to have accepted in full satisfaction of all they could ask or demand by law, and the other being the deceased, in the manner of legitimation, has been providing for his children as a person would do, who was attending to the property, or the country in which he was domiciled, his son of business, where he consulted at the same time, he made these provisions, certainly felt that it was not matter of doubt whether the children had not a claim under their mother, [008] considering the circumstances under which their mother had died; for the deed which he expressly required before he paid to them the portion which he intended for them, contained a reservation not only of that clause, but that the "relict" was applied here in this case by the most eminent lawyers.
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now alluding, if I were to tall them, if they happened to be domiciled in the province of Canterbury, where the wife is a share-holding partner, it would not be a case for the convenience of the province of Canterbury which was to regulate and determine the question, as it was not a case of any personal relationship between the parties heretofore domiciled, it was to be determined in this, but that the circumstances that the marriage had [512] been a marriage of a man and a woman, under which kingdom, on the occasion of very unusual proceedings, was to decide upon it, and that it was to decide upon it with no communication, and no agreement between the parties at the time of the marriage. Upon this doctrine, the result would be, that if a man, domiciled within the province of Canterbury, should, in taking a journey northwards, marry a lady within the province of York, though they went immediately home again, marry a lady within the province of York, though they went immediately home again, and resided during the rest of their lives within the province of Canterbury, the wife would be entitled to five-twentieths of the personal estate.

"Taking it the other way, we have there persons who come from that part of the world to which the custom of the province of York extends: they happen, for the world to which the custom of the province of York extends: they happen, for the want of which the parties are likely to go home again, and they take their charge; they are husband and wife, in this respect, as it is, for better or for worse; and I should consider it to be quite clear law, for the want of which the parties are likely to go home again, and they take their charge; they are husband and wife, in this respect, as it is, for better or for worse; and I should consider it to be quite clear law, that a man might come from a particular part of the world of England, where he had died before he accomplished his purpose, which we may suppose was to marry a lady who had married in the North of England. Some of the children were born. I believe, born in England, and Mr. Hoar having altered his domicile, and dying shortly after, in Scotland, young estate, yet if he came up to live in London, his children were the children of a father domiciled in Scotland, notwithstanding that it was not the usual contract for the purposes of the provinces of Canterbury and London, he had not resided in the land of his native land, and died intestate, the lady then, who, in the first instance would have been entitled to dower, whom he had by the course of events lost, lost rights, which the parties had or should acquire, that was, by way of agreement, to be afterwards conveyed by deed to the province of York.

After the marriage was had, the lady and gentleman thought London was a better place to reside in than York, and the property of the parties was then transferred to London. The Lord Chancellor was of the opinion that the parties were not entitled to that acquisition, and the parties were entitled to the benefit of what the paramount law would give them. It seems that the surviving wife took according to the usual contract for the purposes of the provinces of Canterbury and London, but that the wife was not entitled to the acquirement in the same respects, as it has been understood in this case that the distinction is not substantial enough to be acted upon.

"A number of ingenious difficulties have been stated upon this subject, which may give a great deal of consideration, but we may be sure by laying out all consideration all these cases upon which this has been asked, on account to be the consequences if a man marries a one place and goes immediately to another country, the law of this country must never be changed, that was the case of a gentleman who was married in London, and went to reside in Scotland, and married a man and woman, and they were married in England, in the one case, the right to be share in the wife's property. That was afterwards conveyed by deed to the province of York. After the marriage was had, the lady and gentleman thought London was a better place to reside in than York, and the property of the parties was then transferred to London. The Lord Chancellor was of the opinion that the parties were not entitled to that acquisition, and the parties were entitled to the benefit of what the paramount law would give them. It seems that the surviving wife took according to the usual contract for the purposes of the provinces of Canterbury and London, but that the wife was not entitled to the acquirement in the same respects, as it has been understood in this case that the distinction is not substantial enough to be acted upon.

The party died, and the property of the husband dying intestate at any time from the period when the marriage was contracted, and under all the results of intestine and change which might have taken place.
It appears to me, that those who say that there is such an implied contract beg the whole question, because the question is, whether the implied contract is not previ-
sus the marriage; and it is not at all necessary to enquire, whether the husband and wife, in respect to their expectations, should change or the con-
dition of the husband changes with reference to the law of the country in which they are resident.

Cases of great hardship may be put with respect to Scotch and English ladies. They tell us, with reference to a marriage in England, that the husband was contract that marriages, all the debts due to the wife, and property in the wife, attach to him; but that in case of a marriage in Scotland, with respect to all debts due to the wife, the husband must take the trouble of taking his bill of sale to the payment of that money from those from whom it is due, before he goes to a right it is his own.

But really this difference is not very considerable, because, although in Scotland the husband, if he happens to die, without having done any act to stamp the character of the present peculiar structure of law, taken to have been a contract to go to the wife, because he chooses to forbear to take that which, previously to the connection, was his. Yet, on the other hand, there is nothing more clear than that she, by her very position, can do the whole or any part of the duty of the husband dying intestate. If it had thought proper to lay all his money upon land, and had taken the caution to lay some money in her name, she would not have had what she could call force and we call dower. On the other hand, if Mr. Hog had, for her, which includes all her goods, any number of years, a very strong inclination to take any one provision made out of it for herself.

But the true question is, in this case, it is not of necessity that the husband and wife, as the one of them, and if the one of them, which of them, is to determine, in what manner, and in what place, the husband is to struggle for the possession of provision for himself and his family whilst he lives, and for all the means of provision for the family which he shall have behind him after he is dead; and when you shall say that both in England and in Scotland (about which there can be no doubt), it is competent for the husband to spend every shilling of the property, so long as he does not spend every shilling of the property, which does that amount to this; That the husband, if he be not in his power to make it of no consequence to both his wife and children, in what country they resided, the true point seems to be this, whether there is anything irrational in a man spending, over and above what he had, the whole of his property; but not given the direction of the family as to the place of its residence, that he who has so much power of command over his own actions, and over what he believed to be his own person, which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, whose case is no express contract, the implied contract shall be taken to be, that the wife is to look to the law of the country where the husband died, for the right she is to enjoy, in case the husband

It has been the principle which it seems to me has been adopted, as far as we can we to get what has been decided with regard to those parts of the island with which we are best acquainted; and not being aware that there has been any decision which would convince us; that it appears sufficient to use those principles upon which your Lordships have already decided in this case, it does appear to me, according to my own idea, to be in the text-written subject, that it is more consonant to our own laws, and more consonant to the general principles, to say, that the implied contract is that the rights of the wife shall shift in the change of the marriage contract, as far as they deny Mrs. Hog’s right to transmit the estate to her, she predescribing her husband, the usual shares in the goods of that

In this cannot be done without deciding a question of fact, because if it be true,

Discharges were drawn out in the common form of court discharges in Scotland.
that this gentleman was not domiciled in Scotland in 1760, then, for the same reason, it must follow that he was not domiciled in England, and the point is not the same. But because he was domiciled in the law of the place of his residence, and in the law of that place, and in the law of the place of his residence, because he was domiciled in England, and the point is not the same. But because he was domiciled in Scotland, and therefore in the law of Scotland. The point is not the same.

The question whether the residence would be to the effect to which it is to be applied, and whether it is in the nature of a residence, because he was domiciled in Scotland, and therefore in the law of Scotland. The point is not the same.

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appointment made by the mother, was conveyed to the respondent Thomas Hug, and the sum of £1000 which he received with his wife, and lost to his father, who granted him a bond for it.

A third question is slightly touched upon, which is, whether the respondent was considered as being a minor when the contract of marriage was made, and this was answered in the affirmative by Mr. Couch, who considered the marriage as being invalid on account of the illegitimacy of the parties.

A fourth was, whether the same paid by Roger Hug, in his lifetime, was to be considered as forming a part of Mrs. Leask's share, in calculating what is due to her by virtue of the lease.

With reference to this point of the case, I believe it is difficult to determine the situation of the parties, inasmuch as the claimant is entitled to the declaration of the express interest in the property of his father, and the defendant is entitled to the declaration of the property in question as his own.

It is a well settled rule of law, that in cases of this kind, the court will consider the contract as being void, so far as the defendant is concerned, and that the claimant is entitled to the declaration of his interest as a tenant for life.

An important point in the case was the question of the character of the property, and whether it was movable or immovable; as to which the evidence is clear, and the court decided in favor of the movability of the property.

One of the principal questions which came before the court was the right of the respondent to the property as a tenant for life.

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who was at that election elected a director, stated to his father, that in consequence of a having granted him the above mentioned letter, he could not take the oath as a director, or as holding the said shares for and independent, upon which the father told him he did not give himself any concern on that account, as he intended to provide for his younger children, and added, that he would cancel the letter or direction which the deponent had granted, and therefore that he was at perfect liberty to do so.

But upon this the deponent was satisfied, took the oath required, and he sat as a director in his father's name, for the above shares, or to any other which were afterwards acquired by him for his father, and that he never saw the above mentioned letter after he granted it to his father, and that he knew or expect in his father's name.

This declaration, your Lordship's, observe, refers to a period of twenty years or upwards, which was the time at which the deponent was a minor, and during which he was in his minority, and held his shares under the direction of his father, and he was in no way interested in them, except as the deponent, and the shares were, in his father's name, and held in his father's name for the deponent.

It is further stated, that during the period of his father's life, he was in his minority, and during which he was in the habit of making purchases of shares, in his own name, or on other names; and unless the effect of the evidence in respect of these purchases is extremely difficult to understand, that at any period of the twenty years or upwards, to which his deposition can be referred, it can be a very accurate account of the transactions, that it was the interest of the deponent, in which he was sometimes to be a director of the Bank of Scotland, and consequently to take the shares into his own name, and not to allow any shares to be held in the name of another person, or to sell shares to any person, or to sell shares to be held in any name, or on any other name, without his consent.

It may be necessary to add, that the deponent, at some future time, will be enabled to ascertain his own position, whether it is possible that the shares in his name can speak directly.

I am not at liberty to give any great account upon the subject.

It is not to be supposed that all the shares in the name of the deponent were found, extremely necessary.

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which qualifications are necessary. One is familiar with this, that a person cannot have a seat in Parliament in this country, unless he has a clear freehold estate of 5000 a year at least — that estate once given, it is supposed can be taken back, but it cannot be taken back as against the creditors of the man to whom it has been given; and whatever may be the question as between the party who granted it and the party who receives, public considerations having determined that he shall receive that estate before he can act in that character of a member of Parliament. I conceive that there would be no manner of doubt, that every individual which the person that had vested — to wit, the Westminster Hall, would follow that property, if it went back again, even as conveyance, into the hands of the man who granted it. For where the law requires that a man shall have a property, and when a third person intervenes to give him the qualification, in order that the law may be satisfied, the law will not permit either the one or the other to dissipate the purpose for which that law was made. I take it, therefore, to be quite clear, in this case, that it is impossible to touch these 39 shares, if they should be found, upon examination, to be the subject matter with respect to which the question is to be decided, to a question merely between the father and the son.

"If, therefore, these 39 shares had been given, whether twenty years ago or ten years ago, not only to my father, or to any other, which were then purchased, either by the same individual, or by a person who had acquired in the case then that there was that gift; and, for instance, the dividends and profits of the 39 shares had remained in the husband in the bank, and had been supposed the son at that time to be under them; or, in any view of the case, considering the propriety of making no reference to the father, or the gift which he had made, in order to qualify himself, as a director, according to his qualification, he should be looking at in any short a gift, perfectly absolute, and perfectly consummated in its nature; yet if the purpose of that gift was really to defraud the other children of the marriage, you would, in such a case, say, that [530] is not the real nature of the transaction, and, examining the real nature of the transaction, you would, with respect to third persons, act as you do."

"Now, it appears to me, without saying more upon it, for it is not necessary, in my view of the case, to say more upon it, that it would be a difficult thing to maintain that proposition. In the case of a creditor in this country, unless he has carried for that purpose the diligence to such an extent that he has got a lien upon a man's property, if he upon whose property the lien is, if it is in evidence, the liabilities, he must, to an extent, as is not a qualification free from inconvenience; but, supposing the subject must be in evidence, and the creditors of A., who had no lien upon the property, it was in the hands of A., had no reason to complain; it was their own fault that they had not acquired a lien. So when it came into the hands of B., the right of his creditors immediately attached upon the shares, and it cannot be the property of both A. and B., for the purpose of permitting the claim of both and the other to attach upon it; and it would be found, it was, it would be found, if the matter of the 39 shares had been had been decided immediately after the transaction took place, it would have been competent for the younger children to have raised that which the father himself could not possibly, upon the ground of the policy of the law, have been permitted to raise in a question directly between himself and his son, to wit, he had made the transaction.

"It is extremely possible that the thing may appear a very different complication by the subsequent transactions between the parties to the property; and it is alleged in this case, that notwithstanding these thirty-nine shares, notwithstanding any other shares, more or less in number, in the name of the son, or were by transfer placed in the name of the son, yet that, in point of fact, all the transactions of the father in his lifetime, with reference to the death of his son, the conveyance all the shares, whether the shares appear to be the name of the father or stood in the name of the son, were transactions which had have taken place precisely in the same manner as they did take place, if every one of those shares, to the whole amount of a hundred and forty, had from
LAWSLEY, &c. V. HOG. p. 177. 251

...jeans, as he had so disposed of, his purpose often to have been, if it was not so really, it would be impossible to deny that it would be easily persuaded, because his purpose was to disappoint the legitimation, that, that was his express intention, and that it was to make this conveyance to the future child, taking care, however, that he should not himself either at the act, which he did, because he reserved to himself the interest; and if a person has not the wish otherwise to dispose of the capital, having the capital, he is in pretty near as good a situation as if he had the capital at his own disposal. In the Court of Session, this question was debated. It underwent great consideration before the Judges of that Court, and, having undergone great consideration before men of great eminence, who then filled the Court, they seem to have been much divided in opinion upon it.

If I have any difficulty in the law in saying, that if the interest of the children in the legitimised can be considered as at all analogous to the interest of a child in this country under his father's covenant to have him an equal share, a different rule would have been followed in that country. Such a covenant obliges the father to do nothing, because, if I agree to have this noble Lord an equal share with the noble Lord that sits next him,—if I leave this noble Lord an equal share, I must not be liable to leave the other noble Lord anything; and that leaves us no liberty, if I choose to do no inconsistent act, to throw my whole substance into the stock.

But we have constructed such a covenant as that so as to make it an act which binds to some purpose, and we have said that a disposition of property under the circumstances (I mean), by a person making himself judge of a stock comfortably situate with respect to [363] that property after such a covenant as if he had never entered in that covenant, and go on perpetually in that stock, though, without the slightest, a fraud upon the covenant; and this will not be capable of being considered, according to our law, as that species of gift in the lifetime which is to defeat the covenant to leave at the death.

I refer to this case of Agyre v. Agyre for the purpose of saying, with great deference and great respect, that I should wish rather to reserve what would be my opinion upon such a case as that, if it found its way to this House, than to say at this moment, that I should stick to the doctrine. But I have already said of this case in the doctrine which ought to be adopted by it, it seems to be quite inapplicable of being applied to the present case, as to the thirty-nine shares. If the eighty-one shares be not to be considered the case, there is a vast difference in point of fact between a case in which the person who receives the dividends with an express contract, capable of being produced, to show that he receives the dividends by virtue of a limited interest, and a case in which he receives the dividends, exactly as the absolute owner would do there being no contractual position to show that it was intended between the parties that he should have but a limited interest.

There can be no doubt, if I should lay out £10,000 in stock to-morrow, in some one of your Lordships, though it might be a possible thing, and that you should pay me the dividends for my life, in consequence of an understanding between you and me that I should have the dividends during my life, and pay the capital upon my decease, and yet I survive, if I were to die, and there was no evidence producible, but the single evidence that my money had been laid out, and that you, from time to time, had given me the dividends, I have not the dividends for my life; and pay the interest and the capital upon my decease, and yet I survive, if I were to die, and there was no evidence producible, but the single evidence that my money had been laid out, and that you, from time to time, had given me the dividends does not signify at all what had been invested in the stock or the capital of the property, but that is perhaps a possible thing. It is not a question which is raised in this case, that it is not a question which is raised in this case, that the evidence that the money had been laid out, and that you, from time to time, had given me the dividends does not signify at all what had been invested in the stock or the capital of the property, but that is perhaps a possible thing. It is not a question which is raised in this case, that the evidence that the money had been laid out, and that you, from time to time, had given me the dividends does not signify at all what had been invested in the stock or the capital of the property, but that is perhaps a possible thing. It is not a question which is raised in this case, that the evidence that the money had been laid out, and that you, from time to time, had given me the dividends does not signify at all what had been invested in the stock or the capital of the property, but that is perhaps a possible thing. It is not a question which is raised in this case, that the evidence that the money had been laid out, and that you, from time to time, had given me the dividends does not signify at all what had been invested in the stock or the capital of the property.
suspect in a court of justice, that that which was upon the face of a gift, was not intended to be a gift, before you had seen any other transaction consequent upon it which authorized you to say so; that became the 91 shares were so dealt with, if they were so dealt with, therefore the 81 ought to be so dealt with, and therefore they ought to be considered as the father's. But, to explain myself upon this subject, and wish to do this in the presence of my noble and learned friend who sits near me, do I observe that in this country, after the transfer of these 91 shares, if they had been shares in the Bank of England, if a day had come in which the son had received a dividend for the father's sake, that one single receipt of the dividend for the father's use would have been evidence, upon which you would have been authorized to say, that the receipt of the dividend was for the father's property, and that, in that case, it would not have been competent, and I wish to mark the circumstance again, that, in that case, it would not have been competent for the son to have said, provided he put it upon no other evidence than that this was a payment during the father's life, that it would not have been competent for the son to have said, because this was a payment in the lifetime of the father, therefore the interest of the father was, in the indulgence of the law, in such circumstances, to be taken to be the only interest which the father's examination of facts, there is nothing to prove a limited interest (the conveyance being absolute) but the mere circumstance of receiving dividends, that conveyance had been transferred.

Having said this much as to the 91 shares, the 81 shares too certainly under a different consideration, of course, the 81 shares might be affected by considerations suggested by any of the documents to which I have been alluding, unless as far as they can be hardly affected in reason upon the question, whether they are nine or nine, without attending to the circumstances of dealing that took place as to the 39 shares, and took place as to the 81 shares before the 91 shares were transferred, in the answer is about to mention, by Hog the father to the son.

It appears clearly by the instrument that the shares were intended by the father to have been laid out in land; that Mr. Hog intended that these 81 shares should have been vested in the purchase of land, to be subject to the same trusts, and similar to the estate of Newlands.

Between the date of that deed and his death, and shortly before his death: that no dividends were received between the date of the deed, and the father's death, and understand that he should sell them apparently absolutely to Mr. Hog the son. This must have been entirely to give them to Mr. Hog the son. 1. Mr. Hog the son of the 81 shares was a condition and an understanding that he, Mr. Hog the son, was to make the same disposition of them as the trustees were empowered and required to make of them, and that Mr. Hog had the property so laid out.

1. I believe there can be no doubt that if the father intended absolutely to give them to the son he was in whole good faith, that it was competent for him to do so, and if there were nothing more in this case than the mere circumstances of his having made the gift to the son to the property; if it were laid out in land, that it had been vested in the purchase of land, that the property was vested in the purchase of land at Newlands as I have directed money to be laid out in that neighborhood, and whether a gift, connected with such an understanding, and an understanding that he, Mr. Hog the son, was to make the same disposition of them as the trustees were empowered and required to make of them, and that he had the property so laid out.

2. I believe there can be no doubt that if the father intended absolutely to give them to the son he was in good faith, that it was competent for him to do so, and if there were nothing more in this case than the mere circumstance of conveying the property to the son, to be laid out in land and settled upon that very son, however much the Lands had vested in the son; the father having an interest, that the son did not acquire property in the property.

Upon the ground of judgment, it was competent for the father to alter his purpose, and to alter the purpose, and to transfer the property to the son, to be laid out in land and settled on the son, or to vest the property in the son, or to vest the property in the son, without leaving the land on the son, or to vest the property in the son, or to vest the property in the son.

Upon the principle of the case of the father, to vest the property in the son, and to vest the property in the son.

The proof of the case was that the property in the son.

This is the case of the father, to vest the property in the son, and to vest the property in the son, or to vest the property in the son, in such a way as to vest the property in the son, or to vest the property in the son, in such a way as to vest the property in the son, or to vest the property in the son, in such a way as to vest the property in the son.
that any court of justice could be satisfied. I will read to you Lordship's both parts of Mr. Ramsey's deposition. In the first instance, when he is examined to the interrogatories which relate to this matter. Do you know that, shortly before his death, Mr. [redacted] had executed a transfer in favour of Mr. Thomas Hog, and what shares were thereby conveyed?

Case [redacted] had executed a transfer in favour of Mr. Thomas Hog, and what shares were thereby conveyed?

why the deponent had received some anonymous letters of a very solemn nature, and which he supposed to have come from the person. The pressure is the party who is claiming in right of his wife this legacy; and there can be no doubt that if he had received a letter of a confirming nature, he was fully entitled to disregard that claim of legacy; but whatever was his purpose, he could not execute that purpose except in some way in which the law would allow him to execute that purpose.

Then Mr. Ramsey goes on to say, that he had made a transfer of his bank stock to his son, in order to prevent the possibility of his being attached, as mentioned in the above-mentioned transfer; and that Mr. Hog took it for granted that his son would fulfill what he knew he would be his intention of that, and apparently he did not change his mind with the rest of the estate. Deposes, That Mr. Hog told the deponent that he had executed a trust disposition, and, therefore, the deponent is not bound by the terms of the will.

