SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO: 54
SOME OBSOLETE AND DISCRIMINATORY RULES IN THE LAW OF HUSBAND AND WIFE

March 1982

THIS CONSULTATIVE MEMORANDUM IS PUBLISHED FOR COMMENT AND CRITICISM AND DOES NOT REPRESENT THE FINAL VIEWS OF THE SCOTTISH LAW COMMISSION.

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 30 June, 1982. All correspondence should be addressed to:-

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PART I

INTRODUCTION

1.1. In this consultative Memorandum we seek views on several proposals for reform of the law of husband and wife. Many of these proposals are for the abolition of rules which may have had a useful function in the middle of the 19th century but which are inconsistent with the legal and social position of married women today. Several of the proposals 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 was opened for signature on 1 March 1980 but has not yet been signed by the United Kingdom. Part IV of the Convention, which deals with legal discrimination against women, is reproduced in the Appendix to this Memorandum.

1.2. The proposals in this Memorandum would not result in complicated legislation. They would simplify the law and remove what we would regard as anachronisms. In a few cases the question arises whether a repealed rule should be replaced by a new rule more suited to present conditions. We have put forward options for reform but would welcome suggestions for alternative solutions.

1.3. We propose to issue later a consultative Memorandum on matrimonial property. We do not therefore discuss that subject in this Memorandum. We have also decided not to deal with rules of the criminal law in this Memorandum.

PART II

BREACH OF PROMISE OF MARRIAGE

Present law

2.1. It is competent in Scots law to raise an action for breach of promise of marriage where one of the parties to an engagement "wrongfully" fails to implement his promise to marry the other.[1] Originally, the action permitted a party to recover only pecuniary loss.[2] However, in the early part of the nineteenth century, the courts extended the law and held that damages could include solatium for

> "the unutterable anguish the pursuer must have suffered by the violation of such a contract as this."[3]

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."[4]

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[5] but also for

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[1] Clive and Wilson, Husband and Wife (1974) p.23.

[2] Johnston v. Pasley (1770) Mor. 13916.

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

[4] Ibid., at p.657.

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

loss of the financial benefits which would have resulted from the marriage[1] and for distress and injury to feelings.[2]

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,[3] for instance, L sued a married woman for £500 for breach of promise. He was awarded 1s. and no expenses. Legal aid is not available for an action for breach of promise.[4]

2.3. Breach is not limited to express failure[5] or refusal[6] to marry the pursuer and may include

> "a course of conduct indicative of the defender's settled intention to get rid of the marriage."[7]

Thus, inducing the other party to break off the engagement by insulting or outrageous behaviour[8] or by repeatedly putting the marriage off[9] may amount to an implied breach.

2.4. Liability for breach will arise only where the defender "wrongfully" 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 on the circumstances of each

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[1] 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).

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

[3] (1883) Guthrie's S.C. II, p.450.

[4] Legal Aid (Scotland) Act 1967, Sch. 1, Pt. I.

[5] Currie v. Guthrie (1874) 12 S.L.R. 75.

[6] Whitehead v. Philipps (1902) 10 S.L.T. 577.

[7] Stoole v. McLeish (1870) 8 M. 613, per Lord Benholme at p.614.

[8] Stoole v. McLeish, supra.

[9] Liddell v. Easton's Trs. 1907 S.C. 154 at p.159.

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.[1] In Liddell v. Easton's Trs.[2] 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.

2.5. Long delay by the pursuer in raising the action may provide the defender with a good defence at common law[3] and by statute.[4]

Assessment of the present law

2.6. In favour of the present law, it can be said that it provides compensation to innocent pursuers in situations which might seem to many people to be fair - for example, where a man breaks off the engagement at the last minute without prior warning.

2.7. Against the present law it might be said that it gives scope for blackmail, or "gold-digging" claims or actions raised out of spite. Inquiries which we have made suggest that breach of promise actions are nowadays very rare. There is no way of knowing, however, how often actions are threatened, and even a few blackmail attempts may be thought to be too many.

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

[2] 1907 S.C. 154 at pp.160 and 162.

[3] Colvin v. Johnstone (1890) 18 R. 115 (action raised 10 years after engagement and 8 years after parties had ceased to speak to each other - observations that pursuer barred by mora and acquiescence).

[4] Prescription and Limitation (Scotland) Act 1973, ss. 6 and 11 and Sch. 1 para. 1(g) (5 years prescriptive period applies to "any obligation arising from, or by reason of any breach of, a contract or promise.").

2.8. The present law may also be open to criticism on the grounds that it does not adequately reflect contemporary attitudes. We do not think that the considerable expense of a public opinion survey would be justified on this limited topic, but we would welcome views on the question whether the parties to an engagement to marry are likely nowadays to wish their engagement to be regarded as creating a binding legal relationship, breach of which could result in a claim for substantial damages.

2.9. The present law can also be criticised on the ground that any legal restriction on the freedom of a person to withdraw from a proposed marriage is undesirable and that, for this reason, an agreement to marry should create only a moral duty to fulfil the promise. It is not in the best interests of the parties nor in the interests of society that parties should be encouraged to enter into marriage by the threat of legal action.

2.10. It could also be said that the present law on damages for breach of promise is inconsistent with the approach now taken to financial provision on divorce. This is not now generally seen as designed to provide damages for breach of the obligations assumed on marriage.[1] It may seem anomalous that damages can be claimed for withdrawing from an engagement but not for withdrawing from a marriage.

2.11. A more limited objection to the action for breach of promise might be confined to the heads of damages recoverable. It might be said that it is undesirable to allow damages to be claimed for injury to feelings and "loss of the marriage".

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[1] There was no support on our consultation on this question for the view that financial provision on divorce should be seen as a penalty for fault. See our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) para. 3.42.

With regard to injury to feelings it might be said that there are many hurts suffered in personal relationships and that there is no good reason to single out this type of hurt for special treatment. It might also be said that those who are most deeply hurt would be least likely to claim monetary compensation in a court of law. With regard to "loss of the marriage" it might be said that this claim reflects a view of marriage as an economic transaction which may not now be generally held.

2.12. We would welcome views on the above arguments. Our provisional view is that the action for breach of promise is open to criticism on the above grounds and that the law is in need of reform.

Developments in other countries

2.13. England and Wales

In 1967, the Latey Committee on the Age of Majority stated:

> "we are depressed to think that allowing young people the freedom to enter into contracts makes them liable, at least in theory, to be sued for breach of promise."[1]

The Committee did not make any recommendation on breach of promise as the matter was under consideration by the Law Commission. It expressed the hope, however, that breach of promise actions would soon be a thing of the past. The Law Commission recommended abolition of the action for breach of promise in a Report published in 1969.[2] After describing the emergence and development of the action in English law and the attempts made in the late nineteenth century to have the action abolished, the Commission put forward two arguments in favour of abolishing the action -

[1] Report of the Committee on the Age of Majority, (1967) Cmnd. 3342, para. 184.

