Scottish Law Commission

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FAMILY LAW

REPORT ON OUTDATED RULES IN THE LAW OF HUSBAND AND WIFE

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by the Lord Advocate
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SCOTTISH LAW COMMISSION

Item 14 of the Second Programme

FAMILY LAW

REPORT ON OUTDATED RULES IN THE LAW OF HUSBAND AND WIFE

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on

Outdated Rules in the Law of Husband and Wife

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
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JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
11th February 1983

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PART I INTRODUCTION

1.1 In this Report, prepared as part of our family law programme,[1] we make recommendations for reform of certain aspects of the law of Scotland on husband and wife. Some of these recommendations are for the abolition of rules which may have had a useful function in the middle of the nineteenth century but which are inconsistent with the legal and social position of married women today. Some would remove rules which discriminate against women, or men, on grounds of sex. In this connection we note that the General Assembly of the United Nations, on 18 December 1979, adopted a Convention on the elimination of all forms of discrimination against women. The Convention, which was opened for signature on 1 March 1980, has been signed[2] but not yet ratified by the United Kingdom. Part IV of the Convention deals with legal discrimination against women and is relevant to several of the matters discussed in this Report. Implementation of the recommendations in this Report would remove certain inconsistencies between Scots law and the terms of Part IV of the Convention.

1.2 In accordance with our usual practice, we published a Consultative Memorandum[3] on the matters dealt with in this Report and invited comments on provisional proposals for reform. Most of the proposals received almost unanimous support although, as we note later, there was a division of opinion on one or two issues. We are grateful to all those who submitted comments.[4]

PART II ENGAGEMENTS TO MARRY

Actions for breach of promise of marriage

Present law

2.1 It is competent in Scots law to raise an action for damages for breach of promise of marriage where one of the parties to an engagement "wrongfully"[5] fails to implement his promise to marry the other. Originally, the action permitted a party to recover only pecuniary loss.[6] However, in the early part of the nineteenth century, the courts extended the law and held that damages could include solatium for injury to the pursuer's feelings.[7] At this time, it was thought that a person's standing and reputation in the community could suffer because of a broken engagement. Indeed, it was thought that a broken engagement could lead to a diminished chance of marriage and claims based on this "loss of market" were also allowed. As Lord Meadowbank put it in *Hogg* v. *Gow*:

> "Her heart is used; it is worn; she is less attractive to others."[8]

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[1]See our Second Programme of Law Reform (Scot. Law Com. No. 8, 1968), Item 14.

[2]On 22 July 1981.

[3]Consultative Memorandum No. 54, *Some Obsolete and Discriminatory Rules in the Law of Husband and Wife* (1982).

[4]A list of those who submitted written comments on the Consultative Memorandum is contained in Appendix C.

[5]See *Tucker* v. *Aitchison* (1846) 9 D. 21. The courts have never compelled a person to implement his promise: see e.g. *Hogg* v. *Gow* May 27, 1812, F.C. per Lord Meadowbank at 658.

[6]*Johnston* v. *Paisley* (1770) Mor. 13916.

[7]*Hogg* v. *Gow* May 27, 1812, F.C.

[8]*Ibid.*, at 657.

There is little modern authority on actions for breach of promise of marriage and it is not clear how claims based on "loss of market" would fare today. It seems clear, however, that damages may be recovered not only for actual pecuniary loss incurred in contemplation of the marriage[1] but also for loss of the financial benefits which would have resulted from the marriage[2] and for distress and injury to feelings.[3]

2.2 The action is competent at the instance of either party, although actions by male pursuers have been rare and not conspicuously successful. In *Longmore* v. *Massie,*[4] for instance, a man sued a married woman for £500 for breach of promise. He was awarded one shilling and no expenses. Legal aid is not available for an action for breach of promise.[5]

2.3 Liability for breach will arise only where the defender "wrongfully"[6] failed to implement his promise and so the defender may plead that he or she was justified in breaking off the engagement. What will amount to justification is a question of fact to be decided in the circumstances of each case. It has been held, for example, that the discovery by a man that his fiancée had given birth to an illegitimate child some years before justified him in breaking off the engagement.[7] In *Liddell* v. *Easton's Trs.* the man had postponed the marriage because of a well-founded fear about his own mental health. It was held that a reasonable postponement did not amount to breach but the view was also expressed that in any event a breach would have been justified.[8]

Criticisms of present law

2.4 The present law probably does not reflect modern attitudes. An engagement to marry is nowadays generally regarded as a personal and social commitment and it seems unlikely that many people would regard it as creating a legal relationship, breach of which could result in a claim for substantial damages. We did not think that the considerable expense of a public opinion survey was justified on this limited question, but we did particularly invite views on it in our Consultative Memorandum. There was no dissent from the view expressed above.

2.5 A second criticism of the present law is that any legal restriction on the freedom of a person to withdraw from a proposed marriage is undesirable. It is not in the best interests of the parties, nor in the interests of society, that one of the parties should be induced to enter into marriage by the threat of legal action.

2.6 A third criticism is that a right of action may potentially afford scope for blackmail, or "gold-digging" claims, or actions raised out of spite. This risk has been cited as a major reason for the abolition of the action in England[9]

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[1] *Currie* v. *Guthrie* (1874) 12 S.L.R. 75; *McIntyre* v. *Cunningham* (1920) 36 Sh. Ct. Rep. 54.

[2] *McIntyre* v. *Cunningham* (1920) 36 Sh. Ct. Rep. 54. It is for this reason relevant to make averments as to the defender's financial position (see *Tucker* v. *Aitchison* (1846) 9 D. 21; *Somerville* v. *Thomson* (1896) 23 R. 576).

[3] *Hogg* v. *Gow* May 27, 1812, F.C.; *Rose* v. *Gollan* (1816) 1 Mur. 82.

[4] (1883) 2 Guthrie 450.

[5] Legal Aid (Scotland) Act 1967, Sched. 1, Part II.

[6] See *Tucker* v. *Aitchison* (1846) 9 D. 21.

[7] *Fletcher* v. *Grant* (1878) 6 R. 59.

[8] 1907 S.C. 154, 162.

[9] Law Com. No. 26 (1969), *Breach of Promise of Marriage,* para. 17.

and some states of the United States of America.[1] Although actions appear to be rare, there is no means of knowing how often actions are threatened, and even a few blackmail attempts may be thought to be too many.

2.7 A fourth criticism is that to allow damages to be recovered for breach of promise is somewhat inconsistent with the approach now taken to financial provision on divorce. Divorce is nowadays very common and people can now be divorced against their will even if they have not been guilty of any matrimonial offence.[2] Financial provision on divorce may be awarded to either party[3] but, whatever else may be its purpose, it is no longer generally regarded as providing damages for breach of the obligations assumed on marriage. A person who is granted a divorce after a short childless marriage may well not receive (and indeed will often not even claim) any financial provision. It may seem anomalous that damages can be awarded against someone for withdrawing from an engagement but not for withdrawing from a marriage.

Options for reform

2.8 In our Consultative Memorandum we put forward two options for reform:[4] (a) to abolish the action altogether (as has been done in England and Wales,[5] Australia,[6] New Zealand[7] and some states in the United States of America[8]); or (b) to restrict the damages recoverable (as has been done in some other states in the United States of America[9]). There was almost unanimous support for some reform of the law on breach of promise. Opinion was, however, divided as between the two options. A few commentators suggested a third possibility—to abolish the action for breach of promise but to allow certain losses to be recovered under some other principle. We shall deal with this last possibility first.

2.9 Abolition of the action for breach of promise would not prevent an action based on fraud, or on recompense for unjustified enrichment,[10] or on the somewhat obscure and anomalous line of cases permitting a person in certain limited circumstances to recover expenditure incurred in reliance on an arrangement which is not a legally enforceable contract.[11] It would not be realistic to suppose, however, that such residual common law remedies would provide much prospect of a successful action in all but the most unusual cases. If abolition of the action for breach of promise were to be coupled with the provision of an effective remedy for the recovery of certain losses, the remedy

[1]Feinsinger, "Legislative Attack on 'Heart-balm'", 33 Mich. L. Rev. (1935) 979. Since the 1930s, some 15 states have abolished the action for breach of promise by so-called "heart-balm" statutes, which have been described as a legislative response to serious abuses of the action.

[2]Divorce (Scotland) Act 1976, s. 1(2)(*e*).

[3]*Ibid.*, s. 5.

[4]Proposition 1, para. 2.19.

[5]Law Reform (Miscellaneous Provisions) Act 1970, s. 1(1). We are informed by the Law Commission that, so far as their records disclose, abolition of the action has not given rise to difficulties.

[6]Marriage Amendment Act 1976, s. 21.

[7]Domestic Actions Act 1975, s. 5(1).

[8]See Krause, *Family Law Cases and Materials* (1976), pp. 116–8.

[9]*Ibid.*

[10]See e.g. *Newton* v. *Newton* 1925 S.C. 715.

[11]*Walker* v. *Milne* (1823) 2 S. 379; *Glassford* v. *Brown* (1830) 9 S. 105; *Heddle* v. *Baikie* (1846) 8 D. 376; *Dobie* v. *Lauder's Trs.* (1873) 11 M. 749; *Allan* v. *Gilchrist* (1875) 2 R. 587; *Hamilton* v. *Lochrane* (1899) 1 F. 478; *Gilchrist* v. *Whyte* 1907 S.C. 984; *Gray* v. *Johnston* 1928 S.C. 659.

would have to be a new statutory one. A statutory provision on such a remedy would have to be quite elaborate. We doubt whether this subject is such as to justify elaborate legislative intervention. There is, moreover, a serious difficulty in relation to the role of fault in any such new remedy. If losses could be recovered without fault on the part of the defender there would be a risk of unacceptable results. Why, for example, should a man who himself breaks off an engagement for no good reason recover from his fiancée expense which he has incurred in reliance on the engagement, such as the expense of trying to buy a house? On the other hand, if losses could be recovered only on proof of fault, many of the criticisms levelled at breach of promise actions could be levelled at the new remedy. There would, in fact, be breach of promise actions under another name. One interesting suggestion was that fault should be ignored and that certain losses (such as expenditure actually incurred in contemplation of the marriage or loss caused by the giving up of employment as a result of the engagement) should simply be distributed equally between the parties. Again, however, we are not convinced that this would always produce fair and acceptable results. Suppose, for example, that a man has a well-paid post in some climatically unpleasant part of the world. Because of his engagement to marry, he gives this up for a less well-paid post in Scotland. He then falls in love with another woman and breaks off the engagement. Why should he have a legal right to recover from his former fiancée half of the loss in income resulting from his change of employment? Although we gave careful consideration to these suggestions, our conclusion was that they would be liable to produce at least as much difficulty as the present law. We concluded, therefore, that the effective choice was between the two options presented in the Consultative Memorandum—abolishing the action or restricting the types of damages recoverable.