In the first instance, when the case of Lord Brocket [redacted], and the deponent, to be held out in the purchase of land, which was to be upon the same terms as those of Mr. Hog, were dated in the same manner as the rest of his estate, and had cost him himself with taking the promissory note of his son, and had cost the deponent the principle of 100 pounds to be applied, and apply that which the deponent believed to have been reserved from that hour, as much as to all

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In the first instance, when the case of Lord Brocket [redacted], and the deponent, to be held out in the purchase of land, which was to be upon the same terms as those of Mr. Hog, were dated in the same manner as the rest of his estate, and had cost him himself with taking the promissory note of his son, and had cost the deponent the principle of 100 pounds to be applied, and apply that which the deponent believed to have been reserved from that hour, as much as to all

Mr. Hog took it for granted that his son would fulfill what he knew he would be his intention of that, and apparently he did not change his mind with the rest of the estate. Deposes, That Mr. Hog told the deponent that he had executed a trust disposition, and, therefore, the deponent is not bound by the terms of the will.
nature of it was changed, unless that change be distinctly proved. It appears to me, therefore, that this apparent is groundless, so far as it goes, and that you will be in error in your Supposition of the Court to a contrary construction. I am of another opinion, and think that the effect of the decree is that they shall be brought into collision. This decree or intention, suppose that more than one younger child might be entitled to the legacy; but if there be a valid ground of suspicion, (so, from what has been written in this House, there may be, I say no more than there may be,) that only one child will be entitled to the legacy, if your Lordship will consider the words of the interlocutor with that, that collision is to be only with respect to the legatee. Whatever finally will receive the legacy will receive the benefit of this collision; if more than one receives the benefit of the legacy, more than one will receive the benefit of the collision; if only one turns out finally to be entitled to the legacy, the collision cannot prejudice the estate of that child, because it would then be collision only to itself, for, as I read the hook, the collision is between those who are entitled to the legacy. There is another circumstance of a debt of £2,700, that, as a debt, will fall to be dealt with. There will be no difficulty then, in providing for the difference in respect to these smaller variations. I have been now stating to your Lordships:

"I would beg your Lordships' particular attention to that part of the case (though it is not a matter of very considerable value) which relates to the claim with reference to the extent of confirmation in Scotland and the probate in England. I can have no

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the death of the said Roger Hog, and also such shares, the dividends whereby shall appear, notwithstanding the transfer of the same, to have been, after such transfer, ordinarily received for the account, and applied for the use of the said Roger Hog, ought to be considered as subiect to the purveyor's claim of legitimation; and it is therefore ordered and adjudged, that all such parts of the interdicted complained of in the said appeal, as are inconsistent with those declarations, be, and the same are hereby reversed, and, as so far as they are agreeable thereto, the same be and are hereby affirmed: And it is further ordered, that the same be remitted back to the Court of Session in Scotland, to ascertain whether any, and which of the shares in the Bank of Scotland, agreedly to the declaration aforesaid, are subject to the purveyor's claim of legitimation, and also to ascertain the interests of the purveyor in her father's estate, at her mother's death and at his death, regard being had to this declaration: And it is further ordered and adjudged, that it is unnecessary to consider so much of the matters complained of in the appeal as relates to the domicile of the said Roger Hog, touching which, such declaration hath been made as is herein before considered, he might do the act before committed, and as is herein presented in denuit, it is further ordered and adjudged that the same be, and is hereby dismissed this House.


NOTE.—This case is noticed in Mr. Robertson’s excellent treatise on Personal Estates. The Lord Chancellor’s speech is printed in the Appendix to that volume, but incompletely. It is here given in a corrected form.


IV. Partnership.

WILLIAM GLOVER, Merchant, Leith.—Appellant.

John Glover, Wright in Leith, and Wm. Kerr, Merchant there, Overseers.—Respondent.

11th February 1800.

SUBMISSION.—Abdicates.—Powers to Probate.—Overseers.—Dispute as to an accounting in a copartnership concern, were, after action was raised, submitted to arbitration. The submission conferred a power on the arbitrators to pronounce the submission from time to time, and provision was made for an overseer in case of difference of opinion. They differed in opinion; and the matter coming before the overseers, he pronounced the submission. There was no power conferred on him to do so by the submission. Hold, that though the submission conferred no express power on the overseer to pronounce, yet that the powers of doing so, conferred on the arbitrators, must be held as having devolved on him when they differed in opinion.

The appellant and the respondent, John Glover, were partners in business together, which was carried on in Leith as merchants and bering-masters there. For the dissolution of the concern in October 1799, the respondent, John Glover, bought an action of count and redeeming therefor. The account in the books of the company.
is a pure question of fact without any complication of any kind, (c)ought in ordinary course to be sent to a jury. I cannot help saying for myself I think that is about the worst way of trying a right of way case that can be imagined. It has been practically settled that if it is a question of fact it is to go to a jury. Now, when this case first presented itself in the Outer-House, Lord Low saw ground for sending it, not to a jury, but to prove before himself, and if the case had been in the exact position it was in when it was debated in the Provost-council before him we should certainly have held that his judgment was right. There was then a question of a difficult kind indeed, involving questions of law which might depend on evidence led at the trial, namely, whether a person going up from Dunkeld towards Kirksmichael might be held, on reaching Santa Cruz Well, to have reached a public place. That on occasion might have raised a very difficult question, as to the law applicable to the facts, but that point has now been given up, and the question is whether there have from time immemorial, or for forty years, been public roads from Dunkeld on the line marked on the plan, coming out at what is undoubtedly a public place at Kirksmichael. It seems to me that that is a question as to which, according to the decision, there is no ground for allowing it to be tried by jury. I am therefore of opinion that we should recall the interlocution. Of course the issues must be with reference to a plan.

Lord KIlmarth.—I concur with what your Lordship has said. I quite agree that cases of this kind would be much better tried by a judge than by a jury; but I am afraid that except in special cases the practice is settled in the other way. In the present case I do not think that there is anything in the circumstances which would justify me in differing from the view of your Lordship. That is, the alternative conclusion of the summonses being withdrawn, there must be a trial by jury.

Lord STaMPHis-Darling.—I concur.

Lord LOW.—I also concur.

THE COURT recollected the interlocution quashed against; annulled the defences from the alternative conclusion of the summonses and appointed the pursuers to lodge issues within eight days.


*The first line as finally adjusted was in the following terms —
(5) Whether for forty years and upwards, or from time immemorial prior to 1804, there has been a public road or right of way for passage on foot, horseback, or for driving cattle and sheep, or any other cattle, between Dunkeld and Kirksmichael, leading the said public road or right way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge, at the point marked A on the map, and thence in a north-easterly direction past the house of Bannock and Bannockburn to the Loch nizzard; in a north-easterly direction across the heath past the town of Kirksmichael to the said main road; and thence in a northerly direction past the house of Roman Wall, or the House of Roman, to the town of Kirksmichael, or to the north-east and north-east, or north-east, from the house of Roman Wall, or to the town of Kirksmichael, and to the north-east of the town of Kirksmichael, or to the north-east of the town of Kirksmichael.
No. 23. CASES DECIDED IN THE COURT OF SESSION, &c.

No. 23.

Nov. 28, 1905. Sauwyre-Cookson v. Sauwyre-Cookson’s Trustee.

No. 22. Sauwyre-Cookson v. Sauwyre-Cookson’s Trustee.

SCOTLAND by the law-agents to the trustees, but was executed in London in English form.

Sauwyre-Cookson’s father, Mr Stirling, died on 25th July 1903.

One child only was born of the marriage, but died in 1903.

On 25 November 1904, Mrs Sauwyre-Cookson and her husband, her cousin and administrator-in-law, and for his own interest, raised an action against the surviving trustees under the rest of the will, concluding (1) for reduction of the said trust-conveyance, and also of the before-mentioned receipt and ratification, and (2) for declarator that the said trust-conveyance was revocable by Mrs Sauwyre-Cookson, at least with her husband’s consent, and that she was entitled to revoke it accordingly, and, further (3) for declarator, that on the said trust-conveyance being revoked the whole meane and estate thereby assigned, so far as remaining in the hands of the trustees, was the sole and absolute property of Mrs Sauwyre-Cookson, free from the provisions of the trust-conveyance, and that the trustees were bound to re-invest her in the said estate.

The averments in support of the reductive conclusions sufficiently appear from the opinion of the Lord President.

With respect to the revocable character of the two deeds, the parties had the following averments and pleas, the portions here printed in italics being added by way of amendment in the course of the debate in the Inner-House.

The defendants averred—(Cond. 10) “That the trust-deed was executed by the pursuer Mrs Cookson in contemplation of her marriage with a domiciled Englishman, and that the revocability, of said deed falls to be decided by the law of the matrimonial domicile, videlicet, the law of England, according to which, each marriage, irrevocable by either or both of the spouses. In any event, on her marriage and subsequent marriage, the trust-deed by Mrs Cookson thus became irrevocable by her marriage. Further, the meaning and effect of the receipt and the 5th day of June, and recorded in the Books of Council and Session in Scotland on the 12th day of July 1899, the sum of £1,000, as noted in the statement annexed and signed as relative hereto, which payment made to me at my request, and along with £500 formerly paid to me, for which I granted a receipt in favour of said trustees on the 4th day of May 1899, makes up the aggregate sum of £2,000, which in said trust-conveyance I reserved power at any time, or times, to ask, and receive from said trust, or of which sum of £2,000 I, with consent and concurrence fore- said, do hereby discharge the said trustees, the estate under their charge, and all concerns: Further, I, with consent and concurrence of my said husband, and be, for all right competent to him in the premises, grant or may, and be, for all right competent to him in the premises, to have received from Richard Stirling, Thomas Archibald Watson and Mark Bannatyne, the trustees acting under the trust-deed, a receipt on behalf of the said trustees therein mentioned in their favour.
ratification fall to be decided by the law of England, which was
in domini et loci acta, and according to which a voluntary or con-
tractual postnuptial settlement by one or both, respectively, of
spouses, or a postnuptial settlement in pursuance of inequitable ante-
nuptial marriage articles are all irrevoable at the instance of either
of the spouses, was thus irrevoable.

The pursuer answered:—(Cond. 10) “... The statements in
answer are denied so far as not coinciding herewith. With reference
to the explanations in answer, it is denied that the deeds in question
or either of them, fall to be construed, or their meaning and effect
determined, by the law of England. Not known and not admitted
that the law of England is to the effect stated. With reference to
defendants’ averments, added by way of amendment, it is denied that the
law of England is to the effect stated, or at least has any such effect
in cases where the deed sought to be ratified either contains a clause of
revocation, or is otherwise revocable at the will of the grantor, or is truly
testamentary in character.”

The pursuer pleaded, inter alia:—(4) The pursuers are entitled to
decree of declarator as aroved, in respect,—(a) said trust-conveyance
and settlement was, and is, revocable by the pursuer, at least with
her husband’s consent,Fund; and effect of said trust-conveyance;
conveyance, and the pursuer’s right to revoke the same, were in no
wise affected by Mrs Cookson’s marriage, or by her consequent acqui-
sion of an English domicile, or by the granting of the said receipt and
ratification.

The defendants pleaded, inter alia:—(3) The defendants are entitled to
aluvoror, in respect that (a) the trust-conveyance and settlement having
been executed by the pursuer Mrs Cookson in contemplation of
her marriage with a domiciled Englishman, the revocability thereof fails
to be decided by the law of England, according to which there is irrevoca-
able at the instance of the pursuers; (b) separation, in respect that the
capacity of the pursuer Mrs Cookson to revoke said trust-deed and con-
sidement fails to be decided by the law of England, i.e. Lorrain; and that according
to the law she is incapable of revoking said deed either with or without the
consent of the pursuer Mrs Cookson; (c) in any event, the receipt and
ratification having been executed by England in by spouses domiciled in
England, falls to be construed and given effect according to the law of
England, and, accordingly, the receipt and ratification is irrevo-
cable, and renders said trust-conveyance and settlement irrevo-
able at the instance of the pursuers; (4) Separation, in the same
cause, for the same reasons, all of which is conceded in terms applicable to
a Scotch trust, the jus maritum and right of administration and curatorial
power of husbands is excluded from provisions descinding to females.

On 14th June 1905 the Lord Ordinary (Ardboll) pronounced
the interlocutor:—"Finds (1) that the trust-conveyance and settlement
libeled, taken by itself, is revocable by the pursuer Mrs Sawrey-Cookson,
but the receipt and ratification libeled, the pursuers are barred from
reducing or revoking said trust-conveyance; (3) that the pursuers allege
that they are entitled to have the said receipt and ratification reduced, as has
been stated, under essential error as to its import and effect, induced by
misrepresentation and concealment: Therefore, before further answer
allows to the parties a proof of their averments relating to
the granting and execution of the receipt and ratification under redu-
ction; and (Second) the law of England applicable to both and each
of the deeds under reduction; and appoints the same to proceed
The pursuers, having argued, and argued, The trust conveyance was revocable, and it is no proof that the con\'veyance itself is to be interpreted by Scots law and was revocable. It was prepared in Scotland, in Scotch form, at the request of Scotch trustees, and was made under the same circumstances and in consequence of a Scotch deed, by Scots law and was revocable. It was therefore ancillary to a Scotch deed, and fall to be interpreted by Scots law and as a Scotch deed. But see that it fall to be interpreted as an English deed, all of which is revocable. Further, this ratification coupled with the trust conveyance did not fall under Scotch law and as a Scotch deed. It was not a contract at all, but a unilateral act of the husband, and the husband had no reason for it, and was merely a consenting party to it. The rule as to postmarital settlements by a husband did not apply with the same strictness to those granted by a wife. Here there was no ground for the marriage, and there were no children of the marriage in existence. The averments on which the conclusions of the case were based were relevant as regards both deeds, and should be remitted to probation.

The pursuers, having argued, and argued, that the deed conveyance was revocable, it was in its essence merely a receipt for money, and the clause of ratification was only added as a safeguard to the trustees.

It was actually admitted by the counsel for the pursuers that the deed, if allowed to stand unred, would be a complete answer to the action of reduction at the instance of the pursuers of the original trust conveyance, and, as already stated, I think that standing unred, it is equally valid as a bar to ratification by the pursuers or any other person.

The pursuers maintained further, that the receipt and ratification, given from its ancillary relation to the other deed, is itself revocable by the law of Scotland, just as it would have been if it had been a repetition of the other of the original trust conveyance, and, as already stated, I think that standing unred, it is equally valid as a bar to ratification by the pursuers or any other person.

I am of opinion, on the contrary, that it is irrevocable. It must be noticed that the trust conveyance is adopted not only by the wife, but by the husband, and I think that this amendment in law to the postmarital contract, for, reading the deeds together, I think that the legal result must be arrived at. Now, even supposing it to be judged of by the law of Scotland, I think that upon the authority as

1 Jan. 16, 1857, 22 R. 350.
2 Duncan v. Canan, 1855, 18 Bevan, 128, aff. 1855, 7 D 6, G. 75; De Nicolai v. Currier, L.R. [1890] 1 C. 21; Polles v. Scotch, 1855, 29 R. 293; Poule v. Henderson, L.R. [1890] 1 C. 493; Covert v. Waddell, Nov. 13, 1879, 2 R. 300; Bald v. Bald, 1897, T. 462.
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domicile, and by the law of England she had entirely lost her
capacity to revoke any such deed. 1 If she had lost her capacity to do so it
would have been clear that the deed was in its nature revocable or not. What
must rule in such cases was the capacity of the revoker according to
her loco domicili, and that alone. 2 The averments as to English law were
therefore relevant and should be remitted to probate. But,
even if the trust-conveyance had been revocable once, the effect of the
ratification was to make it no longer revocable. The ratification
was an English deed, it was executed in England by a domiciled
Englishman and Englishwoman, and fell to be construed by the law of
England. There was a relevant averment here that by the law of
England this ratification was in itself irrevocable, and that it was
a good ratification to the effect of making irrevocable a deed that might
have been revocable before. Further, the effect of this ratification,
with which the party was a party, was to make the trust-conveyance,
which had been a unilateral settlement, into an irrevocable post-
matrimonial contract, with the provisions being reasonable in the
non-revocability of reasonable postnuptial settlements applied. 3
There were here no relevant averments to support a case for
reduction. The averments as to the trust-deed did not really amount
to more than essential error, and without clear averments of misrepresentation
that was not enough. 4 With regard to the ratification the averments
were even weaker; there was no relevant averment of misrepresentation
at all, and the circumstances of the case, the parties being at
arms' length, and the pursuers being advised by independent lawyers,
utterly negative any possible case of concealment.

At advising—

LORD PRESIDENT.—Miss Stirling, a Scottish lady, who had a certain
amount of fortune, became engaged to an Englishman of the name of
Sawrey-Cookson. Acting under the advice of her father, she, before she
was married, executed a trust-conveyance and settlement which dealt with
her property. I do not need for the purposes of this case to go minutely
into the provisions of the trust-conveyance and settlement further than
to say, in popular language, that it tied her fortune up and prevented her
husband having access thereto. She afterwards married Mr Sawrey-Cook-
son, who, as I have already pointed out, was an Englishman. Under the
provisions of the trust-conveyance and settlement there was a power in the
trustee, upon the demand of Miss Stirling, to give her a certain sum of
money, limited, I think, to £2000, out of the property. The trustee was
not in any way bound to do so unless they wished. The scope seems to
be an early period to have got into pecuniary difficulties, and accordingly Mr
Cookson made a requisition to the trustees to advance her out of this money
a sum amounting to not more than £2000. The trustees—I am going

1 Cooper v. Cooper, Feb. 24, 1888, 15 R. (H. L.) 71; Guigou v. Young, 1851, 4 De G. & S. 217; Lasie v. Hog, 1884, 4 Pak., 581; Wallack, Private and Secret Law, 49; Edney, County, 100. 2 See rule 146.
2 Fraser, Husband and Wife, ii. 1502; Allan v. Kerr, Oct. 21, 1835; Mor. 34; Paddle v. Peddie's Trustees, Feb. 6, 1831, 15 R. 491; Barnes v. Scottish Widows' Fund Society, Jan. 27, 1890, 2 P. 1094.
that arises in what class of deed is this? It was contended by the defendants in this case that because this lady was going to marry an Englishman, and the deed was executed in order to induce that marriage, it must be construed as an English deed. I am satisfied that that view is erroneous. I think it is quite plain that this deed was a Scottish deed, and must be so construed. The structure of the deed is Scottish—there is, for instance, a clause of registration, which is undeniably Scottish—two of the trustees are Scottish, and it seems to me that the whole idea of the deed leads to the view that it should be Scottish, because if there was any idea at all in that girl setting her hand to a deed not of the class of a marriage contract but of a settlement of her whole estate in view of marriage, the object must have been that her adviser wanted to keep her estate under the domination of a trust which should be under the law to which they were accustomed, and not allow her estate to be dealt with by a law which to them was unfamiliar. Therefore, I have no hesitation in coming to the conclusion that the first deed was a Scottish deed. Now, being a Scottish deed there can, I think, be no doubt that if this lady had remained a Scottish woman the deed would have been itself a revocable deed, because that is the effect of the decision in the seven Judges case of Watt v. Watson. There was a division of opinion in that case, and it is obvious that the opinion of the lady in Watt v. Watson and in there is a good deal to be said on both sides, but I do not think your Lordships can have any doubt that the point was deliberately raised and determined in Watt v. Watson, and if Watt v. Watson is wrong, the only tribunal that can put it right is the House of Lords. Therefore, I am of opinion that, had that lady remained a Scottishwoman, there is no doubt that it would have been in its essence a revocable deed. On that point the Lord Ordinary is of the same opinion.

Now, the next event that happened was the marriage, and according to well-known principles of law, as to which there is no dispute, the lady on marrying a domiciled Englishman became a domiciled Englishwoman. The Lord Ordinary has dealt with this matter thus—after having stated that the deed was a Scottish deed, he says:—"I consider that the revocability of the deed must be judged of by the law which regulates the legality and operation and effect of the deed in other respects, and so judging the matter, I am of opinion that the deed of conveyance was revocable." As regards the proposition his Lordship there lays down, I have no fault to find with it. I have already said the deed was Scottish, and as such, under Watt v. Watson, it had the quality of revocability, and in the state of the record at that time I do not wonder that his Lordship did not go further, but in the discussion that took place before your Lordships it became apparent that the defendants here really wanted to put forward a plea for which at that time they had no materials on the record. But they amended their record in the course of the discussion, and they amended it in the wise, that they put in a perfectly distinct averment that by the law of England a married lady has no capacity to revoke a deed of this sort. I think that is a very good plea. Of course I am not giving any opinion as to whether the substratum of fact upon which it is founded

1 24 R. 330.
2 24 R. 330.
is first of all a good ratification, in other words, that its effect is to ratify and make good something that was revoked before; and it is also said that, by the law of England, the ratification would be itself irrecoverable. I think that is a good plea, and the Lord Ordinary on this matter is of the same opinion. But it is further said that, upon the facts, this deed of renunciation and ratification is itself redivisible, and the Lord Ordinary upholds that matter has allowed a proof. That is the part of the case on which I disagree with the Lord Ordinary. I do not think that the averments which are here made are relevant to allow a proof for the reduction of the second deed. They are very different averments, and necessarily so, from the averments which I have already held relevant upon the first deed. In the first deed you have the case of a girl nineteen years of age, knowing nothing about business, naturally depending on her father and his advisers, and practically signing anything that is put before her, and it may very well be that she signed it under truly essential error as to the nature of the deed which she was signing, such essential error being induced by the persons who got her to sign it. But what is the state of the facts when we come to the second deed? By this time the lady was of full age and married to an impecunious husband, who obviously had very direct views as to the ways of raising money. They pressed the trustees again and again to give them money out of the trust funds. I am only here going upon her own statement, and not upon any statements of the defendants. The trustees at one took the position that they would not give them any money—for every body admits that they were not bound to do so—unless the spouses would execute a ratification of the original trust-conveyance. For instance in cord, if the pursuers say this —"In or about May 1892 the pursuer Mrs Sawrey-Cookson, in terms of the reserved power in her favour contained in the deed, requested and obtained from the trustees a payment of a sum of £500, and thereafter she, on various occasions, made application to the trustees for further payments up to at least the limit of £2000 previously paid by the deed. In or about the beginning of 1894, owing to expenditure on a new residence and from other causes, the pursuer Mrs Sawrey-Cookson's financial needs became pressing, and some creditors were threatening action. She again appealed to the trustees, who declined to consider the same unless she and her husband were prepared to ratify the trust-deed. To this course the pursuer Mrs Sawrey-Cookson declined to assent, and certain correspondence ensued between her then solicitors and the solicitors acting for the trustees. The trustees, however, adhered to the position that ratification of the deed must precede any capital payment by them to Mrs Sawrey-Cookson." After a long story about the negotiations, which I pass over, the pursuers go on to say —"Ultimately under the pressure brought to bear on her by the trustees, and those representing them, and in view of her urgent financial difficulties, the pursuer Mrs Sawrey-Cookson and her husband were forced to comply with the trustees' demand that she should confirm the trust-deed, and the receipt and ratification hereinafter mentioned was accordingly signed." In view of that description of what was going on by the pursuer herself it seems to me idle to say, as she now says, that she was in ignorance of

what her legal rights, as regards the reduction or revocation of the first deed, were. At that time she was at arm's length with the trustees, she was represented by advisers of her own, and if she did not know the law she ought to have known it. Besides that, just let us press the matter and see how really out of the question her present averments are. She says, "I did not know that I could revoke the first deed, and I ought not to have been asked to sign the ratification unless I had been properly told that I could revoke the first deed." The view here of the opposing parties to this moment is that she is not entitled to revoke the first deed. That is a view upon which they may be wrong, but upon which they have at least a good deal to say for themselves upon their view of the English law. In other words her essential error amounts to this, that she was under essential error because the opposing parties did not tell her that the law was exactly the opposite of what they then thought and now think it to be. I think, when pressed, this averment is an absurd averment, and that consequently it is out of the question for your Lordships to allow any proof upon these averments as relevant to set aside the second deed. Upon the whole matter it seems to me to come to this: There are relevant averments to set aside the first deed upon the facts. There is a relevant averment, to the limited extent that I have explained, upon English law as to the capacity of the lady to revoke the first deed, which, by Scottish law, I hold to be revocable. And there are also good averments upon English law as to the effect of the second deed upon the first deed, in the view that the first deed was either revocable or reducible—it does not matter which. The real question that now comes in—what is the most convenient way of dealing with the case. I think after what I have said, and if your Lordships agree with me, obviously the most convenient way of dealing with the case is not at present to go into the facts of the case upon the first deed, but to find out what is the English law upon the two averments which are made upon the English law; and upon a certain view of the English law answer to these questions may obviate any inquiry into the facts at all. Accordingly I am of opinion that we should recall the Lord Ordinary's interlocutor—which, as I have said, I think is wrong in allowing the proof he has done in one instance—and, her status and before further answer, allow the English law to be ascertained upon those two points. When we have got the English law ascertained the case will be disposed of, or it will be in a condition in which we must either have you or may upon the averments and facts as to the first deed.
meeting was attended only by the two councillors above named, who did not constitute a quorum, no business could be done. The petitioner also called a special meeting of council in terms of section 58 of the Town-Councils (Scotland) Act, 1900, to be held on 10th November, for the purpose of electing a provost; but the three councillors who had intimated their resignation abstained from attending, and consequently no election could take place. In view of the attitude of the remaining councillors, no steps were taken or any further meeting to elect a provost. The councillors who were to resign also abstained from taking any action to enable the business of the burgh to be conducted, or any meeting of the town-council to be held, and so rendered it impossible to proceed with the execution of the provisions of the above-mentioned Acts, and of the other Acts under which the business of the burgh was regulated.