[2] Law Com., No. 26, Breach of Promise of Marriage (1969).

firstly, that the action might encourage "gold-digging actions" and, secondly, that

> "the stability of marriages is so important to society that the law should not countenance rights of action the threat of which may push people into marriages which they would not otherwise undertake."[1]

They then canvassed five proposals for reform and accepted the fifth proposal, which was to abolish the action for breach of promise, but replace it with a procedure for settling property disputes between the parties.[2] The recommendations of the Law Commission were given legislative effect by the Law Reform (Miscellaneous Provisions) Act 1970 which, by section 1(1), provides that:

> "An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to such an agreement."

We are informed by the Law Commission that, so far as their records disclose, abolition of the action for breach of promise has not given rise to difficulties or complaints.

2.14. United States of America. Since the 1930s, some fifteen states have abolished the action for breach of promise by so-called "heart-balm" statutes. The statutes were said to be a legislative response to serious abuses of the action. The arguments in favour of abolition were summed up by one writer when he pointed to

> "the prevalence of blackmail peculiar to these actions, the incongruity of applying the damages remedy to injured feelings, and the perversion of that remedy by courts and juries to express their emotional sympathy and moral indignation."[3]

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[1] Ibid. para. 17.

[2] We deal with this question separately in Part III below.

[3] Feinsinger, "Legislative Attack on 'Heart-balm'", 33 Mich. L. Rev. (1935) 979.

2.15. Australia. The action for breach of promise was abolished by the Marriage Amendment Act 1976 but without prejudice to any right to recover gifts made in contemplation of marriage.[1]

2.16. New Zealand. The action for breach of promise was abolished by section 5(1) of the Domestic Actions Act 1975 which provides as follows:-

> "No agreement between two persons to marry each other, wherever made, shall be a contract, and the action for breach of promise is hereby abolished".

Possible reforms

2.17. Retain the action for breach of promise but restrict damages to pecuniary loss or to certain types of pecuniary loss. This would mean that damages for injured feelings could not be recovered. Damages might be restricted to pecuniary loss actually resulting from the breach. On this view it would be necessary to decide what pecuniary losses flowed from the defender's non-performance of the contract as opposed to the pursuer's reliance on it. Arguably only the loss of financial benefits from the marriage would be a pecuniary loss flowing from the breach of promise: other losses, such as wedding expenses, loss of career prospects through having given up employment on the faith of the engagement, or loss of other matrimonial opportunities would have been suffered anyway even if there had been no breach and if the marriage had gone ahead as planned. Alternatively, or additionally, a pursuer could be allowed to recover pecuniary loss sustained as a result of reliance on the engagement, or perhaps only certain types of such loss,

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[1] S.21, inserting a new s.111A into the Marriage Act 1961. For a discussion of this reform see 50 Australian Law Journal (1976) p.326 and Finlay, Family Law in Australia (2nd edn., 1979) pp.71 to 73.

such as actual expenditure on abortive wedding arrangements. If the law were to be restated in statutory form it would be desirable to specify exactly which types of pecuniary loss could be recovered. Possible heads of damages would appear to be:-

(a) loss of the financial benefits flowing from the marriage

(b) loss due to expenses (e.g. on a wedding dress or cancelled wedding reception) actually incurred in contemplation of the marriage

(c) loss of other matrimonial prospects

(d) loss caused by the giving up of employment, or failure to take up employment, as a result of the engagement

(e) other pecuniary loss suffered as a result of reliance on the engagement.

We would welcome views as to which, if any, of these heads of claim ought to be allowd.

2.18. Abolish the action for breach of promise. This could best be done by providing that an agreement to marry should not be regarded as a contract and by expressly abolishing the action for breach of promise.[1] The result would be that an engagement to marry would be in the same position as a personal or social engagement which was not intended to have legal consequences.

Provisional conclusion

2.19. Our provisional conclusion is that actions for breach of promise should be abolished or at least restricted to damages for certain specified types of pecuniary loss. Accordingly we invite views on the question whether

[1] Cf. paras. 2.13 and 2.16 above.

(a) actions for breach of promise should be abolished, or

(b) the damages recoverable in such actions should be restricted to certain types of pecuniary loss and, if so, which? (Proposition 1)

PART III

PROPERTY DISPUTES ON TERMINATION OF ENGAGEMENT TO MARRY

Present law

3.1. There are at present no special rules applying to property disputes between engaged couples. The normal rules applying to any disputes about property apply. Thus if a man has spent money, without any intention of donation, on improving property belonging to his fiancee, he may have a claim based on the general law of recompense.[1] 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.[2] The same rules apply to engagement gifts by third parties.[3]

3.2. The above rules apply to engagement rings as well as to other types of property. Engagement rings may, however, be in a special position because they are, by custom and tradition, linked with the engagement in a way which other gifts between engaged couples usually are not. It may therefore be particularly difficult to decide whether an

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

[2] The applicable legal principle here is restitution and the applicable remedy is the condictio causa data, causa non secuta. See Stair, Institutions of the Law of Scotland, 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: ...").

[3] Ibid.

engagement ring was an unconditional gift or a gift conditional on the marriage taking place or, perhaps, a gift conditional on the other party not breaking off the engagement. There is unlikely to be satisfactory evidence of the parties' intentions and, in the absence of such evidence, various views are possible. In one sheriff court case it was held that the ring was given unconditionally.[1] In another it was held that the ring was given conditionally and was returnable if the marriage did not take place, except where the donor was responsible for breaking off the engagement.[2] There appears to be no other reported Scottish decision on this matter so that the law remains in some doubt.

Possible reforms

3.3. Special property rules for engaged couples. It would be possible to devise a special set of rules for regulating property disputes between engaged couples. In England the Law Reform (Miscellaneous Provisions) Act 1970 gave the courts powers to settle property disputes between couples whose engagement to marry had terminated.[3] This could easily be done in English law by merely applying existing provisions for settling disputes between married couples.[4] There are no such existing provisions in Scots law and in our view it would be unjustifiable and anomalous to enact a special set of rules for property disputes between formerly engaged couples.

3.4. Special rule for engagement rings. There may, however, be a case for a clear statutory rule on the ownership of an engagement ring when an engagement

[1] Gold v. Hume (1950) 66 Sh. Ct. Rep. 85.

[2] Savage v. McAllister (1952) 68 Sh. Ct. Rep. 11.

[3] S.2(2).

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

is terminated. This must be a question which arises fairly frequently and, as we have seen, the present law provides no clear solution. In England, 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."

This has the merit of providing a clear rule for the normal case, while leaving scope for proof that the gift of the ring was conditional - as it might be, for example, in the case of a valuable family heirloom. It would, of course, be possible to devise more complex solutions. An engagement ring might, for example, be presumed to have been given subject to the condition that it would be returned on request if the marriage did not take place for any reason other than the death of the donor but could be retained on the termination of the engagement by the death of the donor.[1] This solution would mean that a man could break off an engagement for no good reason and demand his ring back. Yet another solution might be to allow the ring to be reclaimed unless the engagement were terminated unjustifiably by the donor or by the death of the donor. This could, however, encourage the very enquiries into the justification for breaking off an engagement which abolition of the action for breach of promise is designed to prevent.