2.10 Those who favoured retaining the action but restricting the types of damages recoverable generally thought that a claim for damages should be confined to (a) loss due to expenses actually incurred in contemplation of the marriage; (b) loss caused by giving up employment, or failure to take up employment, as a result of the engagement; and (c) other pecuniary loss suffered as a result of reliance on the engagement. Even these restricted heads of damages could give rise to very substantial claims as, for example, in the case figured above where a man gives up a well-paid post abroad as a result of his engagement to marry. We question whether in modern conditions responsibility for this sort of loss, flowing from a voluntary decision to give up or change employment, can reasonably be laid at the door of a fiancé(e).

Recommendation

2.11 The fundamental question is whether an engagement to marry should be regarded as giving rise to a legal obligation. If not, it is hard to see on what basis any damages should be recoverable. In our view an engagement to marry should not give rise to any legal obligation. We therefore **recommend**:

1. (*a*) An engagement or promise to marry should not have effect to create any legal rights or obligations; and
   (*b*) the action for breach of promise should be abolished.[1]

[1]See draft Bill, Appendix A, cl. 1.

2.12 Part (*a*) of the above recommendation is intended to apply to engagements or promises to marry governed by Scots law, no matter where any action based on them is raised. It lays down a rule of substantive law. Part (*b*) of the recommendation is designed, first, to preclude any attempt to base an action for breach of promise on any ground other than contract or promise; and second, to make it clear that an action for breach of promise is incompetent in a Scottish court, even if the engagement or promise is governed by some foreign law under which it does give rise to a legal obligation. Part (*a*) of the recommendation should, we think, apply to engagements whenever made, unless an action based on such an engagement had actually been commenced before implementing legislation came into force. Part (*b*) would apply only to actions brought after the implementing legislation came into force.[1]

Property disputes on termination of engagement

2.13 There are at present no special rules applying to property disputes between engaged couples. The normal rules applying to disputes about any property apply. Thus if a man has spent money, without any intention of donation, on improving property belonging to his fiancée, he may have a claim based on the general law of recompense.[2] Again, if one party has given the other an unconditional gift (such as a Christmas present) then, in accordance with the general law on the transfer of property by donation, that gift will be irrecoverable even if the engagement is subsequently broken off. If, however, the gift was expressly or impliedly conditional on the marriage taking place it could be recovered, again in accordance with the general law on this topic, if the marriage did not take place.[3] These rules apply to engagement rings[4] and to engagement gifts made by third parties.[5]

2.14 In the Consultative Memorandum we provisionally concluded that the existing law on unjustified enrichment provided adequate remedies for any problems which might arise in relation to property on the termination of an engagement, and that there should not be a special set of rules for regulating property disputes between formerly engaged couples.[6] We noted that, although in England and Wales the courts have power to settle property disputes between couples whose engagement to marry has terminated,[7] the legislation on this matter merely applies existing provisions for settling disputes between married couples.[8] As there are no such provisions in Scots law, we considered that it would be unjustifiable and anomalous to enact a special set of rules

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[1]These points are all dealt with in clause 1 of the draft Bill appended to this Report. Cf. the Law Reform (Miscellaneous Provisions) Act 1970, s. 1.

[2]See e.g. *Newton* v. *Newton* 1925 S.C. 715.

[3]The applicable legal principle here is restitution, and the applicable remedy is the *condictio causa data, causa non secuta.* See Stair I.7.7. (". . . 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: . . .").

[4]See *Gold* v. *Hume* (1950) 66 Sh. Ct. Rep. 85; *Savage* v. *McAllister* (1952) 68 Sh. Ct. Rep. 11. In the first of these cases it was held that a ring was given unconditionally; in the second that it was given on the condition that it would be returned if the marriage did not take place for any reason other than the donor's breach of the engagement.

[5]Stair I.7.7.

[6]See Proposition 2, para. 3.6.

[7]Law Reform (Miscellaneous Provisions) Act 1970, s. 2(2).

[8]Married Women's Property Act 1882, s. 17; Matrimonial Causes (Property and Maintenance) Act 1958, s. 7.

for property disputes between formerly engaged couples. This was supported on consultation, and we therefore make no recommendation for legislation on this point.

2.15 We gave separate consideration in the Consultative Memorandum to the question whether there should be a special statutory rule on the ownership of engagement rings. We noted that in England and Wales section 3(2) of the Law Reform (Miscellaneous Provisions) Act 1970 provides that:

> "The gift of an engagement ring shall be presumed to be an absolute gift; this presumption may be rebutted by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason."

In favour of a rule of this nature, it could be said that the present law is uncertain and that it is advantageous to have a reasonably clear rule. Against a special statutory rule on engagement rings, it could be said that they do not differ in any legally significant respect from various other gifts between engaged couples; that they do not seem to give rise to frequent legal disputes; and that they can safely be left to be regulated by the general law. We stated no provisional conclusion, but merely set out options and invited views. The majority of those who commented thought that no special statutory rule on engagement rings was necessary. We agree with this view and therefore make no recommendation for legislation on this point.

PART III ACTIONS OF ADHERENCE

Introduction

3.1 A wife or husband who has been deserted by the other spouse without reasonable cause may raise an action of adherence. This is an action in which the pursuer requests the court to grant a

> "decree ordaining the defender to adhere to the pursuer and cohabit with her as his wife (*or* with him as her husband)".[1]

Conclusions for adherence were not unusual in consistorial actions before the Courts Spiritual in medieval Scotland.[2] The practice of the Officials was taken over after the Reformation by the Commissary Courts;[3] but decrees of adherence were also given by the Presbyteries.[4] Actions of adherence were recognised by the well-known Act of the Scottish Parliament of 1573 which established desertion as a ground of divorce.[5] Under that Act, a deserted spouse was required to raise an action of adherence in the local court, as the first of sundry preliminary steps of procedure which had to be taken before an action of divorce for desertion could be raised on the expiry of the

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[1]Rules of Court of Session, Appendix, Form 2, para. (18).

[2]*Liber Officialis Sancti Andree*, Abbotsford Club, 1845, items 119, 125, 148 and 162; unpublished Dunblane Act Book, f. 12r°.

[3]For example in Jan. 1567–8, the Earl of Argyll raised an action of adherence in the Commissary Court of Edinburgh. Edinburgh Court Decrees (MSS), vol. 6, 22 June 1573 (Scottish Record Office).

[4]*Selections from the Records of the Kirk Session of Aberdeen*, Spalding Club, 1846, p. 175.

[5]A.P.S. 1573, record edn., c. 1; 12 mo. edn., c. 55: the Act was inspired by Genevan legislation of 1561 based on John Calvin's *Project d'ordonnance sur les mariages*.

prescribed period of desertion.[1] These preliminary steps of procedure were abolished in 1861,[2] but actions of adherence remained competent. They are now almost invariably coupled with a claim for aliment.

Present law

3.2 The ground of an action of adherence, whether or not it includes a claim for aliment, is that the defender, being bound to adhere, wilfully refuses to do so.[3] There is a difference of opinion on the question whether the pursuer must aver and prove that he or she is willing to adhere to the defender. On one view, this is necessary.[4] On another, willingness to adhere is to be presumed from the raising of the action.[5] Yet another view is that while the pursuer must satisfy the court that he or she is willing to adhere, this need not be by corroborated evidence.[6] It is a defence to the action that the defender has reasonable cause for desertion. Since 1956 it has been held that a spouse has reasonable cause for non-adherence, not only if the other spouse has been guilty of adultery or cruelty, but also if he has been guilty of any behaviour which is grave and weighty and such that it would shock the conscience of reasonable persons to require the parties to live together.[7] An action of adherence is a consistorial action and, as such, is governed by special procedural rules.[8] There can, for example, be no decree without proof, even if the action is undefended or the defender admits that he or she refuses to adhere.[9] Although the sheriff courts have no jurisdiction to entertain an action for adherence alone[10] they have, by statute, jurisdiction in an action of adherence and aliment.[11]

3.3 A decree of adherence will not be specifically enforced.[12] A spouse who has obtained such a decree cannot instruct messengers-at-arms or sheriff officers to bring the deserting spouse back by force, and cannot enforce the decree indirectly by doing diligence against the deserting spouse's property to induce him or her to return.[13] In an action of adherence and aliment the award of aliment is conditional on the defender not complying with the decree of adherence. A decree of adherence has no effect on property or succession.

Criticisms of present law

3.4 We consider that the action of adherence has outlived its usefulness.[14] There appear to be only two possible arguments for its retention, both of

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[1]For a fuller description of the procedure, now of purely historical interest, see our Memorandum to the Finer Committee on One-Parent Families (1974) Cmnd. 5629, vol. 2, pp. 160–3 (App. 6, paras. 18–20).

[2]Conjugal Rights (Scotland) Amendment Act 1861, s. 11.

[3]*AB.* v. *CB.* 1937 S.C. 408 at 419–20.

[4]*Cameron* v. *Cameron* 1956 S.L.T. (Notes) 7; *Burnett* v. *Burnett* 1958 S.C. 1; *Jack* v. *Jack* 1962 S.C. 24 at 26.

[5]*Smith* v. *Smith* 1967 S.L.T. (Sh. Ct.) 16.

[6]*Reid* v. *Reid* 1978 S.L.T. (Sh. Ct.) 2.

[7]*Richardson* v. *Richardson* 1956 S.C. 394.

[8]Conjugal Rights (Scotland) Amendment Act 1861, s. 19; Rules of Court, rules 154–170B.

[9]*Sleigh* v. *Sleigh* (1893) 1 S.L.T. 30; *Wright* v. *Wright* (1894) 2 S.L.T. 29.

[10]*Docherty* v. *Docherty* 1959 S.L.T. (Sh. Ct.) 29.