The petition further set forth that there was difficulty as to the procedure to be followed in the circumstances, as the case was not provided for by the Acts, and no steps were taken.

*The Town-Councils (Scotland) Act, 1900 (63 and 64 Vict. cap. 49), enacted:

Sec. 36. "In case of any of the following events occurring between the issue of the notice mentioned in sec. 42 [notice as to annual election of councilors] and the 1st of October in the following year, viz. inter alia, (e) the full number of councillors not being elected at any election, the full number of councillors not being elected by more than one ward;"

"(f) Any election being abortive in consequence of any error or irregularity in the proceedings, the vacancy so occurring shall be filled up ad interim by the councilors in the manner specified, "Provided that any vacancy so occurring under heading (e) or under heading (f) aforesaid may, if the town-council so resolve, be filled up ad interim as soon as may be by a special election by the electors, and such election shall be held so nearly as may be under the provisions of this Act, and the returning-officer at such election shall, subject to the approval of the town-council, fix the date of the election, and shall fix the dates for the issue of all necessary notices and for lodging and withdrawing nomination papers, so that the intervals between such respective dates shall be the same as in the case of ordinary elections under this Act."

Sec. 66. "Where any burgh shall from any cause be at any time without a legal council, any seven electors of such burgh, or any seven persons possessing the qualifications enabling them to be placed on the municipal register, may present a petition to the Sheriff requesting him to conduct an election of a council, in the manner set forth."

Sec. 113. "Wherever it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, or any part thereof, or whenever difficulty or doubt exists as to the procedure to be followed in any case, or where any case arises in connection with the election of councillors or magistrates not provided for by this Act, it shall be lawful for the town-council or any seven electors or householders within the burgh, or for the returning-officer at any election, or the town-clerk, to present a petition in manner provided by sec. 17 of the Burgh Police (Scotland) Act, 1892, and the same procedure shall follow upon said petition, and the Court, to whom the same is presented, shall have the same powers as is provided by the said section in regard to applications presented thereunder."

The Burgh Police (Scotland) Act, 1892 (56 and 57 Vict. c. 50), enacted—

"Sec. 17. Wherever in any burgh . . . it has, from a failure to observe
for an helpless from puberty upwards as to be
unable at any time to support herself. The
case must therefore be taken upon the footing that
parent is a bastard who was launched upon the
world on her own account at or after puberty,
and who now on account of supervening infirmity
seeks to fall back on her father.
In the case of Clarke v. Doran Coal Co. (1891,
18 R. (H.L.) 63 at p. 69) Lord Watson says:
"There is no case in which a parent who had
launched a bastard into the world after educating
and fitting the child to support itself, has been
held liable on the child subsequently becoming
indigent to relieve its necessities." It is clear
that in the opinion of Lord Watson the reason for
the absence of any such case is the absence of
any such rule of law. The only authority
quoted to the contrary is a dictum of Lord
Cunningham in Anderson v. Heriot's of Leith
(1845, 10 D. 960). Of this dictum Lord Watson
remains in the case of Clarke (at p. 65): "The
opinion of the learned judge, which is somewhat
speculative, goes no further than this, that a
claim against a putative father for the mainten-
ance of his child becoming indigent after it had
been self-supporting was in the year 1845 an
entire novelty." Accordingly it appears that
such a claim as is made in this action would have
been regarded as novel in 1845. It would still
have been so regarded in 1891. It is unsupported
by authority, and is negatived by Lord Watson.
A claim which is in this position cannot, I think,
be entertained in the Sheriff Court.
Agent for Pursuer, W. F. McAlpine, Solicitor,
Black-gowrie.—Agents for Defender, Mitchell &
Logan, Solicitors, Perth.
A. N. S.
SHERIFF COURT.
14th January 1910.
(Sherriff Substitute Guv at Edinburgh.)
44. Shand-Harvey v. Bennett Clark
and Others.
INTERNATIONAL LAW—HUSBAND AND WIFE—
GIFTS BY HUSBAND TO WIFE—REVOCABILITY—
MARRIAGE CONTRACT MADE UNDER LAW OF
MAURITIUS—CHANGE OF DOMICILE—BANK-
RUPTCY OF HUSBAND—HELD NOT REVOCABLE IN
RESPECT OF WIFE'S RIGHT UNDER THE MARRIAGE
CONTRACT, AND THAT LEX LOCI CONTRACTUS
MUST PREVAIL NOTWITHSTANDING SUBSEQUENT
CHANGE OF DOMICILE.

This was an action for delivery of a number of
articles at the instance of the wife of the
former proprietor of the estate of Castle Semple,
Renfrewshire, against parties who had purchased
from the trustee on the sequestrated estates of
the husband all the effects in and around Castle
Semple belonging to the bankrupt.
The spouses were married in Mauritius in
1859, and their marriage contract bore that there
should be separation of property between them
in conformity with the civil code of France. In
1883 the husband succeeded to the estate of
Castle Semple, and came permanently to Scot-
land, where he became bankrupt in 1898.
The furniture claimed in the initial writ was
comprised in a number of hulks, including (5)
gifts by the husband to the wife after they
became domiciled in Scotland.
The Sheriff Substitute on 14th January 1910
found that it was admitted that these
articles consisted of presents received between
the years 1883 and 1892 by the pursuer
from her husband after the spouses became
domiciled in Scotland, and that having regard
to the amounts of the presents and
their financial circumstances during that period,
they were of moderate value; found in law that
the pursuer's rights with regard to those articles
were regulated by the antenuptial contract
of marriage between the parties and by the law
of Mauritius, and that the gifts were not revocable.
Therefore granted decree against the defendants.

Sheriff Guv.—By the joint minute of parties
the defendants consented to decree of delivery
passing against them with regard to all the
articles set forth in the initial writ with the ex-
ception of those in the fifth head of the crave.
The defendants' contention with regard to these
is that as they were given by the husband to the
wife ante matrimonio, they are revocable in
respect that the law of Scotland and not the law
Mauritius applies, seeing that the husband,
though domiciled in Mauritius at the date of the
marriage, is now domiciled in Scotland. It is to
be noted that the question is not one of succes-
sion but one of proprietary right. That depends
upon the contract between the parties as to their
separate property. It is conceded that if the
law of Mauritius applies then the purchaser is
entitled to delivery of the articles, and that if
the law of Scotland applies she is not. The
point seems to be settled in the case of Steele v.
Curlier, [1909] A.C. 21. The ruling principle of
that case is that where the point in dispute is
one of contract, the contract fails to be construed
according to its terms and according to the law
applicable to the contract when made, and that
the contract is not affected by the accident that
one of the contracting parties changes his
domicile. In that case there was no written con-
tract, but the contract made by the law of the
place as applicable to the marriage entered into
between the parties was held not to be affected
by the change of the domicile of the husband.
The present case is a stronger one, because we
have a written antenuptial contract of marriage.

Counsel for Pursuer, William; Agents, Hender-
son & Blackstone, S.S.C.—Counsel for Defenders,
Mitchell; Agents, Campbell & Lawson, C.S.
A. N. S.
In so deciding we note in particular that among the factors which the tribunal identified as being of prime importance was that, though the applicants normally supplied labour on the basis of a request by Anderson to the union, they sometimes did so 'on direct request by the respondents to the applicants'. Moreover the tribunal's findings in fact included a finding that whenever the applicants were contacted 'either by the union or by one of the second respondents' officials to carry out work for the second respondents, each of the applicants did so'. In that situation it appears to us that the tribunal were entitled to hold that the situation was more complex than the analysis by the appellants' solicitor-advocate would suggest and in particular that the relationships were not as strictly compartmentalised as in the scheme which he presented to us, even if that scheme faithfully reflected the way in which things normally operated. In particular we have no way of knowing the relative importance or weight which the tribunal attached, in reaching their decision that the necessary mutual obligations existed, to the fact that Anderson sometimes contacted the applicants directly and that when they did the applicants always carried out the work which they were requested to do. They may have attached great weight to it as a matter of 'prime importance'. The solicitor-advocate did not suggest that there was otherwise no material on which the tribunal could properly have reached the decision which they did. That being so, the appeal must fail.

For these reasons we refuse the appeal and remit to the industrial tribunal to proceed as accords.

The COURT refused the appeal.

McGrigor Donald — Thompsons
The cause called before the First Division, comprising the Lord President (Rodger), Lord Kirkwood and Lord Caplen for a hearing on the summar roll.

At advising, on 2 April 1998 —

The dispute between the parties concerns payments by the pursuer in connection with the works on Lauriston. Using funds from a legacy, she made what amounted to a substantial contribution to the repair work. In some cases she made payments to suppliers of materials while in others she paid those who worked on the house. All told, for materials and work she paid £7,080.38 to various people, including her son. The pursuer also paid sums totalling £1,880 to the defender, who then used them to pay for materials and work. In addition she bought a number of items, worth in total £765.33, which she put into the house and garden and which she had to leave behind when she was put out of the house.

The pursuer sued the defender for recovery of her total expenditure of £9,654.71 and after a proof the sheriff pronounced decree for that sum. The sheriff principal having dismissed his appeal, the defender appealed to this court. Before us his counsel did not dispute the quantification of any of the elements in the pursuer’s claim, but argued, rather, that he should not have been held liable at all.

Some indication of the nature of the pursuer’s case is to be found in her first plea-in-law: ‘The pursuer having paid the moniescondescended upon to or for the benefit of the defender and having installed the various itemscondescended upon at the defender’s said dwellinghouse at Lauriston, all on condition that

Although, quite properly, this is not spelled out in her plea-in-law, at the most general level the pursuer’s case depends on the defender’s alleged unjust enrichment at her expense. Discussions of unjust enrichment are bedevilled by language which is often almost impenetrable. Anyone who tries to glimpse the underlying realities must start from the work of Professor Peter Birks, the Regius Professor of Civil Law at Oxford, in particular his book An Introduction to the Law of Restitution (paperback edition, 1989) and his two ground-breaking articles on Scots law, ‘Restitution: A View of the Scots Law’ (1985) 38 Current Legal Problems 67 and ‘Six Questions in Search of a Subject — Unjust Enrichment in a Crisis of Identity’, 1985 JR 227. Professor Birks (Introduction, pp 9–27) and many others have pondered what is meant by unjust enrichment. While recognising that it may well not cover all cases, for present purposes I am content to adopt the brief explanation which Lord Cullen gave in Dollar Land (Cumbernauld) Ltd v CIT Properties Ltd at pp 348–349: a person may be said to be unjustly enriched at another’s expense when he has obtained a benefit from the other’s actions or expenditure, without there being a legal ground which would justify him in retaining that benefit. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed. As the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another’s expense and where the other person may accordingly seek to have the enrichment reversed. The authorities show that some of these situations fall into recognisable groups or categories. Since these situations correspond, if only somewhat loosely, to situations where remedies were granted in Roman law, in referring to the relevant categories our law tends to use the terminology which is found in the Digest and Code. The terms include conditio indebiti; conditio causa data, causa non secuta et — to a lesser extent — conditio sine causa. It is unnecessary in this case to examine all the groups and it is sufficient to note that the term conditio causa data, causa non secuta covers situations where A is enriched because B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration. The relevant situations in this group also include cases where B paid the money or transferred the property to A on a particular basis which fails to materialise — for example, in contemplation of a marriage which does not take place. The pursuer in this action contends that the defender should be regarded as having been unjustly enriched in a manner which falls within this general category and that his enrichment should therefore be reversed.

Once he has satisfied himself that he has a relevant case, anyone contemplating bringing an action must then determine how the court is to reverse the defender’s enrichment if it decides in the pursuer’s favour. This will depend on the particular circumstances. The person framing the pleadings must consider how the defender’s enrichment has come about and then search among the usual range of remedies to find a remedy or combination of remedies which will achieve his purpose of having that enrichment reversed.

Elementary examples make this clear. For instance, if A has been unjustly enriched because he has received a sum of money from B, the enrichment can...
be reversed by ordering A to repay the money to B. B's remedy will be repetition of the sum of money from A. On the other hand, if the unjust enrichment arises out of the transfer of moveable property, the enrichment can be reversed by ordering A to transfer the property back to B. An action of restitution of the property will be appropriate. If A has been unjustly enriched by the transfer from B to him of title in heritable property, then reduction of A’s title will be required. The remedy will be an action of reduction. If A is unjustly enriched by having had the benefit of B’s services, the enrichment can be reversed by ordering A to pay B a sum representing the value of the benefit which A has enjoyed. An action of recoupment will be appropriate. So, repetition, restitution, reduction and recoupment are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way in which the particular enrichment has arisen: see Morgan Guaranty Trust Company of New York v. Latham Regional Council, per Lord President Hope at pp 155B-D. Often, of course, the situation will be complex and the pursuer will require a correspondingly sophisticated set of remedies to reverse the enrichment.

It follows that, despite what was said by both counsel in argument, in Scotland law the term condicio causa data, causa non secuta is used, not to describe a remedy, but to describe one particular group of situations in which the law may provide a remedy because one party is enriched at the expense of the other. A pursuer whose case falls into that group has a ground of action under our law. That being so, although both parties were agreed that the pursuer’s ground of action in the present case fell under the heading of the condicio causa data, it is necessary to identify the remedy which the pursuer seeks. While her crave is simply for payment of the sum of £9,654.71, it really breaks down into two distinct elements.

The larger part of the pursuer’s claim is based on the fact that, in contemplation of the parties’ marriage, she paid for repairs and for materials used in repairs to the defender’s house and that she installed various items in the house and garden. The defender has benefited from these materials, repairs and installations.

The pursuer says that the value of the benefit which she conferred on the defender is the cost of the various materials, repairs and items. That would not necessarily be so in all cases, but no point arises here since, as I have noted, the defender does not dispute that the cost to the pursuer is the true measure of the value of the benefit to him. The pursuer asks the court to order the defender to pay her the cost of the various materials, repairs and items for which she paid and which he enjoys. In this aspect of her case the pursuer is therefore seeking payment of a sum of money which will reverse the defender’s enrichment by transferring from him to her a sum which represents the value of the benefit enjoyed by him as a result of the outlay which she incurred.

The remainder of the pursuer’s claim is different. It is based on the fact that in contemplation of the parties’ marriage she paid £1,980 to the defender, which he used to pay for materials and for work on his house. The pursuer is asking the court to reverse the defender’s enrichment by ordering him to repay that sum to her. This part of her claim is therefore one for repetition of the money which she paid to the defender.

Although the two aspects of the pursuer’s claim can be distinguished in this way, none the less for each of them she relies on the same ground of action, which falls under the rubric of the condicio causa data. On the one hand the pursuer says that she paid money to the defender in contemplation of marriage, on the other she says that she expended money on his house in various ways in contemplation of marriage. Although the usual situations discussed in connection with condicio causa data are where money is paid or property transferred on a particular basis, in my view there is no relevant difference between the two aspects of the pursuer’s claim. If she is entitled to recover money paid to the defender in contemplation of a marriage which never took place, in principle she must equally be entitled to recoupment for the materials and work she paid for on the same basis.

In summary therefore, the pursuer seeks two remedies, recoupment for the benefit, valued at £7,774.71, which the defender enjoys as a result of the pursuer’s expenditure on various materials, repairs and items, and repetition of the sum of £1,880 which she paid to him. The underlying basis upon which the pursuer asks for the two remedies is, however, the same: she paid for the various materials, repairs and items, and she paid him the money, ‘on condition’ — as it is put in the plea-in-law — that the parties would marry; that did not happen, and therefore it is unjust that he should enjoy the benefits for which she paid or keep the money which she paid to him. Although these distinct aspects of the pursuer’s claim are not spelled out in her pleadings, counsel for the pursuer adopted that analysis and counsel for the defender made no submission to the contrary.

It is against the arguments advanced by the defender at the hearing of the appeal. The crucial finding in fact upon which the sheriff based his decision was that ‘the pursuer, who had benefited from a legacy, made a substantial contribution towards the repair work carried out on the property in contemplation of her prospective marriage to the defender and her relationship with him’. This led him to find in law that: The pursuer has paid the materials and installed the items narrated … on the condition that she and the defender would get married; the condition having failed to materialise, she is entitled to payment from the defender.

This finding reflects the terms of the pursuer’s first plea-in-law. Counsel for the appellant argued that since, on the findings in fact, the pursuer had made her contribution ‘in contemplation of her prospective marriage’ rather than ‘on the condition that she and the defender would get married’ she had not established the basis upon which she would be entitled to seek repetition for recoupment under the heading of the condicio causa data. He said that, before the sheriff could grant decrees, he would have required to find specifically that the pursuer’s contribution was conditional on the parties getting married.

In my view counsel stated the position too narrowly. For the pursuer counsel was quick to acknowledge that the phrase ‘on the condition that’ in the pursuer’s first plea-in-law was not particularly apt. It might tend to suggest that her claim was based on some kind of contract between the parties. He submitted that the phrase ‘in contemplation of’ used by the sheriff had been more apt and he referred to Stair, Institutions i vii 7: ‘The duty of restitution extendeth to those things, quae cadunt in non causam, which coming warrantably to our hands, and without any pactio of restitution, yet if the cause cease by which they became ours, there superveneth the obligation of restitution of them; whereas are the conditions in law, sine causa and causa data, causa non secuta, which have this natural ground, and of which there are innumerable instances, as all things that become in the possession of either party in contemplation of marriage, the marriage, which is the cause, failing to be accomplished, the interest of either party ceaseth, and either must restore.’
The passage concerns two situations. The first (described by Stair as sine causa) is where property comes into someone's hands on a particular basis which then ceases to exist. The second (described as causa data, causa non scuti) is where property comes into the person's hands on the basis of some future event which fails to materialise. In either case the property must be restored. The important thing to notice is that in both cases the duty to restore is said to be based not on agreement (pactum), but on a natural ground, i.e., it is a duty imposed by law. This is a useful reminder that, even if in Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd the House of Lords included certain situations relating to the non-performance of a contract under the heading of the condicio causa data, the basis of liability to reverse unjust enrichment is not contractual but rests on this separate duty imposed by law.

Counsel was therefore correct to argue that there was no need for the pursuer to point to any kind of contract between the parties under which the pursuer paid the various sums on condition that they married. Nor need the pursuer prove that her expenditure was conditional in any technical sense. The point from Stair shows that it would be a relevant ground for saying that the defender was unjustly enriched if the pursuer had expended the sums in contemplation of the parties' marriage and the marriage had failed to materialise. That is indeed what the sheriff has held. The defender knew that the pursuer was expending money on his house, which the parties had agreed would be their matrimonial home, and the sheriff has found that all that she did was done in contemplation of the parties' marriage. In these circumstances I reject, for the appellant's first argument as being inconsistent with Stair's statement of the law.

Counsel submitted that, in any event, the pursuer's case must fail because her actions were done for her own benefit or for her own purposes (in suo). The pursuer was aware that her son would be moving into her cottage. She would be moving into the defender's house. She did move in and lived there from about September 1991 until the end of 1992. It was anticipated that her son would be the parties' matrimonial home. The defender agreed to transfer the title of the house into joint names when the pursuer had enough money to pay the conveyancing fees. He changed his will so that the pursuer, rather than his children, would inherit the house. In that situation the pursuer had really spent money on improving the defender's house in her own interest and, that being so, she was not entitled to recover her expenditure from the defender. Counsel referred to Ferrie v Robertson; Buchanan v Stewart; Rankin v Withers; and Newton v Newton.

For present purposes the essential point which these cases vouch is that, if a person spends money on otherwise acts in his own interest (in suo), his expenditure or acts incidentally benefit someone else, the first person cannot seek any payment from the other on the basis that his expenditure or acts have resulted in a benefit to that other person. The cases denying recovery involve situations where the only alleged basis for the pursuer's claim for recompense is that he has expended money or done work from which the defender has derived an incidental benefit. The law rejects the claim: a defender is not regarded as being unjustly enriched just because he enjoys an incidental benefit from expenditure or work which a pursuer has made or carried out for his own purposes.

The pursuer's case is wholly different. She does not argue that the defender should pay her the sum in the crave simply because she paid money to him and spent money on his house from which she derived benefit. The pursuer points, rather, to a particular factor which makes the defender's enrichment unjust. Where such a relevant factor exists, that factor, rather than the mere fact of expenditure by the pursuer and benefit to the defender, constitutes the ground of action. So, in Newton the pursuer was allowed to recover from her former wife money which he had spent on a house which actually belonged to her, but which he had mistakenly thought belonged to him. The critical factor in the pursuer's ground of action was his mistake about the title: he recovered because his wife was benefiting from sums which he would not have spent if he had been aware of the true position. In the present case also the pursuer does not simply rely on the fact that she paid money to the defender and spent money on the defender's property from which he has benefited. On the contrary, the critical factor in her ground of action is that she acted as she did in contemplation of the parties' marriage, which did not take place. That is why she seeks to be repaid the money which she gave him and to be recompensed for her expenditure. The facts bear out her claim. In evidence which the sheriff accepted as truthful and reliable, the pursuer said that she would not have done what she did if the parties had not been engaged, with the intention of being married. The sheriff's findings leave no room for doubt that this was indeed the basis upon which the pursuer paid money to the defender and expended money on his house. That being so, the cases relied on by counsel afford no basis for rejecting the pursuer's claim.

