A HANDBOOK

OF

HUSBAND AND WIFE

ACCORDING TO

THE LAW OF SCOTLAND.

BY

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PREFACE.

THIS book is an attempt to give an account of the law of Husband and Wife with more detail than is possible in a systematic view of the whole law of Scotland, such as Bell's "Principles,"—marvel of condensation though that is,—without aiming at the exhaustive treatment of a work like that of Lord Fraser.

In England, such monumental works as those by Lord-Justice Lindley on "Partnership" and "Company Law;" by Addison on "Contracts;" Taylor on "Evidence;" or Jarman on "Wills"—to give only a few examples—have been found not to prevent the usefulness of books on a smaller scale dealing with the same subjects. And in Scotland the success of Professor Kirkpatrick's book on "Evidence," and Mr. Craigie's volumes on Heritable and Moveable Rights, shows that there is a demand for works of a moderate size. I have been further encouraged by the facts that during the seventeen years which have elapsed since the publication of the second edition of Lord Fraser's standard treatise, the number of cases decided in this branch of the law has been very considerable, and that a profound alteration in the position of a wife with regard to property has been effected by the Married Women's Property Act of 1881. The constant references made to Lord Fraser's work sufficiently indicate my great indebtedness to it as a storehouse of the authorities prior to its date. But the cases have all been independently examined, and the

attempt has been made to cite only those which directly support the propositions in the text. As many of the judgments are of great length, I have in general referred to the particular passage founded upon. Every practitioner knows the irritation produced by having to run over twenty pages in the search for an isolated *dictum*. The first page of the report may always be found by referring to the Table of Cases. I have sometimes adopted the method of stating a case as an illustration, partly for the greater brevity attained by using the form of a rubric, and partly to avoid the tedious iteration of long relative clauses introduced by phrases such as, "in a case in which," &c., &c.

A separate chapter gives an outline of the English law of Husband and Wife, and I hope may be found useful as a guide to the authorities.

In some parts of the subject it may be thought that I have quoted English authorities with dangerous freedom. In questions properly consistorial, where the English cases are applications of rules derived from the canon law, it cannot be doubted that they are entitled to great weight in Scotland, in the absence of any conflicting Scottish authority. In *Collins* v. *Collins*, 1884, 11 R. H.L., at p. 23, it was remarked by Lord Blackburn: "Even now, if any principle to be found in the canon law has been worked out in modern English jurisprudence, or any foreign jurisprudence founded on the canon law, so as to come to an approved result, I think it is not to be too hastily assumed that the result has been rejected by the Scotch law. The same considerations which have led to its being retained and adopted in the English or foreign jurisprudence, may show that it ought to have been retained in Scotch law, and if it be not clear on the Scotch authorities that it has been before now rejected, it may be proper even now to adopt it."

Similar considerations apply to the cases on private international law, in which the English Courts have laid down or

applied principles of general jurisprudence. In this branch of the law there are many recent English judgments of great importance; and although some of the results arrived at in that country may not be followed when the question arises in Scotland, the arguments and authorities considered in the judgment cannot fail to be fully examined. A reference to an English or American case is likely to be of more service than the citation of the conflicting speculative opinions of foreign jurists, however eminent. The nebulous condition of a good deal of this branch of the law has made it necessary to treat it with somewhat disproportionate fulness. After consideration I have omitted the subject of marriage contracts, which belongs rather to conveyancing than husband and wife. It would be impossible in a short statement to do more than repeat what is to be found in the works on conveyancing, while any attempt at a detailed examination of the cases, many of which are extremely special, would have been inconsistent with the scope of my book. In conclusion, I desire gratefully to acknowledge the kind assistance of my friends Mr. John Harvey, Mr. William Hunter, and Mr. J. S. Taylor Cameron, advocates, while this book was in the press. Mr. Harvey very kindly read most of the proof-sheets, and not only verified the references, but made many valuable suggestions.

F. P. W.

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ABBREVIATIONS.

The following text-books are referred to by the name of the Author :—

Bishop on Marriage, Divorce, and Separation.
Burge's Commentary on Foreign and Colonial Laws.
Dicey on Domicil.
Phillimore's International Law.
Westlake's Private International Law.
Story on the Conflict of Laws.

Fraser on Husband and Wife is cited as Fr.

Where the defender's name is the same as the pursuer's it is referred to by the initial letter—*e.g.*, *Baker* v. *B.*

ERRATA.

Page 10, line 5, *for* Act 1600, c. 29, *read* c. 20.
„ 12, note [6], *for Shaw* v. *Att.-Gen.*, 2 P.D., *read* 2 P. and D.
„ 13, note [10], *for Portsmouth*, 1 Hagg., *read* 1 Hagg. E.R.
„ 22, note [4], *for* 6 App., *read* 6 App. Ca.
„ 46, note [7], *for Marshall*, 9 R., *read* 8 R.
„ 49, note [6], *for Timmings*, 3 Hagg., *read* 3 Hagg. E.R.
„ 50, note [1], *for Popkins*, 1 Hagg., *read* 1 Hagg. C.R.
„ 55, note [6], *for Calcraft*, 4 C. and P., 301, *read* 501.
„ 105, note [5], *for* 2 L.R., P. and D., *read* L.R. 2 P and D.
„ 107, note [1] and note [5], *for* 1 L.R., *read* L.R. 1.
„ 110, note [5], *for Lonis*, 1 L.R., *read Louis*, L.R. 1.
„ 124, note [5], *for Eazres*, *read Eayres.*
„ 132, note [3], *for* cases, *read* case.
„ 154, note [2], *for* L.R. 55, *read* L.R. 5.
„ 162, note [4], *for Paterson*, *read Pattison.*
„ 211, note [3], *for Jankonska*, *read Jankouska.*
„ 213, note [4], *for Gibson*, 15,869, *read* M. 15,869.
„ 365, note [3], *for Hellmann*, *read Hellmann.*
„ 384, note [1], *for Dalhousie* v. *M'Donall*, *read M'Douall.*
„ 397. The statement as to the necessity for twenty-one days' residence in Scotland by one of the parties for the validity of an irregular marriage entered into by foreigners, does not extend to an irregular marriage by promise, *subsequente copula.*
„ 421, line 15, *for* status as a rule must be, *read* must not be.

CHAPTER I.

THE CONSTITUTION OF MARRIAGE.

Definition of Marriage.—Marriage is the voluntary union for life of one man and one woman, to the exclusion of all others, entered into in some form recognised by the *lex loci* as sufficient.[1] It is not merely a civil contract, but is rather a status, the gate of which is a contract. The contract once validly made, the parties must accept the incidents and consequences attached by the law of the man's domicile to the status of marriage. In the words of Sir James Hannen,[2] "very many and serious difficulties exist if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract, to which each country is entitled to attach its own conditions, both as to its creation and duration."

Christian Marriage.—The lawful union of a man and woman, in any Christian country, confers upon them the status of husband and wife throughout Christendom. But such an union in a country in which polygamy is lawful, will not be recognised by our Courts as marriage, unless the intention of the parties to contract a Christian marriage be clearly proved.[3] The expression, "Christian marriage," used in many of the cases, imports no more than the kind of marriage recognised in Christendom; and a marriage, celebrated in Japan, between a domiciled Englishman and a Japanese woman, was held valid in England, on evidence that the forms of the *lex loci* had been

[1] Its nature is discussed by Lord Penzance, in *Hyde* v. *H.*, 1866, 1 P. and D. 130; by Stirling, J., in *re Bethell*, 1888, 38 Ch. D. 220, and *see* case of *Warrender* there cited; and by Lord Robertson, Ferg. Div. Cases, 397; cases of *Edmondstone*, *Forbes*, and *Levett*, 1816.

[2] *Sottomayor* v. *De Barros*, 1879, 5 P.D., at p. 101.

[3] Cases of *Bethell* and *Hyde*, *supra*.

complied with, and that the union was essentially monogamous, so that neither spouse, during its continuance, could lawfully contract a second marriage.[1]

Who are capable of Matrimonial Consent?—Before the status of marriage is acquired, there must be complete legal evidence of the consent of parties to enter into it. There must, therefore, be capacity in both to give consent. The following disabilities are recognised by the law of Scotland:—

Grounds of Nullity.

(1.) *Nonage.*

Males below the age of fourteen, and females below the age of twelve, are by our law—in this following the Roman—incapable of matrimonial consent. The rule, *malitia supplet aetatem*, is not applied to this case, and it is irrelevant to plead that the parties, though under age, are *puberes*, and that the alleged marriage has been consummated.[2]

The union of pupils may be converted into marriage if they continue to cohabit after attaining minority, in circumstances which lead the Court to infer that matrimonial consent has been exchanged.[3] The same sort of evidence will be required as in other cases of marriage proved by cohabitation and habite and repute.

The question has been mooted whether, if a pupil go through a form of marriage with a person of full age, the contract can be declared null at the instance of the adult person as well as of the pupil. In England, it is said by some old writers, that both are bound until the pupil arrives at the age at which consent may be given. When this period is reached, the contract may be annulled at the instance of either.[4] But this, it is submitted, would not be held in Scotland, where the contract is void *ab initio*. Coke, in the passage referred to, says that it is "an inchoate and imperfect marriage." Blackstone says the elder may resile, for both must be bound or neither.

(2.) *Impotence.*

Physical incapacity for sexual intercourse is a ground for

[1] Brinkley, 1890, 15 P.D. 76.
[2] *Johnston* v. *Ferrier*, 1770, M. 8931.
[3] Ersk. i. 6, 2.
[4] Blackstone, p. 407 (Kerr's Ed.), i. 151, § 2; Co. Litt., 33 *a*.

annulling marriage, at the instance of the potent spouse.[1] But the impotent spouse cannot, it is thought, crave declarator on the ground of his or her own incapacity. This, however, cannot be said to be finally settled. In *Halfen* v. *Boddington*,[2] Sir James Hannen spoke of it as an open question. It has been supposed to have been determined by Sir John Nicholl in *Norton* v. *Seton*,[3] but in that case the impotence was not clearly proved, and the long delay of the petitioner in raising the suit made it appear probable that the plea was insincere. Dr. Lushington did not regard the decision as settling the general principle.[4] It was held in Ireland, by the Court of Appeal, in a case where the woman repudiated the relation of wife and the obligations of marriage, that the impotent husband was not barred from proving that there was no *verum matrimonium*.[5]

If there is *potentia copulandi* the marriage will not be annulled, though fruitful intercourse may be physically impossible. And the impotence must have existed at the date of the marriage. It has been said that it must be incurable, but this is not now law. In a recent case, in England, the medical evidence was that the woman was impotent, but might be cured by an operation, involving no great risk. This she declined to undergo, and the marriage was set aside.[6] The tendency of modern decisions in England has been to relax the rule. Sir James Hannen says the impediment to intercourse must be physical, and it must not arise from the wilful refusal of the wife to submit to her husband's embraces.[7] In this case that learned judge granted decree, on proof that attempts at intercourse produced hysteria in the wife, and that consummation would have been impossible without force. The wife refused to submit to inspection, and the nature of the case excluded corroboration of the husband's evidence. A very wide door is thus opened to collusion. If the husband alleged hysteria on the wife's part, and she did not defend the action, any childless marriage might be thus annulled. The safer rule seems to be to insist on proof that the woman is *virgo intacta*.

[1] Stair, i. 4, 6; Ersk. i. 6, 7.
[2] 1881, 6 P.D. 13.
[3] 1819, 3 Phill. 147.
[4] *Miles* v. *Chilton*, 1849, 1 Rob. Ecc. Ca. 684.
[5] *A.* v. *A.*, 1887, 19 L.R. Ir., 403.
[6] *L.* v. *L.*, 1882, 7 P.D. 16.
[7] *H.* v. *P.*, 1873, 3 P. and D. 126.

Ill.—Wife alleges husband is impotent, doctors say she does not seem to be *virgo intacta*, and he appears potent. Decree refused.[1]

It is usual to remit to surgeons to examine both the parties,[2] and, in England, the parties, if within the jurisdiction, can be compelled to submit to an *inspectio corporis*. But this would not be enforced in Scotland.

But probably if the party whose capacity is in question withdraw from the jurisdiction and decline to be inspected, this will be taken as an admission.[3] It has been held in England that penetration must be complete.[4] If it be proved that the husband is impotent, *quoad* the wife, this will be sufficient though the evidence is that he might possibly be capable of intercourse with another woman.[5]

Incapacity inferred from resistance.—When after a reasonable time there has been no sexual intercourse, and the wife has resisted all attempts, the Court, if satisfied of the *bona fides* of the suit, will infer that the refusal arises from incapacity, and will annul the marriage.[6]

Wife's Frigidity.—In an action by the wife, the husband may plead that non-consummation is due to the wife's frigidity and dislike to connection.[7]

Limit of Age.—There seems to be no limit of age in actions of this kind,[8] but when the parties were of advanced age at the date of the marriage, it is not probable that the Court would annul it on proof of impotence unless there was actual malformation.

Action only Competent during life of both.—The validity of a marriage cannot be impeached on the ground of impotence after the death of one of the parties.[9] No one but the injured spouse has a title to sue.[10]

[1] *T.* v. *D.*, 1866, 1 P. and D. 127.

[2] *B.* v. *L.*, 1869, L.R. 1 P. and D. 639.

[3] *Pollard* v. *Wybourn*, 1828, 1 Hagg. E.R. 725; Fount. Dec. Vol. i., 274 (22nd Jan., 1684), Fr. i. 104; *Harrison* v. *H.*, 1842, 4 Moore P.C. 96.

[4] *Deane* v. *Aveling*, 1845, 1 Robertson, Ecc. Ca. 279.

[5] *A.* v. *B.*, 1853, 1 Spink, 12. It seems implied in *H.* v. *C.*, 1860, 1 S. and T. 605. As to "relative impotence," *see* Tidy's "Legal Medicine," ii., p. 9; Casper's For. Med. iii. 242.

[6] *S.* v. *A.*, 1878, 3 P.D. 72; *see* note on case of *P.* v. *L.* there given.

[7] *M.* v. *H.*, 1864, 33 L.J., P. and M. 159.

[8] *Williams* v. *Homfray*, 1861, 2 S. and T. 240.

[9] *A.* v. *B. and Another*, 1868, L.R. 1 P. and D. 559.

[10] Bell's Prin. 1524; *A.* v. *B.*, *sup.*

The law on this subject has been much more developed in England than in Scotland, where the authorities are very meagre. The extent to which the English decisions may be regarded as laying down rules which will be adopted in our Courts may be gathered from *C. B.* v. *A. B.*,[1] which is now the leading case. Several doctrines which had been elaborated to a somewhat unreasonable extent by Courts of first instance, are in that case fully dealt with, and placed upon a sound and equitable basis. The case was one in which the parties had cohabited for twenty months, and it was admitted that sexual connection had not taken place. A separation followed, and the wife subsequently gave birth to a child, of which the husband was not the father. He raised an action of divorce for adultery, whereupon the wife craved declarator of nullity on the ground of the husband's impotence. In defence, it was pleaded that she was barred in respect—(1) that the spouses had not cohabited for three years; (2) that the action was not "sincere," being brought for the collateral purpose of frustrating the divorce for adultery; and (3) that the wife had been guilty of unreasonable delay. The law with regard to these three defences was thus laid down by the House of Lords.

Rule of Triennial Cohabitation.—By the canon law a presumption of incapacity arises in certain cases after three years cohabitation. Where the impotence was not clearly proved, and action was raised within that period, the Courts have required the spouses to return to cohabitation until its completion. The rule is stated in the following terms by Lord Watson: "Where two persons after solemnising a marriage live together and cohabit for a period of three years, and the lady is able to show that she is *virgo intacta*, that state of things, in the absence of rebutting proof on the part of the husband, will entitle her to have the nullity of the marriage declared."[2] As to the admission of the rule in Scotland, his Lordship says: "No doubt there is not much authority to show how far that rule has been followed in practice in the law of Scotland, but seeing that it is to be found in the canon law, and is in itself not an unreasonable rule, and has been so recognised in the jurisprudence of England, I have no reason to suppose that the Courts of Scotland would hesitate to adopt

[1] 1885, 12 R. H.L. 36. [2] At p. 46.

it when it is applicable." In many cases the rule is inapplicable, and it may be regarded as settled, that when the impotence is established the Court will not insist on cohabitation for three years as a condition of the action.

"Sincerity."—In a case where the husband's impotence was undoubted, and the wife found to be *virgo intacta*, Sir Robert Phillimore refused to annul the marriage, on the ground that the wife's delay of twenty-six years in raising action was a proof of want of "sincerity."[1] He says: "The law has always required sincerity in the complainer, that is, a real sense of the grievance complained of, unmixed with any other subsidiary motive; and, as a necessary proof of such sincerity, has also required a reasonable promptitude to be exhibited by the complainer in seeking legal redress."[2] This ground of judgment may be treated as overruled, or at least limited to circumstances indicating *mora* and *acquiescence*. In the words of Selborne, L.C.:—"There may be conduct on the part of the person seeking this remedy which may estop that person from having it, as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a full knowledge of the facts and of the law, approbated the contract which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well, now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it may be very various, and in cases of this kind many sorts of conduct might exist,—taking pecuniary benefits for example,—living for a long time together in the same house or family, with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but, it appears to me, that in order to give a reasonable foundation for any such doctrine as that which has been insisted on at the bar,

[1] *W. v. R.*, 1876, 1 P.D. 405. [2] *Ibid.*, p. 408.

there must be a foundation of substantial justice depending upon the acts and conduct of the party sought to be barred."[1] Lord Watson says the rule in this form would be applied also in Scotland.[2]

Delay.—On the plea of delay, as proof of want of sincerity, Lord Selborne says: "Time, like any other circumstance of conduct, is a very material element in the investigation of a case which, upon the facts, is doubtful. When there is a controversy of fact, great delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof which is thrown upon the plaintiff; but that there is any definite or absolute bar arising from a certain amount of delay, is a proposition which I apprehend cannot be established, either by any Scottish or by any English authorities."[3]

(3.) *Insanity.*

An insane person can give no consent. A marriage, therefore, will be declared null if it be proved that at its date one of the parties was of unsound mind.[4] Definitions of insanity are misleading. In a recent case it was said, the Court has to determine "whether the defender was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject."[5]

Onus.—The burden of showing that the defender was insane at the time of the marriage lies on the party asserting it. If, however, it be proved that insanity existed a short period before the marriage, this will shift the *onus*, and it will fall on the defender to prove that the marriage took place during a lucid interval.[6]

Who may bring the Action?—It is always competent for the sane spouse to raise the action. If the insane spouse has been cognosced as a lunatic, the *curator bonis* has a title to sue. If, however, there has been no judicial determination as to the alleged insanity, the right of action is limited to the

[1] *C. B.* v. *A. B.*, at p. 38.

[2] *Ibid.*, p. 45.

[3] *Ibid.*, p. 40.

[4] Stair, i. 4, 6; Ersk. i. 6, 2; Fr. i. 55.

[5] *Per* Sir James Hannen in *Hunter* v. *Edney*, 1881, 10 P.D., at p. 95; and *Durham* v. *D.*, 1885, 10 P.D. 80. *See* case of *Stevenson* v. *S.*, Lord Kyllachy, Ordinary, 1st March, 1893, not yet reported.

[6] *Turner* v. *Meyers*, 1808, 1 Hagg. C.R. 414.

two spouses.[1] But after the death of either the sane or the insane spouse, any person who can qualify an interest, may crave declarator that the alleged marriage was a nullity.[2]

Evidence of Insanity.—Proof of the insanity of relations of the alleged lunatic has been held incompetent. On appeal the point was not decided.[3] But in criminal cases, where such evidence has been tendered in support of a plea of insanity, it has always been rejected.[4]

When sane Spouse prefers to rest Content.—It has not been decided whether the contract can be annulled if the sane spouse is ignorant of the other's insanity at the date of the marriage, and prefers to maintain the tie.

Homologation and Acquiescence.—The insane party on regaining sanity may homologate the marriage, or it may become good by acquiescence.[5]

Intoxication.—If one of the parties at the time of the marriage be in such a state of intoxication as to be incapable of exercising reason, the marriage may be annulled on the ground of want of consent.[6] But such a case could hardly arise without involving fraud in the other party.

(4.) *Consanguinity.*

Persons related to each other by consanguinity or affinity within certain degrees, are by the law of Scotland unable to marry. The statute, **1567**, c. **15**, the title of which is "Anent lawful marriage of the awin blude, in degrees not forbidden by God in His Word," makes all marriages lawful which are not forbidden in the 18th chapter of Leviticus. This chapter is thus adopted as statute law in this country, and has been judicially construed. The chief rule of construction as to its prohibitions has been to hold that, where certain marriages are forbidden, others, in which the parties stand to each other in the same degree, shall be taken as also forbidden

[1] *Turner* v. *Meyers*, 1 Hagg. C.R. 414. In *Stevenson*, *supra*, p. 7 *note*, the *curator bonis* defended in a declarator of marriage against a lunatic.

[2] 1 Hume on Crimes *v.* Adultery; *Christie* v. *Gib*, 1700, M. 6283; *Loch* v. *Dick*, 1638, M. 6278.

[3] *Macadam* v. *Walker*, 1813, 1 Dow, 177.

[4] Dickson on Evidence, p. 9.

[5] *Johnston* v. *Brown*, 1825, 2 S. 495 [N.E. 437]; Shelford on Marriage, 197.

[6] *Johnston* v. *Brown*, *supra*.

by necessary implication. *E.g.*, it is said that a nephew may not marry his aunt. This is held to imply that an uncle may not marry his niece.[1]

Furthermore, prohibitions as to relations by consanguinity are extended to relations by affinity.

Applying these rules, we find that marriage is forbidden between all persons related to each other in the direct line of ascent.

Collaterals.—All persons beyond the second degree, according to the civil law mode of computation, are free to marry, except where one of the parties is the brother or sister of a direct ascendant of the other party—*e.g.*, grand-uncle. Here one of the parties is said to stand in *loco parentis* of the other.[2]

Affinity.—It is convenient, though not strictly correct, to speak of degrees of affinity. The prohibitions are analogous to those regarding relations in blood.

There has been, however, much dispute as regards the marriage with a brother's widow or a deceased wife's sister. These are said to be expressly forbidden by verse 16 of the 18th chapter of Leviticus. Though it is probable this is a wrong construction, it has been uniformly adopted, and there can be no doubt that such marriages are held by the Courts to be within the forbidden degrees.[3]

The relations of the spouses are not *affines* to each other, or, as it is expressed by the canonists, there is no *affinitas affinitatis*. Thus, two brothers of one family may marry two sisters of another family. The prohibition in fact only affects the spouses themselves, who are each prohibited from contracting a second marriage with a blood relation of the other within the prohibited degrees.

There is in this matter no distinction between the full blood and the half-blood.[4] *In contrahendis matrimoniis naturale jus et pudor inspiciendum est.*

It is held in England, but has not been decided in Scotland, that legitimacy or illegitimacy also makes no difference.

[1] Stewart, 1845, 2 Broun, 544.

[2] Craig, ii. 18, 18; Stair, i. 44; Ersk. i. 6, 9; Bankt. i. 5, 39 and 47.

[3] 1 Hume, Crimes, 449; *Fenton* v. *Livingston*, 1861, 23 D. 366.

[4] Stair, *ibid.*; Bankt. i. 5, 42.

Thus the marriage of a man with the daughter of his deceased wife's illegitimate half-sister was set aside.[1]

(5.) *Adultery.*

The common law of Scotland did not forbid the marriage of a divorced spouse with the *particeps criminis* or paramour. But the Act 1600, c. 29, declares all marriages null which are contracted by a divorced spouse with the persons "with quhome they ar declarit be sentence of the ordinar judge to have committit the said cryme and fact of adultery." The statute further declares that the children of such unlawful marriage shall not be capable of succeeding to their parents.[2] There appears to be no modern decision on the subject, and Mr. Bell doubts if it is now in force, at any rate, to the effect of barring the succession of children. Lord Fraser, however, denies that it is in desuetude.[3]

The divorce must be pronounced in Scotland, a strict interpretation of the phrase "ordinar judge," and apparently the paramour must be expressly named in the decree.[4]

In practice it is common to omit the name in the decree, and this is invariably done when it is not given in the summons. Except when damages are sought against a co-defender it is unnecessary to insert his name in the summons, and this mode of evading a statute of very doubtful policy is frequently resorted to. This impediment does not exist in England.

Marriage with Paramour.—The Act 1592, c. 11, imposes certain disabilities on a divorced wife who contracts a second marriage with her paramour. It enacts that when any woman has been divorced for adultery and completes unlawful and pretended marriage with the person with whom she committed adultery, or dwells with him at bed and board, it shall not be lawful for her to dispone her lands, heritages, tacks, rooms, or possessions, either to her pretended husband

[1] Ersk. iv. 4, 56; Alison, 565; *Queen* v. *Brighton*, 1861, 1 B. and S. 447; and *see Woods* v. *W.*, 1840, 2 Curt. 521; *Reg* v. *Chadwick*, 1847, 11 Q.B. 173; Poynter on Marriage, 118; Shelford on Marriage, 174.

[2] Stair, i. 4, 7; Ersk. i. 6, 43 and 111, 10, 9; Ferg. Con. Law, p. 172; Riddell, i., p. 391; *Lyle* v. *Douglas*, M. 329 and 2 Supp. 147 (1670).

[3] Fr. i. 144 and 150.

[4] More's Notes, p. xvi.; Riddell's Peerage Law, pp. 391 and 410.

or to the children of that marriage, or to any other person, in prejudice of the heirs of the first lawful marriage, or failing them, of her other heirs whatsoever. It applies only to the woman, and to her only if she be the owner of heritage. According to Erskine,[1] it extends to onerous as well as gratuitous deeds. The statute does not appear to be illustrated by decisions.

(6.) *Non-Residence in Scotland.*

In order to put a stop to the Gretna Green and other similar marriages, an Act was passed providing that after 31st October, 1856, "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage."[2] And, where the parties arrived in Edinburgh from England between five and six in the morning of 1st July, and were married at 11.30 on 21st July, it was held, on the evidence of Scotch counsel as to the legal mode of computing time, that the statute had not been complied with.[3]

(7.) *Previous Marriage.*

It is impossible that a man should have two lawful wives, or a woman two lawful husbands at the same time. It will, consequently, be a ground for holding a marriage null that one of the parties to it was previously married, and that this previous marriage has not been dissolved. Such an action can be brought by either spouse of the second marriage. And an action to declare the first marriage valid may be brought by either of the spouses to it without its being necessary to call the husband or wife of the second marriage.[4]

Nor is it a defence to the action that the pursuer is founding on his own fraud by which the marriage was induced.[5] For the law will in no circumstances hold two persons to be married between whom a legal impediment exists. The case of a man seeking to have a marriage annulled on the ground that he had by fraud induced the defender to marry him is different. Here

[1] ii. 3, 16.

[2] 19 & 20 Vict. c. 96.

[3] *Lawford* v. *Davies*, 1878, 4 P.D. 61.

[4] *Jolly* v. *M'Gregor*, 1828, 3 W. and S., 202, *note*; *Wright* v. *Wright's Trs.*, 1837, 15 S. 767.

[5] *Miles* v. *Chilton*, 1849, 1 Rob. Ecc. Ca. 684, esp. at 696, *seq.*

if the parties were free to marry, the party by whose fraud the marriage was procured will be barred from founding upon it.

A prior marriage still subsisting is always a ground for annulling a second marriage, although the former was irregular or clandestine and the latter regular.[1] And whether promise *subsequente copula* constitute marriage, or a declarator must first be obtained, it is undoubted that if decree of declarator be obtained by the woman this will be a ground for annulling a subsequent marriage by the man, whether regular or irregular.

If the first marriage be null on account of nonage or other legal impediment, then the second marriage will be binding, although the nullity of the first have not been declared.[2] Doubts have been raised as to this in the case where a spouse of the first marriage was impotent and the nullity had not been declared.[3] Bankton thinks that in this case also the second marriage would be valid. It has been held that the crime of bigamy had been committed, though the second marriage was void from consanguinity.[4]

If a marriage has been dissolved by divorce, the parties to it are free to marry again. But should it afterwards turn out that the divorce was invalid the second marriage will be annulled.[5] In a case in which a Scotch divorce of an English marriage was held to have been invalid for want of jurisdiction a second marriage was annulled and the children of it held illegitimate.[6]

In all cases for nullity on the ground of a prior subsisting marriage the Court will require the strictest evidence of identity. It will be necessary to produce witnesses who have known the defender in his or her character of spouse of both marriages. Admission by the offender will not be sufficient,[7] nor will a conviction for bigamy be conclusive.[8]

A woman who has been induced to go through a form of marriage with a man already married is entitled to recover damages from him. In an old case the commissaries gave £2000.[9]

[1] *Jolly* v. *M'Gregor*, 3 W. and S. 85, where the relevance was not questioned.

[2] 1 Hume, 461; Alison, 538.

[3] M'Ken. Crim. Law *v.* Bigamy, 188; Bankt. i. 5, 56.

[4] *R.* v. *Brawn*, 1843, 1 C. and K. 144.

[5] *Bonaparte* v. *B.* [1892], P. 402.

[6] *Shaw* v. *Gould*, 1868, 3 H.L. 55; see also *Shaw* v. *Att.-Gen.*, 1870, 2 P.D. 156; and *Collins* v. *Hector*, 1875, L.R. 19 Eq. 334.

[7] *Searle* v. *Price*, 1816, 2 Hagg. C.R. 187; *Bayard* v. *Morphew*, 1815, 2 Phill. 321; *Bruce* v. *Burke*, 1825, 2 Add. 480; *Bird* v. *B.*, 1754, 1 Lee, 622.

[8] *Wilkinson* v. *Gordon*, 1824, 2 Add. 152.

[9] *Clark* v. *Fairweather*, 18 Oct. 1728, cited by Lothian, p. 186.

The Effects of a Decree of Nullity.

Between the parties there is, so far as may be, a *restitutio in integrum*.[1] The Court orders a mutual restitution of property, and may give damages to a woman who has been induced by fraud to enter the marriage now declared null. She may compel the man who has defrauded her to account for intromissions with her property.[2]

Where one Spouse is *in bona fide*.—Where one of the spouses of a putative marriage is ignorant of the impediment the children are, it is said, accounted legitimate and will have the ordinary rights of succession. But the parent who was *in mala fide* has no parental rights over the children and cannot take from them by succession.[3] It is said by Lord Fraser that the spouse *in bona fide* acquires the same patrimonial rights in the estate of the other as if no impediment had existed.[4] In a recent case this was expressly left open. A woman contracted a bigamous marriage with a man ignorant of the impediment. He claimed *jus mariti* in her estate, which consisted of a sum of £62. It was held that, even if the law was as stated by Lord Fraser, the rule did not apply to estate of so small value.[5] Stair says: "All things return *hinc inde*."

Debts extinguished by the Marriage revive on decree of Nullity.[6]—**Questions with Third Parties.**—A person, aware of the impediment, who purchases from the putative husband property belonging to the woman acquires no good title, and it may be reclaimed by her.[7] But if the husband, unaware of impediment, has given or sold goods of the wife, in the belief that they had vested in him, *jure mariti*, she has no remedy.[8]

Interim Aliment and Expenses.—Where a marriage exists *de facto* the Court will award aliment and expenses to the alleged wife, *pendente lite*,[9] though at judgment costs may be given against her if the marriage was induced by her fraud.[10]

[1] Stair, i. 4, 20; Ersk. i. 6, 43; Fr. i. 149.

[2] *Young* v. *Naylor*, cited by Bishop, ii. 201.

[3] Fr. on Parent and Child, p. 22. The authorities are here reviewed. The question is not free from doubt.

[4] *Ibid.* But *see Earl of Eglinton* v. *The Countess*, 1610, M. 6185; *Bird* v. *B.*, *supra*.

[5] *Wright* v. *Sharp*, 1880, 7 R. 460.

[6] *Cage* v. *Acton*, 1 Lord Raymond, 515, 521.

[7] 2 Bright, H. and W. 365.

[8] *Ibid.*, 365.

[9] *Portsmouth* v. *P.*, 1826, 3 Add. 63.

[10] *Ibid.*, 1 Hagg. 374.

CHAPTER II.

MODES OF CONSTITUTION.

Regular Marriage.

In Scotland marriage may be either regular or irregular. A regular marriage is one which is celebrated by a minister of religion before two witnesses after due publication of banns, or after the statutory notice to the registrar has been given.[1] A marriage is regular which is celebrated by a Jewish Rabbi, or among the Quakers by the person whose function it is to perform this ceremony, though he may not be, strictly speaking, a minister.[2]

There is no form of celebration prescribed by law, but it may be assumed that the minister will always ask the bridegroom and bride whether they take each other respectively as husband and wife, and on their replying in the affirmative, will solemnly declare them to be married persons.

Banns.—The regulation of banns is left by the law to the discretion of the Church. The practice now is that the session-clerk of the parish or parishes of both the intending spouses is furnished with a notice of their names and designations.[3] This the session-clerk hands to the minister or precentor, by one of whom it is read during the public service. If the man and woman reside in different parishes proclamation must be

[1] Marriage Notice Act, 41 & 42 Vict. c. 43.

[2] 17 & 18 Vict. c. 80, § 46.

[3] Fifteen days' residence in the parish by one of the parties is sufficient. And if the session-clerk does not know that this rule has been complied with, and that the parties are free to marry each other, a certificate of these facts, signed by an elder or two householders, must be given to him with the notice.

made in both. The form is, "There is a purpose of marriage between A B, residing in , and C D, residing in , of which proclamation is hereby made for the first (second, or third) time."

By the Statute 1661, c. 34, if the domicile of either of the parties is in England or Ireland, banns must be proclaimed there in his or her parish church. In England the practice is to proclaim banns on three successive Sundays, and this was formerly done in Scotland also. It is now, however, usual to proclaim them three times on the same Sunday.[1] When proclamation has been made a certificate to that effect is given to the parties by the session-clerk, together with a statutory schedule.[2] This is produced to the minister at the solemnisation of the marriage, and signed by him, the spouses, and two witnesses. It must then be sent within three days to the registrar of the parish, by whom it is entered in the duplicate register.[3] On payment of a fee the registrar is bound to be present at the marriage.[4]

Notice to Registrar — Marriage Notice Act.[3] — The parties may, if they prefer it, adopt another procedure. They may intimate the intended marriage to the registrar of births, marriages, and deaths, for the parish or district in which each has resided for not less than fifteen days. The particulars are entered by him in a marriage notice-book, and a notice in statutory form is then posted by him in a conspicuous place on the window or outer wall of his office. It must remain there seven days, during which time any person may lodge a written objection to the marriage. The objection must be signed by the objector and handed in personally. Lodging a false objection exposes the subscriber to the penalties of perjury. Objections of a formal character—*e.g.*, as to length of residence, where no legal impediment to the marriage of the parties is alleged, are disposed of by the sheriff on a report from the registrar. If a legal impediment be averred the registrar is prohibited from issuing a certificate of notice until a certified judgment of a competent Court be produced to him, to the effect that the

[1] Cook's "Procedure in Church Courts," 5th Ed., 44.

[2] 17 & 18 Vict. c. 80, § 46.

[3] 41 & 42 Vict. c. 43.

[4] 17 & 18 Vict. c. 80, § 47; *see infra*, Registration of Marriage.

parties are not under any legal incapacity to marry. The registrar's certificate is valid only for three months.[1]

Clandestine Marriage.

By this term is meant in Scotland a marriage celebrated by a layman assuming the character of a clergyman, or by a clergyman without banns or certificate of notice.[2] A number of old statutes imposing penalties on ministers not belonging to the Established or the Episcopal Church are virtually repealed by the statute allowing the ministers of other churches to solemnise marriages.[3]

Irregular Marriage.

An irregular, as distinguished from a clandestine marriage, is one which is contracted without any religious ceremony.

Marriages of this kind are divided into three classes, according to the manner in which it is proved that consent has been interchanged.

1. **By Declaration** ***de praesenti.***—If a man and a woman mutually declare that they accept each other for husband and wife, this constitutes in Scotland a valid marriage. A promise to marry at some future time must be clearly distinguished. There must be interchange of consent to present marriage. But if it be proved that the man said "I take you, A B, for my wife," or pointed to the woman before witnesses and said, "This is my wife," or used equivalent words, and that the woman signified her assent, there is a good marriage. Whatever the nature of the language employed, and whether the consent be given by word or by writ, the question for the Court is always "Was there genuine consent to marriage there and then?"[4] It will not—*e.g.*, be enough to prove that the man called the woman "my wife," or spoke of her as "Mrs. A," if the circumstances show that this was merely intended to cloak the relation of mistress and keeper.[5]

[1] With regard to the risks incurred by objecting to the issuing of a proclamation of banns, see *Henderson* v. *H.*, 1855, 17 D. 348.

[2] By the Marriage Notice Act the celebrator is liable to a penalty of £50, 41 & 42 Vict. c. 43, § 12.

[3] 4 & 5 Wm. IV. c. 28.

[4] *Walker* v. *M'Adam*, 1813, 5 Paton, 675; *Aitchison* v. *Solicitors-at-Law*, 1838, 1 D. 42.

[5] *Farrel* v. *Barrie and Others*, 1828, 6 S. 472.

Written Consent.—If one of the parties give the other a written declaration or acknowledgment that they are man and wife, and this be accepted by the other, this is sufficient. The expression in a letter, "I hereby declare you to be my lawful wife," was held to constitute marriage.[1] Such a writing, if not probative, must be proved to be in the hand of the defender, or, at any rate, to have been adopted and signed by him.[2] It is competent to prove that the writing was given in jest, or was intended not to constitute marriage, but to effect some ulterior object.[3] If it be proved to be in the writing of the defender, the *onus* lies on him to show that it does not mean what it says.

It is not enough merely to produce a written declaration or acknowledgment of marriage, or to prove by parole that consent was exchanged. Before finding for the marriage the Court will regard the surrounding circumstances, and the conduct of parties both before and after the critical *punctum temporis*.[4]

The rule is thus stated by Lord O'Hagan[5]: "In all inquiries of this sort, I apprehend the true rule is not to regard singly and apart the one transaction on which reliance is placed as constituting the marriage. It is necessary to exercise 'a large discourse of reason looking both before and after,' and from all the antecedents and all the consequents to ascertain the true mind and purpose of the parties whose intention determines the character of their act." The leading case is *Lockyer* v. *Sinclair*. Here the parties who were engaged to marry signed an antenuptial marriage-contract in common form. Shortly thereafter they exchanged declarations that they were married persons. No *copula* followed. It was proved by *parole* that at the time of exchanging the declarations, they had said they did not intend present marriage. Their subsequent correspondence indicated that they still regarded themselves as merely engaged. It was held there had been no constitution of marriage.

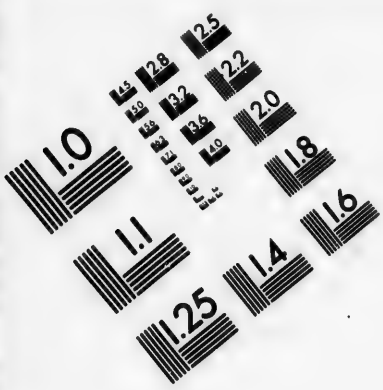
[1] *Richardson* v. *Irving*, 1785, Hume, Decis. 361.

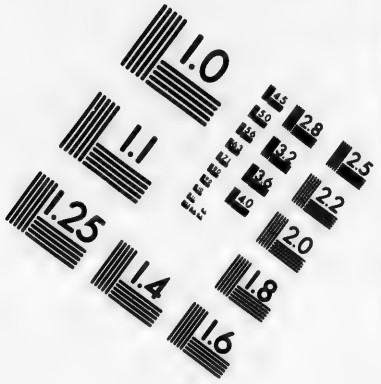
[2] *Mackenzie* v. *Stewart*, 1848, 10 D. 611.

[3] *Fleming* v. *Corbet*, 1859, 21 D. 1043; *Lockyer* v. *Sinclair*, 1846, 8 D. 616.

[4] *Imrie* v. *I.*, 1891, 19 R. 185; *Lockyer* v. *Sinclair*, 1846, 8 D., opinion of L.J.C. Hope, at p. 607.

[5] *Robertson* v. *Stewart*, 1875, 2 R.H.L. 80, at p. 108.





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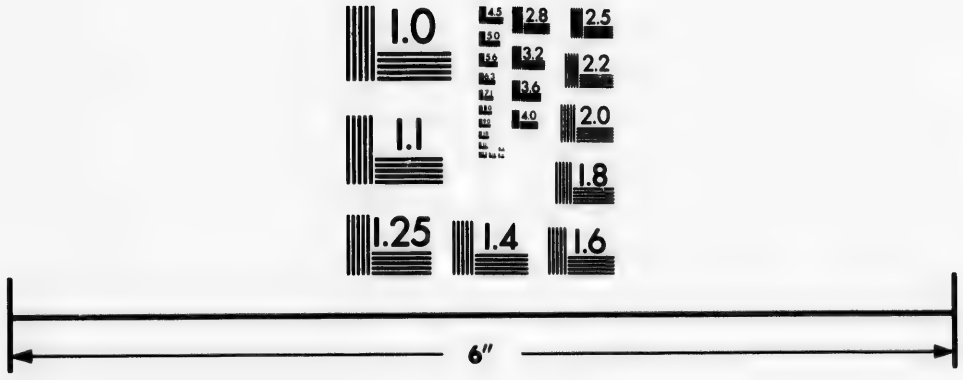



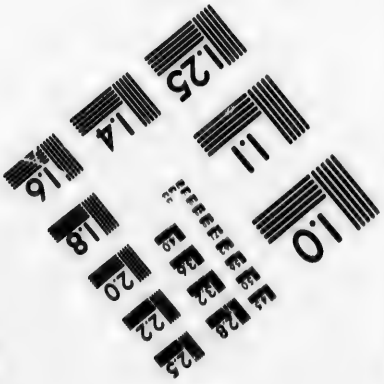

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A stronger case is given by Mr. Bishop.[1] A man of twenty-three is engaged to a girl of sixteen. Her parents are anxious to break off the connection. To prevent this, he persuades her to go through a form of marriage with him before a clergyman. He declares to her that this is merely to make their engagement more solemn, and that they are not to be husband and wife until after two years, and then only if her parents consent and after the ceremony has been gone through again. There is no cohabitation. Two days afterwards, the girl told her parents what had been done, and subsequently she was successful in an action to have the marriage declared null.

The consent must be to present marriage. But the effect of an explicit declaration of consent will not be impeded by a provision that the marriage shall not be disclosed. Nor is it essential that a written acknowledgment of marriage be delivered to the woman if it be proved that she knew of its existence and relied upon it.

Where a man told his mistress that he had written an acknowledgment of his marriage to her which would be found in his repositories after his death, there was held to have been no consent on his part to present marriage. The letter, which was found, was endorsed "not to be opened till after the death of George Fullarton." This was regarded as an attempt to bequeath to the woman the status of widow, though she had never been recognised by him as his wife.[2] But where a letter in which the writer declared a woman to be his wife, but that he desired the marriage to be kept private, was delivered by the man to his agent, and it was proved that the woman knew of the existence of the letter, a marriage was held proved, the agent being taken as holding it for the woman.[3]

In many of the cases in addition to written declarations, there were verbal acknowledgments before witnesses, and *concubitus*.[4] If the woman understood the declaration to mean

[1] i. 245; *Robertson* v. *Cowdry*.

[2] *Anderson* v. *Fullarton*, 1795, Hume, Decis., p. 365, M. 12,690.

[3] *Hamilton* v. *H.*, 1842, 1 Bell, App. 736.

[4] *Currie* v. *Turnbull*, 1806, Hume, Decis., p. 373; *Reid* v. *Laing*, 1823, 1 Sh. App. 440; *Forster* v. *F.*, 1872, 10 M. H.L. 68; *Macalister* v. *Dun*, 1759, 2 Paton, 29.

present marriage, and that be the natural construction of the writing, the man will not be heard to say he meant something else.[1]

It is not necessary for the pursuer to prove the exact time and place of marriage, or the precise words used, if the writings or facts proved sufficiently point to matrimonial consent having been exchanged.[2] In the case of *Leslie*, a man and woman corresponded for twenty-eight years. In their letters they styled each other husband and wife. No *copula* was proved, nor any particular date fixed at which consent was interchanged. Marriage was held established. The circumstances must indicate that the acknowledgment was accepted, and the rule of mercantile law would not apply that a party to whom an offer is made must repudiate it or be taken as accepting.

Cases are to be distinguished in which, at making the declaration, the parties contemplate the subsequent performance of a ceremony or the purifying of some condition before the marriage is constituted. The question was expressly waived whether the words "I hereby engage to be a true husband to you" were *verba de præsenti*, or merely a promise of future marriage.[3]

It has never been decided if marriage can be constituted by exchange of consent in letters. In all the cases in which correspondence has been founded on this has been to prove that consent must have been verbally exchanged.[4]

[1] *Fleming* v. *Corbet*, 1859, 21 D. 1034, *per* L.J.C. Inglis at p. 1045.

[2] *Leslie* v. *L.*, 1860, *per* Lord Deas 22 D. 1017, and *see* Lord Westbury's opinion in *Longworth* v. *Yelverton*, 1864, 4 Macq. 834.

[3] *Reid* v. *Laing*, 1823, 1 Sh. App. 440.

[4] Fr. i. 316.

CHAPTER III.

HABIT AND REPUTE.

The Presumption of Marriage arising from Cohabitation and Habit and Repute.—It is consonant with sound reason and humanity that when a man and woman hold themselves out as married persons the *onus* of showing that the relation between them is concubinage, and not marriage, shall lie on the person who makes that assertion. "Habit and repute arises from parties cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are married persons."[1] "Habite and repute afford by the law of Scotland, as indeed of all countries, evidence of marriage always strong, and in Scotland, unless met by counter evidence, generally conclusive."[2]

The presumption rests in Scotland on an old statute[3] which provides that a woman who has been reputed during a man's lifetime to be his wife, shall be entitled to terce unless it be proved she was not married to him. In the words of Lord Glenlee, "marriage is founded on consent, and there may be single facts so strong as to supersede everything else. But a man's allowing a woman to take the station, and be called his wife, is a constant and continued declaration of consent, and after this has gone on for a considerable time is sufficient proof that they are married."[4]

[1] Lord Chancellor Chelmsford, *Breadalbane* Case, 1867, L.R. 1 Sc. App., at p. 196.

[2] Lord Cranworth, *ibid.*, p. 201.

[3] 1503, c. 23, Thomson's Statutes, ii. 243.

[4] *Elder* v. *M'Lean*, 1829, 8 S. at p. 62.

It is entirely a question of evidence. No definite length of time is prescribed by the law, during which the cohabitation is to continue to ground the presumption.

Repute does not constitute Marriage.—"The fact to be proved is that the parties themselves did mean and intend to contract the relation of marriage, and had truly formed that relation, the indications and appearances of which gave rise to the habit and repute. But the belief and understanding of others do not make and constitute the relation of marriage. It is the consent of the parties inferred from, and evidenced by the conduct which gives rise to the opinion of others." [1]

Nature of Repute which will be Sufficient Evidence. The Repute should be *inter familiares*.—The best evidence will be that of relations or friends of the parties, who are presumably in the same rank of life, and have a good opportunity of judging what is the true character of the connection. The evidence of landladies, of neighbouring shopkeepers, and the like persons, who say they supposed the parties married, never having heard anything to the contrary, but that they had no intimate acquaintance with them, is almost worthless. *E.g.*, a retired army-surgeon, of small means, lived many years with a woman of inferior rank in a flat in the Old Town of Edinburgh. He continued to associate with persons of his own station, most of whom resided in the New Town. By them it was thought that the woman was his mistress. His neighbours in the Old Town, shopkeepers, and others, believed her to be his wife. The repute was treated as insufficient.[2]

A was the mistress of B in Demerara. She followed him to Scotland, and lived with him in various lodgings, going by the name of Mrs. B. B also spoke of her as Mrs. B. Lodging-house keepers deponed that they took them for married persons. A was never introduced to B's friends when they called upon him. It was held that no marriage had been proved.[3]

Divided Repute.—It has been said that the repute must

[1] *Per* L.J.C. Hope in *Lapsley* v. *Grierson*, 1845, 8 D., at p. 47.

[2] *Hamilton* v. *H.*, 1839, 2 D. 89.

[3] *Thomas* v. *Gordon*, 1829, 7 S. 872.

not be divided. This does not mean that the mere fact of one or two witnesses saying they did not think the parties married will prevent the marriage being held proved. But "the cohabitation must not be so equivocal that many of the friends and connections of the parties never knew or supposed it to bear the character of marriage."[1] The Court will weigh the grounds of the opinions of the witnesses and their opportunities of judging.

There must be Cohabitation at bed and board as well as Repute.—A gentleman, residing on his estate near Edinburgh, paid the rent of a house there, in which a woman lived, whom he frequently visited. She bore him children who were educated at his expense. He never lived in the same house with her. It was held there was no such cohabitation as to ground the repute.[2]

Cases of proof of marriage by habit and repute often contain the element of acknowledgment before witnesses. The following cannot be referred wholly to either class. A tells his mother that he intends to marry B, his domestic servant. He subsequently calls in a surgeon to attend B in her confinement, and tells him she is his wife. Shortly after the surgeon dines with A. B sits at table at the wife's end, and A rebukes a servant for calling her "Mary," saying she is now "Mrs. A." The marriage was found proved.[3]

There must be Cohabitation in Scotland.[4]—A, a domiciled Scotsman, goes with B to the Isle of Man, and there cohabits with her. They are reputed to be married. The marriage was held not proved.[5]

Where the Parties at the Commencement of the Intercourse are not free to Marry.—If there be some legal impediment to the marriage of the parties, it is clear that cohabitation as man and wife, coupled with universal repute that they stand in that relation, will not make them married persons. But if during the cohabitation the impediment be removed,

[1] Lord Moncreiff in *Lowrie* v. *Mercer*, 1840, 2 D. 961.

[2] *Lowrie* v. *Mercer*.

[3] *Aitchison* v. *Incorporation of Solicitors*, 1838, 1 D. 42.

[4] *Dysart Peerage* Case, 1881, 6 App. 489.

[5] *M'Culloch* v. *M'C.*, 1759, M. 4591, rev. 2 Pat. 33; but *see infra*, p. 28.

and the cohabitation and repute continue, difficult questions may arise. It may be that at the commencement the parties were ignorant of the impediment, and believed that they were entering into a valid marriage. *E.g.*, A, an Englishman, obtained a divorce from his wife. He was, as the law then stood,[1] not free to contract a second marriage till the period allowed for appealing to the House of Lords had elapsed. In ignorance of this impediment, he went through a form of marriage in Scotland with B, who likewise knew of no obstacle. They were universally reputed to be married persons, and cohabited as such till the death of A. It was held that they must be presumed to have interchanged matrimonial consent when the impediment was removed.[2]

When the Intercourse at its Commencement is known by the Parties to be Illicit.—It has been laid down that in these circumstances no presumption of marriage arises from the fact that the parties continue to cohabit and are reputed married, after the impediment has been removed.[3]

Lord Fraser thinks that this doctrine has been overruled by the judgment of the House of Lords in the *Breadalbane* case.[4] But this, it is submitted, is not a sound deduction from that case. If two persons who are free to marry enter upon a course of illicit cohabitation, the presumption undoubtedly is that they intend to continue unmarried, and strong evidence of change of *animus* will be required before the Court will hold that they have exchanged matrimonial consent. On the other hand, if at the commencement of the intercourse there was an impediment to the marriage, cohabitation and repute when freedom has supervened, may point to the necessary exchange of consent. In other words, if in all the circumstances the fair inference is that there was matrimonial consent, this inference will not be excluded by the fact that the intercourse was originally illicit. Lord Westbury's opinion in the *Breadalbane* case does not seem to go beyond this proposition, which appears consonant with reason and equity.

[1] For the existing law, *see* 31 & 32 Vict. c. 77, § 4.

[2] *De Thoren* v. *Att.-Gen.*, 1876, 3 R.H.L. 28.

[3] *Cunningham* v. *C.*, 1814, 2 Dow, 482; *Lapsley* v. *Grierson*, 1845, 8 D. 34, 1 H. of L. Ca. 498 (1848).

[4] Fr. i., p. 412; *Campbell* v. *C.*, 1867, 5 M.H.L. 115; *see* esp., p. 141.

The facts were these: A, an officer, eloped with B, the wife of an apothecary. After three years B's husband died. A and B continued to cohabit for twenty-two years, moved in good society, and were universally reputed to be married. It was held that they must be presumed to have exchanged matrimonial consent after the death of B's husband.

In a later case, an illicit connection was held to have been converted into marriage.

A formed an illicit connection with B in London. Subsequently they went to Glasgow, and there cohabited for a year and a-half. A then introduced B to his family, and acknowledged her as his wife. They afterwards separated, and lived in America separately for thirty years, B reassuming her maiden name. It was held that marriage had been constituted in Glasgow.[1]

The Presumption in England.—In England marriage may be proved by reputation.[2] But either a religious ceremony or acknowledgment before a registrar is there essential to the constitution of marriage. The presumption, therefore, from cohabitation and repute will not suffice, unless from lapse of time or other cause the absence of any record of the ceremony is explainable.

[1] *Hill* v. *Hibbit*, 1870, 25 L.T. 183.

[2] *See Read* v. *Passer*, 1794, 1 Esp. 212; *Collins* v. *Bishop*, 1878, 48 L.J., Ch. 31; Fr. i. 396.

CHAPTER IV.

OF PROMISE, *SUBSEQUENTE COPULA.*

If a woman prove, by a man's writ or oath, that he promised to marry her, and satisfy the Court by this or other evidence that, on the faith of the promise, she allowed him to have sexual intercourse with her, marriage will be held established from the date of the *copula.*[1] It has never been authoritatively decided that the action is incompetent at the instance of the man. The absence of precedent makes it, however, almost certain that such an action would not now be entertained. Nor is there the same natural presumption that a man in consenting to *copula,* does so only on condition of marriage.

This doctrine rests on a presumption or fiction that when two persons have promised to marry each other, a subsequent *copula* is regarded by them as the fulfilment of the promise.

Nature of Proof required.—Precise and specific words of promise are not essential. In many cases the Court has inferred from the tenor of a correspondence, taken as a whole, that promise must have been interchanged.[2] But the mere fact that the letters are amatory in tone is not enough. For two persons may so correspond without any matrimonial intention. The age, rank in life, actings, and admissions of the parties will all be taken into account in construing a correspondence of doubtful import.

Proof must be found in the Writing if Promise be not Admitted.—It will not be inferred from the fact that the

[1] Stair, i. 4, 6; Ersk. i. 6, 4.

[2] *Campbell* v. *Honyman,* 1831, 2 Dow and Clarke, 265, and 5 Wilson and Shaw, 92; *Yelverton* v. *Longworth,* 1864, 4 Macq. at p. 856; *Morrison* v. *Dobson,* 1869, 8 M. at p. 353, *per* Lord Ardmillan.

parties were reputed to be engaged. But this fact may be taken into account in construing doubtful expressions.[1]

Writing need not be holograph or tested.—If the writ founded on be not in the defender's own hand, but merely signed by him, the *onus* lies on the pursuer to show that he appended his signature to it. For otherwise, as pointed out by Lord Mackenzie, a woman finding a man's signature on a blank piece of paper, might write over it a promise of marriage.[2]

Promise not to be inferred merely from conduct.—In one case, a man admitted that he had showed a woman a passage in a Bible, 1 Cor. vii., relating to marriage, and also the scheme of a widows' fund, to which he was a contributor. From these facts, in connection with the circumstances of the case, the Court inferred that he had promised marriage.[3] But this case has never been followed.

Promise proved by Proclamation of Banns.—Lord Fraser says that promise will be inferred from the parties agreeing to have banns proclaimed.[4] But this seems very doubtful, and the case of *Sawers* v. *Forrest*,[5] on which he relies, cannot be considered as an authority. There was, in that case, no proof of *copula* after the proclamation.

It is not necessary to prove the precise time and place of the Promise.[6]

Conditional Promises.—Where a man has promised to marry a woman, subject to the fulfilment of a condition, as, *e.g.*, after the lapse of a certain length of time, and there is subsequent *copula*, it will be presumed that he agreed to waive the condition, and marriage will be held constituted. But this presumption may be rebutted. And when the terms of the promise itself imply that the *copula* is to take place

[1] *Campbell* v. *Honyman*, *supra*; *Ross* v. *M'Leod*, 1861, 23 D. 972, esp. *per* L. P. M'Neill at p. 981; and *see Monteith* v. *Robb*, 1844, 6 D. 934.

[2] *Mackenzie* v. *Stewart*, 1848, 10 D. 638.

[3] *Stewart* v. *Lindsay*, 8th July, 1818; Hume's Decisions, 380.

[4] Fr. i. 377.

[5] 1st August, 1786, Arniston Collection Sess. Pap., Advocates' Library, vol. clxxii.

[6] *Campbell* v. *Honyman*, *supra*.

first, and marriage to be constituted later, on the happening of some further event, there is no room for the presumption that the condition has been abandoned.[1]

Promise conditional on Pregnancy.—If the promise be to marry the woman if she conceives, the fact that *copula* followed will not be a ground of declarator of marriage. For, *ex necessitate rei*, the marriage was to be after the *copula*. The rule is thus expressed by Lord Chancellor Cottenham. "Consent *de præsenti* is essential to marriage, and marriages established upon a promise, *cum subsequente copula*, are so established upon a fiction that the consent *de præsenti* was mutually given by the parties in consequence of the anterior promise; but if the promise be conditional upon the happening of a future event, there is no room for any such fiction, the *copula* cannot be the perfection or consummation of the prior contract."[2]

When Promise proved, *copula* presumed to be on faith thereof.—In general, if the promise be established, it will be presumed that it was in reliance upon it that the woman consented to the *copula*. But this presumption may be rebutted. The woman may prove that she did not intend marriage, or the man may show that the *copula* was unconnected with the promise. *E.g.*, A promises to marry B. *Copula* followed. On evidence that B, in allowing this to take place, had no intention of consenting to marriage, and was, both then and afterwards, unwilling to accept A as her husband, it was held that marriage had not been constituted.[3]

If there has been *copula* prior to the Promise, the *onus* lies on the Pursuer to show that a subsequent *copula* was on the faith of the Promise.[4]—When the woman is already

[1] *M'Intosh* v. *Shillinglaw*, 6th March, 1829; 1 Jurist, 135. An American case affords a good illustration. A and B enter into an antenuptial contract. Subsequently they cohabit. The evidence shows that they all along contemplated going through a ceremony of marriage. Marriage not established, because no present consent, *Peck* v. *P.*, Amer. Rep., 34, 702; Fr. i. 381.

[2] *Stewart* v. *Menzies*, 1841, 2 Rob., at p. 590; *Kennedy* v. *M'Dowall*, 1794, Ferg. Con. Law Rep. 163.

[3] *Morrison* v. *Dobson*, 1869, 8 M. 347.

[4] *Craigie* v. *Hoggan*, 1838, 16 S. 584, Aff., M'L. and Rob. 942; *Ross* v. *M'Leod*, 1861, 23 D. at p. 994; *Surtees* v. *Wotherspoon*, 1873, 11 M., at p. 389; *Sim* v. *Miles*, 1829, 8 S. 89.

the man's mistress at the date of the promise, there is no presumption that she, in continuing to be so, is relying on the promise. But she may prove that this was the fact. Lord Ardmillan figures the case of the woman being seized with repentance, and declining to continue the intercourse, except on receiving a promise of marriage. In such circumstances, marriage would be constituted.[1]

If the Woman, in consenting to the *copula*, relied on the Promise, it is immaterial that she was ignorant that this would make Marriage.[2]

Must Promise and *copula* both take place in Scotland?—This question is answered by Lord Fraser in the affirmative, and is supported by several *dicta* in the *Yelverton* case.[3] In the same case, Lord Westbury doubts if it would be any bar to the constitution of marriage in this way, that there had been *copula* in England, if *copula* in Scotland followed. But it is submitted that the question is still open. It must be borne in mind that, in the *Yelverton* case, the first *copula* was in Ireland. By the law of that country, as of England, marriage is not constituted by promise *subsequente copula*. It is, therefore, consistent with principle to hold that the contract, not having been made in a form which satisfied the requirements of the *lex loci*, marriage was not thereby made. But it is thought that a different result ought to be reached if the promise and the *copula* occurred in a country where this is a valid mode of marriage—*e.g.*, some of the American States. Nor would it affect the matter that the promise was given in Scotland and the *copula* followed in a country, by the law of which, promise *cum copula subsequente* makes marriage. In either case, if the domicile of the parties is in Scotland, the conditions of both the *lex domicilii* and the *lex fori* seem to have been complied with, and it is

[1] *Surtees*, *supra*; *Sim* v. *Miles*, *supra*, *per* Lord Glenlee, at p. 98.

[2] *Laing* v. *Reed*, 1823, 1 Sh. App., *per* Eldon, L.C., at p. 451; *Longworth* v. *Yelverton*, *supra*, *per* Westbury, L.C., at pp. 854 and 855.

[3] *See* Lord Chelmsford, 4 Macq. 879; Lord Kingsdown, 4 Macq. 902.

not easy to see why the Scotch Court should refuse to recognise the marriage as valid.[1]

Does Promise *cum copula* constitute Marriage, or merely afford a ground of Declarator?—This question is of more than academic interest, as the competence of raising the action, after the death of the defender, depends on the answer which may be given to it by the Court. It is discussed by Lord Fraser at great length, and with much learning. The view adopted by that eminent authority is, that promise followed by *copula* does not constitute *ipsum matrimonium*, but establishes a relation of such a binding and peculiar character, as to ground an action for annulling a subsequent marriage of either to a third person, although entered into *in facie ecclesiæ*.

Lord Fraser is of opinion that originally promise *cum copula* grounded an action on the part of the woman to have the marriage solemnised. As, however, it was impossible to compel the man to solemnise, the decree ordaining him to do so was held to have the same effect. From this the next step was to raise an action of declarator in place of the older action for solemnisation. This change of procedure may have been partly due to the Reformation. The Presbyterian Church could not enforce the judgments of the Commissary Courts by decrees of excommunication. As already stated, one of the most important consequences of this theory would be to make the action incompetent after the death of the defender. For, *ex hypothesi*, the decree of declarator stands in place of an order to solemnise, and as the Court could not order a dead man to solemnise his marriage, so neither will it declare the marriage after his death. Lord Fraser's doctrine with this consequence was adopted by Lord M'Laren, ordinary, in a modern case.[2] The first division did not find it necessary to decide the question, holding the promise not proved, and it was expressly reserved. Lord President Inglis remarked: "I have not yet been convinced that it is incompetent to constitute or establish a marriage between the parties in respect of promise *subsequente copula*, after the death of one of them."

It is submitted that the sounder opinion is, that promise

[1] *See* Gillespie's Bar, 2nd ed., p. 370, *seq.*; but *see Macdonald* v. *M.*, 1863, 1 M. 854.

[2] *Maloy* v. *Macadam*, 1885, 12 R. 431.

cum copula constitutes *ipsum matrimonium.* For, as declaration of present consent is sufficient for this purpose, it is not unreasonable to suppose that when promise has been proved, the *copula* shall be a ground for inferring that the man consented to instant marriage, and that the woman's consent to the *copula* was only given on that condition. Lord Fraser argues that the consequences of marriage have never been held to flow from promise *cum copula,* until after declarator. But it appears a sufficient answer to this, that though the relation of marriage be *ipso facto* constituted by the *copula,* the legal consequences thereof could in no view follow until the facts had been found completely proved in the appropriate Court. Lord Stowell thus states the canon law: "If the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection."[1] And this, with all deference to Lord Fraser, appears clearly laid down by Stair. There is not, as Lord Fraser suggests, an inconsistency between Stair's two statements on the subject. In i. 4, 6, Stair says, "The marriage itself consists not in the promise but in the present consent, whereby they accept each other as husband and wife, whether that be by words, expressly or tacitly, by marital cohabitation, or acknowledgment, or by natural commixtion, where there hath been a promise or espousals preceding, for therein is presumed a conjugal consent, *de præsenti.*" In the other passage, iii. 3, 42, the words are: "Cohabitation as man and wife supplied the solemnity of public marriage, which being a transient act, and having no record, could seldom be proved, yet though it could be proved by the oath of both parties or otherwise that there never was a formal marriage, if the parties were capable of marriage, cohabitation would supply; for after contract, or promise of marriage, or sponsalia, if copulation follow, then is there presumed a matrimonial consent, *de præsenti,* which therefore cannot be passed from by either or both parties as having the

[1] *Dalrymple* Case, 1811, 2 Hagg. C.R., at p. 66; Stair, i. 4, 6, *cf.* iii. 3, 42; Swinburne on "Spousals," p. 224.

essential requisites of marriage." Lord Fraser argues that Stair intends here a relation "having the essential requisites of marriage" without being marriage, a statement almost paradoxical and in no way borne out by the context. Stair is merely distinguishing between regular and irregular marriage. Erskine is equally explicit.[1] He says, "though the promise *de futuro* should be barely verbal, the canonists, and upon their authority both our judges and writers, are agreed that a *copula* subsequent to such promise constitutes marriage, from a presumption or fiction that the consent, *de præsenti*, which is essential to marriage was at that moment mutually given by the parties, in consequence of the anterior promise. This presumption," Erskine dryly remarks, "though but slightly founded in nature, is abundantly recommended by its equity, and the just check which it gives to perfidy." It is submitted that the foundation upon which the doctrine of promise, *cum copula* rests is that *verba de futuro, subsequente copula*, are equivalent to *verba de præsenti*. If this be sound, it is in vain to argue as Lord Fraser does that promise *cum copula* produces anything less than *verum matrimonium*. The position is untenable unless the authority of *Walker* v. *M'Adam*[2] be disputed. It is surely too late to quarrel with that decision. It was then solemnly determined by the whole Court that full and complete marriage could be constituted *per verba de præsenti*. Lord Fraser says that there were five dissentients. But it appears from their opinions[3] that their doubts were as to the sanity of *M'Adam* or his intention to make the woman his wife and not his widow. Not one of them maintains that *ipsum matrimonium* cannot be constituted *per verba de præsenti*.

The judgment was affirmed unanimously by the House of Lords, presided over by the greatest lawyer of the century, who says, "I have also looked at the decisions again and again. I find in all of them, that a contract *de præsenti* forms a present marriage, or *very matrimony*."[4] If this be so, the judgment of Lord Chancellor Lyndhurst,[5] upon which

[1] Prin. i. 6, 2.

[2] 1807, *Mor. App.* v. *Proof*, No. 4, App.; 5 Pat. 675.

[3] 5 Pat.

[4] *Per* Lord Eldon, *ibid.*, at p. 691.

[5] *The Queen* v. *Millis*, 1844, 10 C. and F. 534, and separately reported by Dix.

Lord Fraser so strongly founds, cannot be, as he says it is, a correct exposition of the present law of Scotland. For Lord Lyndhurst does not suggest that *verba de futuro cum copula* produce an effect in any way different from that produced by *verba de præsenti.* No distinction between the two cases is even hinted at. And it is significant to notice that in England the ecclesiastical Court used to compel persons who had contracted *per verba de præsenti,* as well as those who had done so *per verba de futuro cum copula sequente,* to solemnise their marriage *in facie ecclesiæ.*[1] In support of the theory that promise *subsequente copula* constitutes very marriage, reference may be made to the undernoted judicial dicta.[2] Moreover, the case of *Pennycook* v. *Grinton*[3] seems in direct conflict with Lord Fraser's view. There "it was held for law, that a promise of marriage, followed by a *copula,* made from that moment an actual marriage." In that case a subsequent marriage was set aside.

[1] *Jesson* v. *Collins,* 2 Salkeld, 437, Holt, 457; Swinburne on "Spousals," 2nd ed., 222.

[2] Lord President Campell in *Kennedy* v. *MacDowall,* 1796, Ferg. Con. Law Rep., p. 181; Lord Curriehill in *Ross* v. *Macleod,* 1861, 23 D., at p. 987; Lord Deas, *ibid.,* p. 992; Lord Ardmillan in *Surtees* v. *Wotherspoon,* 1873, 11 M. 388; Lord Westbury in *Yelverton* v. *Longworth,* 1864, 4 Macq., at p. 856; Lord Chancellor Cottenham in *Stewart* v. *Menzies,* 1841, 2 Rob., p. 591.

[3] 1752, M. 12,677.

CHAPTER V.

THE DISSOLUTION OF MARRIAGE.

A MARRIAGE is dissolved by the death of one of the spouses, or by their being divorced by the judgment of a competent Court.

Of Divorce.—There are in Scotland two legal grounds of divorce. If either spouse succeed in proving that the other has committed adultery during the marriage, or has been at the time of the action in malicious desertion for four years, the marriage will be declared at an end.

Divorce for Desertion.—This is based upon the statute 1573, c. 55. The Act provides that if either spouse "diverts from the other's company, without a reasonable cause alleged or reduced before a judge, and remains in their malicious obstinacy by the space of four years," and refuses to obey privy admonitions to adhere, that the deserted spouse shall raise an action of adherence, and, if necessary, thereafter shall apply to the minister to publicly admonish the deserter to adhere, and if he shall fail to comply he shall then be guilty of "malicious and obstinat defectioun," and divorce may be obtained. These preliminary proceedings were, however, rendered unnecessary by the Conjugal Rights Act, 1861, § 11, and an action of divorce may now be raised at once if there has been malicious desertion for four years. "Privy admonitions," or *bona fide* requests to return, addressed by the deserted to the deserting spouse, are not of the nature of a solemnity, and may be dispensed with in certain cases—*e.g.*, it may be manifest from the circumstances that any request of the kind would be unavailing. Or, from ignorance of the deserter's address, the request may be impossible. But to justify decree it must in every case appear—(1) that there was wilful

desertion; (2) that it has been obstinately persisted in; (3) it must be without lawful excuse; (4) it must clearly appear that the pursuer of the action, throughout the period of four years of illegal desertion, was desirous of cohabitation, and ready to renew it. The remedy is one given to a spouse who has done his or her duty in the past, and is willing to do it in the future.[1] The Court will jealously guard against the possibility of two spouses, both of whom desire to be free, availing themselves of this mode of severing the marital tie. This would be to open a wide door to divorce by mutual consent, which is quite contrary to the history and policy of our law.

Is it desertion obstinately to refuse marital intercourse, though continuing to reside in family? — Lord Fraser answers this question in the affirmative. There seems no authority for this except the very old case of *Graham*.[2] The English case cited by Lord Fraser lends no support to the doctrine. In that case Lord Penzance says, a spouse who availed himself of a temporary separation to prevent the renewal of intercourse might be a deserter. But by "renewal of intercourse," Lord Penzance does not mean, as Lord Fraser understands him, *conjunctio corporum*. He merely means return to the common home. In that case, the spouses happened to be temporarily apart, without any quarrel, when the wife heard something which made her suspect her husband of infidelity. She thereupon wrote, saying she declined to come back. She afterwards raised an action of divorce, but failed to prove husband's adultery. They did not again cohabit, and neither of them took any steps to effect a reconciliation. It was held, in these circumstances, that it was not desertion in the husband to hold aloof and make no overtures, for no one can desert who does not actually and wilfully bring to an end an existing state of cohabitation.[3]

Pursuer must have been willing to adhere.—Divorce will not be granted if it appear that the pursuer acquiesced in the

[1] *Watson* v. *W.*, 1890, 17 R. 736, *per* Lord President Inglis, at p. 739, and Lord Shand, at p. 743, in which *Willey* v. *W.*, 1884, 11 R. 815, was disapproved of.

[2] *Graham* v. *Buquhanane*, 27th February, 1567, MSS. Records, Com. Court, vol. ii., cited by Fr. ii. 1209.

[3] *Fitzgerald* v. *F.*, 1869, L.R., 1 P. and D. 694.

separation, and never showed an honest desire to induce the defender to resume cohabitation. "It is not enough that the pursuer of a divorce for desertion, who has sat with folded hands all the time, should, when he at the lapse of the statutory period applies for a divorce, say: 'I have been quite willing to receive her back to live with me.' That is what the pursuer says here, but it is not enough. He must be free not only from the imputation of unwillingness to receive her back, but also from the imputation of having been practically a consenting party to her absence, tacitly encouraging her in breaking up the conjugal relation. His position must be that, contrary to his sincere desire and honest effort in furtherance of his desire to restore the family unity, there has been refusal to yield to his active endeavour. He must show not merely continuance of the disruption, but resistance to admonition for reunion actively urged."[1]

Accordingly, where a husband allowed his wife, who had left the common home, to live in the same town, and made no serious effort to induce her to return, it was held that she was not in malicious desertion.[2]

Privy admonitions or remonstrances calling on the deserter to adhere are not a solemnity.—When the parties have means of communication it will not, in the general case, be easy for the pursuer to convince the Court of his desire for reunion if he has not intimated this desire to the defender. "Remonstrance for absence or repeated requests that the deserting spouse should resume cohabitation made seriously and *in bona fide*, but rejected and so unavailing, must be the best evidence in support of the points (1) that the pursuer has desired adherence or renewal of cohabitation, and (2) that the desertion has been wilful, and obstinately persisted in."[3] But in cases where the defender has gone abroad and left his wife with no means of support, and it is clear that remonstrance would have been fruitless, it may be dispensed with by the Court.

The desertion need not be in Scotland, but Scotland must

[1] *Watson, supra, per* L.J.C. Macdonald, at p. 742.

[2] *Barrie* v. *B.*, 1882, 10 R. 208.

[3] *Watson, supra, per* Lord Shand, at p. 743; and *see Muir* v. *M.*, 1879, 6 R. 1353; *Auld* v. *A.*, 1884, 12 R. 36; *Winchcombe* v. *W.*, 1881, 8 R. 726; and *Beattie* v. *Mason*, 1877, 14 S.L.R. 592.

be the husband's domicile at the time of desertion if he is the defender, or if he is pursuer, at the raising of the action.[1]

Offers by Defender to adhere.—The Court will judge of the sincerity of alleged offers by the defender to adhere, and will disregard them if they appear to have been made not to bring about a renewal of cohabitation, but to prevent the pursuer from succeeding in the action.[2] It has been questioned if such an offer comes too late if made after the raising of the action.[3] The sincerity of such an offer, timeously made, will be judged of in the light of the husband's acts.

Ill.—Husband goes to Australia to evade justice. He writes three times to wife, but only one letter contains an address. They are all forwarded through his brother. The letter giving an address comes before expiry of the four years. In it he invites his wife to join him, but sends no money, and gives no information as to his means of subsistence. Held this was not such an offer as she was bound to accept, and that she was entitled to decree.[4]

Ill.—Husband said he offered to return. In cross he admitted that at the time he was living in adultery. Held his offer was not sincere.[5]

The offer must not be fenced with unreasonable conditions.

Ill.—Husband withdraws from cohabitation on account of wife's jealousy of a certain lady. He refuses to return until she writes a letter exonerating this lady. Wife refuses to do this, but presses him to return. Held he is in desertion.[6]

Separation not being at first desertion may become so.—Husband living apart in circumstances which did not constitute desertion suddenly broke off communication with wife, and formed an adulterous connection with another woman. Held this showed intention to desert.[7]

[1] *Carswell* v. *C.*, 1881, 8 R. 901; *Steel* v. *S.*, 1888, 15 R. 896; *Redding* v. *R.*, 1888, 15 R. 1102; *see infra*, p. 39.

[2] *Lilley* v. *L.*, 1884, 12 R. 145; *see* also *Nimmo* v. *Reid*, July, 1830, Lothian, p. 116; *Mackenzie* v. *M.*, 1892, 30 S.L.R. 276.

[3] *Auld* v. *A.*, 1884, 12 R. 36; *Lawrence* v. *L.*, 1862, 31 L.J., P. and M. 145.

[4] *Muir*, 6 R. 1353, *supra*.

[5] *Mallinson* v. *M.*, 1866, 1 P. and D. 93.

[6] *Dallas* v. *D.*, 1874, 43 L.J., P. and M. 87; *see Auld*, *supra*; and *Forbes* v. *F.*, 1881, 19 S.L.R. 118.

[7] *Gatehouse* v. *G.*, 1867, L.R., 1 P. and D. 331.