[11]Sheriff Courts (Scotland) Act 1907, s. 5(2).

[12]*Hastings* v. *Hastings* 1941 S.L.T. 323 at 325.

[13]*Macgregor* v. *Macgregor* (1836) 14 S. 707.

[14]The corresponding English action, for restitution of conjugal rights, was abolished by the Matrimonial Proceedings and Property Act 1970, s. 20.

which lack substance. The first is that the action is a useful way of demonstrating, in a case where there is doubt about which spouse is in desertion, that the pursuer is calling on the other spouse to adhere. There is, however, no reason why a pursuer who is genuinely willing to adhere should not make his or her offer in a less threatening way, and no reason why the law should provide a tactical weapon for a pursuer who is not genuinely willing to adhere. The second argument is that the action of adherence and aliment is a useful remedy for the deserted wife who wishes a decree for aliment. There is, however, no reason why such a wife should not raise an action for aliment alone.[1] It is not necessary, and merely makes the procedure more lengthy and expensive, to seek in addition a decree of adherence.

3.5 The retention of an unnecessary and obsolete remedy complicates the law and is for that reason undesirable. This is well illustrated by the law on the jurisdiction (in the international sense) of the Scottish courts in actions of adherence and aliment. The law here is bedevilled by uncertainty as to whether the action is of a "status" or a pecuniary nature and is confused and unsatisfactory.[2]

Recommendation

3.6 In the Consultative Memorandum we provisionally concluded that actions of adherence should be abolished; and that it should no longer be possible to apply for a decree of adherence either on its own or along with aliment or any other remedy.[3] This provisional conclusion was unanimously supported on consultation. We therefore **recommend:**

2. It should no longer be competent to apply for a decree of adherence.[4]

PART IV ACTIONS OF ENTICEMENT OF A SPOUSE

4.1 Another action which seems an anachronism and which serves no useful purpose is the action for enticement of a spouse.[5] The ground of this action is not adultery, which need not be established, but simply the inducement of a spouse (whether the husband or wife) to leave the other spouse. Although there are statements by some judges and textbook writers to the effect that such an action is possible in Scots law, there is no recorded instance of damages being awarded for enticement. The action has been abolished in England and Wales[6] and in a number of other English-speaking jurisdictions.[7] After

[1]An action of this nature is at present known as an action for interim aliment in the sheriff courts, but the award can continue so long as the defender refuses to adhere. See *Donnelly* v. *Donnelly* 1959 S.C. 97. In our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981), para. 2.59, we recommend that the artificial distinction between actions for interim aliment and actions for so-called permanent aliment should be abolished. Under our recommendations it would continue to be possible for a deserted wife (or husband) to bring an action for aliment alone. There would continue to be no need for a crave or conclusion for adherence.

[2]See Anton, *Private International Law*, pp. 340–1; Clive, *Husband and Wife* (2nd edn. 1982), pp. 219–21.

[3]See Proposition 3, para. 4.6.

[4]See draft Bill, Appendix A, cl. 2.

[5]See Scot. Law Com. No. 42: *Report on Liability for Adultery and Enticement of a Spouse* (1976).

[6]Law Reform (Miscellaneous Provisions) Act 1970, s. 5.

[7]See Scot. Law Com. No. 42, Appendix B.

consultation on this question, we recommended in an earlier Report that the action for damages for enticement of a spouse should be declared by statute to be incompetent.[1] The relevant section of that Report is reproduced in Appendix B. Most of the recommendations in our earlier Report related to adultery, and the opportunity to implement them was taken in the Divorce (Scotland) Act 1976.[2] Our recommendation to abolish the action of enticement has not yet been implemented, however, and we therefore suggest that the opportunity to do so should be taken in any legislation which implements the recommendations contained in this Report. We have included a suitable provision in the draft Bill.[3]

PART V CURATORY OF MARRIED MINORS

Present law

5.1 The law governing the curatory of a minor wife by her husband is set out in section 2 of the Married Women's Property (Scotland) Act 1920, which provides that:

> "A husband of full age, and subject to no legal incapacity, whose wife is in minority, shall be her curator during her minority, but no longer; but where the husband is in minority at the date of the marriage, or subject to some legal incapacity, the wife's father, or other curator,[4] if she have any, shall be entitled to continue to act as such until she attains majority, or her husband's curatory commences."

The effect of this rule is that a young woman under the age of 18 who is married to a man of 18 or over will require his consent, subject to certain exceptions, to all her contracts and other juristic acts. In practice this requirement is likely to be ignored in the case of normal cash transactions, where the question of legal capacity to contract is unlikely to arise. Problems may arise, however, if the wife wishes to litigate or to sell her heritable property or to enter into any other serious legal transaction.

5.2 A male minor does not fall under the curatory of a wife of full age and capacity. On marriage he is probably freed by forisfamiliation from the curatory of his parents.[5] There is, however, some doubt about whether the marriage of a young man always results in forisfamiliation.[6] In the old case of *Anderson* v. *Anderson*[7] it was held that the marriage of a young man of 20, who was still under indenture as an apprentice mason, did not automatically result in forisfamiliation. In *Harvey* v. *Harvey,*[8] however, Lord Justice-Clerk Inglis stated the law, *obiter,* as follows:

> "A girl, by her marriage, only exchanges one curator for another. She passes from the guardianship of her father to that of her husband. But a

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[1] *Ibid.*, para. 46, Recommendation 7.
[2] S. 10.
[3] See draft Bill, Appendix A, cl. 2. No draft Bill was appended to Scot. Law Com. No. 42.
[4] The mother of a legitimate child is now curator along with the father: Guardianship Act 1973, s. 10.
[5] Stair I.5.13; Erskine I.6.53.
[6] Bankton I.6.8.
[7] (1832) 11 S. 10.
[8] (1860) 22 D. 1198 at 1208.

boy above fourteen, by his marriage, . . . becomes at once and for ever emancipated from the paternal curatory, . . .".

Criticisms of present law

5.3 There are two principal criticisms of the present law. The first is that it offends against the principle of sex equality. The second is that the very notion of curatory of married minors seems inconsistent with the law on capacity for marriage. If the law regards two young persons as having sufficient capacity to contract a marriage, it ought, on this view, to regard them as having the capacity to act independently of their parents and each other, even though—as several commentators pointed out to us—early marriage is not necessarily a sign of early maturity.

Options for reform

5.4 In the Consultative Memorandum we put forward a number of options for reform.[1] We did, however, point out that we intended to resume work on a memorandum on the law of minors and pupils when resources permitted, and we noted that it would be possible to deal with the question of the legal capacity of a married minor in that context. Some commentators favoured this course. It seems to us, however, that the discriminatory effect of the present rule should be removed at the earliest opportunity. The first option which we considered was to remove this discriminatory effect by applying the rule of section 2 of the 1920 Act to minor husbands. Thus a husband under the age of 18 would be subject to the curatory of his wife if she were over that age. We doubted whether this solution would be acceptable, and no support for it was forthcoming. A second option would be to provide that marriage as such had no effect on curatory. This, however, would leave the general law on forisfamiliation to operate. A married minor who set up an independent household would be forisfamiliated by virtue of that fact: a married minor who continued to live in his or her parents' home would still be under curatory. There was little support for this option on consultation. The third option, and the one which received the support of a majority of commentators, is to provide that marriage frees a minor from curatory. The effect would be that each spouse would be freed on marriage from the curatory of his or her parents, or of any curator appointed by a parent, and that neither spouse would be subject to the curatory of the other. This in our view would be the most satisfactory solution.

Recommendation

5.5 We therefore **recommend:**

3. (*a*) No married person should, by reason only of minority, be subject to the curatory of his parent or of any person appointed by his parent.

   (*b*) No married woman should, by reason only of minority, be subject to the curatory of her husband.[2]

As a consequential matter section 2 of the Married Women's Property (Scotland) Act 1920 (quoted above) should be repealed.[3] We should point out

[1]Proposition 5, para. 6.4.
[2]See draft Bill, Appendix A, cl. 3(1) and (2).
[3]*Ibid.*, cl. 3(3).

that this recommendation would have no effect on the age of majority. A married minor would remain a minor but he or she would be legally in the position of a minor whose parents are dead and who has no curator. This means, in Scots law, that the minor is free to contract, without the need for anyone else's consent, but is given the right to apply to have certain contracts set aside if they were to his or her serious prejudice ("enorm lesion"). Application cannot be made more than four years after the minor has attained the age of majority.

PART VI HUSBAND'S RIGHT TO CHOOSE PLACE OF MATRIMONIAL HOME

Present law

6.1 At common law the husband is said to have the "right" to choose the place of the matrimonial residence. The counterpart to the right is the duty of the wife to accompany him there, provided only that the accommodation selected is reasonably suitable and that the offer of accommodation itself is genuine.[1] The husband's right to choose the place of the matrimonial home is significant only in the context of desertion since, as we have seen,[2] the duty to adhere will not be specifically enforced. In refusing to adhere in the chosen matrimonial home, the wife risks placing herself in desertion,[3] despite the fact that her refusal may be no more than a disagreement over the location of the home.

Criticisms of present law

6.2 The present law is inconsistent with the idea of legal equality in marriage. In most other areas of the law wives have obtained complete legal equality with their husbands. It is anomalous that the husband should have the right to impose his will in relation to the choice of the matrimonial home.[4] The only justification for the present law might be that in a case of deadlock there ought to be some rule for deciding which spouse is in desertion. This may, however, be doubted. There is no reason why, in certain situations, neither spouse should be held to be in desertion. In such a case the parties could obtain a divorce after two years' non-cohabitation if they both so wished, or after five years even if one refused to consent.[5]

Options for reform

6.3 In the Consultative Memorandum we suggested two possible options for reform.[6] The first would be to replace the present rule by a test based on the reasonableness of the respective attitudes of the spouses. Such a test, if adopted, might provide (a) that in a case where the spouses were living apart

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[1] *Muir* v. *Muir* (1879) 6 R. 1353 at 1356–7; *Martin* v. *Martin* 1956 S.L.T. (Notes) 41.

[2] See para. 3.3 above.

[3] See *Stewart* v. *Stewart* 1959 S.L.T. (Notes) 70.