For these reasons, I am satisfied that the decisions reached by the sheriff and the sheriff principal were correct and I move your Lordships to refuse the appeal.

LORD KINROSS — Your Lordship in the chair has set out fully the facts of the case and the submissions which were made on behalf of each party. The defender did not seek to challenge any of the findings in fact made by the sheriff so that the factual situation was not in dispute. Put shortly, the parties began cohabitation in the pursuer's cottage in Bridge of Earn in June or July 1989. In September 1989 the defender purchased the property known as Lauriston, Main Street, Balbeggie, although at that time it was not habitable as there were ceilings down, the floors required repair and there was no bathroom. After the defender purchased Lauriston the parties discussed marriage. In July and August 1990 they were on holiday in Jersey and while there they became formally engaged. Thereafter they continued to live as man and wife. During 1990, 1991 and 1992 a great deal of work was carried out at Lauriston and the work was almost complete by Christmas 1992. The parties moved into Lauriston in September 1991 and they continued to cohabit there until the end of 1992 by which time the defender had become adverse to the pursuer. When she returned home from work one evening she was locked out of the house and she remained homeless for six months. Accordingly, the sheriff found it established that they lived together from June or July 1989 until the end of 1992 and that they became engaged in July or August 1990 and he also made a finding that they agreed that Lauriston would be their matrimonial home. The sheriff went on to find it proved that the pursuer, who had benefited from a legacy, had made a substantial contribution towards the repair work carried out at Lauriston. In particular, she paid a total of
While the pursuer’s case is that the defendant has been unjustly enriched at her expense and she founds on the conflict causa data causa non secuta, it is, in my opinion, clear that, with a view to having the enrichment reversed, she is seeking two separate remedies, namely, recompense and repetition, both remedies being sought on the basis of the principle of unjust enrichment. In relation to the benefit which the defendant has enjoyed in consequence of her expenditure on various materials, items and work carried out, totalling £7,774.71, her claim is based on recompense and in relation to the total sum of £1,880 which she paid to the defendant, her claim is based on repetition. As I have said, it was not in dispute that the defendant had been enriched to the extent of £9,654.71.

With regard to the general issue of unjust enrichment and the conflict causa data causa non secuta I respectfully agree with the observations made by your Lordship in the chair. Counsel for the pursuer submitted that, on the basis of the findings in fact made by the sheriff, it has been established that the defendant has been unjustly enriched at the expense of the pursuer and that she is entitled to be paid the same for the sum used. Counsel for the defender had to accept that the payments made by the pursuer were in contemplation of her marriage to the defendant and that the defendant had been enriched thereby but he submitted that in the particular circumstances of this case there had not been unjust enrichment. The pursuer was not entitled to recover her expenditure as she had been acting in suo, the payments which she had made having been for her own benefit. Thus, it was said that she knew that her son would be moving into her cottage in 1911 and that she therefore would be moving into the defender’s house. In this connection, however, it should be noted that there is no finding to the effect that the pursuer had come under any obligation to move out of her own cottage. She did, in fact, move into Lauriston and live there from about September 1991 until the end of 1992. While she was living there she benefited from the improvements which had been carried out. Further, the defender had intended to transfer the title of the house into joint names when the pursuer had made available the necessary funds. The defender was not prevented from doing so by the existence of any agreement between her and the defender and I am content to proceed on the basis of the sheriff’s finding that the payments which the pursuer made were in contemplation of her marriage to the defender which failed to materialise.

In the foregoing circumstances the question which arises for our determination is whether or not the sheriff was entitled to grant decree in favour of the pursuer for the sum of £9,654.71, being the total amount which she expended on Lauriston and by which the defender was admittedly enriched.

The pursuer’s case is based on the common law principle of unjust enrichment as expressed in the conflict causa data causa non secuta. Lord Shaw, in his book on “The Burden of Proving Wrongful Enrichment”, states that the burden of proof is on the person alleging the enrichment by which the other is enriched. He further states that, in order to establish a claim for unjust enrichment, the pursuer must prove that the defendant has been enriched, that he has not paid for the benefit, and that there is a causal connection between the enrichment and the benefit received. In this case, the pursuer has established that the defendant has been enriched by the payments she made, and that there is a causal connection between the enrichment and the benefit received.

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enhance what she supposed was to become the matrimonial home. The sheriff’s finding to that effect was not challenged. Thus the defender received funds, or the benefit of funds which, in the circumstances which thereafter arose, he had no warrant to retain. It was not challenged that the amount sued for represents the total sum by which the defender is lacratus at the pursuer’s expense.

The second branch of the appeal was based on the contention that the facts of the case show that the expenditure of money by the pursuer was essentially, or in any event partially, for her own benefit and that since she had been acting in re sua she could not claim recovery from the defender of the value of any incidental benefit he may have received. The problem with this submission is that it does not accord with the facts which the sheriff found proved. The sheriff has found that the reason why the pursuer expended a large portion of her capital in order to develop the house then in the name of the defender was not because she was seeking lodgings in his house but because she was expecting to marry him. She was prepared to employ her capital to enhance what she expected to become the matrimonial home. It was the expectation that the house would be her married home, which she and the defender would share as man and wife, which was the sine qua non of her decision to apply her capital as she did. In the note attached to his interlocutor of 14 June 1996 the sheriff found in her evidence that, had she not become engaged with the intention of marrying, she would have not contributed anything to the house. Thus, to suggest that the reality was that she was contributing to the house for no other reason than to provide herself with lodgings is to overlook the basis on which she acted and is simply not consistent with the factual findings of the court. Therefore, the second branch of the defender’s appeal is also without merit. In my view the appeal should be refused.

THE COURT refused the appeal.

Alex Morton & Co (for Johnston & Herron, Lochgelly) — Balfour & Manson (for Campbell Brooke & Myers, Perth)
Note

1. Excludes by the House of Commons Members’ Fund Act 1962 (c. 53), s. 1(5).

1. Where a case falling within subsection (4) of section 3 of this Act, property belonging to the narrower-range part of a trust fund—
(a) it invested otherwise than in a narrower-range investment, or
(b) being so invested, it retained and not transferred or as soon as may be reinvested as mentioned in subsection (2) of section 2 of this Act,
then, so long as the property continues to be invested and comprised in the narrower-range part of the fund, section one of this Act shall not authorise the making or retention of any wider-range investment.

2. Section 4 of the Trustee Act 1921, or section 33 of the Trusts (Scotland) Act 1921 (which relieve a trustee from liability for retaining an investment which has ceased to be authorised), shall not apply where an investment ceases to be authorised in consequence of the foregoing paragraph.

Part I

Intestate Succession

Assimilation of heritage to moveables for purpose of devolution on intestacy

1.—(1) The whole of the intestate estate of any person dying after the commencement of this Act (so far as it is estate the succession to which falls to be regulated by the law of Scotland) shall devolve, without distinction as between heritable and moveable property, in accordance with—
(a) the provisions of this Part in this Act; and
(b) any enactment or rule of law in force immediately before the commencement of this Act which is not inconsistent with those pro-
visions and which, apart from this section, would apply to that person’s moveable intestate estate, if any;
and, subject to section 37 of this Act, any enactment or rule of law in force immediately before the commencement of this Act with respect to the succession to intestate estates shall, in so far as it is inconsistent with the provisions of this Part of this Act, cease to have effect.

(2) Nothing in this Part of this Act shall affect legal rights or the prior rights of a surviving spouse; and accordingly any reference in this Part of this Act to an intestate estate shall be construed as a reference to so much of the net intestate estate as remains after the satisfaction of those rights, or the proportion thereof properly attributable to the intestate estate.

Right of succession to intestate estate

2.—(1) Subject to the following provisions of this Part of this Act—

(a) where an intestate is survived by children, they shall have right to the whole of the intestate estate;

(b) where an intestate is survived by either of, or both, his parents and is also survived by brothers or sisters, but is not survived by any prior relative, the surviving parent or parents shall have right to one half of the intestate estate and the surviving brothers and sisters to the other half thereof;

(c) where an intestate is survived by brothers or sisters, but is not survived by any prior relative, the surviving brothers and sisters shall have right to the whole of the intestate estate;

(d) where an intestate is survived by either of, or both, his parents, but is not survived by any prior relative, the surviving parent or parents shall have right to the whole of the intestate estate;

(e) where an intestate is survived by a husband or a wife, but is not survived by any prior relative, the surviving spouse shall have right to the whole of the intestate estate;

(f) where an intestate is survived by uncles or aunts (being brothers or sisters of either parent of the intestate), but is not survived by any prior relative, the surviving uncles and aunts shall have right to the whole of the intestate estate;

(g) where an intestate is survived by a grandparent or grandparents (being a parent or parents of either parent of the intestate), but is not survived by any prior relative, the surviving grandparent or grandparents shall have right to the whole of the intestate estate;

(h) where an intestate is survived by brothers or sisters of any of his grandparents (being a parent or parents of either parent of the intestate), but is not survived by any prior relative, those surviving brothers and sisters shall have right to the whole of the intestate estate;

(i) where an intestate is not survived by any prior relative, the ancestors of the intestate (being remoter than grandparents) generation by generation successively, without distinction between the paternal and maternal lines, shall have right to the whole of the intestate estate; so however that, failing ancestors of any generation, the brothers and sisters of any of those ancestors shall have right thereto before ancestors of the next more remote generation.

(2) References in the foregoing subsection to brothers or sisters include respectively brothers and sisters of the half blood as well as of the whole blood; and in the said subsection “prior relative”, in relation to any class of person mentioned in any paragraph of that subsection, means a person of any other class who, if he had survived the intestate, would have had right to the intestate estate or any of it by virtue of an earlier paragraph of that subsection or by virtue of any such paragraph and section 5 of this Act.
(i) those of the said persons who are nearest in degree of relationship to the intestate (in this section referred to as "the nearest surviving relatives"); and
(ii) any other persons who were related to the intestate in that degree, but who have predeceased him leaving issue who survive him; and of those parts, one shall be taken by each of the nearest surviving relatives, and one shall be taken per stirpes by the issue of each of the said predeceased persons.

NOTE
1 Further sentence added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70), Sched. 1 (estate of any person dying after the commencement of that Act), and repealed by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Sched. 2.

Saving of right of Crown as ultimus haeres

7. Nothing in this Part of this Act shall be held to affect the right of the Crown as ultimus haeres to any estate to which no person is entitled by virtue of this Act to succeed.

PART II

LEGAL AND OTHER PRIOR RIGHTS IN ESTATES OF DECEASED PERSONS

NOTE
1 See the Finance Act 1985 (c. 54), s.485(3) and (4).

Prior rights of surviving spouse, on intestacy, in dwelling house and furniture

8.-(1) Where a person dies intestate leaving a spouse, and the intestate estate includes a relevant interest in a dwelling house to which this section applies, the surviving spouse shall be entitled to receive out of the intestate estate-

-(a) where the value of the relevant interest does not exceed £10,000 or such larger amount as may from time to time be fixed by order of the Secretary of State—

(i) if subsection (2) of this section does not apply, the relevant interest;

(ii) if the said subsection (2) applies, a sum equal to the value of the relevant interest;

(b) in any other case, the sum of £10,000 or such larger amount as may from time to time be fixed by order of the Secretary of State:

Provided that, if the intestate estate comprises a relevant interest in two or more dwelling houses to which this section applies, this subsection shall have effect only in relation to such one of them as the surviving spouse may elect for the purposes of this subsection within six months of the date of death of the intestate.

(2) This subsection shall apply for the purposes of paragraph (a) of the foregoing subsection if—

(a) the dwelling house forms part only of the subjects comprised in one tenancy or lease under which the intestate was the tenant, or

(b) the dwelling house forms the whole or part of subjects an interest in which is comprised in the intestate estate and which were used by the intestate for carrying on a trade, profession or occupation, and the value of the estate as a whole would be likely to be substantially diminished if the dwelling house were disposed of otherwise than with the assets of the trade, profession or occupation.

NOTES
1 Amended by S.I. 1993 No. 2690, in the case of a person dying on or after 28th November 1992. Saved by the Prescription and Limitation (Scotland) Act 1973 (c. 52), Sched. 1 para. 2(f).

[Release 30.19 - xi - 93]
Prior right of surviving spouse to financial provision on intestacy

9.— (1) Where a person dies intestate and is survived by a husband or wife, the surviving spouse shall be entitled to receive out of the intestate estate—

(a) if the intestate is survived by issue, the sum of £30,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, or

(b) if the intestate is not survived by issue, the sum of £50,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, together with, in either case, interest at the rate of 7 per cent per annum or at such rate as may from time to time be fixed by order of the Secretary of State on such sum from the date of the intestate’s death until payment.

Provided that where the surviving spouse is entitled to receive a legacy out of the estate of the intestate (other than a legacy of any dwelling house to which the last foregoing section applies or of any furniture and plate of any such dwelling house), he or she shall, unless he or she renounces the legacy, be entitled under this subsection to receive only such sum, if any, as remains after deducting from the sum fixed by virtue of paragraph (a) of this subsection or the sum fixed by virtue of paragraph (b) of this subsection, as the case may be, the amount or value of the legacy.

(2) Where the intestate estate is less than the amount which the surviving spouse is entitled to receive by virtue of subsection (1) of this section the surviving spouse shall be satisfied by the transfer to him or her of the whole of the intestate estate.

(3) The amount which the surviving spouse is entitled to receive by virtue of subsection (1) of this section shall be borne by, and paid out of, the parts of the intestate estate consisting of heritable and moveable property respectively in proportion to the respective amounts of those parts.

(4) Where by virtue of subsection (2) of this section a surviving spouse has right to the whole of the intestate estate, he or she shall have the right to appoint an executor.

(5) The rights conferred by this subsection are incapable of being exercised by a surviving spouse in his or her deceased spouse’s estate shall not be exigible out of the estate of any person dying after the commencement of this Act.

(6) For the purposes of this section—

(a) the expression “intestate estate” means so much of the net intestate estate as remains after the satisfaction of any claims under the last foregoing section, and

(b) the expression “legacy” includes any payment or benefit to which a surviving spouse becomes entitled by virtue of any testamentary disposition, and the amount or value of any legacy shall be ascertained at the date of the intestate’s death.

NOTES

1. Saved by the Prescription and Limitation (Scotland) Act 1973, s.6(2), Sch. 1, para. 2(b).

2. Saved by the Prescription and Limitation (Scotland) Act 1973, s.6(2), Sch. 1, para. 2(b).

Provisions supplementary to sections 8 and 9

9A. (1) Any order of the Secretary of State, under section 8 or 9 of this Act, fixing an amount or rate—

(a) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament; and

(b) shall have effect in relation to the estate of any person dying after the coming into force of the order.

NOTE

*1. Added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c. 55), s. 4.

Abolition of fees and county courts, and calculation of legal rights

10. (1) The right of courtesy of a surviving husband in his deceased wife’s estate and the right of terece of a surviving wife in her deceased husband’s estate shall not be exigible out of the estate of a person dying after the commencement of this Act.

(2) The amount of any claim to jus relicti, jus relicvati or legitimatum out of an estate shall be calculated by reference to so much of the net moveable estate as remains after the satisfaction of any claims thereon under the two last foregoing sections.

10A. (1) Added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70), s. 2, in respect of estates of persons dying on or after 25th November 1968, and repealed by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Sch. 2.

Representation in, and division of, legacies

11. (1) Subject to the next following subsection, where a person (hereinafter in this section referred to as “the deceased”) dies predeceased by a child who has left issue who survive the deceased, and the child would, if he had survived the deceased, have been entitled to legitimatum out of the deceased’s estate, such issue shall have the like right to legitimatum as the child would have had if he had survived the deceased.

(2) If, by virtue of the foregoing subsection or otherwise, there are two or more persons having right among them to legitimatum, then the legitimatum shall—

(a) if all of those persons are in the same degree of relationship to the deceased, be divided among them equally, and

(b) in any other case, be divided equally into a number of parts equal to the aggregate of—

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(i) those of the said persons who are nearest in degree of relationship to the deceased (in this paragraph referred to as "the nearest surviving relatives")

(ii) any other persons who were related to the deceased in that degree and who (if they had survived him) would have been entitled to legitim out of his estate, but who have predeceased him leaving issue who survive him and are entitled to legitim out of his estate;

and, of those parts, one shall be taken by each of the nearest surviving relatives, and one shall be taken per stirpes by the issue of each of the said predeceased persons, being issue who are entitled as aforesaid.

(3) Nothing in the last foregoing subsection shall be construed as altering any rule of law as to collation of advances; and where any person is entitled to claim legitim out of the estate of a deceased person by virtue of subsection (1) of this section he shall be under the like duty to collate any advances made by the deceased to him, and the proportion appropriate to him of any advances so made to any person through whom he derives such entitlement, as if he had been entitled to claim such legitim otherwise than by virtue of the said subsection (1).

(4) For the avoidance of doubt it is hereby declared that where any person is entitled by virtue of subsection (1) of this section to legitim out of the estate of the deceased, and the deceased is not survived by any child, the proportion of the estate due to any surviving spouse in respect of jus relictui or jus reliciae shall be ascertained as if the deceased had been survived by a child.

NOTE
1 As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70), Sched. 1, in respect of estate of any person dying on or after 25th November 1968, and by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Sched. 2.

[THE NEXT PAGE IS M 55]
modified by the provisions of this Act) in relation to the whole of the estate without distinction between moveable property and heritable property; and accordingly on the death of any person (whether testate or intestate) every part of his estate (whether consisting of moveable property or heritable property) falling to be administered under the law of Scotland shall, by virtue of confirmation thereto, vest for the purposes of administration in the executor thereby confirmed and shall be administered and disposed of according to law by such executor.

(2) Provision shall be made by the Court of Session by act of sedersumt made under the enactments mentioned in section 22 of this Act (as extended by that section) for the inclusion in the confirmation of an executor by reference to an appended inventory or otherwise, of a description, in such form as may be so provided, of any heritable property forming part of the estate.

(3) Nothing in this section shall be taken to alter any rule of law whereby any particular debt of a deceased person falls to be paid out of any particular part of his estate.

NOTE
The Administration of Estates Act 1971, s. 6, provides: "6.—(1) It shall be competent to include in the inventory of the estate of any person who died domiciled in Scotland any real estate of the deceased situated in England and Wales or Northern Ireland, and accordingly in section 5 of the Confirmation of Executors (Scotland) Act 1858 the word 'personal' wherever it occurs is hereby repealed.

(2) Section 142(3) of the Succession (Scotland) Act 1964 (act of sedersumt to provide for description of heritable property) shall apply in relation to such real estate as aforesaid as it applies in relation to heritable property in Scotland.

Provisions as to transfer of heritages
IS.—(1) Section 5(2) of the Conveyancing (Scotland) Act 1924 (which provides that a confirmation which includes a heritable security shall be a valid title to the debt thereby secured) shall have effect as if any reference therein to a heritable security, or to a debt secured by a heritable security, included a reference to any interest in heritable property which has vested in an executor in pursuance of the last foregoing section by virtue of a confirmation.

Provided that a confirmation (other than an implied confirmation within the meaning of the said section 5(2)) shall not be deemed for the purposes of the said section 5(2) to include any such interest unless a description of the property, in accordance with any act of sedersumt such as is mentioned in subsection (2) of the last foregoing section, is included or referred to in the confirmation.

(2) Where in pursuance of the last foregoing section any heritable property has vested in an executor by virtue of a confirmation, and it is necessary for him in distributing the estate to transfer that property—
(a) to any person in satisfaction of a claim to legal rights or the prior rights of a surviving spouse out of the estate, or
(b) to any person entitled to share in the estate by virtue of this Act, or
(c) to any person entitled to take the said property under any testamentary disposition of the deceased,
the executor may effect such transfer by endorsing on the confirmation (or where a certificate of confirmation relating to the property has been issued in pursuance of any act of sedersumt, on the certificate) a docket in favour of that person in the form set out in Schedule 1 to this Act, or in a form as nearly as may be to the like effect, and any such docket may be specified as a midcouple or link in title in any deduction of title; but this section shall not be construed as prejudicing the competence of any other mode of transfer.

NOTE
1 As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s. 19.
[Release 22: 1/11/91]
16.-(1) This section applies to any interest, being the interest of a tenant under a lease, which is comprised in the estate of a deceased person and has accordingly vested in the deceased's executor by virtue of section 14 of this Act; and in the following provisions of this section "interest" means an interest to which this section applies.

(2) Where an interest—
(a) is not the subject of a valid bequest by the deceased, or
(b) is the subject of such a bequest, but the bequest is not accepted by the legatee, or
(c) being an interest under an agricultural lease, is the subject of such a bequest, but the bequest is declared null and void in pursuance of section 16 of the Act of 1886 or section 11 of the 1991 Act, or becomes null and void under section 10 of the Act of 1955,

and there is among the conditions of the lease (whether expressly or by implication) a condition prohibiting assignment of the interest, the executor shall be entitled, notwithstanding that condition, to transfer the interest to any one of the persons entitled to succeed to the deceased's intestate estate, or to claim legal rights or remedy of any surviving spouse out of the estate, or towards satisfaction of that person's entitlement or claim, but shall not be entitled to transfer the interest to any other person without the consent—

(i) in the case of an interest under an agricultural lease, being a lease of a croft within the meaning of section 3(1) of the Act of 1955, of the Crofters Commission;
(ii) in any other case, of the landlord.

(3) If in the case of any interest—
(a) at any time the executor is satisfied that the interest cannot be disposed of according to law and so informs the landlord, or
(b) the interest is not so disposed of within a period of one year or such longer period as may be fixed by agreement between the landlord and the executor or, failing agreement, by the sheriff on summary application by the executor—

(i) in the case of an interest under an agricultural lease which is the subject of a petition to the Land Court under section 16 of the Act of 1886 or an application to that court under section 11 of the 1991 Act, from the date of the determination or withdrawal of the petition or, as the case may be, the application.

(ii) in the case of an interest under an agricultural lease which is the subject of an application by the legatee to the Crofters Commission under section 10(1) of the Act of 1955, from the date of any refusal by the Commission to determine that the bequest shall not be null and void,

(iii) in the case of an interest under an agricultural lease which is the subject of an intimation of objection by the landlord to the legatee and the Crofters Commission under section 10(3) of the Act of 1955, from the date of any decision of the Commission upholding the objection.

(ii) in any other case, from the date of death of the deceased, either the landlord or the executor may, on giving notice in accordance with the next following subsection to the other, terminate the lease (in so far as it relates to the interest) notwithstanding any provision therein, or any enactment or rule of law, to the contrary effect.

(4) The period of notice given under the last foregoing subsection shall be—
(a) in the case of an agricultural lease, such period as may be agreed, or, failing agreement, a period of not less than one year and not more than two years ending with such term of Whitunday or Mariotmas as may be specified in the notice; and

(b) in the case of any other lease, a period of six months.