Husband left England for Australia with knowledge and consent of wife. For some years he corresponded regularly with her. Correspondence having suddenly ceased, enquiries were made as to the husband, and it was found he had been living in adultery with a woman who had borne him three children. Held he must be taken as in desertion from the time he formed the intimacy with this woman, or time when correspondence with wife ceased.[1]

Ill.—Husband, in 1880, ceased to live with wife, pretending that his business as editor prevented him from getting home at night. He supplied her with money and visited her occasionally, and in February, 1884, a child was born. In January, 1884, wife discovered that husband had for years been living with another woman. Held by Hannen, President, that desertion did not begin until the wife had discovered the husband's adultery, and was therefore entitled to refuse him access.[2]

Ill.—Parties married in 1866. After four years' cohabitation, husband being in difficulties, it was agreed that a house and shop should be taken in wife's name. From this time they never lived together, but husband occasionally visited wife and slept with her, and he made her an allowance. In spite of wife's request he refused to recommence open cohabitation. In 1885 wife suspected he was carrying on adulterous intercourse, and she never afterwards cohabited with him. In 1888, obtaining positive proof of his adultery, she raised action. Held husband had been in desertion for two years.[3]

Note.—These examples of change of *animus* are subject to the remark that in Scotland adultery, *per se*, would have grounded decree.

Bars to Action.—Seeing that by the Act, 1573, c. 55, the remedy is to be given when one spouse "diverts from the other's company without a reasonable cause," a pursuer will be barred from claiming it if he or she has given the defender a sufficient reason for breaking up the home. If, therefore, he has been guilty of cruelty or adultery[4] he cannot obtain a divorce on the ground of the other's desertion. It has also been questioned whether a husband was not justified in leaving

[1] *Stickland* v. *S.*, 1876, 35 L.T. 767.
[2] *Farmer* v. *F.*, 1884, 9 P.D. 245.
[3] *Garcie* v. *G.*, 1888, 13 P.D. 216.
[4] *Auld* v. *A.*, 1884, 12 R. 36.

his wife if he discovered that she had been unchaste before marriage. But it was lately held by Butt, J., that an allegation of premarital incontinency and pregnancy at the date of marriage is not a relevant defence to an action for restitution of conjugal rights.[1] The pursuer is barred from insisting in the action if he has been guilty of adultery even after the four years' desertion. And it is *pars judicis* to notice this, though the action be undefended.[2] In this case decree was refused where it came out in answer to a question by the Lord Ordinary that the wife, who was pursuer, had given birth to a child seven years after the husband had left her. Great delay in raising action is not necessarily a bar. In one case a husband succeeded in an action brought twenty-seven years after the wife's desertion.[3]

Desertion must be Malicious.—Divorce will not be granted if one of the spouses has left the other to prosecute his business or for some other good reason, and not merely with the intention to break up the home.[4] Accordingly a husband who was a domestic servant was held not to be in desertion merely because he did not give up service and take to some employment which would enable him to cohabit constantly with his wife.[4]

It is not desertion if the absence be caused by imprisonment or captivity. And even though the husband be in desertion when the imprisonment commences, it ceases at that date.[5]

Either spouse having a good reason for ceasing to cohabit may do so, and is not barred if he or she subsequently raise an action against the other as being in desertion.

Ill.—The husband brought a mistress to his house. The wife said either she or the mistress must go. The husband said the mistress should stay, whereupon the wife left the house. Held by Butt, J., that, in the circumstances stated, although the wife had been the first to leave the common home, the husband was guilty of desertion.[6]

[1] *Mason* v. *M.*, 7th June, 1889, 61 L.T. 304; *see* also *Perrin* v. *P.*, 1822, 1 Add. 4; *Reeves* v. *R.*, 1813, 2 Phill. 127.

[2] *Auld* v. *A.*, *supra*.

[3] *Mackenzie* v. *M.*, 1883, 11 R. 105.

[4] *Williams* v. *W.*, 1864, 3 S. and T. 547.

[5] *Young* v. *Y.*, 1884, 10 R. 184; *secus* in England, *Drew* v. *D.*, 1888, 13 P.D. 97.

[6] *Dickinson* v. *D.*, 28th Oct. 1889, 62 L.T. 330.

Ill. — Wife leaves husband on account of his drunken violence and goes to live with her father. She is held not barred from raising action against husband on the ground of desertion.[1]

Jurisdiction.—The Court has jurisdiction to grant divorce at the instance of the wife, although the husband after deserting has acquired a foreign domicile.[2]

For when a cause of action has arisen, it would be highly inequitable to allow the husband to defeat the wife's right to a remedy by changing his domicile. But when the husband's domicile was in England, the deserted wife is not entitled to raise a divorce in Scotland though that was her domicile of origin, and she has returned to it after the desertion.[3] And if the husband has acquired a genuine domicile in Scotland, he will be entitled to insist in the action, though the desertion took place when he was domiciled in a country where no such ground of divorce was recognised. And it is immaterial that his motive in acquiring the domicile was to obtain a divorce.[4]

In an action of divorce raised by a wife against her husband residing abroad, the Court refused to ordain the defender to sist a mandatory, the jurisdiction of the Court being doubtful, and the defender being in embarrassed circumstances.[5]

Voluntary Separation no Defence.—It is no defence to the action that the parties had voluntarily agreed to separate. A contract of separation will not be enforced by the Court, and is revocable at pleasure by either spouse.[6]

But desertion does not begin until the spouse who wishes to resume conjugal cohabitation has intimated this to the other.

Prolonged absence is an element, though a certain amount of correspondence may have been kept up.[7]

The husband may be in desertion though he continue to supply the wife with money.[7]

[1] *Gow* v. *G.*, 1887, 14 R. 443.

[2] *O'Rourke* v. *O'R.*, 1849, 11 D. 976; *Hume* v. *H.*, 1862, 24 D. 1342.

[3] *Redding* v. *R.*, 1888, 15 R. 1102, *per* Lord M'Laren, Ordinary.

[4] *Carswell* v. *C.*, 1881, 8 R. 901; *Steele* v. *S.*, 1888, 15 R. 896.

[5] *D'Ernesti* v. *D'E.*, 1882, 9 R. 655.

[6] *A.B.* v. *C.D.*, 1853, 16 D. 111.

[7] *Yeatman* v. *Y.*, L.R. 1 P. and D. 489.

May Cruelty less in Degree than such as would Ground an Action for Judicial Separation, or amount to a good defence to an Action of Adherence, be pleaded successfully as a Defence to an Action of Divorce for Desertion?—This point was much canvassed in the recent case of *Mackenzie* v. *M.*[1] It was not found necessary to determine the question, as the majority of the Court was of opinion that in the circumstances of that case the wife would have been successful if she had been defending an action of adherence. But Lord Young, whose opinion on this head was concurred in by the Lord Justice-Clerk and Lord Trayner, observed: "It is no criterion of the validity of a defence to an action of divorce for desertion on the Act 1573, to inquire whether or not it would have been a good defence to an action of adherence at the common law." He pointed out that the latter action was in no sense final, and that the Court might ordain a spouse to adhere, with a view of making a trial of reunion, although the pursuer had been very gravely to blame for the separation. Divorce, on the other hand, was, under the Act, inflicted as a statutory penalty, and was final. Lord Trayner said it was in every case a matter of circumstances, if the defender had been absent with "reasonable cause." Lord Rutherfurd Clark, who dissented, said: "The defender has, I think, only one possible justification. She must show that she was not bound to adhere, or, in other words, that she had a good defence to an action of adherence. The Court must give decree of adherence unless a good defence is stated; and when a wife disobeys the decree, she must be in wilful and malicious desertion. For she is refusing to perform what the Court has determined to be her obligation as a wife." If the judgment implies that cruelty was proved, in the sense in which that term has been interpreted by decisions, it is submitted that it carries the law to a point further than has been reached in any previous case.

[1] 1892, 30 S.L.R. 276.

CHAPTER VI.

DIVORCE FOR ADULTERY.

By the Roman Catholic Church marriage has always been regarded as a sacrament, and therefore indissoluble. The ecclesiastical courts were entitled upon certain grounds to pronounce decrees of divorce *a mensa et thoro*, but though this relieved the innocent spouse from the necessity of further conjugal cohabitation, the marital bond was not severed, and it would have been bigamy for one of the spouses to contract a second marriage during the lifetime of the other. In England, until 1857, the only means of obtaining a divorce *a vinculo matrimonii*, was by a private Act of Parliament. This is still the case in Ireland. In 1857 the Divorce Act, 20 & 21 Vict. c. 85, conferred power on the Court specially constituted to dissolve marriages on certain specified grounds. The adultery of the husband is not a sufficient ground. It must be incestuous or bigamous, or coupled with gross cruelty or desertion without reasonable cause for two years. In Scotland, since the date of the Reformation, 24th August, 1560, the Courts have been in use to dissolve marriages on the ground of the adultery of either husband or wife.

What is Adultery ?—It is adultery for a married person to have sexual intercourse except with the other spouse. But if the wife were ravished,[1] or had connection with a man in the belief that he was her husband, or was insane at the time of the connection,[2] the husband would not be entitled to divorce. And it is not adultery if one spouse having been long absent and reasonably believed to be dead, the other spouse contracts a second marriage.[3]

[1] *Long* v. *L.*, 1890, 15 P.D. 218.

[2] But *see* next page, cases of *Hanbury* and *Yarrow*.

[3] *Thomson* v. *Bullock*, 9th Dec., 1836, F.C.

Ill.—Husband sues for divorce and damages against co-respondent. Wife does not defend. Jury gives £50 damages. Judge not satisfied, orders wife to be summoned and cross-examined. She admits intercourse with co-respondent, but says he forced her. She appears mentally and physically weak. Court gives judgment against co-respondent for £50, but refuses to grant divorce.[1]

It has recently been held in England that it is not a good defence to plead that the adultery was committed during insanity, if it appear that the defender knew the nature of the act and its legal consequences.[2]

Title to Sue.—It is only the injured spouse who is entitled to raise the action. Even if the pursuer die after *litis contestatio*, it seems that his heir or representative could not be sisted in his place.[3] But if the party die after judgment of the Lord Ordinary, and when a reclaiming note is pending, his representatives, having a patrimonial interest, may sist themselves.[4]

The curator, *ad litem*, to an insane spouse, has been held not entitled to raise an action of separation.[5]

Title to Defend.—Any person who can instruct a patrimonial interest—*e.g.*, creditors of husband or wife, may defend.[6] The Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), provides that the Lord Advocate may state defences,[7] and that where the Court is satisfied that the defender cannot be found, and the citation is therefore edictal, the summons shall be served on the children of the marriage, if any, and on one or more of the defender's next-of-kin, if known

[1] *Long* v. *L.*, 1890, 15 P.D. 218.

[2] *Hanbury* v. *H.* [1892], P. 222; *Yarrow* v. *Y.* [1892], P. 92.

[3] *Ritchie* v. *R.*, 1874, 1 R. 826; *Clement* v. *Sinclair*, 1762, M. 337; *see Menzies* v. *Stevenson*, 1835, 14 S. 47. This is also law in England. *Grant* v. *G.*, 1862, 31 L.J., Mat. 174.

[4] *Ritchie*, *supra*; *Fenton* v. *Livingstone*, 1849, 3 Macq. 497.

[5] *Thomson* v. *T.*, 1887, 14 R. 634. *Secus* in England. The committee of a lunatic may sue for divorce. *Baker* v. *B.*, 1880, 6 P.D. 12; *Mordaunt* v. *Moncreiffe*, L.R., 2 H.L. Sc. 374. But apparently cognition would not mend the title to sue in Scotland.

[6] *Greenhill* v. *Ford*, 1824, 2 Sh. App., 435.

[7] Query whether Lord Advocate is bound to insist in plea of condonation which has been stated by defender and afterwards withdrawn. *Ralston* v. *R.*, 3 R. 371.

and resident in Great Britain, and that any child or any one of the next-of-kin may appear and state defences.[1] It does not seem to have been decided in Scotland whether an action can be raised against a lunatic on the ground of adultery committed when sane. But such an action has been sustained in England.[2]

The alleged *particeps criminis* may be called as co-defender, and found liable in all expenses.[3]

But where a pursuer virtually alleged that the defender was leading an abandoned life, and did not aver that the co-defender knew she was married, the action against the latter was dismissed.[4] The *particeps criminis*, though not called as a co-defender, may appear and defend himself.[5]

Procedure.—The marriage must first be proved. It is usual to produce an extract register (which by 17 & 18 Vict. c. 80, § 58, is now evidence), and to bring the minister or some other person or persons who were present at the marriage. If the marriage was irregular, it must be proved by evidence of cohabitation and repute or of declaration, or promise *subsequente copula*. If the irregular marriage has previously been registered under 19 & 20 Vict. c. 96, § 2, a copy of the register will be evidence of marriage, but not in itself conclusive.[6] It may be pleaded in defence that the marriage was null—*e.g.*, on account of impotence of husband.[7] A certificate of marriage by a notary not purporting to be a copy of an entry in the register of marriages kept by the law of that country but only containing a reference to the register, cannot be received as evidence of the marriage, although it would be evidence in the foreign country.[8]

Evidence of Parties.—Since 37 & 38 Vict. c. 64, the pursuer and defender are competent and compellable witnesses.

[1] Section 10.

[2] *Mordaunt* v. *Moncreiffe*, L.R., H.L. 2 Sc. App., 374.

[3] 24 & 25 Vict. c. 86, § 7.

[4] *Miller* v. *Simpson*, 1863, 2 M. 225, a very special case; *see Kydd* v. *K.*, *ibid.*, 1074.

[5] *See Wheeler* v. *W.*, 1889, 14 P.D. 157.

[6] Marriage may be proved in England also by reputation, *Reed* v. *Passer*, 1794, 1 Peake Ca. 231, or by cohabitation, Buller, 114.

[7] *Sewell* v. *S.*, 1862, 31 L.J., P. and M. 55. But it would be no defence to plead that the marriage had never been consummated; *Brown* v. *B.*, 1848, 13 Jur. 370.

[8] *Finlay* v. *F.*, 1862, 31 L.J., P. and M. 149.

No witness, however, "shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness should have already given evidence in the same proceeding in disproof of his or her alleged adultery." The proper course is for the judge to ask the witness whether he wishes to give evidence which may have this tendency. If he declares his willingness to be examined, the question may be put. If the witness wishes to avail himself of the statute, the judge must not allow the question to be put.[1] It goes without saying that if a witness goes into the box and does not deny the charge of adultery, but avails himself of the statutory right of taciturnity, this fact cannot fail to affect the mind of the judge, and coupled with evidence, which, if standing alone, would be insufficient, may judicially satisfy him of the truth of the charge. The same remark applies also to the case of a party who seeks to evade the necessity of giving evidence in circumstances in which an innocent person would be expected to be anxious to have an opportunity of exculpating himself.[2]

Proof of Adultery.—It is seldom that there is direct evidence as to the fact of adultery. It has generally to be inferred from a chain of circumstances indicating an undue attachment between the parties, and opportunity for gratifying unlawful passion. The nature of this evidence will vary in every particular case. Much will depend on the rank of the parties, and the state of manners prevailing at the time and place in question, but decree will not be granted unless enough is proved to "lead the guarded discretion of a reasonable and just man to the conclusion" that adultery has been committed. The general rules on the subject are laid down by Lord Stowell in

[1] *Cook* v. *C.*, 1876, 4 R. 78; *Bonnatyne* v. *B.*, 1886, 13 R. 619.

[2] The cross-examination of a witness tending to show she had committed adultery was allowed by Hannen, President, in the following circumstances. Wife brought action for nullity of marriage on ground of husband's impotence. Husband brought cross action for divorce on ground of wife's adultery. Sir James Hannen held that questions of the nature referred to were only barred in actions brought on the ground of adultery, and that the wife might be cross-examined in the suit for nullity as to her intimacy with the man who was co-respondent in the cross action. *M.* v. *D.*, 1885, 10 P.D. 175.

the cases undernoted.[1] Direct evidence that the parties were seen in the act of adultery will, from its intrinsic improbability, be regarded in most cases with suspicion.[2] In general it may be said that guilty intention and opportunity for committing the act must be proved before the Court will infer it.

It is not necessary that there be two witnesses to speak to any one act of adultery. One witness to one act is sufficiently corroborated by another witness to other acts, either committed with the same or another person.[3] But the evidence of one witness, uncorroborated, is not enough, and the testimony of a boy of six was held inadmissible in corroboration.[4] The evidence of prostitutes that the defender has committed adultery with them will be received with caution. It is obvious that an unscrupulous pursuer, or an over-zealous private detective, would have little difficulty in finding a woman of loose character willing, for a consideration, to give testimony of this kind. Lord Fraser in one case went so far as to say: "No number of prostitutes will make up one credible witness, so as to outweigh the denial given to them by the person accused." But this language was expressly disapproved of by the Court, and it was laid down that such evidence must be carefully sifted, but might be so clear and credible as to enable the Court to act upon it, although not corroborated by any witness outside the brothel.[5]

Ante-nuptial incontinence by the defender may be proved, if with the same person with whom it is alleged that adultery was committed, but not otherwise.[6]

It is not competent to prove loose conduct of the alleged paramour with other women.[7] And where the defender offered to adduce medical evidence that the alleged paramour was *virgo intacta*, this was held inadmissible. But it was suggested in that case that there might be circum-

[1] *Loveden* v. *L.*, 1810, 2 Hagg. C.R. 2; *Cadogan* v. *C.*, 1796, 2 Hagg. C.R. 4.

[2] *Sopwith* v. *S.*, 1859, 4 S. and T. 243; *see* to same effect L.P. Inglis in *Walker* v. *W.*, 1871, 9 M. 1092; also *Alexander* v. *A.*, 1860, 2 S. and T. 95.

[3] Dickson, § 1808, and *Whyte* v. *W.*, 11 R. 710.

[4] *Robertson* v. *R.*, 1888, 15 R. 1001.

[5] *Tennant* v. *T.*, 1883, 10 R. 1187.

[6] *Perrin* v. *P.*, 1822, 1 Add. 3; *Reeves* v. *R.*, 1813, 2 Phill., at p. 127.

[7] *King* v. *K.*, 1842, 4 D. 590

stances in which the Court might, on the defender's motion, order a medical examination of the paramour by a neutral medical man.[1]

An agent conducting a consistorial case is now a competent witness, except in an action of declarator, founded on promise *subsequente copula*.[2]

Evidence of Indecency.—Proof of indecent familiarities with the *particeps criminis* either before or after the alleged acts of adultery will be admitted.[3] The evidence of a woman that defender had committed adultery with her was held competently corroborated by evidence of indecent conduct of defender with another woman with whom adultery was not libelled.[4]

It is *prima facie* evidence of adultery if one spouse infect the other with venereal disease.[5]

Where the adultery is inferred from the fact of the wife's pregnancy at a time when it is alleged to be impossible that this could be the result of marital intercourse, the fact of the husband's non-access must be proved. In such cases it is not necessary to libel the name of the paramour or to specify acts of adultery.[6]

Presence in Houses of Ill-Fame.—The fact of a husband or wife going to a brothel, is strong presumptive evidence of adultery. It may, however, be rebutted.[7] *E.g.*—in a case where the wife had been a prostitute, the fact of her being seen in brothels might be explained on the ground that she visited her former associates.[7] In one case, the defence that husband went to brothels as a member of a Female Aid Society, was repelled.[8]

In another case, it was proved that co-defender had taken wife to a brothel. But, on evidence that she was ignorant of the character of the house, the fact of adultery was found not to be established.[9]

[1] *Davidson* v. *D.*, 1860, 22 D. 749.
[2] 37 & 38 Vict. c. 64, §§ 1, 3.
[3] *Burgess* v. *B.*, 1817, 2 Hagg. C.R., at p. 229.
[4] *Whyte* v. *W.*, 1884, 11 R. 710.
[5] *Popkin* v. *P.*, 1 Hagg. E.R. 767; *Collett* v. *C.*, 1838, 1 Curt., at p. 688; *King* v. *K.*, 5 Notes of Cases, 252; and *see Morphett* v. *M.*, 1869, L.R., 1 P. and D. 702.
[6] *Tulloh* v. *T.*, 1861, 23 D. 639.
[7] *Astley* v. *A.*, 1828, 1 Hagg. E.R. 719; *Marshall* v. *M.*, 1881, 9 R.; *Kenrich* v. *K.*, 1832, 4 Hagg. E.R., at p. 138.
[8] *Ciocci* v. *C.*, 1853, 1 Spinks, 121.
[9] *Edward* v. *E.*, 1879, 6 R. 1255.

Extra-Judicial Confessions. — Such admissions of guilt made by the defender, *ante litem motam*, are important adminicles of evidence. The Court will jealously guard against the risk of collusion, but if satisfied on this head will attach great weight to such confessions of guilt.[1] But the admissions must be clear and unequivocal.[2] Statements made by the alleged paramour are not admissible if they were made outwith the presence of the defender, and not communicated to him.[3]

Ill.—At trial the only evidence consisted of confession by wife. On a subsequent day, counsel for the co-respondent stated that he admitted the adultery. The Court, being satisfied of *bona fides*, granted decree.[4]

Ill.—Where the only evidence of adultery was that of the alleged paramour, a woman of bad character, the Court refused decree. But this was before it was competent for the respondent to be examined.[5]

As the confessions of the defender are not evidence against the co-defender, unless they have been communicated to him and not denied, the wife may be found guilty of adultery, though the rule of law prevents the fact being found proved against the paramour.[6]

Admissions. — The admissions of a defender are, in most actions, conclusive against him, it being against his interest to admit any fact founded on by the pursuer. But this value does not attach to admissions in consistorial causes, as both parties may desire to be divorced or separated. Accordingly, it has been provided by statute,[7] "that no decree or judgment shall be pronounced in any of the consistorial cases hereinbefore enumerated, whether it shall or shall not be made for the defendant, until the grounds of action shall be substantiated by sufficient evidence." The cases referred to

[1] *Robinson* v. *R.*, 1859, 1 S. and T. 362; *Le Marchant* v. *Le M.*, 1876, 45 L.J., P. and M. 43; *Williams* v. *W.*, L.R., 1 P. and D. 29.

[2] *Williams* v. *W.*, 1798, 1 Hagg. C.R., at p. 304; *Robinson, supra.*

[3] *Burgess* v. *B.*, 1817, 2 Hagg. C.R. 223; *Croft* v. *C.*, 1830, 3 Hagg. E.R., at p. 318.

[4] *Le Marchant, supra.*

[5] *Ginger* v. *G.*, 1865, L.R., 1 P. and D. 37.

[6] *Robinson* v. *R.*, 29 L.J., Mat. 17?; *Crawford* v. *C.*, 1886, 11 P.D. 150.

[7] 11 Geo. IV. and 1 Wm. IV. c. 69, § 36.

are declarators of marriage, legitimacy, bastardy, nullity of marriage, and actions of divorce or separation. It was laid down in one case that "sufficient evidence" means sufficient evidence independent of the admissions of party.[1] But this is too strongly stated. The Court will require evidence in addition to admissions, but if enough be proved to exclude the suspicion of collusion, great weight will reasonably be given to the admissions.[2]

Defences.—It may be pleaded that the marriage was a nullity.[3] But an impediment to intercourse supervening after marriage is no defence.[4] In England, a wife negatived the charge of adultery, in support of which strong presumptive evidence existed, by proving that she was *virgo intacta*.[5]

Such evidence was once held incompetent in Scotland, but it may be doubted if the grounds for refusing it were satisfactory.[6]

Condonation.—The pursuer in an action of divorce, on the ground of adultery, will be barred from insisting in it, if it appear that he has condoned the adultery founded on. Condonation cannot be conditional. In other words, the husband cannot take back his wife on condition that, if she is afterwards guilty of impropriety, short of adultery, he shall have the right of obtaining divorce, on the ground of the condoned acts of adultery.[7]

By the canon law, condonation *per verba* without return to cohabitation was sufficient to bar the right of action. Bankton[8] and Fraser[9] think that this is also the law of Scotland. But in a recent case this was doubted,[10] and in England nothing short of conjugal cohabitation amounts to condonation. In the leading case Lord Chelmsford said: "Words, however strong, can, at the highest, only be regarded as imperfect forgiveness, and unless followed by something which amounts to a reconciliation, and to a reinstatement of the wife in the condition in which she was before she transgressed, it must

[1] *Muirhead* v. *M.*, 1846, 8 D. 786.
[2] Dickson, § 284.
[3] *Serrell* v. *S.*, 1862, 2 S. and T. 422.
[4] *M.* v. *M.*, 1861, 31 L.J., P. and M. 168.
[5] *Hunt* v. *H.*, 1856, 1 Deane 121.
[6] *Davidson*, 1860, 22 D. 749.
[7] *Collins* v. *C.*, 1884, 11 R. H.L. 19.
[8] Bankton, 1, 5, 29.
[9] Fraser, ii. 1176.
[10] *Ralston* v. *R.*, 1881, 8 R. 371.

remain incomplete.[1] This does not, necessarily, imply a renewal of sexual intercourse.[2] The fact that the innocent spouse continued cohabitation will not support a plea of condonation, unless he had knowledge and not mere suspicions of the infidelity of the wife.

Ill.—Husband who had condoned previous acts of adultery continued to cohabit with wife for two nights after he suspected her of renewed adultery, until he got legal advice. Opinions were expressed that he was not barred by condonation.[3]

It was observed, by Sir J. P. Wilde: "If the evidence lead the Court to the conclusion that the husband did not thoroughly believe that the wife had been guilty, and, therefore, did not forgive her when he took her back, condonation is not established."[4]

It would, however, be condonation, if the husband's attitude of mind appear to have been one of determination to continue to cohabit with wife, whether she was guilty or not.[5]

When the husband and wife continue to reside in the same house, the presumption is that there is condonation. But this may be rebutted.

Ill.—Wife slept at husband's house the night after the last act of adultery charged (of which act he was cognisant). Held that the *onus* of showing that they did not sleep together that night lay on the husband.[6]

Ill.—When husband, at the desire of the wife's friends, let her stay in the house, her maid sleeping with her, the plea of condonation was repelled.[7]

Condonation by Wife.—The Court will be much slower in coming to the conclusion that a wife has condoned her husband's adultery. This arises partly from the hardship of holding that a wife, who has, perhaps, no means of support, bars herself from obtaining relief, because she does not at once leave her husband's house on discovering his infidelity. It is partly due also to social sentiment. Many persons, especially men, would regard with a degree of contempt a husband who

[1] *Keats* v. *K.*, 1 S. and T., 334.
[2] *Ibid.*
[3] *Collins* v. *C.*, 10 R. 250, and 11 R. (H.L.) 19.
[4] *Ellis* v. *E.*, 1865, 4 S. and T. 154.
[5] *Keats, supra.*
[6] *Timmings* v. *T.*, 3 Hagg. 83.
[7] *Lord Cloncurry's* Case, Macq. H.L. 607 (1811).

tolerated his wife's transgressions, but would look upon the wife's forgiveness of similar wrongs as a sign of virtue. "It is not necessary," says Lord Stowell, "for a wife to withdraw from cohabitation on the first or second instance of misconduct; it is legal and meritorious in her to be as patient as possible, forbearance does not weaken her title to relief."[1]

Ill.—Spouses married in 1835, cohabit till 1837. Husband then goes to live with a woman who had been his mistress ever since the marriage. In 1845 this woman dies, and husband wishes to return to wife. She sues for divorce, and is held not barred by knowledge and *mora*.[2] It is stated by Lord Fraser[3] that condonation so completely blots out the transgression that it can never again be referred to in a matrimonial cause. The English doctrine is that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the Courts take cognisance. It has been authoritatively settled that this is not the law of Scotland.[4] But it was held in a recent case that condoned adultery may be referred to as throwing light upon doubtful conduct proved in a subsequent action. The subsequent suspicious conduct must be first proved as a fact before the condoned acts can be referred to. Lord Young gave this illustration: A woman is alone with a man in a park. If she is a virtuous woman that gives rise to no suspicion. But if previous misconduct (*i.e.*, although condoned) with men be proved, her conduct may be otherwise interpreted. Yet such prior misconduct cannot be proved in order to establish that she *was* in the park.[5]

Condonation will not bar the aggrieved spouse from raising an action of damages against the paramour.[6] It may diminish the damages.

It is *pars judicis* to take notice of condonation though not pleaded.[7] The plea has been stated by creditors. But it is

[1] *Popkins* v. *P.*, 1 Hagg. 768; *Durant* v. *D.*, 1 Hagg. Eccl. 768; *Beety* v. *B.*, *ibid.* 793.

[2] *Angle* v. *A.*, 12 Jur. 525.

[3] ii. 1179.

[4] Collins, 11 R.H.L. 19 *supra*.

[5] *Robertson* v. *R.*, 1888, 15 R. 1001.

[6] *Macdonald* v. *M.*, 1885, 12 R. 1327.

[7] *Curtis* v. *C.*, 1854, 4 S. and T. 234; but *see Suggate* v. *S.*, 1859, 1 S. and T. 492. As to whether Lord Advocate must insist, *see Ralston* v. *R.*, 1881, 8 R. 371.

incompetent for them to plead condonation and yet not object to the divorce so far as it affects *status*.[1]

Condonation after Lord Ordinary's Judgment.—In a singular case it was pleaded on a Reclaiming Note that there had been condonation after the Lord Ordinary had granted divorce. If the Court had affirmed his judgment the plea would have been irrelevant. They found, however, that the act of adultery on which he founded was not proved, and admitted the plea of condonation as a relevant defence to other acts which the Court found proved.[2]

Connivance or *Lenocinium*.—It is a general principle of law that a pursuer shall not be allowed to claim a remedy for a wrong to which he has consented, or which has been induced by his own fault. Accordingly a husband or wife who has consented to the adultery of the other spouse, cannot claim a divorce for such adultery. "By connivance," says Sir Cresswell Cresswell, "I understand the willing consent of the husband, that the husband gives a willing consent to the act, although he may not be an accessory before the fact, that although he does not take an active step towards procuring it to be done, he gives a willing consent and desires it to be done."[3] Connivance is something more than mere negligence, inattention, dulness of apprehension, or indifference.[4] It is necessary to show an intention that guilt should ensue, or such extreme negligence as to the conduct of the wife, and such encouragement of acquaintance as were likely to lead to an adulterous intercourse.[5] A man is presumed to intend that the natural and probable consequences of his acts should ensue, and a husband is guilty of connivance who wilfully abstains from taking steps to prevent an adulterous intercourse, which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur.[6]

Where a man who had married a prostitute suggested that

[1] *Greenhill* v. *Ford*, 1822, 1 Sh. 296, 2 Sh. App. 435.

[2] *Robertson* v. *R.*, 1888, 15 R. 1001.

[3] *Marris* v. *M.*, 1862, 31 L.J., P. and M., at p. 72.

[4] *Allen* v. *A.*, 1859, 30 L.J., P. and M. 2; *Rix* v. *R.*, 1777, 3 Hagg. E.R. 74. Connivance is also discussed in *Munro* v. *M.*, 1877, 4 R. 322.

[5] *Gilpin* v. *G.*, 1804, 3 Hagg. E.C. 150; *Stone* v. *S.*, 1844, 1 Rob. 99.

[6] *Gipps* v. *G.*, 1863, 32 L.J., P. and M. 78.

she should return to her former course of life and deserted her, the plea of connivance was sustained.[1]

But where a similar suggestion was made *in rixa*, and not intended to be acted upon, and the wife's adultery was disconnected in point of time from the suggestion, the plea was repelled.[2] "To found the plea of *lenocinium*, it must not only be proved that the husband used the expressions founded on seriously—that is to say, that he meant that his advice should be acted on—but that the wife understood that they were so meant, and that she acted on the advice."[3] Connivance being of a criminal character, the evidence must be grave, and if the facts are equivocal it will not be presumed.[4]

A husband who suspects his wife of infidelity is not guilty of connivance because he causes her to be watched. But when his agent for this purpose attempts to combine the characters of detective and procurer, and causes the act of adultery to be brought about, the husband will be barred though the agent went beyond his instructions.[5] It is not connivance to take a wife to a brothel, except with the intention of tempting her to commit adultery. *E.g.*—It may be proved that the husband took the wife to a brothel to get drink,[6] or to be identified by the brothel-keeper.[7]

Connivance may be pleaded against the wife, but will be less readily inferred than against the husband.[8]

Ill.—If a wife, though unwilling that her husband should live in adultery, ultimately consents, for the sake of obtaining an allowance from him, this is connivance.[9]

Connivance may be inferred from long delay in taking proceedings. It would perhaps be more correct to say that in such cases the pursuer is barred by *mora* and acquiescence.[10] Lord Stowell says: "The Court will be indisposed to relieve a

[1] *Marshall* v. *M.*, 1881, 8 R. 702.

[2] *Hunter* v. *H.*, 1883, 11 R. 359.

[3] *Ibid.*, at p. 367, *per* L.P. Inglis.

[4] *Phillips* v. *P.*, 1844, 1 Rob. 144.

[5] *Picken* v. *P.*, 1854, 34 L.J., P. and M. 22; *Gower* v. *G.*, 1872, L.R., 2 P. and D. 428; *Sugg* v. *S.*, 1861, 31 L.J., P. and M. 41, not followed.

[6] *Donald* v. *D.*, 1863, 1 M. 741.

[7] *Wemyss* v. *W.*, 1866, 4 M., at p. 663.

[8] *Turton* v. *T.*, 1830, 3 Hagg. E.R. 338.

[9] *Ross* v. *R.*, 1869, L.R., 1 P. and D. 734.

[10] *Crewe* v. *C.*, 1800, 3 Hagg. E.R., at p. 131; *see* cases on *Mora*, *infra*, p. 54.

party who appears to have slumbered in sufficient comfort" over the knowledge of his wrongs.[1]

It has been laid down that if a husband have once connived at his wife's adultery he is barred from suing for a divorce on the ground of any other act of adultery, either with the same or another man. He cannot say "*non omnibus dormio*," or "*non semper dormio*."[2] But this doctrine is doubted by Lord Fraser,[3] and is probably a question of circumstances.

Collusion.—This consists in the permitting of a false case to be substantiated or keeping back a just defence.[4] It is collusion if it be shown that the husband promised the wife he would commit adultery that she might get a divorce, and she has him watched to procure evidence.[5]

Ill.—The plea was sustained when it was proved that the husband had had frequent interviews with the wife before and after the raising of the action, and had given her money and urged her not to oppose the divorce.[6]

It is collusion when the parties agree together "to withhold from the Court pertinent and material facts," whether sufficient to establish a defence or not.[7]

Where A, a husband domiciled in England, was living in adultery, and was induced by B, who wanted to marry Mrs. A, to go for forty days to Scotland in order that she might get a divorce, the divorce so obtained was held by the House of Lords to be of no effect in England, as having been procured by collusion. The collusion, in Lord Chelmsford's view, was not in taking money to place himself within the jurisdiction

[1] *Mortimer* v. *M.*, 1820, 2 Hagg. C.R., at p. 313.

[2] *Lovering* v. *L.*, 1792, 3 Hagg. E.R. 85; *Gipps*, 32 L.J., P. and M., *supra*.

[3] 1191, and *see Hodges* v. *H.*, 1795, 3 Hagg., E.R. 118.

[4] So defined by Dr. Lushington in Swabey's "Law of Divorce," p. 18.

[5] *Todd* v. *T.*, 1866, L.R., 1 P. and D. 121.

[6] *Barnes* v. *B.*, 1867, 1 L.R., P. and D. 505. But *see Graham* v. *G.*, 1881, 9 R., at p. 334, where Lord Young puts the question if a husband, seeking divorce on grounds he believes to be true, promises his wife a provision on condition she shall abstain from maintaining a false defence, whether this is collusion.

[7] *Per* Lopes, L.J., *Butler* v. *B.*, 1890, 15 P.D., at p. 74. "Collusion means some fraudulent agreement to present to the Court a falsity, or keep back a truth," *per* Bramwell, B., in *H.* v. *C.*, 1860, 1 S. and T., at p. 617.

of the Scotch Courts, but in agreeing to forfeit money if he gave information which would be prejudicial to the divorce being obtained.[1]

It would seem to be collusion if both parties concur in getting up evidence in support of the divorce, even if the evidence be true.[2] But the fact that the wife, the defender, gave the husband's solicitor a photograph of herself, and attended in Court to be identified, and for so doing received money from the solicitor, was not held to amount to collusion.[3]

Mora.—Long delay in bringing the action raises a presumption that the pursuer has acquiesced in the injury complained of, and unless satisfactorily explained will bar the suit.[4]

Ill.—Husband in 1878 obtained judicial separation on ground of wife's adultery. Wife continued to cohabit with the paramour. In 1882 husband petitioned for divorce. His suit was dismissed on ground of delay. This judgment was reversed after evidence as to the cause of delay, which was poverty.[5]

Ill.—Wife had waited eighteen years. Her reason was that the adultery was with her sister, and to spare her mother's feelings she delayed raising the action till the death of her mother. Divorce granted.[6]

Misapprehension of the law may excuse *mora*.[7] A pursuer is not obnoxious to the plea of *mora*, who being absent from the country at the time of the adultery, raises the action as soon as he returns.[8]

Adultery is also a Ground for Judicial Separation.—A pursuer who has preferred the minor remedy is not barred from subsequently suing for divorce for the same offence.[9]

[1] *Shaw* v. *Gould*, 1868, L.R., 3 H. of L. Ca., at p. 74.

[2] *Midgeley* v. *Wood*, 1861, 30 L.J., P. and M., at p. 59.

[3] *Harris* v. *H.*, 1862, 31 L.J., Mat. Ca. 160.

[4] Bell's Prin., § 1531 ; *Boulting* v. *B.*, 1864, 3 S. and T. 329 ; *Pellew* v. *P.*, 1859, 1 S. and T. 553 ; *Nicholson* v. *N.*, 1873, L.R., 3 P. and D. 53.

[5] *Mason* v. *M.*, 1883, 8 P.D. 21.

[6] *Newman* v. *N.*, 1870, L.R., 2 P. and D. 57.

[7] *Tollemache* v. *T.*, 1859, 1 S. and T. 557.

[8] *Hellon* v. *H.*, 1873, 11 M. 290.

[9] *Geils* v. *G.*, 1850, 13 D., at p. 333, and 1 Macq., at p. 267 ; Ersk. i. 6, 19 ; *see Ciocci* v. *C.*, 1859, 29 L.J., P. and M. 30 and 60.

Action of Damages against the Paramour.—A husband is entitled to raise an action for damages against the seducer of his wife. The ground is generally put as loss of her society—*per quod consortium amisit*—but compensation is also due for the outrage done to his feelings.[1] Damages may be sued for without divorce, or may be made an ancillary conclusion in divorce proceedings. In either case it is competent to send the question to a jury, but the practice is for the Court to decide both as to the divorce and the amount of damages.

A husband who condones his wife's adultery is not thereby barred from suing the paramour for damages.[2]

But a husband who had himself been guilty of adultery which his wife had condoned was held, in England, not entitled to damages from her paramour,[3] but decree of divorce was here refused.

How Damages are Assessed.—Sir James Hannen, in directing a jury, said, in assessing damages against a co-respondent, the jury ought not to seek to punish him, but ought only to give compensation for the loss which the husband had sustained, and must consider whether this loss was caused by the act of the co-respondent. They might consider the fact that the husband had allowed the wife to live apart and knew she had no means of support. The means of the co-respondent were not in any way to be considered as a measure of damages.[4]

In mitigation it may be proved that the marriage was unhappy,[5] that the husband had shown indifference to the wife's reputation,[6] or had himself been guilty of adultery,[7] or other grounds stated for inferring that the husband set a low value on the wife's society. The low character of the wife may also be pleaded.[8]

[1] *Glover* v. *Samson*, 1856, 18 D. 609; *Baillie* v. *Bryson*, 1818, 1 Mur. 317.

[2] *Macdonald* v. *M.*, 1885, 12 R. 1327.

[3] *Story* v. *S.*, 1887, 12 P.D. 196.

[4] *Keyse* v. *K.*, 1886, 11 P.D. 100.

[5] *Trelawney* v. *Coleman*, 1817, 2 Stark. 191; *Willis* v. *Bernard*, 1832, 8 Bing. 376.

[6] *Calcraft* v. *Harborough*, 1831, 4 C. and P., at p. 301.

[7] *Bromley* v. *Wallace*, 1802, 4 Esp. 237; *Baillie* v. *Bryson*, 1818, 1 Mur., at p. 330.

[8] *Manton* v. *M.*, 1865, 4 S. and T. 159.

Ill.—It appeared that the wife, though cohabiting with her husband, was leading an abandoned life when the co-respondent made her acquaintance. Evidence made it, at least, probable that the husband was aware of her infidelity. No damages.[1]

Unless there is evidence that the co-defender knew the defender was a married woman he will not be found liable in damages.[2]

A co-respondent against whom heavy damages were claimed, was held entitled to recover letters between husband and wife, between certain dates, containing material information which would reduce damages.[3] The Court is not at liberty to recognise an agreement between the counsel for the husband and the paramour respectively, as to the amount of damages.[4]

[1] *Manton* v. *M.*, 1865, 4 S. and T. 159.

[2] *Teagle* v. *T.*, 1858, 1 S. and T. 188; *Priske* v. *P.*, 1860, 4 S. and T. 238; and *see Kydd* v. *K.*, 1864, 2 M. 1074.

[3] *Pollard* v. *P.*, 1864, 3 S. and T. 613.

[4] *Callwell* v. *C.*, 1860, 3 S. and T. 259.

CHAPTER VII.

JUDICIAL SEPARATION.

It is competent for the Court, for certain definite causes, to ordain that the spouses shall for the future cease cohabitation, although the *vinculum matrimonii* remains unsevered. Public policy is strongly against increasing the number of persons living as if single, and yet not free to marry—husbands without wives, and wives without husbands. It is only grave and weighty causes, therefore, that the Court will find sufficient to justify the spouses in living apart. The grounds recognised by the law of Scotland are—(1) adultery, and (2) cruelty.

As regards adultery, nothing need here be said. If the innocent spouse prefers the remedy of judicial separation to that of divorce, it is equally competent. The same defences may be pleaded—connivance, collusion, condonation.

(2.) **Cruelty or *Saevitia.***—Gross cruelty, inflicted by either spouse on the other, will ground the decree. The usual form of decree is the following:—"Finds it proved that the defender, A B, has been guilty of grossly abusing and maltreating C D, his wife; therefore finds that the said C D has full liberty and freedom to live separate from the said A B, her husband: Ordains the said A B to separate himself from the said C D, *a mensa et thoro*, in all time coming, and decerns."

Lord Fraser maintains the opinion that it is competent for the Court which grants such a decree, to recall it "on being satisfied that the cause for which it is granted no longer exists; the wrongdoer having reformed his life, and by a thorough repentance and reformation rendered it safe to cohabit with him." But this doctrine has been negatived in a recent case, and it has been held that a decree of separation is permanent, and cohabitation can only be renewed by the

consent of both spouses. A wife obtained decree of separation for cruelty. The cruelty was communication of syphilis. Five years after the husband raised a declaratory action that there was no longer any reason for the separation, and that the Court should recall the decree on the ground that his health was now completely restored, and his wife had no further danger to fear from cohabitation. The action was dismissed as incompetent.[1]

What is Cruelty?—(1.) By the husband. Cruelty is in each case a question of fact. The issue before the Court is —Does the husband's violence imperil the wife's life or bodily health? The ground of interference is not to punish the husband for the past, it is to protect the wife for the future. The question is always, "Whether the wife can with safety to life and health live with the husband now?"[2] Accordingly, the Court will decline to pronounce decree, even though considerable violence may have been used by the husband, if they are satisfied that there is no serious risk of its repetition.

The following dictum of Lord Brougham in a well-known case[3] was cited by Lord President Inglis as the best exposition of the law[4]:—"Personal violence as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health; these are, both by the law of Scotland and England, a sufficient ground for divorce, *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health, that, too, must be taken as regarded by the law of Scotland and by the law of England a sufficient ground for divorce." The cases are infinitely various in their circumstances, and the Court will review the whole history of the married life, and consider the position of the parties. There may be violence so gross as not to be justified by provocation, however great or continued. On the other hand, an act of violence, not directly endangering life, may be regarded as insufficient, if proved to have been committed in exasperation.

[1] *Strain* v. *S.*, 1890, 17 R. 297.

[2] *Per* Lord President Inglis in *Graham* v. *G.*, 1878, 5 R., at p. 1095.

[3] *Paterson* v. *Russell*, 1850, 7 Bell's App., at p. 363.

[4] *Graham* v. *G.*, 1878, 5 R., at p. 1095; and *see Evans* v. *E.*, 1790, 1 Hagg. C.R., at p. 38.

provoked by the injudicious language or conduct of the wife. "That which is violent, if aggressive, may be justified or excused if defensive; and if the wife gave the first blow, if she was the *prior laedens*, though to return it may not be manly, the law will allow for human infirmity under such gross and scandalous indignity."[1] This case is an illustration of very unhappy married life, with constant quarrellings and considerable mutual violence, where the Court declined to decree separation. There must, however, be some proportion between the provocation and the violence. Dr. Swabey says, in a leading case: "If, however, it should appear that even misconduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife's, positive misconduct."[2]

Cruelty is cumulative in character. It has been said that it must be sustained, and indicate a continued want of self-control, and must be referable to permanent causes so as to endanger the future safety of the wife's person or health.[3] But a single act of violence may be so great as to sufficiently disclose a recklessness on the husband's part as to his wife's safety or health which will be a sufficient ground of decree.[4]

Threats.—"Hard words," it is said, "break no bones," and it will not be enough to prove the use of very violent and insulting language. Nor even if couched in the form of a threat to inflict serious bodily harm, if, in the view of the Court, the husband had no intention of carrying out his menace, and the wife knew as well as he did that it was *brutum fulmen*. The Court will distinguish between words

[1] *Per* Sir W. Scott in *Waring* v. *W.*, 1813, 2 Hagg. C.R., at p. 157. *Ill.*—Wife going out for day is taking with her the key of the wine-cellar. She refuses to give it to husband. In taking it from her by force she sustains slight injuries. Not cruelty (*Oliver* v. *O.*, 1801, 1 Hagg. C.R., at p. 371).

[2] *Best* v. *B.*, 1823, 1 Add., at p. 423.

[3] *Plowden* v. *P.*, 1870, 23 L.T. 266; *Power* v. *P.*, 1865, 4 S. and T. 173; *Graham* v. *G.*, *supra*.

[4] *Holden* v. *H.*, 1810, 1 Hagg. C.R., at p. 458; *Smallwood* v. *S.*, 1861, 2 S. and T. 397, case where one act held insufficient; *Reeves* v. *R.*, 1862, 3 S. and T. 139; *Popkin* v. *P.*, 1794, 1 Hagg. E.R., at p. 768, *note*; *Geils* v. *G.*, 1848, 6 Notes of Cases, 134; *Strain* v. *S.*, 1885, 13 R. 132.

of idle abuse and words of menace indicating a malignant intent, such as might reasonably make the wife apprehensive as to her future safety.[1]

Ill.—Husband threatens to cut his wife's arm off and beat her brains out with it, and to pull her out of bed and kick her up and down the room. He once seized a red-hot poker and threatened to run her through with it. Held that cruelty was relevantly averred.[2]

Insults.—Insulting language, though carried to great lengths, is not cruelty. But there are indignities so gross as to be far more painful than blows. There are many dicta to the effect that spitting in a wife's face is legal cruelty. It is not likely that separation would be pronounced on proof of a single act of this kind, taken by itself, but in conjunction with other acts it will weigh heavily with the Court in estimating whether the cohabitation has become unbearable.[3]

Ill.—A husband anxious to disembarrass himself of his wife's company took her by the shoulders in a street, pushed her against a wall, and with the use of filthy language thrust his umbrella against her person. A man passing by took her for a prostitute and seized hold of her leg. Held cruelty.[4]

Habitual coldness and neglect does not amount to cruelty.

Ill.—A husband after four months of marriage ceases to speak to his wife, leaves her nearly all day, occupies a separate bedroom, and declares his determination to continue in this course. Held not cruelty.[5]

Ill. — Husband treats wife with habitual neglect and aversion. Abstains from marital intercourse. She discovers that he is carrying on adulterous intercourse with a servant in the house. Not cruelty.[6]

Perhaps the most difficult class of cases is that in which the husband abstains from actual violence but exercises a course of studied and calculated tyranny. It is no ground for separation that the marriage is unhappy, that the temper and

[1] *D'Aguilar* v. *D'A.*, 1794, 1 Hagg. E.R., at p. 775; *Oliver* v. *O.*, 1801, 1 Hagg. C.R., at p. 364; *Chesnutt* v. *C.*, 1854, 1 Spinks, at p. 198.

[2] *Hulme* v. *H.*, 1823, 2 Add. 27.

[3] *Waddell* v. *W.*, 1862, 2 S. and T. 584.

[4] *Milner* v. *M.*, 1861, 4 S. and T. 240.

[5] *Paterson* v. *P.*, 1850, 7 Bell's App. 337 (in C. of S. 11 D. 421).

[6] *Cousen* v. *C.*, 1864, 4 S. and T. 164.

tastes of the spouses are incompatible, or even that the husband is constantly in a state of degrading intoxication and in the habit of addressing his wife in terms of the grossest abuse.[1] But habitual intoxication is material in considering if the wife's safety is endangered.[2] And where there has been actual violence, it is no defence that it was committed in drunkenness.[3] There is, however, a kind of case where something like a deliberate system of cruel tyranny is carried out with the intention of breaking the wife's spirit. Body and mind are inextricably bound up in our constitution, and mental distress is one of the commonest causes of bodily derangement. A wife's health may be slightly endangered by knocking her down; it may be shattered by years of misery and irritation. The Court will not grant decree because the marriage is so unhappy or the husband is so addicted to some vice that the wife's health is broken down by misery.[4] But where a husband, on the ground that his wife had conspired to prove him guilty of a heartless breach of trust (which appeared to be an unwarrantable inference from a letter of hers), practised a system of tyranny to induce her to confess her sin, which she denied having committed, decree was given. The facts were these: The lady, who was over sixty, had been married twenty-seven years. To bring her to contrition she was entirely deposed from her natural position as mistress of the house. She was debarred the use of money. Every article of dress, every trifle which she required, had to be put down on paper, and her husband provided it if he thought proper. At one time the doors were locked to keep her in; at another a man-servant was deputed to follow her; at another the husband insisted on accompanying her himself whenever she wanted to go out. He spoke to her in the language appropriate to a woman guilty of adultery. He took no meals with her, he occupied a separate bedroom, he passed no portion of the day, however small, in her society. Everybody she desired to see was forbidden the house. She was not allowed to post a letter

[1] *Chessnutt, Geils*, cit.; *Greenway* v. *G.*, 1848, 6 N. of C. 221.

[2] *M'Gaan* v. *M'G.*, 1880, 8 R. 279.

[3] *Fulton* v. *F.*, 1850, 12 D. 1104.

[4] *Chessnutt*, cit., where, however, it may be doubted if Dr. Lushington does not state the law too strongly.

which he had not read. The care of the house was given to a woman who was told to take no orders from the wife. Her health was so broken that medical men said the result of continued cohabitation would probably be paralysis or madness. The full Divorce Court, affirming Lord Penzance, found this cruelty.[1] And in a case where the harsh and irritating conduct of the husband seriously affected the wife's health, Butt, J., said: "Although I am not aware that there were any blows, still, if the conduct of the husband be such as to endanger the life or even the health of the wife, that is cruelty in every sense of the word, whether we talk of 'legal cruelty' or anything else."[2]

The case of Kelly was expressly followed very recently in the following state of facts. The husband occupied a separate room, professsed loathing for his wife, used violent language to her, and treated her with consistent neglect. He kept a mistress during the whole period of the marriage. Medical evidence was given as to the effect of his treatment on the wife's health.[3] The case was practically undefended, and this fact was referred to in a subsequent case as weakening its authority.[4] The facts of *Beauclerk's* case were the following: The husband had at one time left his wife and eloped with a woman with whom he spent some months. He subsequently returned to cohabitation. During cohabitation his conduct was openly profligate, and he habitually told his wife of his amours. There was medical evidence that her distress at his profligacy led to great nervous exhaustion, long fainting fits, and weak irritable heart. Butt, J., held this did not amount to cruelty. The Court of Appeal did not decide this question, dismissing the suit on the ground of the wife's delay of twenty years in bringing the suit. Lord Justice Lindley said: "I will assume that there has been such misconduct on the part of the husband as to have injured his wife's health to his knowledge, and I will assume that, notwithstanding that knowledge, he continued such misconduct. If that was the true result of the evidence, I think it would follow that a case of cruelty had been made out."

[1] *Kelly* v. *K.*, 1870, L.R., 2 P. and D. 59.

[2] *Mytton* v. *M.*, 1886, 11 P.D., at p. 143.

[3] *Bethune* v. *B.* [1891], P. 205.

[4] *Beauclerk* v. *B.* [1891], P. 189.

And Lord Justice Lopes said he was not at all prepared to hold that the facts did not amount to legal cruelty. There appeared to be in this case some evidence of systematic intention on the part of the husband to injure the wife's health, or at least of reckless negligence about it, in narrating his profligate conduct to her after perceiving the injurious effect of these disclosures. But even if this be so, the case indicates a disposition on the part of the Court to extend the principle of the case of *Kelly*. It was suggested as a sound proposition in law that the Court would interfere in any case when a man with ingenuity makes his wife's life a burden to her, without causing her bodily pain or apprehension. This is inconsistent with the older decisions. *E.g.*—Dr. Lushington says: "Mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband (and this was a case where a medical man said the wife's excitement bordered on insanity), does not constitute cruelty, except such conduct was accompanied with violence or threats of violence."[1]

The case of *Kelly* was one of almost diabolical cruelty, perpetrated by a man of whose amendment there was little hope, because he evidently believed he was acting from a sense of duty. At present there is no decision in Scotland which extends the law to the point indicated in *Bethune* and *Beauclerk*, and it may be doubted whether the rule will be so far relaxed.[2] In a case where a servant in the house gave birth to a child of which the husband admitted the paternity, it was held that the wife was justified in non-adherence, the girl still remaining in the husband's house. But the ground of judgment, though not clearly stated in the report, seems to have been that adultery was proved, and not that the retaining of the girl was such an insult as to be legal cruelty.[3]

Attempted Violence.—Seeing that menaces, if serious, amount to cruelty, it follows that an attempt to commit an act of violence, though unsuccessful, may have the same weight. The object of interference being to protect the wife, the Court is not bound to withhold its aid till the wrong has actually been done.

[1] *Chessnutt*, 1854, 1 Spinks, at p. 199.

[2] See, however, *Mackenzie* v. *M.*, 1892, 30 S.L.R. 276.

[3] As to which, *see* *Lessly* v. *Nairn*, 1712, 4 Br. Supp. 880, and *Cousen* v. *C.*, 1865, 4 S. and T. 164; *Latham* v. *Proven*, 1823, 2 S. 284.

Ill.—A husband throws a fire-screen at his wife, intending to hit her, and with a violence which would have made the blow dangerous. This is cruelty though it misses her.[1]

It would seem to be cruelty to terrify a wife into leading a life of prostitution against her will. (See *Coleman* v. *C.*, 1866, L.R. 1 P. and D. 81.)

It is not cruelty to sleep in a separate bed.[2]

Communication of Disease.—The wilful communication of the itch has been held to be cruelty, though perhaps not such cruelty as, standing alone, would justify the interference of the Court.[3] It would appear on principle that a husband suffering from any infectious disease who maliciously or recklessly communicated the infection to his wife, would be guilty of cruelty. But such a case would be difficult of proof. *E.g.*—A husband returns home after an absence, being aware that he is in the early stage of an infectious fever. His wife believes him to be in good health. If in these circumstances he occupies the same bed with her, would that not be cruelty of a more gross kind than if he had struck her?[4]

Communication of Venereal Disease.—It is stated by Lord Fraser that a husband is guilty of cruelty who wilfully and knowingly communicates venereal diseases to his wife. This doctrine was canvassed in a recent case in which all the authorities were reviewed. Lord Shand thus states the law: "I am of opinion that if a husband has reason to believe that an act of connection would be attended with risk of communicating venereal disease to his wife, and he nevertheless recklessly has such connection, with the result of communicating disease, he is guilty of such cruelty as would warrant decree of separation."[5] This is in accordance with the principle that a man is presumed to intend the natural consequences of his act. If the husband shows that he had reasonable grounds for believing himself cured, this will be a good defence.

Ill.—A man contracts syphilis in November. He consults a

[1] *D'Aguilar* v. *D'A.*, 1794, 1 Hagg. E.R. Supp., at p. 778.

[2] *Paterson*, 7 Bell's App. 337, cit.; *D'Aguilar* v. *D'A.*, *supra*, at p. 775.

[3] *Chesmutt*, 1854, 1 Spinks, at p. 205.

[4] *See dictum* of Hawkins, J., in *The Queen* v. *Clarence*, 1888, 22 Q.B.D., at p. 52.

[5] *Strain* v. *S.*, 1885, 13 R., at p. 136. *See* also *Boardman* v. *B.*, 1866, 1 P. and D. 233; *Morphett* v. *M.*, 1869, L.R., 1 P. and D. 702; *Collett* v. *C.*, 1838, 1 Curteis' E.R. 678; *Brown* v. *B.*, 1865, 1 P. and D. 46.

quack practitioner who treats him for the complaint. In April he is advised by this man that he is cured, and may safely marry, as he does. His wife contracts infection. Held cruelty.[1]

The question of *onus* is sometimes difficult. When the wife contracts disease, is there any presumption of fact that she has been infected by her husband?

Ill.—A wife who has been married eight months is found to be suffering from the secondary symptoms of syphilis. The husband is at once inspected by medical men who say he is free from disease, and they would have expected to find traces of it if he had been infected at or since the date of the marriage. The husband swore that he never had syphilis. The wife denied connection with any other man before or after marriage. There was no other evidence. It was found by a jury that the husband had been guilty of cruelty in communicating disease. The full divorce court (Willes, J., dissenting) held there was not sufficient evidence to support a verdict.[2]

It would seem to be settled by the case of *Morphett* that there must be evidence that the husband was suffering from disease. It will not be inferred from the state of the wife, for the wife might have contracted it by an adulterous connection or from illicit intercourse before marriage. Or she might have been infected in some other way than by sexual intercourse.

When the Husband is Infected with Disease at Marriage, but the Wife does not Contract it.—It was held by Dr. Lushington that in this case the charge of cruelty was not sustained. There must be actual communication of the disease.[3] It seems difficult to reconcile this with the general principles of law. If it is cruelty to throw a fire-screen at a wife, though it does not hit her, it is difficult to see why it should be less so to wilfully expose her to the risk of a loathsome disease. Where the husband was suffering from disease, and the wife on that account refused to sleep with him, attempts by him to compel her to do so was held by Lord Stowell to be cruelty.[4]

Confining wife to house.—It is said by Lord Fraser that

[1] *Strain* v. *S.*, 1885, 13 R. 132.
[2] *Morphett*, L.R. 1 P. and D. 702 cit.
[3] *Ciocci* v. *C.*, 1853, 1 Spinks, at p. 132.
[4] *Popkin* v. *P.*, 1794, in note, 1 Hagg. E.C., at p. 768.

it is not cruelty if the husband "confines his wife to the house, or at least directs her movements in such a manner as to prevent her going to places and engaging in pursuits of which he disapproves." But it is, to say the least, very questionable whether a husband who locks his wife in her room to prevent her going out—*e.g.*, to the theatre—would not be guilty of cruelty. In the recent case of *Jackson* it was said that a husband who met his wife on the stairs preparing to elope might be justified in restraining her by force. But this falls far short of the proposition of Lord Fraser.[1]

The refusal of necessaries to the wife is cruelty if the husband is able to supply them. And in judging of the question, What are necessaries? some account will be taken of the position of the parties.[2] At the same time it must be remembered that the husband is the judge as to the scale of expenditure on which the household is to be conducted. And if, having an income of £1000 a-year, he insists on living on £100, his wife cannot complain of cruelty though denied many of the comforts and elegancies of life, provided he supply her with good and sufficient food and clothing.

Cruelty committed in fit of insanity.—If the husband be actually insane, the wife's remedy is to have him placed under restraint. In such a case the Court will not decree judicial separation.[3] For it would be an injustice to the insane husband to release the wife from co-habitation on proof of an injury referable to a cause which might be temporary. It is *pars judicis* to notice evidence directly proving insanity, though this is not pleaded as a defence.[4] But where there is merely proof of violent and ungovernable temper, the Court will not infer there is insanity, or order inquiry into this matter. They will have regard only to the acts done.

Dr. Lushington thus stated the law: "Even if I were satisfied that conduct, dangerous in itself, arose from morbid feelings out of the control of the husband, I must act, if the danger exists, though it is not in my province to inquire into

[1] *R.* v. *Jackson* [1891], 1 Q.B., at pp. 679 and 683.

[2] *Dysart* v. *D.*, 1 Rob. E.R., at p. 111.

[3] *Stewart* v. *S.*, 1870, 8 M., at pp. 828 and 831; *Hall* v. *H.*, 1864, 33 L.J., P. and M. 65.

[4] *Hall*, cit.

or ascertain such cause."[1] It is no defence that the husband was of a violent and excitable temperament. As was observed in the case of *Steuart*, this is precisely wherein lies the wife's danger.

Violence committed under Influence of Disease.—Protection for the future being the ground of interference, it follows that where the acts complained of were committed under the influence of some malady which has since been cured, decree will not be granted unless there appears to be danger of its recurrence.

Sir Cresswell Cresswell says: "If indeed an act of violence were committed under the influence of an acute disorder, such as brain fever, and it were made clear that the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But, if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion which would be dangerous to a wife, then undoubtedly this Court is bound to emancipate her from such peril."[2]

It is no defence to a charge of cruelty that the violence of the husband was provoked by the drunkenness of the wife. "If she comes drunk into his shop he may take her by the shoulders and turn her out, but to follow after her and beat her is inexcusable: there is no law authorising a man to beat his drunken wife."[3]

Delirium Tremens.—So where the violence was done when the husband was suffering from *delirium tremens*, the Court did not refuse decree on proof that the disorder was removed.[4]

Constructive Cruelty.—Cruelty to children in the presence of their mother, and for the purpose of causing her pain, has been held to be cruelty to her.[5] But a strong case of this

[1] *Dysart* v. *D.*, 1 Rob., at p. 116, quoted with approval by Sir C. Cresswell in *Martin* v. *M.*, 1860, 29 L.J., P. and M., at p. 107; also *White* v. *W.*, 1859, 1 S. and T. 591.

[2] *Curtis* v. *C.*, 1858, 1 S. and T., at p. 213, a case which contains a very full exposition of the whole law as to cruelty.

[3] *Per* Sir Cresswell Cresswell, in *Pearman* v. *P.*, 1860, 1 S. and T. 601.

[4] *Marsh* v. *M.*, 1858, 1 S. and T. 312.

[5] *Suggate* v. *S.*, 1859, 1 S. and T. 490.

kind would need to be made out.[1] In an Irish case it was doubted if cruelty by a wife to children in presence of their father would be cruelty to him.[2]

Cruelty by the Wife.—There does not appear to be any reported case in Scotland in which a husband has obtained separation on the ground of his wife's cruelty. But it cannot be doubted that the remedy is open to either spouse.[3] In general it may be said that that which would be cruelty if practised by the husband on the wife will be none the less so if practised by the wife on the husband. And there are cases in which, in spite of the assumed superior strength of the husband, his safety may be directly endangered by the unrestrained violence of the wife.

Ill.—A wife repeatedly struck her husband violent blows with her clenched fist on his face. She tore his cheeks with her nails, thrust a lighted candle into his face so as to burn him, and flung a pewter quart pot at his head. Husband stated he was really afraid to live with her. Decree granted.[4]

Cruelty by the wife may be a ground of separation though the husband's safety be not endangered. The husband may be able to defend himself, but only by actual force, and the Court will not compel cohabitation when the spouses are on such terms that the violence of the wife may naturally provoke the husband to retaliate. In such a case it may be said that the wife's safety is endangered although she is the aggressor.[5] Nor is it a defence that the wife refused to permit marital intercourse.[6]

Condonation of Cruelty or *Remissio Injuriae*.—A wife who, in the knowledge of her husband's adultery, continues to cohabit with him, is held to have forgiven the offence. The case of cruelty is widely different. In divorce for adultery the offender is punished for the most flagrant violation of the

[1] *Birch* v. *B.*, 1873, 42 L.J., P. and M. 23.

[2] *Manning* v. *M.*, 1872, 6 Ir. Eq., at p. 427.

[3] Fr., p. 906; Ferg. Con. Law, pp. 182, 196; Rankine's Ersk., p. 64.

[4] *Kirkman* v. *K.*, 1807, 1 Hagg. C.R. 409; also *White* v. *W.*, 1859, 1 S. and T. 591.

[5] *Forth* v. *F.*, 1867, 36 L.J., P. and M. 122; *Prichard* v. *P.*, 1864, 3 S. and T. 523; *Furlonger* v. *F.*, 1847, 5 N. of C. 422, at p. 425.

[6] *Rowe* v. *R.*, 1865, 4 S. and T. 162.

marriage vow. In separation for cruelty the injured spouse is protected against danger to be apprehended. One looks to the past, the other to the future. It is not the duty of a wife to forgive her husband's adultery—at any rate, in no case is that her *legal* duty. But a wife is to be commended who does not rush to the Court for aid at the first sign of cruelty. Because she has borne much, and has forgiven many wrongs of this kind, is she to be deprived of her remedy when the cohabitation becomes intolerable ?[1] The following exposition of the law is by Lord President Inglis: "It is quite true that the wife condoned these acts of violence by coming back to him, but I am not sure that 'condone' is a very happy expression, because it leads one to think of the kind of condonation applicable to divorce for adultery. When an act of adultery has been condoned, it is wiped out and can never be referred to again, just as if it had never taken place; but it is not so in an action of separation on the ground of violence. When a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof with a view to determine what is the true issue of the case—viz., whether the wife can with safety to person and health live with him now. Because not only do they afford an indication of what the man's temper and habits are, but they also show what may be the result of still continuing to live with him, if there have been acts of recent occurrence, although these may not be of the same aggravated type."[2] But where there had been no recurrence of violence or threats of violence, and the spouses had continued cohabitation, there would be no ground for interference. A wife, who out of caprice, or to gain some ulterior end, desired to cease cohabitation, and came into

[1] *See* Opin. of Lord Meadowbank, in *Shand* v. *S.*, 1832, 10 S., at p. 388.

[2] *Graham* v. *G.*, 1878, 5 R., at p. 1095; *Macfarlane* v. *M.*, 1849, 11 D. 533.

Court and said, "Five years ago my husband knocked me down," would not be heard if the Court believed that her life was at present free from danger.[1] In England the doctrine is expressed in this way. An act of cruelty which the wife has condoned by continuing or returning to matrimonial cohabitation can never be founded on as a ground of action unless it be revived by a subsequent act of cruelty or other matrimonial offence. The law of Scotland is the same, though the expression "revival" has not been adopted.

Mora.—Delay will be considered mainly as an indication of the sincerity of the pursuer. The Court is only entitled to interfere to protect safety, and if the pursuer has delayed for a long period to take action, and gives no reasonable explanation of this delay, it is not unfair to assume that it is not personal safety, but some collateral purpose which is the true object of the action.

Ill.—A wife had been living apart under a deed of separation for twenty years. The cruelty was prior to this. It was "revived," according to English law, by adultery committed nineteen years after separation. The wife's explanation of her delay in averring cruelty was that she had hoped the husband might repent, and wanted to wait till her son grew up to see if he would desire her to seek divorce. Held by Court of Appeal that she was barred by delay.[2]

But where there is no ground for suspecting a collateral purpose, lapse of time is not an absolute bar.

Ill.—Wife left her husband on account of his adultery with her sister. Twenty years after she sued for divorce. She explained she had delayed her action till her mother's death to avoid wounding her feelings by the exposure. Explanation accepted.[3]

Ill.—Delay of six years. Cruelty proved. Wife had left husband's house, and had never returned. She admitted that she had no fear of violence while living apart, and that but

[1] *Westmeath* v. *W.*, 2 Hagg. E.R., supp. at p. 112; *see D'Aguilar*, 1794, 1 Hagg. E.R., at p. 781; *Wilson* v. *W.*, 1849, 6 Moore, P.C. 484; *Bostock* v. *B.*, 1858, 27 L.J., Mat. 86.

[2] *Beauclerk* v. *B.* [1891], P. 189; *see also Matthews* v. *M.*, 1859, 1 S. and T. 499.

[3] *Newman* v. *N.*, 1870, 2 P. and D. 57.

for her husband's refusal to let her see her children, she would not have brought the action. But it was held that as she could not safely return to cohabitation, she was not barred by having delayed action as long as she was allowed access to the children.[1]

An action of separation and aliment at the instance of an insane wife with a *curator ad litem* is incompetent, though an action would be competent for aliment alone.[2]

[1] *Cooke* v. *C.*, 1863, 3 S. and T. 126
[2] *Thomson* v. *T.*, 1887, 14 R. 634

CHAPTER VIII.

CUSTODY OF AND ACCESS TO CHILDREN.

THE Court of Session has the power to determine with which of its parents a child in pupillarity shall reside. It may even find that neither of the parents is fit to have the custody, and accordingly remove it to the care of a person named by the Court. In all cases it may make such regulations as may appear expedient, as to the frequency or duration of visits to be paid by the child to the parent with whom it is not living, or by this parent to the child. In general, where the parents are living separate, and the Court gives to one of them the custody of the child, it will, at the same time, fix the rights to access to the child to be enjoyed by the other parent.

This power in the Court of Session flows from its *nobile officium*, and petitions as to the permanent custody of children, or access to them, are therefore incompetent in the Sheriff Court.[1] The Sheriff may in cases of urgency make interim orders as to custody.[2] The Conjugal Rights Act (24 and 25 Vict., c. 86), § 9, provides, "In any action for separation *a mensa et thoro* or for divorce, the Court may from time to time make such interim orders, and may, in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates." It has been decided that it is incompetent under this section to pronounce an order as to custody after final decree in the action of divorce or separation. The proper procedure then is

[1] Such petitions are presented to the Inner House. The Court may remit to the Lord Ordinary on the Bills to pronounce an order during vacation. *Muir* v. *Milligan*, 1868, 6 M. 1125.

[2] *See Hood* v. *H.*, 1871, 9 M. 449. In one case a Sheriff granted a permanent interdict as to the custody of a child, but on appeal the objection to the jurisdiction was waived: *Lang* v. *L.*, 1849, 11 D. 1217; and see Guardianship of Infants Act, 1886, § 9.

by way of separate petition.[1] In the same case it was held that the statute conveyed no further or higher powers than those which at common law resided in the Court, except that the authority might be exercised in the process between the spouses.

By the common law of Scotland the father has *prima facie* the right to the custody of a legitimate child during its pupillarity.[2]

Ill.—Husband, an engineer engaged abroad, leaves wife in Scotland with four young children. Subsequently he petitions the Court to ordain his wife to deliver the children into the custody of his mother or any person named by him. Court grants the petition without requiring proof of any unfitness in the wife to have the custody. She is allowed access.[3]

It was laid down in the case of *Lang* that the Court will not interfere with the father's right, unless it can be shown "that the children's health, life, or morals, will be endangered by their remaining in their father's custody."[4]

Ill.—Wife who has obtained a judicial separation on ground of cruelty, petitions for custody of two children aged seven and five respectively. Petition refused.[5]

Ill.—A wife left her husband on account of cruelty. Subsequently she gave birth to a child. Husband petitioned for custody of the child, then seven months old. Petition granted. The wife offered to prove that he was unfit, but her averments were not admitted to proof, as they did not disclose any reason for apprehending danger to the child from being in his custody.[6] In considering whether children should be removed from the custody of their father against whom a decree of divorce or of separation has been obtained, the fact that he has been guilty of adultery is material but not conclusive.[7]

Conjugal Rights Act.—The House of Lords in the leading case distinctly laid down the principle that each case must be judged of according to its circumstances. Lord Chancellor

[1] *Lang* v. *L.*, 1869, 7 M. 445.
[2] *Delaney*, 1889, 16 R. 753.
[3] *Pagan* v. *P.*, 1883, 10 R. 1072.
[4] *Per* L. Benholme, at p. 447.
[5] *Lang*, 1869, 7 M. 445; and *see* also *Stewart* v. *S.*, 1870, 8 M. 821.
[6] *Nicolson* v. *N.*, 1869, 7 M. 1118; also *Lilley* v. *L.*, 1877, 4 R. 397.
[7] As to the case of the divorced wife, *see Bowman*, 1883, 10 R. 1234.

Cairns said: "It was suggested that certainly in England the analogous provision to that which I have read (Conjugal Rights Act, § 9) had been acted upon in this way, that where a wife established her title either to a divorce or to a separation, it was either matter of course, or almost matter of course, that that should carry with it for her the custody of the children; and that having shown good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of her children. My Lords, I should greatly regret that any general rule, so sweeping and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so. It appears to me that it must be the duty of the Court in every case to consider the whole of the circumstances of the particular case before it—the circumstances of the misconduct which leads to separation no doubt, the circumstances of the general character of the father, the circumstances of the general character of the mother; and, above all, it should be the duty of the Court to look to the interests of the children, and carefully to weigh, as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down."[1] In this case the husband had seduced a nurse-maid in his own house. Notwithstanding, he was allowed to retain the custody of three boys, aged ten, eight, and seven. Two girls, aged five and three, were ordered to be in the custody of their mother.[2] The dictum of Lord Neaves, in the case of *Lang*, was cited with approval: "If we take a man's children from him we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life. It is not that he has committed faults, but that he teaches, or is likely to teach, evil to them, and corrupt their morals, that can alone entitle us to interfere."[3] In another case the Court exercised its discretion with a different result, and deprived a

[1] *Symington* v. *S.*, 1875, 2 R. (H.L.) 41, at p. 43.

[2] *Ibid.*

[3] *Ibid.*, *per* Lord O'Hagan at p. 46.

father, guilty of adultery with a nurse in his service, of the custody of a girl of four years of age.[1]

Proof of the husband's intemperance, and cruelty to his wife when he was drunk, will not necessarily lead to his being deprived of the custody of children. For it consists with experience that a man may be cruel to his wife and kind to his children. In a case where separation was granted on the ground of the husband's cruelty, the five children, including a girl of four, were left in his custody.[2]

It is competent to pronounce a decree as to the custody of children in an action of separation and aliment, although there is no conclusion in the summons to that effect.[3] But no order as to custody can competently be pronounced under the Conjugal Rights Act, 1861, in an action for divorce or separation, after decree has been pronounced.[4] And a petition for custody when the spouses are living apart is competent, although no action of separation is pending.[5] *Note.*—Where a husband refused to live with his wife, and in a pending action of adherence declared his intention not to adhere, he was held, notwithstanding, entitled to custody.[6]

The English cases on custody are to be referred to with caution, the paramount right of the father not being recognised to the same degree as with us.[7]

Order as to Custody Varied.—In an English case, where a husband who had been divorced for adultery and cruelty had been deprived of the custody of a child, he afterwards petitioned that it should be given back to him. He averred that since the divorce his wife had been leading an immoral life, and that he had married again, and was a fit person to have the custody. In these circumstances the child was transferred to him.[8] And a petition to alter the custody of a child, and give it back to the father, who had been deprived of it, is competent under the Guardianship of Infants Act, § 5.[9]

[1] *Ketchen* v. *K.*, 1870, 8 M., 952.

[2] *Stewart* v. *S.*, 1870, 8 M. 821; and *see Beattie* v. *B.*, 1883, 11 R. 85.

[3] *Symington*, *supra*, 1874, 1 R. 871.

[4] *Lang* v. *L.*, 1869, 7 M. 445.

[5] *Lilley* v. *L.*, 4 R. 397.

[6] *Sleigh* v. *S.*, 1893, 30 S.L.R. 272.

[7] Dixon on "Divorce," 394, *seq.*; and *see D'Alton* v. *D'A.*, 1878, 4 P.D., remarks of Sir James Hannen, at p. 88.

[8] *Witt* v. *W.* [1891], P. 163.

[9] *Beedie* v. *B.*, 1889, 16 R. 648.

Access.—It is usual when the custody of children is given to one of the spouses after separation, to make an order that the other spouse shall be allowed access to them at certain fixed times. And when the spouses are living apart without a decree of separation, it is competent to petition for access to children who are in the custody of the other spouse. But the Court does not regard with favour a *de facto* separation of married persons, and will take into account the consideration that the love of their common offspring might be the means of bringing them again together, and that rather than be cut off from their children they might learn to practise greater tolerance towards each other.[1]

The father's right of custody does not entitle him arbitrarily to refuse his wife access to her children.