[4] See *Dunn* v. *Dunn* [1949] P. 98 per Denning L.J. at 103. In English law the spouse who is acting unreasonably will be in desertion. If it cannot be said that either is more unreasonable, then probably neither will be in desertion. See Bromley, *Family Law* (6th edn. 1981), pp. 113–4; 220–1.

[5] Divorce (Scotland) Act 1976, s. 1(2)(*d*) and (*e*).

[6] Para. 9.3.

because they could not agree on the location of the matrimonial home, the spouse whose rejection of the other's choice was the more unreasonable should be regarded as being in desertion; (b) that if both spouses were equally unreasonable in rejecting the other's choice, both would be regarded as being in desertion (notwithstanding the normal rule that desertion requires a spouse who is willing to adhere and a spouse who refuses to adhere); and (c) that if both spouses were equally reasonable in rejecting the other's choice, neither would be regarded as being in desertion. Other versions of a reasonableness test could be formulated. The second option would be to abolish the present rule and put nothing in its place. In favour of this approach it could be said that the introduction of an express reasonableness test would be an unduly complicated solution to a problem which does not very often come before the courts. If the existing rule were abolished the courts would still be able to deal with the question of desertion and willingness to adhere in a commonsense way in the light of the whole circumstances of the case. On consultation there was virtually unanimous support for this second option.

Recommendation

6.4 We therefore **recommend:**

4. Any rule of law whereby the husband, as between husband and wife, may choose the place of the matrimonial home, should cease to have effect.[1]

PART VII ANTENUPTIAL MARRIAGE CONTRACTS

Introduction

7.1 Marriage contracts, although much less common than formerly, still have their uses in certain situations, and it is not our purpose here to suggest that any restriction should be placed on the freedom of parties to enter into them. We have considered, however, whether two special rules applying to antenuptial marriage contracts are still justified. Both were understandable in the context in which they arose, but may now seem to be unnecessary and unfair to third parties.[2] The first is that a wife can by an antenuptial marriage contract create, out of her own funds, an alimentary liferent[3] for herself which is protected against her creditors. The second is that an antenuptial contract is regarded as an onerous transaction, the marriage itself being the consideration. We examine these rules in turn.

Wife's power to create alimentary liferent in her own favour

Present law

7.2 The general rule is that no-one can so settle his own funds as to secure for himself an alimentary liferent free from the diligence of his creditors:

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[1]See draft Bill, Appendix A, cl. 4.

[2]There used to be another rule in this category. At one time an antenuptial marriage contract could be used to deprive future children of their legitim. This was changed by the Succession (Scotland) Act 1964, s. 12.

[3]The same principles apply to an alimentary annuity or other alimentary right. See Dobie, *Liferent and Fee* (1941), pp. 231–7. For the sake of convenience, however, we discuss the rule in terms of alimentary liferents.

"The reason is that he could otherwise secure for himself the enjoyment of his yearly income and at the same time put that income wholly beyond the reach of his creditors. It is an elementary principle that where anyone has the full beneficial interest in a fund, he is bound to make that fund available to his creditors. . . ."[1]

There is, however, one exception to this rule. A woman can create an alimentary liferent for herself out of her own funds if she settles them by means of an antenuptial marriage contract.[2] A man has no such privilege.

Criticisms of present law

7.3 An alimentary liferent cannot be assigned,[3] and one justification for the present law on a wife's alimentary liferent of her own funds might be that it protects the wife by preventing her husband from cajoling her into assigning her liferent to further his business interests.[4] It is significant that, unless there is clear and explicit provision to the contrary, the alimentary protection lasts only as long as the marriage: the wife's liferent ceases to be alimentary on the death of the husband or on divorce.[5] Whether it is right for the law to take the view nowadays that married women of full age and capacity are in need of special protection[6] is at least open to debate. On the one hand it might be argued that the present rule is a beneficial anomaly which does not seriously prejudice creditors, because they can arrest any excess over a reasonable aliment,[7] and which may still afford a useful protection to wives. On the other hand it might be argued that the existing rule is an unjustifiable exception to a clear and reasonable general rule—that a person cannot settle his own funds in such a way as to provide an income for himself which is protected from his creditors—and that it is inconsistent with the legal status now enjoyed by married women.[8] There was almost unanimous support on consultation for the view that the present rule was an unjustifiable anomaly and should be abolished. Any provision abolishing the rule should, in our view, apply only to contracts entered into after the amending legislation comes into force.

Recommendation

7.4 We therefore **recommend**:

5. (*a*) It should no longer be possible for a woman, by antenuptial marriage contract, to create an alimentary right in her own favour in respect of any property provided by her.[9]

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[1] *Cargill* 1965 S.C. 122 per Lord President Clyde at 124.

[2] *Ibid.*

[3] See *Coles* 1951 S.C. 608.

[4] Cf. the reasoning in *Menzies* v. *Murray* (1875) 2 R. 507.

[5] *Sturgis's Tr.* v. *Sturgis* 1951 S.C. 637; *Neame* v. *Neame's Trs.* 1956 S.L.T. 57; *Strange and Another, Petrs.* 1966 S.L.T. 59; *Pearson and Others, Petrs.* 1968 S.L.T. 46.

[6] Cf. *Beith's Trs.* v. *Beith* 1950 S.C. 66.

[7] See *Livingstone* v. *Livingstone* (1886) 14 R. 43; *Douglas-Hamilton* v. *Duke and Duchess of Hamilton's Trs.* 1961 S.C. 205 at 222, 223, 225. See also the Bankruptcy (Scotland) Act 1913, s. 98(2) (part of alimentary provision which is in excess of a suitable aliment can be claimed by trustee in sequestration).

[8] A similar rule in English law was abolished by the Law Reform (Married Women and Tortfeasors) Act 1935, s. 2(2) and the Married Women (Restraint upon Anticipation) Act 1949, s. 1.

[9] See draft Bill, Appendix A, cl. 5(1)(*a*).

Marriage as onerous consideration for provisions in marriage contract

Present law

7.5 A transfer of property under an antenuptial marriage contract is regarded as an onerous transfer, or a transfer for true, just and necessary cause, even if there is no financial consideration for it.[1] The marriage itself is regarded as the consideration:

> "In comparing postnuptial contracts with antenuptial contracts we see at once this essential distinction, that the provisions of an antenuptial contract are given principally in consideration of the marriage itself, whilst in postnuptial contracts that element is awanting. The marriage has already taken place."[2]

> ". . . there is no contract which our law regards as more onerous than an antenuptial marriage-contract; nor does it affect the onerosity of an antenuptial marriage-contract that the whole money is provided by the husband and none by the wife."[3]

It follows that a transfer under an antenuptial marriage contract is immune from attack by the donor's creditors as a gratuitous alienation.[4] The creditors might be able to reduce the transaction if they could prove that the marriage contract provisions were part of a fraudulent scheme to defeat their claims, but they would have to prove that both parties participated in the fraud.[5] The possibility that creditors might be able to challenge marriage contract provisions which were grossly exorbitant has also been left open,[6] although there would appear to be an obvious difficulty in deciding how much a marriage was worth as consideration for the provisions. The principle protecting antenuptial contracts has been extended to cover a transfer of money by a man to his intended wife to meet the purchase price of a house to be acquired by her for use as the matrimonial home.[7]

Criticisms of present law

7.6 It is doubtful whether the rule that the marriage itself can be regarded as onerous consideration for a transfer of funds by one party to another squares with contemporary attitudes. That the rule was open to abuse was recognised in nineteenth century cases. In *McLay* v. *McQueen*,[8] for example, the Lord Ordinary said that he was "not surprised that the [husband's] creditors should feel indignant and think that they had been tricked". At that time, when antenuptial marriage contracts were everyday transactions and were widely regarded as an essential form of financial protection for a wife and child, the preservation of a potentially unfair rule may have been justified. That is no longer the case. We therefore invited views in the Consultative

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[1]Erskine IV.1.33.

[2]*Dunlop's Tr.* v. *Dunlop* (1865) 3 M. 758 per Lord Benholme at 764.

[3]*McLay* v. *McQueen* (1889) 1 F. 804 per Lord Kincairney at 809.

[4]*Watson* v. *Grant's Trs.* (1874) 1 R. 882; *McLay* v. *McQueen* (1899) 1 F. 804. These actions were founded on, *inter alia*, the Bankruptcy Act 1621. A transfer under an antenuptial marriage contract would also be immune from attack under clause 33 of the draft Bill appended to our Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No. 68, 1982), because the transfer would be for "adequate consideration".

[5]*McLay* v. *McQueen* (1899) 1 F. 804.

[6]*Carphin* v. *Clapperton* (1867) 5 M. 797.

[7]*Armour* v. *Learmonth* 1972 S.L.T. 150.

[8](1899) 1 F. 804 at 810.

Memorandum whether it should continue to be the law that the marriage itself is regarded as onerous consideration for provisions in an antenuptial marriage contract.[1] There was almost unanimous agreement that it should not be, and we therefore recommend that the law should be changed. Any change should not affect existing marriage contracts: it should apply only to contracts entered into after the amending legislation comes into effect. Nor should a change prevent an antenuptial marriage contract from being regarded as onerous where there was in fact sufficient consideration other than the marriage. The abolition of the common law rule should be without prejudice to any statutory provision on gifts in consideration of marriage. Certain gifts in consideration of marriage are, for example, exempt from capital transfer tax.[2]

Recommendation

7.7 We therefore **recommend**:

5. (*b*) It should no longer be the law that the marriage itself is regarded as onerous consideration for provisions in an antenuptial marriage contract.[3]

PART VIII HUSBAND'S REMAINING LIABILITY FOR WIFE'S ANTENUPTIAL DEBTS

Present law

8.1 Under the common law, a right of property in the wife's moveable estate—the *jus mariti*—vested in her husband on marriage. Because the husband took her entire moveable estate and because a married woman was not subject to personal diligence, the husband was liable for the whole of her antenuptial debts. This common law liability was restricted by the provisions of section 4 of the Married Women's Property (Scotland) Act 1877 which limits the husband's liability to

> "the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage, . . .".

However, by the Married Women's Property (Scotland) Act 1881, the *jus mariti* was abolished and the husband, as a general rule, now receives no property "from, through, or in right of his wife". Actual liability may still arise if a husband has received property "from, through, or in right of his wife" by, for example, marriage contract, gift or succession: but our impression is that the husband's liability for his wife's antenuptial debts is now a dead letter. A wife is not liable for her husband's antenuptial debts.