Provided that nothing in this section shall be without prejudice to any enactment prescribing a shorter period of notice in relation to the lease in question.

(5) Subsection (3) of this section shall not prejudice any claim by any party to the lease for compensation or damages in respect of the termination of the lease (or any rights under it) in pursuance of that subsection; but any award of compensation or damages in respect of such termination at the instance of the executor shall be enforceable only against the estate of the deceased and not against the executor personally.

(6) Where an interest is an interest under an agricultural lease, and—

(a) an application is made under section 3 of the Act of 1931 or section 13 of the Act of 1955 to the Land Court for an order for removal, or

(b) a reference is made under section 23(2) and (3) of the 1991 Act to an arbiter to determine any question which has arisen under sections 22(2)(a) and (b) of that Act in connection with a notice to quit, the Land Court shall not make the order, or, as the case may be, the arbiter shall not make an award in favour of the landlord, unless the court or the arbiter is satisfied that it is reasonable having regard to the fact that the interest is vested in the executor in his capacity as executor, that it should be made.

(7) Where an interest is not an interest under an agricultural lease, and the landlord brings an action of removing against the executor in respect of a breach of a condition of the lease, the court shall not grant decree in the action unless it is satisfied that the condition alleged to have been breached is one which it is reasonable to expect the executor to have observed, having regard to the fact that the interest is vested in him in his capacity as executor.

(8) Where an interest is an interest under an agricultural lease and is the subject of a valid bequest by the deceased, the fact that the interest is vested in the executor under the said section 14 shall not prevent the operation, in relation to the legatee, of paragraphs (a) to (h) of section 16 of the Act of 1886, or, as the case may be, section 11(2) to (8) of the 1991 Act, or, as the case may be, subsections (2) to (7) of section 10 of the Act of 1955.

(9) In this section—

(a) "agricultural lease" means a lease of a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931 or of the 1951 Act on a lease of a croft within the meaning of section 3(1) of the Act of 1955;

(b) "the Act of 1886" means the Crofters Holdings (Scotland) Act 1886;

(c) "the Act of 1931" means the Small Landholders and Agricultural Holdings (Scotland) Act 1931;

(d) "the 1991 Act" means the Agricultural Holdings (Scotland) Act 1991;

(e) "the Act of 1955" means the Crofters (Scotland) Act 1955; and

(f) "lease" includes tenancy.

NOTES

1 As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 70), Sch. 2 (estates of any person dying on or after 25th November 1968). See also the Agriculture Act 1986 (c. 49), Sched. 2, para. 3. As regards notice to quit, see the Agricultural Holdings (Scotland) Act 1991 (c. 55), s. 25, supra, Div. L.

2 As amended by the Agricultural Holdings (Scotland) Act 1991 (c. 55), Sched. 11, para. 24.

Protection of persons acquiring title

17. Where any person has in good faith and for valuable acquired title to any interest in or security over heritable property which has vested in an executor as aforesaid directly or indirectly from—

Release 36: 8 May 1993
Evidence as to testamentary dispositions in court proceedings

1 21A. Confirmation of an executor to property disposed of in a testamentary document executed after the commencement of the Requirements of Writing (Scotland) Act 1995 shall not be granted unless the formality of the validity of the document is governed—
(a) by Scots law and the document is presumed under section 3 or 4 of that Act to have been subscribed by the grantor to disposing of that property; or
(b) by a law other than Scots law and the court is satisfied that the document is formally valid according to the law governing such validity.

NOTE
1 Inserted by the Requirements of Writing (Scotland) Act 1995 (c. 7), Sched. 4, para. 39 (effective 1st August 1995: s. 15(2)).

Court of Session may regulate procedure in court proceedings

22.—(1) The powers exercisable by the Court of Session by act of sedentary order under section 18 of the Confirmation of Executors (Scotland) Act 1858, section 16 of the Sheriff Courts and Legal Officers (Scotland) Act 1927 and section 34 of the Administration of Justice (Scotland) Act 1933 (which empowers the court to regulate inter alia procedure in proceedings in the sheriff court and in proceedings for the confirmation of executors) shall include power to regulate the procedure to be followed, and to prescribe the form of content of any petition, writ or other document to be used, in connection with the confirmation of executors in cases where, by virtue of this Act, heritable property devolves upon the executor.

(2) Without prejudice to the generality of the powers conferred upon the court by the said sections and by this section, the power conferred by the said section 34 to modify, amend or repeal by act of sedentary enactments relating to certain matters shall include power so to modify, amend or repeal any enactment relating to the procedure to be followed in proceedings for the confirmation of executors in such cases as aforesaid.

(3) [Repealed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c. 19), Sched., Part I.]

(4) [Repealed by the Finance Act 1975 (c. 7), Sched. 13.]

NOTE
1 See S.I. 1964 No. 1143 and S.I. 1971 No. 1165.

PART IV
ADOPTED PERSONS

Adopted person to be treated for purposes of succession, etc., as child of adopter

23.—(1) For all purposes relating to—
(a) the succession to a deceased person (whether testate or intestate), and
(b) the disposal of property by virtue of any inter vivos deed, an adopted person shall be treated as the child of the adopter and not as the child of any other person.

In this subsection and in the following provisions of this Part of this Act any reference to succession to a deceased person shall be construed as including a reference to the distribution of any property in consequence of the death of the deceased person and any claim to legal rights or the prior rights of a surviving spouse out of his estate.

(2) In any deed whereby property is conveyed or under which a succession arises, being a deed executed after the making of an adoption order, unless the contrary intention appears, any reference (whether express or implied)—

Release 36: 8 May 1995
(a) to the child or children of the adopter shall be considered as, or as including, a reference to the adopted person;
(b) to the child or children of the adopted person's natural parents or either of them shall be construed as not being, or as not including, a reference to the adopted person;
(c) to a person related to the adopted person in any particular degree shall be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter and were not the child of any other person;

Provided that for the purposes of this subsection a deed containing a provision taking effect on the death of any person shall be deemed to have been executed on the date of death of that person.

(2) Where the terms of any deed provide that any property or interest in property shall devolve along with a title, honour or dignity, nothing in this section or in the Children Act 1975 or in the Adoption (Scotland) Act 1978 shall prevent that property or interest from so devolving.

(4) Nothing in this section shall affect any deed executed, or the devolution of any property on, or in consequence of, the death of a person who dies before the commencement of this Act.

(5) In this Part of this Act the expression "adoption order" has the same meaning as in section 38 of the Adoption (Scotland) Act 1978 (whether the order took effect before or after the commencement of this Act); and "adopted" means adopted in pursuance of an adoption order.

NOTE
1 As amended by the Adoption (Scotland) Act 1978 (c. 28), Sch. 3, para. 4. See also the Legitimation (Scotland) Act 1966 (c. 22), ss. 6(1), 6(2). Excluded by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1996 (c. 39), s. 5.

Provisions supplementary to section 23

24.—(1) For the purposes of the law regulating the succession to any property for the purposes of the construction of any such deed as is mentioned in the last foregoing section, an adopted person shall be deemed to be related to any other person, being the child of the adopted child, as the child of the adopted child, or as to be related to any other person, being the child of the adopted child, as the adopted child of the adopted child.

(a) where he or she was adopted by two spouses jointly and that other person is the child or adopted child of both of them, as a brother or sister of the whole blood;
(b) in any other case, as a brother or sister of the half blood.

(1A) Where, in relation to any purpose specified in section 23(1) of this Act, any right is conferred or any obligation is imposed, whether by operation of law or under any deed coming into operation after the operation of law or under any deed coming into operation after the commencement of the Children Act 1975, by reference to the relative seniority of the members of a class of persons, then, without prejudice to any other provision of this Act, an illegitimate child adopted by one of his or her legitimate parents shall rank as if he or she had been born on the date of his adoption, and

(b) if two or more members of the class are adopted persons whose dates of adoption are the same, they shall rank as between themselves in accordance with their respective times of birth.

(2) Notwithstanding anything in the last foregoing section, a trustee or an executor may distribute any property for the distribution of which he is entitled to any interest made by virtue of which any person is or may be included to any interest in any property, or any property, or any property representing it, from any person may have received it.

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25-27. [Repealed by the Divorce (Scotland) Act 1976 (c. 39), Sch. 2.]

PART VI

Miscellaneous and Supplementary

28. [Repealed by the Age of Legal Capacity (Scotland) Act 1991 (c. 50).]

Right of tenant to bring an action under a lease

2A. (1) A bequest by a tenant of his interest under a tenancy or lease to any one of the persons who, if the tenant had died intestate, would have, or would exist in any circumstances have been, entitled to succeed to his interest and for the purpose of this Act shall not be treated as invalid by reason only that there is among the conditions of the tenancy or lease an implied condition prohibiting assignment.

(2) This section shall not prejudice the operation of section 16 of the Crofters Holdings (Scotland) Act 1886, or section 11 of the Agricultural Holdings (Scotland) Act 1991 (which relate to bequests in the case of agricultural leases), or of section 10 of the Crofters (Scotland) Act 1955 (which makes similar provision in relation to crofts).

NOTE
1 As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70), Sch. 2 (estate of persons dying after the commencement of this Act). Excluded by the Agricultural Holdings (Scotland) Act 1991 (c. 55), Sch. 11, para. 25.

Effect of testamentary dispositions on special destinations

36. A testamentary disposition executed after the commencement of this Act shall not have effect so as to evade a special destination (being a destination which could competently be evaded by the testamentary disposition) unless it contains a specific reference to the destination and a declared intention on the part of the testator to evade it.

Presumption of survivorship in respect of claims to property

3L.—(1) Where two persons have died in circumstances indicating that they died simultaneously or rendering it uncertain which, if either, of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse, (a) where the persons were husband and wife, it shall be presumed that both survived the other; and (b) in any other case, it shall be presumed that the younger person survived the elder unless the next following subsection applies.

Release 36. 8 May 1995
(2) If, in a case to which paragraph (b) of the foregoing section would (apart from this subsection) apply, the elder person has left a testamentary disposition containing a provision, however expressed, in favour of the younger person, in favour of the younger person, and the younger person has died intestate, then it shall be presumed for the purposes of that provision that the elder person survived the younger.

Certain testamentary dispositions to be formally valid

32.-(1) For the purpose of any question arising as to entitlement, by virtue of a testamentary disposition, to any relevant property or to any interest therein, the disposition shall be treated as valid in respect of the formalities of execution.

(2) Subsection (1) above is without prejudice to any right to challenge the validity of the testamentary disposition on the ground of forgery or on any other ground of essential invalidity.

(3) In this subsection “relevant property” means property disposed of in the testamentary disposition in respect of which—

(a) confirmation has been granted; or

(b) probate, letters of administration or other grant of representation—

(i) has been issued, and has noted the domicile of the deceased to be, in England and Wales, or in Northern Ireland, 

(ii) has been issued outwith the United Kingdom and had been sealed in Scotland under section 2 of the Colonial Probates Act 1882.

NOTE

Substituted by the Requirements of Writing (Scotland) Act 1995 (c. 7), Sched. 4, para. 40.

Construction of existing deeds

33.—(1) Subject to subsection (2) of this section, any reference in any deed taking effect after the commencement of this Act to jus relictum, jus relictiae or legatum, as the case may be, as modified by Part I of this Act, and any reference in any such deed to courtesy or torce shall be of no effect.

(2) Any reference to legal rights in a marriage contract made before the commencement of this Act and taking effect in consequence of a decree of divorce granted in an action commenced after the commencement of this Act shall be construed as a reference to any right which the husband or the wife, as the case may be, might obtain by virtue of the provisions of section 2 of this Act or section 5 of the Divorce (Scotland) Act 1976 or section 29 of the Matrimonial and Family Proceedings Act 1984 or section 8 of the Family Law (Scotland) Act 1985.

NOTES


As amended by the Law Reform (Parental and Child) (Scotland) Act 1986 (c. 49), para. 7 (17) and Sched. 2, with effect from 6th December 1986.

As amended by the Divorce (Scotland) Act 1976 (c. 39), Sched. 1, para. 2, the Matrimonial and Family Proceedings Act 1984 (c. 42), Sched. 1, para. 6, and the Family Law (Scotland) Act 1985 (c. 37), Sched. 1, para. 4.

Modification of enactments and repeals

34.—(1) Subject to the provisions of section 37 of this Act, the enactments mentioned in Schedule 2 to this Act shall have effect subject to the modifications specified in that Schedule, being modifications consequent on the provisions of this Act.

(2) [Repealed by the Statute Law (Repeals) Act 1974 (c. 22)].

Transfer of certain jurisdiction to Sheriff of Chancery

35.—(1) If at any time it appears to the Secretary of State expedient—

 Release 30 May 1995

Succession (Scotland) Act 1964

do so he may by order refer to the Sheriff of Chancery the jurisdiction of any other sheriff in relation to the service of heirs.

(2) An order made under this section may contain such consequential provisions as appears to the Secretary of State to be necessary, including provisions for the consequential repeal or consequential modification of any enactment relating to the matters dealt with in the order.

(3) Any order made under this section shall be made by statutory instrument.

Interpretation

36.—(1) In this Act the following expressions shall, unless the context otherwise requires, have the meanings hereby respectively assigned to them, that is to say—

“deed” includes any disposition, contract, instrument or writing, whether iner vivos or moris causa;

“an intestate” means a person who has died leaving undisposed of by testamentary disposition the whole or any part of his estate, and “intestate” shall be construed accordingly;

“in testate estate”, in relation to an intestate, means (subject to sections 1(2) and 9(6)(a) of this Act) so much of his estate as is undisposed of by testamentary disposition;

“issue” means issue however remote;

“Land Court” means the Scottish Land Court;

“lease” and “tenancy” include sub-lease and sub-tenancy, and tenant shall be construed accordingly;

“legal rights” means jus relictum, jus relictiae, and legatum;

“net intestate estate” means respectively so much of an estate or an intestate estate as remains after provision for the satisfaction of estate duty and other liabilities of the estate having priority over legal rights, the prior rights of a surviving spouse and rights of succession, or, as the case may be, the proportion thereof properly attributable to the intestate estate;

“owner” in relation to any heritable property means the person entitled to receive the rents thereof (other than rents under a sub-lease or sub-tenancy);

“prior rights”, in relation to a surviving spouse, means the rights conferred by sections 8 and 9 of this Act;

“testamentary disposition” in relation to a deceased, includes any deed taking effect on his death whereby any part of his estate is disposed of or under which a succession thereto arises.

(2) Any reference in this Act to the estate of a deceased person shall, unless the context otherwise requires, be construed as a reference to the whole estate, whether heritable or moveable, or partly heritable and partly moveable, belonging to the deceased at the time of his death or over which the deceased had power of appointment and, where the deceased died immediately before his death held the interest of a tenant under a tenancy or lease which was not expressed to expire on his death, includes that interest.

Provided that—

(a) where any heritable property belonging to a deceased person at the date of his death is subject to a special destination in favour of any person, the property shall not be treated for the purposes of this Act as part of the estate of the deceased unless the destination is one which could competently be, and has in fact been, evacuated by the deceased by testamentary disposition or otherwise; and in that case the property shall be treated for the purposes of this Act as if it were part of the deceased’s estate on which he has tested; and

(b) where any heritable property over which a deceased person had
a power of appointment has not been disposed of in exercise of that power and is in those circumstances subject to a power of appointment by some other person, that property shall not be treated for the purposes of this Act as part of the estate of the deceased.

(3) Without prejudice to the proviso to section 23(2) of this Act, references in this Act to the date of execution of a testamentary disposition shall be construed as references to the date on which the disposition was actually executed and not to the date of death of the testator.

(4) References in this Act to any enactment shall, except where the context otherwise requires, be construed as references to that enactment as amended by or under any other enactment, including this Act.

(5) Section 1(1) (legal equality of children) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply to this Act; and any reference (however expressed) in this Act to a relative shall be construed accordingly.

NOTES

1 As amended by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Sch. 2.
2 Includes inheritance tax; see the Inheritance Tax Act 1984 (c. 51), Sch. 6, para. 1.
3 Added by the Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9), Sch. 1, Para. 7(2), with effect from 8th December 1986.

Exclusion of certain matters from operation of Act

37—(1) Save as otherwise expressly provided, nothing in this Act or (as respects paragraph (6) of this subsection) in the Children Act 1975 or the Adoption (Scotland) Act 1978 shall—

(a) apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof;

(b) [Repealed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, Sch. 3 (estate of any person dying after the commencement of this Act)];

(c) affect any right on the part of a surviving spouse to claim from the representatives of his or her deceased spouse payment of aliment out of the estate of that spouse;

(d) affect the administration, winding up or distribution of or the making up of title to any part of the estate of any person who died before the commencement of this Act or the rights of succession to such an estate or any claim for legal rights of maintenance or for rights arising under the Intestate Husband’s Estate (Scotland) Acts 1911 to 1959 out of such an estate or the right to take any legal proceedings with respect to any such matters;

(e) affect any claim for legal rights arising out of an action of divorce commenced before the commencement of this Act; and

and in relation to the matters aforesaid the law in force immediately before the commencement of this Act shall continue to have effect as if this Act had not passed.

(2) Nothing in this Act shall be construed as affecting the operation of any rule of law applicable immediately before the commencement of this Act to the choice of the system of law governing the administration, winding up or distribution of the estate, or any part of the estate, of any deceased person.

NOTES

1 As amended by the Children Act 1975 (c. 72), Sch. 2, paras. 5, and the Adoption (Scotland) Act 1978 (c. 28), Sch. 3, paras. 5.
2 Saved by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c. 55), s. 6.

Citation, extent and commencement

38.—(1) This Act may be cited as the Succession (Scotland) Act 1964.

(2) This Act shall extend to Scotland only.

(3) This Act shall come into operation on the expiration of the period of three months beginning with the date on which it is passed.

Release: 36: 8 May 1995
Matrimonial Homes (Family Protection) (Scotland) Act 1981 *

(Ac 1981 c. 59)

SECT. Protection of occupancy rights of one spouse against the other
1. Right of spouse without title to occupy matrimonial home.
2. Indemnity and compensation rights.
4. Exclusion orders.
5. Duration of orders under ss. 3 and 4.
7. Disposition by court with spouse's consent to dealing.
8. Interests of habitable creatures.
9. Provisions where both spouses have title.

Protection of rights of spouse against arrangements intended to defeat them
10. Sequestration.
11. Pledging.
12. Adjudication.

Transfer of tenancy
13. Transfer of tenancy.

Matrimonial interdicts
15. Attachment of powers of arrest to matrimonial interdicts.
17. Procedure after arrest.

Cohabiting couples
18. Occupancy rights of cohabiting couples.

Miscellaneous and General
20. Spouse's consent in relation to calling up of standard securities over matrimonial home.
22. Interpretation.
23. Short title, commencement and extent.

An Act to make new provision for Scotland as to the rights of occupancy of spouses in a matrimonial home and of cohabiting couples in the house where they cohabit; to provide for the transfer of the tenancy of a matrimonial home between the spouses in certain circumstances during marriage and on granting decree of divorce or nullity of marriage, and for the transfer of the tenancy of a house occupied by a cohabiting couple between the partners in certain circumstances; to strengthen the law relating to matrimonial interdicts; and for connected purposes.

[30th October 1981]

* Annotations by Professor M. C. Moonen, University of Aberdeen.

1980 (Stat. Law Com. No. 00) and it is encouraging that time was found so speedily for such an important measure.

One broad purpose of the Act is to ensure that both spouses have rights of occupancy in the matrimonial home, and s. 1 therefore makes the fundamental change of conferring on a spouse who is neither owner nor tenant a right of occupancy in the matrimonial home. This is an automatic incident of marriage without any special procedure being necessary but it may be reasserted in writing by a formal process. There is also the very important provision in s. 13 permitting a court to order the transfer of the tenancy of the matrimonial home from one spouse to another. While one might have wished to see provisions such as this included in a wider reform of family property law giving a much larger element of community of property between spouses, they are nonetheless important and welcome. It is to be hoped that this limited reform will not preclude more radical reform in the near future.

Occupancy rights do not prevent a creditor from obtaining payment by selling the house and furniture, but there are measures to deal with the spouse who deliberately gets into debt as an act of spite (ss. 10-12).

The other broad purpose of the Act is to provide increased protection for a spouse or children who are at risk as a result of domestic violence. The primary beneficiaries will be wives who are the victims in over 70 per cent. of violent offences involving family members. Widespread public consensus on this subject has not always resulted in practicable suggestions for improvements, but the measures proposed in the Act should certainly help to supplement the existing criminal penalties. A wife is no longer a presumptive occupant in her husband's house, as she has a right to occupy the matrimonial home (s. 1) and can obtain an eviction order prohibiting her husband from entering his own house (s. 4). She may be able to obtain a transfer of a tenancy (s. 13) and can seek a "matrimonial interdict" to control her husband's conduct (ss. 14-17). The hope is that these measures will do something to reduce the amount of domestic violence and to that extent to avoid the need for criminal proceedings after the event.

The creation of occupancy rights as overriding interests, though not individually registered as such, will involve a very substantial change in conveyancing practices in Scotland. The rights will resemble short leases in that they will not be public but will be effective against third parties other than bona fide purchasers or habitable creatures without notice (ss. 4 (2) (c) and 8). The breach in the principle of relying on the faith of the records will mean that a substantial publicity campaign will be necessary among lawyers as well as the public.

Commencement

The Act received Royal Assent on October 30, 1981. It will come into force on such date or dates as the Secretary of State may appoint (s. 23 (2)).

Extent

The Act applies to Scotland only.

Parliamentary Debate


Protection of occupancy rights of one spouse against the other

Right of spouse without title to occupy matrimonial home

1. (1) Where, apart from the provisions of this Act, one spouse is entitled, or permitted by a third party, to occupy a matrimonial home (an "entitled spouse") and the other spouse is not so entitled or permitted (a "non-entitled spouse"), the non-entitled spouse shall, subject to the provisions of this Act, have the following rights—

(a) if in occupation, a right not to be excluded from the matrimonial home or any part of it by the entitled spouse;
(b) if not in occupation, a right to enter into and occupy the matrimonial home.
59/2 Matrimonial Homes (Family Protection) (Scotland) Act 1961

(2) In subsection (1) above, an "entitled spouse" includes a spouse who is entitled, or permitted by a third party, to occupy a matrimonial home along with an individual who is not the other spouse only if that individual has waived his or her right of occupation in favour of the spouse so entitled or permitted.

(3) If the entitled spouse refuses to allow the non-entitled spouse to exercise the right conferred by subsection (1) (b) above, the non-entitled spouse may exercise that right only with the leave of the court under section 8 (b) or (c) of this Act.

(4) In this Act, the rights mentioned in paragraphs (a) and (b) of subsection (1) above are referred to as occupancy rights only.