Ill.—A husband sues for divorce on the ground of adultery. By a majority the Court finds the charge not established. He declines to take back his wife or allow her to see the children. Held she was entitled to reasonable access.[2] But a wife who leaves her husband's house without legal ground is not entitled to access to children.[3]

It flows from the principle that the welfare of the child is the primary consideration, that the Court would not order a mother to deliver up a child at the breast, although she might be compelled to do so as soon as it was weaned.[4]

A husband who has raised an action for divorce on the ground of adultery will not be compelled to allow his wife access to a child of the marriage, pending the action, unless there be undue delay or other special circumstances.[5]

When the wife has been divorced for adultery the Court will not, except in exceptional circumstances, interfere with the husband's discretion as to access. In the general case he is entitled to forbid all communication between the divorced wife and her children.[6]

But a petition for access by a wife divorced for adultery is

[1] *Mackenzie* v. *M.*, 1881, 8 R. 574.
[2] *M'Iver* v. *M'I.*, 1859, 21 D. 1103.
[3] *Mackenzie* v. *M.*, 1881, 8 R. 574.
[4] *Bloe*, 1882, 9 R. 894.
[5] *A.B.* v. *C.D.*, 1847, 10 D. 229.
[6] *Bowman* v. *Graham*, 1883, 10 R. 1234. The same practice is followed in England, *Handley* v. *H.* [1891], P. 124.

not incompetent.[1] Access will certainly not be allowed if she is leading an immoral life.[2]

The following illustrations may be given of the regulations as to access which the Court is in the habit of making. In most cases the matter is arranged by an agreement of parties.

Ill.—The wife was ordained to deliver to the husband the three boys under the condition that they should reside with her for one month during their autumn holidays, for one week in April, and for one week at Christmas; and under the further condition that once a-month every alternate fortnight during the remainder of the year the said children should spend a Saturday in the house of the wife. The two girls were left in the custody of the wife under the condition that once a-month, a fortnight after the monthly visit of the boys to their mother, the girls should spend a Saturday in their father's house, so that all five children should spend the day together once a-month in their father's house.[3]

Ill.—The wife left her husband's house in consequence of unkind treatment. She subsequently gave birth to a child. When the child was eight months old the husband petitioned for its custody. The Court ordered the wife to give it up on the following condition. The husband and wife were in the same town. The husband was to send the child once a-week to the wife on a day selected by her, to remain from 11 A.M. to 6 P.M. The wife was also to be entitled, but without any attendant, to visit the child in her husband's house without his being present, at any time she might desire.[4]

At common law, on the death or insanity of the father, the mother is entitled to the custody of pupil children.[5] And now, by the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), she is so entitled.—And, if the father has appointed a guardian, the mother may act jointly with him.[6] And she does not lose her right by marrying again.[7] The Act provides (§ 7), "in any case where a decree for judicial separa-

[1] *Shiver* v. *Dixon*, 1885, 12 R. 1013.

[2] *Ibid.*

[3] *Symington*, 1875, 2 R., at p. 975.

[4] *Lilley*, *supra*, 1877, 4 R. 397. The same order was made in *Blo* v. *B.*, 1882, 9 R. 894.

[5] *A.B.*, 1850, 12 D. 1297.

[6] § 5.

[7] *Macqueen* v. *Campbell*, 1888, 15 R. 784 and 606.

tion or for divorce shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage, and in such case the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such child." The mother of a bastard child is entitled to its custody. But her right is personal, and a person named by her in a testament as "tutor, curator, and guardian" to her child, has no title to sue for its custody.[1]

[1] *Brand* v. *Shaw*, 1888, 15 R. 449.

CHAPTER IX.

CONSENT IN FORM BUT NOT IN FACT.

CONSENT is an agreement of two *wills*. No words, however solemn, will bind the parties in marriage if it be proved, to the satisfaction of the Court, that they never gave a real and genuine consent. As Swinburne, an old authority, says, marriage cannot be constituted by the exchange of words of consent uttered in "jeast or sport, for such wanton words are not at all obligatory in so serious a matter as matrimony."[1]

In an American case, a marriage gone through in jest was reduced.[2]

There does not appear to be any case in which a marriage regularly celebrated, *in facie ecclesiæ*, has been set aside on the ground that the parties never consented. And there are *dicta* to the effect that the Court will not go behind a regular ceremony of marriage and find that, in spite of it, there was no real consent. It is said that parties must be concluded to mean what they have expressed in such a solemn manner.[3] But it is submitted that Lord Fraser is right in thinking that a case might arise in which a regular marriage should be set aside on this ground. Marriages celebrated *in facie ecclesiæ* have been frequently avoided, on the ground of force, fraud, or error. And these are only different ways of proving want of mutual consent.[4] No doubt, very clear evidence would be required. The conduct of parties, both before and after the ceremony, would be narrowly looked at. For, although no conduct and no change of mind can undo a marriage once con-

[1] Swinb., "Spousals," p. 105.

[2] *M'Clurg* v. *Terry*, cited by Bishop, § 338 (Ed. 1891).

[3] *See per* Lord Stowell, 2 Hagg. C.R., at p. 106, in *Dalrymple*, and Lord Deas in *Robertson* v. *Stewart*, 1874, 1 R., at p. 667; *contra*, More's "Notes to Stair," p. xiv.

[4] Fraser, i. 429.

stituted, the manner in which parties have comported themselves to each other is often the clearest evidence as to whether they regarded themselves as married persons.

Light reflected by Conduct.—*Ill.*—A young man of twenty-three paid his addresses to a girl of sixteen. Her parents were about to send her away from home, to be out of his way. He persuaded her to accompany him to a clergyman's house and go through a form of marriage, with the mutual understanding that they were not to be married. The ceremony was only to fortify their mutual engagement. At the end of two years, if their parents consented, they were to go through the ceremony anew. There was no consummation, and two or three days after the ceremony the girl told her parents. Subsequently, the man claimed a valid marriage, and she brought a suit to have it declared null. Decree of nullity was granted.[1] In such a case, want of consummation is most material evidence. If, after the ceremony, there had been *concubitus*, it would have been vain for the girl to maintain that she had not meant marriage.

It is conceived that if, as in a case figured by Mr. Henry Erskine, the parties had exchanged written declarations before going through a ceremony of marriage, to the effect that they were doing so for some ulterior object, and did not intend to regard it as binding, there would be no marriage.[2] But if followed by *copula*, it would seem well-nigh impossible to prove want of matrimonial consent. It is quite conceivable for two persons to consent to *marriage* for some purpose collateral to the ends for which that institution exists. But being in it they cannot divorce themselves, *ex mera facultate*. Lord Fraser gives the case of *Jolly* v. *M'Gregor* as one in which a regular, though clandestine, marriage was set aside on the ground of no real consent. But this is a weight which that very singular case will not bear. For Lord Lauderdale, who gave the leading judgment, says: "You must concur with me, therefore, in thinking that there is no proof whatever upon which your Lordships can rest a judicial decision that there was any ceremony took place on the 23rd May, 1816."[3]

[1] Case cited by Bishop, § 339 (Ed. 1891).

[2] 2 Hagg. C.R., App. p. 26.

[3] 1828, 3 W. and S. 85, p. 177. The beginning of his opinion is amusing: "This is an action of

Further, there was no proof of *copula* after the alleged marriage, and the man raised no objection to the woman subsequently marrying another man, named Jolly. It was even proved that M'Gregor, the pursuer, and the defender and Jolly occupied on one occasion a double-bedded room at a hotel, M'Gregor sleeping in one bed, and the woman and Jolly occupying the other. The House of Lords, not unreasonably, held this as very clear evidence that M'Gregor did not regard himself as married to the woman. But they distinctly saved themselves from deciding the general question whether a regular marriage can be thus set aside. In fact, Lord Eldon's judgment may be read as affording authority for the doctrine that the Court will in no case receive evidence of want of consent, when a marriage ceremony has been regularly performed.[1] Where apparent consent has been given, in a less formal way than by marriage *in facie ecclesiæ*, it is well-settled law that proof is admissible to show that the ostensible consent was not genuine. It is competent to prove, by parole evidence or otherwise—(1), that documents bearing to be declarations of marriage were granted for some other purpose, and were not understood by the parties as binding; (2), that though a *copula* followed a promise of marriage, it was not on account of the promise that the woman consented, and, therefore, no matrimonial consent was interchanged; (3), that two persons who cohabit, and are reputed married, do so, nevertheless, with the understanding that they are not really husband and wife. Of (1), the following well-known cases are illustrations:—

Ulterior Purpose.—*Ill.*—Sir James Campbell, who was in Paris in the year 1818, and not able to return to Scotland on account of the war, wishing to send some one to look after his affairs, gave his mistress a power of attorney in these terms:—"I, James Campbell of Craigforth, having nominated my beloved wife, Lina Taline Sassen, my true and lawful

declarator of marriage brought by Malcolm M'Gregor, a man of very low birth, and of distinguished immorality of character, against Mary Black M'Neill, the natural daughter of the Rev. Dr. M'Neill, a clergyman, in respect of immorality of conduct, certainly worthy of sustaining the relation of father-in-law to the pursuer, who, by this declarator, aims at the honour of becoming his son-in-law."

[1] 1828, 3 W. and S., pp. 189, 190.

attorney," &c. The lady was received in Scotland as Sir James' wife. But it was held that this document was not granted for a matrimonial purpose, and no marriage was constituted.[1]

Ill.—A young man gave a woman, who was pregnant by him, a declaration in these terms:—"Mrs. Fairbairn, I hereby acknowledge that you are my lawful wife, and you may from this date use my name, though, for particular reasons, I wish our marriage kept private for some time, and always am, madam, your most obedient servant, ALEX. MORE, Aberdeen, 1st May, 1780." Addressed to "Mrs. Captain Fairbairn, Aberdeen."

The Court of Session held the production of this document was sufficient proof of marriage, but this was reversed by the House of Lords. They held it proved that the declaration was given and received, not to make marriage, but to enable the woman to lie-in at the house of her brother, who would not have received her if he had not believed her married.[2]

Ill.—The woman gave the man a writing as follows:—"I hereby solemnly declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, AGNES KELLO." She possessed £2000; he was on the eve of a second bankruptcy. It was proved that he had represented the declaration as not meaning more than an acknowledgment of her love and affection for him, and a promise of marriage at some future time, when her parents were satisfied. He also promised to return it if it did not serve its purpose. There was no *copula*. A few days afterwards the girl wrote for a return of "that foolish line." He offered to give it back for £500. Subsequently Taylor persuaded her parents to allow banns to be proclaimed; but they, after inquiry, sent a messenger to stop the proclamation. They had been proclaimed twice when he reached the church, but he stopped the third. For three years after all correspondence ceased. Then, on hearing that another man was paying his addresses to Agnes Kello, Taylor raised an action of declarator. The Commissaries found for the marriage, and

[1] *Sassen* v. *Campbell*, 1824, 3 S. 159. The Court of Session gave aliment to the lady, but the House of Lords found she had no right to this, 2 W. and S. 309.

[2] *M'Innes* v. *More*, 1781, M. 12,683; reversed, 2 Pat. App. 598.

the Court of Session adhered. But the House of Lords reversed. They held it proved that the document was not understood by either as a final agreement. The fact of no *copula*, and the conduct of parties since its date, were held as pointing irresistibly to this conclusion.[1]

Ill.—Ulterior object was held proved by the House of Lords in these circumstances:—A landed proprietor gave his housekeeper this paper—"Christy, you and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born in consequence of the present connection betwixt us." The case for the woman bristled with difficulties, for the paper, if treated as a declaration, was not of present consent, and if a promise, was conditional on the birth of a child, and, therefore, present consent was not to be presumed from the subsequent *copula*. It was attempted to prove that the paper was antedated, and was not, in fact, delivered to the woman till after the birth of the child. In this view, it might be read as a present declaration, the condition having been purified before delivery. The House held it incompetent to prove that another date was intended than that which it bore, but found it proved that the paper was given for a collateral purpose. This was, that it might be shown to a young lady to whom the defender was engaged, that so the engagement might be broken off, as in fact it was. No marriage.[2]

Ill.—The parties, who were engaged to marry, signed a marriage-contract in ordinary form. Three days after, they exchanged declarations. The one by the lady was in these terms:—"I declare Edmund Beatty Lockyer to be my husband, J. S. T. SINCLAIR. Thurso, 29th August, 1839." There was no *copula*. The lady averred that she signed the paper at the request of the pursuer to convince his father that they were engaged, and induce him to make a provision for his son. There was a long correspondence between the parties afterwards. Its language was entirely that of lovers, and frequent reference was made to future marriage. The Court, looking to this, and to the fact of non-consummation,

[1] *Taylor* v. *Kello*, 1786, M. 12,687; reversed, 3 Pat. App. 56.

[2] *Stewart* v. *Menzies*, 1833, 12 S. 179; 1836, 14 S. 427; 1841, 2 Rob. App. 547.

held that the writing was proved to have been granted for a collateral purpose, and found there was no marriage.[1]

In a recent case an attempt was made unsuccessfully to establish collateral purpose. The parties had interchanged declarations accepting each other as husband and wife. There was *copula* both before and after the declaration. It was averred that the declaration was given by the man when dangerously ill, to enable the woman to receive the value of an insurance on his life. The Court held that the conduct of parties prior to, and subsequent to, the granting of the documents pointed to matrimonial consent, and found for the marriage. The rule laid down in *Lockyer* v. *Sinclair*, that it is not enough to produce declarations of marriage, however explicit, was accepted. Facts and circumstances must be shown consistent with the view that the parties gave serious consent. The pursuer cannot simply table the declaration and ask the Court to find for him.[2]

No serious Purpose.—Even where it is not possible to prove any collateral purpose as an explanation of an apparent consent to marriage, it may be shown that there was no such seriousness as the law requires.

Ill.—A man gave this document: "Gilkerscleugh, 26th (*sic*), 1864. Dear Sir,—I bind and oblige myself to keep and support that woman through life, I consider her my lawful wife. WILLIAM GALL. Witnesses' hands, G. Milligan, Elizabeth Gall." It was proved that Elizabeth Gall was at the time cohabiting with the defender. The pursuer led evidence that the paper had been written by G. Milligan in the course of a drunken frolic, at a time when the defender, William Gall, was in a state of utter imbecility from drink, and the Court found no marriage constituted.[3]

Ill.—The famous case of *Stewart* v. *Robertson* (the *Murthly* case) is really an illustration of this rule, and is not to be referred, as Lord Fraser seeks to do, to the doctrine of collateral purpose. The words alleged, "Maggie, you are my wife before Heaven, so help me O God," were sufficiently

[1] *Lockyer* v. *Sinclair*, 1846, 8 D. 582.

[2] *Imrie* v. *I.*, 1891, 19 R. 185; *see* remarks of L.J.C. Hope in *Lockyer*, *supra*, at p. 595.

[3] *Gall* v. *G.*, 1870, 9 M. 177.

explicit, and it would in other circumstances have been difficult to plead that they were intended not to make marriage, but to "stop people's mouths." The real ground of the judgment of the House of Lords which reversed that of a majority of the whole Court of Session, was that the Court was not satisfied that there had been any serious intention on the part of either when the alleged words were used. The man was in the course of drinking himself to death. The house in which the pursuer lived was of doubtful respectability, and the evidence of members of her family on which her case mainly rested, was open to grave suspicion. Moreover, the facts pointed to *copula* before, as well as after the alleged exchange of consent, and the conduct of parties after that event and until the man's death, led distinctly to the conclusion that they did not regard themselves as husband and wife.[1]

(2.) Where *copula* has followed promise, it is competent to prove that it was not conceded on the faith of the promise. "In order to the constitution of marriage by promise *subsequente copula*, the *copula* must be conceded by the woman on the faith of the promise. This is the principle or theory of our law on the subject. The relation of the *copula* to the promise must be that of a concession or surrender of person by the woman in reliance that the man's promise of marriage will be fulfilled. In the ordinary case of *copula* following on a promise of marriage, the natural and reasonable presumption is that the woman desired that the man should fulfil his promise, that she relied upon his doing so, and that she yielded her person on the faith of such fulfilment. That is a very natural presumption, and in the absence of evidence to the contrary, the law accepts the presumption as sufficiently instructing the required relation between the *copula* and the promise. But it is not a *presumptio juris et de jure*."[2]

(3.) If two persons cohabited and were reputed married, the presumption that they were married, might be redargued by proof that they had agreed to continue free. Repute will not *make* marriage against the consent of the parties. "The fact to be proved is, that the *parties themselves* did *mean* and *intend* to

[1] *Stewart* v. *Robertson*, 1874, 1 R. 532; rev. 1875, 2 R.H.L. 80.

Per Lord Ardmillan in *Morrison* v. *Dobson*, 8 M., at p. 354; and *see* More's Notes to Stair, xiii., and cases cited by Fraser, i. 427.

contract the relation of marriage, and had truly formed that relation, the indications and appearances of which gave rise to the habit and repute. But the belief and understanding of others do not make and constitute the relation of marriage. It is the *consent* of the *parties* inferred from and evidenced by the conduct which gives rise to the opinion of others. The most complete proof of habit and repute may often exist in crowded cities, as to persons living together, especially in the lower ranks of life, when nevertheless both know well that each or one has a spouse living in another place, and when, whatever colour they allow neighbours to assume as to their relation, they never intended to contract, and knew that they could not contract the relation of marriage."[1]

It is of course to be understood that marriage once made *quocunque modo* cannot be unmade by any change of mind, and if the Court is once satisfied that there was at any point of time true matrimonial consent, evidence of subsequent conduct indicating a change of mind will be disregarded.[2]

And if one of the parties really meant to constitute marriage, and had reasonable grounds for believing that the other party likewise consented, the latter will be personally barred from pleading that he did not mean marriage. For if a man persuades a woman to go through a ceremony of marriage, she having no reason to question his sincerity, and on the faith of it she permits *copula*, it would be monstrous that he should be allowed to come to the Court to have the marriage set aside on the ground that his apparent consent was fraudulent.[3] Lord Fraser quotes an opinion of L.J.C. Hope as conflicting with this doctrine. But in *Lockyer* v. *Sinclair*, the case in question, there was no *copula*. The words of L.J.C. Hope are: "If at the time, and in regard to the object of interchanging what bear to be declarations of marriage, it is proved that one of the parties did not understand that marriage was contracted between them, and did not intend thereby to marry, and did not give consent to actual and very marriage, it is the undoubted law, that in such a case the bond of mar-

[1] *Lapsley* v. *Grierson*, 1845, 8 D., *per* L.J.C. Hope, at p. 47.

[2] *Morrison* v. *Dobson*, *supra*, *per* Lord Ardmillan, at p. 355; *Reid* v. *Robb*, 13 Feb., 1823, Hume, Decis. 378.

[3] Lord Brougham in *Campbell* v. *Honyman*, 1831, 5 W. and S., at p. 146; *Bell* v. *Graham*, 1859, 13 Moore, P.C.C. 242.

riage was not formed."[1] But his Lordship, as the sequel shows, is speaking of a kind of case like the one before him, where the person who now pleads no real consent was induced by the other to go through a form, with an understanding between them that it should not be binding as marriage. He is not in the least disputing the proposition that, if a man pretends to marry a woman, and she believes him to be serious, and consents to marriage, and on the faith of his actings the woman permits sexual intercourse, the man shall be barred from setting up a case of no consent on his part. In other words, the general doctrine that a man shall not be allowed to found on his own fraud as a ground for having a contract rescinded, is applicable to marriage. Nor will the parties be permitted to resile even where no *copula* has followed, and when there is room for the plea that matters are entire. But in such a case the absence of *copula*, unless otherwise accounted for, would afford the strongest presumption that the parties had not themselves regarded the contract as concluded. Where no *copula* has followed the alleged interchange of matrimonial consent, and parties show by their whole actings that they regard each other as free persons, the Court will require the clearest evidence before arriving at the conclusion that marriage has been constituted.

Error, Force, and Fraud.—The gateway to the status of marriage being a contract, as it is well expressed by Mr. Bishop, this contract may be rescinded on proof that it was entered into under essential error, or was induced by the fraud or force of one of the parties.

Error.—It may be safely said that the only error which will be regarded by the Courts as essential so as to annul the contract, is a mistake by one of the parties as to the personality of the other. If, *e.g.*, the face and form of the bride are concealed, and the bridegroom, believing that the woman before him is Mary to whom he is betrothed, goes through the ceremony with her, he will not be bound by his contract when he discovers that Jane has substituted herself in Mary's place. But such a case could hardly be figured into which the element

[1] *Lockyer* v. *Sinclair*, 8 D., at p. 605, quoted by Fraser, at p. 437.

of fraud did not also enter.[1] It is within the range of possibility that two persons returning from a masked ball should go through a form of marriage, each of them being mistaken as to the identity of the other. In such a case it is clear there would be no marriage.[2] There does not appear to be any case reported in Scotland or England in which simple error has been the ground for annulling a marriage.

Error as to Condition, Fortune, Name, &c.—No mistake, except as to identity, is relevant to be pleaded. Stair gives a pointed instance: "Errors in qualities or circumstances vitiate not, as if one, supposing he had married a maid or a chaste woman, had married a whore."[3] Persons about to marry are put on their inquiry, and must be presumed to have satisfied themselves on the matters with regard to each other which they deem important. They take each other *tantum et talem*, and cannot afterwards be heard to say, "I thought he (or she) was richer or cleverer or better born than I find is the case." Nor even where the mistake is one of so serious a kind as to make it manifest that the other party would never have consented in full knowledge of the facts, will this be a ground for setting aside the marriage. Mere mistake as to the name of either of the parties is no ground of nullity, even when a name has been fraudulently assumed as an inducement to the marriage.[4] *Nil facit error nominis quum de corpore constat.* And if real consent has once been given, the Court will not inquire by what artifices such consent has been induced.[5]

Fraud.—Either force or fraud will be found to have been combined with error in all the reported cases. Each case depends on its own circumstances. The Court will have regard to the relative position of the parties, to disparity of age, to evidence of weakness of will or intelligence on the one hand, or of domineering influence on the other. The question always is, Was there genuine consent at the time?

[1] Stair, i. 9, 9; i. 4, 6; *Wakefield* v. *Mackay*, 1 Hagg. C.R., at p. 398; Pothier, "Traité du Contrat de Mariage," § 308.

[2] *See* remarks by Lord Campbell in *Reg.* v. *Millis*, 10 C. and F., at p. 785.

[3] Stair, i. 4, 6.

[4] *Wakefield* v. *Mackay*, 1807, 1 Hagg. C.R., at p. 398.

[5] *Ibid.*; and *Sullivan* v. *S.*, 1818, 2 Hagg. C.R., at p. 248.

Acquiescence and *mora*.—Unless the marriage appears to have been challenged as soon as the error or fraud has been discovered, or the constraint removed, consent will be presumed to have been subsequently given, and the action for nullity will be barred. In England, where a ceremony is essential, and consent must accompany prescribed rites, it may not be clear that supervening consent can cure an initial defect of this kind. But in Scotland, where mutual consent, however expressed, is all that the law requires, it is obvious that matrimonial consent will readily be presumed if the marriage is not promptly challenged.[1]

Fraud on Persons of adult Age.—There does not seem to be any case in the books in which a marriage has been set aside on the ground that an adult man or woman of average intelligence has been induced by fraud to enter into it. The case of *Blair* v. *Fairie*,[2] which Lord Fraser quotes as an illustration, is not an instance of fraud inducing consent, but of a man being trapped into pretending to consent. A woman takes a man into a secluded place, and on his seeking to have *copula*, she says he must promise marriage. He does so, never meaning to perform the promise, as she well knows. *Copula* follows. The woman has had persons lying in ambush to hear the promise. Such a case, if it arose, would have to be proved by the defender's oath, and the Court might well draw the inference that he never consented to marriage, and she did not yield on the faith of his promise. No form of proposition is so dangerous as a universal negative, and I will not say that no case of fraud practised on an adult person of fair intelligence, not drugged or intoxicated, would be sustained by the Court as a ground for setting aside a marriage. But it is certainly not easy to figure such a case. What more gross fraud is well conceivable than this? A man marries a woman whom he has every reason to believe virtuous, and discovers that she is advanced in pregnancy by another man. Yet it may be assumed to be law in Scotland that he cannot have the marriage annulled on this ground.

[1] Stair, i. 9, 9; Crawley, H. and W., p. 9; Bishop, Ed. 1891, §§ 545 and 624; Shelford, Mar. and Div. 197; Poynter, Mar. and Div. 156; *see* also *Crump* v. *Morgan*, 1843, 40 Amer. Decis. 447.

[2] Fr. i. 461.

Ill.—Wife sues in England for restitution of conjugal rights. Husband pleads that she was pregnant when he married her, and that he had been induced to marry her on her false representation that he had seduced her. Plea held irrelevant.[1] Lord Fraser treats the point as still open in Scotland, whether concealment of pregnancy by the woman is such fraud as will enable the man who married her, believing her virgin, to have the marriage set aside. There is American authority in favour of the affirmative.[2] The ground is recognised by the Austrian code, and by the Protestant ecclesiastical law in Germany. There is, notwithstanding, small probability that such a plea would be sustained in our Courts. It does not appear to have been raised either as a ground for annulling the marriage, or in an action of divorce of the wife by the husband as a defence justifying non-adherence.

Fraud committed on person weak from extreme youth, want of natural intelligence, or other cause.

Ill.—A schoolmaster persuades one of his pupils, a girl just over twelve, entitled to £2500, to go through a ceremony of marriage. He has her dressed "as a woman with high-heeled shoes, and a toupé and ornaments on her head," to make the minister think her older. Her mother discovering the affair the same day, carries her off before consummation. Allan, the schoolmaster, raises declarator. Defence of no valid consent sustained.[3]

Ill.—A nobleman of decidedly weak intellect, though not to the point of imbecility, is drawn into marrying the daughter of his solicitor. The solicitor, who was also the Earl's trustee, had great ascendancy over him. Marriage set aside.[4]

A very strong case must be made out. The following illustrations may be given of circumstances in which the Court has declined to set aside the marriage.

[1] *Per* Lord Penzance, *Green* v. *G.*, 1869, 21 L.T., N.S. 401, and so held in America; *see Foss* v. *F.*, 12 Allen 26, cited by Bishop, Ed. 1891, § 498.

[2] *Reynolds* v. *R.*, 3 Allen, 605, where, however, the man was only seventeen and the woman thirty; and *see* Bishop, Ed. 1891, § 485, *seq.*

[3] *Allan* v. *Young*, 1773, Ferg. Con. Rep., p. 37.

[4] *Portsmouth* v. *P.*, 1828, 1 Hagg. E.C. 355; *Wilkinson* v. *W.*, 1845, 4 N.C. 295; and *see Turner* v. *Meyers*, 1808, 1 Hagg. C.R. 414, where, however, the woman's only fraud was in marrying a man clearly insane.

Ill.—A man of twenty-one persuaded a girl of fifteen to go through a ceremony. She was of weak health in body and mind, and had suffered from infancy from St. Vitus's dance. He had made no proposal to her until the day before the marriage, and had already had the banns put up. After the ceremony she returned home to her parents, and there was no consummation. Marriage sustained.[1]

Ill.—A young lady, eighteen, possessed of £1000 a year, is living in the house of her guardian. His brother, a retired butler of fifty-two, persuades her to marry him. No consummation. Five days after, she runs away. Marriage sustained.[2]

Cases of error, force, and fraud slide very much into one another. In the cases afterwards mentioned the element of force is more prominent.

Force and fear is a ground on which any contract in Scotland may be set aside. If it appear to the Court that consent to marriage was only given under the influence of terror caused by the violence or threats of any one, the marriage, if timeously challenged, will be set aside. Much will depend on the age, position, and education of the parties. A weak and imaginative girl may be terrified by threats which a woman of robust mind would regard with contempt. The rule of the canonists that the degree of force used must be such as might have coerced a person of average strength of will—"*virum constantem*"[3]—cannot be said to be now a practical guide.

If the Court is satisfied that the one will was unduly dominated by the other in such a way as to induce an unwilling consent, it will not decline to grant a remedy on the ground that a person of cooler temper and firmer purpose would not in the circumstances have yielded. Consent to make a marriage valid must be free and spontaneous. In cases of the kind under discussion there is consent indeed, but it is the consent which chooses unwillingly the less of two evils. *Coacta voluntas, voluntas est; volui, quia coactus volui.*

But it will not be a sufficient ground for annulling a marriage that a parent or guardian has used considerable pressure to induce consent to it. There must be *vis atrox*—

[1] *Templeton* v. *Tyrce*, 1872, L.R., 2 P. and D. 420.

[2] Field's Marriage Bill, 1848, 2 C. and F., N.S. 48, and cases cit.

[3] *See dictum* by Butt, J., in *Scott* v. *Sebright*, 1886, 12 P.D., at p. 24.

i.e., threats or violence, and the threats must be to do something *adversus bonos mores.* To give an instance from Pothier.[1] A man who has ravished a woman marries her to escape arrest with which she threatens him. He cannot plead nullity on the head of force and fear, for the woman would have been quite entitled to have him arrested. There was nothing in her threat which was *adversus bonos mores.*

The amount of force or fraud necessary to be proved in order to have a marriage set aside varies inversely with the degree of capacity of the party on whom such force or fraud is exercised. If a person possesses such a slight amount of intelligence as to approach imbecility, very little evidence of coercion or deceit would be sufficient.

Sir John Nicholl states the law thus in the leading case of the *Countess of Portsmouth* v. *the Earl*[2]:—"When a fact of marriage has been regularly solemnised, the presumption is in its favour; but then it must be solemnised between parties competent to contract, capable of entering into that most important engagement, the very essence of which is consent; and without soundness there can be no legal consent—none binding in law—insanity vitiates all acts. Nor am I prepared to doubt but that considerable weakness of mind circumvented by proportionate fraud will vitiate the fact of marriage." But when the person whose capacity is doubtful has not challenged the marriage, the Court will require distinct evidence of want of consent.

Ill.—In an action for payment of a legacy, it was pleaded in defence that the plaintiff was illegitimate on the ground that his mother was of weak intellect and of unsound mind, and wholly incapable of entering into or making a contract of marriage or any other contract. It was proved that she was deaf and dumb from birth. The facts that she had never learnt to talk on her fingers, and did not know the value of money were relied on as showing great dulness of intellect. But Sir W. Page Wood found this insufficient to rebut the presumption that she had duly consented.[3]

[1] Pothier, Traité Con. Mar., § 316.

[2] 1828, 1 Hagg. E.R., at p. 359.

[3] *Harrod* v. *H.*, 1854, 1 K. and J., 4, where there are some valuable remarks as to capacity in general; *see Stevenson* v. *S.*, March, 1893 (Lord Kyllachy), not yet reported.

With regard to the kind of threats which have afforded evidence of force, the cases following may be referred to.

Ill.—The guardian of a girl, twelve and a-half years old, persuades her to elope with him from school and go to France. At Boulogne she wishes to return, but he said if she did he would kill himself. Ceremonies of marriage are gone through at Ypres, and at Ahrensburgh in Denmark. It does not appear from the report if there was consummation. Marriage set aside.[1]

A comparison of the two most recent cases in England illustrates the amount of evidence which will be required.

Ill.—A, who was engaged to B, a young lady, persuaded her to accept a number of bills for him. She becomes anxious to break off the engagement. He does not meet the bills, and B is threatened with bankruptcy proceedings. Her mother and other relations are ignorant of her difficulties. A informs her that he cannot extricate her unless she marries him. He also says that if she does not marry him he will "accuse her to her mother, and in every drawing-room in London, of having been seduced by him."[2] She is taken unwittingly to a registrar's office, and there goes through a form of marriage. There was no consummation. Marriage set aside.

Ill.—A, twenty, and B, twenty-four, a young lady, are cousins. A has proposed marriage to B and been rejected. He asks her one day to go with him to the afternoon service at St. Paul's. He takes her to another church, and on arriving there says: "You must come into this church and marry me, or I will blow out my brains, and you will be responsible." They enter, everything has been arranged by A for the ceremony at that time, and B goes through it. He takes her to her mother's afterwards. There is no consummation, and they do not see each other again. Marriage sustained.[3]

[1] *Harford* v. *Morris*, 1776, 2 Hagg. C.R. 423.

[2] *Scott* v. *Sebright*, 1886, 12 P.D. 21.

[3] *Cooper* v. *Crane*, 1891, P. 369.

CHAPTER X.

ADHERENCE.

It is the duty of the spouses to live together, or, as it is expressed in Scotland, to adhere to each other until the marriage tie is severed by death. The husband has the sole right of determining where the home is to be, and the wife is bound to accompany him to any place which he may choose.[1] But this duty of mutual adherence is one which the Courts will not specifically enforce. The action of adherence by which a decree is sought was formerly a necessary preliminary to an action of divorce on the ground of desertion. This necessity has now been removed by statute,[2] and the action of adherence, though still competent, is now in practice unknown, except when aliment is also concluded for.[3] If the non-adherence is obstinately persisted in for four years, the remedy of the other spouse is to obtain a divorce.

What is Non-adherence?—Non-adherence is the refusal by either spouse to live in family with the other. The husband has, it is said, the right of ordering his wife to leave his house and take up her residence in another which he has provided for her separate use.[4] But if he continue to refuse to receive her to his own house for four years, he will be guilty of desertion unless he have a legal ground justifying non-adherence. Nor will the Court interfere if he "take her by the shoulders" and turn her out of the house.[5] But this, except for good cause,

[1] Stair, i. 4, 8. *See* the cautious judgment of Sir John Nicholl in *Molony* v. *M.*, 1824, 2 Add. 249; but *see dictum* of L.J.C. Moncreiff in *Muir* v. *M.*, 1879, 6 R., at p. 1357.

[2] Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), § 11.

[3] Jurid. Styles, iii., p. 157.

[4] *Colquhoun* v. *C.*, 1804, M.; Appx. *v.* Husband and Wife, No. 5.

[5] *Webster* v. *M'Intyre* (not reported), quoted by Fraser, i. 872, more fully stated in Journal of Jurisp. 22, 661.

would be legal cruelty. In a Sheriff-Court case which unfortunately was not carried higher, a decree was obtained ordaining a wife to leave her husband's house and go to live in another which he undertook to supply for her. The wife at last went quietly, otherwise it would have been the duty of the officers of Court to remove her by force.[1] It is submitted that this decision was erroneous. The utmost extent to which the law will lend a husband aid in such a case is that it will not interfere if he turns her out, and will leave her to work out her own remedy.[2]

Is it Non-adherence to refuse Sexual Intercourse?—Lord Fraser maintains that a spouse who refuses marital intercourse without good reason is guilty of desertion though continuing to share the common home. But this, it is respectfully submitted, is a case not contemplated by the statute of **1573**, and cannot be considered as settled by the old case of *Graham*[3] on which he founds. The fact that there is no modern decision in its favour makes the proposition a very difficult one to maintain, and the authority of English law is against it. "There is no doubt," says Sir J. P. Wilde, "after the case of *Orme*, 2 Add. 382, that although the Court enforces conjugal cohabitation,[4] it does not pretend to enforce marital intercourse."[5]

It has been held in England, in a suit for restitution of conjugal rights at the instance of the wife, that it was no defence that she was insane and possessed by a morbid hatred of her husband. His remedy in that case was to have her put under restraint.[6]

Defences to an Action of Adherence.—There can be no doubt that it is relevant to plead in defence to this action, or to an action for divorce on the ground of desertion, any conduct on the part of the pursuer which would have justified a decree of judicial separation in an action at the instance of the other

[1] *See* Journal of Jurisp. 22, 661.

[2] Ersk. i. 6, 19.

[3] *Graham* v. *Buquhanane*, 27th Feb., 1567, MSS. Records Com. Court, Vol. ii., quoted by Fr. ii. 1209.

[4] A decree of restitution of conjugal rights is no longer specifically enforced in England, *Queen* v. *Jackson* [1891], 1 Q.B. 671.

[5] *Rowe* v. *R.*, 1865, 4 S. and T., at p. 163, and *see supra*, p. 34.

[6] *Hayward* v. *H.*, 1858, 1 S. and T. 81; but *see Radford* v. *R.*, 1869, 20 L.T., N.S. 279.

spouse. The Court will not order a wife, *e.g.*, to return to a husband who has been guilty of adultery or cruelty. It is no defence that the pursuer was the first to desert if he is now willing to take back his wife. But if she have obtained a protection order under the Conjugal Rights Act, an action of adherence is not competent until the order has been recalled.[1] Of course it would be a good defence to plead that the marriage was null.[2]

Is any other Defence relevant?—The question whether less misconduct than would ground a decree for judicial separation will be sufficient to justify non-adherence is not free from difficulty. Lord Fraser maintains that a less degree of cruelty would in this case suffice, and that other misconduct—*e.g.*, the antenuptial incontinence of the wife—would justify non-adherence though it would not support an action of separation or divorce. For this doctrine no Scotch authority can be adduced, and it seems contrary to principle.[3] It is the duty of married persons to adhere unless they can show some legal cause of separation. And the only reason for which the Court will pronounce them entitled to live apart are adultery, cruelty, and desertion. It is a curious result, and one not lightly to be accepted, that a husband may say, "I am not bound to live with my wife, though she has given me no such ground of offence as would enable the Court to pronounce a decree of separation." Moreover, there is at least one case in which the contrary doctrine was expressly laid down. The interlocutor of the Second Division in an action of adherence at the instance of the husband contains these words: "Find that the action can only be resisted on the ground that the pursuer so maltreated her at and prior to the date of the contract (there had been a voluntary contract of separation), that she would at said time have been entitled to insist on a judicial separation, and is therefore not bound now to adhere." In that case considerable cruelty by the husband was proved, and the argument was maintained that in defending an action of adherence, the wife was in a more favourable position than if she had been pur-

[1] Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), § 3.

[2] *Ricketts* v. *R.*, 1866, 35 L.J., Mat. 92.

[3] It has the support of Lord Young, but the opinion was *obiter*; *Stevens* v. *S.*, 1881, 18 S.L.R., at p. 602.

suing an action of separation.[1] And although there are conflicting *dicta* to be found in the English cases, the law may be regarded as settled there in the same sense.[2] The case of *Yeatman* v. *Y.*, 1868, L.R., 1 P. and D. 489, throws light on the source of confusion in the English cases. It was there (at p. 491) distinctly laid down by Lord Penzance that "nothing would justify a man in refusing to receive his wife except the commission of some distinct matrimonial offence, such as adultery or cruelty, upon which the Court could found a decree of judicial separation."

The English statute, 47 & 48 Vict. c. 68 (Matrimonial Causes Act, 1884), while it deprives the Court of enforcing specific performance of a decree of restitution of conjugal rights, declares that disobedience to such a decree shall be treated as desertion, and the petitioner shall be entitled to petition the Court for a judicial separation. And non-compliance with the decree has been repeatedly held to be equivalent to desertion for two years, *i.e.*, the period necessary for judicial separation.[3] This seems a clear recognition by the legislature that cohabitation is a legal duty, unless facts justifying judicial separation be proved. The learned writers of a recent work on Divorce adopt the view maintained by Lord Fraser that less than this may be a good defence.[4] They support this contention mainly on two cases, both also referred to by Lord Fraser. It is submitted that these cases, when examined, afford no authority for the proposition, which can be compared in weight with the authorities cited against it.

The first was an action for restitution of conjugal rights brought by the husband. The wife pleaded that—(1) her husband's domicile was in Ireland; and (2) that she was in very delicate health, and in the opinion of her medical attend-

[1] *A B* v. *C D*, 1853, 16 D., at p. 113; and *see* also opinion of L.P. Inglis in *Chalmers* v. *C.*, 1868, 6 M., at p. 550. *N.B.*—In this case "desertion" in the Conjugal Rights Act was being construed, and it might be that less would here suffice than would be "diversion" under Act 1573.

[2] Macqueen, H. and W., 188; and *Scott* v. *S.*, 1865, 4 S. and T. 113; *Burroughs* v. *B.*, 1861, 2 S. and T. 303; *Manning* v. *M.*, 1872, 6 Irish Rep. Eq. 417; *see* also *Rippingall* v. *R.*, 1876, 24 W.R. 967, where it was held that a wife who had obstinately refused to perform her conjugal duties was not barred from suing for restitution of conjugal rights.

[3] *Bigwood* v. *B.*, 1888, 13 P.D. 89.

[4] Browne and Powles on Divorce, 5th Ed., p. 139.

ants incapable of removing to Ireland, or undertaking any considerable journey without imminent danger to her health. I give the whole judgment, which is most cautiously expressed.

"The Court over-ruled these objections—as not choosing, *at present*, to decide that the facts pleaded were wholly irrelevant—especially the wife's state of health and the husband's sole domicile in Ireland, *as pleaded*. Consequently, it admitted the wife's allegation to proof, but without pledging itself to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed, on behalf of the husband, in the libel, at the final hearing of the cause."[1] The judge, in fact, allowed a proof, reserving the question of relevancy. The second case is incorrectly stated by Messrs. Browne and Powles, to have been a suit for restitution of conjugal rights.[2] It was of the following nature :—

A husband, about two years after his marriage, was informed that his wife had prior to marriage given birth to two illegitimate children by different fathers. On being charged by him with this she admitted her guilt. He left her, and they lived apart for some time under a contract of separation. The husband then discovered she had committed adultery, and raised his action for divorce. The statements as to the wife's antenuptial unchastity were objected to as irrelevant, and Sir John Nicholl ordered them to be struck out. He went on to say : "If indeed the wife should set up a case of desertion by the husband, without any provocation on her part, her antenuptial misconduct might be fairly pleaded in his justification. It might possibly, too, be fairly pleaded by the husband, responsively to the wife's libel, in a suit for restitution of conjugal rights." It will be observed that the *dictum* is quite *obiter*, and has never been followed in any judgment.[3]

A singular case, decided by the Privy Council, is also cited by Lord Fraser in this connection. The husband and wife were both Americans by birth. At the marriage in 1831, the husband was rector of a Protestant Episcopal Church in the State of Mississippi. Subsequently they went to Rome in 1843, and both husband and wife joined the Roman Church. They took vows of chastity, and the husband became a Jesuit

[1] *Molony* v. *M.*, 1824, 2 Add. 249.
[2] "Divorce," 5th Ed., p. 140.
[3] *Perrin* v. *P.*, 1822, 1 Add. 1. But *see Barlee* v. *B.*, 1822, *ibid.* 305.

priest, while the wife entered a religious house as a nun. In 1846 they came to England, the husband becoming a private chaplain in a Catholic family, and the wife the superior of a religious community. In 1848 the husband recanted the Roman Catholic faith, became a Protestant, and, later, instituted a suit against his wife for restitution of conjugal rights. The wife pleaded that a rescript of the Pope which they had obtained, and the acts of the parties in Rome, had the force of a judicial separation. Sir H. Jenner Fust rejected the allegation on the ground that the facts, if proved, would be no bar to the action by the husband. The judicial committee allowed proof, on amendment of the libel, by pleading two facts—first, what was the law of Pennsylvania, if this suit had been brought there for adjudication; and secondly, what was the domicile of the parties at the time the transaction took place at Rome. The judgment proceeds: "We pronounce no opinion whatever upon the facts of the case."[1] It is submitted, therefore, that this case also is very far short of a direct authority for the proposition in question, being also, substantially, a case in which proof was allowed without the question of relevancy being really decided. Both principle and authority, both in Scotland and England, seem in favour of the statement contended for, that non-adherence can only be justified by grounds which would be sufficient to found a decree of judicial separation. In the recent case of *Mackenzie* v. *Mackenzie*,[2] Lord Rutherfurd Clark said: "I know of no defence to an action of adherence save adultery and cruelty, though I think that the latter may be moral as well as physical." This proposition was not disputed by the majority of the Court, though their Lordships were of opinion (diss. Lord Rutherfurd Clark) that an action of divorce for desertion may be successfully defended on grounds which would not have been a good answer to an action of adherence. The opinions on this point were not necessary to the judgment, as the majority held that the husband's conduct amounted to cruelty.

[1] *Connelly* v. *C.*, 1851, 7 Moore, P.C.C. 438. [2] 1892, 30 S.L.R. 276.

CHAPTER XI.

ALIMENT AND EXPENSES.

A HUSBAND is legally bound to supply his wife with necessary food and clothing. Failure to do so is, as has been seen, such cruelty as will ground an action of separation. But unless she has left his house in consequence of his cruelty, or adultery, or with his consent, he is not bound to aliment her while she is living apart from him. Nor will he then be liable to tradespeople for necessaries supplied to her. And during cohabitation the wife's claim to maintenance is postponed to that of the husband's creditors—*i.e.*, the husband cannot resist an action for a lawful debt on the ground that he must maintain his wife. He may, by antenuptial contract, make a provision for her at his death, which will give her an equal claim with his other creditors. For this is the price of the marriage. And even after marriage he may by a postnuptial deed make her a creditor for a provision, if four conditions are satisfied—(1) that he is solvent at the date of the deed; (2) that the provision is reasonable in amount; (3) that its operation does not begin till his death; (4) that it is not revocable or defeasible by him. But it is impossible for a husband *stante matrimonio* so to set aside a portion of his means for the aliment of his wife as to be beyond the reach of his creditors.

Ill.—A husband, when solvent, by a postnuptial deed, directed his trustees to pay to his wife the interest of £5000 during the marriage, for the better aliment of herself and the children of the marriage. It was held that the provision was gratuitous and revoked by the husband's subsequent bankruptcy.[1]

Is an Action competent which concludes for Aliment alone?—Unless the spouses have agreed to live apart and

[1] *Dunlop* v. *Johnston*, 1867, L.R. 1 Sc. App. 109.

have not revoked that agreement, or, the conduct of one of them has been such as to justify the other in non-adherence, and decree of separation has been granted, the Court will not pronounce an order for permanent aliment. If the agreement does not admit conduct which would justify judicial separation, it is a sufficient answer if the husband offers to take his wife back, and aliment her in his own house.[1]

1. Where there has been a Contract of Voluntary Separation.—In this case the wife may sue for arrears of aliment under the contract, and for interim aliment for the future, until the contract is revoked. With regard to the future no decree will be made against the husband if he judicially revoke the contract, and offer to take his wife back to cohabitation. But such an offer will be no defence if it appear to the Court to be without *bona fides*.[2]

Ill.—Husband writes to say he is in Canada, and is going to the United States to find work. He offers to receive his wife and family if they will go out to the place in Canada, and undertakes to pay their passage-money. Held this was not such an offer as the wife was bound to accept, it not appearing that if she went to his last address in Canada she would be able to find him.[3]

In such a case where there is a contract of separation which the husband does not judicially revoke by a *bona fide* offer, it is competent to bring the action in the Sheriff-court.[4] For no question of status is raised.

And even when the parties are living apart without any contract of separation, but where the husband is paying the wife a weekly allowance, an action for increased aliment is competent.[5]

[1] *Paterson* v. *P.*, 1861, 24 D. 215; *Hood*, *Crombie*, *Arthur*, *infra*. Permanent aliment may be granted without decree of separation, where the husband admits, either expressly or by non-appearance, that he has deserted his wife or turned her out of doors (Fr. i. 841).

[2] *Hood* v. *H.*, 1871, 9 M. 449. A husband offers to aliment his wife in his own house, but takes lodgings only for her, and does not eat, sleep, or stay in the same house with her. It was held by the House of Lords that this was not adherence sufficient to exempt him from liability in a separate aliment. *Arthur* v. *Gourlay*, 1769, 2 Pat. 184.

[3] *Hood*, *supra*, second judgment, at p. 454.

[4] *Ibid.*, first judgment, at p. 451.

[5] *Tibbets* v. *T.*, 1862, 24 D. 599.

2. Conduct justifying non-adherence.—Where the ground on which aliment is sued for is not a contract or agreement, but that the conduct of the defender has been such as to justify the pursuer in non-adherence, the Court will not decree more than interim aliment, except as auxiliary to decree of separation.[1]

Where separation is not asked, the conclusion for aliment should be limited to "so long as the defender shall refuse to receive and entertain the pursuer." And where not so stated in the conclusion these words were inserted in the decree.[2] In an action for aliment at the instance of a deserted wife it is unnecessary to lead evidence if the husband fails to appear.[3]

I. Interim Aliment.—To what extent is an action for Aliment competent in the Sheriff-Court?—Where no question of status is raised such an action is competent. *E.g.*, where the marriage is admitted and the parties are *de facto* separate. But the power of the Sheriff is limited to making an interim award. It arises merely from the consideration that the wife must not be allowed to starve pending her application to the Court of Session, and aliment would not be granted if she were in possession of means or earning wages adequate for her support. In the words of Lord President Inglis, "The moment it is necessary for the Sheriff to touch anything properly consistorial, the competency of the application is at an end. All that he can do is to provide for the maintenance of a wife in actual separation pending the decision between the parties of the consistorial question of separation. Anything further is undoubtedly beyond his jurisdiction."[4]

Accordingly in a case where the ground was cruelty, but the wife remained in her husband's house, though not occupying the same bed, until after the raising of the action, it was held incompetent for the Sheriff to award interim aliment.[5] For the real question to be determined was whether she was justified in leaving the matrimonial home.[5]

[1] Fr. i. 842.

[2] *Williamson* v. *W.*, 1860, 22 D. 599; *see Coutts* v. *C.*, 1866, 4 M. 802; *Crombie* v. *C.*, 1868, 6 M. 776.

[3] *Wood* v. *W.*, 1882, 19 S.L.R. 631, *per* Lord Kinnear, Ordinary.

[4] *Smith* v. *S.*, 1874, 1 R., at p. 1011; also *Hay* v. *H.*, 1882, 9 R. 667.

[5] *M'Donald* v. *M'D.*, 1875, 2 R. 705; *see* judgment of Sheriff Trayner, *Murphy* v. *M.*, 1883, 27 Journ. of Jur. 441.

The ordinary form of conclusion in such actions before the Sheriff is that the Court shall decree aliment, "aye and until a permanent arrangement of the rights of the parties shall be made by a competent Court."

But this, as pointed out by Lord Deas in the case of *M'Donald*, really supersedes the necessity of an application to the Court of Session, and makes it possible for the Sheriff to award permanent aliment, a result not contemplated by the legislature. The more correct practice for the Sheriff is to decree aliment for a fixed period, which he deems reasonably sufficient to enable the parties to make their application to the supreme Court.[1]

Lord Fraser asserts that if the alleged cruelty or desertion is denied, the Sheriff is bound at once to dismiss the petition for aliment and cannot allow a proof. It may be doubted whether this is sound, and is not certainly sufficiently supported by the case of *M'Donald* on which he founds.[2] It would be a hardship if a wife whose life would be endangered if she returned to her husband's house, could not obtain from the Sheriff sufficient aliment to support her till she can obtain a decree of the Court of Session. The case is different where the marriage itself is denied. It is only in the character of a wife that she is entitled to aliment, and it is clearly incompetent for the Sheriff to look at the question whether she was lawfully married.[3]

Interim Aliment where Marriage is Denied in Supreme Court.—The general rule is that the woman is entitled to interim aliment, *pendente lite*, if she produces *prima facie* proof of marriage.[4]

Where Aliment, *pendente lite*, is given.—The ground is that the wife is entitled to live separate from her husband until the merits of her case have been determined. It would

[1] *See* the subject fully discussed by Sheriff Clark, *Niven* v. *N.*, 1877, 21 Journ. of Jur. 523.

[2] *See Niven*, *supra*.

[3] *Benson* v. *B.*, 1854, 16 D. 555 (judgment of Lord Cowan, Ordinary).

[4] In England a fact of marriage—i.e., a marriage ceremony—whether it turns out invalid or not, must be proved or admitted before alimony is allotted. *Smyth* v. *S.*, 1824, 2 Add. 254; *Longworthy* v. *L.*, 1886, 11 P.D. 85.

obviously be unjust to require a wife to continue to cohabit with her husband when she was charging him with being guilty of cruelty or adultery. And a wife justifiably living apart from her husband is always entitled to aliment, unless she has means, or is in a position to support herself, and is in receipt of adequate wages. This does not mean that it is a sufficient answer for the husband to aver that the wife can support herself, if she has not been in use to do so.

Ill.—Spouses have been living separate for several years. Husband is a contractor, with net income of £225. Wife is in service, earning £14 a-year, besides board and lodging. She asks interim aliment. Refused.[1]

Ill.—Husband, a dentist, with income of £200 a-year. Spouses had been long separate. Wife acted as housekeeper for her son, and he allowed her £30 a-year. Interim aliment refused.[2]

The Case is different according as the Wife is Pursuer or Defender.

When she is Pursuer.—Under the old law she had no claim till she had established a *semiplena probatio*. Now she must have a good *prima facie* case. It is entirely in the discretion of the Court whether to award interim aliment or not.[3] But, unless the circumstances are exceptional, an award will be made if the wife shows that she has no other means of support.

Where Wife has separate Estate.—If she has means reasonably sufficient to maintain her in the rank of life to which her husband belongs, and to pay the expenses of her litigation, she will not be entitled to aliment.[4]

Ill.—Wife of large farmer has £70 a-year. Out of this she has to support herself and one child. She is suing for separation on ground of cruelty, and has defended an action of adherence. £150 given towards aliment and expenses.[5] (*N.B.*—The rubric gives £50).

[1] *George* v. *G.*, 1867, L.R., 1 P. and D. 554.

[2] *Burrows* v. *B.*, *ibid.*

[3] *Currie* v. *C.*, 1833, 12 S. 171.

[4] *Macfarlane* v. *M.*, 1844, 6 D. 1220.

[5] *Ibid.*, 1848, 10 D. 962.

Ill.—Where wife had gone to live with her relatives, and had been with them for about eighteen months, she was awarded aliment on the ground that she was not bound to live in a state of dependence.[1]

Ill.—Wife takes a house, and supports herself by letting lodgings. Aliment refused.[2]

Where Wife is Defender.—In this case it is still clearer that she is entitled to be supported by her husband during the progress of the action. After decree of separation for her fault she is, nevertheless, entitled to aliment from him. While she has the status of wife he is bound to support her. After decree of divorce against her the husband's liability is ended. And if she gets decree against him, her claim is no longer for aliment, but for her provisions, as if he were dead. But if she maintains the children of the marriage she can claim alin ent.[3]

Ill.—Husband is leather merchant, with income of £250 a-year. His wife obtains divorce from him, and takes two children with her. He has two children of another marriage to support. Ordered to pay £20 a-year for aliment of each of the two children who were living with their mother, till these respectively attained the age of ten years.

Ill.—If it is admitted that wife is living with co-respondent, and is supported by him, she cannot get aliment. But mere averment that she is cohabiting with co-respondent is not enough. It must appear that he supports her.[4]

Ill.—Husband sues for divorce on ground of adultery. He is a lieutenant in navy, with pay of 6s. a-day. Wife's father has been in habit of making her an allowance of £100 a-year. He has always paid it in March. The Court refused to grant alimony out of the husband's estate until it was seen whether the father continued the allowance.[5]

[1] *Borthwick* v. *B.*, 1848, 10 D. 1316, note.

[2] *Goodheim* v. *G.*, 1861, 2 S. and T. 250.

[3] *Dunn* v. *Matthews*, 1842, 4 D. 454.

[4] *Madan* v. *M.*, 1867, 37 L.J., P. and M. 10; *Holt* v. *H.*, 1868, 1 L.R., P. and D. 610.

[5] *Eaton* v. *E.*, 1870, 2 L.R., P. and D. 51. But where wife earned 5s. a-day uncertainly by fish-curing, it was held this was not such separate estate as to relieve husband of liability for her *expenses* (*Milne* v. *M.*, 1885, 13 R. 304).

Aliment pending Appeal.—Where the wife has been successful, and the husband is appealing either to the Inner House or the House of Lords, she is clearly entitled to aliment. In the case where a decree of divorce has been pronounced against her by a Lord Ordinary, she does not cease to be the wife until decree has been extracted, and therefore aliment will, in the general case, be granted her till the final judgment on her reclaiming note. But the appeal must not appear merely frivolous or vexatious.[1]

Reduction of Decree.—As after final decree she ceases to be the wife, her right to aliment is completely extinguished, and she cannot therefore obtain it pending the raising of an action of reduction. Lord Fraser states an opinion directly opposite,[2] and supports it by the authority of two old cases, in which aliment was given to a wife pending reduction of a decree of the commissaries.[3] But it was pointed out by the Court, in a case where a wife asked for expenses of an action of reduction, that *De la Motte* and *Allsopp* were not authorities in her favour, because reduction was one of the ordinary modes of review of the commissaries' judgment, and the woman consequently retained her status as wife till decree in the reduction.[4]

Wife presumed Innocent till Decree.—Although the wife's conduct of her case in which she is charged with adultery may seem to amount to a confession of guilt, this is no ground for refusing her aliment *pendente lite*.[5]

Wife in Gaol.—Aliment *pendente lite* has been given in England in spite of the fact that the wife was being maintained at the expense of the country.[6] For otherwise a wife in gaol could not litigate. But a wife who is living with the co-respondent as his wife, and being supported by him, is not

[1] *Ritchie* v. *R.*, 1874, 1 R. 826; *Hoey* v. *H.*, 1883, 11 R. 25; *Donald* v. *D.*, 1863, 1 M. 741.

[2] Fraser, i. 854.

[3] *De la Motte* v. *Jardine*, 1789, M. 447; and *Allsopp* v. *A.*, 1830, 8 S. 1032.

[4] *Stewart* v. *S.*, 1863, 1 M. 449; see also *Bowman* v. *Graham*, 1884, 11 R. 474 (where a divorced wife who had got a sum for expenses of a reduction was found liable to repeat when her action was unsuccessful).

[5] *Smith* v. *S.*, 1863, 4 S. and T. 228.

[6] *Kelly* v. *K.*, 1863, 4 S. and T. 227.

entitled to aliment, though her right to it will revive when she ceases to be supported by the co-respondent.[1]

When Husband has no Funds.—Decree for interim aliment was given where the wife was defender in an action of divorce for adultery, although the husband alleged he was in destitute circumstances and applying for admission to the poor's roll.[2] This, however, was on the ground that as long as his funds held out he was liable to aliment his wife. It does not appear reasonable that where the Court is satisfied that the husband is completely impecunious, decree for interim aliment should be issued. And the law in England is settled the other way.

Ill.—Husband, a pilot on leave of absence for six months without pay. He has no income, and has no property. Court refused to order aliment, *pendente lite*.[3]

Ill.—Husband got for his work his board and lodging and 4s. a-week. Court refused to order aliment *pendente lite*.[4]

Ill.—Husband, a baker with income of £60 a-year. He had given his wife £70 at the commencement of the suit, in lieu of a sum he had received with her at marriage. Held she ought not to receive aliment until this fund was expended.[5]

In Declarator of Nullity.—If she is pursuer, she can claim aliment if she had grounds for relying on the validity of the marriage.[6] If she is defender, the man admits by the fact of raising the action that she has a *prima facie* title to the name of his wife, even where he charges her with having fraudulently procured the marriage. Hence in most cases she will get interim aliment.[7]

Where the ground of nullity averred is bigamy, Mr. Mackay suggests that if interim aliment is awarded, the husband should be entitled, after final decree in his favour, to sue for

[1] *Holt* v. *H.*, 1868, 1 L.R., P. and D. 610.

[2] *Baxter* v. *B.*, 1845, 7 D. 639.

[3] *Fletcher* v. *F.*, 1862, 2 S. and T. 434.

[4] *Capstick* v. *C.*, 1864, 33 L.J., Mat. 105; *see* also *Beaton* v. *B.*, 1863, 2 S. and T. 652; *Brown* v. *B.*, 1863, 3 S. and T. 217.

[5] *Coombs* v. *C.*, 1866, 1 L.R., P. and D. 218.

[6] S. v. B., 1884, 9 P.D. 80; and *see infra*, p. 121.

[7] *Ballantyne* v. *B.*, 1866, 4 M. 494. (The Lord President's doubt arises from the specialty of this case, the ground of declarator being that the woman had been guilty of bigamy.) Same rule in England, *Portsmouth* v. *P.*, 1826, 3 Add., 63.

repetition, or perhaps caution to repeat should be required before payment of aliment.[1]

In a case where the man's action was for nullity, and the woman admitted in pleading that the marriage in question was contracted irregularly in Scotland, and when neither party had resided therein more than three days, this was held a virtual admission of nullity, and interim aliment was refused.[2]

What is *prima facie* proof of marriage is always a question of circumstances. In one case, where the man had given the woman a writing in these terms, "I hereby acknowledge Anna Maria Browne, commonly known by the name of Mrs. Mills, to be my lawful wedded wife," it was held by a majority of the whole Court that there was no *prima facie* case. But the circumstances were very special, and some of the woman's own averments were regarded as lending support to the defence that the writing was granted without a true matrimonial purpose. And the woman never had even ostensibly the status of wife, or avowedly cohabited with the man.[3]

In a less suspicious case such an acknowledgment would probably have been sufficient. It would generally be enough to produce a certificate of marriage.[4] In such a question the Court will be much less inclined to award interim aliment or expenses where the woman has not been enjoying the status of wife.

Amount of Interim Aliment.—This is entirely a matter for the discretion of the Court. As a rule, considerably less will be given than would be fixed as a suitable sum for permanent aliment after separation.

In England the rule is to give one-fifth of the joint income of the spouses, unless the wife's own income is sufficient.[5] As much as £1000 a-year was decreed as interim aliment when it appeared that the husband's income was £8000.[6]

No such absolute rule has been recognised in our Courts, and it is seldom that more than a decent maintenance is given by way of interim aliment.

[1] Mackay, Practice, ii. 561.

[2] *Blackmore* v. *Mills*, 1868, 18 L.T. 586.

[3] *Browne* v. *Burns*, 1843, 5 D. 1288; *Fleming* v. *Corbet*, 1858, 21 D. 179.

[4] *M'Leod* v. *Telfer*, 1820, Hume, p. 10.

[5] *Thompson* v. *T.*, 1867, L.R., 1 P. and D. 553.

[6] *Edwards* v. *E.*, 1868, 17 L.T. 584.

Aliment refused or less given than usual on ground of Wife's conduct.—When the husband averred that the wife had taken from his house furniture of the value of £800 or £1000, the Court refused to order aliment.[1]

And where a wife had instituted a number of vexatious actions against her husband, the Court took this into account and gave her a meagre aliment.[2]

Amount of interim Aliment may be varied on proof of change of circumstances.—Where interim aliment had been given at the rate of £5 a-month, this was afterwards increased to £8 a-month on account of the additional expense to which the wife had been put by her confinement.[3] But in England it has been laid down that the Court will be slow to increase interim aliment—*e.g.*, a husband and wife separated with the agreement that he was to give her £40 a-year. His income was then £210. Subsequently he raised an action of divorce against her on the ground of adultery. She asked for increased aliment, and it was admitted that the husband's income was now not less than £1700. The Court refused to give more than the £40 agreed upon.[4]

II. Permanent Aliment.—A husband is bound to support his wife after decree of judicial separation, unless she is otherwise adequately provided for, and this holds good even when the separation has been obtained on the ground of her cruelty or adultery, for in spite of the decree she still retains the status of his wife.

Amount of Aliment granted.—This is a matter of discretion, and many circumstances may enter into consideration.

The general rule will be that the wife is entitled to be supported decently in the position which she occupies in virtue of her husband's position. It would not be right that she should be reduced to a bare pittance, while her husband is living in affluence. On the other hand, it is not desirable to put her in a better position as regards money than she was during cohabitation, for that would be to hold out an inducement to separation. And as during cohabitation a wife follows the

[1] *Bremner* v. *B.*, 1863, 3 S. and T. 249.

[2] *Hakewill* v. *H.*, 1860, 30 L.J., Mat. 254.

[3] *Hoey* v. *H.*, 1883, 11 R. 25.

[4] *Powell* v. *P.*, 1873, L.R., 3 P. and D. 55, and 1874, p. 186; *see* also *Weber* v. *W.*, 1858, 1 S. and T. 219; contra, *Donald* v. *D.*, 1862, 24 D. 499.

varying fortunes of her husband, so the law does not guarantee to a wife living apart that she shall be secured against the calamities which may befall him. She is still his wife, and has taken him "for better, for worse."

The amount will be a proportion of his income.[1]

The Court has adopted as a guide the rule that, apart from special circumstances, a wife who has no other means of support, will be allowed one-fourth of her husband's net income.[2] If she is to support children of the marriage more may be given to her. On the other hand, if they are to be maintained by the husband and his means are small, this may be a reason for allowing a smaller sum to the wife.[3]

Ill.—Husband's income is £400 a-year. Wife has custody of the three children. Court gave her £160. £100 for herself, and £20 for each of the children.[4]

Ill.—Husband's income £250. He supports two children. £75 given.[5]

It is not a ground for giving smaller aliment that a husband has to support children of a former marriage. But the Court might take this into consideration if he had a large family of them and his means were small.[6]

It may be a ground for giving less that a husband's position requires him to live in a certain style.[7]

Ill.—Husband, a baronet, is a captain serving in India. His pay is £480. £120 given.[8] (In England £160 would have been the usual proportion.)

The rank in life of the parties is always an element for consideration.[9] But the wife takes the rank of the husband,

[1] In referring to the English cases it is important to bear in mind that the rule there is to give one-third of the husband's income. Oakley's "Divorce Practice," p. 137; *Sidney* v. *S.*, 1865, 4 S. and T., at p. 179; *see Wotherspoon* v. *W.*, 1869, 8 M. 81; *Crombie* v. *C.*, 1868, 6 M. 776; *M'Millan* v. *M'M.*, 1871, 9 M. 1067; *Graham* v. *G.*, 1878, 5 R. 1093.

[2] *Lang* v. *L.*, 1868, 7 M. 24.

[3] *Thompson* v. *T.*, 1890, 17 R. 1091; *Wotherspoon* v. *W.*, 1869, 8 M. 81.

[4] *Whieldon* v. *W.*, 1861, 2 S. and T. 388.

[5] *Harris* v. *H.*, 1828, 1 Hagg. E.C. 351.

[6] *Grafton* v. *G.*, 1872, 27 L.T. (N.S.) 768; also *Hill* v. *H.*, 1864, 33 L.J. (Mat.) 104.

[7] *Hawkes* v. *H.*, 1828, 1 Hagg. E.C. 526.

[8] *Louis* v. *L.*, 1866, 1 L.R., P. and D. 230.

[9] *Graham* v. *G.*, 1878, 5 R. 1093; *Thomson* v. *T.*, 1890, 17 R. 1091.

and therefore it is submitted, in spite of the authority of an Irish case, that the fact of the wife being of humble origin is no reason for giving her less aliment.[1] Nor is the fact, that the husband has chosen to live on much less than his income, during the cohabitation, a ground for awarding a less sum to the wife.

Ill.—Husband, a pawnbroker, had an income of about £640. The spouses had lived on about £150. £140 given to the wife.[2]

Where Spouses have fixed on a sum themselves.—The Court will readily be guided in fixing aliment by the fact that in a contract of voluntary separation or otherwise the spouses had themselves determined what sum they considered reasonable.[3]

Ill.—Husband, a publican, makes a net profit of £150 a-year. By a deed of separation the wife had agreed to take 17s. 6d. a-week as aliment. On this she had maintained herself and her mother for some years. She now asked for £78 a-year. Court fixed 17s. 6d. a-week.[4]

It follows from the general rule that if the husband be in good circumstances the wife is entitled to aliment although she may be in possession of separate property sufficient for a bare maintenance. For she ought to be able to live in conformity with her husband's position.

Ill.—Husband has £1100 a-year. Wife has £150 a-year of her own. This was held insufficient for her, and the Court ordered the husband to pay her aliment at the rate of £245 a-year.[5] But aliment is not given for the wife to save out of. It is essentially for present maintenance.[6]

Amount of Aliment.—The following illustrations may be useful on the question of amount :—

[1] *Butler* v. *B.*, 1842, Millward's Ir. Rep. 629.

[2] *M'Millan* v. *M.*, 1871, 9 M. 1067.

[3] But *see Stewart* v. *S.*, 1887, 15 R. 113.

[4] *Thompson* v. *T.*, 1890, 17 R. 1091.

[5] *Sidney* v. *S.*, 1865, 4 S. and T. 178. (This was after dissolution, but the rules as to amount of aliment are the same. It is much to be regretted that our Courts have not the power, possessed by those of England, to order permanent aliment after divorce as well as separation.)

[6] *Thompson*, *supra*.

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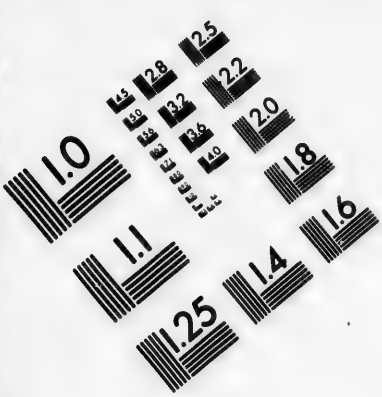



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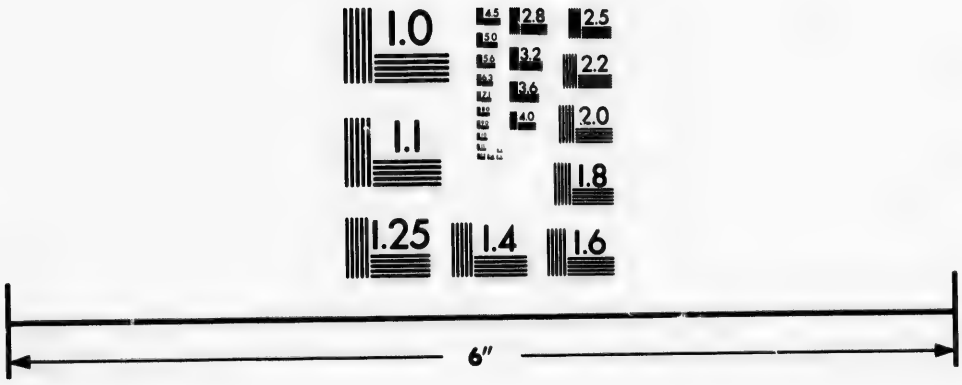



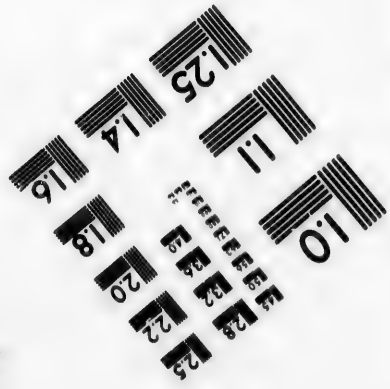

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Ill.—Husband has a clear income from heritage of £243. Wife has £30 of her own. He supports one daughter of the marriage. £55 a-year given.[1]

Ill.—Husband has income of £100 as master of a ship. £30 given.[2]

Ill.—Husband is a fruiterer who keeps no books. Wife said the profits were about £300. An accountant judged from the turnover that husband's net income would be £109. The Lord Ordinary struck it at £200, but gave the wife £65, more than a quarter. This was adhered to.[3]

Ill.—A husband who had deserted his wife had £30 a-year of his own. His mother allowed him £50 a-year. He had a contingent right to the life-rent of a sum of £2500. £20 given.[4]

Ill.—Husband earns wages at the rate of £6 a-month. 6s. a-week given.[5]

The Amount originally fixed may be varied on proof of change of circumstances.—Power is sometimes expressly reserved to the parties in the decree to apply for variation of aliment on the ground of material change of circumstances.[6] But this is unnecessary, as it is always implied.

Ill.—Wife obtains decree of separation and aliment. The aliment is fixed at £40, the husband's income being £115. After the separation she gives birth to a legitimate child. She petitions for increase of aliment, and is allowed £7 a-year in addition.[7]

Ill.—By joint minute in an action of separation husband agreed to pay wife £250 a-year as aliment for herself and two children. Three years later he petitioned to have the amount restricted. The Court remitted to an accountant, and found the husband's income was £430, and that the wife had no means. Aliment restricted to £150.[8] (It is a peculiarity of this case that it was not shown that his income had suffered any diminution. He explained that when he originally con-

[1] *Wotherspoon* v. *W.*, 1869, 8 M. 81.

[2] *Williamson* v. *W.*, 1860, 22 D. 599.

[3] *Jameson* v. *J.*, 1886, 23 S.L.R. 402.

[4] *Derby* v. *Syme*, 1833, 11 S. 305.

[5] *Cowper* v. *C.*, 1860, 23 D. 68.

[6] *Symington* v. *S.*, 1874, 1 R. 871.

[7] *Hay* v. *H.*, 1882, 9 R. 667.

[8] *Stewart* v. *S.*, 1887, 15 R. 113.

sented to £250 he was sanguine about an increase in his business.)

Diligence on the Dependence of an Action of Separation and Aliment.—The general rule is, that in every action in which the payment of a sum of money is concluded for, it is competent to use diligence on the dependence of the action for the enforcement of the claim. But where, as in an action for aliment, the debt is a future one, diligence is incompetent unless the husband is *vergens ad inopiam, in meditatione fugæ*, or is putting away his funds.[1] In this case the proper practice is to proceed by bill setting out the special grounds for the diligence, to enable the defender to answer the allegation.[2]

Ill.—On evidence that the husband was realising his estate with a view to leaving the country, inhibition used by the wife on the dependence of an action of separation and aliment was only recalled on caution for £4000 being found.[3]

There may be Circumstances in which a Husband may be required to find Security for the Payment of Aliment.—Where a husband has only one source of income, such as, *e.g.*, an annuity or a pension, the Court has in some cases ordered him to assign a portion of it in security of his wife's aliment. But when his income is derived from business, the wife is not, in the ordinary case, to be placed in the position of a secured creditor. She must still follow his fortunes.[4]

But in exceptional circumstances diligence used by a wife will not be loosed except on caution or consignation.[5]

Ill.—Wife obtained decree of separation and aliment at the rate of £25 a-year. Subsequently the husband was convicted of setting fire to his property to defraud an insurance company. He was a travelling hawker, and the wife averred she did not know where to find him when the aliment fell due. An

[1] *Symington* v. *S.*, 1875, 3 R. 205.

[2] *Ibid.*, p. 207. For otherwise, as pointed out by Lord President Inglis in *Symington*, the wife would in effect be converting her husband's debtor into her trustee without his consent, and could bring an annual action of furthcoming against him for her aliment.

[3] *Burns* v. *B.*, 1879, 7 R. 355.

[4] *Symington*, *supra*, at p. 207.

[5] *Burns*, *supra*.

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arrestment made by her was only recalled on consignation of £100.[1]

Arrears not Claimable.—Aliment is for present maintenance, and if a wife has managed to support herself without it, either by her own exertions or by the charity of others, she cannot sue for the arrears of aliment. If she has contracted debt for the purchase of necessaries, the husband is directly liable to the persons who have furnished these, and it is by suing him, and not by inducing the wife to sue for arrears of aliment, that the creditors should obtain payment.[2] On the same ground, if a wife dies free from debt her executors cannot sue the husband for unpaid aliment.[3] The wife has no claim for aliment against her husband's bankrupt estate, except under a marriage contract.

Liability of the Husband for the Wife's Legal Expenses.[4]—A wife is entitled to obtain legal assistance for the protection of her safety or the vindication of her character. If she be possessed of separate estate, she must do this at her own charges. If she has no separate estate her husband will be liable for her legal expenses, precisely on the same ground as for food or clothing supplied to her. The Married Women's Property Acts have not, contrary to the opinion of Lord Fraser, made any alteration in this respect. The conditions of the husband's liability remain as before, viz.:—(1) were the expenses reasonably and properly incurred? and (2) has the wife, independent of her husband, any fund out of which she can defray them?[5]

What is Separate Estate?—A wife earning wages of varying amount has not separate estate to the effect of relieving her husband from liability for her legal expenses.[6]

But a wife living apart from her husband, who has saved £500 as a shopkeeper, must defend an action of divorce at her own cost.[7] The principle is the same whether the expense be incurred by the wife in litigating with her husband or with

[1] *James* v. *J.*, 1886, 13 R. 1153.

[2] *M'Millan* v. *M'M.*, 1871, 9 M. 1067.

[3] *Stones* v. *Cooke*, 1835, 8 Sim. 321, note; Fr. i. 863; Bishop, Ed. 1891, § 998.

[4] Begg on Law Agents, 149, *seq.*; Fr. i. 614, and ii. 1230, *seq.*; Smith on Expenses, 228, *seq.*

[5] *Milne* v. *M.*, 1885, 13 R. 304.

[6] *Ibid.*

[7] *Henderson* v. *H.*, 1888, 16 R. 84.

another. For convenience sake the main points decided with regard to her legal expenses generally, will be first mentioned. A wife living separate from her husband with a fixed aliment, under a contract of separation, must litigate at her own expense.[1] Where she had no aliment and was justified in living apart, "she carried along with her a credit for whatever her preservation and safety required. She might, therefore, charge her husband for the necessary expense of this proceeding, as much as for necessary food and raiment."[2] *A fortiori* if she be judicially separated. It goes without saying, that if in an action against the husband himself she be successful, she will get her expenses like any other litigant. A wife with separate estate is liable, though the action is with her husband's concurrence, if the success of it would bring gain to the wife.[3]

Ill.—A wife and husband take various legal proceedings with a view to establish the wife's legitimacy and consequent right to a succession. If the succession had been acquired she would have taken it exclusive of the *jus mariti*. Held that such proceedings were *in rem versum* of the wife, and that the law agent was entitled to decree against her and her husband conjunctly and severally.[3] In both the cases of *Macara* and *Scott*, the husband had made himself a pursuer in the action along with his wife, she having the substantial interest in the suit. It seems natural, therefore, that he should in such a case incur a joint liability with her. But where his concurrence is merely as his wife's curator, and he has no patrimonial interest in the result, is he liable to any extent in expenses? It is submitted that the wife's separate estate, if any, would be primarily liable, and the husband *subsidiarie* if the action was a reasonable one.