Criticisms of present law

8.2 The present rule is a discriminatory relic of the pre-1881 system of matrimonial property and it must be very doubtful whether it now serves any useful function. We therefore invited views in the Consultative Memorandum

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[1]Proposition 7, para. 8.4.

[2]Finance Act 1975, Sched. 6, para. 6. Cl. 5(2) of the draft Bill contained in Appendix A leaves such exemptions unaffected.

[3]See draft Bill, Appendix A, cl. 5(1)(*b*).

whether the rule should be abolished. It was the unanimous view of consultees that it should be. The question arises, however, whether any amending legislation should be confined to debts incurred after it comes into force. If our impression that the rule is a dead letter is correct, there would seem to be little objection to abolishing the rule even in relation to debts incurred before amending legislation comes into force. It would, in any event, be difficult to argue that this would unduly prejudice a woman's creditors, because she continues after her marriage to be liable for her own debts.

Recommendation

8.3 We therefore **recommend**:

6. (*a*) The husband's remaining liability for his wife's antenuptial debts should be abolished.[1]

8.4 As a consequential matter section 4 of the Married Women's Property (Scotland) Act 1877 would fall to be repealed. This, however, would remove the only part of that Act which now has any effect. The only remaining section (apart from the usual provisions on commencement, extent, short title and so on) protects the earnings of a married woman from the husband's *jus mariti* and *jus administrationis*.[2] As these have long disappeared the section is now obsolete and unnecessary. The opportunity presented by the repeal of section 4 of the Act could therefore be taken to repeal the whole of the Act. We therefore **recommend**:

6. (*b*) The Married Women's Property (Scotland) Act 1877 should be repealed.[3]

PART IX PRESUMPTION THAT WIFE IS HUSBAND'S DOMESTIC MANAGER

Present law

9.1 Where spouses are living together, or maintaining a joint household, there is a presumption that the wife is *praeposita negotiis domesticis*, that is, placed by her husband in charge of his domestic establishment.[4] Third parties are entitled to rely on this presumption unless they have been notified to the contrary or the wife has been inhibited,[5] and are entitled to assume that by virtue of her *praepositura*, or position as domestic manager, the wife has authority to act as her husband's agent in domestic matters.[6] Her husband will, therefore, be liable for contracts entered into by her within the scope of her ostensible authority as domestic manager—such as contracts for the supply of food, clothing, medicine, household services and other household necessaries—provided always that the goods or services are suitable to the husband's apparent means, position and standard of living.[7] There is a lack of modern

[1]See draft Bill, Appendix A, cl. 6(1). Cl. 6(2) applies this recommendation to debts incurred before the commencement of any implementing legislation.

[2]S. 3.

[3]See draft Bill, Appendix A, cl. 6(3) and Sched. 2.

[4]Erskine I.6.26; Clive, *Husband and Wife* (2nd edn. 1982), pp. 267–76.

[5]See paras. 9.2 and 9.3 below.

[6]Bell, *Comm.* (7th edn.), pp. 509–10.

[7]Fraser, *Husband and Wife* (2nd edn.), pp. 605, 607, 611–13; Encyclopaedia of the Laws of Scotland, vol. 7, pp. 676–7; Clive, *op. cit.*, pp. 269–71.

cases on the wife's *praepositura*. The law is still as laid down by Erskine in the 18th century:[1]

> "With regard to disbursements necessary for a family, the rule is, that the wife, who is formed by nature for the management within doors, is presumed, while she remains in family with her husband, to be *praeposita negotiis domesticis*. In this character she hath power to purchase whatever is proper for the family; and the husband is liable for the price. . . ."

9.2 The wife's *praepositura* can be cancelled formally by the husband by means of inhibition. This is obtained by presenting the appropriate documents[2] at the Petition Department of the Court of Session. The husband does not need to give a reason for seeking an inhibition, the theory being that "every one may remove his managers at pleasure, without assigning any reason for it"[3] but, in practice, it is usual to narrate that the wife has purported to contract debts to a large amount.[4] When published by registration in the Register of Inhibitions and Adjudications an inhibition has the effect of cancelling the wife's authority to incur debts to third parties on the husband's behalf. Such cancellation is effectual against third parties whether or not they are aware of its existence.

9.3 A husband may also terminate his wife's power to bind him by contracts as *praeposita negotiis domesticis* by giving informal notification to particular third parties of the cancellation of authority.[5] He may also attempt wider publication of this fact by advertisement in a newspaper, but this has effect only against those who are aware of the advertisement. He probably cannot cancel her power to bind him in a question with third parties by a mere private prohibition, unknown to the third parties concerned, or by giving her an adequate housekeeping allowance—for "these are private matters between the spouses, which shopkeepers and tradesmen have no means of knowing, nor title to inquire into".[6] There has, however, been some doubt on these points.[7]

9.4 If a wife contracts as her husband's domestic manager and the other party deals with her on the footing that she is an agent for a disclosed principal, then the husband alone would be liable under the contract; if she contracts as an individual, and the other party relies on her own credit, then she alone would appear to be liable.[8]

9.5 The right of a third party to hold a husband liable for debts contracted by the wife in the exercise of her *praepositura* seems to be based on a combination of two rules. The first is that when a husband and wife live together the wife is presumed by the law to have been, and can be assumed

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[1]Erskine I.6.26.

[2]I.e. a Bill and Letters of Inhibition. These documents must pass the scrutiny of the Deputy Principal Clerk of Session. They must then be presented to the Signet Office. After signeting, the Letters must be served on the wife by a messenger-at-arms. They can then be registered in the Register of Inhibitions and Adjudications. See Clive, *op. cit.*, pp. 271–3.

[3]Erskine I.6.26.

[4]Encyclopaedia of Scottish Legal Styles, vol. 5, pp. 377–8.

[5]Fraser, *op. cit.*, p. 635.

[6]Hume, *Lectures*, I. 141; see also *Dalling* v. *McKenzie* (1675) Mor. 6005: *Alston* v. *Stanfield* (1682) Mor. 6007; *Gow & Sons* v. *Maxwell* (1920) 36 Sh. Ct. Rep. 138.

[7]See the discussion in Clive, *op. cit.*, pp. 268–9, 274.

[8]See *Pettigrew & Stephens, Ltd.* v. *Crawford* (1918) 35 Sh. Ct. Rep. 35.

by third parties to have been, placed by the husband in charge of his domestic establishment.[1] The second is that anyone placed in charge of an establishment (whether it is a shop, or a depot, or a factory, or a hotel, or anything else) can be assumed by third parties, unless they have been notified to the contrary (or, perhaps, put on enquiry), to have the usual authority of a person in that position.[2] The first of these rules can be regarded as part of family law: the second as part of the law of agency. It is only the first rule with which we are concerned.

9.6 The husband's liability by virtue of his wife's *praepositura* must be distinguished from his liability to reimburse those who have provided his wife with necessaries when she was entitled to aliment, but was not receiving aliment, from him.[3] The latter liability is based on the husband's liability to aliment his wife. It is accordingly not limited to cases where the spouses are living together. Nor can it be cancelled by inhibition or notice.[4] On exactly the same principle a wife might be liable for necessaries supplied to her indigent child.[5] We are not concerned with this rule here.

Criticisms of present law

9.7 The present rule that the wife is presumed to be her husband's domestic manager can be criticised as outdated, discriminatory and unnecessary. It is outdated because the legal and social background against which it was formulated has changed considerably.[6] In Erskine's day a married woman had strictly limited contractual capacity. The general rule was that her personal obligations were absolutely null, even if granted with her husband's consent. She was like a child in her husband's family. In relation to property the general rule was that all her moveable property passed to her husband by virtue of the *jus mariti*. Even if she had earnings, which was probably unusual in those sections of the community where the *praepositura* was likely to be important, they too passed to the husband. Personal diligence could not be done against a married woman. There was, therefore, no question of basing liability for household debts on any principle that married women might be liable as individuals of full legal capacity or even on any principle of joint liability. The principle of the husband's liability was the only one that fitted. It is hardly necessary to point out that the situation has changed fundamentally. Married women of full age now have full contractual capacity and can, and do, own property just like any other person. At the very least, it can be said that the way is open for other possible solutions to the question of liability for household debts. The solution whereby the wife is regarded as the husband's housekeeper or domestic manager no longer imposes itself as a matter of necessity.

9.8 The rule may be regarded as discriminatory because it is based on the assumption that the household is the husband's establishment, that the wife is *his* domestic manager, managing the household and entering into contracts on *his* behalf. In the eyes of the present law he is the principal and she is the

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[1]Erskine I.6.26.
[2]Bell, *Comm.* (7th edn.), pp. 509–10; Gloag, *Contract* (2nd edn.), p. 152.
[3]See Clive, *op. cit.*, pp. 276–8.
[4]Erskine I.6.26.
[5]See Morison's Dictionary, *Recompense*, pp. 1342–7.
[6]On the earlier law, see generally, Fraser, *op. cit.*, pp. 519 *et seq.*

agent, and this is so even if both are in full-time paid employment, and even if the wife is in paid employment and the husband is not. Some of those who commented on our Consultative Memorandum clearly found the underlying assumptions of the present law highly objectionable.

9.9 The rule is also unnecessary because (a) credit extended to married women nowadays is quite generally extended to them as individuals in their own right,[1] and (b) ordinary principles of agency are sufficient to make the husband liable for his wife's debts in any case where he has expressly or impliedly given her authority to use his credit or act on his behalf, or where he has held her out to third parties as having such authority. In exactly the same way, of course, a wife might be liable for her husband's debts if she had authorised him to use her credit or act on her behalf, or if she had held him out as having authority to do so. The ordinary law provides a set of non-discriminatory, generally applicable rules on the liability of one person for debts contracted by another, and there is no need for any special rule presuming a wife to be her husband's domestic manager. It is, moreover, doubtful whether suppliers of household goods and services rely on this special rule to any great extent, even assuming they are aware of it. Before a supplier could safely extend new credit, in reliance on the *praepositura*, to a woman calling herself Mrs. So-and-so, he would need to know that (a) she was married (and not, for example, widowed or divorced or merely calling herself Mrs. So-and-so); (b) she was living with her husband (and not, for example, alone or with another man); (c) she had not been inhibited; (d) her husband's credit was good; and (e) the goods or services to be supplied were suitable to the husband's apparent position and standard of living.[2] On one view of the law he would also need to know that (f) the husband had not privately cancelled the wife's authority; and (g) the wife was not provided with an adequate allowance to enable her to pay for the goods or services herself.[3] A supplier, in short, could safely rely on the legal rule under consideration only if he knew both the law and the circumstances of the couple very well. If he knew enough to rely on the *praepositura* he would probably know enough to assess whether he could safely extend credit, even in the absence of any legal rule as to the presumed management of the couple's household affairs.