3.5. An alternative view would be that there is no need for any special legislation on engagement rings. On this view a gift of an engagement ring does not differ in any legally significant respect from any other gift between engaged

[1] This is the solution proposed in the Irish Family Law Bill 1981, cl. 4.

couples and should simply be regulated by the general law. In support of this view it can be argued that, as a matter of general policy, it is desirable to have coherence in the law and to avoid unnecessary special rules for particular fact situations.

Provisional conclusion

3.6. Our provisional conclusion is that, in general, the law of unjustified enrichment provides adequate remedies for any problems which may arise in relation to property on the termination of any engagement. We have formed no concluded view on the question of engagement rings and merely invite views on the following questions

(a) Is any special statutory rule necessary on the ownership or return of an engagement ring on the termination of an engagement?

(b) If so, should there be a rebuttable presumption that the gift of an engagement ring is an unconditional gift? (Proposition 2)

PART IV

ACTIONS OF ADHERENCE

Introduction

4.1. 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 for:

> "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 prescribed period of desertion.[6] These preliminary steps of procedure

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[1] Rules of Court of Session, Appendix, Form 2.

[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. 1567-68, 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). We are grateful to Sheriff David B. Smith for this reference.

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

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

[6] 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. 5629-1 vol. 2, pp.160 to 163 (App. 6, paras. 18 to 20).

were abolished in 1861[1] but actions of adherence remained competent. They are now almost invariably coupled with a claim for aliment.

Present law

4.2. 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.[2] 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.[3] On another, willingness to adhere is to be presumed from the raising of the action.[4] 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.[5] 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 men to require the parties to live together.[6] An action of adherence is a consistorial action and, as such, is governed by special procedural rules.[7] There can, for

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

[2] A.B. v. C.B. 1937 S.C. 408 at pp.419 and 420.

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

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

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

[6] Richardson v. Richardson 1956 S.C. 394.

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

example, be no decree without proof, even if the action is undefended or the defender admits that he or she refuses to adhere.[1] Although the sheriff courts have no jurisdiction to entertain an action for adherence alone[2] they have, by statute, jurisdiction in an action of adherence and aliment.[3]

4.3. A decree of adherence will not be specifically enforced.[4] 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.[5] In an action of adherence and aliment the award of aliment is conditional on the defender not complying with the decree of adherence.[6] A decree of adherence has no effect on property or succession.

Assessment of the present law

4.4. It seems to us that the action of adherence has outlived its usefulness and should be abolished.[7] There would seem to be only two arguments for its retention and both 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.[8] There is, however, no reason why

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

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

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

[4] Hastings v. Hastings 1941 S.L.T. 323 at p.325.

[5] Macgregor v. Macgregor (1836) 14 S. 707.

[6] See Darroch v. Darroch 1947 S.C. 110; Brown v. Brown (1950) 66 Sh. Ct. Rep. 293.

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

[8] See e.g. Deans v. Deans 1965 S.L.T. (Notes) 9.

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 a decree of adherence in addition.

4.5. 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]

Provisional conclusion

4.6. Our provisional conclusion is that it should no longer be competent to crave, or conclude for, a decree of adherence. (Proposition 3). This would not, of course, affect entitlement to aliment or a spouse's freedom to raise an

[1] An action of this nature is at present known as an action for interim aliment in the sheriff courts, but there is nothing interim about the award. It 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 to 341; Clive and Wilson, Husband and Wife, pp.221 to 223.

action for aliment, or interim aliment, if he or she were willing to adhere. Nor would it affect any defence to an action for aliment which a spouse might have on the ground that the pursuer was unwilling to adhere. Our proposal is not concerned with the concept of willingness to adhere but simply with the competency of asking a court to grant a decree ordaining one spouse to adhere to the other.

PART V

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

Present law

5.1. 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.[1] 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".[2]

Background to present law

5.2. 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.[3]

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

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

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

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.

5.3. 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.[1] The need to rectify this abuse was recognised in the Conjugal Rights (Scotland) Amendment Act, 1861. This Act[2] 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[3] for a protection order. This order protected any moveable property acquired by or coming to the wife after the date of the order from the husband's jus mariti. 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."[4]

Such an order continues until recalled by the court or until the parties resume cohabitation.[5] 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

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[1] Fraser, Husband and Wife, 2nd edn. I, p.824.

[2] Ss.1 to 3.

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

[4] Conjugal Rights (Scotland) Amendment Act 1861, s.5.

[5] Ibid., s.3.

from or through her are not affected by the recall of the order.[1] 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."[2]

Assessment of the present law

5.4. 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. Before 1976 it might have been argued that a protection order was useful as an equivalent of a separation decree for a deserted wife: such an order, like a decree of separation, would, for example, prevent any property later acquired by the wife from passing to the husband on her death intestate. The Divorce (Scotland) Act 1976, however, enables a decree of separation to be obtained on the ground of desertion.[3] So this justification for protection orders has gone.

Provisional conclusion

5.5. Our provisional view is that it should no longer be competent for a deserted wife to apply for a protection order. (Proposition 4).

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[1] Ibid., s.3.

[2] Ibid., s.6 read with s.5.

[3] S.4.

PART VI

CURATORY OF MARRIED MINORS

Present law

6.1. 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,[1] 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.

6.2. 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.[2] There is, however, some doubt about whether the marriage of a young man always results in forisfamiliation.[3] In the old case of Anderson v. Anderson[4] it was held that the

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[1] The mother of a legitimate child is now curator along with the father. Guardianship Act 1973, s.10.

[2] Stair I.5.13; Erskine, Inst. I.6.53.

[3] Bankton I.6.8.

[4] (1832) 11 S. 10.

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

Assessment of the present law

6.3. The present law on the curatory of married minors clearly offends against the principle of sex equality. It would be possible to remove discrimination by applying the rules of section 2 of the 1920 Act to minor husbands. A husband under the age of 18 would be under the curatory of his wife if she were over that age or of his parents if she were under that age. We doubt whether this option would be acceptable. 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. Again, this does not seem a very sensible solution. A third option would be to remove discrimination by applying to both spouses the rules presently applying to minor husbands while taking the opportunity to remove the doubt in the law about the effect of marriage in forisfamiliating a minor. Under this solution neither spouse would

[1] (1860) 22 D. 1198 at p.1208.

be under the curatory of the other: both would be freed on marriage from the curatory of their parents. Our tentative preference is for this solution. Whatever merits there may have been in section 2 of the 1920 Act at a time when girls could get married at 12,[1] it must be doubted whether it now serves any useful purpose.