Where the Husband refuses to concur.—Mr. Mackay expresses the opinion that if a husband refuses to concur in an action at his wife's instance, he cannot be liable in expenses.[4] But with respect it appears that this hinges on the grounds of

[1] *Young* v. *Cooper*, 1825, 4 S. 81 (N.E. 83).

[2] *Per* Lord Ellenborough in *Shepherd* v. *Mackoul*, 1813, 3 Campbell, at p. 327.

[3] *Macara* v. *Wilson*, 1848, 10 D. 707; also *Scott* v. *Maxwell*, 1851, 13 D. 503.

[4] Mackay's "Practice," ii., p. 574.

his refusal. He cannot by refusing to concur escape liability, if the Court think that the expenses were such as the wife might reasonably and properly incur, such as, in other words, might fairly be deemed necessary, and if she has no separate estate out of which they may be defrayed. In fact, the husband's formal concurrence or non-concurrence as his wife's curator, does not affect one way or the other the question of his liability for her expenses. It is different when, as in the cases of *Macara* and *Scott*, already cited, he has made himself a joint pursuer or defender.

Ill.—An agent conducted an action for a wife against her husband for the custody of their children It was unsuccessful. He sued both her and her husband for expenses. Held by Lord Meadowbank that there being no reasonable ground of action averred against the husband by the wife, and she having separate estate, he was not liable in her expenses.[1]

Ill.—A wife separate from her husband carries off a child of the marriage. The husband obtains interdict against her. Held she was not liable to him in expenses, it not being shown that she had separate estate.[2]

The English law is analogous, and the following illustrations may be given of legal expenses incurred by a wife for which her husband has been found liable as being, in the circumstances, "necessaries" for her.

Ill.—A wife was turned out-of-doors by her husband with great violence. She exhibited articles of the peace against him (a proceeding similar to law-burrows). Held, this being necessary, her husband was liable to the attorney in the expense.[3]

Ill.—A wife is deserted by her husband. Tradesmen press for accounts, and the landlord threatens to distrain for rent. She takes legal advice as to what measures she ought to adopt. Held husband is liable to the solicitor.[4]

In England, where the husband is liable for his wife's expenses, either of an action against a third party or against himself, such expenses will not be limited to taxed costs as

[1] *Lothian* v. *Todd*, 1829, 1 Jur. 129.

[2] *Lang* v. *L.*, 1849, 11 D. 1217.

[3] *Shepherd* v. *Mackoul*, cit.

[4] *Wilson* v. *Ford*, 1868, L.R., 3 Ex. 63.

between party and party. He is liable for the account, as between agent and client.[1]

But in Scotland, on the taxation of a wife's account in a consistorial action, the auditor allows her all reasonable and proper disbursements. There are therefore no extra-judicial expenses remaining which can be considered as necessaries.[2]

In Actions between the Spouses.—1. Where Wife has separate Estate.—In this case the position of a wife is not different from that of any other litigant. She must defray her own charges, and abide the issue. If she is successful, she will recover her expenses from her husband; if unsuccessful, she must pay his as well as her own.[3] It may be that the wife, though able to support herself, has no fund out of which she can reasonably be expected to find money for litigation. Thus a wife earning wages as a fishcurer was held not to have separate estate.[4] But her own savings as a shopkeeper are so.[5] The Court will have regard to her position and the necessary expenses which it entails.

The wife of a large farmer had £70 a-year of her own. Out of this she had to maintain herself and a child. She was awarded a sum for interim aliment and expenses.[6] The wife should give in a condescendence of her separate estate.[7]

2. Where she has no separate Estate.—Apart from contract a married woman had formerly no separate estate. Her moveables passed by universal assignation to her husband. This is now altered, but the majority of wives who have no fortune must still litigate at their husbands' expense, or not litigate at all. The rules differ according as she is pursuer or defender. It would be a gross injustice if a husband were

[1] *Ottaway* v. *Hamilton*, 1878, 3 C.P.D. 393; *Stocken* v. *Patrick*, 1873, 29 L.T., N.S. 507.

[2] *King* v. *Patrick*, 1845, 7 D. 536. But *see Symington* v. *S.*, 1874, 1 R. 1006, where the expense of executing an arrestment on the dependence was disallowed though the wife proved the adultery, and it was admitted that but for the arrestment the husband would have removed all his funds beyond the jurisdiction.

[3] *Macfarlane*, 1848, 10 D. 962; *Milne* v. *M.*, 1871, L.R., 2 P. and D. 202.

[4] *Milne* v. *M.*, 1885, 13 R. 304.

[5] *Henderson* v. *H.*, 1888, 16 R. 84.

[6] *Macfarlane* v. *M.*, 1848, 10 D. 962.

[7] *Pitt* v. *P.*, 1862, 24 D. 1444.

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able to prefer charges of the most serious and damaging character against his wife, and she were prevented by want of funds from employing agent and counsel for her defence. Accordingly, it is a settled rule of practice, that a wife is always entitled to be put in funds by her husband to defend herself. A motion is commonly made *in initio litis* for a sum in name of interim aliment and expenses, and this is repeated as often as may be necessary. At the end she is entitled to her expenses, taxed on the principle already referred to, whether she has been successful or not in her defence. If the judgment of the Lord Ordinary be in her favour, and the husband reclaim, she is entitled to a sum to enable her to uphold the judgment. And if he appeals to the House of Lords, the Court of Session will give her a sum for her expenses.[1]

When an order for a sum in name of aliment and expenses has been made, the case will not be allowed to proceed until the sum for the expenses has been paid, at any rate unless the husband has had himself put on the poor's roll.[2] In such a case payment of the aliment is not a condition precedent to allowing the action to go on.[3] When the husband is on the poor's roll, he is not bound to pay his wife's expenses. She must likewise go on the poor's roll. But he is liable for her extra-judicial expenses not covered by the privilege of the poor's roll, just as he is for his own expenses of the same kind.[4]

It was remarked by Lords Deas and Ardmillan that a wife has no absolute right to be defended at the expense of her husband, and that in exceptional cases the Court might refuse to award her expenses.[5] The remark, however, was *obiter*, being in an action brought by a woman for the reduction of a decree of divorce. In such a case the woman is in a totally different position from that of defender in a proper consistorial cause. She has been declared no longer a wife and it would be inconsistent with common sense to make the man liable for her expenses, except, of course, in the event of her success. And it seems difficult to figure a case in which a wife who wished to defend an action of divorce or separation should

[1] *Symington* v. *S.*, 1874, 1 R. 1006.
[2] *Dixon* v. *D.*, 1841, 3 D. 559.
[3] *Ibid.*
[4] *M'Gregor* v. *M.*, 1841, 3 D. 1191.
[5] *Stewart* v. *S.*, 1863, 1 M. 449.

not be allowed an opportunity of doing so. Apparently none such is recorded in the books.

When Wife is Pursuer.—The rule of present practice is stated more accurately by Mr. Mackay [1] than by Lord Fraser. In the Commissary Court the wife was bound to make out a *semiplena probatio* before she was awarded interim expenses or aliment. But as pointed out by Lord Corehouse, the Commissary Court sat *de die in diem*. It would be a great hardship if a wife who had left her husband's house and raised an action against him on the ground of his adultery or cruelty were to be presented with the alternative of returning to her husband or being exposed to starvation before she had made out a *semiplena probatio*.[2] Should her ground of action chance to arise just before the commencement of the long vacation she might have to wait four months before obtaining a grant of aliment. In present practice, accordingly, the *onus* is on the defender of showing that the action is vexatious or raised to extort money. Otherwise the Lord Ordinary will in the general case order a sum to be paid for interim aliment and expenses, unless the pursuer's averments seem to him to suggest a trumped-up case. It may be said of this, as of most rules with regard to expenses, that although it may guide it cannot control the absolute discretion of the Court.

Where the Action is dismissed on the ground of want of Jurisdiction.—In an action by the wife the husband pleaded no jurisdiction, in respect he was not domiciled in Scotland. The plea was sustained, but the wife was allowed her expenses.[3]

May the Wife reclaim at her Husband's Expense?—It is entirely in the discretion of the Inner House whether they will allow expenses to a wife who has reclaimed against a decree divorcing her from her husband. They will generally do so if she has a fairly arguable case on the evidence, or has anything really material to urge by way of special defence.[4]

[1] Mackay's Practice, ii. 559; Fr. ii. 1233.

[2] *Currie* v. *C.*, 1833, 12 S. 171.

[3] *Stavert* v. *S.*, 1882, 9 R. 519.

[4] *Kirk* v. *K.*, 1875, 3 R. 128; *see* also *Montgomery* v. *M.*, 1880, 8 R. 26.

It will be an element of consideration that the Court heard a full argument and took the case to avizandum.[1]

But a wife who—*e.g.*, does not argue in the Inner House the question of adultery, but reclaims on a special defence, such as condonation, in support of which she has a very slender argument, must not expect to get her expenses.[2] As a rule a wife who appeals unsuccessfully to the House of Lords will not get her expenses.[3]

Woman's Expenses in actions of declarator of marriage.—A woman raising an action of this nature may, if she has no funds, be awarded a sum for interim expenses if she holds *prima facie* the status of wife. This is entirely a question for the Court on the averments in the particular case. It is inexpedient to facilitate the raising of actions of declarator on shadowy grounds. The threat of such proceedings may easily be made an engine of blackmail by an unscrupulous woman. On the other hand, if the man by his own conduct has placed the woman in the position of his wife, there is no hardship in giving her the advantages incident to that position until she is dislodged from it.

Ill.—Sir James Campbell, unable to return to Scotland on account of the war, gives a lady a power of attorney in which he styles her "my beloved wife." He also writes letters introducing her as his wife to his relations. The Court of Session held she was entitled to interim aliment in an action of declarator.[4] But on appeal this was reversed.[5]

Where the woman has openly cohabited with the man in the ostensible character of wife, she will generally get an award. And this will also be the rule where, in a writing admittedly under his hand, he acknowledges the marriage, unless her own conduct has been inconsistent with the status she claims.

Ill.—Woman produces written acknowledgment of marriage to her. The writing is admitted. But she avers that the day after the writing she and the defender parted, and she has never seen or heard from him since. During the subsequent four years

[1] *Hoey* v. *H.*, 1884, 11 R. 905.

[2] *Dalgleish* v. *D.*, 1878, 5 R. 679.

[3] *Begg* v. *B.*, 1890, 15 Ap. Ca. 170.

[4] *Sassen* v. *Campbell*, Jan. 20, 1819, F.C.

[5] 1826, 2 W. and S. 309.

she has never made any claim to position of wife. Interim aliment and expenses refused.[1]

Ill.—Man gives woman an acknowledgment of marriage. For seven years she makes no claim to rank of wife, and her two children are registered as illegitimate. Interim expenses refused.[2]

Expenses in Inner House.—Where the Lord Ordinary has granted the declarator of marriage, the woman has the status of wife, and will be awarded a sum for interim expenses to defend the judgment in the Inner House.[3]

In Actions of Declarator of Nullity.—In such an action, at the instance of the woman, she will be entitled to interim expenses, if a ceremony is proved or admitted, or she had other grounds for supposing the marriage valid.[4]

When Woman is Defender. — She will generally be entitled to interim expenses as long as she has the *prima facie* status of wife. There may be cases in which the Court will refuse them. But, even when the man discovers that the woman has a previous husband living, she will, as a rule, be awarded a sum to defend an action of nullity. When the Lord Ordinary has found against her, she will not, in general, be awarded a sum to enable her to reclaim.[5] After final decree of nullity, the woman, who has unsuccessfully defended, will not be allowed expenses.

A wife who unsuccessfully brings an action of nullity may, if she has separate estate, be found liable in expenses.[6]

Where the ground of nullity is the woman's previous marriage, it is suggested by Mr. Mackay that the man might raise an action of repetition for the interim expenses paid by him. There appears to be no authority for this statement. He even thinks that caution to repeat might, perhaps, be required before the award. But in many cases the wife would be as little able to find caution as to pay interim expenses. In an English case, where the wife, who petitioned

[1] *Browne* v. *Burns*, 1843, 5 D. 1288.

[2] *Fleming* v. *Corbet*, 1858, 21 D. 179.

[3] *Forster* v. *F.*, 1869, 7 M. 546.

[4] *S.* v. *B.*, 1884, 9 P.D. 80. *See Langworthy* v. *L.*, 1886, 11 P.D., at p. 86; *Bishop*, Ed. 1891, § 922 *seq.* Mr. Mackay doubts this, ii. 561.

[5] *Ballantyne* v. *B.*, 1866, 4 M. 494.

[6] *M.* v. *C.*, 1872, L.R., 2 P. and D. 414.

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for decree of nullity, was out of the jurisdiction, a motion was made that she should give security for costs. The motion was refused, but it appears that if she had been proved to possess separate estate, it would have been granted.[1]

Reduction of Divorce.—A woman against whom decree of divorce has been given is no longer a wife. If she raises a reduction, she must do so as an ordinary litigant, at her own charges. There may be exceptional cases in which the Court, after examining her allegations, may think they are such as she ought to have the opportunity of stating. In one case, a husband who had divorced his wife was ordered to make an interim award, subject to a claim for repetition. In the result she was found liable in expenses, and ordered to repeat the sums so advanced.[2]

Actions for Aliment, Custody, &c.—There is no general rule. Every case is in the discretion of the Court. Where the wife's case appears to have been reasonably raised or defended by her, the husband may be ordered to make interim payments, or found liable in expenses.[3] In a case where the husband petitioned for custody of a child, the wife lodged answers, and moved that the petition should be sisted, to await the issue of an action of separation at her instance. The petition was granted, but no expenses given.[4] And where a wife had forcibly abducted a child, she was ordered to deliver it back to the husband, and pay expenses.[5]

Reponing.—In the general case a party who asks to be reponed must, if his crave be granted, pay the expenses up to date. But this rule is not applicable to cases between spouses, for, if the wife were reponed on condition of paying expenses, she might apply to the Court to order her husband to put her in funds. The result is, therefore, the same if she be reponed *simpliciter*.[6]

[1] *M.* v. *De B.*, 1875, 44 L.J., P. and M. 41.

[2] *Graham* v. *G.*, 1881, 9 R., 327; and *Bowman* v. *Graham*, 1884, 11 R. 474.

[3] *Tibbett* v. *T.*, 1862, 24 D. 599; *Lang* v. *L.*, 1869, 7 M., at p. 446; *Lilley* v. *L.*, 1877, 4 R. 397; *Bloe* v. *B.*, 1882, 9 R. 894.

[4] *Beattie* v. *B.*, 1883, 11 R. 85.

[5] *Hutchison* v. *H.*, 1890, 18 R. 237.

[6] *Steedman* v. *S.*, 1887, 14 R. 682.

Counter-Actions of Divorce.—A counter-action is in no different position from any other action of divorce. Even where decree of divorce has been pronounced by a Lord Ordinary, a wife who has lodged a Reclaiming Note may raise a counter-action of divorce at the husband's expense. For, pending the appeal, she is still wife.[1]

In one case where she was found liable in the expenses of her counter-action, the husband was allowed to set off, *pro tanto*, the expenses due to him against those which he owed to her in the other action. Here she had allowed her counter-action to be dismissed, and the agent by whose advice it was brought acted for her also in the action in which she was defender.[2]

Where Wife has separate Estate.—Expenses either interim or after decree are only awarded to a wife from her husband's funds, *ex necessitate*. If she has separate estate she must take the fortune of war like another litigant. If successful she will get her expenses, if unsuccessful she may have to pay her husband's as well as her own.[3]

Co-defender's liability for Expenses.—The Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 7), provides that the Court may decern against a man with whom a wife is proved to have committed adultery for the whole or any part of the expenses. He must have been cited to defend. The expenses are taxed as between agent and client, and the co-defender may have to pay the wife's expenses as well as his own.[4]

When he will not be liable.—If the co-defender did not know the defender was a married woman at the time of the intercourse, he will not be liable in expenses.[5] It is for the husband to prove the co-defender's knowledge,[6] but if there were circumstances which ought to have put him on his inquiry as to whether she was a married woman, he will not escape liability on this head. But in the case where the woman is a

[1] *Walker* v. *W.*, 1871, 9 M. 460.

[2] *Craig* v. *C.*, 1852, 14 D. 829.

[3] *Frœbel* v. *F. and Liddell*, 1884, 22 S.L.R. 22, where Lord M'Laren followed *Milne* v. *M.*, 1871, L.R. 2 P. and D. 202; and *Miller* v. *M.*, 1869, *ibid.*, p. 13.

[4] *Munro* v. *M.*, 1877, 4 R. 332.

[5] *Teagle* v. *T.*, 1858, 1 S. and T. 188; *Priske* v. *P.*, 1860, 4 S. and T. 238. *See Kydd* v. *K.*, 1864, 2 M. 1074.

[6] *Howe* v. *H.*, 1867, 15 W.R. 498.

prostitute, a co-defender will not be liable even though he knew her to be married.[1]

Where the husband has been guilty of gross carelessness in exposing his wife to temptation, he may not be found entitled to expenses against the co-defender.

Ill.—Where the spouses, though living under the same roof, occupied separate rooms for years, and the husband was aware of the attentions his wife received from other men, the co-defender was not found liable in all the costs.[2]

But the carelessness must be of a gross character.[3]

Co-defender though assoilzied may be refused his expenses.—If the allegations against him are not proved, he is in the ordinary case entitled to his expenses, but when the conduct of the co-defender has been of a disgraceful character the Court may refuse him his expenses though the adultery be not proved.

Ill.—The co-defender had taken the defender to a house of ill-fame, she being ignorant of its character. Adultery was not proved, but the co-defender was refused his expenses.[4]

Ill.—A husband condones his wife's adultery with A B. A B has letters and a ring belonging to the wife which he will not return. To get them back she meets him again secretly. Husband informed of this, raises action. Adultery not proved, but co-defender's expenses refused.[5]

Co-defender's misconduct short of Adultery.—Co-defender seen walking at night with defender in a wood in suspicious circumstances. He knew she was a married woman. Adultery not proved. Co-defender left to pay his own expenses.[6]

A co-respondent against whom adultery was not proved had caused the expense of a second trial by not explaining that certain clandestine visits were paid not to the wife but to her sister. He was refused expenses.[7]

[1] *Nelson* v. *N.*, 1868, L.R., 1 P. and D. 510.

[2] *Codrington* v. *C.*, 1865, 34 L.J., Mat. 60.

[3] *Badcock* v. *B.*, 1858, 1 S. and T. 189.

[4] *Edward* v. *E. and Jenkinson*, 1879, 6 R. 1255.

[5] *Collins* v. *C. and Eazres*, 1882, 10 R. 250; *see* also *Bancroft* v. *B.*, 1865, 34 L.J., Mat. 144.

[6] *Carstairs* v. *C.*, 1864, 3 S. and T. 538.

[7] *West* v. *W.*, 1870, L.R., 2 P. and D. 196.

CHAPTER XII.

DONATIONS *INTER VIRUM ET UXOREM.*

DONATIONS by a husband in favour of his wife, or conversely, are not null, but are liable to revocation at any time during the life of the donor. The doctrine was borrowed from the Roman law, which at an earlier period entirely prohibited donations between the spouses and declared them void. The reasons assigned by Ulpian are the risk of one spouse robbing himself or herself out of love for the other, and the probability that it would be the better of the two who would ultimately be impoverished to the advantage of the less worthy. *Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur donationibus non temperantes, sed profusa erga se facilitate.*[1] And in another passage, *majores nostri inter virum et uxorem donationes prohibuerunt, amorem honestum solis animis aestimantes, famae etiam conjunctorum consulentes ne concordia pretio conciliari videretur, neve melior in paupertatem incideret, deterior ditior fieret.*[2] But this was in time felt to be too harsh and unjust in defeating the real intention of the donor, and Caracalla[3] issued a rescript declaring that donations between spouses should be valid unless revoked. *Ait oratio fas esse eum quidem qui donavit pœnitere: hæredem vero eripere forsitan adversus voluntatem supremam ejus qui donaverit durum et avarum esse.*[4]

The prohibition of the Roman law may be supported by the reasons adduced by Ulpian in its favour. But it does not owe its origin to any fine-spun theories of this kind. It no

[1] D. 24, 1, 1.
[2] D. 24, 1, 3, pr.
[3] Or some say Severus, Savigny, iv. 181.
[4] D. 24, 1, 32, fr. 2 f.

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doubt runs back to the time when the *paterfamilias* administered the estate of the whole family, and neither wife nor child nor slave had any private funds. For a like reason gifts by one son to another, or by one slave to another, as long as both were in the family of the same *paterfamilias*, were also prohibited.[1] For persons *in potestate* had in the early stage of the law nothing of their own which they could give to another, and if the *paterfamilias* gave anything to them it was presumably for temporary enjoyment and not intended to pass out of the family. The law of Scotland has followed somewhat closely the Roman law as to donations between the spouses.

Between whom does the rule exist?—The parties must be validly married. A deed by a man to his mistress could not be revoked on this head. The Emperor Claudian allowed a woman who had married the son of her tutor, which was illegal, to revoke a gift made to him.[2] And Pothier thinks donations between a man and woman who cohabit should be regarded as revocable whether they be validly married or not.[3] But this is not the law of Scotland. It has not, however, been decided whether such a donation could be revoked when the person making it believed that a valid marriage subsisted. Savigny urges that, in this case, the donation would be revokable not so much because it was made by a person ignorant of the impediment to marriage, as on the ground that it was given in error, and in consideration of a marriage which did not exist.[4] He limits this to cases where the impediment is temporary—*e.g.*, want of age, and the parties, when that is removed, would be free to marry. Where the donor, being ignorant that the marriage was invalid, made the donation, believing it to be revocable, and the donee received it understanding it to be subject to revocation, the argument would seem to deserve consideration that it should be treated as a donation between spouses, and revocable.

[1] D. 24, 1, 3, fr. 2 and 3.

[2] Code v. 16, 7.

[3] Traité des Don, §§ 30, 31, 145. *Note.*—In the case of persons believing themselves married, this would be on the ground that the donation was in consideration of the marriage; where they know they are living in concubinage it would be *ne melior sit condicio eorum qui deliquerunt*, and that it would be *contra bonos mores* to uphold such donations.

[4] Savigny, System, iv., p. 168.

Donations by betrothed persons to each other are not revocable.—And the same would be held of donations between spouses whose marriage had been severed by divorce.[1]

What is a Donation?—Mere presents, if of reasonable value, having regard to the rank of the parties, are not revocable.[2] *Si vir uxori munus immodicum calendis martiis aut natali die dedisset, donatio est.*[3] So where a man lent to his wife some of his slaves to till her land, this was said not to be a donation revocable. And the reason applies to all ordinary presents. *Si quas servi operas viri uxori praestiterint vel contra magis placuit nullam habendam earum rationem et sane non amare nec tanquam inter infestos jus prohibitae donationis tractandum est, sed ut inter conjunctos maximo affectu et solum inopiam timentes.*[4]

Ill.—A wife gave her husband valuable jewels to meet expenses. He gave her, in return, an acknowledgment in respect of which she was held entitled to rank on his estate. But it was not even argued that she could have revoked the donation.[5]

Donation by Wife of Income.—A wife who, during a length of time, allows her husband to ingather her separate income and apply the money as if it were his own, is presumed to have intended to give it to him, and cannot revoke it so far as it has been *bona fide* consumed.[6] This was also the Roman law, "*Si uxor viro dotem promiserit et dotis usuras sine dubio dicendum est peti usuras posse, quia non est ista donatio quum pro oneribus matrimonii petantur.*"[7]

What is a revocable Donation?—A revocable donation is the voluntary transfer of some valuable property or right, or the surrender of some valuable privilege by one spouse to the other, either gratuitously or for a consideration grossly inadequate. It is immaterial what form the transaction may take, or what attempts are made to disguise the fact that it is between spouses. Wherever the Court is satisfied that in substance it is a deed by which the one spouse greatly benefits

[1] D. 24, 1, 35.

[2] *See Craig* v. *Monteith*, 1684, M. 5819.

[3] D. 24, 1, 31, fr. 8.

[4] D. 24, 1, 28, fr. 2.

[5] *Hart* v. *H.*, 1845, 7 D. 1081.

[6] *Edward* v. *Cheyne*, 1888, 15 R. H.L. 37; *Allan* v. *Hutchison*, 1843, 5 D. 469. *See Tennent* v. *T.*, 1889, 16 R. 876.

[7] D. 24, 1, 21, fr. 1.

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at the expense of the other, the latter will be entitled to revoke.

Non tantum autem per se maritus et uxor . . . dare non possunt sed nec per interpositam personam.[1] So if a deed were taken from the wife in favour of a third person and an assignation from the grantee to the husband followed thereon, the Court would revoke at the wife's instance.

Rights of third parties.—An obligation by one spouse to pay a debt of the other can be enforced by the creditor.[2] Revocation operates only between the spouses, and a right lawfully acquired by a third party will not be defeated in this way.

Ill.—A wife consents to a wadset of her life-rent lands, with a back-tack to the husband and his heirs. This was found valid as to the creditors, but revocable as to the husband.[3]

The third person's interest must be separate.—If it is the other spouse who really takes the benefit, it is the substance and not the form of the transaction which will be looked at. Where the effect of a destination is to give the property to the other spouse it can be revoked.[4] But a donation by a wife in favour of her husband's children is not revocable.[5]

The renunciation of a right, or the acceptance of a condition, may be a donation.—Thus, a wife who accepted provisions by a post-nuptial contract has been held entitled to revoke on the head of donation because they were to be forfeited on second marriage.[6] And where the Court is of opinion that there is gross inequality they will not allow the deed to stand and merely relieve the widow from this condition. The inequality will vitiate the whole deed.[7]

The kind of case which most frequently arises is where the rights of parties under an ante-nuptial marriage-contract are

[1] D. 24, 1, 3, fr. 9.

[2] *Heisleid* v. *Lindsay*, 1591, M. 6087; *see Standard Investment Co.* v. *Cowe*, 1877, 4 R. 695.

[3] *Arnold* v. *Scot*, 1673, M. 6091.

[4] *Fernie* v. *Colquhoun's Trs.*, 1854, 17 D. 232; *Jardine* v. *Currie*, 1830, 8 S. 937.

[5] *Muir* v. *Stirling*, 1663, M. 6107; *Lang* v. *Brown*, 1867, 5 M. 789; *Somerville's Trs.* v. *Dickson*, 1865, 3 M. 602, aff. 1867, 5 M. H.L. 69.

[6] *M'Neill* v. *Steel's Trs.*, 1829, 8 S. 210; *Marshall* v. *M'Diarmid*, 1826, 4 S. 581.

[7] *M'Neill*, *supra*.

varied by a post-nuptial deed. The law is thus stated by Erskine: "Where the interest of the husband and wife have been settled by ante-nuptial contract, post-nuptial deeds are revocable in so far as they either add to or diminish the provisions of the first contract without a valuable consideration on the other part, for every such provision adding to the wife's prior settlement is a donation by the husband to her, and every deed by which the wife renounces the least share of her former provisions is a donation by her to her husband."[1] This is broadly stated, and must be taken with the following important limitation.

Where there is value received, *hinc inde*, the inequality must be gross before the deed will be reduced.—The phrase of Lord Eldon in the leading case has been always quoted. The Court will not weigh "in nice scales" the value given and received.[2] If there is anything like equality the deed will stand. But where the inequality is excessive the doctrine of donation is applied.

Ill.—An ante-nuptial contract contained reasonable provisions to wife. By a post-nuptial mutual settlement the spouses disponed their whole estate to the survivor, failing issue. The husband had £16,000, the wife had nothing but "expectations" from an uncle which ultimately realised less than £800. Held the provisions were so unequal that husband could revoke.[3]

Ill.—By mutual settlement the spouses conveyed to trustees their whole estate for the survivor in life-rent, and the children of the marriage in fee. In the event of the surviving spouse marrying again, his or her life-rent was to cease and the fee to become at once divisible among the children. The wife's whole estate consisted of £400. From this the husband's *jus mariti* was excluded, and by the settlement it went to the children. The husband had £1000, and heritage yielding £50 a-year. The wife predeceased, and the husband claimed to revoke except as regards the wife's £400. It was held he was entitled to do so. For here he had received

[1] Ersk. i. 6, 30.

[2] *Hepburn* v. *Brown*, 1814, 2 Dow, 342; *Mitchell* v. *M.'s Trs.*, 1877, 4 R. 800.

[3] *Beattie's Trs.*, 1884, 11 R. 846.

nothing in exchange. The wife's £400 was settled on the children, and he did not propose to interfere with it. Whereas he had divested himself of his whole estate, and would forfeit it entirely if he married again.[1]

Donation depends upon intention.—Where the alleged donor expends money for the benefit of both spouses, this is not donation.

Ill.—A husband rebuilds, at his own expense, a house on his wife's property. Held that this was not a donation so as to entitle him to revoke it and claim compensation from his wife's heir-at-law.[2] He was presumed to have had his own advantage in view as much as his wife's, and was in a similar position to a tenant or life-renter who cannot claim for improvements when his possession ceases.

An accession of fortune to the wife, *stante matrimonio*, will prevent the Court regarding as a donation an addition by the husband to her ante-nuptial provisions.[3]

In estimating whether the Bargain was a reasonably fair one, the Value of the rights of each at the Dissolution of the Marriage is to be looked at.—Although at the date of the contract the consideration *hinc inde* might be fairly equal, the circumstances of the parties might entirely change during the subsistence of the marriage. A wife might abandon her legal rights for £50 a-year at a time when, if her husband died, she would receive less, rather than more, by claiming her *jus relictae* and terce. But during the marriage the husband may become a millionaire. Is she then to be bound by her bargain? The law is settled in the negative.

Ill.—The spouses executed a contract of voluntary separation, by which the husband bound himself to pay the wife £30 a-year. She renounced all her legal claims. The husband died, leaving nearly £9000. Held the wife could revoke and take her legal provisions.[4]

Ill.—By ante-nuptial contract the wife was entitled to (1)

[1] *Melville* v. *M.'s Trs.*, 1879, 6 R. 1286.

[2] *Rankin* v. *Wither*, 1886, 13 R. 903.

[3] *Countess of Oxenford* v. *The Viscount*, 1664, M. 6136.

[4] *Hunter* v. *Dickson*, 1827, 5 S. 266, aff., 1831, 5 W. and S. 455, and cases cited.

an annuity of £100; (2) life-rent of all husband's *acquirenda*. By a post-nuptial mutual trust-deed, she agreed to take an annuity of £300 a-year, which she would forfeit on second marriage. The husband's means greatly increased during the marriage, and he left more than £20,000. Held she could revoke and take the provisions in the ante-nuptial contract.[1]

A Reasonable Provision is not a Donation Revocable.—Where the granter is under a natural obligation to provide for the grantee, a deed to this end is not revocable as a donation, if two conditions are fulfilled. (1.) The granter must be solvent at the date of the deed. (2.) The provisions must be reasonable in amount—*i.e.*, suitable to the rank and fortunes of the parties. If they are excessive they will only be reduced *quoad excessum*.[2]

And although a wife is not perhaps under a natural obligation to provide for her husband, yet it can hardly be doubted that a post-nuptial settlement by her of her estate for behoof of her husband and children would be in most circumstances secure against revocation.[3]

In considering what is a reasonable provision, it is an important element that there is no ante-nuptial contract.

Ill.—No ante-nuptial contract. Husband insured his life and took policy in favour of his wife and her heirs. Shortly before his death he was sequestrated. The creditors claimed the value of the policy, and their claim was sustained by the Court of Session. But the House of Lords reversed this judgment, and found that as the widow was not otherwise provided for, and the sum in the policy was reasonable, it was not a donation revocable by the husband, and the wife was entitled to it as a reasonable provision.[4] Where there has been an ante-nuptial contract, which is followed by a post-nuptial deed, the question of gain or loss is to be determined by reference to the ante-nuptial contract. Marriage is the highest consideration

[1] *Thomson* v. *T.*, 1838, 16 S. 641. In *Mitchell* v. *M.'s Trs.*, 1877, 4 R. 800, Lord Ormidale and L.J.C. Moncreiff expressed the opinion that gross inequality, either at date of deed or at dissolution, would be a ground of revocation.

[2] *Gibson's Trs.* v. *G.*, 1877, 4 R. 867; *Melville* v. *M.'s Trs.*, 1879, 6 R. 1286; *Craig* v. *Galloway*, 1860, 22 D. 1211, rev. 1861, 4 Macq. 267.

[3] Ersk. i. 6, 30; *Stirling* v. *Crawfurd*, 1716, M. 6111; Fr. ii. 943; but *see Inglis* v. *Loury*, 1676, M. 6131.

[4] *Craig* v. *Galloway*, *supra*.

known to the law, and in the ante-nuptial contract parties have solemnly determined their mutual rights. Although, therefore, the wife may have, by an ante-nuptial contract, accepted £50 a-year in lieu of her legal rights, and the husband be a millionaire, any additional provision he may make for her by post-nuptial deed is a donation revocable.[1]

Mr. Montgomerie Bell says that the question is still open whether in estimating lesion the date of the contract, or the date of death, is the *tempus inspiciendum*. But it is submitted that the authorities sufficiently bear out the doctrine in the text.[2] And this has the authority of Lord Fraser.[3]

It is not possible to make a Provision Secure against the Husband's Creditors unless it is Secure against the Husband himself.—The doctrine of "reasonable provision" will not be applied unless the subject is placed outside the husband's control.

Ill.—Husband took title to heritage in favour of himself, and his wife in conjunct life-rent, for her life-rent use allenarly, and children in fee, but reserving to himself power to sell, or burden, or even gratuitously dispone the subjects without wife's consent. He was then solvent, and his wife was otherwise unprovided for. The husband died insolvent, and the wife claimed the subjects as a reasonable provision. But it was held that by the destination, the husband remained sole proprietor, and as he could revoke, his creditors could do the same.[4]

No Post-nuptial Provision to take Effect *stante matrimonio*, will be sustained in a Question with the Husband's Creditors.—It is an elementary principle of the law of bankruptcy that a man shall not be allowed to place his property

[1] Ersk. i. 6, 30; *Rae* v. *Neilson*, 1875, 2 R. 676; *Jardine* v. *Currie*, 1830, 8 S. 937; *Maclachlan* v. *Watson*, 1839, 1 D. 1177; and *see Cooper* v. *C.*, 1885, 12 R. 473; rev. on other grounds, 1888, 15 R. H.L. 21.

[2] *Hunter* v. *Dickson*, 1827, 5 S. 266; aff. 5 W. and S. 455; *M'Neill* v. *Steel's Trs.*, 1829, 8 S. 210; *Thomson* v. *T.*, 1838, 16 S. 641; *Blaikie* v. *Milne*, 1838, 1 D. 18. But *see Nisbett* v. *N.'s Trs.*, 1835, 13 S. 517.

[3] Fr. ii. 928. The most recent cases in which the point was argued is *Mitchell* v. *M.'s Trs.*, 1877, 4 R. 800.

[4] *Honeyman & Wilson* v. *Robertson*, 1886, 14 R. 163.

in such a position that he gets the benefit of it, and yet it is protected from his creditors in the event of his bankruptcy. He cannot, by declaring his income alimentary or non-assignable, or by any imaginable scheme, relieve himself from the legal obligation of applying his funds to pay his debts.

Ill.—A husband by post-nuptial deed conveyed to trustees £2600 which had come to his wife from her father. There was no ante-nuptial contract, and it fell under the *jus mariti*. He bound himself to pay to the trustees from his own funds £2000. The purposes were to pay the life-rent to the husband, and after his death to the wife if she survived, and the fee to the children, *natis* and *nascituris*. The provisions were declared alimentary. He was then solvent. He never implemented his obligation to pay the £2000, and subsequently became bankrupt. It was held that the life-rent went to the trustee in his sequestration.[1]

Ill.—A husband, being solvent, executed a heritable bond, by which he bound himself to pay his wife an annuity of £200 during his life, and £500 after his death, in lieu of her legal rights. On his insolvency it was held that the bond was reducible by his creditors, *quoad* the annuity of £200 *stante matrimonio*.[2]

Ill.—A husband who had £10,000, vested £5000 in trustees to pay the interest to his wife during the subsistence of the marriage, for the better aliment of herself and family. She had no other provision. Held the deed was revoked by his subsequent sequestration.[3]

But when a fund is conveyed by the husband to trustees, the conveyance is not revocable in so far as it is a reasonable provision for the wife, and the trustees will not be entitled to denude, although both the spouses are willing to concur in granting them a discharge.[4]

[1] *Miller* v. *Learmonth*, 1871, 10 M. 107, where the authorities are fully given; aff., 1875, 2 R. H.L. 62.

[2] *Kemp* v. *Napier*, 1842, 4 D. 558.

[3] *Dunlop* v. *Johnston*, 1865, 3 M. 758; Aff., 1867, 5 M. H.L. 22. The case of *Wright* v. *Harley*, 1847, 9 D. 1151, may be regarded as overruled. In it a husband, on the narrative that he was of improvident habits, and easily imposed upon, conveyed his estate to trustees to maintain and clothe himself, and to pay the balance to his wife. The wife's provision was sustained in a question with a creditor.

[4] *Low* v. *L.'s Trs.*, 1877, 5 R. 185.

Proof of Donation.—Presumption.—It is said that there is a presumption against donation. By this is merely meant that the evidence must be distinct, because men are little prone to give away their means without consideration. This presumption of fact, though of considerable weight in a question whether a man intended to make a gratuitous alienation to a stranger, is of little value in a question between spouses. For what is more natural than that a man should make such an alienation to his wife merely out of love, favour, and affection? On the other hand, if a man owes another £100, and gives him a cheque for that amount, it would require the clearest evidence to prove that this was a donation and not intended to extinguish his debt. Accordingly, a deed by one spouse in favour of the other, is presumed to be a donation if there is no consideration stated. If the deed bears to be remuneratory, the burden of proving that it was not truly onerous is thrown on the party seeking to reduce it. But in the words of Lord Moncreiff: "The real nature of it in this respect cannot be altered by the narrative of the deed itself."[1]

What is sufficient Evidence of Donation?—It is undoubted that in every case two points must be proved—(1.) that there was an *animus donandi;* and (2.) that this *animus* can be legally given effect to.[2]

Delivery.—In the case of money or other corporeal moveables, the best evidence of donation is naturally the actual delivery of the subject. But at least in the case of donation *mortis causa*, delivery is not essential to the proof.[3] In a question between spouses it would be unreasonable to exact proof of actual delivery. The husband is the natural custodier of writs belonging to the wife, and, in the ordinary case, any repositories in which are kept valuables which belong to either spouse are accessible to both.[4]

Donation by Special Destination.—If a husband buys a heritable subject, and takes the title to himself and his wife and the survivor, the destination will carry the subjects to his

[1] *Jardine* v. *Currie*, 1830, 8 S., at p. 942.

[2] Dickson on "Evidence," § 164.

[3] *Blyth* v. *Curle*, 1885, 12 R. 674; *Gibson* v. *Hutchison*, 1872, 10 M. 923.

[4] *Smith* v. *S.'s Trs.*, 1884, 12 R. 186. But *see Walker's Exrs.* v. *W.*, 1878, 5 R. 965.

wife if the husband predeceases without revoking. In like manner stock certificates, debenture bonds, and similar deeds taken with a destination to the wife, will carry the property to her if she survive.[1]

Ill.—A husband bought railway shares, and took the certificates in these terms: "This is to certify that C. C. and Mrs. E. C. are proprietors of shares." Held that this implied joint-proprietorship, and on husband's predecease one-half went to the wife.[2]

Ill.—The same person bought shares in English companies, and took certificates in identical terms. It was admitted that by the law of England certificates so expressed were held *prima facie* to give the survivor a right to the whole. There being no evidence to rebut this presumption, the English rule was applied, and the whole shares declared to belong to the widow.[2]

Ill.—A husband lent £500 to harbour trustees, and took the assignation in name of himself and his wife equally between them, and to the survivor of them and to the heirs of the survivor. It was held that this carried the sum to the widow.[3]

Such special Destinations will not be revoked by a subsequent general conveyance to trustees of the testator's whole estate. — Whether the husband intended to evacuate the special destination is in each case a *quaestio voluntatis*, but the rule is, "where there are two *mortis causa* conveyances or bequests to different donees—the first special and the second general—the general grant is not presumed to import a revocation of the special grant, but both are read together, and the second is held to affect the succession, *minus* the subjects given in the first."[4] In this class of cases the importance of delivery is far less where the donation is by one spouse to another, than where it is to any other person. A destination so taken by a father to a son will not deprive the father of the power to revoke if the deed is undelivered.[5] But

[1] *Connell's Trs.* v. *C.'s Trs.*, 1886, 13 R. 1175.

[2] *Connell, supra.*

[3] *Walker's Executors* v. *W.*, 1878, 5 R. 965.

[4] *Per* Lord Benholme, cited by Lord Shand in *Walker, supra*, at p. 970.

[5] *See* Lord President Inglis' opinion in *Walker, supra.*

in the case of a wife, delivery itself does not prevent revocation.

A policy of insurance taken by the husband over the wife's life, and payable to her heirs, is a donation, and is not revoked by a general conveyance to trustees.[1] But a policy taken by the husband over his own life in favour of trustees for behoof of his wife and children confers no vested right on them unless delivered. And when the husband who had taken a policy in these terms afterwards conveyed his estate to a trustee for his creditors, and shortly afterwards died, it was held that the fund in the policy passed to the trustee.[2]

Entries in Husband's Business Books.—Memoranda made by a husband in his private cash-book, coupled with evidence that he referred in his family to these entries, have been held as sufficient proof of donation.

Ill.—Husband kept a private cash-book headed in his writing: "Note of sums due by me to Mrs. S. (his wife) and my family as stated in each of their accounts." His wife at the time of her marriage possessed certain heritable property, the rents of which fell to him *jure mariti*. In this cash-book he credited his wife with the rents of her estate. He gave the children credit for small sums of money which they had at various times received as presents. On each account he added interest. He kept the book in his repositories, but it was frequently referred to in the family, and he used to inform the persons interested as to the balance in their favour. Held this was sufficient to instruct donation to the wife, and that she was entitled at his death to the sum standing at her credit.[3]

Deposit-Receipts.—The common practice in certain classes of taking deposit-receipts in name of the husband and wife and the survivor, has led to many cases in which the question was if the sum deposited had been validly given. It is conclusively settled that such a destination does not in itself carry the sum deposited to the surviving spouse. It is valuable evidence of intention, but it must be corroborated. "A document of this kind cannot of itself operate as a will containing

[1] *Thompson's Trs.* v. *T.*, 1879, 6 R. 1227.

[2] *Jarvie's Trs.* v. *J.'s Trs.*, 1887, 14 R. 411.

[3] *Smith* v. *S.'s Trs.*, 1884, 12 R. 186.

a bequest of money in favour of the persons in whose names it is conceived failing the deceased."[1] And the fact that a man was in the habit of adding to a deposit-receipt in favour of the alleged donee is not in itself sufficient corroboration.[2] Nor is the endorsation and delivery of a deposit-receipt of much value as evidence of donation. For the presumption is that it was endorsed, and handed over merely to be cashed for the depositor.[3] On the other hand, where there is other evidence of *animus donandi*, it is not necessary to prove delivery of the deposit-receipt.[4] The position of the parties, their relation to each other, and the circumstances of their life in general will all be considered.

Ill.—A miller, earning 14s. 6d. a-week, lodged, in 1862, £13 in a savings bank in name of himself and his wife "conjunctly and severally and the longest liver of them." He died in 1882. At this time the deposit had grown to £182. His wife had by his instructions taken care of the pass-book, and had lodged the additions and got the interest added from time to time. An account in another bank had been always drawn upon for household expenses. This was the circumstantial evidence. In addition the wife deponed that the husband had always said the money on deposit was to be hers. The wife's brother corroborated. Held the donation was proved.[5]

Still slighter corroboration may be sufficient where the husband has placed the money in bank in his wife's name.

Ill.—Deposit-receipt in wife's name, and pass-book of a current account also in her name, are found after the husband's death in his repositories. She depones that he had placed these sums in bank for her after recovering from an illness in which she had nursed him. Slight corroborative evidence. Donation proved.[6]

Where the money in bank was the wife's before her marriage, and passed to the husband, *jure mariti*.—In this

[1] *Per* Lord President Inglis in *Crosbie's Trs.* v. *Wright*. 1880, 7 R., at p. 826.

[2] *Ibid.*, *supra*; and *see Jamieson* v. *M'Leod*, 1880, 7 R. 1131.

[3] *Sharp* v. *Paton*, 1883, 10 R. 1000; *Dawson* v. *M'Kenzie*, 1891, 19 R. 261.

[4] *Crosbie's Trs.*, *supra*, at p. 828.

[5] *Blyth* v. *Curle*, *supra*, 1885, 12 R. 674.

[6] *Thomson's Executor* v. *T.*, 1882, 9 R. 911.

kind of case slight parole evidence may be sufficient to prove that he had given it back again to his wife when coupled with the fact that the husband never claimed the money as his.

Ill.—Wife at marriage had a sum of money on deposit-receipt. It fell by operation of law under the *jus mariti*. For twenty years it remained in bank, still standing in the wife's maiden name. The husband never interfered with it in any way. She deponed that the day before his death her husband said to her, "Nobody shall touch that money that you earned hard, for it is your own money." For this there was only her testimony. Held that donation was proved.[1]

Ill.—A wife had £3000 of her own which fell under the *jus mariti*. The husband lived at Surinam, where he carried on business. The wife resided in Edinburgh. He left her full control of the £3000. She bought a house with part of it, and he signed a deed relating to this as consenter to his wife's act, and not as proprietor. With part she bought City of Glasgow bank stock. At this he expressed disapproval, but said it was her affair. It was held that donation was proved, and as the husband had died without revoking, his estate was not liable in the bank's liquidation.[2]

Surrogatum.—It is a settled rule that the conversion of a wife's heritage into moveables does not, *ipso facto*, bring it under the *jus mariti*.[3] This rests on presumed intention. In the absence of evidence to the contrary, the wife is not presumed to have meant to make a donation of her estate to her husband. It is more likely that her intention is to reinvest it in heritage, and so retain it as her separate estate. But where her intention clearly is to allow the price to become the property of the husband, this is a donation revocable, subject to the qualification that if she has allowed the husband to apply the money in meeting ordinary household expenses she cannot revoke. But such part of the money as can be traced, and remains in the husband's hands, she can revoke. And if he has invested it or has applied it to any specific purpose of his own, not being mere domestic expenditure, this can be

[1] *Gibson* v. *Hutchison*, 1872, 10 M. 923.

[2] *Wright's Executors* v. *C. of G. Bank*, 1880, 7 R. 527.

[3] Stair, ii. 1, 4; Fr. i. 703.

revoked by her.[1] The price of English land, the property of the wife of a domiciled Scotsman, appears to stand in a different position.

Ill.—Wife at marriage owned land in England. No marriage-contract. After marriage she sold it, and made a declaration in terms of 3 & 4 Wm. IV. c. 74, that she intended to give up her interest in the estate without receiving any provision from her husband in lieu thereof. The husband took the price, and applied it to his own uses. She subsequently executed a deed of revocation, and pleaded that the price of her English property was either *surrogatum*, and so did not pass to her husband, or else if it did pass under the *jus mariti*, was a donation revocable. The Court of Session affirmed this contention without determining whether the donation had been made or not. If it was, the revocation was effectual, if not the price was *surrogatum*. But the House of Lords reversed this judgment. The *ratio* on which the reversal proceeded, was (1.), that by the law of England, the real estate which was the wife's before marriage, became then an estate which belonged to both spouses. Their interests in it were undetermined, and depended on which of them survived the other, and whether there was issue of the marriage. For on this hinged the right of courtesy. (2.) Being heritable estate of the husband as well as of the wife, it could not be sold without the concurrence of both. (3.) As the husband could, if he liked, have prevented the sale, it was not a donation on the wife's part, if he consented thereto on the condition that the price should go to him.[2] It is humbly thought that this reasoning is unconvincing, because, although expressed in different language, the rights of a Scottish husband in his wife's Scotch heritage are essentially the same. In Scotland, as well as in England, a wife cannot at common law sell her heritage without her husband's concurrence. But it has never been thought that this prevented the price of it being a donation, if she let it fall under the *jus mariti*.

Donation by renunciation of *jus mariti*.—It is a donation

[1] *Hutchison* v. *H.*, 1843, 5 D. 469; *Tennent* v. *T.'s Executors*, 1889, 16 R. 876 (*see* esp. note of Lord Fraser, Ordinary).

[2] *Welch* v. *Tennent*, 1891, 18 R. H.L. 72. It must be remembered that, the subject being English land, the *lex loci* governed.

if the husband, by a post-nuptial deed, renounce his *jus mariti* in his wife's estate. But if the wife has no other provision, and the sum is not excessive, the doctrine of reasonable provision will be applied and the renunciation will be irrevocable.[1]

Who may Revoke?—The right of revocation is strictly personal to the donor. It does not transmit to his heirs or representatives. It may be exercised by the donor after the death of the donee.[2] If a spouse becomes insane and a *curator bonis* is appointed, the *curator* may exercise the right of his ward, and revoke all prior donations.[3] At the donor's death, without revoking, the *res donata* becomes the absolute property of the donee. To this there is one qualification. The donor's creditors can revoke after his death.

Right of Creditors to Revoke.—The primary purpose of a man's estate is to pay his just debts. It would be manifestly unjust if a husband could remove part of his funds beyond the reach of his creditors by giving it to his wife, and yet retaining power to recover it at any time. Accordingly, wherever the donation is revocable and the donor insolvent, his creditors may exercise the right of revocation which belongs to their debtor. They must first discuss his other property. But sequestration operates *ipso facto* the revocation of all donations by the debtor.[4] It goes without saying that in cases in which the husband could not have revoked, his creditors have no higher right.[5] Their right is co-extensive with his, and will be barred by showing that the alleged donation was in the circumstances a reasonable provision or was granted for adequate consideration, he being, in either case, solvent at the time of granting.

The presumption is against Revocation.—Where a subsequent deed may be construed as importing revocation, but is at the same time consistent with the subsistence of the donation, the presumption, *in dubio*, is that the donor intended the gift to stand. Thus, if a man by deed conveys a house to

[1] *Shearer* v. *Christie*, 1842, 5 D. 132; *M'Phersons* v. *Graham*, 1750, M. 6113; Fr. i. 793 and ii. 948.

[2] *Rae* v. *Neilson*, 1875, 2 R. 676.

[3] *Blaikie* v. *Milne*, 1838, 4 D. 18.

[4] *Kemp* v. *Napier*, 1842, 4 D. 558.

[5] *Craig* v. *Galloway*, 1860, 22 D. 1211, rev. 1861, 4 Macq. 267.

his wife, and subsequently executes a trust-disposition carrying all his estate heritable and moveable to trustees, he will not be presumed to have meant revocation.[1]

So the fact that a man after making a donation of a heritable subject charges it with a burden, is not held to imply revocation. The donee will take it *cum onere*.[2] This was also the law of Rome as laid down in a novel: *Donationem non videri revocatam, ex eo quod donator rem donatam hypothecæ aut pignori dederit.*[3]

How Revocation may be made.—Revocation may be proved *prout de jure*. It may be by express recall, or it may be implied.

Implied Revocation.—Sequestration, as already stated, operates revocation. But the mere contracting of debt subsequent to the donation has no such effect.[4] Revocation is implied by the subsequent granting of the *res donata* to a third person.[5] And any subsequent deed which is inconsistent with the view that the donor intended the donation to subsist, effects revocation.[6] And a decree of divorce for adultery revokes all prior donations by the innocent spouse.

It is even said by the older institutional writers that it is sufficient that the donor knew of the donee's adultery or, at anyrate, enough if he intended to raise a divorce though he died before doing so.[7] But this has never been decided, and it is improbable that it would now be found to be the law.

Revocation need not be intimated to the donee.[8]

Right to Revoke may be barred by homologation.—If the donor homologate after the dissolution of the marriage, revocation will be barred. Homologation *stante matrimonio* would be itself a donation and revocable. And when the marriage has been dissolved, the Court will require very clear and distinct evidence before arriving at the conclusion that there

[1] Ersk. i. 6, 31; *see Walkers Exrs. v. W.*, 1878, 5 R. 965.

[2] Ersk. l. c.

[3] Nov., clxii., c. 1; *Kinloch v. Rait*, 1674, M. 11,345.

[4] Ersk. l. c.

[5] *Gordon v. Step-Daughter*, 1687, 2 Supp. 110.

[6] *Henderson's Trs. v. Tulloch*, 1833, 12 S. 133.

[7] Stair, i. 4, 18; Brodie's Notes, p. 39; *see* Fraser, ii. 953.

[8] Ersk. i. 6, 31; Fr. ii. 951, and cases cited.

had been homologation. It must be proved that the spouse, who is alleged to have homologated, was in full knowledge of the loss which he would incur by his action.[1]

Ill.—Three months after husband's death widow attended meeting of trustees. The will was read over to her and explained, and she elected to take under it and signed a minute to that effect. If she entered into a second marriage her whole interest was forfeited. She married again, and for three years signed receipts of interest for her children, and in other ways recognised the will. It was held that she was not barred by homologation and could still take her legal rights.[2] In most cases the plea of homologation will not be sustained, unless in making the election the party averring lesion had independent legal advice.[3] And this is especially necessary in a question with a woman or a person unskilled in business affairs.

Revocation is not barred by Ratification nor Prescription.[4] And a Clause declaring the Deed irrevocable has no Effect.[5]

The Right of the Donee during the Donor's Life.—The donee holds the *res donata* subject to the resolutive condition that it may be revoked during the life of the donor. He cannot give, even to an onerous third party, a higher right than his own. *Resoluto enim jure dantis, resolvitur jus accipientis.*[6] To this there is one exception. If the *res donata* be a moveable subject, and the donee has conveyed it to an onerous assignee who was ignorant that his author held it liable to revocation, the assignee's title is good. For he was entitled to rely on the presumption that his author, who possessed the subject, was the owner of it.[7]

The donee, as the *bona fide* possessor of the *res donata*, may consume the fruits thereof. And it would seem that the *fruges bona fide perceptae et consumptae* are not revocable.[8]

The Risk.—If the donee burden the *res donata* the donor

[1] *Rae* v. *Neilson*, 1875, 2 R. 676; and *see Inglis' Trs.* v. *I.*, 1887, 14 R. 740.

[2] *Donaldson* v. *Tainsh's Trs.*, 1886, 13 R. 967.

[3] *Donaldson*, *supra*, *per* Moncreiff, L.J.C., at p. 971.

[4] Ersk. i. 6, 35; Fr. ii. 59.

[5] *Jardine* v. *Currie*, 1830, 8 S. 937.

[6] Ersk. i. 6, 32; *Inglis* v. *Laury*, 1676, M. 10,284.

[7] Bell's Prin., 1617.

[8] *Kemp* v. *Napier*, 1842, 4 D. 558.

can claim that it be restored to him free from the burden.[1] If the donee improve it, the donor must compensate the donee.[2] If it perish without the fault of the donee, the loss is said to be the donor's.[2] And it is said that if the *res donata* have in good faith been consumed by the donee, he is only bound to return the amount by which he is *locupletior* at the revocation.[2] It is not certain that these last propositions, which have Lord Fraser's authority, would be sustained. For they rest on rules of the Roman Law which were laid down at a time when donations between spouses were null and not merely revocable. In that case the donor remained the owner. But by our law it would appear that the property is transferred, subject to a resolutive condition.

Advances by Wife to Husband.—A wife who out of estate separate by contract made advances to her husband for his business, was held entitled to rank in his sequestration as an ordinary creditor. In this case, which was subsequent to the Act of 1881, it was said that donations by her for this purpose would have been revocable.[3] Section 1, sub-section 4, of this Act provides that where money or other estate of the wife has been lent or entrusted to the husband, or immixed with his funds, she can only rank as a creditor after the other onerous creditors have been paid. This would seem not to extend to estate of the wife from which the *jus mariti* has been excluded by contract.[4] An onerous assignee of the wife is in no better position, and is not entitled to rank as an ordinary creditor.[5] The section extends to furniture or other moveables which the wife has lent to the husband. *E.g.*, a husband seven months before his sequestration sold the furniture in the house to his wife conform to an inventory, and gave her a sale-note, narrating that he owed her a sum of money, and that the furniture was in payment of his debt. The wife allowed the furniture to remain where it was. The Court held that, assuming the *bona fides* of the transaction, the furniture had been entrusted by the wife to the husband, and she was only entitled to a postponed ranking.[6]

[1] Ersk. i. 6, 32.

[2] Fr. ii. 961.

[3] *Laidlaw* v. *L.'s Trs.*, 1882, 10 R. 374.

[4] *See* § 8.

[5] *Cochrane* v. *Lamont's Trs.*, 1891, 18 R. 451.

[6] *Anderson* v. *A.'s Trs.*, 1892, 19 R. 684.

CHAPTER XIII.

JUS MARITI.

By the common law of Scotland the whole moveable estate of the wife passes at marriage by an implied universal assignation to the husband. His right to her personal estate is called his *jus mariti*. It extends not only to every moveable right vested in the wife at the date of the marriage, but also to all those to which she acquires right *stante matrimonio*.

Ill.—A wife is entitled to a share of *legitim* which has vested, but is still in the hands of her father's trustees. She obtains a divorce on the ground of the husband's adultery. Held that the divorced husband can claim the *legitim*, as having fallen within the *jus mariti*.[1]

Wife's Equity to a Settlement.—In one case before the Married Women's Property Act, an attempt had been made to soften the rigour of the common law by borrowing a rule of English equity. It was provided that, where a married woman succeeded to property or acquired right to it by donation or bequest, or any other means than by her own industry, she might claim that it should not fall under the *jus mariti*, except on condition that the husband should make a reasonable[2] provision therefrom for her maintenance. But the claim needed to be made before the husband or any one in his right had obtained complete and lawful possession of the property.[3] It seems unlikely that further questions can arise under this provision.

[1] *Ferguson* v. *Jack's Exrs.*, 1877, 4 R. 393.

[2] Conjugal Rights Act, 1861, § 16. As to "reasonable," *see Somner* v. *S.'s Trs.*, 1871, 9 M. 594; *Taylor* v. *T.*, 1871, 10 M. 23; *Kinnear* v. *Ferguson*, 1871, 10 M. 54.

[3] *See Clark* v. *C.*, 1881, 8 R. 723; *Reid* v. *M'Walter*, 1878, 5 R. 630.

In what Cases does the *jus mariti* still subsist?—The extent of the *jus mariti* has been greatly narrowed by statute. A wife's earnings after marriage were excluded from it by the Act of 1877.[1] At common law her paraphernalia never fell under it. But it still applies, apart from contract, to the following cases:—

1. Where the marriage was contracted and the wife acquired right to moveable estate prior to the commencement of the Married Women's Property Act, 1881,[2]—viz., 18th July, 1881.

2. Where the wife possessed heritage at the marriage, which occurred prior to the Act, the income accruing thereafter falls under the *jus mariti*.[3]

3. Where the marriage is prior to the Act, but the husband had before the passing thereof made a reasonable provision for his widow by an irrevocable deed, moveable property, or the income of heritage, to which the wife acquires right after 18th July, 1881, will still fall under the *jus mariti*.[4]

4. When the husband's domicile is in Scotland at the date of vesting, but he was not domiciled here at the marriage, the *jus mariti* subsists *in pleno vigore* (§ 1, sub-sec. 1).

When is *jus mariti* excluded?—1. When it has been renounced by the husband by ante-nuptial marriage-contract, or by post-nuptial contract when the renunciation is irrevocable as a reasonable provision, and the husband was solvent.[5] And except in a question with a creditor of the husband at the date of the deed, the wife's whole estate may be now excluded in this way from *jus mariti* after the marriage (*see* 8, *infra*).

2. When the property was conveyed to the wife on the condition that the *jus mariti* should be excluded.

3. When the marriage was on or after 18th July, 1881, the *jus mariti* is excluded from all moveables and rents of heritage belonging to the wife at marriage or acquired by her afterwards.

[1] 40 & 41 Vict. c. 29, § 3.
[2] 44 & 45 Vict. c. 21.
[3] *Horsbrugh* v. *Scott*, 1889, 16 R. 507.
[4] Section 3, sub-sec. 1.
[5] Bell's Prin., § 1562.

4. When the marriage was before the Act, it is excluded from moveables or rents of heritage acquired by her after the Act except where the husband has made a reasonable provision in the terms above-mentioned.

5. When the wife has obtained a judicial separation it is excluded from all property acquired by her thereafter.[1]

6. When the wife has obtained a Protection Order it is excluded from property acquired by her by her own industry or by succession after her husband's desertion.[2]

7. "The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act [1st January, 1878], in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act, through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof."[3]

8. *Jus mariti* is also excluded when the marriage was prior to 18th July, 1881, but the spouses have declared by deed that the wife's estate shall be regulated by the Act, and have complied with the directions therein set forth.[4]

How *jus mariti* is renounced.—The famous sublety is long exploded that a husband cannot renounce his *jus mariti* "because the very right of the reservation to that effect becomes the husband's *jure mariti*, and makes it elusory and ineffectual, as always running back upon the husband himself; as water thrown upon a higher ground doth ever return."[5] And the doctrine of Bell, that a renunciation must be of a particular subject, is not sound.[6] It has been held, on the contrary, that it is competent by ante-nuptial contract for the husband to

[1] Conjugal Rights Amendment Act, 1861 (24 & 25 Vict. c. 86), § 6.
[2] *Ibid.*, § 1.
[3] Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29, § 3).
[4] 44 & 45 Vict. c. 21, § 4.
[5] Stair, i. 4, 9.
[6] 1 Bell Com. 638.

renounce his *jus mariti* over all his wife's estate, *per aversionem*, and as to *acquirenda* as well as *acquisita*.[1]

Jus mariti might be excluded by a wife in ante-nuptial contract, or it might be excluded as to any particular property or estate by the person giving it or bequeathing it to the wife, either before or during the marriage. For it might well happen that a person should desire to benefit a wife without feeling an equal anxiety to defray her husband's expenses or pay his creditors.[2]

But words excluding *jus mariti* might not be enough to prevent a fund being carried to trustees under a marriage-contract. A wife in an ante-nuptial contract had conveyed to the trustees property she might thereafter acquire. Her father subsequently left her a share of the residue of his estate, declaring that it should be exclusive of the *jus mariti*, and should not fall under the conveyance in his daughter's marriage-contract. It was held that as he had appointed no trust or machinery to prevent it so falling, the marriage-contract trustees were entitled to demand it as coming under the clause conveying *acquirenda*.[3]

And the mere exclusion of *jus mariti* by the person bequeathing a fund to a married woman had no further effect than to enable her, if she took appropriate steps, to retain it as her separate estate. She might allow it to come into her husband's hands the next day. Where a father declared the provisions made by him for his daughters to be alimentary, and exclusive of the *jus mariti* of their husbands, but provided no continuing trust, the Court directed his testamentary trustees to pay over the provisions to the daughters, taking from them receipts bearing that the money was alimentary and exclusive of *jus mariti*.[4]

Exclusion need not be expressed in very apt terms if the intention can be spelt out.[5]—Renunciation by the husband being a donation, may be proved *prout de jure*.[6] And it may be inferred from facts and circumstances, as when a

[1] *M'Dougall* v. *City of Glasgow Bank*, 1879, 6 R. 1089.

[2] Fr. i. 783; Ersk. i. 6, 14.

[3] *Douglas's Trs.* v. *Kay's Trs.*, 1879, 7 R. 295; followed in *Simson's Trs.* v. *Brown*, 1890, 17 R. 581.

[4] *M'Nish* v. *Donald's Trs.*, 1879, 7 R. 96.

[5] *Irvine* v. *Connon's Trs.*, 1883, 10 R. 731; Fr. i. 783.

[6] *Wright's Executors* v. *C. of G. Bank*, 1880, 7 R. 527.

husband showed plainly by a course of conduct that he did not lay claim to property to which he was entitled *ex jure mariti*.[1] But clear indication of intention will be required. And where a wife was an innkeeper before marriage, and the spouses separated, the fact that the husband left her for some years in the enjoyment of the stock and furniture of the inn, which had passed to him *jure mariti*, was held not sufficient to instruct that he had made a donation of them by renouncing his marital right.[2] But in a case before the statutory protection of a wife's earnings the facts were these. The husband and wife lived separate for more than twenty-five years. During the whole of this period the wife supported herself, and brought up the two children of the marriage, by her industry as a washerwoman. The husband never gave her any money. It was proved that he had occasionally borrowed small sums from her, which he had always repaid. At the wife's death she had saved a sum of £60 which the husband claimed as falling under the *jus mariti*. It was held that the fair inference from the facts was that the husband had tacitly renounced his *jus mariti*, and agreed that he would not claim his wife's earnings.[3] And the fact that a husband kept an account under his wife's name in a private cash-book in which he credited her with the income of estate which had been hers before marriage, coupled with evidence that he had been in the habit of speaking of the balance in her favour, as her property, was held sufficiently to instruct renunciation of the *jus mariti*.[4]

Nature of *jus mariti*.—The effect of the *jus mariti* is to carry the estate which was the wife's to the husband. A husband, whose *jus mariti* and *jus administrationis* are not excluded by convention or statute, may deal with his wife's moveable estate and the income of her heritage precisely as if she did not exist, and the property had been originally his own.[5]

[1] *Wright's Exors.* v. *C. of G. Bank*, 1880, 7 R. 527.

[2] *Henderson* v. *H.*, 1889, 17 R. 18. In this case it was a material fact that after the separation the husband refused a proposal to bring his wife's estate under the Married Women's Property Act, 1881, by executing a deed in terms of § 4.

[3] *Davidson* v. *D.*, 1867, 5 M. 710.

[4] *Smith* v. *S.'s Trs.*, 1884, 12 R. 186.

[5] As to "equity to a settlement," *see supra*, p. 144.

Communio bonorum.—In the institutional writers the moveable estates of both spouses are said to form a communion in which both have an interest, but of which, *stante matrimonio*, the husband is the sole administrator. To Lord Fraser especially is due the credit of having pointed out that, whatever may be the historical justification of the expression *communio bonorum*, it is as regards the law of Scotland, empty and misleading.[1] The most recent writer on the subject characterises it roundly as a "lying phrase."[2] In the words of Lord Kinloch, "It becomes obvious that no such thing has ever been denoted by the expression as a proper partnership or society between the spouses during the subsistence of the marriage. Emphatically the reverse has been again and again held. During the subsistence of the marriage the husband is not merely administrator, he is the *dominus* or absolute proprietor of all the moveable estate belonging to both parties. Whatever is the wife's, passes to him by an implied legal assignation, and becomes his as much as what is primarily his own. He can dispose of it at pleasure without any accountability. It is all liable for his debts to the very last farthing. The wife has no right of disposal to the extent of one shilling, nor can she withdraw any part from her husband's power, nor in any way interfere with his absolute proprietary right. All this is *triti juris*. It is in vain, therefore, to say that during the subsistence of the marriage a society or partnership or anything resembling it, exists between the spouses. The wife is destitute of any right. The whole belongs to the husband. To call any part of the effects the wife's own during the subsistence of the marriage is a legal solecism."[3]

And in the same case Lord President Inglis said: "I do not think it necessary, in giving judgment in this case, to trace with any minute and jealous accuracy the extent to which that doctrine has been adopted in our law. I shall only say that, in regard to its practical results, all we know of the *communio bonorum* is that when the husband predeceases the wife, the wife is entitled *jure relictæ*, to one-third or one-half of that moveable estate, or of his free executry. . . .

[1] Fr. i. 648, *seq.*

[2] Dr. David Murray's "Property of Married Persons," p. 12.

[3] *Fraser* v. *Walker*, 1872, 10 M., at p. 847.

The right of the executors of the wife has been abolished by statute, whether she dies testate or intestate, and therefore, the only practical result of the *communio bonorum*, if indeed it be a result of that at all, is the *jus relictæ*."[1]

What Subjects fall under *jus mariti*?—Everything which belonged to the wife's moveable estate is carried by the *jus mariti*. Whatever is heritable remains excluded therefrom. No attempt can here be made to state with fulness the law of heritable and moveable. In general it may be said that the following subjects are recognised as heritable :—

1. Lands, houses, mills, teinds, fishings.

2. Trees and natural fruits before separated from the ground. But industrial crops are moveable. And probably shrubs and plants in a nursery-garden being intended for sale, and forming a kind of artificial crop, would be held to be moveable as to succession.[2]

3. Heritable Securities.—It is to be borne in mind that heritable bonds, though now moveable *quoad* succession, remain heritable as to the rights of the spouses.[3] No heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti*, where the same is conceived in favour of the wife, "unless the husband shall have right and interest therein otherwise." This very clumsy expression is borrowed from the Act 1661, c. 32. It means merely that such a bond may fall to the husband in terms of a marriage-contract, or other deed and not at common law, *jure mariti*. It makes no difference that the wife is not the original creditor in the bond. Although it comes to her as moveable succession, it does not fall under the *jus mariti* of her husband.[4]

What Bonds are Heritable *inter conjuges*?—All bonds providing for payment of an annualrent, or with a clause of interest, which, in the language of the old lawyers, bear a *tractus futuri temporis*, were at common law heritable. They were made moveable by the Act 1661, c. 32, except *quoad* the fisk and *inter conjuges*. But such bonds were

[1] *Fraser* v. *Walker*, 10 M., at p. 843.
[2] *Begbie* v. *Boyd*, 1837, 16 S. 232.
[3] Titles to Land Consolidation Act, 1868, 31 & 32 Vict. c. 101, § 117.
[4] *Hodge* v. *H.*, 1879, 7 R. 259.

always moveable until the date at which the principal is payable.[1] If a woman, in right of such a bond, marry before the date at which the principal is due, the bond falls within the *jus mariti*.

But if the interest is not only made to run, but is payable before the date of payment of the principal, the bond will be heritable after the first term at which the interest is due.[2]

When the principal is payable at a distant or uncertain date. It was laid down in two old cases, that such a bond was heritable, even before the date at which interest or principal was payable. In the former, the term of payment of the principal was "diverse years" after the date of the bond, and though the creditor died before the first term's annual rent fell due, the bond was found heritable.[3]

In the latter, the principal was to be paid at the first term after the death of a person living.[4] But these cases seem inconsistent with the decision in the case of *Gray* v. *Walker*,[5] in which it was held by Lord Neaves that a personal bond was moveable, which was payable on the death of a person living at its date, and bore interest after the term of payment.

The debentures, bonds, and mortgages of public trusts and companies are heritable, apart from provision in the Private Act or some incorporated Clauses Act. So a mortgage by the Glasgow Water Works was found heritable *quoad* the widow, on reasoning which would seem to apply to the debenture of an ordinary joint-stock company.[6] Such mortgages and debentures of companies under the Companies Clauses Consolidation Acts are moveable.[7]

Bonds secluding Executors.—Bonds taken payable to heirs and assignees secluding executors are heritable *destinatione*, and such a bond carried by service to a married woman as an heir would not fall under the *jus mariti*. But a bond of this character, if assigned or conveyed to a stranger

[1] *Douglas*, 1629, M. 5504.
[2] Ersk. ii. 2, 9; *Ramsay*, 1682, M. 4234
[3] *Gray* v. *Gordon*, 1666, M. 3629.
[4] *Falconer* v. *Beatie*, 1627, M. 5465.
[5] 1859, 21 D. 709.
[6] *Downie* v. *Christie*, 1866, 4 M. 1067.
[7] 8 & 9 Vict. c. 17, § 46, and 26 & 27 Vict. c. 118, § 23.

and his heirs, would go to the stranger's executors. And so such a bond assigned to the father of a married woman, he not being the creditor's heir, and falling to the daughter, by succession, would not be excluded from the *jus mariti* of her husband.[1]

Bonds taken to Heirs.—Where a bond is taken to A. B. and his heirs without mention of executors, this is understood as meaning heirs in *mobilibus*, and such a bond would fall under *jus mariti*.[2]

4. Dung.—The dung produced upon a farm is heritable *destinatione*, although it has not yet been applied to the land.[3] But this *ratio* would not be good unless the occupier was under a common law or conventional obligation to apply to the farm the manure produced upon it. If the owner were also occupier, the question would be one of intention to be gathered from previous practice and the custom of the district.

5. Building Materials.—When collected on the ground for the purpose of completing an unfinished building they are heritable *destinatione*. This seems contrary to the opinion of Erskine,[4] which is approved of by Lord M'Laren.[5] But the case founded on by the latter learned writer,[6] lends, it is respectfully submitted, no support whatever to the doctrine of the text that building-materials are not heritable until actually added to the building. That case turned entirely upon the terms of a contract, and involved no question of law. And it was held in an older case that window-frames, doors, and the like found within a house when a-building, but not yet fixed to their proper places belong to the heir.[7] The case there did not require to be put higher than that such specially constructed pieces of work

[1] Ersk. Prin., 18th Ed. 120. Lord Fraser thinks the question open, Fr. i. 722.

[2] Ersk. Prin. 120. *See Lesly* v. *Nicholson*, 1725, M. 5766; and *Meuse* v. *Executors of Craig*, 1748, M. 5506, for an exposition of the general doctrine.

[3] *Reid's Executors* v. *R.*, 1890, 17 R. 519.

[4] Ersk. ii. 2, 14.

[5] M'Laren on Wills, i., p. 184.

[6] *Stewart* v. *Watson's Hospital*, 1862, 24 D. 256.

[7] *Johnston* v. *Dobie*, 1783, M. 5443; and *see dictum* of L.P. Inglis in *Reid's Executors*, *supra*, at end of p. 522.

as window-frames made to fit a particular place in a building must be regarded as already part of it *destinatione.* But "some of the judges seemed to be of opinion, that even the simple collecting of materials for building might often denote the *animus destinandi* of the proprietor, so as to render them heritable. Others appeared to admit no other rule but the then actual state of the subjects. The opinion of the majority was, that in cases like the present where the will of the proprietor, so strongly marked, is actually carrying into execution by overt acts, such *animus* should have full effect."[1]

6. Sum to be applied to Heritage.—A sum of money may be rendered heritable *destinatione* if it appear plainly that it was intended by the deceased to be applied to heritage. Thus a man sold part of an estate which was subject to a burden, and intimated to the creditor in the bond his intention to pay off the debt. The creditor was entitled to six months' notice, and the debtor invested the price of the bonds sold, amounting to £16,000, in the funds until this time had expired. Before it had elapsed the debtor died, and it was held by the House of Lords that his residuary legatee was bound to relieve the heir and pay off the bond.[2] And where a man had commenced to build a house, and had accepted contracts for its construction, but died when it was in building, it was held by Lord Ormidale, Ordinary, that the sum necessary to complete the house according to the plan of the deceased, even in excess of the contracts, was heritable *destinatione.*[3]

7. Fixtures.—According to the brocard "*quicquid plantatur solo, solo cedit,*"[4] articles, in their own nature moveable, may become heritable by being attached to lands or buildings. The cases, it must always be remembered, turn upon intention, and the questions to be determined are—(1) Was there physical annexation? and (2) Was it the intention of the person putting up the fixture that it should remain per-

[1] *Johnston* v. *Dobie, supra,* M., at p. 5444.

[2] *Minto* v. *Elliot,* 1825, 1 W. and S. 678.

[3] *Malloch* v. *M'Lean,* 1867, 5 M. 335.

[4] *See* Justinian Inst. ii. 1, §§ 29, 30; Broom's Maxims, 6th Ed. p. 376.

manently annexed, or did he intend it to be removed when it had served a temporary purpose? It is plain that a tenant or lessee has not usually the intention to make a donation to his landlord by annexing valuable fixtures to the property, except in so far as this may be necessary for the tenant's own enjoyment of the subjects. Accordingly he will in general be entitled to remove fixtures unless in so doing he injures the structure. The question as between heir and executor is different, and the Court will far more readily assume that the intention was to benefit the heritage.[1]

Trade-fixtures.—In questions between landlord and tenant, the leading rules to be extracted from the cases are that the fixtures may be removed (1) unless there is a custom of trade to the contrary;[2] (2) if their removal does no material injury to the lands;[3] (3) if the fixtures are moveable *sua natura*, and can be taken away without being destroyed or rendered useless. The foundation of these rules is that trade would be discouraged if a tenant could not erect machinery or other fixtures for the purposes of carrying on his business, without at the same time being compelled to make a present of them to his landlord. As between heir and executor such cases have but a slight and distant application.