Options for reform

9.10 In the Consultative Memorandum we discussed several options for reform.[4] One was to retain the present law without alteration. There was virtually no support for this on consultation. Another was to replace the wife's *praepositura* by a new rule imposing joint and several liability for household debts. We canvassed this possibility, largely because it has been

[1]It is unlawful to discriminate against a married woman in the provision of goods, facilities or services on credit: Sex Discrimination Act 1975, ss. 1 and 29. In *Quinn* v. *Williams Furniture*, The Times, Nov. 4, 1980 the Court of Appeal held that retailers who refused to provide a married woman with credit facilities unless her husband signed a guarantee, in circumstances where no guarantee would have been required of a married man, contravened the 1975 Act.

[2]See on this last point *Clark* v. *Noble* (1912) 28 Sh. Ct. Rep. 303; *Baird* v. *Cattrall* 1922 S.L.T. (Sh. Ct.) 138; *D. Olswang & Co. Ltd.* v. *Neillands* 1938 S.L.T. (Sh. Ct.) 4; *Nairn & Marshall* v. *Thomson* (1936) 52 Sh. Ct. Rep. 149.

[3]See Walton, *Husband and Wife* (3rd edn.), pp. 201, 204; contrast, however, Clive *op. cit.*, pp. 268–9, 274.

[4]Paras. 10.16 to 10.18.

adopted in a number of other jurisdictions, although we ourselves had grave reservations about it. We pointed out that the rule would have to be carefully limited to necessaries for the family or household, and that this might give rise to problems of definition or vagueness. There would have to be some rule on the liability of the spouses as between themselves. In Ontario, for example, questions of liability as between the spouses are determined according to the parties' mutual obligation of support: thus if the husband alone is in paid employment, and his wife has no means, he alone is ultimately liable and *vice versa*.[1] A rule of this nature could, however, be difficult to apply and productive of disputes about the parties' obligations of support in cases where those obligations were not *directly* in issue. On the other hand, to give the spouses no right of relief as between themselves could produce harsh results. A wife, for example, might be held liable for debts contracted by her husband with no right of relief against him. Whatever solution was adopted, wives would become liable for debts, such as rent or fuel bills, contracted by their husbands in circumstances where they are not liable at present. There would inevitably be situations in which the imposition on one spouse of liability for the other's debts would be perceived as unjust, particularly if the spouses had separated. Although a few commentators supported the idea of joint and several liability for household debts, a clear majority supported the third option which we put forward for consultation—namely, to abolish the wife's *praepositura* and leave liability for household debts to depend on the general law. This is the solution which we favour. It would have the additional advantage that liability for debts would not depend on a person's marital status. Moreover, if the rule that the wife is presumed to be the husband's domestic manager were abolished, there would be no justification for any special procedure for cancelling the wife's authority by inhibition. This was the view which we took in the Consultative Memorandum[2] and it received almost unanimous support on consultation.[3]

Recommendation

9.11 We therefore **recommend**:

7. (*a*) Any rule of law that a married woman is presumed to be her husband's domestic manager should be abolished and liability for household debts should be left to depend on the general law.

   (*b*) It should no longer be competent for a husband to inhibit his wife from contracting debts on his behalf.[4]

PART X HUSBAND'S LIABILITY FOR EXPENSES OF LITIGATION BY WIFE AGAINST THIRD PARTY

Present law

10.1 The law still recognises that in certain circumstances a husband may be liable for the expenses of his wife, in litigation between the wife and a third party, if he actively participates in the litigation, even although he is not a party to the action and does not have sufficient interest in, and control over,

[1]Family Law Reform Act 1978, s. 33.

[2]Para. 10.21.

[3]The only support for retaining inhibitions (with an improved procedure) came from those few consultees who favoured retention of the *praepositura*.

[4]See draft Bill, Appendix A, cl. 7.

the action to make him *dominus litis*.[1] The rule was a reasonable and useful one before the Married Women's Property (Scotland) Act 1920. It seems anomalous today. Before 1920 a married woman had very limited legal capacity. Her husband was her curator, and his consent was, as a rule, necessary to any litigation by her, whether as pursuer or defender. In this situation it was not unnatural that the courts should reserve the right to find the husband liable for the expenses of such litigation if his intervention exceeded certain limits.[2] The limits differed according to whether the wife was the defender or the pursuer. If she was the defender the husband would be liable only if his intervention amounted to "mischievous interference";[3] if she was the pursuer

> "the husband could be made liable for the expenses awarded against her in any case in which it appeared to the judge who tried it that the husband was an active participant in the suit."[4]

Criticisms of present law

10.2 The leading textbook on expenses, published in 1912, deals with the cases on this question under the heading of "Tutors and Curators".[5] The nature of the question discussed was whether the husband, by consenting as curator to his wife's action, incurred liability for expenses and if so in what circumstances. A similar question arose in relation to a father's liability, as curator to his minor child, for the expenses of litigation by the child with his consent.[6] It might have been thought that the husband's special liability based on participation in the wife's litigation would have disappeared with the abolition of his curatorial power by the Married Women's Property (Scotland) Act 1920. That Act enables a married woman to sue and be sued as if she is unmarried. Her husband's consent is no longer necessary. He is, legally, in the same position as any other third party who is not a party to the action, and it seems anomalous that he should be subject to any special rules on liability for expenses. In *McMillan* v. *Mackinlay*,[7] however, it was held that his liability was unaffected by the 1920 Act. We cannot see any justification for an exception to the normal rule that a third party, who is not a party to the action, does not incur liability for expenses merely because he advises and helps one of the litigants. In the Consultative Memorandum we suggested that the effect of the decision in *McMillan* should be overturned. We considered, however, that where the husband has the true interest in the subjectmatter of the action and full control of it—i.e., he is the *dominus litis*—he should continue to be liable for expenses in the same way as any other litigant. This view was unanimously supported on consultation.

Recommendation

10.3 We therefore **recommend**:

8. There should be no special rule whereby a husband is liable for the expenses of litigation between his wife and a third party merely because

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[1] *McMillan* v. *Mackinlay* 1926 S.C. 673; *Swirles* v. *Isles* 1930 S.C. 696.
[2] See Maclaren, *Expenses* (1912), pp. 233–5.
[3] *Swirles* v. *Isles* 1930 S.C. 696 per Lord President Clyde at 701.
[4] *Ibid.*, at 700.
[5] Maclaren, *Expenses*, Part V, Ch. IX.
[6] *Ibid.*, pp. 232–3; *Rodger* v. *Weir* 1917 S.C. 300.
[7] 1926 S.C. 673.

he has participated in the litigation. Any change in the law in this respect should be without prejudice to the husband's liability as *dominus litis* if he would be so liable on the ordinary principles governing such liability.[1]

PART XI PROTECTION ORDERS UNDER THE CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT 1861

Present law

11.1 It is still technically competent for a wife who has been deserted by her husband to apply to the court for a protection order under the above Act. We explain the background to this remedy in the following paragraphs. We must, however, make it clear at the outset that protection orders have been rendered virtually obsolete by the Married Women's Property (Scotland) Acts of 1881 and 1920.[2] Their sole remaining legal significance is in the field of intestate succession: when a wife has obtained a protection order, any property thereafter acquired by her passes on her death intestate "in like manner as if her husband had been then dead".[3]

11.2 At common law, the whole moveable estate belonging to the wife passed, by operation of law, to the husband. The right of the husband was called his *jus mariti*, as distinguished from his *jus administrationis*, which was a right to manage all his wife's estate, whether heritable or moveable. The *jus mariti* extended to all the moveable estate held by the wife at the time of the marriage or to which she acquired right during the subsistence of the marriage. The husband might deal with his wife's moveable estate as if she did not exist, he might sell or dispose of it at will, and it was available to his creditors in satisfaction of his debts.[4] The *jus mariti* could, however, be excluded by agreement in an antenuptial marriage contract or by a third party expressly providing that property conveyed or bequeathed to the wife should be excluded from the *jus mariti*.

11.3 The common law rule could lead to quite blatant injustice. Thus a deserted wife might, for example, succeed in establishing a small shop through her own efforts. The husband, by virtue of the *jus mariti*, was entitled to return at any time to claim her stock-in trade, any furniture she might have purchased and any savings she might have accumulated.[5] The need to rectify this abuse was recognised in the Conjugal Rights (Scotland) Amendment Act 1861. This Act[6] empowered a married woman, deserted by her husband without reasonable cause, to apply by way of petition to the Outer House of the Court of Session or to a sheriff court[7] for a protection order. This order

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[1]See draft Bill, Appendix A, cl. 8.

[2]Similar English provisions for protection orders under the Matrimonial Causes Act 1857 were repealed by the Administration of Justice Act 1965, s. 34(1) and Sched. 2.

[3]Conjugal Rights (Scotland) Amendment Act 1861, s. 6 read with s. 5.

[4]*Fraser* v. *Walker* (1872) 10 M. 837.

[5]Fraser, *Husband and Wife* (2nd edn.), p. 824.

[6]Ss. 1–3.