(a) in a particular matrimonial home; or

(b) in a particular property which it is intended by the spouses will become a matrimonial home.

(5) A non-entitled spouse may renounce in writing his or her occupancy rights only—

(a) in a particular matrimonial home; or

(b) in a particular property which it is intended by the spouses will become a matrimonial home.

(6) A renunciation under subsection (5) above shall have effect only if at the time of making the renunciation, the non-entitled spouse has sworn or affirmed before a notary public that he was made freely and without coercion of any kind.

DEFINITIONS

"entitled spouse": ss. 1 (1) (2), 22.

"matrimonial home": s. 22.

GENERAL NOTE

This is the crucial section declaring a general right of occupancy for spouses who have no individual title to the matrimonial home. Previously a spouse who was the owner or tenant of the matrimonial home could eject the other spouse at any time. The existence of the marriage had no effect on this right, although it would often result in an obligation to provide accommodation elsewhere. Now the "entitled spouses" are entitled to occupy the home and any third party is excluded from it once there. Being statutory rights, attempts to evade them can be criminal offences under s. 30 of the Rent Act 1965.

A corresponding, but more limited, right is created in s. 18 for cohabiting couples.

The non-entitled spouse may renounce the occupancy rights, but only by a fairly onerous procedure designed to prevent renunciation from becoming a mere matter of style. Renunciations must be in writing, must be matrimonial homes and must be made before a notary public and with an oath that no coercion has been employed (s. 1 (5) and (6)).

(7) For any obligation performed under subsection (1) (b) above shall have effect in relation to the rights of a third party as if the payment were made or the obligation were performed by the entitled spouse; and the performance of an obligation which has been enforced under subsection (1) (c) above shall have effect as if it had been enforced by the entitled spouse.

(8) Where there is an entitled and a non-entitled spouse, the court, on the application of either of them, may, having regard in particular to the respective financial circumstances of the spouses, make an order for apportionment of expenditure incurred or to be incurred by either spouse—

(a) without the consent of the other spouse, on any of the items mentioned in paragraphs (a) and (c) of subsection (3) above;

(b) with the consent of the other spouse, on anything relating to a matrimonial home.

(9) Where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home—

(a) either spouse shall be entitled, without the consent of the other spouse, to carry out such non-essential repairs or improvements as may be required by the court, being such repairs or improvements as the court considers to be appropriate for the reasonable enjoyment of the respective financial circumstances of the spouses, make an order for apportionment of expenditure incurred or to be incurred by either spouse, or with or without the consent of the other spouse, on anything relating to a matrimonial home.

(b) the court, on the application of either spouse, may, having regard in particular to the respective financial circumstances of the spouses, make an order for apportionment of expenditure incurred or to be incurred by either spouse, or with or without the consent of the other spouse, on anything relating to a matrimonial home.

(10) Where one spouse owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and furnishings in a matrimonial home—

(a) the other spouse may, without the consent of the first mentioned spouse—

(i) make any payment due by the first mentioned spouse which is necessary, or take any other step which the first mentioned spouse is entitled to take, to secure the possession or use of any such furniture and furnishings (and any such payment shall have effect in relation to the rights of a third party as if it were made by the first mentioned spouse); or

(ii) carry out such essential repairs to the furniture and
59/8 Matrimonial Homes (Family Protection) (Scotland) Act 1961

3.—(1) Where there is an entitled and a non-entitled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order—

(a) declaring the occupancy rights of the applicant spouse;

(b) enforcing the occupancy rights of the applicant spouse;

(c) restricting the occupancy rights of the non-applicant spouse;

(d) regulating the exercise of either spouse of his or her occupancy rights;

(e) protecting the occupancy rights of the applicant spouse in relation to the other spouse.

(2) Where one spouse owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and furnishings in a matrimonial home, the other spouse, if he or she has occupancy rights in that home, may apply to the court for an order granting to the applicant the possession or use in the matrimonial home of any such furniture and furnishings; but, subject to section 2 of this Act, an order under this subsection shall not prejudice the rights of any third party in relation to the non-performance of any obligation under such hire-purchase or conditional sale agreement.

(3) The court shall grant an application under subsection (1) (a) above if it appears to the court that the application relates to a matrimonial home; and on an application under any of paragraphs (b) to (e) of subsection (1) or under subsection (2) above, the court may make such order relating to the application as appears to it to be just and reasonable having regard to all the circumstances of the case including—

(a) the conduct of the spouses in relation to each other and otherwise;

(b) the respective needs and financial resources of the spouses;

(c) the needs of any child of the family;

(d) the extent (if any) to which—

(i) the matrimonial home; and

(ii) in relation only to an order under subsection (2) above, any item of furniture and furnishings referred to in that subsection,

is used in connection with a trade, business or profession of either spouse;

(e) whether the entitled spouse offers or has offered to make available to the non-entitled spouse any suitable alternative accommodation.

(4) Pending the making of an order under subsection (3) above, the court, on the application of either spouse, may make such interim order as it may consider necessary or expedient in relation to—

(a) the residence of either spouse in the home to which the application relates;

(b) the personal effects of either spouse or any child of the family; or

(c) the furniture and furnishings:

Provided that an interim order may be made only if the non-applicant spouse has been afforded an opportunity of being heard by or represented before the said order.

(5) The court shall not make an order under subsection (3) or (4) above if it appears that the effect of the order would be to exclude the non-applicant spouse from the matrimonial home.

(6) If the court makes an order under subsection (3) or (4) above which requires the delivery to one spouse of anything which has been left in or removed from the matrimonial home, it may also grant a warrant authorising a messenger-at-arms or sheriff officer to enter the matrimonial home or other premises occupied by the other spouse and to search for and take possession of the thing required to be delivered, if need be by opening shut and lockfast places, and to deliver the thing in accordance with the said order.

Provided that a warrant granted under this subsection shall be executed only after expiry of the period of a charge, being such period as the court shall specify in the order for delivery.
7. Where it appears to the court—
(a) on the application of a non-entitled spouse, that that spouse has suffered a loss of occupancy rights or that the quality of the non-entitled spouse's occupation of a matrimonial home has been impaired; or
(b) on the application of a spouse who has been given the possession, use or furniture and furnishings by virtue of an order under subsection (2) above, that the applicant has suffered a loss of such possession or use or that the quality of the applicant's possession or use of the furniture and furnishings has been impaired,
in consequence of any act or default on the part of the other spouse which was intended to result in such loss or impairment, it may order that other spouse to pay to the applicant such compensation as the court in the circumstances considers just and reasonable in respect of that loss or impairment.

(8) A spouse may renounce in writing the right to apply under subsection (2) above for the possession or use of any item of furniture and furnishings.

Definitions

"entitled spouse": s. 3 (1) (2), 22.
"matrimonial home": s. 22.
"court": s. 22.

General Note

If asked, the court (sheriff or Court of Session) must grant a declarator of rights of occupancy in a matrimonial home, but it has a discretion over other remedies after taking into account a number of specified considerations (s. 3 (2)). It may transfer the use of furniture and furnishings (s. 3 (2)). It may regulate and restrict occupancy rights (s. 3 (2)) and may make interim orders (s. 3 (2)). It may even order compensation to be paid to one spouse if the other's deliberate act deprives the applicant of occupancy of the matrimonial home or the use of furniture or even if the "quality" of the occupation or use is impaired (s. 3 (2)).

A non-entitled spouse is excluded from the matrimonial home by the entitled spouse. Consequently, the court cannot enforce the right of occupation without court order (s. 3 (3)). Considerable worry was expressed in Parliament that a restriction of the occupancy rights of a spouse could be used to obtain the same effect as a full exclusion order under s. 3, but without the safeguards in s. 3. Hence s. 3 (3) of the Act prohibits orders under s. 3 if the effect appears to be an exclusion of a spouse from the matrimonial home. This prohibition may, however, cause considerable difficulty in determining whether a particular court order is valid. The restricted spouse may well claim that the real "effect" of an order was to exclude him and therefore that the court had no power to make the order.

The court may vary orders made under this section, and they automatically cease to have effect in various circumstances, including termination of the marriage (s. 4 (5)).

Exclusion orders

4.—(1) Where there is an entitled and a non-entitled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order (in this Act referred to as "an exclusion order") suspending the occupancy rights of the other spouse ("the non-applicant spouse") in a matrimonial home.

(2) Subject to subsection (3) below, the court shall make an exclusion order if it appears to the court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.

(3) The court shall not make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable—
(a) having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (c) of section 9 (9) of this Act;
(b) where the matrimonial home is (i) or is part of an agricultural holding within the meaning of section 1 of the Agricultural Holdings (Scotland) Act 1969; or
(ii) is let, or is a home in respect of which possession is given, to the non-applicant spouse or to both spouses by an employer as an incident of employment, subject to a requirement that the non-applicant spouse or, as the case may be, both spouses must reside in the matrimonial home, having regard to that requirement and the likely consequences of the exclusion of the non-applicant spouse from the matrimonial home.

(4) In making an exclusion order the court shall, on the application of the applicant spouse—
(a) grant a warrant for the summary ejectment of the non-applicant spouse from the matrimonial home;
(b) grant an interdict prohibiting the non-applicant spouse from entering the matrimonial home without the express permission of the applicant;
(c) grant an interdict prohibiting the removal by the non-applicant spouse, except with the written consent of the applicant or by a further order of the court, of any furniture and furnishings in the matrimonial home;
(d) unless, in paragraph (a) or (b) above, the non-applicant spouse satisfies the court that it is unnecessary for it to grant such a remedy.

(5) In making an exclusion order the court may—
(a) grant an interdict prohibiting the non-applicant spouse from entering or remaining in a specified area in the vicinity of the matrimonial home;
(b) where the warrant for the summary ejectment of the non-applicant spouse has been granted in his or her absence, give directions as to the preservation of the non-applicant spouse's goods and effects which remain in the matrimonial home;
(c) on the application of either spouse, make the exclusion order or the warrant or interdict mentioned in paragraph (a), (b) or (c) of subsection (4) above or paragraph (a) of this subsection subject to such terms and conditions as the court may prescribe;
(d) on application as aforesaid, make such other order as it may consider necessary for the proper enforcement of an order made under subsection (4) above or paragraph (a), (b) or (c) of this subsection.

(6) Pending the making of an exclusion order, the court may, on the application of the applicant spouse, make an interim order suspending the occupancy rights of the non-applicant spouse in the matrimonial home to which the application for the exclusion order relates; and subsections (4) and (5) above shall apply to such interim order as they apply to an exclusion order:
Provided that an interim order may be made only if the non-applicant spouse has been afforded an opportunity of being heard by or represented before the court.

(7) Without prejudice to subsections (1) and (6) above, where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, it shall be incompetent for one spouse to bring an action of ejectment from the matrimonial home against the other spouse.

DEFINITIONS

"entitled spouse"; s. 1 (2), 22.
"matrimonial home"; s. 22.
"child of the family"; s. 22.

GENERAL NOTE

This is a very significant and drastic innovation in the law. For the first time, a spouse who is clearly the owner or tenant of a matrimonial home may be excluded from the home, and even from any specified area in the vicinity of the matrimonial home. The justification for such a step has to be actual or probable violence by one spouse (the "non-applicant spouse") against the other or against a child of the family. The reason is that if the usual civil remedy of interdict against such violence has often proved to be ineffective.

If the making of an order is necessary to protect the applicant or a child of the family from conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to physical or mental health, the court may grant an exclusion order, and will normally grant warrant for summary ejectment of the violent spouse, interdict against re-entering the house and against removal of furniture and furnishings.

The spouse holding the interdict may permit the violent spouse to re-enter the matrimonial home, but it must be an express and not merely implied permission (subr. (4)).

The power in subr. (5) to grant interdict against entering or remaining in a specified area in the vicinity of the matrimonial home is designed to prevent molestation but it does not extend to areas beside a child's school, unless that school happens to be in "the vicinity of" the matrimonial home.

Duration of orders under ss. 3 and 4

5.—(1) The court may, on the application of either spouse, vary or recall any order made by it under section 3 or 4 of this Act, but subject to subsection (2) below, any such order shall, unless previously so varied or recalled, cease to have effect—

(a) on the termination of the marriage; or

(b) subject to section 6 (1) of this Act, where there is an entitled and a non-entitled spouse, on the entitled spouse ceasing to be an entitled spouse in respect of the matrimonial home to which the order relates; or

(c) where both spouses are entitled, or permitted by a third party, to occupy the matrimonial home, on both spouses ceasing to be so entitled or permitted.

(2) Without prejudice to the generality of subsection (1) above, an order under section 3 (3) or (4) of this Act which grants the possession or use of furniture and furnishings shall cease to have effect if the furniture and furnishings cease to be permitted by a third party to be retained in the matrimonial home.

Occupancy rights in relation to dealings with third parties

Continued exercise of occupancy rights after dealing

6.—(1) Subject to subsection (3) below—

(a) the continued exercise of the rights conferred on a non-entitled spouse by the provisions of this Act in respect of a matrimonial home shall not be prejudiced by reason only of any dealing of the entitled spouse relating to that home; and

(b) a third party shall not by reason only of such a dealing be entitled to occupy that matrimonial home or any part of it.

(2) In this section and section 7 of this Act—

"dealing" includes the grant of a heritable security and the creation of a trust but does not include a conveyance under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845;

"entitled spouse" does not include a spouse who, apart from the provisions of this Act,—

(a) is permitted by a third party to occupy a matrimonial home; or

(b) is entitled to occupy a matrimonial home along with an individual who is not the other spouse, whether or not that individual has waived his or her right of occupation in favour of the spouse so entitled; and

"non-entitled spouse" shall be construed accordingly.

(3) This section shall not apply in any case where—

(a) the non-entitled spouse in writing either—

(i) consents or has consented to the dealing, and any consent shall be in such form as the Secretary of State may, by regulations made by statutory instrument, prescribe; or

(ii) renounces or has renounced his or her occupancy rights in relation to the matrimonial home or property to which the dealing relates;

(b) the court has made an order under section 7 of this Act dispensing with the consent of the non-entitled spouse to the dealing;

(c) the dealing occurred, or implements, a binding obligation entered into by the entitled spouse before his or her marriage to the non-entitled spouse;

(d) the dealing occurred, implements, a binding obligation entered into before the commencement of this Act; or

(e) the dealing comprises the purchase of a matrimonial home by a third party who has acted in good faith, if, at the time of the dealing, there is produced to the third party by the entitled spouse—

(i) an affidavit sworn or affirmed by the entitled spouse declaring that there is no non-entitled spouse; or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse.

(4) The Land Registration (Scotland) Act 1979 shall be amended as follows—

(a) in section 6 (4)—

(i) after the words "the interest of" there shall be inserted "(i)"; and

(ii) after the words "is not a long lease" there shall be inserted "and"

(b) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
(b) in paragraph (b) of section 9 (4)—
(i) after the words "the interest of" there shall be inserted "(i)"; and
(ii) after the words "is not a long lease" there shall be inserted "and"
and
(c) in section 28 in the definition of overriding interest after para-
graph (g) there shall be inserted the following—
"(gg) the non-entitled spouse within the meaning of section 6 of the
Matrimonial Homes (Family Protection) (Scotland) Act 1981;".

DEFINITIONS
"entitled spouse"; s. 1 (1), 6 (2), 12.
"matrimonial home"; s. 22.
"dealing"; s. 6 (3).

GENERAL NOTE
It would be very easy to evade occupancy rights if they were not effective against third parties. All that the entitled spouse would have to do would be to set up a leaseholder to a transfer to a friend. Hence it has been provided that dealings by the
entitled spouse do not affect the occupancy rights of the non-entitled spouse.

However, it has been a vital principle of Scottish law that the faith of the
records must be preserved, so that every transaction and inconsiderables (other than a right of way and a short lease) must appear on the register. Although the Scottish Law Commission did recommend a different procedure, it was decided that the new
occupancy rights would arise automatically and without individual registration. Hence a new breach in the faith of the records has been created, by the mechanism of
"matrimonial home" as overriding interests under the Land Registration (Scotland)
Act 1973 just as if they were short leases. Every house transaction now
should be treated similarly to an offer to take account of this.

The main, and very important, exception appears in subs. (3) (c). The non-
entitled spouse with occupancy rights is not protected against a bona fide third party purchasing the house without notice, provided that at the time of the sale, the entitled
spouse produces either an affidavit that there is no non-entitled spouse or a recogniza-

Dispensation by court with spouse's consent to dealing
7.—(1) The court may, on the application of an entitled spouse or
any other person having an interest, make an order dispensing with the
consent of a non-entitled spouse to a dealing which has taken place or a
proposed dealing, if—
(a) such consent is unreasonably withheld; and
(b) such consent cannot be given by reason of physical or mental
disability;
(a) an affidavit sworn or affirmed by the entitled spouse declaring that there is no non-entitled spouse; or
(b) a renunciation of occupancy rights or consent to the taking of the loan which bears to have been properly made or given by the non-entitled spouse.

Definitions
entitled spouse: s. 1, 22.
matriomal home: s. 22.

General Note
While the section is in general terms, the main beneficiaries of this section added to the House of Commons will be building societies and those who deposit savings with them. The non-entitled spouse in sole occupation of the matrimonial home may be ordered by the court to make any payments due by the entitled spouse. This situation might arise after an exclusion order if the entitled spouse did not keep up payments.

The provision is only for creditors in good faith, as we may assume building societies would be, who have also had to protect them before the granting of the loan to any affidavit that there is no non-entitled spouse or a renunciation of occupation or consent purporting to have been made by the non-entitled spouse. There is no clear indication of whether an old affidavit would suffice, but good faith would not be consistent with relying on a 20-year-old statement that no spouse existed. It is possible that building societies will take a renunciation of occupancy rights from a non-entitled spouse as a matter of routine, but it is to be hoped that they will not, as much of the purpose of the Act would thereby be destroyed.

Provisions where both spouses have title
9.—(1) Subject to subsection (2) below, where, apart from the provisions of this Act, both spouses are entitled to occupy a matrimonial home,
(a) the rights in that home of one spouse shall not be prejudiced by reason only of any dealing of the other spouse; and
(b) a third party shall not be prejudiced by reason only of such a dealing unless the bankrupt immediately before the act and warrant appointing the trustee was an entitled spouse and the other spouse is a non-entitled spouse which would be the position of the non-entitled spouse's separate estate.
(2) The definition of "dealing" in section 6 (2) of this Act and sections 6 (5) and 7 of this Act shall apply for the purposes of subsection (1) above as they apply for the purposes of section 6 (1) of this Act subject to the following modifications—
(a) any reference to the entitled spouse and to the non-entitled spouse shall be construed as a reference to a spouse who has entered into or, as the case may be, proposes to enter into a dealing and to the other spouse respectively; and
(b) in paragraph (b) of section 7 (4) the reference to occupancy rights shall be construed as a reference to any rights in the matrimonial home.

Protection of rights of spouse against arrangements intended to defeat them
Sequestration
10.—(1) After section 81 of the Bankruptcy (Scotland) Act 1918 there shall be inserted the following section—

 Recall of sequestration by non-entitled spouse
31A. (1) If a debtor's sequestrated estate includes a matrimonial home of which the debtor, immediately before the act and warrant appointing the trustee was an entitled spouse and the other spouse is a non-entitled spouse, the Court of Session, on the application of the non-entitled spouse within 40 days of the date of the act and warrant, may—
(a) recall the sequestration; or
(b) make such order as it thinks appropriate to protect the occupancy rights of the non-entitled spouse,
if it is satisfied that the purpose of the application for sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled spouse.
(2) In section 80 of this Act, the words from "and the Lord Ordinary" to the end shall apply for the purposes of this section subject to the following modifications—
(a) the words "in these several cases" shall be omitted;
(b) for the words "the recall" there shall be substituted the words " or make an order to protect the occupancy rights of a non-entitled spouse, the recall or order ".
(3) In this section and section 80 of this Act—
entitled spouse and "non-entitled spouse" have the meanings respectively assigned to them by section 6 (2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
matriomal home" has the same meaning as in section 22 of the said Act of 1981;
and other expressions used in this section and the said section 80 and in that Act have the same meanings in those sections as in that Act.
(2) After section 76 of the Bankruptcy (Scotland) Act 1918 there shall be inserted the following section—

 Notification of sequestration to non-entitled spouse
76A. (1) Where—
(a) the bankrupt's estate includes a matrimonial home of which the bankrupt immediately before the act and warrant appointing the trustee was an entitled spouse and the other spouse is a non-entitled spouse; and
(b) the trustee is aware that the entitled spouse is married to the non-entitled spouse and knows where the non-entitled spouse is residing,
the trustee shall, within 7 days of the date of the said act and warrant, intimate to the non-entitled spouse that sequestration of the entitled spouse's estate has been awarded.
(2) In this section—
entitled spouse and "non-entitled spouse" have the meanings respectively assigned to them by section 6 (2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
"matrimonial home" has the same meaning as in section 22 of the said Act of 1981.

General Note
The "dealsings" against which s. 6 gives protection are voluntary actions of the entitled spouse, and do not include the diligence of creditors. To prevent circumvention of occupancy rights by a forced sequestration or diligence, the court may recall a sequestration or make appropriate orders to protect the non-entitled spouse. It must be satisfied that the sequestration was wholly or mainly for the purpose of defeating occupancy rights.

Similar provisions for pointings and adjudications appear in ss. 11 and 13.
of employment, and the lease is subject to a requirement that the
entitled spouse must reside therein;
(b) is or is part of an agricultural holding;
(c) is on or pertains to a croft or the subject of a cottar or the
holding of a landholder or a statutory small tenant;
(d) is let on a long lease;
(e) is part of the tenancy land of a tenant-at-will.
(8) In subsection (6) above—
"agricultural holding " has the same meaning as in section 1 of
the Agricultural Holdings (Scotland) Act 1949;
" cottar " has the same meaning as in section 28 (4) of the Crofters
(Scotland) Act 1965;
" croft " has the same meaning as in the Crofters (Scotland) Act
1955;
" holding ", in relation to a landholder and a statutory small
tenant, " landholder " and " statutory small tenant " have
the same meanings respectively as in sections 2 (1), 2 (2) and
22 (1) of the Small Landholders (Scotland) Act 1911;
" long lease " has the same meaning as in section 28 (1) of the
Land Registration (Scotland) Act 1979;
" tenant-at-will " has the same meaning as in section 20 (8) of
the Land Registration (Scotland) Act 1979.
(9) Where both spouses are joint or common tenants of a matri-
monial home, the court may, on the application of one of the spouses,
make an order vesting the tenancy in that spouse solely and providing,
subject to subsection (11) below, for the payment by the applicant
to the other spouse of such compensation as seems just and reasonable
in the circumstances of the case.
(10) Subsections (2) to (8) above shall apply for the purposes of
an order under subsection (9) above as they apply for the purposes of
an order under subsection (1) above subject to the following modificat-
sions—
(a) in subsection (8) for the word " tenant " there shall be sub-
stituted the words " sole tenant ";
(b) in subsection (4) for the words " non-entitled " there should be
substituted the word " applicant ";
(c) in subsection (5) for the words " non-entitled " and " liability
of the original entitled spouse " there shall be substituted
respectively the words " applicant " and " joint and several
liability of both spouses ";
(d) in subsection (7)—
(i) for the words " a non-entitled " there shall be sub-
stituted the words " an applicant ";
(ii) for paragraph (e) there shall be substituted the follow-
ing paragraph—
" (e) is let to both spouses by their employer as an
incident of employment, and the lease is subject to
a requirement that both spouses must reside
there; ";
(iii) paragraphs (c) and (e) shall be omitted.
(11) Where the matrimonial home is a secure tenancy within the
meaning of the Tenants' Rights Etc. (Scotland) Act 1965, no account
shall be taken, in assessing the amount of any compensation to be
awarded under subsection (1) or (9) above, of the loss, by virtue of
the transfer of the tenancy of the home, of a right to purchase the home
under Part I of that Act.
(12) In the Tenants' Rights, Etc. (Scotland) Act 1965—
(a) paragraph 6 of Part I of Schedule 2 is repealed; and
(b) in section 15 (1) for the words "paragraphs 1 to 6" there shall be substituted the words "paragraphs 1 to 5".