As between heir and executor trade-fixtures will go to the heir unless there is strong evidence of contrary intention, or the character of the annexation is such as to negative the idea that it was meant to be permanent.[4] Where the fixtures appear intended less for carrying on trade than for making the most beneficial use of the land, the presumption in favour of the heir is even stronger. The rule is thus stated by Lord Blackburn:[5] "Whenever the chattels have been annexed to land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of

[1] *Elwes* v. *Maw*, 1802, 3 East. 38, per Lord Ellenborough, C.J., at p. 51.

[2] *Bailey* v. *Hobson*, 1869, L.R., 5 5 Ch. App. 180.

[3] *Gibson* v. *Hammersmith Rail. Co.*, 1863, 32 L.J. Ch., at p. 341; *Wake* v. *Hall*, 1883, 8 App. Ca. 195.

[4] *Brand's Trs.* v. *B.'s Trs.*, 1876, 3 R. H.L. 16, and sequel, 1878, 5 R. 607; *Fisher* v. *Dixon*, 1845, 4 Bell's App. 286.

[5] *Wake* v. *Hall*, 1883, 8 App. Ca., at p. 204.

the annexation may be such as to show that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough in *Elwes* v. *Mawe*,[1] says that those cases 'may be considered as decided mainly on the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty.' Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and, as Lord Hardwicke said, in *Lawton* v. *Lawton*,[2] 'You shall not destroy the principal thing by taking away the accessory to it;' and, therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it, may be so great as to prevent the removal."[3]

8. Conversion.—The first principle of the law of testate succession is that where a testator has left a properly-executed will expressing his testamentary intentions, effect will be given to these if they are not unlawful or impossible of execution. Accordingly, although the testator's estate at death may be either heritable or moveable, he may impress upon all or part of it an opposite character by a direction to trustees to turn heritage into money or money into heritage, as the case may be. This is known as constructive conversion. The question usually arises as a dispute between the heir and executor of a beneficiary under the will. If the beneficiary's right is to a heritable subject, it will transmit on his death intestate to his heir-at-law; if his right is to moveables, it goes to his executors.

[1] *Supra*, at p. 53, and Smith's Leading Cases, 9th Ed., at p. 198.

[2] 1743, 3 Atk., at p. 15.

[3] For the general law *see* Amos and Ferrard on "Fixtures," 3rd Ed.; Rankine on "Landownership," p. 108, *seq.*

Implied direction to Convert.—Little difficulty arises where conversion is expressly directed. But in many cases where no express injunction is present, it has been held that the testator had nevertheless indicated with sufficient distinctness his intention that conversion should be effected. If an absolute duty is imposed upon trustees to turn an estate into money, or this is indispensable to the carrying out of the trust, conversion operates *a morte testatoris*, and the right of a beneficiary who dies before the sale has been carried out, transmits to his executors.[1] But where the sale is left optional and in the discretion of the trustees, there is no conversion until the subjects are actually sold.[2]

Division virtually impossible.—Where from the large number of beneficiaries, the inequality of their shares or otherwise, it is practically impossible to divide the estate without a sale, conversion *a morte* will take effect.[3] But in one case the fact that there were fifty-two beneficiaries, was held not to imply a direction to convert.[4] This case was, however, special, as the truster directed the trustees, if they sold, to reinvest the price in heritage, and provided that, at the period of distribution, they should "denude in favour of the persons who shall then have right to the different subjects"—language clearly inappropriate to a division of money. And where the heritable estate consisted of five subjects of unequal value, and there were five beneficiaries, it was held (diss. Lord Justice-Clerk Moncreiff and Lord Young) that the trustees might convey to each a fifth part *pro indiviso* of the heritage, and that no conversion was implied.[5]

But in a later case a testator authorised his trustees to retain his estate in the form it might be in at his death, but directed that the shares provided for his sons should be re[illegible]able in five yearly instalments, and also directed that "in fixing the principal sums to be paid to my sons, my trustees

[1] *Buchanan* v. *Angus*, 1862, 4 Macq. 374.

[2] *Ibid.*; *Aitken* v. *Munro*, 1883, 10 R. 1097.

[3] *Weir* v. *Lord Adv.*, 1865, 3 M. 1006; *Adv.-Gen.* v. *Blackburn's Trs.*, 1847, Exchequer Cases, at p. 32, *seq.*, *per* Lord Fullerton.

[4] *Duncan's Trs.* v. *Thomas*, 1882, 9 R. 731.

[5] *Sheppard's Trs.* v. *S.*, 1885, 12 R. 1193; and *see Auld* v. *Anderson*, 1876, 4 R. 211.

shall always retain a sufficient sum, of which they shall be sole judges, to meet and provide for the proportions of annuity provided to my wife." It was held that sale was intended, and was practically indispensable to the execution of the trust, and conversion was found to have taken effect.[1]

Conversion is not operated by the Sale of Subjects by a Bondholder if he dies infeft.[2]—For this would conflict with the rule that the husband's sasine is the measure of the tercer's right.

Where a woman having a *jus crediti* in a Trust-Estate marries at a time when her Claim is to Heritage.—In this case a sale by the trustees, and conversion of the heritage into moveables, will not bring her share under the *jus mariti*.[3]

9. A Claim to a Share of an Estate is Moveable as a *jus crediti*, though part of the Estate may consist of Heritage.—Thus, where trustees who had power to sell heritage sold some of it, but left a heritable bond outstanding, it was held that the right of a beneficiary to a share of the sum in the bond, was moveable, and that on his death before division one-third of such share passed to his widow *jure relictæ*.[4]

Right mere *jus crediti*.—A right which is a mere *jus crediti*, the nature of the estate which will be left to satisfy it being uncertain, is moveable.[5]

10. A Share in a Partnership is Moveable.—This is so although the property of the company firm may consist in whole or in part of heritage. For the right of the partners is to a share after realisation.[6]

Heirship moveables were heritable *destinatione*,[7] but are now abolished.[8]

[1] *Brown's Trs.* v. *B.*, 1890, 18 R. 185.

[2] *Rossborough's Trs.* v. *R.*, 1888, 16 R. 157.

[3] *Cuthill* v. *Burns*, 1862, 24 D. 849; *Aitken* v. *Munro*, 1883, 10 R. 1097, *per* Lord M'Laren, Ordinary.

[4] *Gilligan* v. *G.*, 1891, 18 R. 387.

[5] *Wardlaw's Trs.* v. *W.*, 1880, 7 R. 1070.

[6] 2 Bell Com. 2.

[7] 3 Ersk. 8, 17.

[8] 31 & 32 Vict. c. 101, § 160.

Rights having a tract of future time, such as annuities, are heritable.[1]

Patents[2] and copyrights[3] are moveable. And so it would appear is the goodwill of a business where it forms a separate item in the price of a going concern.[4]

11. Policies of Insurance.—A policy of insurance on a wife's life in favour of her executors does not fall under the *jus mariti* because it is not due *stante matrimonio*.[5]

Policies effected by a married woman on her own or her husband's life for her separate use are now by statute exclusive of the *jus mariti* and right of administration.[6]

Property abroad.—Where the property is in a foreign country its character as heritable or moveable is determined by the law of that country. This, although difficult to reconcile with principle, is now settled. It was forcibly contended by Lord Young that although the law of a foreign country might well decide who should succeed to lands within its jurisdiction, there is no reason why reference should be made to the foreign law to determine the character of other rights. But it was held concluded by authority, and mortgages on English land being by the law of England moveable were held to be moveable in the succession of a domiciled Scotsman.[7]

Wife's Earnings.—The earnings of a married woman as already stated are excluded both from the *jus mariti* and right of administration.[8]

If she had a stock-in-trade at marriage this was not earnings and passed to the husband *jure mariti*.[9]

But the fact that the trade was carried on in the husband's house, and the wife's earnings were put into a common purse

[1] *Lord Advocate* v. *Oswald*, 1848, 10 D. 969.

[2] *See Hill* v. *H.*, 1872, 11 M. 247.

[3] 5 & 6 Vict. c. 45, § 25.

[4] *Bell's Trs.* v. *B.*, 1884, 12 R. 85.

[5] *Smith* v. *Kerr*, 1869, 7 M. 863; *Thomson's Trs.* v. *T.*, 1879, 6 R. 1227.

[6] 43 & 44 Vict. c. 26; *see infra*, Married Women's Policies of Assurance (Scotland) Act, 1880.

[7] *Monteith* v. *M.'s Trs.*, 1882, 9 R. 982.

[8] Married Women's Property Act, 1877 (40 & 41 Vict. c. 29, § 3).

[9] *Ferguson's Tr.* v. *Willis, Nelson & Co.*, 1883, 11 R. 261.

with the husband's, has been held not to prevent the Act from applying. Lord Young dissented, and the decision seems open to question.[1]

When the wife was a fish-hawker before marriage, and the husband adopted her business, the spouses hawking separately, it was held that the wife had not a separate business and that her earnings were not protected.[2]

The Earnings of an Unlawful Occupation are not protected.—It has been held in England that a wife's earnings as a brothel-keeper were not protected. And although the English Act uses the phrase: "Money or property she may acquire by her own *lawful* industry," it is thought the same decision would be pronounced in Scotland in spite of the omission of the word lawful in the Scottish Act.[3]

Effect of exclusion of *jus mariti*.—*See* CAPACITY.

Evidence of separate business.—The fact of the husband living in the house at the time the business is carried on, if it appears that he did not interfere in the conduct of it, does not deprive the wife of the protection of the Act.[4] Mellor, J., says: "To take an instance from fiction, Madame Mantalini, as described in Nicholas Nickleby, might, in my opinion, come within the application of the Act. Mr. Dickens makes her husband, although he lives in the house, do nothing in any way connected with her millinery business except consume her profits."[5] But where the husband rented a house in which his wife let lodgings it was held she was his agent.[6]

Evidence of separate trade.—The mere evidence of the widow that a business carried on in her husband's house was really her separate business was held in England to be not sufficient without corroboration.[7]

[1] *Morrison* v. *Tawse's Executrix*, 1888, 16 R. 247.

[2] *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935.

[3] *Mason* v. *Mitchell*, 1865, 3 H. and C. 528.

[4] *Lovell* v. *Newton*, 1878, 4 C.P.D. 7.

[5] *Laporte* v. *Costick*, 1874, 31 L.T., at p. 437.

[6] *Ibid.*, and *see ex parte Shepherd*, 1879, 10 Ch. D. 573.

[7] In *re Whittaker*, 1882, 21 Ch. D. 657.

CHAPTER XIV.

THE STATUS OF A MARRIED WOMAN.

By the common law a wife has no legal *persona*. It is merged at marriage in the person of the husband. Erskine expresses the doctrine thus: "The husband acquires by the marriage a power over both the person and estate of the wife. Her person is in some sort sunk by the marriage, so that she cannot act by or for herself. And as for her estate, she has nothing that can be truly called her own where matters are left to the disposition of the law; for not only her *persona*, but the rents of her heritable estate and the interest of her bonds become the property of the husband. In consequence of this power, the husband can recover the person of his wife from all who shall withhold or withdraw it from him. Nay, her person, while she is *vestita viro*, is free from all execution upon debts contracted by herself, which by her coverture she becomes disabled to pay."[1]

The rule of the English common law is the same. A married woman is styled *feme covert* because, as Blackstone puts it, she does every thing under the husband's "wing, protection, and cover." Her *persona* is "incorporated and consolidated into that of the husband."[2] The husband as the *dignior persona* is the head of the house. As his duty is to love and cherish his wife, so hers is to love and obey him. She comes under obligation to follow his fortunes, to live where he chooses, in all things lawful to obey him. And this headship of the family is so inherent in the nature of marriage that an agreement by the husband to renounce it would be void. So where an action for divorce was compromised, the parties agreeing to a separation, and the husband covenanted that the wife should have the custody and control of two of the children, it was held that such a stipulation would not be

[1] Ersk. i. 6, 19.

[2] Black. 1, 15; (Kerr, 4th ed., p. 418).

enforced by the Court, as being in derogation of the right inherent in a father to direct the bringing up of his children.[1] It was said in a leading case "to allow a partition of power between the husband and the wife, and a liberty of resistance of the latter to the will of the former in the regulation of the household, would induce perpetual discord, and prove destructive of domestic happiness, and the best interests of society. . . . It is only where the wife has suffered personal injury that the courts of law will interfere with the husband in the regulation of his household. The more delicate, though not less acute, sufferings of the mind come not within the cognisance of any earthly tribunal."[2]

It was held in this case that a wife could not compel a husband to maintain her in his house. If he turned her out, or assigned her another residence apart from him, she had no resource except to claim aliment, and, if he persisted for four years in refusing to receive her into his house, to sue for divorce on the ground of desertion.

Neither a decree of adherence in Scotland, nor a decree ordering restitution of conjugal rights in England, can now be enforced by imprisonment.—A husband having obtained such a decree in England, and the wife not obeying it, forcibly carried her off, and confined her in his house. On a return to a writ of *habeas corpus*, it was held by the Court of Appeal that he must set her at liberty. *Cochrane's* case,[3] referred to by Lord Fraser, was there overruled, and it was doubted whether by the law of England a husband at any time possessed the rights of moderate castigation and of restraint claimed for him by some of the old text-writers.[4]

[1] *Vansittart* v. *V.*, 1858, 27 L.J., Ch. 289.

[2] *Colquhoun* v. *C.*, 1804, Mor. App. 1; Husb. and Wife, No. 5., *sub finem*. In England, under the Matrimonial Causes Act, 1884 [47 & 48 Vict. c. 68, § 5], the only remedy for refusal to return to conjugal cohabitation is that the Court may, in its discretion, order the wrong-doer to make provision for the deserted spouse.

[3] 1840, 8 Dowl, P.C. 630.

[4] *The Queen* v. *Jackson* (1891), 1 Q.B. 671. As to old *dicta* about right of husband to chastise his wife *modicis virgis*, *see* 1 Bac. Abr. 693. In Sir Thomas Seymour's Case (Godbolt, 215) it was held that a wife had no remedy if her husband beat her, because she is *sub virga viri*, Coke, C.J., dissented. *See* Crawley, H. and W. 34.

It was suggested in the case of *Jackson* that circumstances might be figured in which a husband might have the right of temporarily restraining his wife's liberty. *E.g.*, if he met her on the stairs as she was about to elope. In Scotland, of course, if she obstinately refuse to cohabit with him for four years, he can obtain a divorce. The English husband is in a much more unfortunate position. He has no higher remedy than to obtain a judicial separation, if he can prove that his wife has deserted him for two years without cause.[1]

A Wife cannot be a Curator, but may be an Executrix or a Trustee.—A married woman, being herself in the *curatela* of her husband, as hereafter explained, and not being able effectually to incur any personal obligation, cannot at common law be a tutor or curator.[2] But she may, with the consent of her husband, be an executrix or *factrix in loco tutoris*, or a trustee.[3] The husband's consent is necessary to the wife's assuming any such office, because he becomes personally liable for her obligations contracted in that capacity.[4] No doubt her separate estate, if she has any, will be primarily liable. A woman married to a second husband may now be tutor to her children by a former marriage.[5]

In *Stoddart*,[6] Lord Meadowbank said: "The husband's power of prevention must be exercised *in limine*, he does not authorise every act and deed." This is also the opinion of Lord Fraser.[7] The contrary has, however, been held in England.[8] The case of *Darling* was special in respect that the testator had nominated the husband and wife as co-trustees. As a question of intention, it was held that the wife was entitled to a separate vote, and presumably might have voted against her husband at a meeting of trustees. Where a wife is a trustee or executrix apart from her husband, or has married after her appointment, there is not the same presump-

[1] 20 & 21 Vict. c. 85, § 16.

[2] Fraser, Guardian and Ward, 2nd Ed., pp. 171 and 346.

[3] *Watson* v. *Darling*, 1825, 1 W. and S. 188.

[4] *Paterson* v. *M'Vicar*, 1886, 13 R. 550.

[5] Guardianship of Infants Act, 1886 [49 & 50 Vict. c. 27]. See *Campbell* v. *Maquay*, 1888, 15 R. 784.

[6] *Stoddart* v. *Rutherford*, 30th June, 1812, F.C.

[7] i. 514.

[8] Williams on Executors, Vol. II., 8th Ed., p. 967, and cases cited.

tion that the testator intended her to act independently of her husband's concurrence in her actings, and the fact that the liability is his, not hers, makes it reasonable that his consent should be required, not only to her acceptance but to acts of administration.

A married woman who has been nominated as an executrix may give up inventory, and crave confirmation without being required to set forth the consent of her husband.[1] But she will not be deemed as executrix dative, unless the petition avers that her husband consents. Where a wife had been deserted by her husband, his consent was dispensed with.[2]

If a woman holding the office of trustee subsequently marry, the consent of her husband to her continuing to act will be presumed if he do not intimate that he does not consent. If he make such an intimation his wife's trusteeship falls, she remaining, of course, liable for actings prior to the marriage.[3]

In a case where a married woman had been appointed executrix, a debtor had paid a sum of money to her in the *bona fide* belief that she was entitled to act. As a matter of fact her husband had expressed his non-consent to her undertaking the office. It was held by the Court of Exchequer Chamber that the debtor was not liable to pay the debt over again to the executor who was entitled to administer.[4]

In England a husband has now been relieved from liability in respect of his wife's acts or omissions as trustee, if she has been appointed to the office since the Married Women's Property Act, 1882, or being a trustee has married since that date.[5] The husband will, however, not escape liability if he has himself acted or intermeddled in the trust.

Husband's curatory of Wife.—The husband is said to be his wife's curator. But, unlike any other curator, he does not require to give up an inventory of his ward's estate. Even though he be minor, and she major, this quasi-curatorial

[1] Currie on Confirmation, p. 66.

[2] *Ibid.*, p. 98.

[3] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[4] *Pemberton* v. *Chapman*, 1858, 27 L.J., Q.B. 429.

[5] 45 & 46 Vict. c. 75, §§ 1, 18, 24; and with regard to a husband's liability in England for his wife's acts as trustee, *see* Lewin on Trusts, 9th Ed., p. 32, and cases cited.

character attaches to him in virtue of the marriage. And if she has curators at the time of her marriage, their appointment falls, and they are superseded by the husband. But if the husband be himself a minor, under curatory, as well as the wife, it is suggested that the wife's curators ought still to act as regards her separate estate with the concurrence of the husband's curators.[1]

On this doctrine of the husband's *curatela* depends the wife's inability to sue or be sued without his concurrence. But the analogy between the husband's position and that of a curator to a minor is not to be pressed.[2]

A married woman may be an instrumentary witness.[3]

Married Woman as Voter.—*See* ELECTION LAW.

Nationality.—A married woman takes by law her husband's nationality as well as his domicile.[4] If her nationality before marriage was British, and she marry a foreigner, she becomes a statutory alien. Should she survive her husband she may at any time during her viduity obtain a certificate re-admitting her to British nationality. If she has taken this step, every child of hers which has, during infancy, become resident with her in the British dominions is a British subject.[5]

English Law.—In *re March, Mander* v. *Harris*, 1883, 24 Ch. D. 222, Chitty, J., held that the effect of the English Married Women's Property Act, 1882, was to sever the unity of person, and to divide that compound person which the law formerly recognised, at least for many purposes. The judgment in this case was reversed, but nothing was said as to the general doctrine.[6]

But it would appear that except so far as expressly limited by the Act, the principle of unity of person still holds good. So it has been held that a husband cannot, any more than before the Act, sue his wife for an ante-nuptial debt.[7]

And a communication by a husband to his wife of a libel on a third person is not, any more than formerly, a publication.[8]

[1] Fr. i., p. 516; More's Notes to Stair, p. xviii.

[2] Fr. i. 515, gives a summary of the points of difference.

[3] 31 & 32 Vict. c. 101, § 139; *Hannay*, 1873, 1 R. 246.

[4] 33 Vict. c. 14, § 10.

[5] Fr. i. 518; 33 Vict. c. 14, § 10.

[6] 1884, 27 Ch. D. 166.

[7] *Butler* v. *B.*, 1885, 14 Q.B.D. 831.

[8] *Wenshall* v. *Morgan*, 1888, 20 Q.B.D. 635.

CHAPTER XV.

THE CAPACITY OF A MARRIED WOMAN.

As already stated, by the common law of Scotland, as by that of England, a married woman has no legal *persona* distinct from her husband. And although certain exceptions to this general rule were admitted by the common law, and the capacity of married women has been considerably enlarged by statute, the principle itself has not been abandoned, and the latest Act expressly provides that it shall not affect a wife's non-liability to diligence against her person.[1] Lord Stair regards this as among the privileges of women. "Law and Custom," he says, "hath favoured and privileged wives, in many cases, *propter fragilitatem sexus*. They are free from obligements for sums of money, and from personal execution by horning or caption, if it be not for criminal causes."[2]

A Wife's personal obligations to pay money are null, unless she is living separate from her Husband, or the obligation is shown to have been *in rem versum* of herself. —The fact that a wife has separate estate, or that her husband consented to the contract does not validate it. It must be shown to have been made with reference to her separate estate or, at any rate, to have been *in rem versum*. A case, of which the following is the full report, well illustrates the rule: "Mrs. Auchincloss, having inherited a considerable property from her father and brothers (which in her contract of marriage was excepted from the *jus mariti*), granted a letter of guarantee 'for any yarn to be furnished' to her son of a former marriage, to the extent of £1400; and her husband subjoined, 'The above is done with my consent.' In an action against her and the trust-disponees of her husband after his

[1] 44 & 45 Vict. c. 21, § 8. [2] Stair, i. 4, 22.

death, the Court held—1st, That the wife's obligation was null and ineffectual against her person or estate; and, 2nd, That the husband, by merely consenting to the deed of his wife, did not incur responsibility as a principal guarantee."[1] But a heritable bond by a married woman over her separate estate, if granted with her husband's consent, will be effectual, though given in security of advances to be made to the husband.[2] The personal obligation in such a bond is worthless.

Limitations on Incapacity of Married Women.—The personal obligation of a married woman will be sustained in the following cases, which will be separately considered.

I. At Common Law.

a. When the obligation is *in rem versum* of the wife.

b. When the husband is imprisoned, or *civiliter mortuus.*

c. When the obligation is one *ad factum præstandum.*

d. When she is a trader, and the contract is in the course of her trade. In addition, a married woman may personally bind herself in the following cases, if the obligation be one for necessaries for herself or her children.

e. When the husband is abroad, or the wife is living separate, and has agreed to maintain herself, or is supplied with aliment by the husband, or the separation was by her fault—in short, in every case in which she has no mandate to bind her husband.

II. Statute.

a. By the Conjugal Rights Act, 1861, when she has obtained a decree of judicial separation or a protection order.

b. By the Married Women's Property Act, 1877, she may deal as an unmarried woman with her wages and earnings and the investments thereof, and her contracts bind these assets. But she does not bind herself personally.

c. By the Married Women's Property Act, 1881, the rents of her heritage are not subject to the *jus mariti*, or right of administration. She may therefore deal with them as if she were unmarried. As to the income of her moveable estate, she receives no new capacity except that of granting a receipt for it. It must be observed that none of the statutes confers upon her the capacity to bind herself personally, except when she is judicially separated or has a protection order.

[1] *Lennox* v. *Auchincloss*, 1821, 1 S., 2nd Ed. 19.

[2] *Brown* v. *Bedwell & Yates*, 1830, 9 S. 136.

Obligations of a Wife binding as *in rem versum*.—This rule slides into the other one that, when a married woman has separate estate, obligations entered into by her with reference to that estate will bind it though they will not ground personal diligence against her. For furnishings made to the wife and family are not *in rem versum* of her, but of her husband, as he is bound to provide her and them with necessaries.[1] Lord Fraser says that the wife's debts, contracted before marriage, are *de in rem verso* of her.[2] But the old cases on which he founds are more naturally to be referred to the principle that a creditor may sue a married woman and her husband for a debt contracted by her before marriage, and may recover payment out of her separate estate.[3] Contracts made by the wife with regard to the improvement of her heritage, or the investment of her moveables, if held exclusive of the *jus mariti* and *jus administrationis*, are binding upon her estate.[4] And if engaged in trade with her separate estate she may grant bills and incur other obligations arising out of her business, and in that case render her separate estate liable. But her obligations unconnected with her separate estate will not bind her.[5] It is not necessary to show that the contract was actually advantageous for the wife; it is enough that the gain, if any, would have accrued to her and not to her husband. Thus a married woman having estate, from which the *jus mariti* and *jus administrationis* were excluded, may invest it in a trading company and incur the risks incident to the holding of shares.[6] In accordance with general rules of equity, a married woman cannot approbate and reprobate a contract, or take profit under it, and yet plead it is not binding upon her. "Her conscience, as well as that of her husband, might be affected by personal frauds, so as to enable the Courts to adjudge what otherwise would have been hers to the defrauded party. If property were given to her, on an express

[1] *Walker* v. *Home*, 1827, 6 S. 204; *Buie* v. *Gordon*, 1831, 9 S. 923; Bell's Prin. 1612.

[2] Fr. i. 536.

[3] *Primrose* v. *Watson*, 1610, M. 5982; *Sinclair* v. *Richardson*, 1677, M. 5984.

[4] *Brown* v. *Grahame*, 1830, 8 S. 834.

[5] Opin. of L.P. Inglis in *Biggart* v. *City of Glasgow Bank*, 1879, 6 R., at p. 481.

[6] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470; *Wright's Executors* v. *City of Glasgow Bank*, 1880, 7 R. 527.

or implied condition, she might accept and sue for it, but she could not, any more than a person under no disability, at once accept the gift and reject the condition." [1]

When a married woman is debtor before her marriage in an obligation, and after marriage the creditor discharges the old obligation and takes a new one in its place, this latter is null, as granted by a married woman, and is not enforceable on the ground that it is *in rem versum*. This was so held when a renewal bill was granted by the woman after marriage, the old bill having been discharged.[2] And this case was recently followed when a new cash-credit bond was taken from a married woman in lieu of one in which she was liable before marriage.[3]

When the Husband is *civiliter mortuus*, or in imprisonment. —The term "civil death" does not appear to have been used with much precision either in Scotland or England. Sir F. Pollock doubts if it was ever a term of art except "when a man entereth into religion and is professed," [4]—*i.e.*, becomes a monk. But it is undoubted that the wife of a man who has fled from trial, or who is in penal servitude or imprisonment, may bind herself by contract.[5]

But it would appear that penal servitude or imprisonment for a long term of years would be necessary. The wife of a husband who is undergoing a short imprisonment does not acquire an unlimited contractual capacity, though possibly her contracts for *necessaries* may bind her. In one case where the husband had been attainted of high treason during the rebellion of 1745, and was transported to the plantations in America, the question arose whether the rents of his wife's heritage were forfeited to the crown, or if she could take them for herself. The argument was sustained "that a person who is banished the realm for life, is considered as dead with regard to every benefit he enjoys by the Municipal law of his country, and his wife is considered as a *femme-sole*, and entitled to her jointure." [6]

[1] *Cahill* v. *C.*, 1883, 8 App. Ca., *per* Selborne, L.C., at p. 426.

[2] *Ewing* v. *Lady Strathmore's Trs.*, 1831, 9 S. 558.

[3] *Jackson* v. *MacDiarmid*, 1892, 19 R. 528.

[4] Contracts, p. 81 *note*.

[5] For an interesting discussion of the analogy between transportation and "civil death," *see Ex parte* Franks, 1813, 7 Bing. 762.

[6] *Farquhar* v. *Lord Adv.*, 1753, M. 4669.

A wife's title to sue with a curator *ad litem* was sustained where she had been appointed *executor dative* to her father, being designed "wife of A. G., now somewhere abroad," and it was proved that A. G. had been transported to Botany Bay.[1]

Lord Fraser says the wife of an alien enemy is in the same position. But this appears erroneous. During war neither she nor her husband can maintain an action. And Sir F. Pollock thinks she cannot be sued alone[2]—*i.e.*, except in the cases where any woman living separate from her husband is liable.

An obligation *ad factum praestandum* may be binding, and when it is so will ground personal diligence.—This does not mean that a married woman who has contracted to sing at a concert or to paint a picture will be compelled, under pain of imprisonment, to fulfil her obligation. Specific implement of a contract to perform certain work is not enforced, but failure grounds a claim of damages. But when she has bound herself to deliver an article or grant a deed, or do something of a like nature which it is entirely within her power to perform, and which cannot be validly performed by another, and decree ordaining her to perform it has been pronounced, she may be imprisoned for failure to implement the decree.[3]

Obligations by married woman who is a Trader.—If a married woman is a member of a firm, or a shareholder in a company, she binds her separate estate, but is not liable to personal diligence.[4] But a contract unconnected with her separate estate does not bind her.

Wife's right to become a Partner. — *See* WIFE AS PARTNER.

Obligations by a married woman living separate.—When the husband is in another country, or the wife has left his house in such circumstances as not to carry with her a man-

[1] *Anderson* v. *Shand*, 1833, 11 S. 688.

[2] Fr. i. 548; Contracts, p. 80 *note*; *see De Wahl* v. *Braune*, 1856, 1 H. and N. 178.

[3] Ersk. i. 6, 19; Fr. i. 555; *see* for same rule in England, Fry on Specific Performance, p. 689.

[4] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470.

date to pledge his credit for necessaries, it is settled that she binds her separate estate. But the contract must be for necessary furnishings for herself or her children.

But when the husband is abroad, and the wife is a trader in Scotland, her contracts are as binding upon her as if she were unmarried, and so will be enforced by personal diligence.[1]

The law as regards these points was early settled.[2]

1. Where Husband is abroad.—"Adam Gairns pursues Elizabeth Arthur for the drugs furnished to her and her children, at her desire; it was *alleged* absolvitor, because she was and is clad with a husband, and the furniture could only oblige him, but not her. It was *replied*, that she had a peculiar estate left by her father, wherefrom her husband was secluded, and which was appointed for her entertainment, that her husband was at that time, and yet, out of the country, and hath no means. The Lords found the reply relevant."[3]

And the same was found where a wife living separate had an aliment settled upon her.[4]

2. Where a Wife whose Husband has Deserted her is a Trader.—Where "a woman and her husband having deserted and dwelling sundry, and the wife keeping an open hostlerie diverse years, albeit her husband have served inhibition upon her," and had given her bond for flesh and furnishings made to her house, it was held that the wife would be personally liable.[5] This case was followed where the action was for wines supplied to a deserted wife who kept an inn,[6] and for commodities to one who lodged boarders.[7] In *Churnside* v. *Currie*, a century later, the further step was taken of finding that obligations by a married woman living separate and engaged in trade will ground personal diligence.[8] The report runs: "The husband of Janet

[1] *Orme* v. *Diffors*, 1833, 12 S. 149.

[2] For a discussion of the cases in which a wife living separate binds *her husband* by her contracts for necessaries, *see* chapter on "Wife's Contracts," *infra*.

[3] *Gairns* v. *Arthur*, 1667, M. 5954.

[4] *Robins* v. *Southesk*, 1688, M. 5955.

[5] *Hog* v. *Little*, 1611, M. 5955.

[6] *Russell* v. *Paterson*, 1629, M. 5955.

[7] *Hay* v. *Corstorphin*, 1663, M. 5956.

[8] 1789, M. 6082.

Currie having left Scotland in bankrupt circumstances, she entered into trade in order to maintain herself and her children. Being charged with horning for payment of a bill of exchange granted by her to James Currie, she offered a bill of suspension, founded on the general rule of law, that a woman *vestita viro* could not, by any contract, subject herself to personal diligence. This plea, however, was entirely disregarded, as inapplicable to a case like the present, where the debt had been contracted by a wife in her own name, while her husband was out of the kingdom. To refuse the ordinary legal compulsatories, in such circumstances as these, would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support." And in the case of *Orme* v. *Diffors, Churnside* was expressly accepted as settling the law.

Liability of Wife who has fraudulently held herself out as unmarried.—Lord Fraser says in this case she is liable if she positively represented herself as unmarried, or if the marriage was secret. When the other party, if he had shown ordinary prudence, would have known he was dealing with a married woman, she is not bound.[1] The doctrine is supported by Bankton,[2] who says: "If the wife passes herself for a person unmarried and contracts debts, they will be effectual against her; because the law does not protect people in committing of frauds, it being a rule in such case that *deceptis non decipientibus jura subveniunt.*"[3] The contrary has been held in England.[4]

Probably the rule must not be carried further than this, that a wife who has induced a third party to contract with her by holding herself out as unmarried cannot repudiate the contract and at the same time take benefit under it. In England it has been held that action would not lie against a wife where she had fraudulently represented herself to the plaintiff as unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff

[1] Fr. i. 544.
[2] i. 5, 74.
[3] See also Elchie's Annot., p. 26.
[4] *Cannam* v. *Farmer*, 1849, 3 Ex. 698.

vas induced to advance a sum of money to that person.[1] For here the fraud was directly connected with the contract with the wife, and was the means of effecting it, and parcel of the same transaction.[2]

Conjugal Rights Act, 1861 [24 & 25 Vict. c. 86]—Where a wife has obtained a Protection Order or a decree of Judicial Separation.—In this case she holds, exclusive of the *jus mariti* and *jus administrationis*, property which she has acquired by her own industry, or has succeeded or acquired right to after desertion if she has a Protection Order; or property acquired by her in any way after decree, if she is judicially separated. And in either case if the spouses return to cohabitation the property which in virtue of the act had been the wife's separate estate will continue to hold that character unless the husband and wife enter into a written agreement to another effect. As regards such estate then, the wife has the power to bind it by her contracts. But during the separation her capacity is greater. It is provided that "the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married." She may, therefore, make herself liable in personal diligence, although not engaged in any occupation.

Married Women's Property Act, 1877.—A married woman's earnings in any business which she carries on under her own name, and her gains made through the exercise of any literary, artistic, or scientific skill, are after 1st January, 1878, held by her exclusive of the *jus mariti* and *jus administrationis*. It is further provided that the investments of such wages, earnings, money, or property, "shall be deemed to be settled to her sole and separate use"—a curious introduction of English phraseology into a Scotch statute—and that her receipts shall be a good discharge. It will be seen that no general power of contract is here conferred, as was done by the Conjugal Rights Act on a woman who had a Protection Order, or was judicially separated. The married woman engaged in

[1] *Liverpool Adelphi Loan Association* v. *Fairhurst*, 1854, 9 Ex. 422.

[2] *See Wright* v. *Leonard*, 1861, 11 C.B. N.S., 258; Pollock on Contracts, p. 78.

trade under her own name may bind herself personally in obligations connected with her business. But an obligation unconnected with her business or her separate estate is still null.[1]

Married Women's Property Act, 1881.—This most important statute touches the capacity of married women very lightly, and its effects are not by any means free from doubt. It is, however, *luce clarius* that there is no intention to confer on a married woman the power to contract as if unmarried, or even to deal with her separate estate as a married woman may deal with estate held exclusive of the *jus administrationis* as well as of the *jus mariti*.

The Scottish Act is much more grudging than the English one, which enacts: "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *femme-sole*."[2] As it does not seem that the effect of this is to render a married woman personally liable—so that the creditor's remedy is still against her estate, and not herself—the position of the English wife is, it is submitted, analogous to that of a married woman in Scotland possessing estate exclusive of the *jus mariti* and *jus administrationis*. The Scotch wife holding estate from which the husband's rights have been excluded is, in reference to her separate estate, as able to bind herself as if she were unmarried. "Whatever obligations she incurs in the enjoyment and administration of that separate estate itself are, in my opinion, binding upon her just as if she were an unmarried woman."[3] Nothing could have been simpler than to place all married women possessing separate estate upon the same legal footing. But the Act of 1881 is careful not to do this. It provides that the moveable estate of the wife, where the Act applies, shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. The addition of the words or the *jus administrationis* would have placed the married woman in

[1] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470.

[2] Married Women's Property Act, 1882, § 1 (2).

[3] *Per* L.P. Inglis in *Biggart* v. *City of Glasgow Bank*, 1879, 6 R., at p. 481.

Scotland in a similar position of independence to that enjoyed by a wife in England.

***Jus administrationis* excluded to limited extent.**—It is provided that the income of the wife's moveable estate shall be payable to her on her own receipt, and, as the rents of her heritage are declared to be no longer subject to the *jus mariti* and right of administration of her husband, a wife's tenants will get a sufficient discharge in a receipt signed by the wife alone. But the Act does not apply to the rents of heritage, the fee of which had already vested in the wife prior to its date.[1] Both provisions are confined to income, and the result is that a married woman may contract and bind the income of her estate by her contracts. It is, however, expressly declared that she shall not be liable in personal diligence any further than formerly. As regards her heritable property, or the capital of her moveable estate, her capacity remains unchanged. She cannot assign the prospective income of it, or dispose of it in any way, without the husband's consent. A married woman living with her husband is only free to deal with capital when, by paction or otherwise, the *jus administrationis* as well as the *jus mariti* have been effectually excluded; or when the capital in question consists of earnings, or accumulations of earnings, gained by her in a separate business, in the sense of the Act of 1877; or of the savings of income, or, apparently, of the rents of her heritage. She is not prohibited from assigning the prospective rents of her heritage, and as the husband's right of administration is excluded as to the produce of heritable estate, it would seem that she is free to assign or dispose of such rents in advance.[2]

Savings from income of Separate Estate.—It cannot be said to be settled by any authority in Scotland whether such savings are separate estate in the wife, and, if so, whether she can dispose of them without her husband's consent.

The first point is hardly doubtful. But it may be thought that accumulations of income accruing to capital become at once capital, on the principle *accessorium sequitur principale*, and that the intention of the Act of 1881 is to give the

[1] *Horsburgh* v. *Scott*, 1889, 16 R. 507. [2] § 2.

married woman no power of dealing with capital. In this view it might make a difference whether the wife allowed the income of her separate estate, or part of it, to accresce to the capital, as, *e.g.*, if the annual interest were added to a deposit-receipt, or if, on the other hand, she drew the income as it became payable, and thus divided it from the capital.

The only Scotch case which bears on the question was one in which the spouses lived separate for thirty years. The wife supported herself by her own exertions, and it was held on the evidence that the husband must be taken to have agreed that the wife's earnings and the savings thereof should belong to her, and not fall under the *jus mariti*. The case was really one of fact; but it was observed that when a husband gives an allowance in name of aliment to a wife living apart, he will be presumed to intend that any savings she may make out of it shall belong to her.[1] It is, however, well settled in England that the savings of a wife's separate estate are themselves separate estate. In an old case a wife at marriage reserved power to dispose of her separate estate, and a question arose if this covered accumulations. The judgment of Lord-Keeper North is quaintly expressed thus: "It appears not that any other estate came afterwards to the lady, and, therefore, what she died possessed of is to be taken to be the separate estate, or the produce of it, unless the contrary had been made appear; and as she had a power over the principal, she, consequently, had it over the produce of it; for the *sprout* is to savour of the *root*, and to go the same way."[2] This case has ruled the practice.[3]

Power of Court in certain cases to dispense with Husband's Consent.—The only other clause of the Act of 1881 which affects the capacity of a married woman is section 5, which provides that when a wife is deserted by her husband, or living apart from him with his consent, a judge of the Court of Session, or Sheriff Court, may, on petition addressed to the Court, dispense with the husband's consent to any deed relating to her estate. This gives a discretionary power to

[1] *Davidson* v. *D.*, 1867, 5 M. 710.

[2] *Gore* v. *Knight* 1705, 2 Vernon, 534.

[3] *Duncan* v. *Cashin*, 1875, L.R. 10 C.P. 554.

the Court. It was held by Lord M'Laren, Ordinary, that the fact that at the date of the petition the wife was living in adultery was not an absolute bar. But the case was one where the husband had deserted his wife a few months after the marriage, and had made no provision for her maintenance. The wife's adultery was subsequent to the desertion.[1]

A married woman living with her husband has not, any more than formerly, capacity to contract a personal obligation.—Apart from the exceptional cases which have been enumerated, *e.g.*, obligations granted by a wife whose husband is in penal servitude, or by a wife deserted, or engaged in trade, or obligations *ad factum praestandum*, the personal obligation of a married woman is still null. If she has estate separate in the full sense from her husband—*i.e.*, estate from which the *jus mariti* and right of administration have been excluded—and the earnings of separate trade and the rents of her heritage are now in the same position—she may deal with this as if unmarried, and is liable to the extent of such estate in obligations connected with the enjoyment and administration of it. A contract for necessaries supplied to her does not bind her separate estate unless it is shown that she expressly pledged her own credit and not that of her husband. And contracts purely personal, and not connected with her separate estate, are null.[2] As to all this the Act of 1881 has made no change. Accordingly, it has been held, since the Act, that a married woman who possessed estate from which both the *jus mariti* and right of administration were excluded had no capacity to grant a promissory note.[3] And a married woman who had signed a discharge of *legitim*, and accepted a conventional provision, was found entitled to repudiate the discharge and recur to her legal rights, on the ground that it was granted by her without her husband's concurrence.[4] But where a wife, having separate estate, signed with her husband a promissory note, on the faith of which a bank made him an advance, it was held by Lord Kinnear, Ordinary, that the bank

[1] *Niven*, Petr., 1883, 20 S.L.R. 587.

[2] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470.

[3] *M'Lean* v. *Angus Brothers*, 1887, 14 R. 448.

[4] *Miller* v. *Galbraith's Trs.*, 1886, 13 R. 764.

was entitled to debit the wife's account, in which the interest of her estate was lodged, with the sum in the note.[1]

A married woman's moveable estate, to which the Act applies, is in the same position as estate from which, by agreement, the *jus mariti* has been excluded but not the *jus administrationis*.—In this case the rule is that the husband's consent is still necessary to validate his wife's deeds, but the Court will protect her against an attempt by him to turn his curatorial power into a means of enriching himself at her expense. "A husband's *jus mariti* and a husband's right of administration or curatorial power are different things, and the exclusion of the one does not necessarily imply the exclusion of the other. It is always a question of intention. The husband's *jus mariti* virtually makes him proprietor of his wife's moveables, but his curatorial power is quite different, and must be exercised solely for her behoof, and to save her from being hurt by her own acts. In the present case, as only the *jus mariti* is mentioned, and not the right of administration, I think the husband's curatorial power still subsists, and that he must, simply as curator, concur in his wife's acts. But as his *jus mariti* is expressly cut off, and as the annuity is not subject to his debts and deeds, he cannot use his curatorial power for the purpose of getting the annuity, or any part of it, into his own hands, or under his own power. If he will not concur in the payment to his wife alone, or for her sole behoof, the Court on an appropriate application, and on cause shown, may authorise her to act without him, or may name another curator."[2]

Stair draws no distinction between the *jus mariti* and right of administration. He says: "*Jus mariti*, as a term in our law, doth signify the right that the husband hath in the wife's goods. Yet it may well be extended to the power he hath over her person, which stands in that economical power and authority whereby the husband is lord, head, and ruler of the wife."[3] But Erskine discriminates them. He says: "It also proceeds from the curatorial power of the husband, that all

[1] *Burnett* v. *Brit. Lin. Co.*, 1888, 25 S.L.R. 356.

[2] *Per* Lord Gifford in *Bryce's Tr.*, 1878, 5 R., at p. 728.

[3] i. 4, 9.

deeds done or granted by a wife without his consent are in themselves null, though they should relate to her own property, and make no encroachment on any right competent to the husband." [1]

A married woman cannot, without her husband's concurrence, sue or be sued, or grant any deed, or enter into any contract, with regard to her estate held by virtue of the Act.

Ill.—A married woman possessing estate exclusive of the *jus mariti* charged on a decree without the concurrence of her husband. A bill of suspension of the charge was passed *simpliciter*.[2]

Ill.—A married woman assigned as security for her husband, and during his absence from the country, a fund which had been given for her aliment, secluding the *jus mariti*. The deed was found void. There were here two sufficient grounds for setting aside the deed, and the House proceeded mainly on the alimentary nature of the fund. But Lord Campbell states explicitly: "I am likewise of opinion that the deed is void, on the ground that it was granted without the concurrence of the husband." [3]

Wife's Capacity to deal with her heritage.—A wife has no power to dispose of her heritage without her husband's concurrence unless it is held by her exclusive of both the *jus mariti* and right of administration.[4] *E.g.*, in one case where the husband was in America, his wife sold "certain [illegible] of which she was proprietrix, for £30, and reserved power to her husband to buy it back. In an action of reduction by the husband and wife together, the disposition was set aside as *funditus* null.[5]

If her heritage vested in her after the Act of 1881, or has been brought under that Act by mutual deed, in terms of section 4, it would seem that a receipt by her to tenants for rents would be sufficient. But she receives no additional capacity from the Act to alienate or burden her heritage. If,

[1] i. 6, 22, and *see ibid.*, 27.

[2] *Wight* v. *Dewar*, 1827, 5 S. 549.

[3] *Rennie* v. *Ritchie*, 1845, 4 Bell's App., at p. 241. But *see* "Title to Sue," *infra*.

[4] *Boyle* v. *Crawford*, 1822, 1 S. 372; *Bullions* v. *Bayne*, 1793, M. 6149.

[5] *Boyle*, *supra*.

however, she holds it exclusive of both the *jus mariti* and right of administration, she may deal with it in all respects as if she were unmarried.[1] As regards heritage, the rents of which but for the Act would have fallen under the *jus mariti*, a wife has no power to grant by herself any deed. Her deeds may be reduced, unless brought within one of the exceptions discussed in treating of a wife's personal obligations.

A Wife cannot grant a lease or do any other act of administration of her heritage.—This has not been made the subject of recent decision, and Erskine speaks of it as open.[2] But the ground upon which alienations have been held null is simply that a married woman is *sub cura mariti*, and therefore all deeds by her are null which are granted without his consent. And this reason is applicable to such an act as the granting of a lease as well as to an alienation. It can hardly be doubtful that at common law a wife has no such power.[3] It cannot be said to be equally clear if the Married Women's Property Act has made no change in this matter. For, as already pointed out, she does not seem to be prohibited from assigning the prospective rents of her heritage. It is a curious result if it should be found that a wife may gratuitously assign her rents in advance, but cannot without her husband's consent grant a lease or remove a tenant.[4]

Where the Wife is judicially separated, or has a Protection Order, or the Husband is civilly dead, a Wife may deal with her heritage as if unmarried.[5]—Lord Fraser says that she may do so if her husband be insane.[6] But the case of *Bold* v. *Montgomerie*[7] is hardly sufficient to support this, for there the husband's liferent was reserved. And Erskine states the law in more guarded language. He says: "Where the husband is from furiosity, or other disability, rendered incapable of interposing his consent as curator, the

[1] Fr. i. 814; *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470; *see* opinion of L.P. Inglis, at p. 481; More's Notes to Stair, p. xvii.

[2] i. 6, 27; but *see Cockburn* v. *Burn*, 1679, M. 5795 and 5998.

[3] Fr. i. 804.

[4] Mr. Rankine does not indicate an opinion as to her power to assign rents in advance, but thinks she has no greater power than formerly to grant leases. Leases, p. 22.

[5] *See supra.*

[6] Fr. i. 819.

[7] 1729, M. 6902

necessity of the case may support a deed granted by the wife alone, affecting her heritage, if it be rational."[1]

The Court may now dispense with the husband's consent, if the wife is deserted, or the spouses are living apart.[2]

Capacity of Wife to grant an *inter vivos* Deed not to take effect till her Death.—The question is still open whether an obligation by a wife is valid if payment is postponed until after her death. Erskine,[3] Bell,[4] and More[5] think such a deed will be sustained. The point was much considered in *Miller* v. *Milne's Trustees*,[6] where the case of *Colquhoun*,[7] founded on by Erskine, was canvassed. Erskine appears to assimilate a deed of this kind to a legacy. But his language is hardly consistent. A personal obligation incurred by *inter vivos* deed must be conceived of as at once binding, and continuing to bind her until her death, although the date of payment is postponed. The analogy with testaments is misleading, for these have no effect till the wife's death, when the husband's curatory falls.[8] The view that such an obligation is invalid is strongly put by Lord Deas. His opinion on the point was shared by Lords Neaves, Ivory, Cowan, and Mackenzie. Lord President M'Neill, Lords Ardmillan and Curriehill, and, more doubtfully, Lords Kinloch, Benholme, and Wood were of the view that it might be sustained. The Court found it unnecessary to determine the question, as, in the circumstances of that case, it was found that the obligation was personal to the grantee, and even if originally valid, could not be insisted in by his representatives.

Capacity of Wife to Test.—A married woman has complete freedom to dispose of her moveable estate by *mortis causa* deed.[9] As to heritage, a difficulty was felt formerly, from the fact that heritage could only be conveyed in *de præsenti* form. Bankton[10] accordingly thought she could not test

[1] i. 6, 27 *fin.*

[2] Married Women's Property Act (1881), § 5.

[3] Ersk. i. 6, 28; Ersk. Prin. i. 6, 15.

[4] Bell's Prin. 1613.

[5] More's Notes to Stair, p. xviii.

[6] 1859, 21 D. 377.

[7] *Colquhoun* v. *Lady Roseburn's Executors*, 1720, M. 5973.

[8] *See Miller*, *supra*, opinions of Lords Cowan and Mackenzie, p. 387.

[9] Ersk. i. 6, 28; and *see* opinions in *Miller*, *supra*; M'Laren on Wills, i. 271.

[10] i. 5, 67.

on her heritage, a doctrine cited with approval by Lord Deas.[1] But Erskine was of a contrary opinion.[2] As heritage can now be bequeathed by *mortis causa* deed, this objection is removed, and she may, if major, test upon her heritage.[3] Her estate is now subject to claims of *jus relicti* and *legitim* if her domicile at death was in Scotland.[4]

Capacity of Wife to elect between legal and conventional provisions.—This is perhaps rather a question of right than capacity in the proper sense.

It is settled that where a married woman is entitled to provisions under her father's settlement from which the *jus mariti* is excluded, her husband cannot in every case compel her to repudiate the conventional provisions and claim *legitim*.[5] It is a question of circumstances, and the Court will regard the wife's interest. The question will hardly come up again, for the husband would not, as formerly, obtain possession of the sum falling to his wife in name of *legitim*.

[For Capacity of Wife as Partner, Capacity to Sue, *see infra*.]

[1] *Miller* v. *Milne*, *supra*, at p. 402.

[2] Ersk. i. 6, 28, and *see* opinions of Lords Curriehill (p. 399), Cowan, and Mackenzie (p. 387), in *Miller*, *supra;* Menzies, Conv., p. 39.

[3] Titles to Lands Consolidation Act, 1868, § 20.

[4] Married Women's Property Act, 1881, §§ 6, 7.

[5] *See Millar* v. *Birrell*, 1876, 4 R. 87.

CHAPTER XVI.

HUSBAND'S LIABILITY FOR WIFE'S CONTRACTS.

Wife as *praeposita rebus domesticis*.—There is a presumption that the person who has charge of a house is authorised by the master of it to order, on his account, such provisions and ordinary furnishings as may be necessary. The presumption arises equally whether the domestic management is in the hands of a wife, a sister, a daughter, or a paid housekeeper.[1] It does not depend on the marriage relation, but is purely a question of agency. Cohabitation raises a presumption of fact that the husband assents to contracts made by the wife for necessaries suitable to his degree and estate, or to the style which he permitted her to assume, if the circumstances are such that the wife would be the natural person to give the order as agent for, and to pledge the credit of, the husband.[2] In a recent case in the House of Lords it was laid down that the question was always one of fact. Had the wife authority in the circumstances to pledge the husband's credit? The mere fact of marriage or cohabitation does not imply a mandate.[3] Quite otherwise is the case of the wife who has been deserted, or compelled by her husband's misconduct to leave him. Considerations of agency are here inapplicable. As the husband is bound to maintain his wife, so, if he fail to do so, any one who supplies her with necessaries is entitled to relief from the husband.[4]

[1] Ersk. i. 6, 26; 1 Bell's Com. 479.

[2] *Manby* v. *Scott*, 2 Smith's Leading Cases, 9th Ed., p. 466.

[3] *Debenham* v. *Mellon*, 1880, 6 App. Ca. 24.

[4] *See infra*, and the same would apply if husband gave wife, who was cohabiting with him, no money to buy food or clothes, *per* Bramwell, L.J., in *Debenham*, 1880, 5 Q.B.D., at p. 398.

The Husband may rebut the Presumption that the Wife was contracting as his Agent.—He may show that he made her a sufficient allowance, and had not as a fact authorised or acquiesced in the contract in dispute.[1] The husband, according to the ordinary principles of agency, will be barred if he has sanctioned a course of dealing—*e.g.*, by payment of previous accounts, and has not notified to the tradesman that he was not to give credit to the wife in future.[2]

In *Debenham* v. *Mellon*[3] it was suggested by Bramwell, L.J., that there was a distinction between articles of daily consumption such as bread or meat, and articles such as dress or jewellery. Bramwell, L.J., points out that in certain neighbourhoods, and in a certain class, it is unusual to pay ready money to butchers and bakers. In such cases it would seem unjust that the husband should be able to rebut the presumption of agency by proving that he had forbidden his wife to buy on credit. He should notify to the tradesmen that he has revoked his wife's authority to deal on the usual terms. The question is still open.

The following cases illustrate the principles on which the Court has proceeded:—By necessaries are meant such articles as fairly fall within the domestic department which is usually confided to the wife. They must be suitable to the style of living adopted by the husband.[4]

In a case where the question was whether certain things were "necessaries" for an infant, Baron Parke said: "All such things as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party in order to support himself properly in the degree, state, and station of life in which he moved."[5] By the same canons will be determined what are necessaries for a wife, but it must always be kept in view that it is for the

[1] *Rennaux* v. *Teakle*, 1853, 8 Ex. 680.

[2] *Jolly* v. *Rees*, 1864, 15 C.B. N.S. 628.

[3] 1880, 5 Q.B.D., at p. 398.

[4] *Phillipson* v. *Hayter*, 1870, L.R. 6 C.P. 38; *Harrison* v. *Grady*, 13 L.T. N.S. 369.

[5] *Peters* v. *Fleming*, 1840, 6 M. and W., at p. 47; *Chapple* v. *Cooper*, 1844, 13 M. and W., at p. 258.

husband to fix in what style he chooses to live.[1] If a baronet prefers to live in a small house, at the rate of £300 a-year, articles supplied to his wife will not be accounted necessaries on the ground that other ladies of her rank purchased the like.

In general it may be said that food, clothing, furniture,[2] and medical attendance,[3] are necessaries.

Ill.—The wife of a gentleman of position is ordered to go to Bath, to take the waters. She borrows money to do so. Held husband is liable to repay the loan as being necessary for his wife.[4]

It is for the pursuer to prove affirmatively that the articles were necessaries—*i.e.*, suitable to the style of living adopted by the husband.[5]

The fact that the wife possesses separate estate does not prevent the presumption arising, that in buying necessaries she is doing so as agent for her husband.[6] It will, however, be a circumstance to regard in considering whether the tradesman gave credit to the wife or to the husband. For if it appears that he looked to the wife for payment, the husband will not be liable.[7]

Where the goods are not necessaries agency is not presumed.

Ill.—Wife of clergyman buys foreign birds to value of £900. Accounts made out in her name. She accepts bills of exchange drawn on herself. Held credit was given to her.[8]

Ill.—Jewels purchased by married woman. Invoices made out in her name. She said she was buying them for a friend who would pay for them. Held husband was not liable.[9]

[1] *Waithman* v. *Wakefield*, 1807, 1 Camp., at p. 121.

[2] *Hunt* v. *De Blaquière*, 1829, 5 Bing. 550.

[3] *Aldis* v. *Chapman*, 1810, Sel. N.P. 232; *Beale* v. *Arabin*, 1877, 36 L.T. N.S. 249; *Harrison* v. *Grady*, cit.

[4] *Kinfauns* v. *K.*, 1711, M. 5882.

[5] *Phillipson* v. *Hayter*, *supra*.

[6] *Davidson* v. *Wood*, 1863, 1 De G. J. and S. 465.

[7] *Metcalfe* v. *Shaw*, 1811, 3 Camp. 22; *Jewsbury* v. *Newbold*, 1857, 26 L.J. Exch. 247; and *see Bing* v. *Smith*, 1836, 14 S. 355.

[8] *Freestone* v. *Butcher*, 1840, 9 C. and P. 643.

[9] *Taylor* v. *Britton*, 1823, 1 C. and P. 16 *n*.

Insanity not notified, no revocation.—If the husband has implicitly or expressly authorised the wife to pledge his credit, the authority will not be revoked by his supervening insanity, if the creditor had no notice.[1] But if she had an allowance she will have no authority to contract for him.[2]

If the credit was truly given to the husband, the wife has no personal liability.

It was held in two old cases that the husband did not escape liability by showing that he gave his wife an allowance, if in fact she misspent it.[3] But this doctrine is doubted by Lord Fraser,[4] and the contrary is well established in England. It is submitted that *Dalling* and *Alston* proceed upon a fallacy. The husband's liability only exists in cases where the wife was entitled to assume that she had his authority. If he had forbidden her to pledge his credit, she has no power to bind him. And if mere prohibition is a sufficient revocation of her mandate, an allowance must have the same effect.[5] Nor would it appear to be material, whether the allowance was sufficient or not. It was, in any case, intended to amount to a withdrawal of the implied mandate.[6] It is quite immaterial whether the tradesman knew of the prohibition or allowance or not, unless there has been a course of dealing.[7] And the fact that the wife was already sufficiently provided with articles of the class in question will be enough, if proved, to displace the presumption that she had authority from her husband to purchase other like articles.[8]

Mere grumbling or remonstrance by the husband at the wife's extravagance does not amount to withdrawal of her authority to buy on his credit.[9]

But with regard to the goods already purchased the husband's

[1] *Drew* v. *Nunn*, 1879, 4 Q.B.D. 661.

[2] *Richardson* v. *Du Bois*, 1869, L.R., 5 Q.B. 51.

[3] *Dalling* v. *M'Kenzie*, 1675, M. 6005; *Alston* v. *Philip*, 1682, M. 6007.

[4] i. 608.

[5] *Debenham* v. *Mellon*, 1880, 6 App. Ca. 24.

[6] Lush on Husband and Wife, p. 304.

[7] *Jolly* v. *Rees*, 1864, 15 C.B. N.S. 628; *Debenham* v. *Mellon*, *supra*.

[8] *Morgan* v. *Chetwynd*, 1865, 4 F. and F. 451; and *see Debenham*, 1880, 5 Q.B.D., at p. 397.

[9] *Morgan*, *supra*; *Schoolbread* v. *Baker*, 1867, 16 L.T. N.S. 359.

disapprobation will be evidence on the question whether the wife had his authority to make the contract.[1]

Ill.—Wife in habit of buying meat on husband's credit. Husband is lost at sea. His wife did not hear of his death for some time, and during this period the butcher supplied meat as usual. Held wife was not liable.[2]

Law Expenses.—*See infra.*

When Husband and Wife are living apart.—Upon quite different grounds, a husband may be liable for the price of necessaries supplied to his wife when they are living apart. His liability does not here depend on any presumed authority, or implied mandate to the wife to contract as his agent. It rests on his obligation, as husband, to maintain his wife. If his conduct has been such as to justify his wife in leaving him, or if he has consented to the separation, his obligation to maintain her continues, unless she has sufficient means of support. Accordingly, anyone who supplies her with necessaries is presumed to do so as agent for the husband, and may recover from him.[3] "When husband and wife live separate," says Lord Mansfield, "the person who gives credit to the wife is to be considered as standing in her place inasmuch as the husband is bound to maintain her."[4] The question, in all such cases, is whether the wife is justified in living apart. If she is, or if the husband has consented to it, and the wife is without means, the husband's liability is absolute. He cannot escape from it by advertising that he will not be responsible for her debts, or by warning individual tradesmen not to look to him for payment.[5] The *onus* lies upon the creditor to show that the wife was justified in living separate, and that the articles supplied were necessaries in the sense of reasonable.[6] The measure of what is reasonable is the position and style of living of the husband.

[1] *Atkins* v. *Curwood*, 1837, 7 C. and P. 756.

[2] *Smart* v. *Ilbery*, 1842, 10 M. and W. 1.

[3] Fr. i. 638; *Reed* v. *Moore*, 1832, 5 C. and P. 200; *Johnston* v. *Sumner*, 1858, 3 H. and N. 261.

[4] *Ozard* v. *Durnford*, Selw. Nisi Prius, 229.

[5] *Harris* v. *Morris*, 1801, 4 Esp., N.P.C. 41; *Dixon* v. *Harrell*, 1838, 8 C. and P., at p. 719; *Bolton* v. *Prentice*, 1745, 2 Stra. 1214.

[6] *Mainwaring* v. *Leslie*, 1826, 2 C. and P. 507; *Edwards* v. *Towels*, 1843, 5 M. and G. 624.

When is the Wife justified in living apart?

1. If the husband be guilty of gross misconduct or cruelty to the wife,[1] or if she have a reasonable apprehension of ill-treatment,[2] she is entitled to live apart.

2. If he brings a prostitute to the house, or if the wife discovers that he has been guilty of adultery.[3]

3. If he has deserted her.[4] For this purpose it would not be necessary to prove deliberate intention not to resume cohabitation. Even if the abandonment were for a short time, the wife must be supported, and, if necessary, at the husband's expense.

When the Separation is by Mutual Consent.—In the absence of special agreement, the husband will be liable, unless the wife has adequate means. But the parties may make their own terms. And if the wife agrees to live apart on condition that the husband pay her an allowance, she cannot pledge his credit on the ground that the allowance was insufficient. Nor could she do so if she had agreed to live upon the income of her separate estate. For in the words of Lush, J., "She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the condition upon which that consent was given."[5]

But the husband must prove that he paid the allowance, if this was the condition of separation.[6] If he has done so, it is immaterial whether the tradesman knew that the wife had an allowance.[7] If he does not know the terms of the separation, he supplies the wife at his peril.

It does not appear to have been decided by what standard the Court will determine what are necessaries for a wife if the husband has stipulated to pay her an allowance, and has failed to do so. *E.g.*, if a husband with an income of £2000 agrees, on separation, to pay the wife £150 a-year, and fails to

[1] *Hodges* v. *H.*, 1796, 1 Esp. 441; *Houliston* v. *Smith*, 1825, 3 Bing. 127; *Brown* v. *Ackroyd*, 1856, 5 E. and B. 819; *Tempany* v. *Hakewill*, 1858, 1 F. and F. 438.

[2] *Aldis* v. *Chapman*, Selw. Nisi Prius, 232.

[3] Fr. i. 640.

[4] *Deare* v. *Soulten*, 1869, L.R. 9 Eq. 151; *Jenner* v. *Morris*, 1861, 3 D.F. and J. 45.

[5] *Eastland* v. *Burchell*, 1878, 3 Q.B.D., at p. 436.

[6] *Hunt* v. *De Blaquière*, 1829, 5 Bing. 550.

[7] *Mizen* v. *Pick*, 1838, 3 M. and W. 481; *Hunt* v. *De Blaquière*, *supra*, at p. 561.

do so, will the wife be entitled to pledge his credit for such things as are reasonable for a person with £150 a-year, or is the measure to be the income of the husband?

Whatever the ground of separation may have been, the authority of the wife to pledge the husband's credit is determined if she be guilty of adultery.[1] And it is immaterial whether the tradesman knew of her adultery or not. For he stands in her place, and if the husband can show a sufficient reason why he should not be liable for the wife's support, this will be a good defence against the tradesman.[2]

If she has authority in the circumstances to pledge the husband's credit, she may borrow money, and if the creditor proves that it was expended on necessaries, he can recover it from the husband.[3]

Legal Expenses are Necessaries.—The husband is generally liable for the expenses of consistorial actions raised by the wife, and if she be living apart with authority to bind him for necessaries, he will also be liable for all ordinary legal expenses incurred by her, provided the agent appears to have acted in *bona fide*, and with reasonable diligence.[4] The fact that the wife had really no sufficient grounds for raising an action will not deprive the agent of his claim against the husband, unless he has acted negligently, or knew the action was groundless.[5] The *onus* lies on the agent.[6]

Effect of Notice or Advertisement of Husband.—If the husband, by payment of previous bills or otherwise, has held his wife out as his agent, he is liable to the persons who dealt with her on the faith of this holding out, until he informs them

[1] *Govier* v. *Hancock*, 1796, 6 T.R. 603; *Cooper* v. *Lloyd*, 1859, 6 C.B. N.S. 519; *Harris* v. *Morris*, 1801, 4 Esp. 41.

[2] *Atkyns* v. *Pearce*, 1857, 2 C.B. N.S. 763.

[3] *Jenner*, *supra*; *Grindell* v. *Godmond*, 1836, 5 A. and E. 755; *Johnston* v. *Manning*, 1860, 12 Ir. C.L.R. 148; *Kinfauns*, 1711, M. 5882.

[4] *M'Allister* v. *M.*, 1762, M. 4036; *Clark* v. *Henderson*, 1875, 2 R. 428; *Macgregor* v. *Martin*, 1867, 5 M. 583; *Wilson* v. *Ford*, 1868, L.R., 3 Ex. 63.

[5] *Flower* v. *F.*, 1873, L.R., 3 P. and D. 132; *Robertson* v. *R.*, 1881, 6 P.D. 119, 122; *Williams* v. *Fowler*, 1825, Macclel. and Y. 269.

[6] *Taylor* v. *Hailstone*, 1882, 47 L.T. 440.

that her authority is withdrawn.[1] And a general advertisement that he will not be responsible for her debts is not sufficient, unless it be proved to have come to the knowledge of the tradesman.[2]

Inhibition.—The husband may formally recall the wife's authority to bind his credit, by executing letters of inhibition against her. The procedure is identical with that employed in ordinary inhibitions by creditors.[3] No reason needs to be given, and the bill is passed as matter of course. If registered in the General Register of Inhibitions, no other publication is necessary.[4] The inhibition prohibits the wife from contracting debt, and forbids others to give her credit to the husband's prejudice. It is effectual though the tradesman prove that he had no knowledge of it.[5] But as the husband can by no means relieve himself of his alimentary duty to maintain his wife and family, the wife may bind him, in spite of the inhibition, if he do not supply her with necessaries.[6] And by ratification or acquiescence in the wife's contracts he may bar himself from pleading the inhibition.[7] The *onus* of proving that he supplied her with necessaries *aliunde*, lies on the husband.[6]

[1] *Debenham* v. *Mellon*, 1880, 6 App. Ca., at pp. 32 and 36; *Jolly* v. *Rees*, 1864, 15 C.B. N.S., at p. 640.

[2] *Hodge* v. *Cooper*, 1841, 10 L.J., C.P. 218.

[3] Jurid. Styles, iii. 280.

[4] 31 & 32 Vict. c. 64, § 16.

[5] *Topham* v. *Marshall*, M. App. v. Inhibition, No. 2 (1808).

[6] Ersk. i. 6, 26; *Auchinleck* v. *Monteith*, M. 5879 (1675); *Campbell* v. *Ebden*, M. 5879 (1676); *Gordon* v. *Sempill*, M. App. v. Husb. and Wife, 4 (1776).

[7] *Ker* v. *Gibson*, 1709, M. 6023.

CHAPTER XVII.

LIABILITY OF HUSBAND FOR WIFE'S ANTE-NUPTIAL DEBTS, AND FRAUDS ON MARITAL RIGHTS.

At common law a husband was liable *in solidum* for his wife's moveable debts contracted before marriage,[1] but the Married Women's Property Act, 1877,[2] greatly limited the liability of the husband under this head. It enacts that in any marriage which takes place after 1st January, 1878, the husband's liability for his wife's ante-nuptial debts "shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage." In order to determine the amount by which the husband is *lucratus*, the Act provides (Section 4) that any Court in which a husband shall be sued for an ante-nuptial debt of his wife shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of any property acquired by him through her, and in respect of which he is liable under the Act.

It has been held in England that an English husband, who had married in England a Jersey woman, was only liable for her ante-nuptial debts *in quantum lucratus*, though by the law of Jersey he would have been liable for the whole. It would appear from this decision, if followed in Scotland, that a Scotsman marrying in a country where a husband is liable *in solidum* for his wife's ante-nuptial debts, incurs the same liability as a native of the foreign country, and cannot plead in Scotland the protection of the Married Women's Property Act.[3] For he takes her *cum onere*.

There is still one case in which a husband in Scotland is possibly liable *in solidum* for an ante-nuptial obligation of

[1] *Infra*, p. 192.
[2] 40 & 41 Vict. c. 29, § 4.
[3] *De Greuchy* v. *Wills*, 1879, 4 C.P.D. 362.

his wife.[1] Section 78 of the Companies Act, 1862, provides: "If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not been married, and he shall be deemed to be a contributory accordingly." It was held in the case of *Wishart* v. *City of Glasgow Bank*,[2] that a wife's obligation as a contributory, in respect of shares held by her before her marriage, was one which was contracted when she became a partner of the company, though not prestable till the liquidation. On this ground it was decided that it was an "ante-nuptial debt" in the sense of the Act of 1877, and that the husband's liability was limited to the amount by which he was *lucratus* by the marriage. But in a later case in England, Fry, J., construed Section 78, taken in connection with Section 75, of the Companies Act, 1862, as meaning that the husband is to be regarded as having become at the marriage a debtor and not merely the husband of a debtor, and held that his name, as well as his wife's, should be placed upon the list as a contributory with no limitation of his liability.[3] In the case of *Hill* v. *City of Glasgow Bank*,[4] where a wife was placed on the list of contributories, her husband's name was put on as a contributor also. In this case the effect of the Married Women's Property Act, 1877, was not considered, as the marriage was prior to the Act. But it appears that the husband's liability under Section 78 of the Companies Acts was regarded as that of a proper contributory. The effect of this is that he is liable *in solidum*, and cannot relieve himself of further indebtedness by surrendering the property he has received through the marriage. The case of *Wishart* v. *City of Glasgow Bank*[2] may be thought to be overruled so far as deciding that the husband's liability to contribute is merely as for an "ante-nuptial debt" of his wife, for which he is bound only *in quantum lucratus*. Notwithstanding, it is open to argument that the husband only incurs this

[1] *See infra* "Wife as Partner."

[2] 1879, 6 R. 823.

[3] *In re West of England Bank, ex parte Hatcher*, 1879, 12 Ch. D. 284; *see* Buckley on Companies Acts, 6th Ed., p. 207.

[4] 1879, 7 R. 68.

unlimited liability if a company in which his wife is a shareholder is being wound up, and that his liability on calls on her shares is in any event limited to the amount by which he was *lucratus*[1] by the marriage.

A husband has now no liability to aliment his wife's indigent relatives unless he has been *lucratus* by the marriage, and his liability is in any event limited to that amount.[2]

It does not appear to have been decided whether the Husband's Liability as limited by the Act ceases on the Dissolution of the marriage.—In England the question is also open, but the better opinion seems to be that he continues liable to the limited extent after the wife's death.[3] And this, it is pretty certain, would be held in Scotland, as under the old law the husband at the dissolution of the marriage continued liable for his wife's ante-nuptial debts so far as he was *locupletior* by the marriage.[4]

It was formerly held that a husband who had received only a moderate tocher, relative to the position of the parties, was not *lucratus* by the marriage. For it was reasonable she should bring a moderate tocher *ad sustinenda onera matrimonii*.[5] These decisions have, it is submitted, no bearing on the construction of section 4 of the 1877 Act. The Act does not say the husband shall be liable *in quantum lucratus* or *locupletior*, but to the amount of the value of any property he may have received through the wife. This would clearly cover even a moderate tocher.

Former Law.—It does not seem likely that many questions can now arise as to the husband's liability for his wife's ante-nuptial debts where the marriage took place prior to 1st January, 1878. A brief statement of the common law will be sufficient for the present purpose. The husband married before the commencement of the Act is liable *in solidum* for

[1] But this is not the view of L.J. Lindley, "Company Law," 5th Ed., p. 42. *See infra*, "Wife as Partner," where the subject is more fully dealt with.

[2] *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[3] *See* Macqueen, "Husband and Wife," 3rd Ed., p. 76.

[4] Ersk. i. 6, 17; Stair, i. 4, 17; *M'Quail* v. *M'Millan*, 1676, M. 5874; *Wilkie* v. *Stewart*, 1678, M. 5876; *Robertson* v. *Lyon*, 1821, 1 S. 47.

[5] Ersk. i. 6, 17.

his wife's moveable debts contracted before marriage. And it is no defence that he was not *lucratus* by the marriage. The debts must be of such a kind as, if they had been due to her instead of by her, would have fallen within the *jus mariti*. If a woman at the time of her marriage holds the office of executrix or trustee, and her husband consents to her continuing to act in that capacity, he will be liable for obligations incurred by her in that character after the marriage.[1] And he will, in any event, be liable for those incurred before it.

Her natural obligations to aliment her indigent parents or her children by a former marriage are ante-nuptial debts in this sense, though they may not have become prestable until after the marriage.[2] So also is her liability to aliment an illegitimate child born before marriage.[3] So a husband married after the Act of 1877, and not *lucratus*, is not bound to aliment his wife's mother.[4] Furnishings made to the wife before marriage, when she was living in her father's house, will in general be presumed to have been made in reliance on his credit. For such accounts, therefore, the father, and not the husband, will be liable. It was found in two old cases[5] that a husband was liable for the price of his wife's wedding clothes, on the ground that these furnishings were *in rem versum* of the husband. The debt was therefore regarded as not properly an ante-nuptial debt of the wife, but as a liability of the husband's own. For this reason he could be sued for it even after the dissolution of the marriage.[6]

It is to be borne in mind that the husband is not the true debtor in respect of his wife's ante-nuptial debts. If she has separate estate this is primarily liable. And if the husband pays the debt he has relief against the wife's separate estate. And he may require that her estate be first discussed.[7]

The action should be brought against the wife, and the

[1] *Pattison* v. *M'Vicar*, 1886, 13 R. 550.

[2] *Reid* v. *Moir*, 1866, 4 M. 1060; *Foulis* v. *Fairbairn*, 1887, 14 R. 1088.

[3] *Aitken* v. *Anderson*, 1815, Hume, 217.

[4] *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[5] *Neilson* v. *Guthrie*, 1672, M. 5878; *Henderson* v. *Lafreis*, 1696, M. 5881.

[6] *Alston* v. *Philip*, 1682, M. 6007.

[7] Fr. i. 602; Bell's Com. (Shaw's Ed.), 676; *Leven* v. *Montgomery*, 1683, M. 5876; *Wilkie* v. *Stewart*, 1678, M. 5876.

husband for his interest, and the decree will be in these terms, superseding execution against her *stante matrimonio*. Accordingly, if the marriage be dissolved by the death of the wife, the husband's liability at once ceases, even though decree has already been obtained against him, except *in quantum lucratus*.[1] Nothing short of a completed diligence—*e.g.*, an arrestment followed by furthcoming, or a decree of adjudication—will prevent the husband's liability from ceasing at the death of the wife.[2] He was not *lucratus* if he merely received a moderate tocher.[3] By the Act his liability, as above stated, subsists to the amount of any property acquired through the marriage. Conversely, if the husband dies, the wife becomes liable for her ante-nuptial debts.

Even for a Wife's Heritable Debts contracted before marriage the Husband is liable *in quantum lucratus*.[4]—And on the same principle he is liable for all her debts where he has by marriage-contract or otherwise acquired her whole estate, heritable and moveable. In this case also he will continue liable for her heritable debts after the dissolution of the marriage—*i.e.*, of course *in quantum lucratus*.

If a reference to oath be necessary to prove the constitution and resting-owing of the debt, it must be the oath of the husband and not the wife.[5]

Deeds granted by a Woman after Proclamation of Banns.—Gratuitous alienations by a woman whose banns have been proclaimed may be reduced by the husband, if the marriage takes place, on the ground that his curatorial power draws back on the marriage to the date of the banns.[6] It was held "as deeds of a wife clad with a husband, without his consent, are null after the solemnisation of the marriage, because she is then *in potestate viri, et sub ejus tutela*, so that she is truly wife after the contract of marriage becoming public by pro-

[1] Fr. i. 593; Ersk. i. 6, 16 and 17.

[2] *Wilkie* v. *Stewart*, 1678, M. 5868; *Bryson* v. *Menzies*, 1698, M. 5869.

[3] Ersk. i. 6, 17; *Burnet* v. *Lepers*, 1665, M. 5871; *see supra*, p. 192.

[4] *Leslie* v. *Wallace*, 1708, M. 5853.

[5] *Munro* v. *Macleod*, 1809, Hume, 215; and *see Mitchell* v. *Moultrys*, 1882, 10 R. 378.

[6] Ersk. i. 6, 22; Bell's Prin. ii. 1551; Fr. i. 681.

clamation."[1] The right of challenge extends to dispositions by the bride of heritage.[2] Logically, it should cover onerous deeds also, but it does not appear that any alienation for value has been set aside on this head, and Bell limits this ground of reduction to gratuitous grants.[3] It is thought that the Married Women's Property Act has not affected this question so far as regards alienations of capital.