Provisional conclusion

6.4. We intend to resume work on a memorandum on the law on minors and pupils when resources permit.[2] One possibility, therefore, would be to deal with the question of the legal capacity of a married minor in that context. Another possibility would be to regard the present rule on the curatory of married minors as a severable topic and to deal with it in the context of the present project. As the appropriate vehicle for reform may depend on the results of consultation as well as on the time scale of our more general review of the law on minors and pupils we prefer to keep our options open at this stage. In the meantime we invite views on the question whether the present rule that a husband of full age and capacity is the curator of his minor wife should be replaced by (a) a rule that marriage frees a person, whether male or female, from the curatory of his or her parents or (b) some other rule, and if so what?
(Proposition 5)

[1] The minimum age for marriage was not raised to 16 until 1929. Age of Marriage Act 1929.

[2] See our Sixteenth Annual Report (Scot. Law Com. No. 70) para. 3.28.

PART VII

HUSBAND'S LIABILITY FOR WIFE'S ANTENUPTIAL DEBTS

Present law

7.1. Under the common law, a right of property in the wife's moveable estate - the jus mariti - vested in her husband on marriage. Since 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. 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.

Assessment of the present law

7.2. 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.[1] We invite views on the question whether the husband's residual liability for his wife's antenuptial debts should be abolished. (Proposition 6). The equivalent rule in English law making a husband liable for his wife's antenuptial debts to the extent of property acquired from or through her was repealed in 1935[2] without, so far as we are aware, any ill effects. Similar rules in several Canadian jurisdictions have been repealed without creating any practical difficulty.[3]

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[1] One situation in which the present rule might conceivably be useful would be where a woman who has incurred substantial debts transfers all her property to her husband by antenuptial marriage contract. Under the present law that would be deemed to be an onerous transfer, the marriage being regarded as the consideration, so that the creditors could not readily reduce it. In such a situation it might be useful for them to be able to proceed against the husband. In the next part of the Memorandum, however, we question whether it should continue to be the law that the marriage itself is regarded as consideration for provisions in an antenuptial marriage contract which would otherwise be treated as gratuitous. See para. 8.4.

[2] Law Reform (Married Women and Tortfeasors) Act 1935, s.3.

[3] See Law Reform Commission of Saskatchewan, Tentative Proposals for an Equality of Status of Married Persons Act (May, 1981) p.27.

PART VIII

ANTENUPTIAL MARRIAGE CONTRACTS

Introduction

8.1. In the nineteenth century, antenuptial marriage contracts played an important part in the life of the middle and upper classes.[1] Their main function was to tie up funds, provided by the spouses or their families, in such a way that the funds were available for the support of the spouses and the benefit of their children, while being protected from alienation by the spouses themselves and from diligence by their creditors.[2] Antenuptial marriage contracts were also used to modify the common law rules on matrimonial property and succession.[3] This was particularly useful before 1881 because, in the absence of a marriage contract, all the wife's moveable property would have passed to the husband by operation of law.[4] Antenuptial marriage contracts are now rare: wives and children are protected by other means, such as insurance policies and pension schemes, and marriage is not now usually seen as a matter involving complicated financial transactions between two families. Marriage contracts, however, 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. What we would like to consult on, however, is 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

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[1] See Murray, The Property of Married Persons (1891) p.86.

[2] Id. p.88.

[3] See Bell, Lectures on Conveyancing (3rd edn. 1882) p.850.

[4] Id. pp.908 and 909.

to third parties.[1] The first is that an antenuptial contract is regarded as an onerous transaction, the marriage itself being the consideration. The second is that a wife can by an antenuptial marriage contract create, out of her own funds, an alimentary liferent for herself which is protected against her creditors. We examine these rules in turn.

Marriage as consideration for provisions in marriage contract

8.2. Present law. 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.[2] 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."[3]

> "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."[4]

It follows that a transfer under an antenuptial marriage contract is immune from attack by the donor's creditors as a

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[1] 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.

[2] Erskine IV.1,33.

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

[4] McLay v. McQueen (1899) 1 F. 804 per Lord Kincairney at p.809.

gratuitous alienation.[1] 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.[2] The possibility that creditors might be able to challenge marriage contract provisions which were grossly exorbitant has also been left open,[3] 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.[4]

8.3. Assessment of present law. It must, we think, be open to question whether the rule that the marriage itself can be regarded as the consideration for a transfer of funds by one party to another now squares with contemporary attitudes. That the rule was open to abuse was recognised in nineteenth century cases. In McLay v. McQueen,[5] 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

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[1] 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 cl. 33 of the draft Bill appended to our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot. Law Com. No. 68, 1981) because the transfer would be for "adequate consideration".

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

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

[4] Armour v. Learmonth 1972 S.L.T. 150.

[5] (1889) 1 F. 804 at p.810.

widely regarded as an essential form of financial protection for a wife and children, the preservation of a potentially unfair rule may have been justified. It must be doubtful whether that is any longer the case.

8.4. Provisional conclusion. We have formed no firm view on this matter but we invite views on the question whether it should continue to be the law that the marriage itself is consideration for provisions in an antenuptial marriage contract. (Proposition 7). We add two points. First, any change in the law on consideration for marriage contracts should clearly not affect existing marriage contracts: it should apply only to contracts entered into after the relevant legislation (if any) comes into effect. Secondly, any change in the law would not prevent an antenuptial marriage contract from being regarded as onerous where there was in fact sufficient consideration other than the marriage. As the courts have not been disposed to weigh the onerosity of marriage contracts "in very nice scales"[1] it follows that any change on the lines referred to would affect only those antenuptial marriage contracts where there was a gross imbalance in the funds provided by the parties.

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

8.5. Present law. 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.

> "The reason is that he could otherwise secure for himself the enjoyment of his yearly income and at the same time put the income wholly beyond the reach of his creditors. It is an elementary principle

[1] Mitchell v. Mitchell's Trs. (1877) 4 R. 800 at p.807. See also Beattie's Trs. v. Beattie (1884) 11 R. at p.851.

[2] (1899) 1 F. 804 at p.810.

> 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.

8.6. Assessment of the present law. 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 so 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 a question on which we would welcome views. On the one hand it might be argued that the present rule is a beneficent 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

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

[2] Ibid.

[3] See Coles, Petr. 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 Petr. 1966 S.L.T. 59; Pearson & Ors. Petrs. 1968 S.L.T. 46.

[6] Cf. Beith's Trs. v. Beith 1950 S.C. 66; Cargill 1965 S.C. 122 at p.125.

[7] See Livingstone v. Livingstone (1886) 14 R. 43; Douglas-Hamilton v. Duke and Duchess of Hamilton's Trs. 1961 S.C. 205 at pp.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).

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.[1]

8.7. Question for consideration. We invite views on the question whether it should, or should not, continue to be possible for a woman, by antenuptial marriage contract, to create an alimentary liferent of her own funds in her own favour. (Proposition 8).

[1] 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.

PART IX

THE HUSBAND'S RIGHT TO CHOOSE THE PLACE OF THE MATRIMONIAL HOME

Present law

9.1. 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. What will be regarded as reasonable by the court will depend on the facts of each case. Thus, Lord Justice-Clerk Moncreiff in Muir v. Muir stated:

> "I cannot say that it is the duty of a wife to go wherever her husband chooses."[1]

In that case, the husband had been forced to flee Scotland to evade his arrest for embezzlement. He wrote to his wife, inviting her to join him somewhere in "the wilds of Australia",[2] but without offering to pay for her passage there or specifying exactly where she would be required to live. In these circumstances, the court held that she was justified in refusing his offer.