Definitions

"entitled spouse"; s. 2, 22.
"matrimonial home"; s. 22.

General Note

This important provision supplements the range of remedies available by permitting the court to transfer a tenancy (other than of the tied homes and agricultural housing referred to in sub.s. (7) ) from one spouse to the other. Such a transfer has, of itself, no effect on rights of occupancy, and if an exclusion order were appropriate, that would have to be separately applied for. It is, however, a very valuable and the power to transfer a tenancy on divorce is a useful addition to the Court of Session's powers.

Other methods of transfer of tenancies remain competent, and it is to be hoped that where such other methods are open, the parties will not resort to the more expensive court process unnecessarily. The power may reduce the number of actions for custody of children where the real purpose seems to have been to obtain a transfer of a local authority tenancy rather than custody which was not seriously in dispute.

Sub.s. (11) is designed to avoid the risk of a wife who obtains a transfer of a local authority tenancy having to pay compensation to her husband (the original tenant) for the potential capital gain which he might have realized if he had purchased the house.

Matrimonial interdicts

Interdict competent where spouses live together

14.—(1) It shall not be incompetent for the court to entertain an application by a spouse for a matrimonial interdict by reason only that the spouses are living together as man and wife.

(2) In this section and section 15 of this Act—

"matrimonial interdict" means an interdict including an interim interdict which—

(a) restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family; or

(b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified area in the vicinity of the matrimonial home.

Definition

"matrimonial home"; s. 22.

General Note

This section creates the separate concept of "matrimonial interdicts" which prohibits certain conduct towards the rest of the family or entering or remaining in the matrimonial home or any specified area in its vicinity. The latter is similar to the provision in s. 4 (6) for interdict to be attached to an exclusion order. This section is not limited to exclusion orders and is expressly made competent even although the parties are living together.

Attachment of powers of arrest to matrimonial interdicts

15.—(1) The court shall, on the application of the applicant spouse, attach a power of arrest—

(a) to any matrimonial interdict which is ancillary to an exclusion order, including an interim order under section 4 (9) of this Act;

(b) to any other matrimonial interdict where the non-applicant spouse has had the opportunity of being heard by or represented before the court, unless it appears to the court that in all the circumstances of the case such a power is unnecessary.

(2) A power of arrest attached to an interdict by virtue of subsection (1) above shall not have effect until such interdict is served on the non-applicant spouse, and such a power of arrest shall, unless previously recalled, cease to have effect upon the termination of the marriage.

(3) If, by virtue of subsection (1) above, a power of arrest is attached to an interdict, a constable may arrest without warrant the non-applicant spouse if he has reasonable cause for suspecting that such person is being in breach of the interdict.

(4) If, by virtue of subsection (1) above, a power of arrest is attached to an interdict, the applicant spouse shall, as soon as possible after service of the interdict on the non-applicant spouse, ensure that there is delivered—

(a) to the chief constable of the police area in which the matrimonial home is situated; and

(b) if the applicant spouse resides in another police area, to the chief constable of that other police area,

a copy of the application for the interdict and of the interlocutor granting the interdict together with a certificate of service of the e. interdict.

(5) Where any matrimonial interdict to which, by virtue of subsection (1) above is attached a power of arrest, is varied or recalled, the spouse who applied for the variation or recall shall ensure that there is delivered—

(a) to the chief constable of the police area in which the matrimonial home is situated; and

(b) if the applicant spouse (within the meaning of subsection (6) below) resides in another police area, to the chief constable of that other police area,

a copy of the application for variation or recall and of the interlocutor granting the variation or recall.

(6) In this section and in sections 16 and 17 of this Act—

"applicant spouse" means the spouse who has applied for the interdict; and

"non-applicant spouse" shall be construed accordingly.

Definition

"matrimonial interdict"; s. 14.

General Note

The usual procedure for enforcing an interdict by way of civil action for penalties for breach is far too ponderous for cases of matrimonial violence, and has proved to be ineffective in many instances.

Hence the special steps have been taken of attaching a power of arrest to matrimonial interdicts, so that the police may arrest, without warrant, a spouse whom they reasonably suspect of being in breach of interdict. This does not necessarily imply that the spouse arrested has committed a criminal offence but gives time to decide whether criminal or civil action will be taken (s. 17).

The power of arrest must be attached to interdicts ancillary to an exclusion order and will normally be attached to all interdicts in which the defender spouse has had an opportunity of being heard (sub.s. (1) ).

It is the duty of the spouse seeking the interdict to notify the police of the granting of the interdict and of its terms, and of any variation or recall (sub.s. (4) and (6) ). The interdict must be served on the defender if the power of arrest is to be effective, and it ceases upon termination of marriage (sub.s. (6) ).

Police powers after arrest

16.—(1) Where a person has been arrested under section 15 (3) of this Act, the officer in charge of a police station may—
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(a) if satisfied that there is no likelihood of violence to the applicant spouse or any child of the family, liberate that person unconditionally; or
(b) refuse to liberate that person; and such refusal and the detention of that person until his or her appearance in court by virtue of—
(i) section 17 (2) of this Act; or
(ii) any provision of the Criminal Procedure (Scotland) Act 1975, shall not subject the officer to any claim whatsoever.

(2) Where a person arrested under section 15 (8) of this Act is liberated under subsection (1) above, the facts and circumstances which gave rise to the arrest shall be reported forthwith to the procurator fiscal who, if he decides to take no criminal proceedings in respect of those facts and circumstances, shall at the earliest opportunity take all reasonable steps to intimate his decision to the persons mentioned in paragraphs (a) and (b) of section 17 (4) of this Act.

DEFINITION
"applicant spouse": s. 15 (6).

GENERAL NOTE
When a spouse has been arrested by virtue of s. 15, he may be released by the police if satisfied that there is no longer a risk of violence to the rest of the family, in which case the facts are reported to the procurator fiscal for a decision on criminal proceedings.

Alternatively he or she may be left in detention, when s. 17 applies.

Procedure after arrest

17.—(1) The provisions of this section shall apply only where—
(a) the non-applicant spouse has not been liberated under section 16 (1) of this Act; and
(b) the procurator fiscal decides that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.

(2) The non-applicant spouse who has been arrested under section 15 (8) of this Act shall wherever practicable be brought before the sheriff sitting as a court of summary criminal jurisdiction for the district in which he or she was arrested not later than in the course of the first day after the arrest, such day not being a Saturday, a Sunday or a court holiday prescribed for that court under section 10 of the Bail (Scotland) Act 1980.

Provided that nothing in this subsection shall prevent the non-applicant spouse from being brought before the sheriff on a Saturday, a Sunday or such a court holiday where the sheriff is in pursuance of the said section 10 sitting on such a day for the disposal of criminal business.

(3) Subsections (1) and (2) of section 3 of the Criminal Justice (Scotland) Act 1980 (intimation to a named person) shall apply to a non-applicant spouse who has been arrested under section 15 (8) of this Act as they apply to a person who has been arrested in respect of any offence.

(4) The procurator fiscal shall at the earliest opportunity, and in any event prior to the non-applicant spouse being brought before the sheriff under subsection (2) above, take all reasonable steps to intimate—
(a) to the applicant spouse; and
(b) to the solicitor who acted for that spouse when the interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for that spouse, that the criminal proceedings referred to in subsection (1) above will not be taken.

1981 c. 59

5. On the non-applicant spouse being brought before the sheriff under subsection (2) above, the following procedure shall apply—
(a) the procurator fiscal shall present to the court a petition containing—
(i) a statement of the particulars of the non-applicant spouse;
(ii) a statement of the facts and circumstances which gave rise to the arrest; and
(iii) a request that the non-applicant spouse be detained for a further period not exceeding 2 days;
(b) if it appears to the sheriff that—
(i) the statement referred to in paragraph (a) (ii) above discloses a prima facie breach of interdict by the non-applicant spouse;
(ii) proceedings for breach of interdict will be taken; and
(iii) there is a substantial risk of violence by the non-applicant spouse against the applicant spouse or any child of the family, he may order the non-applicant spouse to be detained for a further period not exceeding 2 days;
(c) in any case to which paragraph (b) above does not apply, the non-applicant spouse shall, unless in custody in respect of any other matter, be released from custody; and

in computing the period of two days referred to in paragraphs (a) and (b) above, no account shall be taken of a Saturday or Sunday or of any holiday in the court in which the proceedings for breach of interdict will require to be raised.

DEFINITION
"applicant spouse": s. 15 (6).

GENERAL NOTE
Many breaches of interdict will also be criminal offences, probably at least breach of the peace. However, this section provides for continuing detention for a period not exceeding two days even although the procurator fiscal decides to take no criminal proceedings. The essential purpose is to protect the spouse who obtained an interdict from molestation or anxiety in the period between arrest and the hearing of the civil action for breach of the interdict.

The procurator fiscal decides not to institute criminal proceedings in the case of a spouse in detention for breach of a matrimonial interdict, he will set the circumstances before the sheriff. The sheriff may then order detention for up to two days provided that a prima facie case of breach of interdict is shown and that civil proceedings for breach of interdict will be taken and that there is a substantial risk of violence by the spouse detained. If all these elements cannot be shown, the spouse will be liberated.

Cohabiting couples

Occupancy rights of cohabiting couples

18.—(1) If a man and a woman are living with each other as if they were man and wife ("a cohabiting couple") in a house which, apart from the provisions of this section—
(a) one of them (an "entitled partner") is entitled, or permitted by a third party, to occupy; and
(b) the other (a "non-entitled partner") is not so entitled or permitted to occupy, the court may, on the application of the non-entitled partner, if it appears that the man and the woman are a cohabiting couple in that house, grant occupancy rights therein to the applicant for such period, not exceeding 3 months, as the court may specify:
Provided that the court may extend the said period for a further period or periods, no such period exceeding 6 months.

(2) In determining whether for the purpose of subsection (1) above a man and woman are a cohabiting couple the court shall have regard to all the circumstances of the case including—

(a) the time for which it appears they have been living together;

and

(b) whether there are any children of the relationship.

(3) While an order granting an application under subsection (1) above or an extension of such an order is in force, or where both partners of a cohabiting couple are entitled, or permitted by a third party, to occupy the house where they are cohabiting, the following provisions of this Act shall subject to any necessary modifications—

(a) apply to the cohabiting couple as they apply to parties to a marriage;

(b) have effect in relation to any child residing with the cohabiting couple as they have effect in relation to a child of the family.

section 2;

section 8, except subsection (1) (d);

section 4;

in section 5 (1), the words from the beginning to "Act" where it first occurs;

sections 10 and 14;

section 15, except the words in subsection (2) from "and such a power of arrest" to the end;

sections 16 and 17;

and

section 22;

and any reference in these provisions to a matrimonial home shall be construed as a reference to a house.

(4) Any order under section 3 or 4 of this Act as applied to a cohabiting couple by subsection (8) above shall have effect—

(a) which the spouses own in common, the court, after having regard to all the circumstances of the case including—

(a) the matters specified in paragraphs (a) to (d) of section 3 (8) of this Act; and

(b) whether the spouse bringing the action offers or has offered to make available to the other spouse any suitable alternative accommodation,

may refuse to grant decree in that action or may postpone the granting of decree for such period as it may consider reasonable in the circumstances or may grant decree subject to such conditions as it may prescribe.

Spouse's consent in relation to calling up of standard securities over matrimonial homes

20. Section 19 (10) of the Conveyancing and Feudal Reform (Scotland) Act 1970 shall have effect as if at the end there were added the following provision—

"Provided that, without prejudice to the foregoing generality, if the standard security is over a matrimonial home as defined in section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the spouse on whom the calling-up notice has been served may not dispense with or shorten the said period without the consent in writing of the other spouse."

Miscellaneous and General

Rights of occupancy in relation to division and sale

19. Where a spouse brings an action for the division and sale of a matrimonial home, the court, after having regard to all the circumstances of the case including—

(a) the matters specified in paragraphs (a) to (d) of section 3 (8) of this Act; and

(b) whether the spouse bringing the action offers or has offered to make available to the other spouse any suitable alternative accommodation,

may refuse to grant decree in that action or may postpone the granting of decree for such period as it may consider reasonable in the circumstances or may grant decree subject to such conditions as it may prescribe.
Procedural provision

21. Section 2 (2) of the Law Reform (Husband and Wife) Act 1962 (dismissal by court of delinquent proceedings between spouses) shall not apply to any proceedings brought before the court in pursuance of any provision of this Act.

Interpretation

22. In this Act—

\(\text{"caravan"}\) means a caravan which is mobile or affixed to the land;

\(\text{"child of the family"}\) includes any child or grandchild of either spouse, and any person who has been brought up or accepted by either spouse as if he or she were a child of that spouse, whatever the age of such a child, grandchild or person may be;

\(\text{"the court"}\) means the Court of Session or the sheriff;

\(\text{"furniture and furnishings"}\) means any article situated in a matrimonial home which

(1) is owned or hired by either spouse or is being acquired by either spouse under a hire-purchase agreement or conditional sale agreement; and

(2) is reasonably necessary to enable the home to be used as a family residence, but does not include any vehicle, caravan or houseboat, or such other structure as is mentioned in the definition of "matrimonial home";

"matrimonial home" means any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure;

"occupancy rights" has, subject to section 18 (6) of this Act, the meaning assigned by section 1 (4) of this Act;

"the sheriff" includes the sheriff having jurisdiction in the district where the matrimonial home is situated;

"tenant" includes sub-tenant and a statutory tenant as defined in section 8 of the Rent (Scotland) Act 1971 and "tenancy" shall be construed accordingly;

"entitled spouse" and "non-entitled spouse", subject to sections 6 (2) and 12 (2) of this Act, have the meanings respectively assigned to them by section 1 of this Act.

Short title, commencement and extent

23.—(1) This Act may be cited as the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

(2) This Act (except this section) shall come into operation on such day as the Secretary of State may by order made by statutory instrument appoint, and different days may be so appointed for different provisions and for different purposes.

(8) This Act extends to Scotland only.
Family Law: Statutes

could, if a corresponding enactment in this Act were in force at the relevant time, have been made, given, begun or done by virtue of the corresponding enactment, it shall, if effective immediately before the corresponding enactment comes into force, continue to have effect thereafter as if made, given, begun or done by virtue of that corresponding enactment.

2. Where any enactment passed before this Act, or any instrument or document refers either expressly or by implication to an enactment repealed by this Act, the reference shall (subject to its context) be construed as or as including a reference to the corresponding provision of this Act.

3. Where any period of time specified in any enactment repealed by this Act is current at the time or reenactment of this Act, this Act has effect as if its corresponding provision had been in force when that period began to run.

Visits by local authority officers under section 3(2)

4. Until such time as the Secretary of State may by order made by statutory instrument appoint, subsection (2) of section 3 shall have effect with the substitution for the words "in accordance with regulations made under subsection (3)" of the words "from time to time where the local authority considers such a course to be necessary or expedient for the purposes of subsection (1)".

Notification under section 5

5.—(1) In this paragraph the relevant date means the date on which regulations made under section 3(3) come into force.

(2) Every person who is maintaining a foster child within the area of a local authority on the relevant date and who before that date has not given notice in respect of the child to the local authority under subsection (1) or (2) of section 5 shall within eight weeks of that date give written notice to the local authority that he is maintaining the child.

Children above compulsory school age

6. Where immediately before the commencement of this Act Part I of the Children Act 1989 applied in relation to a child by virtue only of section 13 of that Act, this Act shall apply in relation to him as it applies in relation to a foster child, until—

(a) he would, apart from the upper limit of the compulsory school age, have ceased to be a foster child, or

(b) he reaches the age of 18, or

(c) he lives elsewhere than with the person with whom he was living when he reached the said limit.

Section 22

SCHEDULE 2

Consequential Amendments

[Amendments to Acts reprinted in The Parliament House Book are given effect in the prints of those Acts.]

Section 22

SCHEDULE 3

Repeals

[Repeals of Acts reprinted in The Parliament House Book have been given effect.]

Family Law (Scotland) Act 1985

(1985 c. 37)

An Act to make fresh provision in the law of Scotland regarding aliment; regarding financial and other consequences of decree of divorce and of declarator of nullity of marriage; regarding property rights and legal capacity of married persons; and for connected purposes.

[16th July 1985]

Release 4b. 28 April 1997

Daily Law (Scotland) Act 1985

ARRANGEMENT OF SECTIONS

Aliment

Section

1. Obligation of aliment.

2. Additional Aliment.


4. Amount of aliment.

5. Variation or decree of aliment.

6. Interim aliment.

7. Agreements on aliment.

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12. Orders for payment of capital sum or transfer of property.

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Supplemental

18. Orders relating to avoidance transactions.

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21. Award of aliment or custody where divorce or separation refused.

22. Expenses of action.

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23. Marriage not to affect property rights or legal capacity.

24. Presumption of egal share in household goods.

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General

26. Interpretation.

27. Amendments, repeals and savings.

Citation, commencement and extent.

Schedules

Schedule 1—Minor and consequential amendments.

Schedule 2—Repeals.

Aliment

Obligation of aliment

(1) From the commencement of this Act, an obligation of aliment shall be owed by, and only by—

(a) a husband to his wife;

(b) a wife to her husband;

(c) a father or mother to his or her child;

(d) a person to a child (other than a child who has been boarded out with a local or other public authority or a voluntary organisation) who has been accepted by him as a child of his family.

(2) For the purposes of this Act, an obligation of aliment is an obligation to contributors to which a court is required or entitled to have regard under
section 4 of this Act in determining the amount of alimony awarded in an action for alimony.

(3) Any obligation of alimony arising under a decree or by operation of law and subsisting immediately before the commencement of this Act shall, except as otherwise consistent with this section, cease to have effect as from the commencement of this Act.

(4) Nothing in this section shall affect any arrear due under a decree at the date of termination or cessation of an obligation of alimony, nor any rule of law by which a person who is owed an obligation of alimony may claim alimony from the executor of a deceased person or from any person enriched by the succession to the estate of a deceased person.

“child” means a person—

(a) under the age of 18 years; or

(b) over that age and under the age of 25 years who is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation;

“husband” and “wife” include the parties to a valid polygamous marriage.

Actions for alimony

2.—(1) A claim for alimony only (whether or not expenses are also sought) may be made, against any person owing an obligation of alimony, in the Court of Session or the sheriff court.

(2) Unless the court considers it inappropriate in any particular case, a claim for alimony may also be made, against any person owing an obligation of alimony, in proceedings—

(a) for divorce, separation, declarator of marriage or declarator of nullity of marriage;

(b) relating to orders for financial provision;

(c) concerning parental responsibilities or parental rights (within the meaning of sections 15 and 24) respectively of the Children (Scotland) Act 1995 or guardianship in relation to children;

(d) concerning parental responsibility or legitimacy;

(e) of any other kind, where the court considers it appropriate to include a claim for alimony.

(3) In this Act “action for alimony” means a claim for alimony in proceedings referred to in subsection (1) or (2) above.

(4) An action for alimony may be brought—

(a) by a person (including a child) to whom the obligation of alimony is owed;

(b) by the curatrix or curatrix of an incapacitated person;

(c) on behalf of a child under the age of 18 years, by—

(i) the parent or guardian of the child;

(ii) a person with whom the child lives or who is seeking a residence order (within the meaning of section 112(6) of the Children (Scotland) Act 1995) in respect of the child;

(d) by a woman (whether married or not) who may bring an action for alimony on behalf of her unborn child as if the child had been born, but no such action shall be heard or disposed of prior to the birth of the child;

(5) A woman (whether married or not) may bring an action for alimony on behalf of her unborn child as if the child had been born, but no such action shall be heard or disposed of prior to the birth of the child.

(6) The court shall be competent to bring an action for alimony notwithstanding that the person for or on behalf of whom alimony is being claimed is living in the same household as the defender.

(7) It shall be a defence to an action for alimony brought by virtue of subsection (6) above that the defender is fulfilling the obligation of alimony and intends to continue doing so.

(8) It shall be a defence to an action for alimony brought by or on behalf of a person other than a child under the age of 16 years that the defender is making an offer, which it is reasonable to expect the person concerned to accept, to receive that person into his household and to fulfil the obligation of alimony.

(9) For the purposes of subsection (8) above, in considering whether it is reasonable to expect a person to accept an offer, the court shall have regard among other things to any conduct, decree or other circumstances which appear to the court to be relevant: but the fact that a husband and wife have agreed to live apart shall not of itself be regarded as making it unreasonable to expect a person to accept such an offer.

(10) A person bringing an action for alimony under subsection (4)(c) above may give a good receipt for alimony paid under the decree in the action.

Amendment

1. Substituted by the Children (Scotland) Act 1995 (c. 30), Schedule 4, para. 36, infra. 1

2. As amended by the Age of Legal Capacity (Scotland) Act 1991 (c. 26), Schedule 1, para. 40 and Schedule 2.

Powers of court in action for alimony

3.—(1) The court may, if it thinks fit, grant decree in an action for alimony, and in granting such decree shall have power—

(a) to order the making of periodic payments, whether for a definite or an indefinite period or until the happening of a specified event;

(b) to order the making of alimentary payments of an occasional or special nature, including payments in respect of incurring, funeral, or educational expenses;

(c) to backdate an award of alimony under this Act—

(i) to the date of the bringing of the action or to such later date as the court thinks fit; or

(ii) on special cause shown, to a date prior to the bringing of the action;

(d) to award less than the amount claimed even if the claim is undisputed.

(2) Nothing in subsection (1) above shall empower the court to substitute a lump sum for a periodic payment.