Fraud on Marital Rights.—Apart from the doctrine of the effect of banns, gratuitous alienations by a woman during betrothment are reducible if they were concealed from her intended husband in such circumstances as to indicate fraud.[4] Bell says, "if there have been no banns proclaimed, or not regularly, the validity of such a conveyance will depend on grounds of reduction or preference at common law."[5] There appears to be only a single decision in Scotland, and it is to be noticed that Stair refers this case to a different principle.[6] In England the doctrine is well recognised.[7] Fraud was found in one case though the husband was ignorant that his intended wife was owner of the property.[8] It is thought that there will be no further room for this rule since the Married Women's Property Act,[9] and in Scotland the husband's rights in his wife's estate are so limited by the Act that it would be difficult to prove such a pre-nuptial alienation to be fraudulent.[10]

[1] *Bute* v. *B.*, 1666, M. 6031.

[2] *Fletcher*, 1611, M. 6029.

[3] Prin. ii. 1551; Com. (Shaw's Ed.), i. 673; and *see Gilchrist* v. *Pringle*, 1682, M. 6032; and argument in *Blair* v. *Mallock*, 1776, M. 5846, at p. 5848.

[4] *Auchinleck* v. *Williamson*, 1667, M. 6033.

[5] Prin. ii. 1551.

[6] i. 4, 9.

[7] *Strathmore* v. *Bowes*, 1789, White and Tudor's L.C., i. 471.

[8] *Goddard* v. *Snow*, 1826, 1 Russ. 485; but *see St. George* v. *Wake*, 1833, 1 M. and K. 610.

[9] *See* Crawley, H. and W., p. 57.

[10] Bell's Prin. l.c. (editor's note).

CHAPTER XVIII.

THE EFFECTS OF DIVORCE ON PROPERTY.

On divorce the innocent spouse is at once entitled to claim legal rights, as if the guilty spouse had died at the date of the decree. And conventional provisions payable to the surviving spouse by the guilty one, or any one on his or her behalf, become at once exigible. Thus, where the husband's father had contracted to pay an annuity to his son's wife in the event of her survivance, it was held on the son's divorce for adultery that she was entitled to demand immediate payment.[1] But this does not apply to testamentary provisions made for the innocent spouse by his or her own relations in the event of survivance, unless this appears to have been intended.[2] *E.g.*, A wife was entitled under her father's will to certain subjects in the event of her surviving her husband. She divorced her husband for desertion, and called on her father's trustees to convey the subjects to her at once. It was held they had no power to do so, as the time contemplated was the natural death of the husband during the wife's lifetime.[3]

Legal Rights.—The wife, if innocent, is entitled to claim her terce and *jus relictæ*.[4] The husband, if innocent, is entitled to claim his courtesy if the other conditions attaching to that right have been fulfilled.[5] And it would appear that he is now entitled to *jus relicti*.[6]

There is no difference in result whether the ground of

[1] *Johnstone-Beattie* v. *Johnstone*, 1867, 5 M. 340.

[2] *Scott and others*, 18th July, 1893, not yet reported.

[3] *Mason* v. *Beattie's Trs.*, 1878, 6 R. 37

[4] Ersk. i. 6, 46 and 48; Stair, i. 4, 20; Fr. ii. 1217; Bell's Com., 5th Ed. 634.

[5] Fr. ii. 1218; Bell's Com. *ibid.*

[6] Married Women's Property Act, 1881 [44 & 45 Vict. c. 21], § 6.

divorce be adultery or desertion,[1] with one doubtful exception.

Where the Ground of Divorce is the Husband's Adultery, is he bound to restore the Tocher?—The statute, 1573, c. 55, provides that in divorce for desertion "the party offending shall lose the tocher and the *donationes propter nuptias*." The patrimonial effects of divorce for adultery do not rest upon statute, and although it is now settled that as regards legal and conventional rights they are the same as where the ground is desertion, this has not been decided with regard to restitution of the tocher. There is an old authority to the contrary which is approved of by Lord Fraser.[2] But it may well be doubted whether, if the question arose again, this authority would be followed.[3]

Guilty Spouse Bankrupt.—Where the guilty spouse is bankrupt at the date of decree, the innocent spouse may rank for conventional provisions if they are such as to give a *jus crediti*.[4] There can be of course no ranking with onerous creditors for legal rights or for provisions which only amount to a *spes successionis*.

Divorce has no retroactive Effect.—If the right has vested in the guilty spouse prior to decree, the divorce will not bar him or her from claiming it. Thus a husband who had been divorced was found entitled to claim a sum which had vested in the wife *stante matrimonio*, and fallen under the *jus mariti*, although it had not been paid at the date of divorce.[5]

Donations.—Donations made by the innocent spouse are revoked *ipso facto* by decree of divorce, and those made by the guilty become irrevocable.[6] It was held in an old case that when adultery was followed by divorce, a revocation by the

[1] *Thom* v. *T.*, 1852, 14 D. 861; *M'Alister* v. *M'A.*, 1854, 26 S.J. 597; *Johnstone-Beattie*, 1868, 6 M. 333; *Harvey* v. *Farquhar*, 1870, 8 M. 971, aff. 1872, 10 M. H.L. 26.

[2] *Justice* v. *Murray*, 1761, M. 334; Fr. ii. 1223.

[3] Ersk. i. 6, 48, and the Notes; Bell's Prin., § 1622, and Notes; Bell's Com., 5th Ed. i. 634; and *see Johnstone-Beattie*, *supra*.

[4] Bell, *supra*; Fr. ii. 1225.

[5] *Ferguson* v. *Thomson*, 1877, 4 R. 393.

[6] Ersk. i. 6 31; Fr. ii. 1224.

guilty spouse after the adultery, but before the decree, was ineffectual.[1]

Mutual Divorces.—Where there are counter-actions, and both spouses are divorced, neither has any claim upon the property of the other. The effect is the same as if both had died at the date of decree.[2]

Heritage of Divorced Wife.—A wife divorced for adultery who marries or openly cohabits with the paramour, cannot alienate her heritage to any person in prejudice of the issue of the dissolved marriage, or failing them, of her lawful heirs.[3]

Effects in England.—In England a decree of divorce does not in itself operate any effect on the property of the spouses. But by the Divorce Act[4] the Court has power to vary settlements, so as to divide the joint income of the spouses as shall seem just. And where a Scotswoman married an Englishman under an ante-nuptial contract in Scotch form, and was divorced for adultery, it was held by Sir James Hannen, that he had power to vary the Scotch settlement.[5] A wife divorced for adultery will be awarded permanent alimony if she is indigent.[6]

[1] *Murray* v. *Livingston*, 1576, M. 328.

[2] *Fraser* v. *Walker*, 1872, 10 M. 837.

[3] Act, 1592, c. 119; Fr. ii. 1224; Ersk. ii. 3, 16.

[4] 22 & 23 Vict. c. 61, § 5.

[5] *Normanby* v. *N.*, 1890, 15 P.D. 186.

[6] *See* Chapter on "English Law," *infra*.

CHAPTER XIX.

TERCE.

TERCE is one of the two legal life-rents known to our law. The other is courtesy. Terce is otherwise called in the books, *tierce partie*, *tertia pars*, a just and reasonable third part.[1] It is the life-rent right enjoyed by a widow, or a wife who has divorced her husband, to one-third of the income of the heritable estate in Scotland in which he died vest and seised, or was infeft at the date of the divorce. It is excluded if she has accepted a special provision.[2]

Who is entitled to Terce?—It is a just and reasonable presumption that a woman claiming terce shall in the general case not to be bound first to prove her marriage. And this was declared at an early period by statute. The Act 1503, c. 77 (c. 23, ed. Thomson), provides: "It is statute and ordained anent the exceptions proponed against widowes, persewand and followand their brieves of teirce or the profite of their teirce quhilk is oftimes proponed against thay widowes that they were not lauchful wives to the persones, their husbands be quhome they follow their said teirce; that, therefore, quhair the matrimonie was not accused in their lifetimes, and that the woman askand this teirce, beand repute and halden as his lauchful wife in his lifetime, sall be teirced and bruik her teirce, but ony impediment or exceptions to be proponed against her ay and quhil it be clearly decerned and sentence given that scho was not his lauchful wife, and that scho suld not have ane lauchful teirce therefore."

[1] *See* Stair ii. 6, 12; More's Notes cexvi.; Ersk. ii. 9, 44; Bell's Com., 5th Ed. i. 57; Bell's Prin. ii. 1595; Fr. ii. 1079.

[2] Terce is analogous to the English *dower*, not to be confounded with *dowry*=tocher.

The heir who disputes the terce on the ground of the invalidity of the marriage cannot take this objection at the inquest on the brieve unless the claimant was not reputed the wife of the deceased. He must raise a declarator, or bring the question in some other competent form before the Court of Session. In a recent case the alleged widow had obtained a brieve, and the Sheriff had fixed a diet for the inquest. At this stage the heir-at-law tendered a minute craving that the process should be sisted on the ground (1) that he was about to raise a declarator of the invalidity of the marriage, and (2) that the lady had accepted a conventional provision. Held that the heir was not entitled to a sist in respect of the Act 1503, c. 77.[1]

Prior to the Intestate Moveable Succession Act (18 Vict. c. 23, § 7), there was no right to terce if the marriage had been dissolved within year and day without the birth of a child which had been heard to cry. And formerly an alien wife was excluded, but this was remedied by the Naturalisation Act (33 Vict. c. 14, § 10).

Divorce.—A woman who has obtained a divorce on the ground of her husband's adultery or desertion is, apart from contract, entitled to terce just as if he were dead.[2]

Nature of Terce.—The widow does not take her terce in the character of a creditor, a disponee, or an heir. Her right flows from the law, entirely independent of her husband's volition. Her title to the third part rests upon her husband's sasine. Her right cannot be defeated except by herself.

What subjects are liable to Terce?—There are two primary conditions (1), the subjects must be heritable, (2) the husband must die infeft in them as of fee.

1. Terce is due from lands and houses.—(*a*) *Mansion-House.*—There is an obvious difficulty in assigning to the widow a third part of the mansion-house, which is in its nature indivisible. In several old cases the subject was discussed, but the law cannot be said to have been settled.

[1] *Craik* v. *Penny*, 1891, 19 R. 339.

[2] *Johnstone-Beattie* v. *Johnstone*, 1867, 5 M. 340; *Harvey* v. *Farquhar*, 1870, 8 M. 971, aff. 10 M. H.L. 26; Fr. ii. 1217.

It is believed, however, that by the uniform practice of the profession, the widow is not allowed a terce of the mansion-house and its pertinents if there is only one such house on the estate. This is contrary to the case of *Montier* v. *Baillie*.[1]

Lord Fraser[2] cites the case of *Mead* v. *Swinton*[3] as having overruled *Montier* v. *Baillie*. But it will not bear this weight, being decided purely on a specialty. In that case the husband built a new mansion-house a few yards from the old one. He died before the new house was completed. The widow claimed that she was entitled to the old house as an appendage to her terce. It was pleaded (1) that even where there are two mansion-houses the widow is not entitled to one of them, and (2) that in this case there were not truly two mansion-houses. The husband would not have built the new house close to the old one, if he had not intended to pull the old one down or convert it into offices. The report bears: "The Court went on the specialty, on which they were clear that Lady Hannay's claim was groundless. Some of the judges, however, expressed great doubts whether, even independent of the specialty, it had any foundation in law."

It may be regarded, nevertheless, as certain that the decision in *Montier* v. *Baillie* would not be repeated, and that from a mansion-house and the garden, and other pertinents thereto, the widow is not entitled to terce. This rests on the principle that the mansion-house is not a rent-producing subject, and, moreover, being indivisible it goes to the heir whose duty it now is to represent the family, and not to the widow.

Where Heir does not Live in Mansion-House.—It is stated by Erskine that if the heir choose to reside elsewhere, the widow may claim the mansion-house preferably to any other tenant "upon payment to him of a reasonable rent for his two-thirds."[4] This appears to mean on payment of two-thirds of the rent which would be paid by another tenant. As Lord Fraser points out, the case of *Logan*, on which Erskine

[1] 1773, M. 15,859.

[2] ii. 1097, note (*a*). The judgment of the sheriff that the lady had no claim upon either of the houses was sustained, but nothing is said as to the law where there is only one mansion-house.

[3] 1796, M. 15,873.

[4] Ersk. ii. 9, 48.

founds, does not support the proposition. The house there was the dwelling-house of a skipper in Leith, a kind of subject clearly liable to terce.[1]

It is probable, therefore, that no such right in the widow would now be sustained where the subject is the proper mansion-house of an estate.

Where the House is Let.—If the heir, instead of residing in the house chooses to let it for a rent, there seems no reason why the widow should not be entitled to a terce of the rent. This has the authority of Bell,[2] but is unsupported by decision, except the following: Certain "grass-yards," orchards, &c., adjoining the mansion-house were let at a rent. The widow claimed terce. The heir objected on the ground that they were pertinents of the mansion-house, which was not liable to terce.[3] "The Lords, in respect nothing was alleged or instructed that there was a tower, fortalice, or manor-place having a garden or orchard for pleasure rather than for profit, found no necessity to decide what interest a tercer would have in such; but these being let by appearance as grass-yards, they repelled the allegeance, and found the tercer entitled to a third part of the rent paid upon that account." It is submitted that this suggests the true principle, and that when the mansion-house is let and becomes a profit-bearing subject, it is liable to terce.

What is a Mansion-House?—A mansion-house is the house appertaining to a country estate. In *Moncrief*, *supra*, the idea is expressed by "tower, fortalice, or manor-place." Erskine uses the phrase "manor-place or country seat."[4] A town-house is not a mansion-house. Nor is a villa or dwelling-house in the country to which no estate pertains.

Where there are two Mansion-Houses.—It is said by Erskine that in this case the widow is entitled to the second or worse of the two.[5] This was doubted in *Mead* v. *Swinton*, *supra*, and there is no decision in support of it. Bell thinks she would get a terce of one.[6]

[1] *Logan* v. *Galbraith*, 1665, 1 Br. Sup. 507, and M. 15,842. Fr. ii. 1097.

[2] Prin. 1598; Fr. ii. 1097.

[3] *Moncrief* v. *Tenants of Newton*, 1667, M. 15,844.

[4] Ersk. ii. 9, 48.

[5] Ersk., *ibid.*

[6] Prin. 1598.

Terce of Servitudes and Fishings.—Where the lands enjoy a servitude, the widow will be entitled to her proportional share of its use. Where it is divisible, as a right of pasturage, she will have the third of her husband's privilege, and the heir will have the remaining two-thirds.[1] Where it is indivisible, as a right of way, she is entitled to all reasonable exercise of the servitude. Where the husband dies infeft in fishings, it would appear that his widow is entitled to a terce in them.[2]

Heritable Securities.—Heritable securities, though now moveable, *quoad* succession, remain heritable as between the spouses, and are liable to terce.[3]

Teinds.—Terce is not due in the ordinary case from teinds. It is only where they are held by a separate title from the stock that they are liable to terce.[4] And the widow has no right if the husband's title was merely personal and he had not been infeft in them.[5]

What Subjects are not liable to Terce.

1. Real Burdens by Reservation.—A husband who has disponed lands subject to a real burden cannot be said to be infeft in the burden. It is the sasine of the disponee on which his right rests. Professor Bell at first expressed the opinion that, notwithstanding, terce was due, on the ground that the sasine of the disponee was the sasine of the disponer.[6] But the soundness of this view he afterwards doubted. There appears to be no other authority on the point. Looking to the strictness with which the Court regards the husband's sasine as the measure of the terce, it is not likely that a widow's claim would now be sustained.

2. Superiorities.—It was very early settled that terce is not due from superiorities,[7] and the rule has been extended to

[1] —— v. *M'Kenzie*, 1628, M. 15,838.

[2] Fr. ii. 1089.

[3] 31 & 32 Vict. c. 101, § 117.

[4] *Lady Dunfermline* v. *Her Son*, 1628, M. 15,840; *Monerief* v. *Tenants of Newton*, 1667, M. 15,844; Ersk. ii. 9, 48; Bell's Prin. 1598; Fr. ii. 1088.

[5] *V. Arbuthnott*, 1805; Hume, 294.

[6] 1 Bell, 59, *see* Note in Shaw's Ed., p. 807; and Bell's Prin. 1598, where note (c) is by the author himself.

[7] *Glenbervie* v. *Luss*, 1541, M. 15,835.

feu-duties.[1] Casualties being uncertain were never fit subjects for terce.[2]

Ill.—Husband shortly before his death feued out by one transaction the greater part of his estate of Dean, adjoining Edinburgh, at a feu-duty of £2000, much exceeding its agricultural value. Held the widow had no right to terce.[3]

It is impossible not to feel the force of the argument of Lords Moncreiff and Medwyn, who dissented from the judgment, but the Court held the question was concluded by authority.

3. Rights of Reversion, &c.—Such rights are not liable to terce on the ground that, not being certain or regular payments, they are unsuitable for terce, which is essentially alimentary.[4] And the same rule applied to rights of church patronage when they existed.[5]

4. Coal and other Minerals.—The widow is not entitled to a terce of the rents payable by mineral tenants. For these are naturally limited in time as the minerals become exhausted. They resemble, in fact, payments of a price for the *corpus* by instalments more than proper rents.[6]

Nor is the widow entitled to commence mineral workings for profit. But if coal mines are being worked at the commencement of her life-rent she will be entitled to as much coal as is necessary for her domestic use. And it would appear that she might open a quarry of limestone to obtain so much lime as was required for the estate.[7]

5. Timber.—The widow who actually occupies her terce lands has the ordinary rights of a liferentrix as to timber. She may cut so much as is necessary for the repair of buildings and fences. She can claim brushwood and windfalls, except when

[1] Ersk. ii. 9, 49; Bell's Prin. 1598; Fr. ii. 1098; *Nisbett* v. *N.'s Trustees*, 1835, 13 S. 517.

[2] Fr. *ibid.*

[3] *Nisbett* v. *N.'s Trustees*, 1835, 13 S. 517.

[4] *M'Dougall* v. *M'D.*, 1801, M. *v.* Terce, App. 1; Ersk. ii. 9, 49.

[5] Ersk. *ibid.*

[6] *Belschier* v. *Moffat*, 1779, M. 15,863; *Lady Lamington* v. *Her Son*, 1682, M. 8240; *see* remarks by Lord Cairns in *Gowans* v. *Christie*, 1873, 11 M. H.L., at p. 12.

[7] *Lady Lamington, supra; Dickson* v. *D.*, 1823, 2 S. 152 (N.E. 138); *D.* v. *Duch. Dow. of Roxburghe*, 19 Jan., 1816, F.C.; Rankine on Landownership, p. 639; 1 Bell, 59; and *see Campbell* v. *Wardlaw*, 1883, 10 R. H.L. 65.

some great storm has swept down large numbers of trees. And she may cut coppice-wood—*silva cædua*—for this is of the nature of a crop being wont to be cut at regular intervals.[1]

6. Leases.—Leases are not feudal, and consequently the leaser's widow has no terce.[2]

7. Burgage.—For reasons sufficiently obscure lands held burgage were never terceable.[3] This was remedied by the Conjugal Rights Act, 1861.[4] And by a later Act all distinction between burgage and feudal tenures was removed.[5]

8. Personal Bonds.—Personal bonds bearing interest, and bonds secluding executors are not liable in terce, because though heritable they are not feudal, and the condition of terce is that the husband must have been *sasitus ut de feodo*.[6]

Lesser Terce.—If a proprietor die during the lifetime of the widow of the former owner, this does not extinguish her terce. But his own widow is only entitled to lesser terce—*i.e.*, to terce of two-thirds of the income. On the death of the first widow, the right of the second is enlarged, *ipso facto*, to a full terce of the lands.[7] There might even be a third widow whose right would only extend to one-third of the income of the two-thirds after deducting the lesser terce. In other words she would get $\frac{1}{3} \times (\frac{2}{3} - \frac{2}{9} = \frac{4}{9}) = \frac{4}{27}$.

The Husband must die infeft in the Subjects as of fee, or where Terce is exigible on divorce, he must be so infeft in them at the date of the divorce.—The husband's sasine is at once the measure and the security of the tercer's right.

Where Property Sold, but the Seller is still Infeft.—So strict is the rule that even when certain lands had been actually disponed by the husband, and the disponee took pos-

[1] *MacAlister's Trs.* v. *M.*, 1851, 13 D. 1239; *see* Authorities in Rankine, 637.

[2] Ersk. ii. 9, 49.

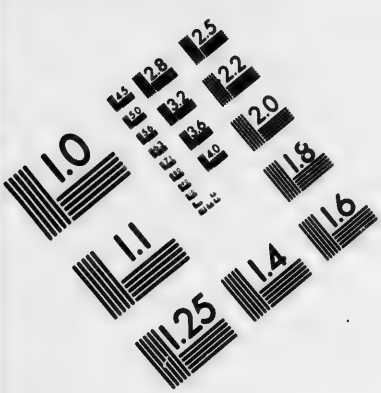
[3] Ersk. *ibid.*

[4] 24 & 25 Vict. c. 86, § 12.

[5] 37 & 38 Vict. c. 94, § 25.

[6] Fr. ii. 1090.

[7] Ersk. ii. 9, 47; Fr. ii. 1100.





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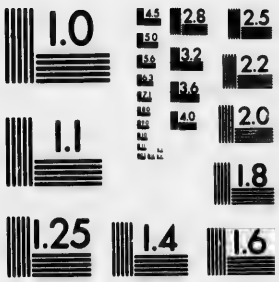

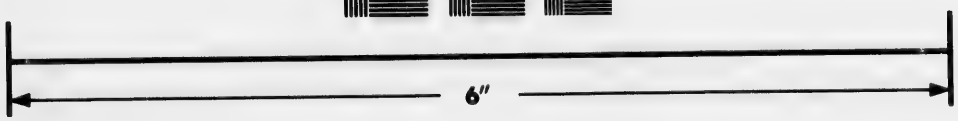



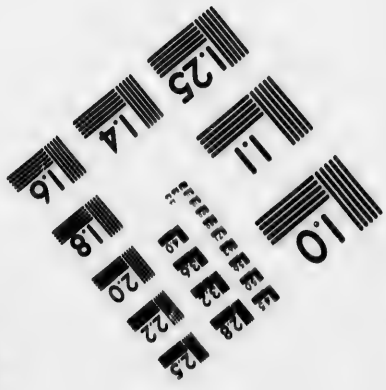

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session, but was not infeft, it was held that the widow must have her terce.[1] Erskine says: "The husband's sasine is the measure of the wife's terce; . . . thus neither an heritable bond nor a disposition of lands granted by the husband, if death has prevented him from giving seisin to the creditor or disponee, can hurt the terce."[2] This language was expressly made the ground of judgment in *Campbell* v. *C.*[3]

A fortiori, if the husband has sold, but not disponed, the widow's terce is not excluded. *E.g.*, a bondholder infeft sold the security subjects, but died before granting a disposition. Held the widow was not entitled to *jus relictæ* out of the price on the ground of conversion. Her husband died infeft in the subject, and her right was to terce.[4]

But there are certain cases in which the Court will look behind the records, viz.:—

Where the Husband's Infeftment is only Nominal.—When the husband was only a nominal fiar, or held as a trustee, his widow has no terce.

Ill.—A father takes a title to lands in favour of himself in life-rent, and his son in fee. He reserves to himself power to contract debt or sell without the son's consent. The son's widow claimed terce. Held that the substantial property was in the father. As the son's fee was nominal, his widow had no terce.[5]

Cases where terce is due though the Husband did not die Infeft.—When the father alienates gratuitously in favour of his heir or a third party, reserving his liferent.

In the case of *Cumming* the father obviously retained all the powers of a proprietor. For a person who reserves a life-rent with power to burden or dispone the subjects has really conveyed nothing but a *spes successionis* to the disponee, who will take if the disponer dies without having exercised his power of defeating the deed. But there may be cases in which a father absolutely divests himself of the fee in favour of his son or heir.

When such a deed is gratuitous, and no provision has been

[1] *MacCulloch* v. *Maitland*, 1788, M. 15,866.

[2] Ersk. 2, 9, 46.

[3] 1776, 5 Br. Supp. 627.

[4] *Rossborough's Trs.* v. *R.*, 1888, 16 R. 157.

[5] *Cumming* v. *King's Advocate*, 1756, M. 15,854.

made for the widow *aliunde*, there is a presumption that the father's deed was a fraudulent device to escape the obligation of terce. She may accordingly bring an action to be found entitled to her terce in spite of the disposition.[1] But her right is personal, and will not avail against creditors or singular successors.

Where a Father has Contracted in his Son's Marriage-Contract to Infeft him in Lands, and has failed to fulfil his Obligation.—In this case the son's widow has also a personal claim for her terce against her father-in-law, or his representatives.[2]

Where the Husband has Fraudulently delayed to take Infeftment, in order to defeat the Widow's Rights.—In this case the widow would have a claim if she could prove the fraud.[3]

But *dolus non praesumitur, et culpa caret qui jure suo utitur, nullique facit injuriam.* In one case a husband had lain out of part of the lands fifteen years, and had declared that his wife should never have anything by his death that he could keep from her. But the Lords "found no terce due in lands wherein the husband was not infeft, and that it would be too arbitrary to go upon presumptions and designs that he lay out of purpose to deprive her."[4]

Where the Husband was Infeft at Death, but his Title is afterwards Reduced.—In this case, if the husband had the radical right to the lands, and it is merely the titles that are blundered, the widow will be entitled to terce as against his representatives or gratuitous disponees.[5]

Husband took by service as heir-male where he should have served as heir simply. The radical right was in him. His service was set aside as inept by a reduction brought after his death by the heir-of-line. Held this did not exclude the widow's terce.[6]

[1] Ersk. 2, 9, 46; Stair, 2, 6, 16; Fr. ii. 1091; *Marq. of Annandale* v. *Scot*, 1711, M. 15,848.

[2] Stair, Ersk. l.c.; *Blair* v. *Hamilton*, 1561, M. 15,836.

[3] *See* arg. in *Marq. of Annandale* v. *Scot*, *supra*.

[4] *Carruthers* v. *Johnston*, 1705, M. 2252 and 15,846. The two reports should be compared.

[5] Bell's Prin. § 1598.

[6] *Rose* v. *Fraser*, Jan. 26, 1790, F.C. (wrongly referred to by Bell, Erskine, Fraser, and others as being in M. *v.* Terce, App. No. 1).

The objection that he was not infeft was one which the husband could not have taken, and was therefore not open to his representatives.

But in a question with the husband's creditors the widow's claim to terce will not be sustained if there is a flaw in his title of such a nature as to vitiate his infeftment.

Ill.—Where the instrument bore that sasine had been granted in the year one thousand eight hundred and three, and the word *three* was written on an erasure, the widow was held, in a question with creditors, to be excluded from terce. And this though the date was clear from the year of the king's reign being given.[1]

A widow whose terce has been lost by the blunder of the agent in making up her husband's title may have a claim for damages against the agent. But if there is no ground for thinking that the husband desired the widow to have terce, and would have rectified the blunder if he had been aware of it, her action against the agent will fail.

Ill.—In the case of *Goldie* v. *G.*, the husband's sasine was taken four years before his marriage. By a post-nuptial contract he had made a provision for his widow and she had renounced her legal rights. On the ground that in these circumstances he did not intend her terce to stand, it was held she had no claim of reparation against the agent who blundered the title.[2]

When the Husband has disponed the lands in trust or for security.—If the right to the lands is really in the husband, and is merely burdened with debt, the widow is entitled to terce although the trustee or creditor is infeft. She is in that case liable for one-third of the interest.

Ill.—Husband disponed lands redeemable on payment of debts. Creditor took infeftment. Held the widow could claim a terce of the free rents after interest on the debt had been paid.[3]

Ill.—Husband disponed lands by a disposition *ex facie* absolute, but qualified by a back-bond, and truly granted in

[1] *Hoggan* v. *Ranken*, 1835, 13 S. 461; aff. 1 Robinson, 173.

[2] *Goldie* v. *G.*, 1842, 4 D. 1489.

[3] *Belschier* v. *Moffat*, 1779, M. 15,863; but *see Gardyne* v. *Royal Bank*, 1851, 13 D. 912, esp. at p. 942.

security. Widow's claim to terce after payment of interest was sustained.[1]

But it would appear that the widow's claim would have been excluded if the disponee instead of holding base of the disponer had entered with the superior. The question, however, was not raised with the widow.[2]

Where the Trust did not flow from the Husband and he was never infeft.—Where a third party has disponed to trustees for behoof of the husband and he was never infeft, but had only a right to call on the trustees to denude in his favour, his widow cannot claim terce.[3]

When was Husband's infeftment completed?—The widow of a proprietor whose title is still personal has no claim to terce.

A resignation *in favorem* being virtually a mere authority to the superior to make a new grant did not divest the resigner of the fee. It was his widow and not the widow of the disponee in whose favour the new grant was to be made who was entitled to terce. But entry by resignation is now abolished.[4]

Resignation *ad remanentiam* stood on a different footing. It reinvested the superior in the *dominium utile* and merged the two estates. When the vassal conveys the property to the superior, the latter now makes up his title by recording the disposition, and by a minute of consolidation.[5] If the vassal were to die before the disposition had been recorded his widow would take her terce. Similarly, in the case of adjudication of lands, if the decree or abbreviate has not been recorded, the debtor's widow is not excluded from her terce.[6]

Terce opens at Husband's death.—The widow's right commences at the death of her husband. She is entitled to her third of the rents payable at the term after his death.[7]

[1] *Bartlet* v. *Buchanan*, Feb. 21, 1811, F.C.

[2] Fr. ii. 1092; *Gardyne*, *supra*.

[3] Fr. ii. 1092; More's "Notes to Stair," p. cexix.; M'Laren on "Wills," i., p. 85.

[4] Conveyancing Act (37 & 38 Vict. c. 94), § 4.

[5] Conveyancing Act, § 6; *see* 1 Bell, 59; Bell's Prin. § 1600; Fr. ii. 1093.

[6] Fr. ii. 1095, Bell, l.c.; *Carlyle* v. *Crs. of Easter Ogle*, 1725, M. 15,851.

[7] *Belschier* v. *Moffat*, 1779. M. 15,863; Fr. ii. 1082.

How Terce is excluded.—(*a.*) *By direct discharge. In ante-nuptial marriage-contract.*—A woman who contracts, before her marriage, to take a provision on her husband's death, and in respect of such provision discharges her legal rights, is bound by her contract.

He may leave large estates and she may have contracted to take £50 a-year, but she has made her bargain and must stand by it. If she were a minor at the date of the deed she may reduce it on proof of *enorm lesion*. It has been held that *enorm lesion* means positive loss and not merely the loss of contingent gain, so that a woman without fortune at marriage cannot successfully urge this plea.

Ill.—A girl, eighteen years old, agrees to take £80 in lieu of legal rights. Husband at marriage had income from business of over £2000 a-year. At his death his estate was worth £50,000. Held, diss. Lord Rutherfurd Clark, that she had not sustained *enorm lesion*.[1]

(*b.*) *By post-nuptial deed.*—A wife may renounce her terce and *jus relictae, stante matrimonio*. If her renunciation was gratuitous, or for a consideration grossly inadequate, she may revoke it as a donation.[2]

(*c.*) *By acceptance of a conventional provision in a testamentary deed of the husband. Doctrine of election.*—Where there is no ante-nuptial contract, and the husband has made a voluntary provision for his widow as in full of her legal rights, she is put to her election—*i.e.*, has the choice of taking either the provision in the deed, or otherwise claiming her terce and *jus relictae*. And if she dies without having had a reasonable opportunity of making this election, her right to do so transmits to her representatives.[3]

Where the provision in the deed is not expressly in full of legal rights, the *onus* of showing that this was not intended lies on the widow.

By the old law, unless a provision for a widow expressly bore to be in discharge of her legal rights, she could claim both.

[1] *Cooper* v. *C.*, 1885, 12 R. 473, rev. on ground that as she was an Irish minor her contract was voidable without proof of lesion, 1888, 15 R. H.L. 21.

[2] *Supra*, p. 128.

[3] *Edward* v. *Cheyne*, 1888, 15 R. H.L. 33; but *see Pringle's Executrices*, 1870, 8 M. 622.

This was remedied in consequence of a case in which the report runs: "The Lords delayed to give interlocutor till they saw if the Parliament in June would make any statute anent terces."[1]

The same year an Act was passed, providing: "That in time coming where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage, or some other writ before or after the marriage; that the wife shall be thereby secluded from a terce out of any lands or annual rents belonging to her husband, unless it be expressly provided in the contract of marriage, or other writ containing the said provision that the wife shall have right to a terce by and attour the particular provision conceived in her favours."[2]

The Act only shifts the *onus*. If it appears from the deed that the husband's intention was not to exclude terce, the widow will take it in addition to the conventional provisions.

Ill.—Husband makes a settlement, giving his wife an annuity out of Russian estates, and directs his trustees to sell an estate in Scotland and give her the life-rent of the price. This last part of the settlement failed from informality. The widow claimed terce of the Scots heritage, and it was held that as he meant her to have a life-rent of the price of the whole, it was clearly not his intention to make the other provisions a bar to terce.[3]

Ill.—Husband conveys to his wife, by separate deeds, estates both in England and Scotland. The deeds disponing the Scotch estates are reduced on ground of incapacity and informality. Widow, by House of Lords reversing Court of Session, found entitled to terce, on ground that his intention was that she should have much more than a terce of his Scotch estate in addition to the land in England.[4]

A distinction has been made in the House of Lords between unilateral and bilateral deeds as affected by this Act. It was said that the Act applies only to contracts or other bilateral

[1] *Craigleith* v. *Prestongrange*, 1681, M. 15,845.

[2] 1681, c. 10 (c. 12, Thomson's Ed.).

[3] *Jankowska* v. *Anderson*, 1791, M. 15,868 and 6457.

[4] *Ross* v. *Aglionby*, 1797, M. 4631, *rev. sub. nom. Lowthian* v. *Ross*, 1797, 3 Pat. 21.

writs.[1] But this distinction does not seem to have been followed in later cases.

In general, if a widow is left the life-rent of the whole estate, this will be presumed to be in lieu of all legal rights.[2]

Acceptance to be valid must be made in full and fair knowledge of her legal rights.—Even when the widow has expressly accepted the conventional provision and discharged her legal rights, she will be entitled to fall back upon them, if she can show that she was not fairly put in possession of all material facts, and thereby placed in a position to judge which course would be more for her advantage. And the Court will be slow to think she was fairly put in this position where her choice was clearly against her interest, and she had no separate agent to advise her.

In one case a widow attended a meeting of trustees and signed a minute accepting conventional provisions in lieu of legal rights. For some years she received interest from the trustees. By the will she forfeited all provisions on second marriage, which occurred. On proof that she was never informed that her second marriage would not have deprived her of her legal rights, and that she had no independent legal advice, she was held not to be barred from repudiating the will.[3]

It would appear that there may be circumstances in which the widow is allowed to acknowledge the will for a limited time or purpose and yet keep open her right to repudiate it and recur to her legal rights.

Ill.—A widow by the will was entitled to the life-rent of a house and to the furniture, and to the right of carrying on the husband's business as long as she remained unmarried. She signed a deed accepting the provisions as in satisfaction of her legal rights, "so long as I continue to carry on said business." On her desiring to marry again she was held entitled to repudiate the will.[4]

In deciding whether the right to repudiate is still open the Court may consider whether injury has been done by the

[1] *Lowthian, supra.*
[2] Ersk. iii. 3, 30.
[3] *Donaldson* v. *Tainsh's Trs.*, 1886, 13 R. 967.
[4] *M'Fadyen* v. *M'F.'s Trs.*, 1882, 10 R. 285.

delay or prejudice would be caused by allowing the widow to elect.[1]

Implied acceptance.—Where no minute or deed of acceptance has been signed by the widow her consent to take under the will and renounce her legal rights may be inferred from her actings. But these actings must afford clear and unequivocal evidence of her intention to make this choice. And, however clearly proved, her election will not bind her unless she made it with a clear knowledge and understanding of what her legal rights were.[2]

A widow attended meetings of trustees. She married again within a year. By so doing she forfeited all benefit for herself, but received from the trustees an annuity for the board and education of the children. After ten years she was found entitled to repudiate.[2]

A wife who signs her husband's will in token of her consent will not necessarily be presumed to have consented to the whole deed. But if it includes a life-rent to her of the whole estate this necessarily implies a renunciation of legal rights. If she survive and die without revoking her consent as a donation, her representatives cannot claim to take legal rights and repudiate the will.[3]

Terce barred by entail.—A husband cannot by making an entail of his estates defeat his widow's right to terce. But a third party granting an entail is in a different position. As the giver of a donation he may dictate the terms of it. Precisely as a person giving property to a wife may exclude the *jus mariti* and *jus administrationis* of her husband, so an entailer may direct that the widows of the heirs of entail shall not enjoy terce.[4] And this is a clause in all entails. It is immaterial that the entail fails to fulfil the statutory requirements as, *e.g.*, by not containing clauses irritant and resolutive. And it need not have been recorded. The principle upon which it is a good exclusion of terce is simply

[1] *M'Fadyen, supra; Selkirk* v. *Law*, 1854, 16 D. 715; *Donaldson, supra.*

[2] *Hope* v. *Dickson*, 1833, 12 S. 222.

[3] *Baxter's Trs.* v. *B.'s Executor*, 1884, 11 R. 996; aff., *Edward* v. *Cheyne*, 1888, 15 R. H.L. 33; *see* Ersk. iii. 3, 30.

[4] *Gibson* v. *Reid*, 1795, 15,869 and 5891; *Hay Newton* v. *H. N.*, 1867, 5 M. 1056, aff., 1870, L.R., 2 Sc. App. 13.

that it makes a gift subject to a condition and is accepted with the condition by the donee.[1]

Conviction of High Treason.—As the effect of conviction divests the criminal of all property and carries it to the Crown, the widow has no terce. But crimes involving life-rent escheat do not bar terce.[2]

Terce barred by Divorce.—The guilty spouse on divorce for adultery or desertion loses all claim to terce.[3]

How Widow's Right is made Effectual.—The old procedure is by the two steps of service and kenning. This is still competent, though very rarely resorted to.[4]

Service.—The procedure commences with a note to Chancery asking for a brieve for serving the widow to be kenned to her terce.

The brieve obtained is directed to the Sheriff of the county or counties in which the lands lie. When they lie in different sheriffdoms, it would seem that the brieve should be directed to the Sheriff of Edinburgh.[5] The brieve is presented to the Sheriff or Sheriff-Substitute, with a petition praying him to appoint an inquest and order service. The brieve is proclaimed at the Market Cross of the head burgh of the county, and is served on the heir-at-law and next-of-kin of the deceased. The Sheriff fixes a diet of proof, and summons a jury of fifteen. The widow lays before them a claim of service describing the lands out of which she claims terce. They hear proof on the two points—(1) That the widow was wife to the deceased; and (2) That he died infeft in the lands mentioned in the claim.

As to (1) it is enough that the woman was habite and repute wife;[6] and as to (2) the proof is satisfied by production of the deceased's sasine. The plea may be taken that the widow has accepted a conventional provision, and the inquest

[1] *Hay Newton*, *supra*, at p. 1071.

[2] Stair, 2, 6, 17; Fr. ii. 1112.

[3] Ersk. i. 6, 46; Fr. ii. 1217; and *see supra*, "Effects of Divorce," p. 171.

[4] *Craik* v. *Penny*, 1891, 19 R. 339; Jurid. Styles, i. 342, *seq.*; Ersk. ii. 9, 50; Fr. ii. 1101.

[5] Bell's Prin. ii. 1602, Note (*a*); M'Laren, Wills, i., p. 107; Fr. ii. 1101; Nicolson's Note to Ersk. ii. 9, 50; 1 & 2 Geo. IV. c. 38, § 11.

[6] Act 1503, c. 77.

may hear evidence, and return a finding on that point.[1] If the evidence is sufficient, the inquest pronounce a verdict serving the widow to just and reasonable terce of the said lands, and finding that her right commenced at the first term after her husband's death. The Sheriff interpones his authority, and decerns.

Appeal.—The proceedings under a Brieve of Terce may be appealed to the Court of Session at any time before the trial. It is probable even that such an appeal is competent after the verdict, but before extract. For the restrictions imposed on the former right of advocation of causes from an inferior court, at any stage in the process, seem never to have been extended to this procedure by Brieve. But the safer course after verdict would be to raise a reduction.[2]

Nature of Widow's Right before Service.—The right of the widow before service is involved in considerable obscurity. The cases and the *dicta* of text writers are dubious and conflicting. Professor More expresses one view thus: "The widow's right of terce is founded solely on her husband's seisin; and her service merely declares, but does not constitute, her right like the service of an heir."[3] This statement, however sound, is quite unsupported by the case cited by More.[4] It was held in an old case that a widow, although not served to her terce, had a title to sue tenants for rents.[5] But in this case the widow had taken the unusual course of bringing against the heir an action of declarator of her right to terce. Otherwise it may be considered clear that a widow who has not served has no active title, and could not therefore sue tenants for rents or removing. Lord Fraser says there would be no *condictio indebiti* if rents had been paid to her.[6] And this is in accordance with principle, for there is no *condictio* when the creditor has an equitable, though not a legal, right to the sum paid.

Does the Right of a Widow unserved Transmit to her Representatives?—This question was answered in the

[1] *Craik* v. *Penny*, 1891, 19 R. 339, per L. M'Laren at p. 343.

[2] *Ibid.*

[3] More's Stair, ccxvii.

[4] *Yeoman* v. *Oliphant*, 1666, M. 15,843.

[5] *Fea* v. *Trail*, 1731, M. 16,115.

[6] Fr. ii. 1107.

negative in one case.[1] But it arose with a singular successor.

Ill.—Husband died infeft in a house. Widow not served to terce. Heir sold to A, who knew of widow's possible claim. A sold to B, who had no such notice. The widow died, and her representatives sued B for one-third of the rent for the twenty-nine years of her viduity.

The Court decided that the defender was not liable. They put their judgment on the ground that the widow's right not having been vested in her by service, did not transmit. The plea which was taken of *fruges bona fide perceptae et consumptae* would appear to have been sufficient for the disposal of the case. Professor More remarks on *M'Leish*, that "this matter would require to be seriously reconsidered." And his doubt is approved of by Bell.[2]

In a later case it was found unnecessary to decide the point. But Lord President Inglis remarked: "If it were not for these special circumstances, questions of great general importance and difficulty would arise in this case regarding the steps which it is necessary for a widow to take during her viduity in order that the terce may vest in her person, and be capable of transmission to her representatives; and it is a great relief to me to find, in the circumstances of this special case, ample grounds for judgment without entering into any consideration of these very difficult questions."[3]

Effect of Service.—Service gives the widow a *pro indiviso* right jointly with the heir. It is as yet unascertained what part of the lands is hers. But her claim to one-third thereof is fixed and transmissible. She has a title to sue for rents to the extent of one-third. But it would appear that she cannot sue a removing or prevent the heir from so doing.[4]

Service operates *retro*.—Service does not constitute the widow's right. This rests on the husband's infeftment, and opens *ipso jure* at his death. Consequently by service the

[1] *M'Leish* v. *Rennie*, 1826, 4 S. 485.

[2] Bell's Prin. 1602; More's Notes on Stair, ccxviii.

[3] *Pringle's Executrices*, 1870, 8 M. 622, at p. 625.

[4] Fr. ii. 1108. This is no doubt law, but in the case of *Barclay* v. *Scot*, 1675, M. 15,844, founded on by Lord Fraser, the widow had not been *served*. *See* Dirleton's Report, M. 15,845.

widow's right draws back to the husband's death, and fixes her right to a third of the rents from that period. And this right is good against singular successors, but with a difference.

With Heir.

Ill.—Husband's heir sells part of lands for £240. More than twenty years after widow raises an action against him to have it found that she was entitled to the interest of one-third of £240 as having been disappointed of her terce by the sale of lands to that extent. This claim was sustained.[1] It does not appear from the report, if the widow had been served or not.

With singular Successor.—It is a good defence by a tenant that he duly paid the rent to the heir, and had no knowledge of the widow's claim. But what if the heir sells the subjects to a purchaser who has no knowledge of the fact that it may be found burdened with terce? In this case the purchaser will be bound to pay the widow her terce from the time of kenning. For the byegone rents he will escape if he can show that they have been *bona fide* consumed. But the widow has an action against the heir for her terce of these byegone rents.[2]

Ill.—A creditor in possession of the lands by adjudication had obtained a decree of maills and duties, and for some years had uplifted the whole rents. The widow then served to her terce and sued the tenants and the creditor for one-third of the rents from her husband's death. The tenants brought a multiple-poinding. It was held the widow was entitled to her third of the byegone rents "so far as the same are *in medio*."[3]

A Purchaser who discovers before paying the price that the Property is liable to a Widow's Terce may retain part of the price to meet this claim.

Ill.—The husband's heirs sold the lands to A. On searching the records A found an inhibition at the instance of the widow. He consigned a third part of the price till he should be relieved of any demands on account of this claim of terce.

[1] *Bell* v. *Halliday*, 1825, 4 S. 286.

[2] *Wamphray*, 1669, 2 Br. Supp. 440.

[3] *Milne* v. *Wood*, 1770, M. 15,858; and *see* *M'Leish* v. *Rennie*, 1826, 4 S. 485.

The Court found him entitled to retain "a part of the price." The report does not give the proportion.[1]

A purchaser who had paid the price without knowledge of the latent claim to terce, would have an action of relief against the seller.

Kenning to Terce.—As the service fixes the widow's right to a *pro indiviso* third of the lands, the kenning is the process by which her third is divided from the two-thirds which belong to the heir. The old procedure, now very rarely resorted to, is as follows:—The Sheriff either goes himself to the lands or grants a precept to a "Sheriff in that part" to do so. Lots are cast whether the widow or the heir is to have the "sunny side." By this is meant the eastmost side. If the widow gets the "sunny" and the heir the "shady" side, the Sheriff gives the first acre of the estate on the east to the widow, and the two next to the heir, and so on. The alternate lots are called "kavels."[2]

Lord Fraser says the casting of the lots was to determine whether the division should be commenced on the east or west side of the estate. In either case the heir got the two first acres, and the widow the third. But this, with submission, seems erroneous. From a comparison of Craig ii. 22, 32 with Stair ii. 6, 14, it would appear that the lot was to decide if the widow was to get the "sun" or the "shade,"—*i.e.*, if her alternate kavels were to lie east or west of those of the heir. Stair's language is ambiguous, but Craig says:—"*Vicecomes sortes in urnam conjicit aut aliquo alio modo sortiendi utitur, utrum triens solaris an umbralis conjugi debeatur.*" If Lord Fraser's interpretation is correct, it is hard to see why the fact that the division was to commence on the east or west of the estate should make the widow's third "sunny" or "shady." But the matter is clear if we understand that, at whichever side of the estate the casting begins, it is the more easterly of the two shares first set apart which is the "sunny" side.

Where subjects are indivisible.—Houses and buildings which cannot be divided are valued, and a third of the yearly value given to the widow.[3]

[1] *Boyd* v. *Hamilton*, 1805, M. 15,874.

[2] For some learning as to kavels, *see Gray* v. *Richardson*, 1876, 3 R. 1031.

[3] Ersk. ii. 9, 48; *Logan* v. *Galbraith*, 1665, M. 15,842; Fr. ii. 1103.

Another way is to make a remit to Valuators.—These appear before the Sheriff, and depone to the justness of their valuation. The Sheriff then decerns her lot to pertain to the widow as her terce, and proceeds to the lands and kens her thereto, or grants a precept to a "Sheriff in that part" to do so. An instrument called an Instrument of Kenning, is in either case taken in the hands of a notary.[1]

Lord Fraser says the modern practice is for the widow and the heir to enter into a submission to have their respective rights ascertained.

But this, it is believed, is also a matter of rare occurrence. It is natural that where there is considerable heritable estate, there should generally be either a will or a marriage-contract, by which the terce is excluded. And in other cases an arrangement is usually made between the widow and the heir. Either the heir agrees that the widow shall live in the house, to take that as the simplest example, and to pay him two-thirds of the rent, or he agrees to live in it and to pay her one-third. If it is let to a tenant the heir agrees to pay the widow one-third of the rent. If she sees that he does not let the rent fall into arrears she can lose little, because, as already explained, if the heir sells the house she can claim terce from the purchaser.

No Infeftment Necessary.—The widow's terce, like the husband's courtesy, requires no infeftment. So it was found that an Instrument of Kenning "needed not to be registrate as other seasines."[2]

[1] Jurid. Styles, i. 347.

[2] Wamphray, 1669, 2 Br. Supp. 440; Menzies' Conveyancing, p. 672.

CHAPTER XX.

JUS RELICTAE AND *JUS RELICTI.*

ON the death of the husband, or on his being divorced, the wife is entitled at common law to one-third of his free moveable estate, if he leave lawful children of that or a previous marriage, or one-half, if no such child or children survive. And by the Married Women's Property Act, 1881, a corresponding right is given to a surviving husband.

The Act provides, section 6: "After the passing of this Act the husband of any woman who may die, domiciled in Scotland, shall take, by operation of law, the same share and interest in her moveable estate, which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." The case of divorce is not mentioned, but as the theory is that the innocent spouse shall take the same share in the estate of the guilty spouse as if the latter were naturally dead, there can be no doubt that the innocent husband who has divorced his wife can claim *jus relicti.*

It is now settled that this section applies where the marriage was contracted before the Act, and that the husband is entitled to his half or third of the *whole* moveable estate of the wife, whether she acquired it before or after the Act.[1] And it applies to a wife's moveable estate from which the *jus mariti* has been excluded by ante-nuptial marriage-contract,[2] provided that the contract leaves the wife absolute control of her estate. It may accordingly be assumed that the two rights are co-equal and co-extensive, and in the sequel where any point is men-

[1] *Patersons* v. *Poë*, 1883, 10 R. H.L. 73.

[2] *Fotheringham's Trs.* v. *F.*, 1889, 16 R. 873.

tioned as decided with regard to *jus relictae*, it will be equally true of *jus relicti*. The husband will not be decerned executor-dative to his wife before her next-of-kin, for the wife's right to *jus relictae* was never held to entitle her to be preferred to his next-of-kin in competition for the office of executor-dative.[1]

Nature of Right.—It has been disputed if *jus relictae* is more fitly regarded as a right of succession or as a right of division. Stair[2] and Erskine[3] speak of it as a right of division of the property over which the husband had during the marriage the absolute right of disposal. The language of the older writers is coloured by the now antiquated theory of a *communio bonorum* of which the husband was the administrator. The Court, in a recent case, found it unnecessary to determine the speculative nature of the right.[4] For practical purposes it is probably sufficiently defined as a legal right, opening to the wife by the death of the husband, and not capable of being defeated by any testamentary or revocable deed. In one aspect it may be said to be a claim of debt against the husband's trustee or executor, which may be made effectual by action against him. But it is not a debt which can compete with onerous claims. If the estate was insolvent at the death there will be no *jus relictae*. The widow is a creditor among heirs, an heir among creditors, to use an old phrase as applicable to her as to persons having a *spes successionis in obligatione*.

Vesting of *Jus Relictae*.—*Jus relictae* vests *ipso jure* at the death of the husband, and transmits to the widow's representatives, although confirmation to the husband's estate has not been granted.[5] But the widow has no active title until either she or some one else has taken out confirmation. She may retain her husband's goods which are in her hands for her third, but she cannot pursue his debtors for payment to her of one-third of the debts due by them.[6] She is entitled in the general case to interest on her *jus relictae* from the death. Her claim is, however, limited to the interest which the

[1] *Campbell* v. *Falconer*, 1892, 19 R. 563.
[2] iii. 8, 43.
[3] iii. 9, 20.
[4] *Tait's Trs.* v. *Lee*, 1886, 13 R. 1104.
[5] *Dunduff* v. *Craigie*, 1612, M. 3843; *M'Aulay* v. *Bell*, 1712, M. 3848.
[6] *Dunduff*, *supra*.

husband's funds actually yield, and may be met by the defence that they were in whole or part unproductive. *E.g.*, if his capital was locked up in a business, or otherwise invested in such a way as to be incapable of realisation without delay, and yielding no interest, this would be a good plea in the mouth of the executors against a widow's claim for interest on her *jus relictae.*[1]

How *Jus Relictae* may be defeated.—The husband's estate is, during his lifetime, completely under his control, and he may squander it or give it away at his pleasure. He may also make his investments in such a form as to lessen the fund available for *jus relictae.*

Death-bed.—A curious question was raised by Lord Fraser on this branch of the law. The Act 34 & 35 Vict. c. 81, provides "that no deed, instrument, or writing, made by any person who shall die after the passing of this Act (16th August, 1871) shall be liable to challenge or reduction *ex capite lecti.*" Lord Fraser suggests that these words do not cover every form of transaction formerly reducible as done on death-bed. *E.g.*, if a man hand over a sum of money or lend out money on a heritable bond, would it be competent for the widow still to plead that the fund from which her *jus relictae* was payable could not thus be diminished?[2] Lord Fraser is of opinion that this is still within her right.[3] But the better opinion seems to be that the words of the Act are sufficiently wide to abolish the whole law of death-bed. The preamble of the Act runs :—"Whereas it is expedient to abolish *all* challenges and reductions in Scotland *ex capite lecti.*" In the *Lauderdale* Peerage Case[4] the question was if a marriage on death-bed effected legitimation of children previously born. It was pleaded that the rights of the person who would have been the heir but for the alleged legitimation could not be prejudiced by any act on death-bed. Lord Watson says : "That is a very remarkable plea, because from the time when Sir Thomas Craig wrote his *Jus Feudale*, until it was abolished

[1] *M'Intyre* v. *M.'s Trs.*, 1865, 3 M. 1074.

[2] Fr. ii. 1008, and ii. 1059.

[3] Fraser is followed by the learned editor of Bell's Principles. (Bell's Prin. ii. 1585.)

[4] 1885, 10 App. Ca. 692. But *see Hay* v. *Coutts' Trs.*, 1890, 18 R. 244.

by Act of Parliament in 1871, the law of death-bed was according to all the authorities limited in its application to deeds, instruments, or writings, executed *in lecto* to the prejudice of the heir *alioquin successurus.*" [1]

Deeds in fraud of *Jus Relictae*.—It is now well settled that if the husband's deed be irrevocable, and completely divest him, it will not be reducible as *in fraudem* of *jus relictae* or *legitim*, although expressly declared to be for the purpose of diminishing those rights. The following statement of the law by Bell is approved of by Lord Fraser:—

"*Legitim*" (and the proposition is equally true of *jus relictae*) "is diminished by every deed of the father *inter vivos* and *in liege poustie* disposing of his moveable funds, provided it be not fraudulently contrived in order to disappoint the children without touching the father's own right during his life." [2]

The fact that a husband has suddenly converted his moveable estate into heritage with a view to lessen the *jus relictae* is not fraudulent.[3]

Provided the transaction be real the Court will not enquire into the motive by which it was prompted. But there is a different class of cases in which an attempt is made to defeat the *jus relictae* or the cognate right of *legitim* by a simulate deed which does not, in fact, divest the granter. This is the only kind of deed which the Court will reduce as *in fraudem* of *jus relictae.*

Ill.—A father, anxious to exclude one of his sons from *legitim*, handed £1000, nearly the whole of his moveable estate, to his eldest son. He took from this son three I.O.U.'s for £400, £300, and £300, respectively, in favour of his other children, excluding A. These I.O.U.'s the father retained in his possession till his death. In an action by A for *legitim* it was held that the transaction was simulate and that the fund formed part of the personal estate of the father at the time of his death.[4]

Ill.—Father conveyed his whole estate to his only son under burden of an annuity of £100 a-year. Father and son

[1] At p. 754.
[2] Bell's Prin. ii. 1584; Fr. ii. 1010.
[3] *Lashley* v. *Hog*, 1804, 4 Pat. 581, *per* Lord Eldon, at p. 623.
[4] *Buchanan* v. *B.*, 1876, 3 R. 556.

were partners in business. After the deed the effects of the co-partnery were never regularly delivered by inventory to the son. At a later date a submission was entered into with a daughter on the narrative that no settlement had been made upon her, and that she had not discharged her *legitim.* The submission was dropped. In an action by this daughter for *legitim,* it was held that "the voluntary and gratuitous disposition by David Millie, senior, in favour of his son, the defender, cannot be held as a *bona fide* alienation and transfer of his property, but a collusive transaction devised for the purpose of defeating the claim of *legitim* competent to the pursuer."[1]

Ill.—A father transfers bank stock to his son's name. The dividends, however, are credited as they fall due to the father's account. Held there was no *bona fide* alienation, and the sum represented by the stock was liable to *legitim.*[2]

The principle running through all the cases is that if the granter, in fact, continues to enjoy the benefit of the property after the alleged transfer, and has not made himself any poorer thereby, the transaction will be set aside.

Lord Eldon, in the leading case of *Lashley* v. *Hog,* says the enquiry is whether the subsequent profits accrued to the granter or grantee. "The receipts of the profits during the life of the person, is evidence of the ownership of that person in the subject matter which produces the profits."[3]

The husband's power to defeat the *jus relictae,* [illegible] summed up thus. He may defeat it by any *inter vivos* revocable deed. A revocable deed leaves the subject in his power till death. He may, in fact, defeat the right by any genuine *inter vivos* transfer, but not by the semblance of alienation without the reality.

How *Jus Relictae* may be discharged or renounced.

1. *By ante-nuptial contract.*—The right may be expressly renounced in an ante-nuptial contract of marriage, and such a renunciation is binding upon the widow, although her provision in the contract is vastly less than she would have received as

[1] *Millie* v. *M.,* 1803, M. 8215, aff., 1807, 5 Pat. 160.

[2] *Lashley* v. *Hog,* 1804, 4 Pat. 581.

[3] At p. 641.

jus relictae. If she were a minor, the contract may be cut down on the ground of minority and lesion.[1] And where the conventional provision is inadequate for the widow's bare support, it is thought she would be entitled to additional aliment if the estate is sufficient.[2]

Renunciation will not be Implied.—Unless *jus relictae* is expressly discharged, very clear indications of the intention to renounce it will be required. It may be covered by general words without being named, as where there is a discharge of "all legal rights," or the intention to exclude it may be otherwise clearly implied.[3] But if the language is ambiguous the right to *jus relictae* will not be excluded.[4]

2. *By post-nuptial Deed.*—The wife may discharge her *jus relictae, stante matrimonio,* in a separate deed, a mutual settlement, or any other writing. Where a wife signed her husband's will, and the testing clause said that she did so "in token of her consent to and approval of the foregoing settlement," she was held to have validly renounced her *jus relictae,* though in the body of the deed she was not mentioned as a consenting party.[5] But such discharge, if gratuitous or for a consideration grossly inadequate, may be revoked by her as a donation.[6]

Ill.—Husband by his will gave his wife the life-rent of his whole estate. He directed his trustees "after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed)" to pay over a large number of legacies. Many of these legacies were to the wife's relatives. The wife signed the deed. It was held that although the *jus relictae* was not mentioned, it was clearly her intention to renounce it, and effect must be given to this intention.[7]

3. *By Acceptance of a Conventional Provision.*—The Act,

[1] *Cooper* v. *C.*, 1888, 15 R. H.L. 21.

[2] *See infra,* "Aliment to indigent survivor."

[3] Ersk. 3, 9, 16; Fr. ii. 1060; *Durrant Stewart's Trs.* v. *Durrant Stewart,* 1891, 18 R. 1114.

[4] *Keith's Trs.* v. *K.*, 1857, 19 D. 1040.

[5] *Dunlop* v. *Greenlees's Trs.*, 1865, 3 M. H.L. 46.

[6] *See supra,* "Donations *inter virum et uxorem.*"

[7] *Edward* v. *Cheyne,* 1888, 15 R. H.L. 33 (in C. of S., *Baxter's Trs.*, 1884, 11 R. 996).

1681, c. 10, which provides that a widow who takes a conventional provision shall not be entitled to terce unless the husband's intention was clearly that she should have both, does not extend to *jus relictae.* Accordingly the widow may take both the provision under the deed, and also her *jus relictae,* unless she has renounced it, or a contrary intention appears on the face of the deed.

But where the husband leaves various testamentary writings, in some of which provisions are declared to be in full of *jus relictae,* whereas, in others, a provision is given without any such clause of exclusion, the Court will read the whole as one deed, and put the widow to her election.[1]

Deed inconsistent with intention that widow should take both provision and *Jus Relictae.*—It is a settled rule that when the husband gives the widow a life-rent of his whole estate, heritable and moveable, and she accepts it, this is in full of *jus relictae.*[2] But where there is intestacy as to the fee, she is not barred from claiming *jus relictae* by taking a liferent of whole estate.[3]

Where there is a total settlement.—If the husband has made a settlement of his whole estate, or even of his whole moveable estate, it is plain that he did not mean the widow to take the provision in the deed, and her *jus relictae* in addition. For, as he has divided the whole moveables, there is no fund out of which the *jus relictae* is to come. This case has repeatedly arisen as to *legitim,* and the same principle applies to a widow claiming *jus relictae.*[4]

4. *By electing after the husband's death to take the provisions in his settlement or other deed.—*Where the widow's right is not barred by ante-nuptial contract or by an onerous contract made by her, *stante matrimonio,* and where it is further

[1] *Stewart* v. *Stephen,* 1832, 11 S. 139.

[2] Ersk. iii. 3, 30; *Edward* v. *Cheyne, supra; see* especially opinions of Lord Kinnear and Lord Craighill in C. of S., 11 R. 996; *Riddel* v. *Dalton,* 1781, M. 6457.

[3] So held by Lord Kyllachy in a case as to *jus relicti, Chalmers* v. *Grierson,* 6th March, 1893 (not yet reported). And *see Simon's Trs.* v. *Neilson,* 1890, 18 R. 135.

[4] Fr. ii. 1069, 1021; Bell's Prin. ii. 1591.

clear from the husband's testamentary writings that he did not intend her to take both legal and conventional provisions, she is put to her election between these.

Election may be inferred from conduct.—The proper course is for the husband's trustees to obtain from the widow a discharge of her legal rights in consideration of her conventional provision. But when this has been omitted, her consent may be inferred from a course of conduct, clearly pointing to her having elected to take under the settlement.

Whether her acceptance be express or implied it may be repudiated by her, if she can show that she had not a full and fair knowledge of her legal rights.[1]

Delay is no bar.—In such cases it is frequently pleaded that the action is barred by taciturnity and *mora*. Mere delay short of the forty years' prescription is not a bar, but only throws on the party against whom it is pleaded, the duty of explaining his inaction. Taciturnity is of no value as a plea, unless it can be shown that the party who lay by was in full knowledge of his right of action. It is only where the pursuer took no action for a long period during which he must have been in full knowledge of the facts, and can give no explanation of his inactivity, that effect may be given to these pleas. The circumstances must point distinctly to the right having been abandoned, and the plea of *mora* merges in that of acquiescence.[2]

Ill.—Thirty years after a father's death, a settlement by him was found in an old trunk. Legatees claimed against the father's representatives. It was held that they were not barred by taciturnity and *mora*.[3]

Ill.—A widow who survived her husband for ten years, neither accepted her conventional provisions nor claimed her legal rights. Although repeatedly called on by the trustees to elect, she made no sign, and in an action of multiplepoinding to have the estate disposed of at the sight of the Court, she

[1] *Donaldson* v. *Tainsh's Trs.*, 1886, 13 R. 967; *M'Fadyen* v. *M'F.'s Trs.*, 1882, 10 R. 285; *Hope* v. *Dickson*, 1833, 12 S. 222; *see supra*, sub Terce.

[2] *See* opinion of Lord Deas in *Robson* v. *Bywaters*, 1870, 8 M. 757.

[3] *Scath* v. *Taylor*, 1848, 10 D. 377.

declined to appear. The trustees consigned half-yearly in bank the annuity provided to her in the settlement. After the widow's death her representatives claimed her legal rights, but it was held she must be taken to have acquiesced in the action of the trustees, and accepted the conventional provision.[1]

Ill.—A widow was maintained during the eleven years of her viduity by her eldest son, who was her husband's executor, during which time she made no claim for *jus relictae.* Fifteen years after her death her representatives raised an action for it against the representatives of the son. It was held that the claim was not barred by *mora* and taciturnity.[2]

When *Jus Relictae* is discharged, how is estate divided?—Discharge, *stante matrimonio,* makes the division at death bipartite as if the widow had predeceased. But if there is no discharge before the husband's death the division will be tripartite, if the children claim *legitim,* and the widow elect to take under the will. The sum, which would have fallen to her as *jus relictae* is credited to the executor.[3]

Effect of wife's election to take legal rights.—In this case the *jus relictae* will fall to be paid out of the residue which, by the will, would go to the residuary legatee, if this residue is sufficient. If the residue is insufficient, general legacies will contribute rateably, and in the last place, if necessary, special legacies will be resorted to to supply the deficiency.[4]

Husband must die domiciled in Scotland.—It has not been absolutely decided, but is probably law, that a widow is in no case entitled to *jus relictae,* unless her husband died domiciled in Scotland, although he was domiciled there at the date of the marriage.[5]

[1] *Pringle's Executrices,* 1870, 8 M. 622.

[2] *MacKenzie* v. *M.'s Trs.,* 1873, 11 M. 681; and *see Gourlay* v. *Wright,* 1864, 2 M. 1284.

[3] Fr. ii. 1070; *Fisher* v. *Dixon,* 1840, 2 D. 1139.

[4] *Tait's Trs.* v. *Lees,* 1886, 13 R. 1104.

[5] See *infra,* "Effect of Change of Domicil."

CHAPTER XXI.

COURTESY.

THE oldest authority is in these terms: "When ane man receives with his wife lands, in name of marriage, and begets upon her ane heir, son or daughter, heard cryand, within four walls of the house, and the wife happen to decease, the lands and heritage which pertained to the wife shall remain and be possessed by the husband, induring his lifetime."[1]

The courtesy of Scotland, *curialitas*, is the right of a husband whose wife died infeft in Scotch heritage to a life-rent of her lands. It is subject to four conditions:—1. The wife must die infeft. 2. There must have been a child born of the marriage, which has been heard to cry. 3. This child must be the wife's heir. 4. The lands must have come to the wife by succession, and not by singular title. The law as to courtesy was said by Lord President Inglis to depend entirely upon artificial rules of law. "I am not disposed," said that eminent Judge in a leading case, "in giving judgment upon these questions, to attempt any exposition of legal principles, or even to venture upon any illustration, which I think would be neither useful nor safe. This appears to me to be a branch of the law in which the maxim is directly applicable, *non omnium quae a majoribus nostris constituta fuerunt, ratio reddi potest.*"[2]

Wife's Infeftment.—The wife's sasine is the absolute measure of the husband's right to courtesy, and in the case cited the Lord President remarked that he knew of no case in which a husband would be entitled to courtesy out of heritable subjects in which his wife did not die infeft.[3] Thus, where a

[1] Reg. Maj. ii. 58, § 1; so translated in Hodge *v.* Fraser, 1740, M. 3119.

[2] *Clinton* v. *Trefusis*, 1869, 8 M. 370.

[3] *Ibid.*

wife succeeded both to the superiority and property which were on separate titles, and was infeft in the superiority, but died before taking sasine of the *dominium utile*, it was held the courtesy attached only to the superiority.[1]

Courtesy does not extend to lands held by trustees under instructions to convey to the wife.[2]—But where the wife had the radical right, and was infeft in her lifetime, and the infeftment not quarrelled, the courtesy was held not excluded, because it appeared after her death that her title had been incorrectly made up. For if the challenge had been made during her life, the error would presumably have been rectified.[3]

Heritable Bonds, Feu-Duties, Burgage, Casualties.—Heritable bonds are liable to courtesy, though moveable as to succession.[4]

Feu-duties are liable to courtesy, though not to terce.[5] And so were, formerly, lands held burgage.[6] Lord Fraser thinks casualties of superiority are not affected by courtesy, on the ground that the right to claim them requires infeftment, which is unnecessary for the exercise of the right of courtesy.[7]

Real burdens preferable to the Wife's Sasine exclude the Courtesy.—But the husband would, on the analogy of terce, be entitled to courtesy of lands sold by the wife if she died before granting a disposition.[8]

The Birth of a Child heard to Cry.—Lord Stair quaintly says: "The courtesy takes no place unless a ripe child be born, though the marriage should continue for many years, so that the being of children procreated and born into maturity is the chief motive introductory of this law. And the law hath well fixed the maturity of the children by their crying or weeping, and hath not left it to the conjecture of witnesses whether the child was ripe or not."[9]

No other evidence of life is competent.—It is settled that to

[1] *Porteous* v. *Bell*, 1757, 5 Br. Sup. 855.

[2] *Clinton, supra.*

[3] *Hamilton* v. *Boswell*, 1716, M. 3117; aff., Robertson's App. 192.

[4] 31 & 32 Vict. c. 101, § 117.

[5] *Clinton, supra.*

[6] *Clinton, supra.*

[7] Fr. ii. 1123; Bell's Dict. *voce* Courtesy.

[8] *Rossborough's Trs.* v. *R.*, 1888, 16 R 157.

[9] Stair, ii. 6, 19.

give a right to courtesy the child must be heard to cry, or, as expressed in the old cases, to "weep and bray." And medical evidence that the child was born alive will not be admitted unless crying is averred.[1] This was held on the construction of the words "living child" in a will, a case where the Court might reasonably have disregarded the arbitrary rule. But they thought it settled in the case of courtesy, and inexpedient to hold that a child might be a living child for one set of purposes, and not for another. It is, however, only to the case of a child which survives its birth but a short time that the rule would be strictly applied. Where the only evidence is that the condition of the lungs shows that the child must have breathed after birth, or that it gave other signs of life equally faint, there is no great absurdity in saying the child was not, in common language, born alive. But when it survives for a considerable time, and is unmistakably alive, it would hardly seem that the rule would apply,[2] any more than it would to the case of a child who was a deaf mute.

The Child must be at some time the wife's heir.—If the wife has a son by a former marriage who survives her, and is infeft, the right to courtesy does not arise.[3] And it would appear that since the Conveyancing Act this is true when the child survives the mother, but dies without making up a title. For vesting takes place now without service.[4] But if the son of the prior marriage predeceases the mother, and a child of the second marriage becomes the heir, the husband will have his courtesy. And so if there be daughters of the first, and a son of the second marriage. For he is the heir. And if there be daughters only of both marriages who succeed as heirs portioners, the husband will have courtesy out of the lands to which his daughters succeed.[5]

The wife must have taken by succession.—There is no courtesy when the wife acquires lands by conquest as—*e.g.*, by purchase.[6] It is not settled whether courtesy arises out of

[1] *Roberton* v. *Mod. of General Assembly*, 1833, 11 S. 297.

[2] *See dictum* of Lord Glenlee in *Roberton*, *supra*.

[3] *Darleith* v. *Campbell*, 1702, M. 3113.

[4] 37 & 38 Vict. c. 94, § 9.

[5] Fr. ii. 1122.

[6] *Lawson* v. *Gilmour*, 1709, M. 3114; *Hodge* v. *Fraser*, 1740, M. 3119.

lands which the wife takes by singular title, but to which she was *alioquin successura*. When the wife was *alioquin successura*, but took infeftment on a disposition in her favour to save the expense of a service, this was held to be *praeceptione haereditatis*, and the lands found liable to courtesy.[1] And this case has been approved of.[2]

Where a father divided various heritable subjects among four daughters, it was held that the husband of one of them was only entitled to courtesy out of the one-fourth part of the estate given to her to which she might have served herself heir-portioner.[3]

Constitution of Courtesy.—Where the legal conditions already enumerated are present, courtesy arises *ipso jure* on the death of the wife. No service or other form of making up a title is required.[4]

Courtesy is personal to the husband.—Where a husband had neglected to claim his courtesy, the argument was sustained "that this courtesy is only personal, and died with the person of the said relict, who having neglected it all his lifetime, his executors can claim no right thereunto after his decease; even as in a lady tercer, who albeit she had never so good right to a terce, yet if she be not kenned to it in her own time, in vain should her executors sue for it."[5]

Husband enjoying courtesy is liable for the interest of Wife's Personal Debts.—A tercer is not liable for any debts except such as are heritable and affect the lands subject to the terce. This is reasonable, because the terce extends over but a third of the lands. But as courtesy covers the whole lands, and the husband during his enjoyment of the right is, in a certain sense, the wife's representative, it is right that he should not allow the interest on her debts to accumulate during his life-rent. He is not liable in the principal sums, and only for the interest to the amount by which he is *lucratus* by the courtesy. "The Lords found that the husband in posses-

[1] More's Notes, cexix., *Primrose* v. *Crawford*, M. *voce* Courtesy, App. 1, also reported in Hailes, i. 458.

[2] *Knight* v. *Robinson*, 1786, M. 8815; Fr. ii. 1123.

[3] *Watts* v. *Wilkin*, 1885, 13 R. 218.

[4] Ersk. ii. 9, 52; Fr. ii. 1124.

[5] *M'Auley* v. *Watson*, 1636, M. 3112.

sion of the courtesy was liable in the payment of the current annual-rents, of personal as well as real debts, to the value of the rents he enjoyed by the courtesy, reserving to him relief against executors or other heirs or successors to any other part of the wife's estate, heritable or moveable, which he did not enjoy by virtue of the courtesy." [1]

By ancient law husband enjoyed during his life all the honours and dignities belonging to the wife.—It appears that in virtue of the *jus mariti*, during the wife's lifetime, and of the courtesy after her death, the husband of a peeress might take the title of his wife and sit in Parliament and in the Privy Council in her stead. Thus John Maxwell, of Terregles, *Miles*, after marrying Lady Herries, a peeress, styled himself Johannes Dominus Herries, and sat in Parliament as Lord Herries.[2]

Right to Vote.—*See* ELECTION LAW.

Is courtesy demandable from lands from which the *jus mariti* and *jus administrationis* are excluded?—Lord Fraser suggests that this is doubtful, but it is thought that the question must be answered in the affirmative. On the theory that courtesy is the extension of the *jus mariti*, it may be difficult to see why courtesy should arise where the husband has had no *jus mariti*. But as already shown in *Clinton* and *Watts*, the Court in questions of courtesy is little moved by considerations of legal principle, and no doubt as to the husband's right to courtesy, although he had no *jus mariti*, appears to have been started by the older writers. In England it is settled that the fact of the wife's estate being held for her separate use does not affect the courtesy.[3]

The Married Women's Property Act, 1881, has not impaired the right to courtesy.

How courtesy is excluded.—Courtesy is barred by being renounced or discharged by the husband, and this is commonly done in marriage-contracts.

The acceptance of a conventional provision is not an

[1] *Monteith* v. *Her Nearest of Kin*, 1717. M. 3117; Ersk. ii. 9, 55; Fr. ii. 1126.

[2] Herries Peerage Claim, 1848, 3 Macq. 585; *see* arg. in *Monteith*, *supra*; Ersk. ii. 9, 54; Riddell's Peerage Law, p. 110.

[3] *Cooper* v. *Macdonald*, 1877, 7 Ch. D. 288, *per* Jessel, M.R.

implied discharge of courtesy.[1]—In this courtesy differs from terce, not being included in the Act, 1681, c. 10.

An alien husband is not entitled to courtesy.—By statute the wife of a natural born or naturalized subject has all the privileges of a natural born subject, and is entitled to terce.[2] But an alien husband, if not naturalized, would have no claim to courtesy.[3]

Caution may be demanded on cause shown.—The husband in right of courtesy may, like other liferenters, be required to find caution under the Acts 1491, c. 25, and 1535, c. 15, if ground be shown for suspecting that he is deteriorating the subjects. But otherwise caution will not be exacted in his case any more than in that of a tercer.[4]

[1] Bell's Com., 5th Ed. i. 636; *Primrose* v. *Crawford*, 1771, as in Hailes, i. 458.

[2] 7 & 8 Vict. c. 66, § 16; 33 Vict. c. 14, § 10.

[3] More's Lectures, i., p. 74.

[4] *Ralston* v. *Leitch*, 1803, Hume's Decis. 293; Ersk. ii. 9, 59; *see Rogers* v. *Scott*, 1867, 5 M. 1078.

CHAPTER XXII.

WIFE AS PARTNER IN A FIRM, OR SHAREHOLDER IN A JOINT-STOCK COMPANY.

1. Partner.—Can a Wife, who is a Partner in a Firm at the date of the Marriage, continue to be a member of the Firm?—At common law the contract of partnership may be dissolved by a material change in the status or condition of one of the partners, as—*e.g.*, if he become insane. And the marriage of a female partner is, in like manner, held to affect so materially her power to fulfil her duties as a partner, as to involve the dissolution of the partnership.[1] In addition to the reason given by Bell, the dissolution of partnership by the marriage of a female partner, may be referred to the principle that this is introducing a new member into the firm without the consent of the other partners. It is on this ground that bankruptcy is a ground of dissolution, for otherwise the bankrupt partner's trustee would be let into the firm.[2] In the words of Lord President Inglis: "The dissolution of a business, by the marriage of a female partner, has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the business without her husband, and she cannot bring him in."[3] There is no case since the Act of 1881 deciding that the marriage of a female partner, subsequent to that date, dissolves the firm. It appears that this is no longer the law of England. But this rests on the Married Women's Property Act, 1882, §§ 1 and 2, which give full contractual capacity

[1] Bell's Com., 5th Ed. ii. 634.