9.2. In addition, the exercise of the husband's right must be genuine and not made, for example,

> "in the hope that she would refuse it, and that he might thereby escape liability for her maintenance."[3]

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,[4] the duty to adhere will not be specifically

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[1] Muir v. Muir (1879) 6 R. 1353 at pp.1356-7.

[2] Ibid., per Lord Gifford at p.1358.

[3] Martin v. Martin 1956 S.L.T. (Notes) 41.

[4] See para. 4.1 above.

enforced. In refusing to adhere in the chosen matrimonial home, the wife risks placing herself in desertion,[1] despite the fact that her refusal may be no more than a disagreement over the location of the home.

Assessment of the present law

9.3. 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.[2] The only justification for the present law might be that in a case of deadlock it is essential that there should 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.[3] There are two options for reform. 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 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

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

[2] See Dunn v. Dunn [1949] P. 98 per Denning L.J. at p.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.114, 220 and 221.

[3] Divorce (Scotland) Act 1976, s.1.

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. It may well be thought that the introduction of an express reasonableness test on the above lines would be unduly complicated and that if the husband's so-called right were abolished the courts could still deal with the question of desertion and willingness to adhere in a common sense way in the light of the whole circumstances.

Question for consideration

9.4. We invite views on the questions (a) whether the rule that, as between husband and wife, the husband may choose the place of the matrimonial home should be abolished and (b) if so, whether that rule should be replaced by some new statutory rule in relation to desertion and (c) what that new statutory rule should be. (Proposition 9).

PART X

CONTRACTS FOR HOUSEHOLD NECESSARIES

Present law

10.1. 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.[1] Third parties are entitled to rely on this presumption unless they have been notified to the contrary or the wife has been inhibited[2] and are also 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.[3] 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.[4] There is a lack of modern cases on the wife's praepositura. The law is still as laid down by Erskine in the 18th century:[5]

> "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 ....".

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[1] Erskine I.6.26; Clive & Wilson, Husband and Wife pp.253 to 262.

[2] See paras. 10.2 and 10.3 below.

[3] Bell, Commentaries (7th edn.) pp.509 and 510.

[4] Fraser, Husband and Wife (2nd edn.) pp.605 and 607, 611 and 612; Encyclopedia of the Law of Scotland Vol. 7, pp.676 and 677; Clive & Wilson, op. cit., pp.254 to 256.

[5] Erskine, I.6.26.

10.2. The wife's praepositura can be cancelled formally by the husband by means of inhibition. This is obtained by presenting the appropriate documents[1] 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"[2] but, in practice, it is usual to narrate that the wife has purported to contract debts to a large amount.[3] When published by registration in the Register of Inhibitions and Ajudications 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.

10.3. 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.[4] 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 can probably not 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

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[1] 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 & Wilson, op. cit., pp.257 to 260.

[2] Erskine I.6.26.

[3] Encyclopedia of Scottish Legal Styles, Vol. 5 pp.377 and 378.

[4] Fraser, op. cit., p.635.

and tradesmen have no means of knowing, nor title to enquire into."[1] There has, however, been some doubt on these points.[2]

10.4. 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.[3]

Basis of present law

10.5. 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 by third parties to have been, placed by the husband in charge of his domestic establishment.[4] 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.[5] 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 in this Memorandum.

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[1] Hume, Lectures, I. 141; Dalling v. McKenzie (1675) Mor. 6005; Alston v. Stanfield (1682) Mor. 6007; Gow v. Maxwell (1920) 36 Sh. Ct. Rep. 138.

[2] See the discussion in Clive & Wilson, op. cit., pp.253 and 254.

[3] See Fraser, op. cit., p.621; Pettigrew & Stephens Ltd. v. Crawford (1918) 35 Sh. Ct. Rep. 35.

[4] Erskine I.6.26.

[5] Bell, Commentaries, (7th edn.) pp.509 and 510; Gloag, Contract (2nd edn.) p.152; Walker, Contract, para. 6.13.

10.6. 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.[1] 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.[2] On exactly the same principle a wife might be liable for necessaries supplied to her indigent child.[3] We are not concerned with this rule here.

Effect of abolishing rule that wife is presumed to be husband's domestic manager

10.7. Abolition of the rule that a wife can be assumed to have been placed in charge of the husband's household would not affect liability based on ordinary principles of agency. This would mean that if a husband regularly paid bills incurred by his wife, or in fact held his wife out to third parties as his domestic manager, he would be liable as principal for debts contracted within the scope of her implied or ostensible authority. The same would apply to a cohabitee or to a husband held out as his wife's domestic manager. In practical terms, therefore, the result of abolishing the rule that the wife is legally presumed to be praeposita negotiis domesticis would not necessarily be to abolish the husband's liability for household debts contracted by his wife but might be to create more uncertainty for some wives and some suppliers of goods or services. Suppose, for example, that a window cleaner knows that a couple are married and living together and that the wife has not been inhibited. He can accept the wife's instructions

[1] See Clive & Wilson, op. cit., pp.263 to 265.

[2] Stair I.4.17; Erskine I.6.26.

[3] See Morison's Dictionary, Recompense, pp.13424 to 13427.

to clean the windows in the knowledge that the husband will be liable for the bill. If the rule that the wife is presumed to be placed in charge of household affairs were abolished, the window cleaner could not rely on recovering from the husband unless the wife had in fact been held out by the husband as his housekeeper or domestic manager. In theory, therefore, abolition of the rule that the wife is presumed to be praeposita negotiis domesticis might mean that housewives who had no obvious source of funds on which the supplier could rely would find it difficult or impossible to obtain household goods or services on credit. It is, however, doubtful whether suppliers of household goods and services are generally aware of this rule of law or in fact place any reliance on it. The question is relevant in relation to a new extension of credit to a wife in her capacity as wife. It does not arise if there has been a course of dealing in which the husband has regularly paid the wife's bills. In such a case the supplier could rely on implied authority by virtue of the course of dealing. It does not arise in relation to cash transactions - at supermarkets, for example. It does not arise where the transaction is with the husband - as many domestic transactions (for example, for expensive items of furniture or household equipment) may be. And it does not arise where the supplier relies on the wife's own credit as an individual,[1] as will now very often be the case.[2] The days

[1] Fraser, op. cit., p.612.

[2] 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.

when it was exceptional for a married woman to have any paid employment or any savings or any other property have gone.[1] 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 (a) that she was married (and not, for example, widowed or divorced or merely calling herself Mrs So-and-so), (b) that she was living with her husband (and not, for example, alone or with another man), (c) that she had not been inhibited, (d) that her husband's credit was good and (e) that 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 (f) that the husband had not privately cancelled the wife's authority and (g) that 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 the circumstances of the couple fairly 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.