Amount of alimony

4.—(1) In determining the amount of alimony to be awarded in an action for alimony, the court shall, subject to subsection (3) below, have regard—

(a) to the needs and resources of the parties;

(b) to the earning capacities of the parties;

(c) generally to all the circumstances of the case.

(2) Where two or more parties owe an obligation of alimony to another person, there shall be no order of liability, but the court, in deciding how much, if any, alimony to be awarded against any of those persons, shall have regard, among other circumstances of the case, to the obligation of alimony owed by any other person.

(3) In having regard under subsection (1)(c) above generally to all the circumstances of the case, the court—

(a) may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he maintains as a dependant in his household, whether or not the defender owes an obligation of alimony to that person; and

(b) shall not take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account.

(4) Where a court makes an award of alimony in an action brought by or on behalf of a child under the age of 16 years, it may include in that award provision as it considers to be in the best interests of the child in all the circumstances reasonable in the circumstances in place at the time of the award provision as it considers to be in the best interests of the child in all the circumstances reasonable in the circumstances.
action to enforce such an agreement as is referred to in subsection (2) above as they apply to an action for aliment.

4. In subsection (2) above "the court" meant the court which would have jurisdiction and competence to entertain an action for aliment between the parties to the agreement to which the application under that subsection relates.

5. In this section "agreement" means an agreement entered into before or after the commencement of this Act and includes a unilateral voluntary obligation.

NOTE

1 Inserted by S.I. 1993 No. 660.

Financial provision on divorce, etc.

Orders for financial provision

8.—(1) In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum to him by the other party to the marriage;

(b)(aa) an order for the transfer of property to him by the other party to the marriage;

(b)(ba) an order under section 12A(2) or (3) of this Act;

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as it

(a) considered just or reasonable having regard to the resources of the parties.

(b) agrees to the principles set out in section 9 of this Act;

(c) considers that the provisions of this Act are not inconsistent with the principles set out in section 8 of this Act.

(2) An order under subsection (2) above is in this Act referred to as an "order for financial provision".

NOTES

1 As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40).

2 Sched. 9 para. 34 and Sched. 9.

3 Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40). Sched. 9 para. 34.

4 As inserted by the Pensions Act 1995 (c. 26), s.167(1). Section 167(4) of the Pensions Act 1995 provides that "nothing in the provisions mentioned in section 166(5) [of the 1995 Act] applies to a court exercising its powers under section 6 (orders for financial provision on divorce, etc.) or 12A (orders for payment of capital sum: pensions lump sum) of the 1985 Act in respect of any benefits under a pension scheme which fall within subsection (5)(b) of section 10 of that Act ("pension scheme" having the meaning given in subsection (10) of that section)."

Principles to be applied

9.—(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;

(b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;

(c) the economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;

(d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

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(e) a party who at the time of the divorce seems likely to be in serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

"economic advantage" means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity, and "economic disadvantage" shall be construed accordingly;

"contributions" means contributions made whether before or during the marriage and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

Sharing of value of matrimonial property

10.—(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances.

(2) The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either of them—

(a) before the marriage so far as they relate to the matrimonial property,

(b) during the marriage and which are outstanding at that date.

(3) In this section "the relevant date" means whichever is the earlier of—

(a) subject to subsection (7) below, the date on which the parties ceased to cohabit;

(b) the date of the summons in the action for divorce;

(c) Subject to subsection (5) below, in this section and in section 11 of this Act "the matrimonial property" means all property belonging to the parties or either of them at the relevant date which was acquired by them or him (other than by way of gift or succession from a third party)—

(a) before the marriage for use by them as a family home or as furniture or furnishings for such home;

(b) during the marriage but before the relevant date.

(4) The portion of any rights or interests of either party—

(a) under a life policy or similar arrangement; and

(b) in any benefits under a pension scheme which either party has or may have (including such benefits payable in respect of death of either party), which is referable to the period to which subsection (4)(b) above refers shall be taken to form part of the matrimonial property.

1(5A) In the case of an unfunded pension scheme, the court may not make an order which would allow assets to be removed from the scheme earlier than would otherwise have been the case.

(6) In subsection (1) above "special circumstances", without prejudice to the generality of the words, may include—

(a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;

(b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage; and

(c) any destruction, dissipation or alienation of property by either party, and any resulting imbalance has been (including the nature of the matrimonial property, the use made of it and the extent to use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;

(e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.

(7) For the purposes of subsection (5) above no account shall be taken of any cessation of cohabitation where the parties thereafter resumed cohabitation, except where the parties ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.

(8) The Secretary of State may by regulations make provision—

(a) for the value of any benefits under a pension scheme to be calculated and verified, for the purposes of this Act, in a prescribed manner;

(b) for the trustees or managers of any pension scheme to provide, for the purposes of this Act, information as to that value, and for the recovery of the administrative expenses of providing such information from either party, and regulations made by virtue of paragraph (a) above may provide for that value to be calculated and verified in accordance with guidance which is prepared and from time to time revised by a prescribed body and approved by the Secretary of State.

(9) Regulations under subsection (8) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

1(10) In this section—

"benefits under a pension scheme" includes any benefits by way of pension, whether under a pension scheme or not; "pension scheme" means—

(a) an occupational pension scheme or a personal pension scheme (applying the definitions in section 1 of the Pension Schemes Act 1993, but as if the reference to employed earners in the definition "of personal pension scheme" were to any earners);

(b) a retirement annuity contract;

(c) an annuity, or insurance policy, purchased or transferred for the purpose of giving effect to rights under a pension scheme falling within paragraph (a) above; and

"prescribed" means prescribed by regulations.

(11) In this section, references to the trustees or managers of a pension scheme—

(a) in relation to a contract or annuity referred to in paragraph (b) or (c) of the definition of "pension scheme" in subsection (10) above, shall be read as references to the provider of the annuity;

(b) in relation to an insurance policy referred to in paragraph (c) of that definition, shall be read as a reference to the insurer.

NOTES

1 As amended by the Pensions Act 1995 (c. 26), s.167(2)(a) and as further amended by the Family Law Act 1996 (c. 27), s.177(1).

1 Inserted by the Pensions Act 1995 (c. 26), s.167(2)(b).

2 Inserted by the Pensions Act 1995 (c. 26), s.167(2)(b).

Factors to be taken into account

II.—(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and

(b) any resulting imbalance has been (including the nature of the matrimonial property, the use made of it and the extent to which it is reasonable to expect it to be realised or divided or used as security),

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(a) the matrimony property within the meaning of section 10 of this Act includes any rights or interests in benefits under a pension scheme which the liable party has or may have (whether such benefits are payable to him or in respect of his death); and

(b) those benefits include a lump sum payable to him or in respect of his death.

(2) Where the benefits referred to in subsection (1) above include a lump sum payable to the liable party, the court, on making the capital sum order, may make an order requiring the trustees or managers of the pension scheme in question to pay the whole or part of that sum, when it becomes due, to the other party to the marriage ("the other party").

(3) Where the benefits referred to in subsection (1) above include a lump sum payable in respect of the death of the liable party, the court, on making the capital sum order, may make an order—

(a) if the trustees or managers of the pension scheme in question have power to determine the person to whom the sum, or any part of it, is to be paid, requiring them to pay the whole or part of that sum, when it becomes due, to the other party;

(b) if the liable party has power to nominate the person to whom the sum, or any part of it, is to be paid, requiring the liable party to nominate the other party in respect of the whole or part of that sum;

(c) in any other case, requiring the trustees or managers of the pension scheme in question to pay the whole or part of that sum, when it becomes due, to the other party instead of to the person to whom, apart from the order, it would be paid.

(4) Any payment by the trustees or managers under an order under subsection (2) or (3) above—

(a) shall discharge to the order of the trustees or managers' liability to or in respect of the liable party or to the extent of the amount of the payment; and

(b) shall be treated for all purposes as a payment made by the liable party in or towards the discharge of his liability under the capital sum order.

(5) Where the liability of the liable party under the capital sum order has been discharged in whole or in part, other than by a payment by the trustees or managers under an order under subsection (2) or (3) above, the court may, on an application by any person having an interest, recall any order under either of those subsections or vary the amount specified in such an order, as appears to the court appropriate in the circumstances.

(6) Where—

(a) an order under subsection (2) or (3) above imposes any requirement on the trustees or managers of a pension scheme ("the first scheme") and the liable party acquires transfer credits under another scheme ("the new scheme") which are derived (directly or indirectly) from a transfer from the first scheme of all his accrued rights under that scheme; and

(b) the trustees or managers of the new scheme have been given notice in accordance with regulations under subsection (8) below, the order shall have effect as if it had been made instead in respect of the trustees or managers of the new scheme; and in this subsection "transfer credits" has the same meaning as in the Pension Schemes Act 1993.

(7) Without prejudice to subsection (6) above, the court may, on an application by any person having an interest, vary an order under subsection (2) or (3) above by substituting for the trustees or managers specified in the order the trustees or managers of any other pension scheme under which any lump sum referred to in subsection (1) above is payable to the liable party or in respect of his death.

(8) The Secretary of State may by regulations—

(a) require notices to be given in respect of changes of circumstances relevant to orders under subsection (2) or (3) above;
(b) make provision for the recovery of the administrative expenses of complying with such orders from the liable party or the other party.

(9) Regulations under subsection (8) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(10) Subsection (10) (other than the definition of "benefits under a pension scheme") and subsection (11) of section 10 of this Act shall apply for the purposes of this section as those subsections apply for the purposes of that section.

NOTE

1 Inserted by the Pensions Act 1995 (c. 26), s. 167(3). Section 167(4) of the Pensions Act 1995 provides that "nothing in the provisions mentioned in section 166(5) (of the 1995 Act) applies to a court exercising its powers under section 8 (orders for financial provision on divorce, etc.) or 8A (orders for payment of capital sum: pension lump sums) of the 1985 Act in respect of any benefits under a pension scheme which fall within subsection (3)(b) of section 10 of that Act ("pension scheme" having the meaning given in subsection (10) of that section).

Orders for periodic allowance

13.—(1) An order under section 8(2) of this Act for a periodic allowance may be made—

(a) on granting decree of divorce;
(b) within such period as the court on granting decree of divorce may specify; or
(c) after decree of divorce where—
(i) no such order has been made previously;
(ii) application for the order has been made after the date of decree; and
(iii) since the date of decree there has been a change of circumstances.

(2) The court shall not make an order for a periodic allowance under section 8(2) of this Act unless—

(a) the order is justified by a principle set out in paragraph (c), (d) or (e) of section 9(1) of this Act; and
(b) it is satisfied that an order for payment of a capital sum or for transfer of property under that section would be inappropriate or insufficient to satisfy the requirements of the said section 8(2).

(3) An order under section 8(2) of this Act for a periodic allowance may be for a definite or an indefinite period or until the happening of a specified event.

(4) Where an order for a periodic allowance has been made under section 8(2) of this Act, and since the date of the order there has been a material change of circumstances, the court shall, on an application by or on behalf of either party to the marriage or his executor, have power by subsequent order—

(a) to vary or recall the order for a periodic allowance;
(b) to backdate such variation or recall to the date of the application therefor or, on cause shown, to an earlier date;
(c) to convert the order into an order for payment of a capital sum or for a transfer of property.

(4A) Without prejudice to the generality of subsection (4) above, the making of a maintenance assessment with respect to a child who has his home with a person to whom the periodic allowance is made (being a child to whom the person making the allowance has an obligation of aliment) is a material change of circumstances for the purposes of that subsection.

(5) The provisions of this Act shall apply to applications and orders under subsection (4) above as they apply to applications for periodic allowance and orders on such applications.
Incidental orders

14.—(1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce.

(2) In this Act, “an incidental order” means one or more of the following orders—

(a) an order for the sale of property;

(b) an order for the valuation of property;

(c) an order determining any dispute between the parties to the marriage as to their respective property rights by means of a declarator thereof or otherwise;

(d) an order regulating the occupation of the matrimonial home or the use of furniture and furnishings therein or excluding either party to the marriage from such occupation;

(e) an order regulating liability, as between the parties, for outgoings in respect of the matrimonial home or furniture or furnishings therein;

(f) an order that security shall be given for any financial provision;

(g) an order that payments shall be made or property transferred to any curator bonis or trustee or other person for the benefit of the party to the marriage by whom or on whose behalf application has been made under section 8(1) of this Act for an incidental order;

(h) an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement;

(i) an order as to the date from which any interest on any amount awarded shall run;

(k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.

(3) An incidental order referred to in subsection (2)(d) or (e) above may be made only on or after the granting of decree of divorce.

(4) An incidental order may be varied or recalled by subsequent order on cause shown.

(5) So long as an incidental order granting a party to a marriage the right to occupy a matrimonial home or the right to use furniture and furnishings therein remains in force then—

(a) section 2(1), (2), (5)(a) and (b) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (which confer certain general powers of management on a spouse in relation to a matrimonial home), and

(b) subject to section 15(3) of this Act, section 12 of the said Act of 1981 and section 41 of the Bankruptcy (Scotland) Act 1985 (which protect the occupancy rights of a spouse against arrangements intended to defeat them), shall, except to the extent that the order otherwise provides, apply in relation to the order—

(i) as if that party were a non-entitled spouse and the other party were an entitled spouse within the meaning of section 1(1) or (2) of the said Act of 1981 as the case may require;

(ii) as if the right to occupy a matrimonial home under that order were “occupancy rights” within the meaning of the said Act of 1981; and

(iii) with any other necessary modifications; and

subject to section 15(3) of this Act, section 11 of the said Act of 1981 (protection of spouse in relation to furniture and furnishings) shall apply in relation to the order as if that party were a spouse within the meaning of the said section 11 and the order were an order under section 3(3) or (4) of the said Act of 1981.

[Repeal 20: 21 - v. 92]
(6) In subsection (2)(b) above, “settlement” includes a settlement by way of a policy of assurance to which section 2 of the Married Women’s Policies of Assurance (Scotland) Act 1880 relates.

(7) Notwithstanding subsection (1) above, the Court of Session may by Act of Sederunt make rules restricting the categories of incidental order which may be made under section 8(2) of this Act before the granting of decree of divorce.

NOTE
1 As amended by the Bankruptcy (Scotland) Act 1985 (c. 66), Sch. 7, para. 23.

Rights of third parties
15.—(1) The court shall not make an order under section 8(2) of this Act for the transfer of property if the consent of a third party which is necessary under any obligation, enactment or rule of law has not been obtained.

(2) The court shall not make an order under section 8(2) of this Act for the transfer of property subject to security without the consent of the creditor unless he has been given an opportunity of being heard by the court.

(3) Neither an incidental order, nor any rights conferred by such an order, shall prejudice any rights of any third party insular as those rights existed immediately before the making of the order.

Agreements on financial provision
16.—(1) Where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce, the court may make an order setting aside or varying—

(a) any term of the agreement relating to a periodic allowance where the agreement expressly provides for the subsequent setting aside or variation by the court of that term; or

(b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into.

(2) The court may make an order—

(a) under subsection (1)(a) above at any time after granting decree of divorce; and

(b) under subsection (1)(b) above on granting decree of divorce or within such time thereafter as the court may specify on granting decree of divorce.

1 Without prejudice to subsections (1) and (2) above, where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce and—

(a) the estate of the party by whom any periodical allowance is payable under the agreement has, since the date when the agreement was entered into, been sequestrated, the award of sequestration has not been recalled and the party has not been discharged;

(b) an analogous remedy within the meaning of section 10(5) of the Bankruptcy (Scotland) Act 1985 has, since that date, come into force and remains in force in respect of that party’s estate;

(c) that party’s estate is being administered by a trustee acting under a voluntary trust deed granted since that date by the party for the benefit of his creditors generally or is subject to an analogous arrangement; or

(d) by virtue of the making of a maintenance assessment, child support maintenance has become payable by either party to the agreement with respect to a child to whom or for whose benefit periodical allowance is paid under that agreement, the court may, on or at any time after granting decree of divorce, make an order setting aside or varying any term of the agreement relating to the periodical allowance.

Any term of an agreement purporting to exclude the right to apply for an order under subsection (1)(b) or (3) above shall be void.

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the party making the claim may, not later than one year from the date of the disposal of the claim, apply to the court for an order—

(i) setting aside or varying any transfer of, or transaction involving, property effected by the other party not more than five years before the date of the making of the claim; or

(ii) interdicting the other party from effecting any such transfer or transaction.

(2) Subject to subsection (3) below, on an application under subsection (1) above for an order the court may, if it is satisfied that the transfer or transaction had the effect of, or is likely to have the effect of, defeating in whole or in part any claim referred to in subsection (1) above, make the order applied for or such other order as it thinks fit.

(3) An order under subsection (2) above shall not prejudice any rights of a third party in or to the property where that third party—

(a) has in good faith acquired the property or any of it or any rights in relation to it for value; or

(b) derives title to such property or rights from any person who has done so.

(4) Where the court makes an order under subsection (2) above, it may include in the order such terms and conditions as it thinks fit and may make any ancillary order which it considers expedient to ensure that the order is effective.

Injunction and arrestment

19.—(1) Where a claim has been made, being—

(a) an action for aliment, or

(b) a claim for an order for financial provision,

the court shall have power, on cause shown, to grant warrant for inhibition or warrant for arrestment on the dependence of the action in which the claim is made and, if it thinks fit, to limit the inhibition to any particular property or to limit the arrestment to any particular property or to funds not exceeding a specified value.

(2) In subsection (1) above, “the court” means the Court of Session in relation to a warrant for inhibition and the Court of Session or the sheriff, as the case may require, in relation to a warrant for arrestment on the dependence.

(3) This section is without prejudice to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (wages, pensions, etc., to be exempt from arrestment on the dependence of an action).

Provision of details of resources

20. In an action—

(a) for aliment;

(b) which includes a claim for an order for financial provision; or

(c) which includes a claim for interim aliment,

the court may order either party to provide details of his resources or those relating to a child or incapax on whose behalf he is acting.

Award of aliment or custody where divorce or separation refused

21. A court which refuses a decree of divorce or separation shall not, by virtue of such refusal, be prevented from making an order for aliment.

NOTE

As amended by the Children (Scotland) Act 1995 (c. 36), s.105(3) and Sched. 5, infra.

Expenses of action

22. The expenses incurred by a party to a marriage in pursuing or defending—

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(a) an action for aliment brought by either party to the marriage on his own behalf against the other party;
(b) an action for divorce, separation, declarator of marriage or declarator of nullity of marriage;
(c) an application made after the commencement of this Act for variation or recall of a decree of aliment or an order for financial provision in an action brought before or after the commencement of this Act, shall not be regarded as necessary for which the other party to the marriage is liable.

Actions for aliment of small amount

23. [New s 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963 is printed in that Act, supra, Division D.]

Marriage not to affect property rights or legal capacity

24.—(1) Subject to the provisions of any enactment (including this Act), marriage shall not of itself affect—
(a) the respective rights of the parties to the marriage in relation to their property;
(b) the legal capacity of the parties to the marriage.
(2) Nothing in subsection (1) above affects the law of succession.

Presumption of equal shares in household goods

25.—(1) If any question arises (whether during or after a marriage) as to the respective rights of ownership of the parties to a marriage in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.
(2) For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while the parties were married and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.
(3) In this section “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than—
(a) money or securities;
(b) any motor car, caravan or other road vehicle;
(c) any domestic animal.

Presumption of equal shares in money and property derived from housekeeping allowance

26. If any question arises (whether during or after a marriage) as to the right of a party to a marriage to money derived from any allowance made by either party for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party in equal shares.

General

Interpretation

27.—(1) In this Act, unless the context otherwise requires—
“action” means an action brought after the commencement of this Act;

“child support maintenance” has the meaning assigned to it by section 3(6) of the Child Support Act 1991;
“the court” means the Court of Session or the sheriff, as the case may require;
“deed” in an action for aliment includes an order of the court awarding aliment;
“family” includes a one-parent family;
“incidental order” has the meaning assigned to it by section 14(2) of this Act;
“maintenance assessment” has the meaning assigned to it by section 54 of the Child Support Act 1991;
“marriage”, in relation to an action for declarator of nullity of marriage, means purported marriage;
“matrimonial home” has the meaning assigned to it by section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 as amended by section 13(10) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985;
“needs” means present and foreseeable needs;
“obligation of aliment” shall be construed in accordance with section 32 of this Act;
“order for financial provision” means an order under section 8(2) of this Act and, in sections 18(1) and 22(2) of this Act, also includes an order under section 5(2) of the Divorce (Scotland) Act 1976; “party to a marriage” and “party to the marriage” include a party to a marriage which has been terminated or annulled;
“property” in sections 8, 12, 13 and 15 of this Act does not include a tenancy transferable under section 13 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
“resources” means present and foreseeable resources;
“voluntary organisation” means a body, other than a local or other public authority, the activities of which are not carried on for profit.

Amendments, repeals and savings

28.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out therein.
(2) The enactments specified in columns 1 and 2 of Schedule 2 to this Act are repealed to the extent specified in columns 3 of that Schedule.
(3) Nothing in subsection (2) above shall affect the operation of section 5 (orders for financial provision) of the Divorce (Scotland) Act 1976 in relation to an action for divorce brought before the commencement of this Act, but in the continued operation of that section the powers of the court—
(a) to make an order for payment of periodical allowance under subsection (2) thereof; and
(b) to vary such an order under subsection (4) thereof, shall include power to make such an order for a definite or an indefinite period or until the happening of a specified event.

Citation, commencement and extent

29.—(1) This Act may be cited as the Family Law (Scotland) Act 1985.
(2) This Act shall come into operation on such day as the Secretary of State may appoint by order made by statutory instrument, and different days may be appointed for different purposes.
(3) An order under subsection (2) above may contain such transitional provisions and savings as appear to the Secretary of State necessary or expedient in connection with the provisions brought into force (whether wholly or partly) by the order.
(4) So much of section 28 of, and Schedule 1 to, this Act as affects the operation of the Maintenance Orders Act 1950 and the Maintenance Orders (Reciprocal Enforcement) Act 1972 shall extend to England and Wales and to Northern Ireland as well as to Scotland, but save as aforesaid this Act shall extend to Scotland only.

NOTE

SCHEDULES

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

[Amendments to Acts printed in The Parliament House Book have been given effect in the prints of those Acts.]

SCHEDULE 2

[Repeals affecting Acts printed or formerly printed in The Parliament House Book have been given effect.]

Child Abduction and Custody Act 1985

(1985 c. 60)

An Act to enable the United Kingdom to ratify two international Conventions relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.

[25th July 1985]

NOTE
1 See the Family Law Act 1986 (c. 55), s. 1(1)(A)(iv).

ARRANGEMENT OF SECTIONS

PART I

INTERNATIONAL CHILD ABDUCTION

Section
2. Contracting States.
3. Central Authorities.
5. Interim powers.

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