[2] Lindley on Partnership, 5th Ed. 583, 649.

[3] *Russell* v. *R.*, 1874, 2 R. 93.

as to separate estate.[1] It is to be observed that a private firm differs from a joint-stock company in this, that there is a *delectus personarum* exercised in the firm, which does not exist in the joint-stock company. The success of the firm depends on the capacity of the individual partners. It may be ruined by the negligence or ignorance of one of them. In the joint-stock company, as the actual management is delegated to a small number, who are selected presumably for their business aptitude, there is no objection to having many partners who are ignorant of affairs, and the fact that the marriage of a female partner may mean the introducing of her husband as a shareholder, is not of such importance as to dissolve the company.

Can a Wife become a Partner without her Husband's consent?—At common law it is clear that she cannot, and it is thought that the Married Women's Property Acts, of 1877 and 1881, have not given her any power to do so. In a case which arose under the Act of 1877, it was remarked by Lord President Inglis: "It is to be observed that, although a wife may carry on a separate business from her husband, it clearly cannot be contended that she may do so without the consent of her husband. Supposing the husband is of opinion that it is not consistent with his wife's health, or her morals, that she should engage in any separate trade, is it to be said that the curatorial power of the husband is to be abolished, and that the wife is to be allowed to do as she desires, against her husband's wishes?"[2] If she becomes a partner, with her husband's consent, her separate estate will be liable, but her husband incurs no liability.[3]

Can a Wife enter into a trading partnership with her Husband?—It seems to have been assumed, as a consequence of the doctrine of unity of person, that a husband and wife cannot enter into a trading partnership with each other, although the wife possesses separate estate. This was decided

[1] *See* Lindley on Partnership, p. 583; Pollock on Partnership, 5th Ed., p. 86, *note*.

[2] *Ferguson's Trs.* v. *Willis*, 1883, 11 R., at p. 268; and *see Ashworth* v. *Outram*, 1877, 5 Ch. Div. 923, where it is assumed that the husband's consent is necessary to the wife's carrying on a separate trade.

[3] Lindley on Partnership, 78.

in one case by Lord Ivory, Ordinary, and on appeal the point was not argued.[1] The doctrine is approved of by Lord Fraser.[2] In England, a contrary result would, probably, be arrived at.[3]

As the Married Women's Property Acts confer upon a married woman no greater capacity to contract than was formerly enjoyed by a wife in dealing with estate from which the *jus mariti* and *jus administrationis* were excluded, it would seem that she cannot, any more than before, become a partner in business with her husband. And this is supported by section 8, which provides that "this Act shall not affect any contracts made, or to be made, between married persons before or during marriage, or the law relating to such contracts."

2. Shareholder.—At common law the moveable estate of a woman passes, on her marriage, by universal assignation, to her husband. Accordingly, where the *jus mariti* has not been excluded, either by convention or by statute, shares in a joint-stock company held by an unmarried woman become, at her marriage, the property of the husband. It makes no difference that her name remains upon the register, or that the receipts for dividends are signed by her and not by her husband.[4] The position of matters is the same as if the husband had made the investment. The wife is to be regarded as the husband's agent. "If a husband authorises, or allows his wife to use funds belonging to him, for the purpose of a particular investment, or for the purpose of a particular adventure—a trading adventure or other—I hold that, in such a proceeding, the wife is acting merely as the agent of her husband, and that, so acting, she acts for her husband's behoof, and, consequently, binds not herself, but her husband only."[5]

In such a case the husband is the shareholder from the date of the marriage, and he, and not his wife, is liable in respect of all obligations of the company, and his name alone will be placed on the list of contributories in the event of the company being wound-up.[6] And a like result may be arrived

[1] *Macara* v. *Wilson*, 1848, 10 D. 707.

[2] i. 513.

[3] *See* in *re Childs*, 1874, 9 Ch., App. 508; Lindley, *supra*, 691, *note* b, and 78.

[4] *Thomas* v. *City of Glasgow Bank*, 1879, 6 R. 607.

[5] *Ibid.*, *per* L.P. Inglis, at p. 611.

[6] *Ibid.*

at although the wife's name appears upon the register as holder of the shares exclusive of the *jus mariti*, if in fact they were purchased with the husband's funds. Nor are the terms of the transfers conclusive on this latter point. The Court will, if necessary, go behind them, and inquire into the reality of the transaction.

Ill.—Shares were entered in the stock-ledger of a company in the name of "Mrs. A, exclusive of the *jus mariti* and right of administration of her husband." The transfers bore that the money was paid by Mrs. A "out of her own special funds and estate." The dividend warrants were sent to the wife and signed by her. But on proof that the shares were actually bought with the husband's money, and that the dividends had been used by him for his own purposes, it was held that he, and not his wife, was the shareholder, and, in the winding-up of the company, that his name, and not hers, should be placed on the list of contributories.[1] Nor will the husband escape liability by proving that he intended the purchase of the shares to be a donation, at least if his liability as a contributory would be of such amount as to render him insolvent.[2] And even when the donation to the wife might be irrevocable by the husband, as being intended as a "reasonable provision," it would appear that the husband is still the shareholder. For the husband cannot put his funds beyond the reach of his creditors during his lifetime. The doctrine of "reasonable provision" cannot secure the wife in an income during her husband's lifetime. It merely gives her a contingent right to a capital sum in the event of her survivorship. During the marriage, although the husband cannot revoke the provision, it remains his property subject to the wife's claim if she be the survivor. Consequently, if the company be wound-up, *stante matrimonio* the husband and not the wife will be regarded as the shareholder.[3] But a donation, *inter virum et uxorem*, becomes irrevocable on the death of the donor without revoking. Accordingly, where the effect of the evidence was

[1] *Steedman* v. *City of Glasgow Bank*, 1879, 7 R. 111; *Carmichael* v. *City of Glasgow Bank*, 1879, 7 R. 118.

[2] *See* Lord Shand's opinion in *Wright's Exors.* v. *City of Glasgow Bank*, 1880, 7 R., at p. 535.

[3] *Thomas* v. *C. of G. Bank*, 1879, 6 R., per L.P. Inglis, at p. 611.

that the husband intended certain shares, bought by a wife with money which had vested in him *jure mariti*, as a donation to her, and he died without revoking, it was held that the wife was the partner, and that the husband's executors were not to be placed on the list of contributories. And in this case there was no written proof of donation. The money had been originally the wife's. It fell under the *jus mariti*, and the intention to make a donation of it to the wife was inferred from facts and circumstances.[1]

In England this matter has been differently regarded by the Court. Where the company accepted the wife as a shareholder without any misrepresentation or concealment on the part of the husband, it was held by Hall, V.-C., that the name of the wife, and not that of the husband, must be placed on the list of contributories. In this case, as in *Steedman*, the shares were truly purchased with the husband's funds, and he had drawn the dividends and dealt with the shares as his own.[2] It rests on the principle recognised in various cases that where a company accepts a new shareholder and agrees to allot shares to him, they cannot claim to have the name of another person put on the register on the ground that the shareholder they took was a "man of straw," whom the other employed to screen himself from liability.—*E.g.*, A. bought shares in a company. On discovering that the vendor was a director, A. gave as the name of the transferee a foreman in his employment, earning weekly wages of two guineas. In the transfer the foreman was described as "gentleman," and his address given at the works where A. carried on business. The company being wound-up, an application was made to place A. on the list of contributories. But Jessel, M.R., refused the application, and said "A. was never a shareholder. He had entered into no contract with the company. He made no bargain with the company to undertake any of their liabilities. A trustee for him had, and that trustee is the shareholder. . . . Neither directly nor indirectly had A. anything to do with the company."[3]

It does not seem easy to reconcile these cases with the

[1] *Wright*, *supra*.

[2] *London, Bombay, &c., Bank*, 1881, 18 Ch. D. 581.

[3] *Williams'* Case, 1875, 1 Ch. D. 576; and *see King's* Case, 1871, L.R. 6 Ch. App. 196.

principle laid down in *Steedman* and *Carmichael*. They must be distinguished from the class of cases in which a person who is already a shareholder, and therefore under liability to the company, seeks to escape such liability by a fictitious transfer to another, who in reality is to hold the shares for the transferor. In such cases it is the transferor who is the contributory.[1]

Wife as Shareholder in respect of her Separate Estate.—If a woman at her marriage hold shares exclusive of the *jus mariti*, or if they come to her *stante matrimonio*, by succession, or donation under a deed which excludes the *jus mariti*, the wife and not the husband is the partner. And since 18th July, 1881, the exclusion is effected by statute, and a woman shareholder who was married after that date, or has acquired shares thereafter, *quocunque modo*, holds them as her separate property, and she, and not her husband, is the partner. This is subject to an exception in the case where, before the passing of the Act, the husband has by irrevocable deed made a reasonable provision for his wife in the event of her succeeding him.[2] On the other hand, the operation of the statute may be extended to property of a wife married before the passing thereof if the spouses have declared by mutual deed their intention that the wife's whole estate shall be regulated by the Act, and have adopted the statutory procedure.[3] But, as already explained, the fact that the shares stand in the married woman's name, exclusive of the husband's rights, is not conclusive evidence that they are truly hers, but merely raises a presumption which may be rebutted.[4]

Can a Wife become a Shareholder without her Husband's Consent?—The reasons which appear to be fatal to her right, against her husband's wish, to become a partner in a private firm do not apply, or at least apply with much diminished force, to her right to take shares in a company. For this does not involve her in duties of personal supervision and management such as might, in her husband's view, withdraw

[1] *Hyam's* Case, 1859, 1 De G., F. and J. 75; Lindley on Company Law, 6th Ed., p. 827.

[2] 44 & 45 Vict. c. 21, § 3, sub-sec. 1.

[3] *Ibid.*, § 4.

[4] *Steedman*, *supra*, 1879, 7 R. 111; *Carmichael*, *supra*, 7 R. 118.

her too much from her domestic affairs. It seems quite reasonable, unless the husband's curatory is to be abolished, that he should be entitled to say, "I do not choose that you should spend your time in a shop. I prefer that you should remain at home." But reasons of this kind have little weight if the partnership is in a joint-stock company. If the money is the wife's own, and she has full control of it, why may she not invest it as she pleases? It has, accordingly, been said that when a married woman has separate estate, she may invest it in the shares of a company even against her husband's wish.[1]

This was held in England, and the principle thus stated by Kindersley, V.-C., following Turner, L.J., "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case."[2]

And in the case of *Biggart*, where a married woman invested funds of her own, from which the *jus mariti* and *jus administrationis* were excluded, in shares of a bank, it was held that she had validly become a partner, and rendered her separate estate liable. L.P. Inglis said: "She has become a partner of this bank unless the Act is a nullity; and in becoming a partner of this bank she must bind somebody to meet the liabilities of the bank, *pro rata*. She certainly did not bind her husband by what she has done, because it might have been done, as I have said before, not only without his consent or knowledge, but *against his express desire;* and, therefore, I am very clear that she could not bind her husband in doing it. But if she could not bind her husband,

[1] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470.

[2] *Mrs. Matthewman's* Case, 1866, L.R. 3 Eq. 781.

does it not of necessity follow that she must have bound herself?"[1]

The force of this reasoning is, however, greatly weakened if a married woman by taking shares exposes her husband to the risk of himself being placed on the list of contributories in terms of section 78 of the Companies Act, 1862, a question dealt with immediately. Should this be held to be the law, it would seem reasonable that a husband should be able to prevent his wife from investing her funds in joint-stock companies. It would be most inequitable that a married woman possessing £5, exclusive of the *jus mariti*, should have it in her power to invest it in a share of a bubble company, and thereby render her husband's whole estate liable in the winding-up of the company.

Right of Administration not excluded.—A married woman cannot without her husband's consent invest in the shares of a company funds from which the right of administration has not been excluded as well as the *jus mariti*. The husband's right of administration, as explained in the chapter dealing with the capacity of a wife to contract, has not been taken away except to a strictly limited extent. It is excluded from funds which belong to the wife in virtue of a deed by which the husband's right of administration is excluded, or which consist of her earnings, or of the rents of her heritage, or of the income of her moveables, or, lastly, when she has a protection order, or has been judicially separated, from her funds acquired after the decree or the date of the order. Even in these cases the liability which may attach to the husband under section 78 of the Companies Act makes it, for the reasons stated above, not free from doubt whether the wife can invest her funds in shares against his consent. As regards the *corpus* of her moveable estate, which in virtue of the Married Women's Property Act is now vested in her exclusive of the *jus mariti*, it is clear that she has no power to invest it without her husband's consent.[2]

Husband's liability as Contributory.—When a married woman holds shares which by convention or statute are

[1] 6 R., at p. 481.

[2] 44 & 45 Vict. c. 21, § 2.

exclusive of the *jus mariti*, is her husband liable as a contributory in the winding-up of the company? This question is at present involved in much obscurity. The Companies Act, 1862, § 78, provides: "If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly." It is worthy of argument that this section means if a woman marries after the winding-up has commenced. Before then she is a shareholder, but not a contributory. Section 74 is ambiguous: "The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound-up." The view that "contributory" is a term having no meaning until the company is wound-up is supported by a *dictum* of L.J.C. Inglis, who says: "The term contributory is therefore not identical with the term shareholder of the company. Many people may be contributories who are not shareholders, and there may be shareholders who are not contributories. A contributory is a person liable to make contributions to the assets of the company when it is being wound-up, for the purpose of paying the debts of the company."[1] But an opposite view was taken in England by Fry, J. A woman holding bank shares, which belonged to her absolutely, married. By settlement before the marriage the shares were assigned to a trustee for the wife for her separate use. Six months after the marriage the bank was wound up. The names of both the husband and the wife were placed on the list of contributories, the husband being entered "as a member or contributory in his own right." The husband applied to have his name removed from the list. It was argued for him that in any event he was only liable to the extent of the property he had received through the marriage, a husband's liability for his wife's ante-nuptial debts being thus limited by the Act of 1874 then in force. But Fry, J., held, on the construction of sections 78 and 75 of the

[1] *Mitchell*, 1863, 1 M., at p. 1118; and *see* Buckley on the Companies Acts, 6th Ed., p. 207.

Companies Acts, that the husband's liability was in his own right and could not be thus limited. "He is," said that learned judge, "in the position of a debtor, and not merely the husband of a debtor. He is a contributory himself, and not merely the husband of a contributory, and that liability to contribute, which is made equal to a debt of his own, cannot be affected by the Act of 1874, which only deals with the husband's liability in respect of his wife's debts. Therefore it does not touch the husband's own liability to contribute."[1]

And in the case of *Hill* v. *City of Glasgow Bank*, where an unmarried woman held shares as a trustee, and married, the names of both her husband and herself were placed upon the list.[2] There is perhaps no conflict between these cases and those of *Biggart*[3] and *Mrs. Matthewman*.[4] And it is submitted as a sound proposition in law that if a woman who is already married invest part of her estate, which she holds exclusive of the *jus mariti* and right of administration, in the shares of a company, and the company accept her as the shareholder, her separate estate will be liable to contribute, and her husband does not incur any liability.[5] And the same result would follow if she so invested funds held by her in virtue of the Married Women's Property Act, and her husband consented to the investment. For section 78 of the Companies Act appears to apply only to women who were shareholders before marriage. It was enacted to prevent the manifest injustice of permitting a woman, who had already incurred certain liabilities to the company, to escape these liabilities by marrying. But if a company admit as a partner a woman who is already married, equity demands that she shall be considered as contracting on her own behalf, and as binding her separate estate, but not her husband. The hardship of such a case as *ex parte Hatcher*, has been remedied in England by an express enactment limiting the liability of a husband, married after the Act, in respect of his wife's obligations as a shareholder entered into before her marriage, "to the extent of

[1] *Ex parte Hatcher*, 1879, 12 Ch. D. 284.

[2] 1879, 7 R. 68.

[3] 6 R. 470, *supra*.

[4] L.R. 3 Eq. 781, *supra*.

[5] *Biggart*, 6 R. 470, *supra*; *Forbes* v. *City of Glasgow Bank*, 1879, 6 R. 1122; Lindley on Company Law, p. 41.

all property whatsoever belonging to his wife which he shall have acquired, or become entitled to, from or through his wife."[1]

No such provision occurs in the Scottish Act, and, accordingly, if the reasoning of Fry, J., in *ex parte Hatcher* be sound, the man who marries a woman who is a shareholder makes himself liable *in solidum* as a contributory, in the event of the company being wound-up. The question does not appear to have been argued in *Hill's* case, which is further distinguishable from *ex parte Hatcher*, in this important respect that in *Hill* there was no marriage-contract, and the wife's shares passed to her husband on her marriage, whereas in *ex parte Hatcher* the shares were separate estate of the wife. But in the case of *Hill* it does not appear, from the report, that the wife's obligation to contribute was treated as an ante-nuptial debt, or that the husband's liability was limited to the amount by which he was *lucratus* by the marriage. On the other hand, in the previous case of *Wishart* v. *City of Glasgow Bank*,[2] it was distinctly laid down that a husband married after 1877 was entitled to have his name removed from the list of contributories, on surrendering any property which he had acquired through his wife. It is to be observed that the husband's liability, under section 78, is expressly limited to the continuance of the marriage.

[1] Married Women's Property Act, 1882, § 14, *see* § 13; but Lord Thring thinks it even still open whether he is not liable *in solidum*. Thring on Companies, p. 87.

[2] 1879, 6 R. 823.

CHAPTER XXIII.

WIFE'S HERITABLE ESTATE.

1. Where the *jus mariti* and right of administration are both excluded.—In this case a wife may deal with her heritage, in all respects, as if she were unmarried.[1] This was doubted in one case,[2] but it underlies the judgment in *Biggart*, and is stated expressly, by Lord Gifford, in a recent decision.[3] Accordingly, where the Court found that the terms of a deed of separation imported a renunciation of the right of administration, it was held that a wife's lease of her heritage was valid.[4] The husband has here no power, authority, or right of any kind in his wife's heritage.

2. Where the Wife's Heritage vested in her prior to the Act of 1881, or the operation of the Act is excluded by the Husband having made a reasonable Provision by irrevocable Deed.—At common law a married woman's heritage does not fall under the *jus mariti*, but the husband is entitled, in virtue of that right, to the annual fruits. And he is possessed of all the powers of a proprietor over her heritage, subject to the important limitation that he cannot, without her consent, alienate the lands, or burden them beyond the period of the joint life of the spouses, or of his own life, if he enjoys the courtesy.[5]

The husband may, without his wife's consent, grant a lease of her lands, which will be good for the period of his

[1] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470; *Annand* v. *Chessels*, 1775, 2 Pat. 369.

[2] *Gordon* v. *G.*, 1832, 11 S. 36.

[3] *Standard Property Investment Co.* v. *Cowe*, 1877, 4 R. 695.

[4] *Keggie* v. *Christie*, 25th May, 1815, F.C. And *see* More's Notes, xvii., and Fr. i. 814.

[5] *Kennedy* v. *Watson*, 1848, 11 D. 171.

administration.[1] And he may assign the rents for the same period.

The Husband's right to the Rents may be attached by his Creditors, and passes to the Trustee in his Sequestration.—The nature of the husband's right has been disputed, and the question raised whether it is heritable, and, therefore, a proper subject of adjudication, or moveable, and to be attached by arrestment.

But it is now settled that the right, being one which bears *tractum futuri temporis*, is to be adjudged.[2] The view that the husband's right is not continuous, but is merely a right to draw certain moveable funds when they fall due, is expressed in a more recent case, by Lord Fullerton.[3] But such an adjudication, to be effectual, must expressly include the *jus mariti*. *Ill.*—A creditor of the husband led an adjudication against certain lands, as being his property, "with all right, title, and interest which the said defender has, or can claim thereto." It was afterwards found that the lands belonged to the debtor's wife, and it was held that the adjudication, with this general clause, had not competently attached the husband's right to the future rents.[4]

The husband's right being adjudgeable, passes to the trustee for creditors, by the general adjudication of the bankrupt statute.[5] And where a wife granted a bond and disposition of her heritage, in security of her husband's debt, to which the husband was a party, "for all right or interest which I (husband) have, or can pretend in or to the said subjects, *jure mariti* or otherwise," it was held that this was a valid assignation of his right to future rents, and that the creditor in the bond must value and deduct this right, before being entitled to a ranking.[6]

It was contended in an old case that a wife was entitled to aliment out of the rents of her heritage in the event of her

[1] *Grieve* v. *Pringle*, 1797, M. 5951; Bell's Prin. i. 1184; More's Notes, xx.; Fr. i. 812; Rankine on Leases, p. 22. There is a conflicting decision, *Gibson* v. *Aitken*, 1798, Hume, 205.

[2] *Smith* v. *Frier*, 1857, 19 D. 384; *Calder* v. *Steele*, 19th Nov., 1818, F.C.; Ersk. ii. 12, 6; Fr. i. 761.

[3] *Borthwick* v. *M'Farlane*, 1844, 6 D. 1290.

[4] *Calder*, *supra*.

[5] *Borthwick*, *supra*.

[6] *Ibid*.

husband's bankruptcy. The argument was urged that she was really the fiar, and her husband the life-renter of her heritage, and that a fiar who has no separate means of livelihood must be alimented by the life-renter. But this was negatived.[1]

The husband having no right of property in the *corpus* or stock cannot sue or transact with reference to it.—Where a husband brought, in his wife's name, a reduction of a deed *ex capite lecti*, which, if successful, would have had the effect of carrying certain lands to his wife, it was held that this required his wife's concurrence, and the defender was assoilzied.[2]

And on the same principle where a husband entered into a submission as to the validity of a deed conveying heritage to his wife, it was held that the submission was not binding on the wife, in respect she was not a party to it, and had not homologated it.[3]

Powers of Wife over her Heritage.—As has been already stated, a wife cannot alienate or burden her heritage, or perform any act of management without her husband's consent and concurrence.[4]

Deeds should be executed by both Spouses.—Whenever it is proposed to alienate or burden the wife's heritage, the concurrence of both spouses is necessary. And as the husband consents not merely as his wife's curator, but as himself having an interest in the subjects, it is proper that this should be set forth. The usual style is, "I, A, wife of B, heritable proprietrix of the subjects hereinafter disponed, with the special advice and consent of my said husband, and I, the said B, for myself, my own right and interest, and as taking burden on me for my said wife, and we both with joint consent and assent," &c.[5] It is then usual for the wife to ratify the deed.[6]

A minor wife may set aside a deed granted by her with consent of her husband to her lesion.[7]—It would be obviously unjust that a wife in minority should be in a worse position as

[1] Robb, 1794, M. 5900.
[2] *Aitkens* v. *Orr*, 1802, M. 16,140.
[3] *M'Cally* v. *Inglis*, 1821, 1 S. 69.
[4] Ersk. i. 6, 27; Fr. i. 804; and *see supra*, p. 178.
[5] Jurid. Styles, 5th Ed., I., p. 97.
[6] *See infra*, "Ratification."
[7] *Gibson* v. *Scoon*, June 6, 1809, F.C.

to restitution than an unmarried woman being a minor with curators. The argument was thus stated: "A father is likely to appoint, and even a minor to chuse, curators, more fit for the discharge of that duty than the husband who has been the choice of a girl under age."[1]

Husband can consent to Deed in his own favour.—A major wife may execute a deed in favour of her husband which will be sustained, but may be revocable as a donation. To such a deed the husband may give his formal consent. But if the deed be a direct donation to him, his acceptance of it will be sufficient evidence of his consent.[2] When the wife is minor, Erskine suggests that there may be a difficulty in respect that the husband is then curator to a minor, and that no curator can be *auctor in rem suam*.[3] But probably the wife is sufficiently protected by the fact that she can revoke a donation, or avail herself of the plea of minority and lesion.

Proof of Husband's Consent.—As already stated, his consent to a deed in his own favour is presumed. It is not sufficient evidence of the husband's consent that the deed was in favour of the trustee for his creditors.[4] Nor that it was in favour of his relations. In one case, the spouses had mutually conveyed their estate to the survivor, "reserving power to alter, at any time of our life, as either of us shall think fit." The day before the husband's death, the wife executed a deed conveying part of the estate, under burden of her life-rent, to her husband's relations. The deed proceeded on the narrative that it was granted by her, from a desire to fulfil his wish. But it was held to be null, for want of his concurrence as a party.[5]

It would appear that a husband's consent to his wife's deed may be proved, *rebus ipsis et factis*. But where the transaction is one to which writing is essential, it is as necessary that his consent should be in writing, as that of the wife herself. For her deed, without his concurrence, is not valid

[1] *Gibson* v. *Scoon*, June 6, 1809, F.C.

[2] Bell's Prin. ii. 1610; Ersk. i. 6, 23.

[3] *Ibid.*

[4] *Dick* v. *Donald*, 1826, 2 W. and S. 522.

[5] *Brownlee* v. *Waddell*, 1831, 10 S. 39.

to any effect.[1] If, however, a case were presented, in which a wife was averred to have made a verbal contract as to heritage, which had been validated by *rei interventus*, it is still unsettled if the husband's consent might not be established by reference to the oath of the husband and wife.[2]

It was held in an old case, where a husband had written a disposition by his wife of her lands, and had subscribed it as a witness, that this was sufficient evidence of his consent.[3] Even where he merely subscribes as witness, there is a presumption arising from his relation to the granter that he knew and approved of the contents of the deed. But this presumption may be rebutted.[4]

A Deed null for lack of Husband's concurrence may be homologated by the woman, when *sui juris*.—Thus, where a wife had granted a personal bond, upon which she paid interest after her husband's death, it was found that this payment, during viduity, amounted to homologation of the null bond.[5]

Will the Husband's subsequent consent Validate the Deed?—This is still undetermined. The negative was found in an old case.[6] But in a later case an opposite decision was given.[7] The question was touched in another case. But there the ratification by the husband was after the wife's death. It was held, in a question with her heir-at-law, that the deed was not validated.[8] But where a married woman raised letters of horning in her own name, and without the concurrence of her husband, under which she executed a poinding, it was held that the poinding was validated by the consent of her husband, subsequently interposed.[9] The question was mentioned by Lord Kinloch in a modern case as still open.[10]

[1] *Dickson* v. *Blair*, 1871, 10 M. 41.

[2] *Ibid.*

[3] *Riddell* v. *Scot*, 1728, M. 5681.

[4] *Hepburn* v. *Kirkwood*, 1686, M. 5650; *Halyburton* v. *H.*, 1666, M. 5675; *Johnstone* v. *Berry*, 1725, M. 5657; Dickson, i. § 862.

[5] *Mitchell* v. *Cunningham*, 1672, M. 5711.

[6] *Dunbar* v. *Melville*, 1566, M. 6001.

[7] *Cochran* v. *Hamilton*, 1698, M. 6031.

[8] *Bullions* v. *Bayne*, 1793, M. 6149.

[9] *Borthwick* v. *Grant*, 1829, 7 S. 420.

[10] *Dickson* v. *Blair*, 1871, 10 M., at p. 46.

Husband *civiliter mortuus*, or Insane.—There is some obscurity as to what amounts to civil death, and the proposition that a woman, whose husband is *civiliter mortuus*, may deal with her heritage as if unmarried, does not seem to be supported by any authority. At anyrate, it is thought the doctrine would not be extended beyond that laid down by Erskine. He says: "Where the husband is, from furiosity or other disability, rendered incapable of interposing his consent as curator,[1] the necessity of the case may support a deed granted by the wife alone, affecting her heritage, if it be rational."[2] The case of *Bold* v. *Montgomerie*[3] is open to the remark made by Lord Fraser that the insane husband's rights were reserved in the deed found valid.

Even in this modified form the statement is not otherwise supported, and is very questionable. Bankton says: "The wife cannot subscribe deeds, *inter vivos*, without the husband's concourse to authorise her, even though they respect only her own heritage, to take effect after dissolution of the marriage; but, if the husband is furious, or absent out of the kingdom, such deeds relating to her own interest, to be effectual after the marriage is dissolved, will be good, though the husband does not subscribe consenter, the necessity of the case making way for this exception. The like will hold, upon the supervening of his forfeiture, or any other disability."[4]

The other institutional writers are silent on the point. Lord Fraser thinks the husband's subsequent ratification, *stante matrimonio*, would validate the wife's deed.[5]

When Husband's Consent may be dispensed with.—A wife judicially separated, or with a protection order, may deal as if unmarried with her heritage acquired after the decree, or the presenting of the petition for the order, subject in the latter case to the restriction that the protection shall not extend to property of which the husband has before that date obtained lawful possession, or against which a creditor of his has done diligence.[6]

Lord Fraser thinks that a wife whose husband was abroad

[1] *See* Fr. i. 819.
[2] i. 6, 27, *ad fin.*
[3] 1729, M. 6002.
[4] Bankton, i. 5, 67.
[5] i. 806, *ante* previous page.
[6] Conjugal Rights Amendment Act, 1861, §§ 4, 5, 6.

might validly alienate or burden her heritage if that were necessary for her support.[1] But this appears to be contrary to the case of *Boyle*. There the husband had emigrated to America, leaving his wife destitute. She alienated "certain coal" for £30, reserving a power of redemption to her husband. In an action of reduction at the instance of the spouses, the Court found the deed null.[2] If Lord Fraser's view be sound, the plea that the deed was good as granted to raise necessary aliment should have been sustained.

Court may dispense with Husband's Consent.—But a wife in this position may now take advantage of the Married Women's Property Act, 1881, which provides (§ 5): "When a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff-Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

The *jus mariti* and right of administration are not excluded from the Income of Heritage of which the fee vested in the Wife prior to the Act.—This was held in a case where there was a life-rent interposed, and the wife who was the fiar did not become entitled to the rents till after the Act.[3]

3. Rights of Spouses in Wife's Heritage to which the Act applies.—The Act provides (§ 2): "When a marriage is contracted after the passing of this Act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband." Its application is not limited as is section 1, which deals with moveables, to the case in which the husband's domicile was in Scotland at the time of the marriage. The tenants of a Scotswoman who marries a foreigner will therefore be in safety in paying rents to her on her individual receipt. It applies to heritage acquired by the wife after the Act, unless the husband "have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him."[4] But not to heritage

[1] i. 817.

[2] *Boyle* v. *Crawford*, 1822, 1 S. 372 (N.E. 350).

[3] *Horsburgh* v. *Scott*, 1889, 16 R. 507.

[4] Section 3, sub-sec. 1.

vested in the wife prior to the Act,[1] unless where the parties have by mutual deed declared that the wife's whole estate shall come under the Act, and have complied with the conditions therein set forth.[2] The husband having now no right to the rents of the wife's heritage, it follows that he cannot, as formerly, sue for them, or give a receipt to tenants, or grant a lease, or in any other way exercise the powers of a proprietor. But the exclusion of the husband's rights is limited to the rents and produce, and the wife cannot any more than formerly sell or burden the *corpus*. She may grant a receipt for rents, and it would appear, but is not settled, that she may assign prospective rents.[3] It is also possible, though more doubtful, that her right would be sustained to grant a lease or exercise other acts of administration not affecting the *corpus*.[4]

[1] *Horsbrugh, supra.*
[2] Section 4.
[3] *See supra*, p. 178.
[4] Mr. David Murray thinks she has no such power. "Property of Married Persons," p. 67.

CHAPTER XXIV.

JUDICIAL RATIFICATION OF WIFE'S DEEDS.

It was very early felt to be necessary to protect persons dealing with a married woman from the risk of a reduction, at her instance, based upon the ground that she had been compelled by her husband to grant the deed in dispute. The somewhat unusual course was taken of converting a decision in a particular case into a statutory enactment. The title of the Act, 1481, c. 83, is as follows :—"Ane woman conjunct fear makand faith that scho sall never cum against the Alienation theireof, sall nocht be hearde afterwardes to impugne the said Alienation." And the body of the Act runs thus :—

"**Memorandum.**—The sext day of March, the zeir of God 1481 zeires, Robert Danielstoun, was persewed be a woman called Glen, before the Lords of Councel, and scho wald have cummin against her aith, that scho maid in judgement before the Official of Glasgow, and there was schawin ane Instrument under the seale of the said Official, that scho consented to the alienation of sik lands, and swore that scho suld never cum in the contrair hereof, and wauld have the saidis landes, alleageand that it was her conjunct-feftment, and maid revocation after her husbandis decease, sayand that he compelled her thereto. The action was delivered against this woman." [1]

Present Practice.—The wife appears before any justice of peace, usually at his private house, and there, outwith the presence of her husband, declares on oath that the deed was freely granted by her. Her declaration is commonly endorsed on the deed to be ratified, but may merely refer to this deed. The old form of preparing a notarial instrument setting forth the ratification is now obsolete. The ratification is sufficiently

[1] Ersk. i. 6, 33 ; Fr. i. 820.

attested by the subscription of the wife and the justice of peace, without witnesses, the act being of a judicial nature.[1] The usual form is the following :—

At , the day of , 18 , in presence of F, one of Her Majesty's Justices of the Peace for , compeared personally B, wife of A, and, in absence of her said husband, ratified and approved of the within disposition (if the ratification be separate from the disposition, say of a disposition, dated , granted by her said husband for himself, with consent of her the said B, and by her for herself with consent of her said husband, and by them both with joint consent and assent, in favour of D, of the lands of E, and others therein specified), and that in the whole articles and clauses thereof; and declared that she was no ways coacted, compelled, or seduced to grant or concur in the same, but that she did so of her own free will and motive; and she gave her great oath that she should never quarrel or impugn the same, directly or indirectly, in any manner of way, in time coming, as she should answer to God, &c.

(*Signed*) B.
„ F, *J.P.*

If the ratification be separate from the disposition, a docquet should be endorsed on the latter, stating that it is the disposition referred to in the ratification. The docquet should be signed by the wife and the justice of peace.[2]

The ratification is of no value unless made in the absence of the husband, and this fact must be expressly stated.[3] It was formerly doubted if a simple declaration was not sufficient, but it is now fixed by statute that the wife's oath is necessary.[4]

Ratification not essential.—It is stated by Mr. Bell that deeds of alienation by a wife of her own property are presumed to proceed from the husband's undue influence, the presumption being counteracted by her judicial ratification. But this appears somewhat too strongly laid down, and is not supported by the passages in Erskine cited by him.[5] Such a deed

[1] M. Bell's Conv., i. 134.
[2] Jurid. Styles, i. 96.
[3] Ersk. i. 6, 33.
[4] 6 & 7 Will. IV. c. 43.
[5] Bell's Prin. ii. 1615, and *see* Ersk. Prin. i. 6, 19 (18th Ed.); and Inst. i. 6, 34 and 36.

granted by a wife is valid although not ratified, unless she prove that it was extorted from her *ex vi aut metu*, or qualify some other good ground of reduction.[1] But where ratification has been asked and refused, very slight evidence of undue influence by the husband would be sufficient.[2]

Ill.—A husband had by antenuptial marriage-contract conveyed certain heritage to his wife in life-rent. Being in embarrassed circumstances, he obtained her concurrence to a disposition of the property liferented by her. She averred that he came into her bedroom when she was unwell and told her that he was threatened with ruin by the bank if she did not grant the deed. She had had no previous intimation, and at first refused, but he threatened that if she did not sign it he would flee the country to escape imprisonment, and leave her and her children to do as they best might. At this juncture the bank agent came with the deed prepared. Without reading it or having it explained to her, she signed it. The deed was not ratified. In a reduction by her, on the head of force and fear, fraud and essential error, it was held that the averments as to force, fear, and fraud were not relevant. Lord Deas said, "Here the only fear alleged is fear of consequences, which it was quite lawful for the bank to hold out, and equally lawful for the husband to communicate to his wife, as well as to tell her what he himself might thereupon feel constrained to do in order to avoid imprisonment and gain a livelihood; and when the wife, to avoid the consequences thus impending, agreed to sign the deed, it would be more correct to say that she acted from affection than that she acted from fear; and although affection may no doubt induce fear for the person who is its object, yet if the fear so induced be merely the fear of, or in other words, the desire to avoid such consequences as are stated here, all which might have ensued without illegality on the part of anybody, this is not the sort of fear which we can hold relevant to avoid a formal and delivered deed. The bank threatened nothing which was unlawful, and the husband held out nothing which was unlawful, for he only said he would be constrained to leave the country,

[1] *Buchan* v. *Risk*, 1834, 12 S. 511; *Standard Property Co.* v. *Cowe*, 1887, 4 R., *per* L.J.C. Moncreiff, at p. 702.

[2] *Buchan*, *supra*, *per* Lord Moncreiff, at p. 514.

which might be a very natural course for him to take to avoid imprisonment, and seek a livelihood, and was very different from the case put (upon which I give no opinion) of a threat by the husband to commit suicide, or some other violent and unlawful act."[1] A proof before answer was allowed of the averments as to essential error. This case is a good illustration of the doctrine that a deed, although unratified, will stand unless *vis et metus* be proved, and that it is not enough to show that it was granted *ex reverentia maritali*. If a wife chooses out of affection to bestow her property on her husband, the law interposes no obstacle.

Ratification will bar Challenge though the Deed be in favour of the Husband.—A wife may effectually convey her separate estate to her husband or his creditors.[2] Such a deed is revocable as a donation, but only in a question with him. If a right is conferred upon an onerous third party, and the deed is ratified, the wife cannot reduce it on the head of undue influence by the husband.[3] She may, in a question with her husband, claim to be reimbursed.[4]

A Deed, though Ratified, may be reduced on grounds not covered by the Ratification.—The purpose of ratification is limited to the exclusion of challenge, on the ground of the husband's undue influence. It is not intended to make the deed of a wife unchallengeable on a ground upon which the deed of any person *sui juris* might be set aside. Accordingly, if she can prove that she was induced to grant it by fraud, even of her husband, or by force exercised by a third party, or that there was essential error, she will be successful in a reduction.[5]

May the Wife plead that the Ratification itself was extorted *ex vi aut metu*?—It is quite settled that ratification is an absolute bar to challenge on the ground of the husband's undue influence, even although the wife should make the most specific averments.[6] But the question is not

[1] *Priestnell* v. *Hutcheson*, 1857, 19 D., at p. 500.

[2] *Buchan*, *supra*.

[3] *Standard Co.*, *supra*, *per* Lord Gifford, at p. 704.

[4] *Ibid.* And Ersk. i. 6, 35.

[5] Ersk. i. 6, 35; Fr. i. 823.

[6] Ersk. i. 6, 34; 1 Bell Com., 5th Ed., 143.

free from doubt whether a reduction might not be sustained on proof that the ratification was extorted by force as well as the deed ratified. The affirmative view has the authority of Erskine.[1] It is also supported by Professor Menzies, who refers to the case of *M'Neill* v. *Steel's Trustees*[2] as an example of a deed reduced at the instance of a wife, though ratified by her. But that case was not a reduction *ex capite metus*, but a claim to revoke on the ground that the deed was a donation between the spouses. In such a question ratification is immaterial. Professor Montgomerie Bell also thinks ratification would not absolutely exclude reduction.[3] But the opposite doctrine was expressly determined in an old case,[4] and i supported by Bell, who thinks that proof that the ratificatio was extorted would not be admissible "unless the party taking benefit by the deed should be proved to have been participant in the violence, or at least to have had notice of the compulsion under which the deed was granted and the ratification made."[5] Lord Fraser expresses no clear opinion, but rather seems to think ratification an absolute bar.[6] He cites Bankton[7] as in favour of that view, but all that is there said is that "a ratification upon oath excludes the wife's reduction upon the head of force, though she was actually compelled." It does not appear that Bankton here considers the point whether averments would be competent that the ratification itself was extorted. And the same remark applies to the passage in Mackenzie's Institutes,[8] also cited by Fraser. But the doctrine seems to be supported by Craig.[9] The question must be considered open. No doubt, very clear evidence of force and fear would be required before the Court would reduce a ratified deed. But the principle that any deed granted without genuine consent is null, is one so deeply founded in our law, that it is hard to think plain proof would be excluded that the ratification was extorted. This is the opinion of the learned editor of the last edition of Erskine's "Principles."[10]

[1] i. 6, 34.
[2] 1829, 8 S. 210; Menzies, p. 41.
[3] Conv. i. 135.
[4] *Grant*, 1642, M. 16483.
[5] 1 Comm., 5th Ed., 143.
[6] i. 822.
[7] i. 5, 79.
[8] i. 6, 14.
[9] Jus Feudale, ii. 22, 16.
[10] i. 6, 19.

CHAPTER XXV.

PARAPHERNALIA AND PIN MONEY.

PARAPHERNALIA, in the language of the Roman Law, denotes all property belonging to the wife which was reserved from the *dos* or *φερνή*, and remained, therefore, the separate estate of the wife. The law is thus stated in the Code, in a decree by the Emperors Theodosius and Valentinian:—"Hac lege decernimus, ut vir in his rebus quas extra dotem mulier habet, quas Græci *parapherna* dicunt, nullam uxore prohibente habeat communionem, nec aliquam ei necessitatem imponat."[1] Its meaning has, however, been greatly restricted in our law, and is now limited to the wife's dress and ornaments, and such articles of furniture as are suitable for keeping these things, and have been appropriated to that purpose.

Nothing is paraphernal except the wife's clothes, and things "quae sunt de mundo muliebri."[2] Paraphernalia do not fall under the *jus mariti*, and if given by the husband to the wife are not revocable like other gifts.[3] Nor are they affectable by the husband's debts.[4] The leading case is *Dicks* v. *Massie*,[5] where "the Lords found that, under the paraphernalia peculiarly belonging to the wife, and no ways entering into the communion of goods betwixt the husband and her, are comprehended the *mundus* or *vestitus muliebris*—viz., all the body-cloaths belonging to the wife, acquired by her at any time, whether in this or any prior marriage, or in virginity or viduity; and whatever other ornaments or other things were peculiar to her person, and not proper for men's use or wearing, as necklaces, earrings, breast-jewels, gold chains, bracelets, &c., and that under child-bed

[1] Code 5, 14, 8.

[2] *Mistress of Gray* v. *The Master*, 1582, M. 5802.

[3] *Craig* v. *Monteith*, 1684, M. 5819; Ersk. i. 6, 15.

[4] *Ibid.*

[5] M. 5821 (1655).

linens as paraphernal and proper to the wife, are to be understood only the linen on the wife's person in child-bed, but not the linens on the child itself, nor on the bed or room, which are to be reckoned as moveables, and, therefore, found the child's spoon, porringer and whistle, are not paraphernal, but fall under the communion of goods, but that ribbons, cut or uncut, are paraphernal and belong to the wife unless the husband were a merchant; and found that all the other articles are of their own nature of promiscuous and common use, either to men or women are not paraphernal, but fall under the communion of goods, unless they become peculiar and paraphernal by the gift and appropriation of the husband to her, such as a marriage-watch, rings, jewels, and medals, &c. But found that a purse of gold or other moveables, that by the gift of a former husband became properly the wife's goods and paraphernal, exclusive of the husband, are only to be reckoned as common moveables *quoad* a second husband, unless they be of new gifted and appropriated by him to the wife again: And found that such gifts and presents as one gives to his bride before or on the day of the marriage are paraphernal and irrevocable by the husband during that marriage, and belong only to the wife and her executors, but found any gifts given by the husband to the wife after the marriage-day are revocable, either by the husband's making use of them himself or taking them back during the marriage,[1] but if the wife be in possession of them during the marriage, or at her death, the same are not revocable by the husband thereafter. And found cabinets, coffers, and other alleged accessories for holding the paraphernalia are not paraphernal, but fall under the communion of goods.[2] Some of the Lords were for making anything given the next morning after the marriage paraphernal, called the morning gift[3] in our law, but the Lords esteemed them man and wife then, and so revocable." It was at one time common for the bridegroom to present the bride with a purse containing antique or curious coins or medals. These so-called "purse-pennies" were paraphernal. This would not be the

[1] *I.e.*, if they be not properly paraphernal in character. Ersk. i. 6, 15; Fr. ii. 774; and *see* a case in the Sheriff Court—*M'Kellar* v. *Watson*, 1886, 4 S.C.R. 78 (Sheriffs Lees and Berry).

[2] But *see contra Pitcairn* v. *Peatherer*, 1716, M. 5825, and *Cameron* v. *M'Lean*, 1870, 13 S.L.R. 278.

[3] The *Morgengabe* of German Law.

case if the coins had been such as were in common currency. But, *e.g.*, "Spanish pistoles, French Louis d'ors, Hungary ducats, English Jacobus's and Carolus's, &c., though all these had a determinat known value" would probably be *inter paraphernalia*.[1] In fact they must be such coins as the husband must be presumed to have given to the wife not to spend, but to keep as tokens or souvenirs of the marriage.

With regard to a wardrobe used for a time by both spouses but afterwards by the wife alone, Lord Deas gave the following exposition of the law:—"1st, That those articles are in their nature paraphernal which are adapted for the use and enjoyment of the female spouse as distinguished from promiscuous use; 2nd, That articles of promiscuous use may be made paraphernal by being gifted to the wife before or on the day of the marriage either by the husband or by friends, and either by express or implied gift, if they are not out of keeping with the rank of the recipient. It is with the first branch only that we have to do here. It is admitted that the wife's clothes are adapted for her own, and not for promiscuous use. It seems naturally to follow that she must have some place to put them in. If this wardrobe had been used by her alone from the beginning there could not have been the slightest doubt. The only room for doubt arises from the fact that it was used by both for the first three months. But it does not appear that at first the husband had any place to put his clothes in, and I do not think that this partial use by him for the first three months is sufficient to alter the legal character of the article. It is not suggested that it is inconsistent with the rank of the spouses."[2] Although presents made by the bridegroom to the bride at or before marriage are *inter paraphernalia*—though they may be articles of promiscuous use, such as, *e.g.*, a watch—this is not the case with wedding presents made by others to her, unless paraphernal in their nature.[3] Bed and table linen though marked with the wife's initials are not paraphernal.[4]

[1] *Lady Bute* v. *The Earl*, 1711, M. 5824; Fountainhall, ii., p. 744.

[2] *Cameron* v. *M'Lean*, *supra*.

[3] These would appear to be the wife's separate estate since the Married Women's Property Act. So held in Sheriff Court, *Duncan* v. *Gerard*, 1888, 4 S.C.R. 246, and *M'Intosh* v. *Macrae*, 1888, 4 S.C.R., 317; *see contra Strain* v. *S.*, 1886, 2 S.C.R. 108.

[4] *Hewat* v. *Wood*, 1803, Hume's Decisions, 210.

Articles such as a mirror,[1] a lady's dressing-plate,[2] a tea-service,[3] have been held not paraphernal. Although paraphernalia do not fall under the *jus mariti*, yet the right of administration prevents the wife from being able to sell or pledge them without the husband's consent.[4] If, however, the impignoration be in security of the husband's debts his consent will be implied.[5] Lord Fraser doubts the authority of the case of *Gemmil*,[6] but it is in accordance with an anonymous case decided in 1754.[7] In an earlier case "the Lords by a scrimp plurality found wives had the sole administration of their jewels, when in straits to raise money, and therefore sustained the Lady Kirkhouse's impignoration, though done without her husband's consent. Some merrily said this was too great an interlocutor in favours of women."[8] A wife can test on her paraphernalia,[9] and on her intestacy they descend to her next-of-kin.[10]

The Married Women's Property Act has, in marriages to which it applies, placed the wife's whole moveable estate very much in the position of her paraphernalia under the old law. But the law of paraphernalia may still be of importance in questions as to diamonds or other valuables given by the husband to the wife. Such donations, as explained, are, being paraphernal, not revocable by the husband or his creditors. It has not been decided whether the husband's *jus relicti* extends to paraphernalia, and it would appear that the expression "moveable estate," in § 6, means such estate of the wife as was formerly subject to the *jus mariti*.

The English law on the subject was different. The husband could dispose of the wife's paraphernalia, whether by sale or gift, and they were liable for his debts. But he could not dispose of them by will. During the husband's life the wife could not alienate her paraphernalia. The leading idea in the English cases is that paraphernalia are to be limited to jewels, &c., given by the husband to the wife for her to wear. He does not intend her to sell them or use them as a fund of

[1] *Hewat, supra.*
[2] *Lady Wigton* v. *Lady Fleming*, 1748, M. 5771.
[3] *Gemmil* v. *Yule*, 1735, Elchies *voce* Husband and Wife, No. 4, and M. 5997.
[4] *Ibid.*
[5] Ersk. i. 6, 27.
[6] i. 806.
[7] 5 Brown's Supp. 811.
[8] *Pringles* v. *Irvine*, 1711, M. 5972.
[9] *Young* v. *Wright*, 1880, 7 R. 760.
[10] Ersk. i. 6, 41; Fr. i. 806.

credit.[1] But such articles given to a wife by a third party were presumed to be given to her for her separate use, and she had full power over them.[2] In England property of any kind, including things which would formerly have been reckoned paraphernalia, are now the wife's separate property if acquired after 1st January, 1883.

Pin Money.—This is a term of English law which occasionally occurs in Scotch marriage-contracts. There does not seem to be any authority on the subject in the Scotch books, and the Courts would no doubt give it the effect which it would receive in England. It denotes an allowance settled by the husband upon the wife before marriage for her pocket-money and to buy dress suitable to the rank and position of the husband. If the husband himself pay for the articles in respect of which pin-money is provided, he may deduct what he has paid from the allowance. If the wife do not dress as becomes her station it would appear that the husband might refuse to pay the pin-money. If the husband pay for his wife's dress and other personal expenses, and it does not appear that she demanded her pin-money, she cannot claim arrears after his death. And it was so held where the wife was a lunatic and the doctrine of acquiescence inapplicable. When she has been in the habit of receiving her pin-money but has allowed it to run in arrear, she cannot, on the husband's death claim for more than one year's arrears.[3] And her executors have no claim at all, the pin-money being essentially for the wife's personal expenses. For if the husband were bound to pay arrears of pin-money to the wife's representatives this would not relieve him of his common-law liability for her debts, so that he would have to pay twice over.[4] It was held in a very special case where a wife had from time to time claimed her pin-money, and the husband had promised to pay it, that she was entitled to all the arrears due at the death of the husband.[5]

[1] White and Tudor, p. 621; *Tipping* v. *T.*, 1 P. Williams, 729.

[2] *Graham* v. *Londonderry*, 1746, 3 Atk. 393.

[3] *Fowler* v. *F.*, 3 P. Wms. 355; *Powell* v. *Harkey*, 2 P. Wms. 84; *Thrupp* v. *Harman*, 1834, 3 M. and K. 513.

[4] The law of pin-money is explained with great fulness by Lord Brougham in *Howard* v. *Digby*, 1834, 2 Cl. and F. 634. But *see* Macqueen, H. and W., 3rd Ed., p. 326.

[5] *Ridout* v. *Lewis*, 1738, 1 Atk. 269.

CHAPTER XXVI.

LIABILITY OF WIFE TO CONTRIBUTE TO THE EXPENSES OF THE HOUSEHOLD OR TO ALIMENT AN INDIGENT HUSBAND.

It is the duty of the husband to defray the expenses of the household, and to maintain and educate the children of the marriage. He is the head of the family, and the administrator both of his own and of his wife's funds.[1]

Where the husband is indigent, is a wife with separate estate bound to contribute?—This has never been expressly decided. Bankton says, "If the wife has a subject exclusive of the husband's right, she must contribute proportionally towards the maintenance of their common children, and in default of the father she is simply liable."[2] It is undoubted law that when the father is dead, the mother is bound to aliment the children of the marriage.[3] But there does not appear to be any reported case where it was held that a wife is bound to maintain the children during the husband's lifetime if he is unable to do so. The doctrine, however, has the support of Erskine,[4] of Mr. More,[5] and of Lord Fraser.[6] The last writer refers to Stair[7] and Bankton,[8] but the language of these authorities is consistent with the view that it is only after the husband's death that the wife's liability emerges. It would probably be held that a wife who is able to maintain her children must do so if her husband is incapable, subject to any claim she may have against him for relief. This would

[1] Ersk. i. 6, 19, and 56.

[2] i. 6, 15.

[3] *Fairgrieves* v. *Henderson*, 1885, 13 R. 98; *Buchan* v. *B.*, 1666, M. 411; *Macdonald* v. *M.*, 1846, 8 D. 830; Ersk. i. 6, 56.

[4] i. 6, 56 (*see note* in Nicolson's Edition).

[5] More's Notes, xxix.

[6] Parent and Child, p. 86.

[7] i. 5, 7.

[8] i. 6, 15.

seem to be the case when the spouses are living together, and the wife's liability is still more clear when the husband is a lunatic without means, or is in imprisonment, or is otherwise beyond the reach of the parochial law.

Wife's liability to contribute where husband is not indigent.—A different question is presented where the husband is not incapable of supporting his wife and children, and the wife has separate estate. To take an extreme case, a husband is a clerk with an income of £100 a-year. His wife has a separate estate of £1000 a-year. Is she legally entitled to allow her income to accumulate, or spend it wholly upon foreign missions, and leave her husband to support the children of the marriage and herself? Or, on the other hand, must she contribute to defray the common expenses in proportion to her means? Lord Fraser[1] thinks that her liability to contribute is a legal consequence of recognising her right to hold separate estate, although he does not regard the point as free from doubt. It is submitted that there is no legal obligation upon her to contribute. At common law, a wife has no funds out of which to aliment anybody. If her separate estate is in virtue of a marriage-contract, her liabilities as well as her rights are to be looked for in that deed. And no such new liability will be held to have been imposed upon her by the Married Women's Property Acts, which contain no express references to the subject.[2] In England, a wife with separate estate is by statute bound to prevent her husband from becoming chargeable to the parish,[3] and is likewise bound to maintain her children and grandchildren, although probably in this case her liability only emerges if her husband is incapable of supporting them.[4] But it was settled that at common law no liabilities of this kind attached to a wife, and it is thought that the principle of these decisions would be followed in Scotland where no statutory change has been introduced.[5]

[1] i. 837.

[2] *See Fingzies* v. *F.*, 1890, 28 S.L.R. 6.

[3] Married Women's Property Act, 1882, § 20.

[4] *Ibid.* § 21.

[5] *Hodgens* v. *H.*, 1837, 4 C. and F. 323; *Coleman* v. *Birmingham Overseers*, 1881, 6 Q.B.D. 615.

Wife not liable to aliment indigent husband.—It cannot be regarded as settled that a wife is bound to support her children during her husband's lifetime, although she may be in a position to do so. There is, as above shown, some authority for this proposition. But it seems pretty clear that she cannot be held liable to aliment her husband although he be incapable of supporting himself. In a recent case,[1] in the Outer House, Lord Kyllachy expressed an opinion that at common law no such liability attached to a wife with separate estate, and that the Married Women's Property Act had made no change. The opinion was, however, not necessary for the decision in that case.

[1] *Fingzies* v. *F.*, 1890, 28 S.L.R. 6.

CHAPTER XXVII.

RIGHT OF SURVIVOR TO ALIMENT—WIDOW'S MOURNINGS.

Aliment to indigent surviving Spouse from Estate of Predeceaser.—If one spouse die leaving estate, it is consonant with equity that the survivor should be entitled, if otherwise unprovided for, to aliment out of this estate. Such a right cannot compete with creditors. It is only after payment of all the deceased's debts that a claim may be made.[1] At common law a husband had no *jus relicti*, and his right to courtesy was conditional on the birth of a living child. The husband of an heiress might accordingly be left penniless by his wife's death. Similarly the character of the husband's investments might be of such a nature as to yield no terce to the widow, and yet not to swell the *jus relictae*. This would be the case if he left heritage in which he was not infeft, or personal bonds bearing interest, or, formerly, burgage.

In such cases reasonable aliment will be awarded subject to such conditions as may seem to the Court expedient.

Ill.—Husband leaves heritable estate worth £240 a-year. He was only infeft in so much of it as gave the widow a terce of £40. In an action against the heir, her pupil son, the Court gave the widow an additional aliment of £20 a-year, "for nineteen years, or until the same is recalled or altered by authority of the Court."[2]

Ill.—Husband died within year and day of marriage. By old law wife had not then terce or *jus relictae*. She claimed aliment. "A majority of the Court considered the

[1] Fr. ii. 971.

[2] *Thomson* v. *M'Culloch*, 1778, M. 434; also in Hailes, ii. 797.

claim of an indigent widow for aliment from the heir of her opulent husband as deeply founded in nature."[1]

Ill.—Husband died possessed of burgage which was worth £80 a-year, but liable to annual charges of £20. The burgage was not terceable, and the widow otherwise unprovided for. Court granted her interim aliment of £20 a-year.[2]

Ill.—Husband left heritage worth £240 a-year. His sister succeeded as heir-at-law. The Court found widow entitled to an annuity of £60 "to continue until the same be recalled or altered by the authority of the Court."[3]

It would appear that an indigent husband has the same claim.[4]

Claim barred by Ante-nuptial Contract.—The acceptance of a small provision in an ante-nuptial marriage-contract will bar the right to claim additional aliment. It was held in one case that such a contract settles irrevocably the rights of parties. The case, however, was not one in which the surviving spouse was indigent, the conventional provision, 700 Louis d'ors per annum, being adequate for maintenance though small relatively to the husband's estate.[5]

If the provision was quite insufficient to support the widow—say £5 a-year—and considerable funds were left, it may be doubted whether the Court would not grant further aliment.

Widow's Mournings and Aliment to first term after husband's death.—A widow has a legal claim for mournings suitable to her husband's quality. This is a privileged debt, and preferable even against ordinary creditors.[6]

As against the husband's representatives, but not in competition with his creditors, she is entitled to aliment from his

[1] *Lowther* v. *M'Laine*, 1786, M. 435; Hailes, ii. 1012. Lord Hailes adds an amusing note: "Some of the judges who carried this question told me that they did not mean that Mrs. M'Laine should have any aliment in case she married again: if so, they have shown little favour to a handsome young woman of irreproachable character."

[2] *Harvie* v. *H.*, 1828, 6 S. 1144.

[3] *Hobbs* v. *Baird*, 1845, 7 D. 492; *see* also *Lee* v. *Bates*, 1840, 3 D. 317.

[4] *Lowther, supra;* Hailes, ii. 1013, *per* L. Braxfield; Fr. ii. 969.

[5] *Countess Dow. of Seafield* v. *The Earl*, 8 Feb., 1814, F.C.; Nicolson's Note to Ersk. i. 6, 41.

[6] *Sheddan*, 1802, M. 11855; Bell's Com., 5th Ed. ii. 157; Fr. ii. 968.

death to the first term at which her provisions, whether legal or conventional, are payable. And the measure of such aliment is the husband's position, and not the amount of her provisions.[1] Where the husband's representatives have kept up his house and establishment for her till the term, she will not be given aliment in addition.

The claim does not rest on necessity. A widow who broke up her husband's establishment and went to live with her father, the Duke of Gordon, was still held entitled to aliment till her jointure commenced.[2] But the fact that she did not keep up the house will affect the amount. In one case it was said that she was not entitled if she had separate estate. But this was unnecessary to the decision, the husband's estate being insufficient to pay debts.[3]

The right will not be held to be renounced by a general clause accepting provisions in lieu of all legal rights.[4]—But where a widow was entitled to the liferent of the whole residue it was held she had implicitly renounced this right to aliment.[5] The claim was even allowed when made fifteen years after the husband's death.[6] It would hardly be granted if brought by a wife's representatives, she not having made any claim.[7]

[1] Ersk. i. 6, 41; *M'Intyre* v. *M.'s Trs.*, 1865, 3 M. 1074.

[2] *Palmer* v. *Sinclair*, 27 June, 1811, F.C.

[3] *Buchanan* v. *Ferrier*, 1822, 1 S. 322 (N.E. 299).

[4] *Palmer, supra; Rennie* v. *Walker*, 1800, M. *v.* Presumption, App. No. 4.

[5] *De Blonay* v. *Oswald's Reprs.*, 1863, 1 M. 1147; *Hadaway* v. *Barker*, 1830, 8 S. 800.

[6] *Palmer, supra.*

[7] *Hadaway, supra.*

CHAPTER XXVIII.

PROTECTION ORDERS UNDER THE CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT, 1861 [24 & 25 VICT. c. 86].

THIS statute, which commenced on the 1st November, 1861, has not been repealed by the Married Women's Property Acts of 1877 and 1881, and it is still competent to apply for a protection order, though the necessity for such an application will now only arise in comparatively few cases, and it is believed that in the practice of the Sheriff Courts as well as in that of the Court of Session proceedings under this Act are almost unknown. In granting a license to a married woman, the licensing Court sometimes makes it a condition that she shall obtain a protection order (see Petition, *Sutherland*, May 20, 1893, not reported). The Act provides that a wife deserted by her husband without reasonable cause may apply by petition to the Lord Ordinary for an order to protect property, which she has acquired or may acquire by her own industry after such desertion, and property which she has succeeded to, may succeed to, or acquire right to, after such desertion. The power to grant such orders was given to the Sheriff by 37 & 38 Vict. c. 31 (16 July, 1874). The petition must be intimated in the Minute Book and served on the husband. Answers may be lodged by the husband or any creditor of his, or any person claiming in his right. On proof of the desertion, and that it was without reasonable cause, the Court will pronounce an interlocutor giving the protection craved. The interlocutor must be intimated in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as the Court may appoint (Sect. 1).

Where no answers have been lodged a petition may be presented to the Court by whom the order was granted for a recall of such order. This petition for recall may be by the husband or any person claiming in his right or as a creditor of his (Sect. 2).

Where there has been appearance by the husband he may petition for recall. But in this case he must prove that he has ceased desertion and is cohabiting with his wife. It is in the discretion of the Court, moreover, to require him to find security for such period as may be appointed, that he will continue to cohabit with her.

Return to cohabitation operates as a tacit recall of the order. The statute appears to limit this tacit recall to the case where, on the application for the order, no appearance was made by the husband. But it would seem that this limitation was not intended.[1]

In any case the recall, whether tacit or after petition, has no retroactive effect. Property which the wife has acquired during the subsistence of the order remains vested in her as if she was unmarried, and any right which a third party has acquired from or through her during the same period is unaffected by the recall.

Provision is made for review (Sect. 3).

What is Desertion without reasonable cause?—The well-known phrase, "wilful and malicious desertion," familiar in the law since the Act of 1573, is not used here. It has been suggested, though never directly decided, that "desertion without reasonable cause" means something different from "wilful and malicious desertion."[2]

Ill.—Husband in debt to amount of £5000, suddenly goes to San Francisco to evade his creditors. He has had no quarrel with his wife, and writes to her in affectionate terms, but does not invite her to join him, and contributes nothing to her support, but expresses the hope of return when he can pay his debts. Held this was desertion in sense of the statute.[3]

Where there was evidence that the wife was a drunkard

[1] *See* Dove Wilson's "Sheriff Court Practice," p. 391.

[2] *Turnbull*, 1864, 2 M. 402.

[3] *Ibid.*

and of loose conduct, it was held that this was not "reasonable cause" for the husband's desertion, and doubted if any cause would be sufficient which would not be a good defence to an action of adherence.[1]

An offer to return to cohabitation will, in general, prevent a protection order being granted. But such an offer will be disregarded if it appear to the Court to be without *bona fides*.

Ill.—Husband had left his wife for ten years, and contributed nothing to her support. She is injured in a railway accident, and has a prospect of getting compensation. She applies for an order, whereupon he offers to return to cohabitation. Order granted, and offer disregarded.[2]

Effect of Order.—The order has the effect of a 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.[3] In particular, it bars an action of adherence by the husband. If the wife die intestate, her estate goes to her heirs.

Property exempt from Order.—The order will not protect—(1) property of which the husband, before the date of the petition, had obtained full and complete lawful possession; (2) property which any creditor of the husband has before that date attached by arrestment, followed by a decree of furthcoming; (3) property which such a creditor has before that date duly poinded, and of which he has carried through and reported a sale.[4]

[1] *Chalmers* v. *C.*, 1868, 6 M. 547.
[2] *Chalmers, supra.*
[3] § 5.
[4] § 4.

CHAPTER XXIX.

WIFE'S DELICTS AND *QUASI*-DELICTS.

A WIFE has no immunity against penalties for breach of the law, and must suffer the legal consequences of her act. For her delicts and *quasi*-delicts her husband is not responsible, unless it appear that they were committed in pursuance of his instructions, or that he was accessory to them. In other cases, the rule obtains *culpa tenet suos auctores.*

Where a wife had unlawfully executed a poinding in her husband's name, he being out of the country, an action was brought against both spouses for wrongous intromission. The judgment runs: "No action found against the husband for any fact done by the wife, albeit civilly pursued, no more than he could be convened for a debt contracted by her, or for bonds or obligations made by her without his consent."[1] And so a husband is not liable for his wife's slander.[2]

But in accordance with the general law of agency, where a husband who wished to sell a business allowed his wife to give false information as to the profits, he was held liable for her fraudulent representations.[3] But where a wife was in charge of her husband's shop, and it was alleged that she had maliciously caused a saleswoman to be apprehended on a false charge of theft, it was held the husband could not be made liable on the ground that the wife acted as his agent.[4]

In certain cases execution is suspended *stante matrimonio.*

[1] *Scot* v. *Banks*, 1628, M. 6015 (Durie's Report).

[2] *Milne* v. *Smiths*, 1892, 20 R. 95; *Barr* v. *Neilsons*, 1868, 6 M. 651.

[3] *Taylor* v. *Green*, 1837, 8 C. and P. 316.

[4] *Mullen* v. *White*, 1881, 18 S.L.R. 493.

Imprisonment.—Where the sentence is one of imprisonment *in modum poenae*, it will be carried out against a married woman.[1]

Where a Sentence of pecuniary fine is imposed.—In this case execution will pass at once against any separate estate a wife may have.[2] But if she have no separate estate execution is suspended. The fine remains a debt against her, but it is not enforceable *stante matrimonio*. On the dissolution of the marriage it may be recovered by any competent diligence.[3]

Arrestment *in meditatione fugae*.—A married woman not being, as a rule, liable to personal diligence, cannot be arrested as *in meditatione fugae*. But where the obligation is one arising *ex delicto*,[4] or is granted in such circumstances as to render her personally liable,[5] she is liable to be arrested under a *fugae* warrant, but only in the rare case where the debt is one for non-payment of which imprisonment may follow. It is now settled that a warrant can in no case be issued against a person as being *in meditatione fugae*, unless imprisonment can follow for non-payment.[6]

Husband must be called.—The husband must be called for his interest, as his wife's curator. But he will not be found liable in expenses unless they have been caused by his wrongful or vexatious manner of conducting the defence.[7]

[1] Ersk. i. 6, 24; Fr. i. 557.

[2] *Ibid.*; *Barr* v. *Neilsons*, 1868, 6 M. 651.

[3] *Barr*, cit., *per* L.P. Inglis.

[4] *Turnley* v. *Watson*, 1832, 6 W. and S. 271.

[5] *Supra*, p. 166.

[6] *Hart* v. *Anderson's Trs.*, 1890, 18 R. 169. *See* Debtors (Scotland) Act, 1880 [43 & 44 Vict. c. 34].

[7] *Baillie* v. *Chalmers*, 1791, 3 Pat. 213; *Milne* v. *Smiths*, *supra*.

CHAPTER XXX.

CRIMES AND EVIDENCE OF SPOUSES IN CRIMINAL AND *QUASI*-CRIMINAL PROCEEDINGS.

For a wife's crimes or delicts, and *quasi*-delicts, her husband is never liable, unless it appear that her act was performed in obedience to him.

A wife convicted of a crime involving the penalty of imprisonment or penal servitude, must suffer the penalty in the same way as an unmarried woman.

Presumption that a Crime committed by a Wife, in presence of her Husband, was under compulsion. — In England there is a presumption of law that crime committed by a married woman, while her husband is present, is done under coercion by him. The presumption may be rebutted, and it does not extend to cases of murder, treason, and, probably, robbery, or to misdemeanours.[1] It does not appear that this presumption has ever been admitted in our law.[2] But Hume suggests that "where threats or violence have been employed by the husband to coerce her, a lower degree of terror shall excuse the submission of the wife, who is habitually subject to his power, and has not the same means as a stranger of escape from his resentment." He thinks a wife might, perhaps, successfully plead coercion by her husband as an excuse for the commission of "venial trespasses and petty crimes," and in mitigation of punishment for more serious offences.[3] And there is no doubt that leniency will be shown to a wife where the presumption is that she was constrained,

[1] See the subject discussed in Russell on Crimes, 5th Ed., p. 139, *seq.*; Archbold, 21st Ed., p. 26.

[2] Hume, i. 47.

[3] *Ibid.*, i. 49.

or even persuaded, by her husband to commit the act. *Ill.*—So, in a case where a husband and wife were both found guilty of wilful fire-raising, the husband was sentenced to transportation for life, and the wife to imprisonment for two years. It was remarked that she had probably acted under the influence of her husband.[1] But this is a presumption which may be rebutted by proof that she took an equal, or even the principal, part in the crime, and that she acted of her own free will.[2]

A Wife is not to be held guilty of a Crime because she harbours or conceals a guilty Husband, and does not give information as to his offence.[3]—Even where he has stolen goods, and she has concealed them, she will not be guilty of reset, if it appear that she acted merely to screen her husband.[4] But if she not only conceal the stolen goods, but take charge of the selling or disposing of them, she must bear the penalty of a resetter.[5]

Evidence of Spouses for or against each other in Criminal Cases.—The rule is that the husband or wife of the panel is inadmissible. Evidence in the prisoner's favour would clearly be open to grave suspicion, while evidence against him might be prompted by secret enmity. This is the ground for the rule stated by Hume.[6]

It might be rested also on this, that it would be to impose an unfair strain upon the conscience of a wife to give her the alternative of committing perjury, or of being the instrument of her husband's conviction, and that a prisoner convicted on such evidence would be certain to cherish a violent animosity against the witness, so that the peace of families might be destroyed. But, whatever the ground, the rule is firmly established.

Divorced Spouse.—It would appear that a spouse, whose marriage with the panel has been severed by divorce, would still be inadmissible as to any facts which are said to have

[1] *Harris Rosenberg and Alithia Rosenberg*, 1842, 1 Broun, 367.

[2] Macdonald's Criminal Law, p. 16; 1 Alison, 668; Bell's Notes to Hume, p. 7.

[3] 1 Hume, 49; 1 Alison, 669.

[4] *John Hamilton and Mary Hamilton*, H.C. 1849, J. Shaw, 149.

[5] 1 Alison, 338 and 670.

[6] 2 Hume, 349.

occurred during the marriage, but admissible as to facts after the divorce.[1]

Where there are two or more Prisoners.—It has been held in England that where several prisoners are on trial for the same crime, it is incompetent to call the wife of one of them as a witness for or against another prisoner, for her evidence would tend to the conviction or acquittal of her husband. So where three prisoners were indicted for burglary, and one of them called the wife of another to prove an *alibi*, her evidence was rejected. The ground stated by Littledale, J., was that "though she only came to speak as to *Draper* being in one place, which had nothing to do with *Smith* (her husband) being concerned in the offence, yet her evidence would go to show that the witness for the prosecution was mistaken as to Draper, and then, if he was mistaken as to one, it would weaken his evidence altogether, and by that means the witness proposed to be called by *Draper* might benefit her husband." The question was reserved, and all the judges, with two dissentients, thought the ruling right.[2] And the same was held where the wife's evidence was tendered against the prisoners, not including her husband.[3] There does not appear to be any Scotch authority.

Penuria Testium.—The rule is not so absolute as to suffer no exception. Where the fact in dispute is so occult that without the testimony of the spouse of the prisoner it cannot by possibility be proved, this evidence may be admitted.

Ill.—A husband charged with murder alleged in defence that he discovered the deceased in the act of adultery with his wife and killed him. He was allowed to call his wife to prove that he caught them in the act.[4] Without her evidence this could not possibly have been proved, and as Mr. Dickson points out, she was not likely to make a false confession of

[1] *See Monroe* v. *Twisleton*, Peake Add. Ca. 219; *O'Connor* v. *Majoribanks*, 1842, 4 Mann. and Grang. 435; Roscoe's Crim. Evid., p. 116.

[2] *R.* v. *Smith*, 1826, 1 Moody's Crown Cases, 289; same held *R.* v. *Hood*, 1830, *ibid.*, 281; *see* Roscoe, cit., p. 118.

[3] *R.* v. *Webb*, 3 Russell, 5th Ed. 622.

[4] *Christie*, 1731, Maclaurin's Crim. Ca. 632; 2 Hume, 400; *see* remarks of L.P. Inglis on this case in *Surtees* v. *Wotherspoon*, 1872, 10 M. 866; also 3 Russell, 5th Ed. 625; *R.* v. *Jellyman*, 1838, 8 C. and P. 604.

adultery.[1] But where a man charged with murder alleged general maltreatment of his wife by the deceased, and offered as evidence in support of this a declaration made by his wife in precognition before the Sheriff, this was held inadmissible. The panel was allowed to prove that his wife showed marks of violence upon her body, and the account she gave of them.[2] The distinction appears to be that the facts founded on in the latter case were not so occult that it was impossible to prove them by other testimony than that of the wife.[3]

Spouse who is personally injured may give Evidence.—A more important exception to the general rule is that, where the offence charged consists in personal injury inflicted by one spouse on the other, the injured person's evidence is admissible. It would seem on principle that wherever admissible the injured spouse is bound to give evidence. Lord Moncreiff points out that it is for the interest and safety of a wife, as well as for the interests of justice, that she should not have an option of declining to answer questions as to her husband's violence to herself.[4] And this is settled at any rate where the charge is one of personal violence.[5] In a case where a husband had falsely accused his wife of an attempt to poison him, in consequence of which accusation she was apprehended and kept in imprisonment for five weeks, her declaration when apprehended was admitted as evidence against her husband.[6] But where a man and woman were charged with forging the name of the female prisoner's husband, and uttering a forged cheque, the question was raised whether the husband as the person injured might give evidence against his wife. The Court intimated doubt as to this, and, as the male panel was the principal object of the prosecution, the case against the female panel was given up.[7] The law of England is the same. And so where a husband was charged with rape upon his own wife, he having assisted another to ravish her, the wife's evi-

[1] Evidence, ii. 1571.

[2] Goldie in 2 Hume, 400, *note*.

[3] 2 Alison, 464.

[4] Bell's Notes, p. 252.

[5] Will. Commelin, Dumfries, 1836, 1 Swinton, 291, where Alison's opinion to the contrary was unsuccessfully relied on, 2 Alison, 462; and *see* Macdonald, p. 472.

[6] *Elliot Millar*, 1847, Arkley, 355.

[7] *Fegan and Hyde*, 1849, J. Shaw, 261.

dence was admitted.[1] And where the charge was of conspiracy to carry off and marry an heiress, Hullock, B., was of opinion that, even assuming the lady was now the lawful wife of one of the defendants, her evidence was admissible.[2] On the ground that the charge was not one involving personal wrong, a wife's evidence was rejected where the husband was charged with the statutory offence (in England) of leaving her chargeable to the parish.[3] And so was that of the husband on an indictment against the wife, a prostitute, for conspiring with others in procuring the marriage with him.[4]

Bigamy.—It might well have seemed that bigamy was of the nature of a personal wrong to the innocent spouse of the lawful marriage. And, accordingly, Alison [5] thinks the evidence of such a person ought to be received. But the law is settled the other way. And this was held in a case where the Crown had no chance of a conviction without the wife's testimony, and gave up the prosecution on its being ruled inadmissible.[6] The rule as to *penuria testium*, explained by Lord President Inglis in *Surtees* v. *Wotherspoon*,[7] does not mean that the evidence in question should be received, because it would be highly valuable for the case of the party seeking to adduce it.

In an earlier case Lord J.C. Hope had indicated an opinion in favour of admitting the wife, but the witness was withdrawn and the point not decided.[8] And even where the spouse of the panel was adduced to prove a point merely incidental—viz., that a person was dead, whose statement was to be proved by hearsay, this was rejected.[9] And the law of England is the same.[10] On the first marriage being proved, the innocent party to the alleged bigamous marriage is a competent witness.[11] But if the proof of the first marriage were doubtful, and the fact disputed, it would seem that this evidence should be rejected.[12]

[1] *R.* v. *Lord Audley*, 3 Howell's State Trials, 402; Russell, cit., p. 625.

[2] *R.* v. *Wakefield*, 2 Lewis C.C. 1 and 279.

[3] *Reeve* v. *Wood*, 1864, 5 B. and S. 364.

[4] *R.* v. *Sergeant*, 1826, Ryan and Moody, 352.

[5] 2 Alison, 463.