Assessment of the present law

10.8. In favour of the present law it could be argued that it still reflects reality. It might be said that everyday

[1] See Manners and Rauta, Family Property in Scotland (O.P.C.S. 1981). In the case of almost two-thirds of the couples in this survey, both partners had had full-time work at some time during the marriage. 20% of wives and 23% of husbands had savings over £500. 34% of wives and 35% of husbands had savings of over £100. 57% of owner-occupied matrimonial homes were owned jointly by husband and wife. 65% of couples who had only one bank account had it in joint names.

[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; Olswang 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 (2nd edn.) pp.201 and 204. Contrast, however, Clive and Wilson, op. cit., pp.254 and 261.

observation suggests that most household purchases are made by women and that wives, rather than husbands, tend to be in charge of domestic affairs. The present law, it may be said, does no harm and may be helpful to wives, making it easier for them to obtain household goods and services on credit. This may be in the interests of both spouses. As was stated in one nineteenth century book on the law of husband and wife:

> "A wife would, indeed, be of little use to her husband in their domestic arrangements, if she could not order necessaries for the domestic consumption."[1]

It might also be said that if the rule is retained that the wife is presumed by the law to be her husband's domestic manager, then inhibition is necessary to enable this legal presumption to be cancelled conclusively and in a way which is effective against all parties. On the other hand, it could be argued that inhibition is needlessly difficult to obtain, unfair to small traders and shopkeepers who are unlikely to know of it, and capable of being used in a vindictive way against a wife who has not abused her authority. It may be that even if the law on the wife's praepositura is retained unaltered, the law on inhibitions of wives should be reformed. It may even be that inhibitions of wives should be made incompetent and that husbands should be expected to notify suppliers by advertisement or notice. We would welcome views on these points.

10.9. Against the present law on the wife's praepositura it could be argued that it does not in fact reflect reality. It is based on the assumption that the household is the husband's establishment, that the wife is his domestic

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[1] Fraser, op. cit., p.605. Nowadays, of course, a husband could simply ensure, by giving his wife an adequate housekeeping allowance, that she had sufficient funds for household purposes.

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 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. On this view, it might be argued that even if most contracts for the supply of household necessaries are entered into by women (and while this is probably true of food purchases, it is not necessarily true of other necessaries such as gas or electricity, and is certainly not true of accommodation)[1] and even if the wife, rather than the husband, is likely to be the domestic manager, it by no means follows that most wives see themselves, or are seen by their husbands and others, as acting as their husband's agent or domestic manager. In many cases, no doubt, wives will not think in terms of legal analogies at all but will simply regard themselves as acting for the family. If spouses do resort to any legal analogy in this context it may be that many would see themselves as part of a partnership in which there happens to be a division of labour suitable to both parties and the children rather than as parties to a relationship of principal and agent.[2] It may be that the present law is regarded as objectionable on the ground that it is based on an outmoded and sexually discriminatory model. We do not know. One of the purposes of this consultative Memorandum is to find out.

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[1] See Todd and Jones, Matrimonial Property (O.P.C.S. 1972) pp.29 and 30; Manners and Rauta, Family Property in Scotland (O.P.C.S. 1981) p.4, Table 2.3.

[2] The idea of marriage as a partnership between equals is reflected in the results of the survey of Family Property in Scotland carried out at our request in 1979. Thus when asked why they had first put their homes in joint names 40% of informants gave as their reason a general belief in equality in marriage. Manners and Rauta, op. cit., p.5, Table 2.5. Virtually all couples regarded household furniture as belonging to both jointly. Ibid. p.6, Table 2.9.

10.10. What is clear is that the legal and social background to the law on contracts for household necessaries has changed considerably since the present rule was formulated.[1] 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 a rule on 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.

Comparative survey

10.11. English law. At first glance English law on this topic seems very similar to Scots law. The general rule has been stated as follows:[2]

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[1] On the earlier law, see generally, Fraser, op. cit., pp.519 to 535, 679 to 741.

[2] Bromley, Family Law (6th edn. 1981) pp.152 and 153. Certain dicta in Debenham v. Mellon (1880) 6 App. Cas. 24 could, however, be read as indicating that nothing turns on the parties' status and that liability is simply a matter of the ordinary law of agency. Contrast the dicta of Lord Selborne L.C. at pp.32 and 33 with those of Lord Blackburn at p.36.

> "If a married woman is cohabiting with her husband, there is a presumption that she has his authority to pledge his credit for necessary goods and services which belong to those departments of the household which are normally under her control."

However, in English law the husband can escape liability by proving that he had privately forbidden his wife to pledge his credit, even if the prohibition was not known to the third party,[1] or by proving that the wife had an adequate allowance out of which she could herself have paid for the goods or services.[2] It is doubtful, to say the least, whether this is the law in Scotland.[3] As a private prohibition suffices, in English law, to terminate the wife's authority, there is no need for, and no provision for, any remedy akin to inhibition of wives.

10.12. France. Until 1942 French law was based on the theory that the husband was presumed to have authorised his wife to carry out domestic transactions on his behalf. The law being based on tacit authority, it was thought that the husband could withdraw that authority at will.[4] In 1942 the law was placed on the footing of a mandate by operation of law (un mandat legal). Article 220 of the Code Civil was amended to provide that:-

> "The married woman has ... the power to act on behalf of her husband for household necessaries and to use for the purpose any funds which he allows her."

The law was changed in 1965 and Article 220 now provides as follows:

> "Each of the spouses has power to enter into contracts which have as their object the support of the household or the education of the children:

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[1] Ibid., p.154; Debenham v. Mellon (1880) 6 App. Cas. 24.

[2] Bromley, p.154; Morel v. Westmorland [1904] A.C.11.

[3] See para. 10.3 above.

[4] See Marty et Raynaud, Droit Civil, Les Personnes (3rd edn.) pp.261 and 262.

every debt thus contracted by one spouse binds the other jointly ("solidairement").

There is, nevertheless, no joint liability for manifestly excessive expenditure, having regard to the standard of living of the household, to the utility or otherwise of the transaction, and to the good or bad faith of the third party entering into the contract.

Nor is there joint liability for instalment purchases if they have not been consented to by both spouses."

It has been held that a lease of the family home is a contract having as its object the support of the household and that the wife is thus liable for the rent even although the tenancy was entered into by the husband alone.[1]

10.13. West Germany. The law used to regard the wife as having power to bind her husband by contracts within the domestic sphere. This was known as the "Schlüsselgewalt" or "power of the key". It rested on the same theory as the wife's praepositura in Scots law - that the wife could be regarded in law as her husband's domestic manager or housekeeper. The law was reformed in 1976 when the whole law on marriage was recast to give greater recognition to the idea of marriage as an equal partnership.[2] Article 1357 of the BGB now provides as follows:

"(1) Each spouse is entitled to contract for the appropriate supply of necessaries for the family, with effect also for the other spouse. Both spouses are bound by, and have rights under, such contracts unless the circumstances suggest otherwise.

(2) A spouse can limit or exclude the right of the other to bind him by such contracts; if no

[1] Rouen, 22 dec. 1970, D. 1971 429.