[7]Conjugal Rights (Scotland) Amendment Act 1874.

protected from the husband's *jus mariti* any moveable property acquired by or coming to the wife after the date of the order. The protection order had the effect of a judicial decree of separation a *mensa et thoro* in regard

> "to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued."[1]

Such an order continues until recalled by the court or until the parties resume cohabitation.[2] The 1861 Act directs that property acquired by the wife during the subsistence of the order remains vested in her as if unmarried, and her rights to that property and the rights of any third parties acquired from or through her are not affected by the recall of the order.[3] As noted above, when a wife has obtained a protection order, all property which she may acquire or which may devolve upon her passes to her heirs and representatives if she dies intestate, "in like manner as if her husband had been then dead."[4]

Criticisms of present law

11.4 So far as we are aware the protection order is, in practice, obsolete. It was a statutory device introduced in 1861 to circumvent the husband's *jus mariti* and it has now been superseded by other statutory developments in this field. The *jus mariti* and the *jus administrationis* have both been abolished and a separate property system now prevails. It is now possible to obtain a separation decree on the ground of desertion;[5] and this has the effect of preventing any property thereafter acquired by the wife from passing to her husband on her death intestate.[6]

Recommendation

11.5 Our provisional suggestion that protection orders should be abolished by statute was unanimously supported on consultation. We therefore **recommend**:

9. It should no longer be competent for a deserted wife to apply for a protection order under the Conjugal Rights (Scotland) Amendment Act 1861.

This recommendation is not the subject of a separate clause in the draft Bill contained in Appendix A, but is given effect by the repeal of the relevant provisions of the 1861 Act and of the whole of the Conjugal Rights (Scotland) Amendment Act 1874 (which contained provisions supplementary to those of the 1861 Act.)[7]

PART XII SUMMARY OF RECOMMENDATIONS

1. (*a*) An engagement or promise to marry should not have effect to create any legal rights or obligations; and

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[1]Conjugal Rights (Scotland) Amendment Act 1861, s. 5.
[2]*Ibid.*, s. 3.
[3]*Ibid.*, s. 3.
[4]*Ibid.*, s. 6 read with s. 5.
[5]Divorce (Scotland) Act 1976, s. 4.
[6]Conjugal Rights (Scotland) Amendment Act 1861, s. 6.
[7]See draft Bill, Appendix A, cl. 9(2) and Sched. 2.

(*b*) the action for breach of promise should be abolished.
(Paragraph 2.11; clause 1.)

2. It should no longer be competent to apply for a decree of adherence.
(Paragraph 3.6; clause 2.)

3. (*a*) No married person should, by reason only of minority, be subject to the curatory of his parent or of any person appointed by his parent.

(*b*) No married woman should, by reason only of minority, be subject to the curatory of her husband.
(Paragraph 5.5; clause 3.)

4. Any rule of law whereby the husband, as between husband and wife, may choose the place of the matrimonial home, should cease to have effect.
(Paragraph 6.4; clause 4.)

5. (*a*) It should no longer be possible for a woman, by antenuptial marriage contract, to create an alimentary right in her own favour in respect of any property provided by her.
(Paragraph 7.4; clause 5(1)(*a*).)

(*b*) It should no longer be the law that the marriage itself is regarded as onerous consideration for provisions in an antenuptial marriage contract.
(Paragraph 7.7; clause 5(1)(*b*) and (2).)

6. (*a*) The husband's remaining liability for his wife's antenuptial debts should be abolished.
(Paragraph 8.3; clause 6(1) and (2).)

(*b*) The Married Women's Property (Scotland) Act 1877 should be repealed.
(Paragraph 8.4; clause 6(3) and Sched. 2.)

7. (*a*) Any rule of law that a married woman is presumed to be her husband's domestic manager should be abolished and liability for household debts should be left to depend on the general law.

(*b*) It should no longer be competent for a husband to inhibit his wife from contracting debts on his behalf.
(Paragraph 9.11; clause 7.)

8. There should be no special rule whereby a husband is liable for the expenses of litigation between his wife and a third party merely because he has participated in the litigation. Any change in the law in this respect should be without prejudice to the husband's liability as *dominus litis* if he would be so liable on the ordinary principles governing such liability.
(Paragraph 10.3; clause 8.)

9. It should no longer be conpetent for a deserted wife to apply for a protection order under the Conjugal Rights (Scotland) Amendment Act 1861.
(Paragraph 11.5; clause 9(2) and Sched. 2.)

APPENDIX A

Law Reform (Husband and Wife) (Scotland) Bill

ARRANGEMENT OF CLAUSES

SCHEDULES

DRAFT

OF A

BILL

TO

Amend the law relating to husband and wife and breach of promise of marriage and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of actions of breach of promise of marriage, adherence and enticement

Promise of marriage not an enforceable obligation.

1.—(1) No promise of marriage or agreement between two persons to marry one another shall have effect under the law of Scotland to create any rights or obligations; and no action for breach of any such promise or agreement may be brought in any court in Scotland, whatever the law applicable to the promise or agreement.

(2) This section shall have effect in relation to any promise made or agreement entered into before it comes into force, but shall not affect any action commenced before it comes into force.

Clause 1

This clause implements Recommendation 1 of the Report. The technique used is very similar to that used in section 1 of the Law Reform (Miscellaneous Provisions) Act 1970 (which abolished actions for breach of promise in England and Wales). The first part of *subsection* (1) applies to promises or agreements governed by Scots law, no matter where any action based on them is raised. The reference to an action precludes any attempt to base an action on any ground other than contract or promise; and also makes clear that a promise or agreement governed by the law of another country cannot be litigated in Scotland (see paragraph 2.12). The clause is to apply to promises or agreements whenever made, unless an action has actually been commenced before the Act comes into force (*subsection* (2)).

Actions of adherence and enticement abolished.

2.—(1) No spouse shall be entitled to apply for a decree from any court in Scotland ordaining the other spouse to adhere.

(2) No person shall be liable in delict to any person by reason only of having induced the spouse of that person to leave or remain apart from that person.

(3) This section shall not affect any action commenced before this Act comes into force.

Clause 2

Subsection (1) implements Recommendation 2. The effect is that it will no longer be possible to apply for a decree (whether on its own or along with any other remedy) ordering one spouse to adhere (i.e. live with) the other. The technique used is similar to that used in section 20 of the Matrimonial Proceedings and Property Act 1970 (which abolished petitions for restitution of conjugal rights in England and Wales).

Subsection (2) implements Recommendation 7 of an earlier Report of the Commission (Scot. Law Com. No. 42: *Report on Liability for Adultery and Enticement of a Spouse* (1976): see Part IV of the Report). The technique used is similar to that in section 5 of the Law Reform (Miscellaneous Provisions) Act 1970 (which abolished liability for enticement of a spouse in England and Wales).

Abolition of miscellaneous rules relating to husband and wife

Curatory after marriage.

3.—(1) No married person shall, by reason only of minority, be subject to the curatory of his parent or of any person appointed by his parent.

(2) No wife shall, by reason only of minority, be subject to the curatory of her husband.

10 & 11 Geo. 5 c.64.

(3) Section 2 of the Married Women's Property (Scotland) Act 1920 (husband to be curator to his wife during her minority) is repealed.

EXPLANATORY NOTES

Clause 3

This clause implements Recommendation 3.

Subsection (1) abolishes parental curatory over a married minor; *subsection* (2) abolishes a husband's curatory over his minor wife. Neither provision, however, confers the status of majority on a married minor: he or she will be legally in the position of a minor whose parents are dead and who has no curator. He or she will thus be free to contract, without the need for anyone else's consent, but will retain the right to have certain contracts set aside if seriously prejudicial (see paragraph 5.5). The clause does not affect other forms of curatory, e.g. that of a curator *ad litem* or a curator *bonis*.

Abolition of husband's right to choose matrimonial home.

4. Any rule of law entitling the husband, as between husband and wife, to determine where the matrimonial home is to be, shall cease to have effect.

Clause 4

This clause implements Recommendation 4. The courts will still be able to deal with the question of desertion and willingness to adhere in the light of all the circumstances.

Abolition of certain rules relating to antenuptial marriage contracts.

5.—(1) In relation to an antenuptial contract of marriage entered into after this Act comes into force—

(*a*) any rule of law enabling a woman to create an alimentary right in her own favour in respect of any property provided by her shall cease to have effect;

(*b*) any rule of law whereby the marriage is onerous consideration for any provision of the contract, shall cease to have effect.

(2) Nothing in paragraph (*b*) of subsection (1) above shall affect the operation of any enactment relating to gifts in consideration of marriage.

EXPLANATORY NOTES

Clause 5

Subsection (1)(*a*) implements Recommendation (5)(*a*). It will remove the sole exception to the general rule that no-one can settle his own property so as to secure an income for himself which is protected from his creditors. The word "property" is quite general and is undefined. It will cover, among other things, incorporeal property such as shares, bonds and other investments. The subsection applies only to contracts entered into after the Act comes into force.

Subsection (1)(*b*) removes a rule whereby a transfer of property under an antenuptial marriage contract is immune from attack by the donor's creditors as a gratuitous alienation, unless they can prove that both parties participated in a fraudulent scheme to defeat their claims. The subsection applies only to contracts entered into after the Act comes into force. It does not affect any statutory rules on gifts in consideration of marriage – for example, the rule that certain gifts in consideration of marriage are exempt from capital transfer tax (*subsection* (2): see paragraph 7.6).

Abolition of husband's remaining liability for wife's debts incurred before marriage.

6.—(1) A husband shall not be liable, by reason only of being her husband, for any debts incurred by his wife before marriage.

(2) Subsection (1) shall have effect in relation to any such debts, whether incurred before or after this Act comes into force.

40 & 41 Vict. c.29.

(3) Section 4 of the Married Women's Property (Scotland) Act 1877 (liability of husband for wife's antenuptial debts limited to amount of property received through her) is repealed.

Clause 6

This clause implements Recommendation 6. The word "debts" is used, as it appears in section 4 of the Married Women's Property (Scotland) Act 1877, which is repealed by *subsection* (3). (The rest of the 1877 Act is repealed by Schedule 2.) The clause is made fully retrospective, on the ground that the present rule appears to be a dead letter, and in any event a woman continues to be liable for her own debts after her marriage (see paragraph 8.2).

Abolition of *praepositura.*

7.—(1) For the purpose of determining a husband's liability for any obligation incurred by his wife after this Act comes into force, a married woman shall not be presumed as a matter of law to have been placed by her husband in charge of his domestic affairs, and any rule of law to the contrary shall cease to have effect.

(2) No warrant of inhibition or inhibition in whatever form may be granted at the instance of a husband for the purpose of cancelling his wife's authority to incur any obligation on his behalf.

(3) No such inhibition granted before the date this Act comes into force shall be registered on or after that date, and any such inhibition registered before that date shall be treated as discharged on that date.