[2] Erstes Gesetz zur Reform des Ehe und Familienrechts June 14, 1976.

sufficient ground exists for the limitation or exclusion the court must, on application, set it aside. A limitation or exclusion has effect against third parties only in accordance with art. 1412 [which refers to notification or registration].

10.14. South Africa. The common law rule in South Africa is that a married woman can bind herself and her husband by contracts for household necessaries.[1] It is not settled whether this rule derives from implied agency or is a legal incident of marriage.[2] Where the marriage is out of community the Matrimonial Affairs Act 1953[3] provides that both husband and wife are jointly and severally liable for debts incurred by either spouse in respect of necessaries for the joint household, but if the wife pays any such debt, she has a right of recourse in full against the husband. The one-sided nature of the last part of this provision has been criticised. Why, it is asked, should a wife who has ample means of her own be able to recover in full from a husband who has only modest means? It has been suggested that recourse between the spouses should follow the duty of support.[4]

10.15. Ontario. The common law was the same as in England. The Family Law Reform Act of 1978 now provides as follows:[5]

> "(1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third party for necessaries of life, except where the spouse has notified the third party that he or she has withdrawn the authority.

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[1] Hahlo, The South African Law of Husband and Wife (4th edn. 1975) pp.169 and 170.

[2] Ibid.

[3] S.3.

[4] Hahlo, op. cit., p.176.

[5] S.33.

(2) [Relates to children]

(3) Where persons are jointly and severally liable with each other under this section, their liability to each other shall be determined in accordance with their obligation to provide support.

(4) The provisions of this section apply in place of the rules of common law by which a wife may pledge the credit of her husband."

Options available

10.16. Retain existing law. We are not convinced that the existing law, which was developed at a time when married women had no contractual capacity, is well suited to present conditions. It is moreover based on a "stereotyped assumption" about the role of women as housekeepers and domestic managers which appears to conflict with the policy behind the Sex Discrimination Act 1975.[1] Nonetheless one possible option would be simply to retain the existing law. We would welcome views.

10.17. Abolish rule that wife is presumed to be placed in charge of husband's household and leave liability to general law. The effect would be to increase the number of cases in which spouses would be regarded as contracting as individuals. We would welcome views on whether this would be likely to make much difference in practice and on whether it would be a satisfactory solution. We can see many attractions in it. It would not give rise to new problems of liability as between the spouses. It would reduce to a minimum problems of cancellation of authority. It would enable inhibitions of wives to be abolished. It would apply

[1] Cf. Coleman v. Skyrail Oceanic Ltd. [1981] I.R.L.R. 398 per Lawton, L.J. at p.400 - "stereotyped assumptions do amount to discrimination against women" ... "the dismissal of a woman based upon an assumption that men are more likely than women to be the primary supporters of their spouses and children can amount to discrimination under the Sex Discrimination Act 1975".

to all couples, whether married or not. It would be simple legislatively. It would recognise that spouses are individuals with full contractual capacity, responsible for their own contracts but not for the other spouse's contracts. Our provisional view is that if the law is to be changed this would be the best solution.

10.18. Replace existing rule by joint and several liability for household debts. As we have seen, this type of solution has been favoured in recent reforms in several countries - with or without special supplementary rules. If such a rule were adopted, and we have the gravest doubts about whether it should be, it would be essential to limit it very carefully - e.g. to contracts for the appropriate provision of necessaries for the family or household. This might give rise to problems of definition or, alternatively, to vagueness. It would be for consideration whether hire-purchase and similar instalment contracts should be excluded, as in French law. It would also be for consideration whether there should be any special rule on the liability of the spouses as between themselves - e.g. that, as in Ontario, liability should follow the obligation of aliment, so that if the husband was in paid employment and the wife had no means he alone would be liable and vice versa. Another possibility would be to provide that the spouses should have no right of relief inter se. This would be a less refined but simpler solution. Whatever solution were adopted the possible consequences would have to be carefully weighed. In many cases wives would certainly be liable for debts contracted by their husbands in circumstances where they are not liable now. We have already referred to the French case in which the wife was liable for rent even although the tenancy was in the husband's name. Wives might similarly be liable for debts incurred by their husbands for food, fuel, clothing and other household supplies. Would these results be acceptable? From the point of view of the landlord or supplier they might seem fair. The wife,

after all, might have benefited from the accommodation or supplies provided. Would they seem fair to wives whose small savings were eaten up because their husbands had squandered their wages? Any feeling of unfairness experienced by such wives might, of course, be no more than the sense of injustice which might be felt in certain circumstances, whether under the present law or under a statutory rule of joint and several liability, by a husband held liable for his wife's debts. Any rule which holds one person liable for another's debts is liable to give rise, on occasion, to feelings of injustice. Another question is whether a new statutory rule on liability for household debts should be confined to married couples. Why should it not apply to unmarried couples cohabiting as man and wife, or even to any other couple running a joint household, such as two sisters or a mother and an adult son? Although a new rule of joint and several liability seems at first sight to be attractively egalitarian and to give expression to the idea of partnership in marriage, it would be beset with problems, some of which are of a fundamental nature. We consider that there could be grave difficulties and dangers in such a solution and that very careful consideration indeed should be given to the question whether a simple regime of separate liability, subject to the ordinary rules of the common law, might not be preferable. Our tentative view is against the introduction of a new statutory rule based on joint and several liability, and in favour of leaving liability to depend on the general law,[1] but we would welcome views.

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[1] This is also the view taken by the Law Reform Commission for Saskatchewan in its recent report on Tentative Proposals for an Equality of Status of Married Persons Act (May, 1981) p.41 - "The Commission believes that the ordinary law of agency provides all the authority that is necessary in cases in which it is convenient for one spouse to act for the other. To presume an agency relationship for any purpose in an era in which few married women have neither some independent resources, nor adequate provision from the family breadwinner to purchase necessaries, is both unnecessary and a potential source of misunderstanding between husband, wife and creditors .... Few merchants and tradesmen are willing to advance credit to a wife on the basis of a legal rule which they cannot be sure applies in a specific case, assuming even that merchants and tradesmen are generally aware of the rule."

10.19. Modernise law on inhibitions. If the present law on the praepositura were retained it would be necessary to consider whether the law on inhibitions of wives should be reformed. It may be thought to be unrealistic. It seems unlikely that many traders relying on a husband's credit when making sales to a wife would in fact be aware of any inhibition. The procedure, moreover, seems needlessly bureaucratic and expensive. If the husband is entitled to inhibit his wife as of right, why should he not be able to record a simple notice of inhibition directly without going through the procedure of Bills and Letters and signeting and service? Should there be some procedure by which the wife could have an inhibition recalled by the court on showing that it was unjustified? Should there be a maximum duration for an inhibition,[1] or should it be effective until recalled by the husband?

10.20. If a new statutory rule on, say, joint and several liability for household debts were introduced it would clearly be necessary to reform the law on inhibitions. Any procedure for cancelling the power of one spouse to bind the other would have to be available to both. The questions raised in the preceding paragraph would also arise in relation to this option. If the new statutory regime were to apply to cohabiting unmarried couples the question would arise whether inhibition ought to be available in their case too.

10.21. If the law on liability for household debts were left to depend on the general law (with no special rule for married or cohabiting couples) there would seem to be no need for the remedy of inhibition. The basic rule would be that each person was liable for his or her own debts.

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[1] Inhibitions relating to land prescribe in 5 years under s.44 of the Conveyancing (Scotland) Act 1924. It has, however, been held in the sheriff court that this provision does not apply to inhibitions of wives. Daets v. Deary (1926) 42 Sh. Ct. Rep. 146.

Propositions for consideration

10.22. We invite views on the following. Should the law on a married person's liability for household debts continue to be based on a presumption that a married woman living with her husband has been placed by him in charge of his domestic affairs (praeposita negotiis domesticis)? (Proposition 10)

If not, it is our provisional view that liability for household debts should be left to depend on the general law and that there should be no new statutory rule (such as, for example, a rule imposing joint and several liability for household debts). (Proposition 11)

If, however, it is thought that there should be a new statutory rule we invite suggestions on its content and on whether it should apply to unmarried couples living together as man and wife. (Proposition 12)

Should the law on inhibitions of wives be (a) abolished (b) retained without modification or (c) retained with modifications and, if so, what? (Proposition 13)

PART XI

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

Present law

11.1. 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 dominus litis and even although the expenses are not "necessaries" for which he is liable.[1] This 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"; 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."[3]

Assessment of the present law

11.2. The leading textbook on expenses, published in 1912, deals with the cases on this question under the heading of

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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 to 235.

[3] Swirles v. Isles 1930 S.C. 696 per L.P. Clyde at pp.700 to 701.

"Tutors and Curators".[1] 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.[2] 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,[3] however, it was held that his liability was unaffected by the 1920 Act. The court seemed to reason that because the husband's consent as curator was not sufficient to render him liable for expenses before the Act, therefore it was not necessary. The decision leaves the law in a state of some uncertainty. Is the rule limited to husbands and wives?[4] If so, is it one-sided, or is a wife liable if she participates in her husband's action? If not, what are the limits of the rule, and what is

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[1] Maclaren, Expenses, Ch. IX.

[2] Id. p.232 and 233; Rodger v. Weir 1917 S.C. 300.

[3] 1926 S.C. 673.

[4] Lord Anderson in McMillan v. Mackinlay 1926 S.C. 673 at p.679 expressed the view, obiter, that it applied to any intervention by a "relative" or "friend" but there appears to be no authority for this view and it is not clear how "relative" or "friend" should be defined. Lord Sands in Swirles v. Isles 1930 S.C. 696 at p.703 thought the rule was part of the law of husband and wife.

the justification for having a rule half way between the dominus litis rule and the normal rule that a third party, who is not a party to an action, does not incur liability for expenses merely because he advises and helps one of the litigants? It is difficult to resist the conclusion that the decision in McMillan v. Mackinlay preserved a rule which should have disappeared along with the husband's curatory over his adult wife and created more problems than it solved.

11.3. Abolition of the rule in McMillan v. Mackinlay would not affect the rule whereby a person may be liable for expenses as the dominus litis - that is, on the ground that he has the true interest in the subject matter of the action and full control of it so that he can settle or abandon it at will.[1] This rule is not confined to actions by married women but applies quite generally. Abolition of the McMillan v. Mackinlay rule in relation to husbands would not prevent the curator of a minor, who intervened too actively in litigation to which he consented as curator, from being found liable in expenses as under the present law.[2]

Provisional conclusion

11.4. Our provisional conclusion is that without prejudice to any liability as dominus litis or otherwise 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 actively participated in the litigation. (Proposition 14)

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[1] See Maclaren, Expenses, pp.147 to 153; Swirles v. Isles 1930 S.C. 696.

[2] See e.g. Rodger v. Weir 1917 S.C. 300.

PART XII

SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

BREACH OF PROMISE OF MARRIAGE

Para.

1. We invite views on the question whether 2.19
   (a) actions for breach of promise should be abolished, or
   (b) the damages recoverable in such actions should be restricted to certain types of pecuniary loss and, if so, which?

PROPERTY DISPUTES ON TERMINATION OF ENGAGEMENT TO MARRY

2. (a) Is any special statutory rule necessary on the ownership or return of an engagement ring on the termination of an engagement? 3.6
   (b) If so, should there be a rebuttable presumption that the gift of an engagement ring is an unconditional gift?

ACTIONS OF ADHERENCE

3. It should no longer be competent to crave, or conclude for, a decree of adherence. 4.6

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

4. It should no longer be competent for a deserted wife to apply for a protection order. 5.5

CURATORY OF MARRIED MINORS

5. We invite views on the question whether the present rule that a husband of full age and capacity is the curator of his minor wife should be replaced by (a) a rule that marriage frees a person, whether male or female, from the curatory of his or her parents or (b) some other rule, and if so what? 6.4

		Para.
	HUSBAND'S LIABILITY FOR WIFE'S ANTENUPTIAL DEBTS	
6.	We invite views on the question whether the husband's residual liability for his wife's antenuptial debts should be abolished.	7.2
	ANTENUPTIAL MARRIAGE CONTRACTS	
7.	We invite views on the question whether it should continue to be the law that the marriage itself is consideration for provisions in an antenuptial marriage contract.	8.4
8.	We invite views on the question whether it should, or should not, continue to be possible for a woman, by antenuptial marriage contract, to create an alimentary liferent of her own funds in her own favour.	8.7
	HUSBAND'S RIGHT TO CHOOSE THE PLACE OF THE MATRIMONIAL HOME	
9.	We invite views on the questions (a) whether the rule that, as between husband and wife, the husband may choose the place of the matrimonial home should be abolished and (b) if so, whether that rule should be replaced by some new statutory rule in relation to desertion and (c) what that new statutory rule should be.	9.3
	CONTRACTS FOR HOUSEHOLD NECESSARIES	
10.	Should the law on a married person's liability for household debts continue to be based on a presumption that a married woman living with her husband has been placed by him in charge of his domestic affairs (*praeposita negotiis domesticis*)?	10.22

		Para.
11.	If not, it is our provisional view that liability for household debts should be left to depend on the general law and that there should be no new statutory rule (such as, for example, a rule imposing joint and several liability for household debts).	10.22
12.	If, however, it is thought that there should be a new statutory rule we invite suggestions on its content and on whether it should apply to unmarried couples living together as man and wife.	10.22
13.	Should the law on inhibitions of wives be (a) abolished (b) retained without modification or (c) retained with modifications and, if so, what?	10.22

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

14.	Without prejudice to any liability as *dominus litis* or otherwise 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 actively participated in the litigation.	11.4

APPENDIX

United Nations Convention on the Elimination of All Forms of Discrimination Against Women. (Opened for signature 1 March 1980).

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the child shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. [Not relevant in this context.]