Clause 7

This clause implements Recommendation 7. It abolishes the wife's *praepositura*, i.e. the presumption that she is placed by her husband in charge of his domestic establishment. The clause does not affect the following rules:

(i) if one spouse contracts as an agent on the other spouse's behalf, and discloses this fact, the other spouse alone is liable;

(ii) if a spouse contracts as an individual, he or she alone is liable; and

(iii) a person who is in charge of any establishment can be assumed to have the usual authority of a person in that position.

All that *subsection* (1) does is to abolish the discriminatory legal rule whereby the wife is presumed to be the husband's housekeeper, whatever the couple's actual arrangements. As a necessary consequence the power of the husband to cancel by means of inhibition his wife's authority to incur obligations on his behalf is abolished; and all such inhibitions already registered are to be treated as discharged on the date when the Act comes into force. It will remain competent for spouses to inhibit each other from disposing of heritable property in accordance with the normal rules governing such inhibitions.

Abolition of husband's liability for wife's judicial expenses when neither a party nor *dominus litis*.

8. Any rule of law whereby a husband—

(*a*) who is not a party to an action between his wife and a third party, and

(*b*) who is not, in relation to that action, *dominus litis*,

may nevertheless be found liable in the expenses of that action, shall cease to have effect.

Clause 8

This clause implements Recommendation 8. It abolishes the rule (sometimes called the *particeps litis* rule) whereby mere participation by a husband in litigation between his wife and a third party could render him liable for expenses. See *McMillan* v. *Mackinlay* 1926 S.C. 673; *Swirles* v. *Isles* 1930 S.C. 696. If, however, he has the true interest in the subjectmatter of the action and full control of it—i.e. he is the *dominus litis*—he is to continue to be liable for expenses in the same way as any other litigant. The expression *dominus litis* has previously been used in legislation (Legal Aid (Scotland) Act 1967, section 8(9)).

Consequential amendments and repeals.

9.—(1) The enactments specified in Schedule 1 shall have effect subject to the amendments specified in that Schedule, being amendments consequential to the provisions of this Act.

(2) The enactments specified in Schedule 2 are repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Citation etc.

10.—(1) This Act may be cited as the Law Reform (Husband and Wife) (Scotland) Act 1983.

(2) This Act shall come into force at the end of the period of one month beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

SCHEDULES

Schedule 1

Section 9(1)

Enactments Amended

Court of Session (Scotland) Act 1850 (c.36)

1. In section 16 (certain enactments to apply to actions of adherence etc.), omit "actions of adherence, and".

Conjugal Rights (Scotland) Amendment Act 1861 (c.86)

2. In section 19 (interpretation), in the definition of "consistorial action", omit "and of adherence".

Sheriff Courts (Scotland) Act 1907 (c.51)

3. In section 5 (extension of jurisdiction), in subsection (2), omit "adherence and aliment".

Maintenance Orders Act 1950 (c.37)

4. In section 6 (jurisdiction of the sheriff in certain actions of aliment), in subsection (2), omit "an action of adherence and aliment or".

Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18)

5. In section 4 (power of sheriff to make provisional maintenance order), in subsection (2), omit "or adherence and aliment".

Matrimonial Proceedings (Polygamous Marriages) Act 1972 (c.38)

6. In section 2, in paragraph (*e*) of subsection (2), omit "adherence and aliment".

Civil Jurisdiction and Judgments Act 1982 (c.27)

7. In Schedule 8, in paragraph 2, in rule (5), omit "for adherence and aliment or".

EXPLANATORY NOTES

Schedule 1

The amendments in this schedule are all simple deletions which are consequential on the abolition of decrees for adherence (clause 2(1)).

Schedule 2 Section 9(2)

Enactments Repealed

Chapter	*Short Title*	*Extent of Repeal*
24 & 25 Vict. c.86	Conjugal Rights (Scotland) Amendment Act 1861.	Sections 1 to 5.
37 & 38 Vict. c.31	Conjugal Rights (Scotland) Amendment Act 1874.	The whole Act.
40 & 41 Vict. c.29	Married Women's Property (Scotland) Act 1877.	The whole Act.
10 & 11 Geo. 5 c.64	Married Women's Property (Scotland) Act 1920.	Section 2.
6 & 7 Eliz. 2 c.40	Matrimonial Proceedings (Children) Act 1958.	Subsection (2) of section 9.

Schedule 2

Conjugal Rights (Scotland) Amendment Act 1861

This repeal implements Recommendation 9, with the result that it will no longer be competent for a deserted wife to apply for a protection order.

Conjugal Rights (Scotland) Amendment Act 1874

This Act is supplementary to sections 1 to 5 of the 1861 Act and falls to be repealed along with them.

Married Women's Property (Scotland) Act 1877

The repeal of section 4 (by clause 6(3)) leaves nothing of substance in the Act and allows it to be repealed entirely (see paragraph 8.4 and Recommendation 6(*b*)).

APPENDIX B

Excerpt from Scottish Law Commission, *Report on Liability for Adultery and Enticement of a Spouse* (Scot. Law Com. No. 42, 1976)

PART IV: DAMAGES FOR ENTICEMENT

The existing law

41. In our Memorandum No. 18, we also examined the action of damages for enticement. We showed that there was considerable doubt on the question whether the action is competent under the law of Scotland. The ground of the action is not adultery, which need not be established, but simply the inducement of a spouse (whether husband or wife) to leave the other spouse.

42. While some textbook authorities in Scotland recognise the competency of an action of damages for enticement,[1] there are few reported cases in this field. The first is *Duncan* v. *Cumming*[2] where a husband sought to recover damages in an action styled an action *injuriarum* against his wife's father 'on account of his instigating and enticing and encouraging his daughter to desert and abandon the pursuer her husband and harbouring her in his house after she had deserted him'. The concluded view of the Court of Session does not, however, appear in the report of the case.

43. The second reported decision is *Adamson* v. *Gillibrand*[3] where a husband brought an action of damages against his mother-in-law alleging that she had by illegal and improper acts and practices caused his wife to desert him and remain in desertion without good cause. The Lord Ordinary dismissed the action on the ground that the pursuer's averments were irrelevant. He took the opportunity, however, to set out a series of propositions which appear to have been derived mainly from the English authorities cited in the action. A subsequent case in the sheriff court, *McGeever* v. *McFarlane*,[4] concerned the right of a wife to seek damages for the enticement of her husband. Relying on English authority, both the sheriff-substitute and the sheriff-principal accepted that a wife was entitled to damages from a woman who by artifices induced her husband to leave home and give up his wife.[5] While both judges accepted the competency of the claim, they held that it was irrelevant in the circumstances.

44. The position, accordingly, is that there is no recorded instance of damages being in fact awarded for enticement and no wholly satisfactory authority for the existence of this right of action in Scotland.[6] In England, the corresponding right of action was abolished by section 5 of the Law

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[1]Fraser, *Husband and Wife*, (2nd ed.;1878) p. 1203; Walton, *Husband and Wife*, (3rd ed.:1951) p. 282; Walker, *Delict* (1966) pp. 714–716; contrast the sceptical treatment in Clive and Wilson, *Husband and Wife* (1974) pp. 280–281.

[2](1714) 5 Broun's Supplement 104.

[3]1923 S.L.T. 328.

[4](1951) 67 Sh. Ct. Rep. 48.

[5]Cf. Walton, *Husband and Wife*, (3rd ed.; 1951) p. 282.

[6]The Court of Session Act 1825, section 28 (which enumerates certain causes as appropriate for jury trial) refers to actions of damages on account of seduction or adultery but does not refer to actions of damages for enticement.

Reform (Miscellaneous Provisions) Act 1970. For some time before that Act, the English courts had shown a distinct tendency to narrow the scope of the action by saying that it involved 'the deliberate break-up of marriage',[7] that it did not lie against parents-in-law,[8] and that such actions were 'no more than legal fossils incapable of further growth beyond the point which binding precedent compels us to acknowledge that they had already reached'.[9] They were declared by statute not to survive for the benefit of, or against, the estate of either party. Their abolition was recommended successively by the Lord Chancellor's Law Reform Committee[10] and by the Law Commission for England and Wales.[11]

Consultation and Proposals

45. In our Memorandum No. 18, we invited comments on the question whether actions of damages for enticement should be allowed in future in Scots law. We argued that such actions are an anachronism in the present social climate and fulfil no useful purpose. They are officially discouraged, as legal aid is not available.[12] They are anachronistic because they imply that one spouse has a species of proprietary right to the society of the other. They fulfil no useful purpose both because the remote chance that such an action may be raised is not a serious deterrent to a third party who wishes to persuade one spouse to leave the other and because success in the action is more likely to persuade the enticed spouse to remain apart than to rejoin the other. Such an action would be likely to increase the bitterness between those involved. They are objectionable on that account and also because there is a danger that they may be raised for reasons of mere spite. We therefore suggested provisionally in our Memorandum that the action should be declared incompetent.

46. With only one exception, all of those who submitted comments on our Memorandum, including the bodies representative of the legal profession, agreed with our provisional views that such actions should be abolished, if they exist. We therefore recommend that *the action of damages for enticement of a spouse should be declared by statute to be incompetent* (Recommendation 7).

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[7] *Winchester* v. *Fleming* [1958] 1 Q.B. 259 *per* Devlin J. at p. 266.
[8] *Gottlieb* v. *Gleiser* [1958] 1 Q.B. 267.
[9] *Pritchard* v. *Pritchard and Sims* [1967] P. 195 *per* Diplock L.J. at p. 209.
[10] Eleventh Report, Cmnd. 2017.
[11] *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25 (1969) para. 101 and App. II, paras. 132 and 133.
[12] Legal Aid (Scotland) Act 1967, Sch. 1, Pt. II.

APPENDIX C

List of those who submitted written comments on Consultative Memorandum No. 54

Aberdeen University, Faculty of Law
Convention of Scottish Local Authorities
Edinburgh Campaign for Women's Legal and Financial Independence
Equal Opportunity Law Group
Faculty of Advocates
Professor W. M. Gordon, Faculty of Law, Glasgow University
Inverness Association of University Women
Law Society of Scotland
Dr. R. D. Leslie, Faculty of Law, Edinburgh University
Thomasina Mackay, Solicitor, Inverness
Scottish Convention of Women
Scottish Law Agents Society
Scottish Legal Action Group
Scottish Marriage Guidance Council
Society of Writers to H.M. Signet

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