[6] *Armstrong*, 1844, 2 Broun, 251.

[7] 1872, 10 M. 866.

[8] *M'Donald*, 1842, 1 Broun, 238.

[9] *Ann Paterson*, 1860, 3 Irv. 649.

[10] Roscoe, 129.

[11] *Thorburn*, 1844, 2 Broun, 4.

[12] Taylor on Evidence, ii. 1161.

Spouse as Production.—In cases of bigamy, it is essential that the witnesses should have known the panel in the character of spouse both of the legal and the bigamous marriage. Accordingly, the spouse of the first marriage, although inadmissible as a witness, may be brought as a production to be identified by the witnesses. And this was even done in a case noted by Hume, where it was alleged that the prisoner's wife had disposed of a bank-note taken by him from a house which had been broken into. The wife though inadmissible was brought and identified as the person who disposed of the note. Alison doubts this case,[1] but Taylor cites it without disapproval,[2] and the law appears settled by a more recent decision.[3]

Where the Marriage of the Witness is Disputed.—It may happen that the prisoner avers that a witness is his wife without there being any means of instant verification of his statement. The question is still open whether an averment that he was irregularly married to the witness would make it necessary for the Court to consider incidentally the status of the parties.[4] Lord J.C. Moncreiff indicated an opinion that a witness could not be held disqualified unless there were means at hand of regularly and conclusively establishing the question of status. In this case the prisoner had himself previously denied the marriage, and the woman's evidence not amounting to a distinct statement that she was his wife, she was admitted as a witness, and the point left open.[5]

In Proceedings under the Public-Houses Acts.—It does not appear that in complaints under these Acts the evidence of the wife of the accused has ever been received. In rejecting it in a recent case, the Court declined to lay down as an absolute rule that such evidence was inadmissible. In very special circumstances, where a wife might be the only person who could possibly have the required information, her evidence might be received on the ground of *penuria testium*.[6]

[1] Alison, ii. 463.
[2] Taylor, ii. 1161.
[3] *Bryce*, 1844, 2 Broun, 119.
[4] Dickson, ii., § 1570.
[5] *Reid*, 1873, 2 Coup. 415.
[6] *Morrison* v. *M.*, 1887, 14 R., J.C. 28.

Evidence Tending to Criminate other Spouse.—It may happen that a witness is asked a question pointing at criminal conduct on the part of her husband, although no prosecution has been directed against him.

Ill.—The settlement of A., a female pauper, turned on the validity of her marriage with C. If she was his wife, she would derive her settlement from him. The evidence of a woman B. was tendered to prove that she was C.'s lawful wife, and that A.'s marriage with him was bigamous. This was admitted, though tending to render C. liable to a charge of bigamy.[1] But the wife's evidence and the decision of the Court would not have been evidence against him, if tried for that crime, being altogether *res inter alios acta.*

The law was thus stated by Ellenborough, C.J. :—"If we were to determine without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds ; and there is not any authority to sustain it, unless indeed what has been laid down, as it seems to me, somewhat too largely in *Rex* v. *Cliviger*,[2] may be supposed to do so."[3] But it was thought by Bayley, J., that the witness, although competent, might decline to answer a question tending to criminate her husband, and throw herself on the protection of the Court. Where the husband (or wife) of the witness has already been tried for the crime, and acquitted or condemned, the ground of privilege no longer exists.

Ill.—A. tried for sheep stealing. Proposed to call the wife of B. to prove that A. and B. had stolen the sheep jointly. B. had previously been convicted. Held his wife was a competent witness.[4]

The Act of **1853** abolished the general incompetency of husbands and wives to give evidence for or against each other

[1] *R.* v. *All Saints, Worcester*, 1817, 6 Maule and S. 194.

[2] 2 T.R. 263.

[3] *R.* v. *All Saints, Worcester*, *supra*, at p. 199. Followed in *R.* v. *Bathwick*, 1831, 2 Barn. and Ad. 639.

[4] *Reg.* v. *Williams*, 1838, 8 C. and P. 284.

in civil causes, but preserved the common law as to their incompetence in criminal proceedings, and provided that nothing herein contained "shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage," and *vice versâ*.[1]

Evidence of Spouses admissible by certain Statutes.—Various statutory exceptions to the common law rule have been made in recent Acts. The following list may not be exhaustive. The husband or wife of the person accused of the statutory offence, is a competent and compellable witness under these Acts :—

The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, § 11), where the charge is of maliciously breaking a contract of service, whereby the inhabitants of a place are deprived of gas or water; or whereby injury is caused to persons or property, §§ 4 and 5; or where a master, legally bound to provide a servant or apprentice with necessary food, clothing, &c., has neglected to do so, to the danger of the servant's health, § 6.

40 Vict. c. 14, where the charge is for non-repair of a public highway or bridge, or nuisance to a public highway, river, or bridge; or where any *quasi*-criminal proceeding is instituted for trying or enforcing a civil right only.

The Army Act, 1881 (44 & 45 Vict. c. 58, § 156, sub-section 3).

The husband or wife of the accused is a competent witness, but not compellable, under—

The Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 69, § 20), offences against young girls.

The Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51, § 53, sub-section 2).

The Prevention of Cruelty to Children Act, 1889 (52 & 53 Vict. c. 44, § 7).

The husband or wife of the accused may be tendered as a witness for the defence under :—

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63, § 21).

[1] 16 Vict. c. 20, § 3.

The Explosive Substances Act, 1883 (46 Vict. c. 3, § 4, sub-section 2), making or possessing explosives under suspicious circumstances.

The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, § 10).

Bankruptcy.—Under the Bankruptcy Act, the wife of a bankrupt may be compelled to answer all lawful questions relating to the affairs of the bankrupt.[1] And this rule would no doubt be extended to the husband of a female bankrupt.

Can a Wife steal from her Husband or *vice versa*?—It would appear that she can. A difficulty was formerly felt owing to the theory of *communio bonorum*. But it was held in one case that a husband was relevantly charged with theft where he had surreptitiously appropriated a sum of money forming part of the wife's tocher, he having renounced his *jus mariti* and right of administration.[2] In England, by the common law, a husband and wife cannot steal from one another.[3] But an exception has been introduced by the Married Women's Property Act, 1882.[4]

Rape.—Can a Husband commit Rape upon his Wife?—Hume[5] and Alison[6] say that he cannot be guilty of this crime except as aiding another person to commit it. The same doctrine is laid down in England by Hale.[7] The ground assigned by him is that the wife's consent at marriage is irrevocable. But Sir James Stephen says, "It may be doubted, however, whether the consent is not confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted at least of an indecent assault."[8] But that learned judge has withdrawn this opinion in a recent case in which a husband was charged with a statutory assault, on the ground that he had infected his wife

[1] 19 & 20 Vict. c. 79, §§ 90, 91.
[2] *Kilgour*, 1851, J. Shaw, 501; but *see Muirhead* v. *M'Intosh*, 1886, 13 R.J.C. 52.
[3] Hale, P.C., i. 514.
[4] 45 & 46 Vict. c. 75, §§ 12, 16.
[5] i. 306.
[6] i. 214.
[7] P.C. 629.
[8] Digest of Crim. Law, 4th Ed., p. 194.

with gonorrhœa.[1] It is, however, supported by several *dicta* in that case.[2]

Assault.—Husband and wife may be guilty of assault upon each other. Great provocation by the wife will not justify the husband in assaulting her, and if the injury be serious, it will hardly weigh in mitigation of sentence.[3] A husband will be justified in an assault upon a third person so far as it was necessary to protect his wife from violence, and *vice versa*.[4]

[1] *R.* v. *Clarence*, 1888, 22 Q.B.D., at p. 46.

[2] *Per* Wills, J., p. 33; *per* Hawkins, J., p. 52, but *see* p. 51; *per* Field, J., p. 57. In this context it may be noted that it is now rape to have connection with a married woman by personating her husband, Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, § 4).

[3] Bell's Notes, p. 91; Macdonald, p. 155.

[4] Archbold, 21st Ed., p. 760.

CHAPTER XXXI.

BREACH OF PROMISE OF MARRIAGE.

ALTHOUGH the Courts will not compel parties to implement their agreement to marry each other, yet breach of the contract without sufficient grounds founds an action of damages. The issue in such an action is, "whether the defender promised and agreed to marry the pursuer, and whether he (or she) wrongfully failed to perform said promise." The law is thus stated by Erskine: "By the custom of Scotland all promises of marriage, whether private or more solemn, contained in written contracts, may, in the general case, be resiled from, which proceeds from our close adherence to the rule, *matrimonia debent esse libera*, and from the consideration of the fatal consequences which often attend forced marriages. But if we suppose matters not entire, that is, anything done in consequence of the promise, whereby damage arises to any of the parties from the non-performance, the party refusing to fulfil, though he cannot be compelled to celebrate the marriage, may be condemned to pay the damage sustained by the other party."[1] But as early as the year 1685, a woman having proved that she had expended £80 Scots in entertaining the man's friends and "taking off bridal cloaths, &c.," "The Lords, at the advising for that expense, and for her loss of the market, modified £100 against him, in regard especially that he could give no rational ground why he gave over the bargain." "This decision," says Fountainhall, "seems equitable, though it be new."[2] And in addition to claims for real damage and loss of market it has long been settled that compensation is due as *solatium* for wounded feelings.[3] There is no doubt that the action is

[1] i. 6, 3.

[2] *Grahame* v. *Burn*, 1685, M. 8472.

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

competent at the instance of the man, although the amount of damages which a jury would award to him might afford but a slight *solatium*.[1]

The Promise.—The promises to marry must be reciprocal. But if the parties have conducted themselves as engaged persons, the promises will in most circumstances be presumed to have been interchanged, and *a fortiori*, if it be proved that the man promised to marry the woman, her acceptance will in general be presumed from her conduct. So in an old case, Lord Robertson says, "There was a courtship in order to marriage, and though there was no express promise, the parties so conducted themselves to each other as to create a reasonable belief that it was the intention both of the one and of the other to marry."[2] And in a more recent case it was observed by Lord President M'Neill: "There is a clear distinction between the proof necessary to establish a promise of marriage, which is to be made the foundation of a declarator of marriage, and a promise which is to be made the foundation of a claim of damages. The former must be direct and specific. The latter may quite competently be inferred from a course of conduct and correspondence, and it is not inconsistent with this that in this case the correspondence should of itself establish the promise."[3] In England the same rule has long been settled. If there is evidence of the man's offer, "there is no necessity to prove an actual promise on the woman's part; it is sufficient to show that she countenanced the promise, and carried herself as one who approved and consented to it."[4] But the action will fail if it appear that the woman never fully accepted the proposal. A man is not to be bound for ever, and the lady at liberty to have him or not at any future time.[5]

Considerable latitude as to the date of the promise is allowed in the issue. In one case the issue was taken: "Whether between the month of September, 1854, and the month of September, 1859, both inclusive, the defender

[1] Fr. i. 488.

[2] *Hogg* v. *Gow*, 27 May, 1812, F.C., at p. 658.

[3] *Murray* v. *Napier*, 1861, 23 D. 1243.

[4] *Per* Holt, C. J., in *Hutton* v. *Mansell*, 3 Salk. 16, 64; *Hickey* v. *Campion*, 1872, 6 Ir. C.L. 557; 20 W.R. 752.

[5] *Vincall* v. *Vencss*, 1864, 4 F. & F. 344.

promised and engaged to marry the pursuer."[1] In a more recent case a latitude of a year and a-half was allowed.[2] An averment that on the faith of the promise the pursuer permitted *copula* is not bad in an action for breach-of-promise and seduction on the ground that it would be relevant to found an action of declarator that marriage had been constituted by promise and *copula*. For the pursuer is not shut up to that remedy, in which, moreover, she would be limited to proof *scripto vel juramento*.[3]

The promise need not be unconditional. It may be qualified by any reasonable condition, and if the promise be to marry on the happening of a certain event—*e.g.*, the death of the defender's father, there will be no breach till that event occurs. But if before then one of the parties has repudiated the contract, or if by marrying somebody else he has put it out of his power to keep his promise, the right of action at once arises, and the pursuer does not need to wait till the time originally stipulated for.[4] In a case where a man had married another woman it was unsuccessfully contended that he had not broken his promise because his wife might die in time for him to fulfil his prior contract without unreasonable delay.[5] Where a man promised a woman to marry her if she would go to bed with him, the question was raised but not decided whether the plea of *turpis causa* would be good. Lord Mansfield indicated an opinion that this defence would not be sustained.[6] Such a defence would be clearly bad in Scotland.[7] An expression by a man to a third party of an intention to marry a woman is not a promise unless made in the presence of the woman herself, or unless the third party be authorised to communicate it to her.[8]

Breach.—It is not necessary to prove that the defender expressly declined to fulfil the contract. Even where a man never refused to marry, nay, professed his willingness to do

[1] *Murray* v. *Napier*, *supra*.

[2] *Moor* v. *Oliver*, 1868, 5 S.L.R. 500.

[3] *Forbes* v. *Wilson*, 1868, 6 M. 770.

[4] *Cole* v. *Cottingham*, 1837, 8 C. and P. 75; *Frost* v. *Knight*, L.R., 1872, 7 Ex. 111; *Donoghue* v. *Marshall*, 32 L.J. 310.

[5] *Caines* v. *Smith*, 1846, 15 M. and W. 189.

[6] *Morton* v. *Fenn*, 1783, 3 Doug. 211.

[7] *See Paton* v. *Brodie*, 1857, 20 D. 258.

[8] *Cole* v. *Cottingham*, 8 C. and P. 75.

so, it was held that his conduct showed a fixed determination to constrain the woman to break off the marriage, and that he was liable in damages.[1] So where a man wrote to a woman saying he had ceased to love her, but would marry her if she liked, it was held a question for the jury to say if this amounted to breach.[2] But rude and unmannerly conduct by the defender to the pursuer does not amount to breach unless it appears to the jury that it was intended to force the pursuer to give up the contract.[3] Where the defender had twice fixed a day for the marriage and then postponed it, and had afterwards mentioned another day on which he failed to appear, it was held there was evidence of breach.[4] When the action is already commenced it is too late to profess a willingness to fulfil the contract.[5]

It has been decided in England that where the contract and the breach were both abroad, the action could not be maintained in the English Court.[6] *Secus* where though the contract was made abroad, the breach occurred in England.[7]

Release may be proved by circumstances. As the promise may be inferred from the conduct of parties, it may likewise be inferred from their actings that the engagement has been terminated by mutual consent. So it was held rightly left to the jury to say whether the fact, that prior to the action the parties had held no communication with each other for two years, was sufficient evidence that the woman had acquiesced in breaking off the engagement.[8]

Defences.—It may perhaps be said that the only absolute defences are—(1) that the woman has been unchaste, and that either before or after the promise, provided her unchastity was unknown to the defender when he promised; (2) that

[1] *Cattenach* v. *Robertson*, 1864, 2 M. 839.

[2] *Ibid.*

[3] *Stoole* v. *M'Leish*, 1870, 8 M. 613.

[4] *Currie* v. *Guthrie*, 1874, 12 S.L.R. 75.

[5] *Dennis* v. *M'Kenzie*, 24 L.J. 363.

[6] *Cherry* v. *Thompson*, 1872, L.R. 7 Q.B. 573.

[7] *Durham* v. *Spence*, 1870, L.R. 6 Ex. 46; *Cherry* and *Durham* turn mainly on the construction of a statute, but the last part of the judgment in the former case supports the proposition in the text.

[8] *Davis* v. *Bomford*, 1860, 6 H. and N. 245.

either of the parties is impotent at the time of the breach; (3) that the promise was procured by fraud.

Ill.—The man discovered the woman had been unchaste after date of promise. He was held justified in breaking his contract.[1]

Ill.—The same result was arrived at where the unchastity had been prior to promise and unknown to the defender at the time of the promise.[2]

It is an implied condition of the man's promise that the woman shall be a virgin at the marriage, unless circumstances show that he is aware she has lost her virginity. Probably this statement would hold good in the case which does not appear to have occurred of a widow passing as a single woman and concealing her prior marriage.[3]

As the impotence of either would be a ground for avoiding the contract after the marriage ceremony, it would be absurd to hold the promisor bound to go on after discovery of the other's incapacity. It is probable, however, that if the potent party were willing to go on in knowledge of the other's condition, this would be within his option—*e.g.*, a woman would be entitled to say: "I prefer to hold the rank and position of the defender's wife, and am willing to forego the chance of having children." In such a case there seems no reason why the man if he breaks the contract should not be liable in damages.

Fraud.—Breach of the contract of betrothment will not found an action of damages if it be proved that the contract was induced by fraud.

Ill.—Where the lady had concealed from the man that she had formerly been a barmaid, and had lived at another time with a woman of bad character, in circumstances of suspicion, this was held a good defence.[4]

In this case, Abbott, C.J., left it to the jury to say whether the defendant was induced to make this promise, or to

[1] *Irving* v. *Greenwood*, 1824, 1 C. and P. 350.

[2] *Fletcher* v. *Grant*, 1878, 6 R. 59; *Beach* v. *Merrick*, 1844, 1 C. and K. 463.

[3] *See dicta* in *Beachey* v. *Brown*, 1860, El. Bl. and El. 796; and *Baker* v. *Cartwright*, 1861, 10 C.B. N.S. 124.

[4] *Wharton* v. *Lewis*, 1824, 1 C. and P. 529.

continue this connection by false representations or wilful suppressions of the truth; for if he was induced to continue the connection by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, it was a good defence to this action, and the defendant was entitled to their verdict. It is always a question of circumstances whether the facts misrepresented or concealed are sufficiently material to warrant the breach. It is not enough for the defender to say, "If I had known so-and-so I would not have given the promise." He would not be entitled to break his contract on discovering—*e.g.*, that the lady wore a wig or had false teeth. And it was even held not a good defence that the pursuer had concealed the fact that she had once been insane and confined four months in a lunatic asylum.[1]

Serious change in health of one of the parties may justify the other in non-performance.—It would seem to be law, and is certainly good sense, that if any great change takes place in the bodily or mental condition of either of the parties after the promise, the other shall not be compelled to go on. And this was laid down in England by a very eminent judge.[2] The paucity of authority on this point is no doubt due to the fact that in such circumstances actions for breach of promise are felt to be hopeless, even if relevant. No jury would give damages in a case where it was proved that the reason for the breach was that since the promise the pursuer had become paralytic or consumptive. And such reasons—as that the pursuer had since the promise suffered a great loss of character, as—*e.g.*, by conviction of a crime, though not absolute defences in law, would practically destroy the chance of obtaining more than nominal damages, even if the jury found for the pursuer.

Ill.—The woman found the man had an abscess in his breast. Held by Lord Kenyon she was entitled to refuse to marry him.[3]

It may, however, happen that it is the defender who wishes

[1] *Baker* v. *Cartwright*, 1861, 10 C.B. N.S. 124.

[2] *Atchinson* v. *Baker*, 1797, Peake's Add. Ca. 103, Lord Kenyon.

[3] *Ibid.*

to resile on the ground of his own supervening infirmity. In such a case if the pursuer wished to go on, difficult questions would arise. Suppose—*e.g.*, that after the promise a man discovers in himself some disease, bodily or mental, of a nature very likely to be transmitted to his children. Is he not to be entitled to withdraw from his engagement to marry except on payment of damages? The Court of Exchequer Chamber, by a bare majority, decided that a man who was in an advanced state of consumption, and could not have married but at great risk to life, was, nevertheless, not entitled to resile.[1] Pothier in his "Traité du Mariage," part 2, ch. i., § 61, says, "I am discharged from a promise to marry" ("de l'engagement des fiançailles," a solemn betrothal commonly made in presence of a priest) "not only when there happens to the person to whom I am engaged something which, could I have foreseen it, would have prevented me from entering into the engagement; but, still further, I am discharged when something happens to me which, could I have foreseen it, would have prevented me from entering into the engagement—*e.g.*, if I become afflicted with some disease which does not permit me to enter into the state of marriage without the risk of injuring my health, as if I become consumptive" ("pulmonique"). The general rule of the law of contracts is against this view. In the leading English case of *Paradine* v. *Jane*,[2] it is stated thus:—"Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then the law will excuse him. But, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract."

Sir Frederick Pollock[3] questions the authority of *Hall* v. *Wright* on the ground that in a contract so highly personal, it is not unreasonable to think that it is always made subject to the implied condition that the promiser shall be excused from performance if he be in a state of health unfitting him for marriage. The case is one not very likely to recur, few women would raise an action against a man whose defence was

[1] *Hall* v. *Wright*, 1859, E.B. and E. 746.

[2] Aleyn, 26.

[3] Contracts, 5th Ed., p. 405.

that in his condition marriage would endanger his life, and juries would not in such a case be apt to award more than nominal damages.

It is not a defence that the man has discovered that the woman was engaged to another person at the date of his promise to her, and concealed that fact from him.[1] Nor that the defender was married when he gave the promise, unless the pursuer knew it. For this would be to allow him to found on his own fraud.[2]

Defence of *Mora*.—The claim must be made within a reasonable time if intimacy cease. And it would appear that mere intimation that the claim is not departed from, will not keep it alive indefinitely. It must be insisted in.[3]

Whether Action competent by or against Executors.—In England it was settled by Lord Ellenborough that an action for damages for breach of promise could not be brought by the executors of a deceased person unless they could show that his estate had sustained actual damage by the breach. In this case the claim would be limited to the amount of such special damage.

"The general rule of law is, *actio personalis moritur cum persona*; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is the debts and goods of the deceased, but not of their wrongs, except when those wrongs operate to the temporal injury of their personal estate."[4] The converse case of an action against the executors of the promiser was recently decided in England.[5] It was then held that such an action would only lie to the extent to which there had been special damage. In the language of Bowen, L.J., "With the death of the promisor, all claim to damages of an exemplary or sentimental kind ought to cease, and such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from

[1] *Beachey* v. *Brown*, 1860, E. B. and E. 796.

[2] *Millward* v. *Littlewood*, 1850, 5 Ex. 775.

[3] *Colvin* v. *Johnstone*, 1890, 18 R. 115.

[4] *Chamberlain* v. *Williamson*, 1814, 2 M. and S. 408.

[5] *Finlay* v. *Chirney*, 1887, 20 Q. B.D. 494.

the breach or within the contemplation of both parties at the date of the promise, and in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case." Lord Esher, M.R., even doubted whether the action would lie if special damage was alleged, and says, "I can hardly conceive of a case where such special damage could arise as would support the action."

There would appear to be no direct authority in Scotland to the effect that the action is incompetent by or against executors. The authority of the English cases is weakened by the consideration that English law applies the maxim, "*actio personalis moritur cum persona*," with much greater rigour than has been done in our Courts. No action in England can be brought by a man's executors for damages on the ground of any injury done to his person, feelings or reputation —as *e.g.*, for slander or assault. But in Scotland it has been held that the widow and executrix of a deceased person was entitled to sue an action for damages by slander.[1] It is true that in this case real patrimonial loss was averred. But Lord Gifford says, "In the first place this is not an action for pure *solatium*. I am not sure that the action, even if it had been in that character alone, would not have transmitted." In America it is settled that the action cannot be brought by an executor. A very singular case[2] lends some countenance to the view that the action would not be incompetent against executors. There a woman went through a ceremony of marriage with a man in 1868 and cohabited with him for some months. The man, who was a sailor, went on a voyage and never returned. In 1884 the woman saw an advertisement in a newspaper in terms of the Presumption of Life Act referring to the man whom she believed to be her husband. On inquiry, it turned out that when he went through the ceremony with her he had a wife living. The woman who had been thus deceived had herself married after the disappearance of her supposed first husband, and could not qualify any patrimonial loss which she had sustained by

[1] *Auld* v. *Shairp*, 1874, 2 R. 191; *Stebbins* v. *Palmer*, 1822, 1 Pickering (Mass.), 71; *Latimore* v. *Simmons*, 1825, 13 Sergeant and Rawle (Penn.), 183.

[2] *Evans* v. *Stool*, 1885, 12 R. 1295.

her cohabitation with him. In an action of damages brought by her and her husband against the widow and executrix of the sailor, it was held that the liability had not been extinguished by his death. This was a very strong case, for it was treated by all the judges as clear that the woman had not suffered either patrimonial loss or injury to reputation. Her only ground of claim was that her feelings and those of her husband had been wounded by the discovery that, sixteen years before, she had been the victim of this deception. The question was expressly kept open, whether the claim would have transmitted to her executors as well as against the executors of the wrong-doer. But in a very recent case *Auld* v. *Shairp* was justified on the ground that patrimonial loss was there averred. And it may be regarded as settled, that where this is not the case, the title of executors to sue an action for breach of promise will not be sustained.[1]

Measure of Damages.—As has been said, compensation is given not only for loss of the particular marriage and diminished chance of marriage at all, or, as it is quaintly expressed, loss of market, but also in *solatium* for the wound inflicted on the sensibility of the pursuer. The language of Mr. Sedgwick has been quoted by a very eminent judge with approval.[2] "In this action, though in form *ex contractu*, yet it being impossible from the nature of the case to fix any rate or measure of damages, the jury are allowed to take into their consideration all the circumstances; and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation." The Court will be slow to interfere with the verdict of a jury in these cases. The rule is thus stated by Baron Hullock: "The principle which governs the Courts in cases of this description is not whether they think the damages too large, but whether they be so large as to satisfy the Court that the verdict was perverse, and the result of gross error, misconception, or undue motives." Chitty says of the English authorities, "In no reported case

[1] *Bern* v. *Montrose Lunatic Asylum*, 1893, 30 S.L.R. 748.

[2] Damages, 7th Ed. ii., p. 449, cited by Willes, J., in *Smith* v. *Woodfine*, 1857, 1 C.B. N.S. 660.

has a new trial been granted for excess of damages, and in many cases has it been refused."[1]

Evidence as to the amount of the defender's means is admissible, and usual.[2] The pursuer's loss is the greater if she would have gained by the marriage position and the enjoyment of wealth.[3] And damages for seduction, if this is alleged, may be obtained in the same action.

Actions for Breach of Promise are among the causes appropriate for jury trial, and will be sent to a jury unless special cause is shown why this should not be done.[4] The fact that in the same action there is a conclusion for aliment for an illegitimate child is not such "special cause."[5]

[1] Contracts, 12th Ed. 622.

[2] *Smith* v. *Woodfine*, *supra*. In this case the authorities are carefully reviewed by Willes, J.

[3] *Berry* v. *Da Costa*, 1866, L.R. 1 C.P. 331.

[4] Evidence Act, 1866 (29 & 30 Vict. c. 112), § 2.

[5] *Trotter* v. *Happer*, 1888, 16 R. 141.

CHAPTER XXXII.

SEDUCTION.

SEDUCTION is an expression, the meaning of which is pretty well understood, though it is not very easy to define. A man is said to seduce a woman when he prevails upon her by artful persuasion to allow him to have carnal intercourse with her. The woman consents, or the act would be rape, but she has been beguiled into consenting. A frequent case is where the act occurs in the course of a courtship, the woman believing that the man intends to marry her, and perhaps relying on an express promise. In a case of this kind the Court appointed the following issue: "Whether in the course of the period betwixt May, 1876, and October, 1877, the defender courted the pursuer and professed honourable intentions towards her; and whether, by means of such courtship and professions, the defender seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage."[1] It is not necessary in the issue to say more than, "whether during the period of . . . the defender did seduce the pursuer, and did prevail on her to permit him to have carnal connection with her, to her loss, injury, and damage."[2] In the older cases it was usual to say, "the pursuer being of virtuous conduct, and of untainted character," or words to that effect, but it has been settled that this is not necessary.[3]

Although the seductive arts set forth in the condescendence consist usually in averments that the defender professed honourable love, and the intention to marry the pursuer, this element is by no means essential. It is none the less seduction

[1] *Gray* v. *Brown*, 1878, 5 R. 971.
[2] *Kay* v. *Wilson's Trs.*, 1850, 12 D. 845.
[3] *Walker* v. *M'Isaac*, 1857, 19 D. 340.

if the man by gradually inflaming the passions of a previously virtuous girl, and, after repeated solicitations, finally overcomes her resistance, although marriage between them be never thought of.[1] But some element of deceit or stratagem must be set out on record, or, at anyrate, it must appear that the woman did not yield at once.[2] Mere carnal intercourse is not seduction. If it appear that the woman lured the man on, or that the connection was the result of equal desire in both, there is no ground of action. It would be unjust to make the man liable in damages for an act of simple fornication not brought about by any wiles on the part of either. It is enough that he is bound to contribute to the support of a child born of the connection. The action for damages for seduction is frequently combined with one for breach of promise. It may also be alternative to a conclusion in an action of declarator of marriage by promise *subsequente copula*. If this be done, it will not be dealt with till the question of marriage is disposed of, and will not be allowed to prejudice that question.[3] The claim will lie against the heirs or representatives of the seducer.[4]

Married Woman.—A wife may obtain damages against a paramour if she prove that he overcame her virtue by seductive wiles. But the husband's action against his wife's paramour is not for seduction in the sense above indicated. It exists whether she was artfully seduced or willingly consented. Nor is his action barred by condonation of her adultery.[5]

Damages.—The amount will vary with the infinite diversity of circumstances. The age and position of the parties, their relation to each other, the amount of artifice employed, the previous character of each, will be elements for the consideration of the jury in each case.

The law of England is different. It is there held that a woman has no action against her seducer for *volenti non fit*

[1] *Linning* v. *Hamilton*, 1748, M. 13,909; *Buchanan* v. *Macnab*, 1785, M. 13,918; *Stewart* v. *Menzies*, 1837, 15 S. 1198, aff. 1841, 2 Robin. 547.

[2] *Stewart* v. *Menzies*, *supra*.

[3] *Robertson* v. *Henderson*, 1833, 12 S. 70; *Forbes* v. *Wilson*, 1868, 6 M. 770.

[4] *Kay* v. *Wilson's Trs.*, 12 D. 845.

[5] *Macdonald* v. *M.*, 1885, 12 R. 1327. And *see Paterson* v. *Bone*, 1803, M. 13,920; and *Baillie* v. *Bryson*, 1818, 1 Murray, 334. And *see* p. 55, *supra*.

injuria. The action can be brought only by a parent or master, and conclude for damages *per quod servitium amisit*. But where the daughter resides *in familia*, that is sufficient proof of service, and if the action is brought by a parent, the jury are entitled to take into account the shame and grief brought upon the plaintiff as well as loss of service.[1]

In a recent case, where the seduction complained of was alleged to have taken place in England and the defender had subsequently come to Scotland, it was held that the action here was not relevant, there being no loss of service averred. It was laid down that as the woman would have had no action in England she could have none here, on the ground that by the law of Scotland no action can be maintained on account of a wrongful act committed within the jurisdiction of a foreign country, unless the act was wrongful by the law of the country where it was committed, as well as by the law of Scotland.[2]

[1] *Bedford* v. *M'Kow*, 3 Esp. 119; *Berry* v. *Da Costa*, 1866, L.R. 1 C.P. 331; *Terry* v. *Hutchinson*, 1868, L.R. 3 Q.B. 599.

[2] *Ross* v. *Sinhje*, 1891, 19 R. 31.

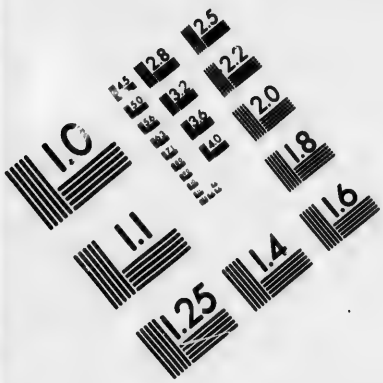
CHAPTER XXXIII.

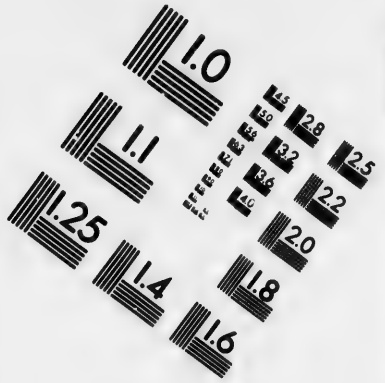
THE REGISTRATION OF MARRIAGES.

REGULAR marriages must be registered under statutory penalties in case of failure, and irregular marriages may be registered on compliance with certain conditions. Certified extracts of entries in the register books are admissible evidence of the facts they record,[1] but are not *probatio probata* of them, and may be challenged on the ground that the marriage was invalid from force, pupillarity, want of capacity, nearness of kin, or otherwise, or that the register itself is erroneous or has been vitiated.[2] The essential validity of the marriage depends on the proof of interchange of matrimonial consent, and in no degree rests on registration or the want of it. Registration is merely an adminicle of evidence which may be more or less important. The provisions as to registration of marriages are contained in certain sections of four Acts.[3]

Regular Marriages.—When the marriage has been performed by a minister, or a person appointed to celebrate marriage by the Jews or Quakers, after publication of banns, or notice under the Marriage Notice Act,[4] Schedule C., appended to the Act 17 & 18 Vict. c. 80, as amended by the Registrar-General,[5] must be transmitted within three days after the marriage to the registrar of the parish in which the marriage was solemnised. Failure to comply renders the husband, and failing him the wife, liable in a penalty not exceeding £10.[6] Provision is made, when the parties desire it, for the attendance of the registrar at the ceremony.[7]

[1] 17 & 18 Vict. c. 80, § 58.
[2] Dickson on Evidence, ii. 1204.
[3] 17 & 18 Vict. c. 80; 18 Vict. c. 29; 23 & 24 Vict. c. 85; 42 Vict. c. 8.
[4] 41 & 42 Vict. c. 43.
[5] *See* Appendix.
[6] § 46.
[7] § 47.





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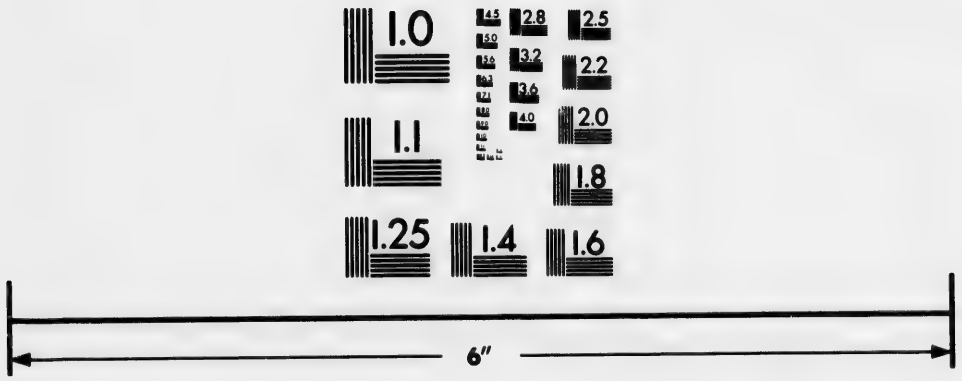



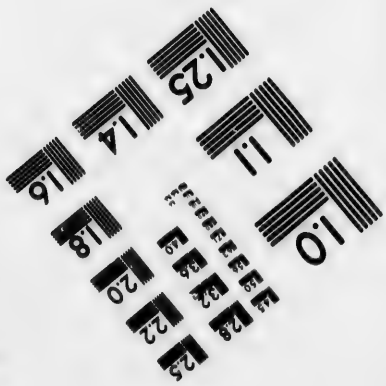

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Irregular Marriages.—Parties appearing before a justice of the peace or magistrate may, on a somewhat fictitious complaint at the instance of the procurator-fiscal, have themselves convicted on their own confession of having contracted an irregular marriage. But proof, other than the acknowledgment of parties, must now be adduced that one of them had at the date thereof his usual residence in Scotland or had lived there during the twenty-one days preceding the marriage. The registrar is forbidden to record the marriage unless the extract of conviction bears that such proof was adduced.[1]

A simpler mode is provided by the same Act.[2] The parties, within three months after they have contracted an irregular marriage, may present a joint application to the sheriff or sheriff-substitute of the county in Scotland in which it was contracted. On proof (1) of the marriage, and (2) that one of them had his or her usual residence in Scotland, or had lived there for twenty-one days preceding it, the sheriff will grant a warrant to the registrar to record the marriage. The registrar's fee is in this case five shillings.[3]

Where Marriage is established by Action of Declarator.—The clerk of Court is bound under penalty of forty shillings to transmit a notice of the decree to the registrar of the parish of the domicile or usual residence of the parties. If they belong to different parishes it should be transmitted to the registrars of both.[4]

Foreign Marriages.—If the marriage of a Scottish subject, which has been celebrated abroad, be intimated within twelve months, to the registrar-general, and certified by the British Consul of the country or district within which it has taken place, such marriage will be entered in a book called "The Foreign Register."[5] Provision has been made by a more recent Act for the registration of marriages celebrated abroad by officers and soldiers of Her Majesty's land forces or members of their families who are with the regiment.[6]

[1] 19 & 20 Vict. c. 96, § 3. The Registrar is entitled to a fee of twenty shillings, 17 & 18 Vict. c. 80, § 48.

[2] § 2.

[3] For the usual form of proceedings, *see* Appendix.

[4] 17 & 18 Vict. c. 80, § 49.

[5] 23 & 24 Vict. c. 85, § 10.

[6] 42 Vict. c. 8, § 2.

CHAPTER XXXIV.

THE MARRIED WOMEN'S POLICIES OF ASSURANCE (SCOTLAND) ACT, 1880 [43 & 44 VICT. C. 26].

THIS Act, which commenced on the 26th August, 1880, provides—1. A married woman may effect a policy of assurance on her own life or on the life of her husband. In either case, if it is expressed to be for her separate use, it vests in her and is payable to her and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration. It may be assigned by her *inter vivos* or *mortis causa* without her husband's consent.[1]

2. A policy of assurance taken by a married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children. The policy and its proceeds shall vest in him as trustee, or in any trustee whom he may nominate in the policy, or in a separate writing intimated to the Insurance Office. It is not liable to the diligence of his creditors, or revocable as a donation, or reducible on any ground of excess or insolvency. But if it be proved that the policy was effected and the premiums paid with intent to defraud creditors, or if the husband is made bankrupt within two years of the date of the policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.[2]

Where the policy is expressed in general terms, as for the

[1] § 1.
[2] § 2. The Act is printed in the Appendix.

"benefit of the wife and children of the assured," how will the proceeds be divided? This has not been decided in Scotland. In England, conflicting judgments have been given by judges of first instance construing identical words.[1] Chitty, J.,[2] and Malins, V.C.,[3] held at first that the wife took the proceeds for life, and the children the fee. But Malins, V.C., subsequently adopted another view, and decided that the proceeds should be divided as on intestacy.[4] This is, it is submitted, supported by no good grounds. The Act, itself, provides that the policy shall not form part of the husband's estate. Why then should the fund be divided as if it were part of his estate of which he had not disposed? In a later case,[5] North, J., held that the wife and children took as joint tenants, or, as we should express it, that the fund fell to be equally divided among the survivors at the date of payment. And this appears to be the sounder view.

Fraud on Creditors.—It has been held in England that the husband's creditors cannot claim repayment of premiums on a policy settled by the husband on his wife and children, when it is proved that the premiums were paid by the wife out of her separate estate.[6]

Where the policy was effected by the wife, but with money belonging to the husband, and was expressed to be for the benefit of the children, it appears that the husband, on the wife's death, could claim repayment of the value of the premiums so advanced by him.[7]

The wife may assign or burden her interest.—It would appear that, where not excluded by the terms of the policy, a married woman may dispose *stante matrimonio* of her interest on a policy taken by her husband on his life for her benefit. In an English case an opposite conclusion was reached, but

[1] The statute in England is The Married Women's Property Act, 1882, § 11, which re-enacts, with some additions, § 10 of the Act of 1870, upon which the Act for Scotland was expressly modelled.

[2] Adam's Policy Trusts, 23 Ch. D. 525.

[3] Mellor's Policy Trusts, 6 Ch. D. 127.

[4] Same case, 7 Ch. D. 200.

[5] In *re Seyton*, 1887, 34 Ch. D. 511

[6] *Holt* v. *Everall*, 1876 (C. A.), 2 Ch. D. 266.

[7] *Holt* v. *Everall*, *supra*.

the judgment is expressly founded on the terms of the policy.[1]

The policy may be surrendered.—A policy effected by a husband on his own life for behoof of his wife in terms of sect. 2 does not constitute a trust for the wife's protection, which cannot be revoked even at her own request, on the principle of *Torry Anderson's* case. The trustee may surrender it at any time for its surrender value. And it does not appear that he needs the wife's concurrence. Probably, even where the husband is himself the trustee he may surrender the policy at his own hand, and if the Insurance Company had no notice of any contemplated breach of trust, they would not be entitled to withhold payment.[2]

Foreign Husband.—A husband domiciled abroad may effect a policy under the Act.[3]

[1] *King* v. *Lucas*, 1882 (C. A.), 23 Ch. D. 712.

[2] *Schumann* v. *Scottish Widows' Fund*, 1886, 13 R. 678.

[3] *Ibid.*

CHAPTER XXXV.

ELECTION LAW.

Parliamentary Franchise.—It is quite settled that women, whether married or unmarried, are not entitled to the parliamentary franchise. In rejecting a claim made by a woman to vote, the Court rested their decision upon the fact that there was a long and uninterrupted custom in Scotland limiting the franchise to males. The claim was made under section 3 of the Reform Act of 1868,[1] on the ground that "every man" possessing the qualification included woman. But it was held that section 56, which saved all existing laws and customs relating to the franchise, was applicable to this case, and decisive against the claim.[2]

Husband's Right to Vote in Respect of Wife's Heritage.—It is provided by the Reform Act of 1868 that "husbands shall be entitled to be registered and to vote in respect of lands and heritages (of the requisite value) belonging, whether in fee or in liferent, to their wives, or owned or possessed by such husbands after the death of their wives by the courtesy of Scotland."[3]

But where a married woman was entitled to the occupation of a house as a schoolmistress, it was held that this did not confer on her husband the right to vote in respect of such occupation. There must be an actual right of property in the liferentrix to entitle her husband to be put on the roll.[4]

It is not necessary that the liferentrix should have made

[1] 31 & 32 Vict. c. 48.

[2] *Brown* v. *Ingram*, 1868, 7 M. 281. And so held in England, *Chorlton* v. *Lings*, 1868, L.R. 4 C.P. 374, where there is a learned discussion of the history of the subject.

[3] § 14.

[4] *Boyle* v. *M'Gowan*, 1877, 5 R. 10.

up her title,[1] nor that there should have been a conveyance to trustees to hold for her.

Ill.—A wife's father bound himself in her marriage-contract to give her the "free liferent, use, and possession" of certain lands during his own life, and at his death to convey them to the marriage-contract trustees for his daughter in liferent and her children in fee. It was held that the daughter was life-rentrix even during her father's lifetime, and that her husband was entitled to be put on the roll.[2]

Where trustees holding moveable funds for a wife, with a power to convert and invest in heritage, exercised the power during this marriage, it was held that this made the wife a proprietor of heritage, and that her husband was entitled to vote.[3] But this was on the footing that the investment was permanent, and it does not seem that the same result would be reached where trustees were, in carrying out the purposes of the trust, entitled at once to realise the estate and divide.[4] Where trustees holding heritage had a power of sale which they had not exercised, and the trust-purposes were all fulfilled except that of division, which was to be accomplished without a sale, the husband of one of the beneficiaries was held entitled to a vote.[5] If the feudal title is in trustees who are merely directed to pay the rents to a certain person, this does not constitute a liferent in the sense required. For there is here no right of ownership in the person to whom the rents are to be paid. He has only a personal claim against the trustees.[6]

The husband does not lose his claim to vote in respect of his wife's heritage on account of his *jus mariti* being excluded.[7]

The husband's right to be admitted to the roll rests on the principle that he shall vote where she would herself have been entitled to do so but for her sex. Accordingly, where the *jus mariti* had not been excluded and the husband was under sequestration, it was held that he was not entitled to vote.

[1] 2 & 3 Will. IV. c. 65, § 7.

[2] *Forbes* v. *Halley*, 1882, 10 R. 4.

[3] *Blackwood* v. *Veitch*, 1878, 6 R. 53.

[4] *See Wilson* v. *Cowan*, 1868, 7 M. 299.

[5] *Stewart* v. *Campbell*, 1869, 8 M. 13.

[6] *Martin* v. *M'Lurg*, 1868, 7 M. 299.

[7] *Blackwood* v. *Veitch*, *supra*, and cases cited in Swinton's Digest, p. 62.

For the right to the fruits of the wife's heritage was then vested in the trustee for the husband's creditors.[1] Where a tercer marries again, it would appear that the second husband can vote, provided of course the terce lands are of sufficient value.[2] The husband of a tenant is not entitled to vote in respect of his wife's tenancy.[3]

Municipal Franchise.—The Municipal Elections Amendment (Scotland) Act, 1881, provides that where in the previous Acts prescribing the qualifications of voters at municipal elections in Scotland, "words occur which import the masculine gender, the same shall be held for all purposes connected with and having reference to the right to vote in the election of town councillors, and also to nominate candidates for election to the said office, to include females who are not married, and married females not living in family with their husbands; but such females shall not be eligible for election as town councillors.[4]

County Councils.—A married woman, not living in family with her husband, possessing the qualification for being registered as a parliamentary elector, but disqualified by sex from being so registered, may vote in elections for county councils.[5] But she is not eligible as a county councillor.[6]

School Boards.—It cannot be said that the right of married women to vote for members of a school board, or to be elected upon it, rests upon any firm foundation. Section 14 of the Education (Scotland) Act, 1872,[7] which makes the decision of the sheriff final upon all such questions, has prevented the matter being determined in the Court of Session. Solicitor-General (now Lord) Rutherfurd Clark gave an opinion in 1873 in these terms: "The question is attended with doubt; but I am inclined to think that married women are not entitled to vote, being subject to a legal disqualification,

[1] *Buchanan* v. *M'Culloch*, 1865, 4 M. 135.

[2] Swinton's Digest, 156, case of W. Martin, Lanarkshire, 1838. § 14 of the Reform Act, 1868, seems to remove the ground of Mr. Cay's doubt—Cay on Reform Act, p. 91.

[3] *M'Queen* v. *Dunn*, 1874, 2 R. 3.

[4] 44 Vict. c. 13, § 2.

[5] Local Government (Scotland) Act, 1889 [52 & 53 Vict. c. 50], § 28, sub.-sec. 2.

[6] *Ibid.*, § 9.

[7] 35 & 36 Vict. c. 62.

inasmuch as they are under the curatory of their husbands."[1] An opposite conclusion was reached by Sheriff (afterwards Lord) Fraser.[2] The ground of judgment adopted by the last-named learned judge was that the exclusion of women from the parliamentary franchise rested on custom, whereas in school board elections there was a contrary custom, women having by common consent been admitted to vote, and to be elected as members of school boards. This reason has become much stronger in the sixteen years since the judgment was pronounced. Many married women have sat upon school boards without question, and it seems unlikely that their right will be made the subject of further dispute.

Parochial Board.—The Poor Law Act of 1845[3] enacts that "in all meetings and matters under this Act, the husbands of owners of lands and heritages shall be entitled to vote and act in right of their wives." The question does not seem to have been raised whether a married woman not living with her husband might not be entitled to vote, but it is probable that such a claim would be rejected. Married women have been elected as members of parochial boards, and allowed to sit without question. Lord Fraser thinks they are eligible.[4]

[1] Cited in Sellar's Education Acts, 8th Ed., p. 138.

[2] *Lochwinnoch* Case, 20 Journal of Jur. 483. And *see* Fr. i. 518.

[3] 8 & 9 Vict. c. 83, § 26.

[4] Fr. i. 518.

CHAPTER XXXVI.

PRACTICE.

Title to Sue.—By the general rule of the common law a married woman is not entitled to raise an action in her own name alone. To make the instance good it is necessary that her husband be conjoined with her as her administrator-in-law. Where he is unable or unwilling to concur, the Court may allow the action to proceed after appointing a *curator ad litem* to the wife.[1] Title to sue has its foundation in interest, and the necessity for the husband's concurrence in actions by the wife appears not so much to depend on the doctrine that her *persona* is sunk in that of her husband, so that she is by marriage placed in a position analogous to that of a minor, as on the fact that, where the common law operates, it is the husband and not the wife who has the real pecuniary interest in the suit. For if the wife's incapacity to sue alone were based upon the theory of personal disability, she would not be relieved from the incapacity by possessing separate estate.

Sums falling under *jus mariti*.—Where the sum which would be acquired by the success of the suit would fall under the *jus mariti*, it is the husband who has the true interest, and he may sue the action against his wife's wish, and without making her a party.

Ill.—Husband and wife are living separate. Wife has a claim for *legitim*. Husband held entitled to sue without her concurrence.[2]

Ill.—Husband who had been divorced for adultery found entitled to sue for *legitim*, which had vested in his wife before

[1] Ersk. i. 6, 21.

[2] *Macdougal* v. *Wilson*, 1858, 20 D. 658.

the decree of divorce.[1] Where, however, the husband was bankrupt and the wife had a right of election between her *legitim* and a conventional provision from which the *jus mariti* was excluded, it was held by a majority of the whole Court that the husband and his creditors were not entitled to insist in enforcing her claim to *legitim*.[2] There was much diversity of judicial opinion in this case.

In an older case two husbands raised a reduction *ex capite lecti*, in the names of their respective wives. It was objected that their wives had not authorised the action, and the Lord Ordinary before answer ordained the pursuers to produce the written consent of their wives. In respect of failure to comply with this order the defenders were assoilzied. The pursuers reclaimed, and argued that they had a separate right to insist in the reduction as, if the deed were set aside, the rents of the estate, which would then become the property of the wives, would fall under the *jus mariti* of the pursuers. But the Court adhered, and it was observed from the bench, "That the husband's *jus mariti* has no place until the property be vested in the wife; she is therefore a necessary party in an action of reduction which relates to the property of the estate, and not merely to the management of it."[3]

As regards sums falling under the *jus mariti*, therefore, the husband may sue without the wife but not the wife without the husband. But after 1st November, 1861, a wife could in such circumstances claim that a reasonable provision for her support should be made from a sum recovered in such an action, provided that her claim was made timeously.[4]

Title to Sue as to Wife's Heritage.—Where the Act of 1881 does not apply, the husband may sue for the rents of heritage which is vested in the wife.[5] Where it applies she may sue for rents without his concurrence. But he cannot himself sue or compel her to sue an action involving her right to the fee of heritage.[6] Thus, where a husband brought an action to compel his wife to concur with him in

[1] *Ferguson* v. *Jack's Executors*, 1877, 4 R. 393.

[2] *Stevenson* v. *Hamilton*, 1838, 1 D. 181; and *see Millar* v. *Birrell*, 1876, 4 R. 87.

[3] *Aitkins* v. *Orr*, 1802, M. 16,140.

[4] Conjugal Rights Act, 1861 [24 & 25 Vict. c. 86], § 16.

[5] See *supra*, p. 247.

[6] *Aitkins* v. *Orr*, *supra*.

serving her as heir to her father, the action was dismissed.[1] And where a husband entered into a submission as to his wife's right to a heritable subject, the decree-arbitral was reduced on the ground that the wife had not been a party to the submission.[2]

Where Husband refuses to concur.—Where the subject of the action was a sum which would, if recovered, fall under the *jus mariti*, the action was entirely in the discretion of the husband. For the ground upon which he was held entitled to sue in such a case against his wife's wish was simply that he and not his wife had the true interest.[3] From which it followed that if he did not choose to raise the action she had no right to complain. But where the subject of the suit was something which would belong to the wife exclusive of the *jus mariti*, the husband could not prevent the raising of the action merely by arbitrarily refusing to concur in it.[4] The Court would appoint a *curator ad litem*.

Ill.—A woman raised an action in her own name as an heir-portioner, concluding for count and reckoning as to the price and rents of certain heritage belonging to her late father, alleged to have been adjudged and sold by heritable creditors. After closing the record it was discovered that the pursuer was a married woman. Her husband declined to concur. It was held that, in so far as the conclusions related to heritage or its *surrogatum*, the pursuer was entitled to insist in the action, and a *curator ad litem* was sisted.[5]

Ill.—In an old case, where a wife as an heir-portioner of her father brought a reduction *ex capite lecti* of a deed granted by him, "the Lords found that the husband behoved to be *in processu*, but if he refused concourse, the Lords would authorise the wife to insist to reduce the right, in so far as the husband had no interest further than his *jus mariti* and the courtesy."[6]

Ill.—A wife raised an action of damages against her trustees

[1] *Ferguson* v. *Cowan*, 1819, Hume, 222; but best reported in a note to *Macdougal* v. *Wilson*, 20 D., at p. 662.

[2] *M'Cally* v. *Inglis*, 1821, 1 S. 69 [N.E. 70]; and *see Kennedy* v. *Watson*, 1848, 11 D. 171.

[3] *Macdougal* v. *Wilson*, 1858, 20 D. 658.

[4] Stair, i. 4, 15; Ersk. i. 6, 21; Fr. i. 569.

[5] *Blair* v. *Burns*, 1829, 8 S. 264.

[6] *Hacket* v. *Gordon*, 1673, M. 6039.

for having lent a sum on a heritable bond without a search, which would have revealed prior incumbrances. The money was vested in the wife in liferent, secluding the *jus mariti*, and in her children in fee. The land upon which the trust-money was lent belonged to the pursuer's husband. He did not concur, but it was pleaded that as the pursuer was living in family with him the action must be presumed to be with his concurrence, and as the loss was occasioned by his fraud in concealing the prior burdens, restitution could not be claimed. The wife's title to sue was sustained.[1]

Title to Sue since Act of 1881.—A married woman's title to sue without her husband's concurrence when she is residing with him in family, and he is capable of consenting but refuses, has not been judicially considered since the Act of 1881. Where the subject of the action was heritage, her title was sustained at common law, as already shown, in cases where the husband showed no good reason for refusing his consent. It is submitted that the principle of these cases would now be extended to suits by a married woman in which the conclusion is for payment of a sum of money or delivery of a moveable subject. For this sum or subject would no longer fall under the *jus mariti*, and the wife's interest would appear to give her a title. It seems that where the husband's intervention is only necessary as her curator, she will not be barred by his arbitrary refusal to concur. The appointment of a *curator ad litem* serves the double purpose of making up the deficiency in the wife's capacity, and of protecting any interest the absent husband may have in the action.

A married woman suing since the Act, is in a similar position to a wife who sued before its date for a sum or subject which would not, if recovered, have fallen under the *jus mariti;* but as to which the right of administration had not been excluded. In two cases where a charge had been given by a married woman without her husband's con-

[1] *Graham* v. *Hunter's Trs.*, 1831, 9 S. 543. *See* Mackay's Practice, i. 309. I have referred to the session-papers, and find that the right of administration was not excluded in this case. The point does not appear to have been noticed. It should be observed, however, that the husband was himself a defender as one of the trustees.

currence, a bill of suspension was passed *simpliciter*, although the husband's *jus mariti* was excluded.[1] On the other hand, in a case already noticed a wife's title to sue was sustained though the right of administration was not barred.[2] This case was followed by Lord Mure in an Outer-House judgment.[3] The case of *Graham* is not to be regarded as an authority for dispensing with a curator when the *jus mariti* is excluded from the subject of the action, but the right of administration subsists. For there the husband was called as a defender, and the point was not raised. But in no case does it appear to be laid down that a husband whose *jus mariti* is excluded can by his mere *ipse dixit* prevent his wife from raising an action. The Court, unless satisfied that the action is an unreasonable one, will, if the husband refuses his concurrence, appoint a *curator ad litem*.[4]

In what cases a Wife may sue as if unmarried.—A wife may, in some cases, sue as if unmarried—*i.e.*, without her husband's concurrence, or that of a curator in his room. (1) She may sue as if *sui juris* in an action relating to her estate from which both *jus mariti* and right of administration are excluded. In some cases a *curator ad litem* has been appointed, but this would appear to be unnecessary. The doctrine is clearly laid down in the case of *Biggart* that, *quoad* such separate estate, she may be regarded as *sui juris*, a position which clearly involves the right to sue and to defend without a curator.[5] So a wife who was heiress in possession of an entailed estate, from which by an ante-nuptial marriage-contract her husband's *jus mariti* and right of administration had been excluded, was found entitled to present a petition for disentail without her husband's concurrence, and to subscribe the deed of disentail without his consent.[6] In this case

[1] *Borthwick* v. *Urquhart*, 1827, 5 S. 242; *Wight* v. *Dewar*, 1827, 5 S. 549.

[2] *Graham* v. *Hunter's Trs.*, 1831, 9 S. 543.

[3] *Mackay* v. *Allan*, 1868, 40 Sc. Jur. 221; where, however, a *curator ad litem* was appointed.

[4] *See Finlay* v. *Hamilton*, 1748, M. 6051; *Cullen* v. *Ewing*, 1830, 9 S. 31; *Blair* v. *Burns*, 1829, 8 S. 264.

[5] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R., at p. 482; *Graham*, *supra*; *Waddell* v. *W.*, 1837, 16 S. 79; Fr. i. 572.

[6] *Hay Primrose*, 1850, 12 D. 916.

a *curator ad litem* was appointed. It is submitted, however, that the true principle is that a married woman is, *quoad* such estate, subject to no legal incapacity, and should be allowed to sue without a curator.

The *jus mariti* and right of administration are, it must be remembered, excluded from the wages and earnings of a married woman acquired after 1st January, 1878, and from all investments thereof.[1]

A wife who has obtained a judicial separation or a protection order, may sue and be sued as if she were not married.[2] This privilege is not extended to a wife judicially separated if the decree was obtained at the instance of the husband.[3]

Where the Husband is Defender.—In consistorial causes it is not now the practice to appoint a *curator ad litem.* Lord Fraser points out that the office of curator is not so much to protect the interest of the wife as to represent and bind the absent husband.[4] This being the case, it is an otiose proceeding to appoint a curator in a *lis* to which the husband is a party.[5] And it is difficult to see why the character of the cause should make any difference in this respect. When the husband is present as defender in a non-consistorial action at his wife's instance, what is gained by the appointment of a *curator ad litem?*[6]

Where Husband cannot concur.—When the husband is subject to some legal incapacity such as outlawry, or is fatuous or lunatic, his concurrence will be dispensed with and the wife allowed to sue with a *curator ad litem.*[7] And this will be the case when the husband is in penal servitude.[8] But bankruptcy does not render the husband incapable of acting as his wife's curator. And if a bankrupt husband concur in his wife's action, the Court will not appoint a *curator ad litem.*[9] In one case where the bankrupt husband had an interest in

[1] 40 & 41 Vict. c. 29, § 3.

[2] Conjugal Rights Act, 1861 [? ' & 25 Vict. c. 86], §§ 5 and 6.

[3] Sect. 6.

[4] *See per* Lord Pres. in *Brown* v. *Graham*, 1829, 1 Jur. 50.

[5] Fr. i. 570.

[6] *Ibid.*, i. 571.

[7] Ersk. i. 6, 21.

[8] *Paul* v. *Gibson*, 1834, 12 S. 431, aff. 7 W. and S. 462.

[9] *Horn* v. *Sanderson*, 1872, 10 M. 295.

the suit the Court appointed a curator,[1] but this seems to be inconsistent with the more recent authority of *Horn* v. *Sanderson*.

Where the husband is abroad, or cannot be found, and the wife can show urgency, she will be allowed to sue with a *curator ad litem*.[2]

The absence of the husband would not relieve the wife from the necessity of obtaining his concurrence if he were within the reach of ordinary communication. In one case the husband had gone to sea and was reputed dead, and although the defender alleged that the husband "within this month was seen at Air," "the Lords, in respect both parties acknowledged that the husband had been a great while absent, found the action competent to the wife."[3] In another case a married woman sued for aliment of a child born during the marriage, but alleged to be the fruit of illicit intercourse with the defender prior to that date. The husband was a sailor. He had deserted the wife and could not be found. She was allowed to sue with a curator.[4] But in a case of a like character, where a wife had given birth to a child three years after she had been deserted by her husband, opinions were expressed that the wife had no title to sue. No curator had, however, been appointed in this case.[5]

And in a more recent case where a wife proved that her husband had been absent for seven years, and that she had made all reasonable endeavours to find him, but unsuccessfully, her title to sue was sustained. Her counsel intimated he was willing to have a *curator ad litem* sisted, and this was done.[6] Nothing was said in this case with regard to the Act of 1881, but it is thought that the fact that the money recovered would not now fall under the *jus mariti* should give her a sufficient title to sue a claim of this nature at least with a curator.

When the Action is one of Damages.—It is settled by a series of decisions that a wife may sue an action of damages

[1] *Willox* v. *Farrell*, 1849, 11 D. 1206.

[2] Ersk. i. 6, 21; Fr. i. 569.

[3] *Gardiner* v. *Colvil*, 1667, M. 6038.

[4] *Jobson* v. *Reid*, 1832, 10 S. 594.

[5] *Wilkinson* v. *Bain*, 1880, 8 R. 72.

[6] *M'Quillan* v. *Smith*, 1892, 19 R. 375.

for slander without being required to obtain her husband's concurrence.[1] A *curator ad litem* will be appointed.[2] The ground of these judgments is that such an action is primarily resorted to for the purpose of vindication of character. This distinguishes it from a mere claim of debt, and gives the wife a substantial interest to insist, although the damages recovered would fall under the *jus mariti* of her husband. It is more doubtful if, before the Act of 1881, a wife had sufficient interest to sue an action of damages for personal injury, in which no question of reputation was involved.

In one case a widow was found not to have a title to sue for damages on account of wrongous imprisonment, suffered during her husband's lifetime.[3] This judgment was questioned in *Smith* v. *Stoddart*. Under the old law it is not very easy to see how the wife could have an interest during her husband's lifetime, except where her reputation had been attacked. But it appears unnecessary to discuss the point, for it is thought that since the Act of 1881 no difficulty would be felt in sustaining the wife's title to sue, as the damages recovered would not fall under the *jus mariti*.

Husband's subsequent Concurrence.—Where the instance is bad from want of the husband's concurrence, the defect may be cured by his intimating his concurrence at a later stage.[4] This he will, of course, be allowed to do in the general case only on conditions.

When Husband must be cited as Defender.—In actions against a married woman it is necessary to cite her husband. This is usually done by calling him "as her curator and administrator-in-law." But it is sufficient if he be called "for his interest."

The husband need not be called in actions against a wife who is judicially separated, or has a protection order, or if she be carrying on a separate trade, and the action relate thereto.

[1] *Gale* v. *Bennett*, 1857, 19 D. 665; *Smith* v. *Stoddart*, 1850, 12 D. 1185.

[2] *Gale*, *supra*.

[3] *Milne* v. *Gauld's Trs.*, 1841, 3 D. 345.

[4] *Lyle* v. *Mackay*, 1849, 11 D. 404, overruling *Napier* v. *Rollock*, M. 6047. *See Bartholomew* v. *Houston*, 1881, 18 S.L.R. 568, where the Authorities are reviewed in a judgment by Lord Fraser.

And it would appear to be unnecessary on principle to cite him where the action relates to estate of the wife's from which the *jus mariti* and right of administration have been excluded. But in practice the husband is cited *ob majorem cautelam*. And even where the wife's estate is only separate in virtue of the Act of 1881, it is not certain that the husband must be called, though in practice this is invariably done.[1] Where the husband has a separate interest of his own he must be called as an individual. If a woman who is defender in an action marry *pendente processu*, her husband must be sisted. It is not settled whether this may be done by letters of diligence, or if it is necessary to raise a supplementary summons. Lord Fraser thinks a supplementary action the proper procedure, seeing that the husband has a material interest.[2] It is possible that, since the Act of 1881, it would be sufficient to obtain letters of diligence. Where the wife has an interest to defend, and the husband refuses to appear, the Court will appoint a *curator ad litem*.[3] Where the husband has no separate interest, and dies during the course of the action, it is unnecessary to sist his representatives. The fact that he was called for his interest, and not merely as his wife's curator, is immaterial.[4]

What Actions are Consistorial?—The term "consistorial action" includes "actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, actions of separation *a mensa et thoro*, of divorce and of adherence, and of putting to silence, and actions of aliment between husband and wife, instituted in the Court of Session."[5] Adherences are not mentioned in the enumeration of causes as to which it is provided that decree for the pursuer shall not be given, even although appearance shall not be made for the defender, until the grounds of action shall be substantiated by sufficient evidence.[6] But they are added by a later

[1] Mr. Mackay thinks it unnecessary to call him in this case—Manual, p. 166.

[2] i. 583; *see* also Mackay's Manual, 166. But *see* Ersk. i. 6, 21.

[3] *M'Kenzie* v. *Ewing*, 1830, 9 S. 31.

[4] *Murray* v. *Philp*, 1843, 6 D. 159.

[5] Conjugal Rights Act, 1861 [24 & 25 Vict. c. 86], § 19.

[6] 11 Geo. IV. and 1 Will. IV. c. 69, §§ 33 and 36.

Act.[1] So where a defender admitted on record that he had left his home, had refused to live with his wife, and did not intend to resume cohabitation, the pursuer craved decree without leading evidence. But the plea was rejected.[2]

Signing of Summons.—The summons in a consistorial cause may be signed either by a clerk of the Court of Session or by a writer to the signet.[3]

Service.—It is provided by the Conjugal Rights Act, § 10, that "in every consistorial action the summons shall be served upon the defender personally, when he is not resident in Scotland: provided always that if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient; but in every case where the citation is edictal, the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when the said children and next-of-kin are known and resident within the United Kingdom, and such children and next-of-kin, whether cited or so resident or not, may appear and state defences to the action."[4] Such personal service must be by the delivery of the summons to the defender personally by a person duly authorised by the pursuer for that purpose. It need not be by a messenger-at-arms or other officer of the law.[5] The person serving the summons shall return a certificate that delivery of it has been made. And the Lord Ordinary, if not satisfied, may call for further evidence of service.[6]

Proof that the defender could not be found is not always led. An affidavit to that effect by the pursuer's agent has been accepted as sufficient.[7] If the defender have had a known address abroad, a registered letter should be addressed to him there, and the envelope of the letter if returned should be produced. And where there is no evidence that the defender is furth of Scotland, but it is shown that attempts

[1] 13 & 14 Vict. c. 36, § 16.

[2] *Sleigh* v. *S.*, 24th May, 1893, *per* Lord Wellwood (not reported).

[3] *See* 13 & 14 Vict. c. 36, § 15; 31 & 32 Vict. c. 100, § 13; *Craig* v. *C.*, 1851, 14 D. 261.

[4] 24 & 25 Vict. c. 86, § 10.

[5] 31 & 32 Vict. c. 100, § 100.

[6] *Ibid.*

[7] *See M'Callum* v. *M'C.*, 1865, 3 M. 550; Fr. ii. 1545.

to find him have proved fruitless, and that he has no known address in Scotland, edictal citation has in practice been sustained as sufficient. It is to be observed that the words of the section "if it be shown to the satisfaction of the Court that the defender cannot be found" are not necessarily limited to the case of his not being "resident in Scotland." No decision on the point is reported.

Defender Absent less than forty days from Scotland.—The Judicature Act, 6 Geo. IV. c. 120, § 53, provides that "where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence, and have been absent therefrom during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed." It was argued in one case that it followed from this that a defender who had been absent less that forty days must be presumed to be present in Scotland, and service might be well executed upon him by affixing the summons "in the lock-hole of the most patent door" of the empty house which he had vacated. But it was held by Lord Kinnear that the citation in such a case fell under 24 & 25 Vict. c. 86, § 10, and must be personal.[1]

Where no Defences are lodged.—In consistorial actions a defender or co-defender who has not lodged defences will not be barred from appearing at the proof. Questions of status are *publici juris*, and on the same ground as that which makes it necessary to have evidence in addition to admissions of parties, the Court will allow any person to appear, even at the last moment, who can throw light upon the issue.

In one case, where a defender had been personally served in England, but lodged no defences, he appeared by counsel at the proof. The Lord Ordinary (Lee) adjourned the proof, appointing the defender to state by minute the defences he proposed to maintain. He did not obey the order, but again appeared by counsel, and his counsel was allowed to cross-examine the pursuer's witnesses.[2]

[1] *Laughland* v. *L.*, 1882, 19 S.L.R. 645.
[2] *Watts* v. *W.*, 1885, 12 R. 894.

Sisting a Mandatory.—Either a pursuer or defender in a consistorial cause may be required to sist a mandatory if absent from the United Kingdom. Since the Judgments Extension Act, 1868, by which a decree pronounced in Scotland may be enforced in England or Ireland, a mandatory will not be required unless other cause be shown than the mere fact of residence in those countries.[1] A wife absent from the country, pursuer in a divorce, and having no separate estate, was held not bound to sist a mandatory.[2] It is entirely in the discretion of the Court, and now-a-days a defender is not in the general case required to sist a mandatory although resident out of the United Kingdom. In consistorial causes which concern status, it is especially desirable that a defender should appear in order that the facts may be brought out. Accordingly in a recent case, where the defender was in embarrassed circumstances, and it appeared that the effect of the order would be that the action would be undefended, the Court declined to order him to sist a mandatory.[3] Where, as in this case, the defender takes the plea of no jurisdiction, this will be an additional reason for not requiring a mandatory.

Oath of Calumny.—The Act 11 Geo. IV. and 1 Will. IV. c. 69, § 36, provides that "the Lord Ordinary shall in all actions of divorce administer the usual oath of calumny to the pursuer." In practice it continues to be administered also in actions of declarator of nullity of marriage, when the ground alleged is impotence.[4] The oath may be taken to lie

[1] *Lawson's Trs.* v. *Brit. Linen Co.*, 1874, 1 R. 1065; *N.B. Railway Co.* v. *White*, 1881, 9 R. 97.

[2] *Campbell* v. *C.*, 1854, 17 D. 514.

[3] *D'Ernesti* v. *D'E.*, 1882, 9 R. 655.

[4] The form of oath is: At Edinburgh, the day of , In presence of the Hon. Lord , compeared the pursuer , who being solemnly sworn and examined *de calumnia*, depones that he (or she) has just cause to insist in the present action of divorce against the defender (his spouse or her husband), because he (or she) believes she (or he) has been guilty of adultery (or that she (or he) has wilfully deserted him (or her)), and that the facts stated in his (or her) libel, which has been read over to him (or her) are true. Depones that there has been no concert or collusion between him (or her) and the said defender in raising this action in order to obtain a divorce, nor does he (or she) know, believe, or suspect that there has been any concert or agreement between any other person on his (or her) behalf, and the defender or any other person on her (or his) behalf with the view or for the purpose of obtaining such

in retentis if the pursuer is going abroad. And this may be done although the summons has not yet been called.[1] Where the pursuer is abroad and unable to attend, a commission may be granted to take the oath of calumny.[2]

Identification of Defender.—Where the action is undefended, it may be necessary for the pursuer's case to have the defender present in order to be identified by witnesses. And an order may be pronounced commanding his attendance. "The Lord Ordinary appoints the defender to appear at the proof on the day of next, for identification." A defender disobeying such an order may be compelled to attend by letters of second diligence, and may be apprehended and brought in custody. In one case where such an order had been disobeyed, counsel for the pursuer proposed to show a photograph of the defender to the witnesses. This was objected to as secondary evidence, and the objection was sustained by Lord Fraser.[3] But in a later case Lord Trayner declined to follow this precedent, and pointed out that it would be unjust to the pursuer to adjourn the proof at the last moment, and that the defender could not object to the use of secondary evidence, seeing the necessity for its use arose from his own fault.[4]

Res Judicata.—It was a rule of the canon law that a judgment against the validity of a marriage never became final. "Id in matrimonium speciale est, ut sententia in con-

divorce. All which is truth, as the deponent shall answer to God. (Signed by pursuer and judge.) The oath of calumny was formerly administered in non-consistorial causes, and advocates had to swear to their belief in the goodness of their case both in fact and law, a severe strain on the professional conscience. And the Act, 1429, cap. 125, enacts: "And gif the principal partie be absent, the advocate sall sweare in the saule of him, after as is contained in thir meters:

"Illud juretur, quod lis sibi justa videtur.
Et si quaeretur verum, non inficietur.
Nil promittetur, nec falsa probatio detur.
Ut lis tardetur, dilatio nulla petetur."

These mediæval mnemonics are misprinted in *Paul* v. *Laing*, 17 D. 604, a case in which the history of the oath of calumny may be studied.

[1] *Scott*, 1866, 4 M. 1103.
[2] *Orde* v. *Murray*, 1846, 8 D. 535.
[3] *Grieve* v. *G.*, 1885, 12 R. 969.
[4] *L.* v. *L.*, 1890, 17 R. 754.

jugali causa lata . . . nunquam transeat in rem judicatam."[1] The reason appears to have been that the spiritual Court would be encouraging a sin if it compelled two persons to live apart whose marriage might be proved to be lawful in spite of a former decision. The Church Court was concerned with the spiritual weal of the parties, and its decisions were *pro salute animae*. This rule was not adopted by our law, or, at anyrate, was not recognised after the transfer of jurisdiction in consistorial causes to a purely civil tribunal.[2]

It is settled by the case of *Lockyer* that a decree in a consistorial cause is *res judicata*, and stands until reduced.

Cruelty found a good defence to an action of divorce for desertion, is not *res judicata* as a ground of separation and aliment.—In an action of divorce by a husband on the ground of desertion, his wife successfully pleaded that she was not bound to adhere on account of his cruelty. She consequently raised an action for separation and aliment, and maintained that it was unnecessary for her to lead evidence as to her husband's cruelty, that being *res judicata* in the action for divorce at his instance. But this plea was repelled by Lord Fraser, whose judgment was adhered to.[3] One of the grounds assigned was that the *res* was not the same, because less cruelty would justify non-adherence than would ground an action of separation. This, it is humbly thought, is doubtful, though supported by *dicta* in the recent case of *Mackenzie* v. *Mackenzie*.[4] But another ground given seems clear—viz., that the defender in such a case should have an opportunity, if he think fit, of adducing other evidence than that which he produced in the previous case.

Reduction.—The fact that evidence must be led for the pursuer in consistorial causes even where no defences are lodged does not prevent the decree being regarded in that event as a decree in absence. It may be set aside by a reduction, at anyrate within year and day.[5] Lord Fraser

[1] Sanchez, lib. 7, Disp. 100; Burge's Commentaries, i. 183, where the whole passage is cited.

[2] *Lockyer* v. *Ferryman*, 1876, 3 R. 882, aff. 1877, 4 R. H.L. 32.

[3] *Steven* v. *S.*, 1882, 9 R. 730.

[4] 1893, 20 R. 636; *see Juridical Review*, vol. v., p. 143.

[5] *Stewart* v. *S.*, 1863, 1 M. 449.

thinks reduction is competent until twenty years after decree, in virtue of the Court of Session Act, 1868 [31 & 32 Vict. c. 100, § 24].[1] But this is still unsettled. It is thought that the rule of the consistorial Court, which excluded review of a decree in absence after year and day, has never been repealed.[2] But no lapse of time would bar a reduction on the ground of fraud, as—*e.g.*, by subornation of perjury, provided the action be brought as soon as the fraud comes to light.[3]

Is an Allegation that the Witnesses at the First Trial perjured themselves a relevant Ground of Reduction?—This question is not settled, but the weight of principle and authority is against allowing a proof where it is not averred that the witnesses who spoke falsely were bribed to do so.[4]

In a recent case a wife who had been divorced for adultery raised a reduction on the ground that material evidence against her was perjured, and that the witnesses had been bribed to give false evidence by a detective in the employment of her husband. The Court allowed a proof before answer of the averments of subornation, and the pursuer having failed to establish these, they held, adhering to a judgment of Lord Fraser, that the averments of perjury were irrelevant, and dismissed the action. It was, however, suggested by Lord Young, who gave the leading judgment, that there might be very exceptional circumstances in which the relevancy of averments of perjury would be sustained.[5]

In a Special Case Reponing may be Allowed.—A wife brought an action of separation and aliment. The summons was served personally on the husband, and notice of the day of proof was sent him by registered letter. He did not appear at the proof, and decree was pronounced against him. The husband then lodged a reclaiming note. It was pleaded that this was incompetent, and that his only remedy was to raise a

[1] Fr. ii. 1238.

[2] *Menzies* v. *M.*, 1835, 14 S. 47; *Lockyer* (1876), *sup.*, opinion of L. Craighill, at p. 889, and Lord Gifford, p. 911. But L.J.C. Moncreiff, at p. 898, and L. Ormidale, at p. 902, doubt whether the rule exists, and the point was not decided.

[3] *See* opinion of L. Hatherley, in *Lockyer*, 4 R. H.L., at p. 39, L. Blackburn, at p. 43.

[4] *Per* L. Gifford in *Lockyer*, 3 R., at p. 912; L.C. Cairns, *ibid.*, 4 R., at p. 35.

[5] *Begg* v. *B.*, 1889, 16 R. 550.

reduction. The husband stated that he had no funds to instruct counsel, and was out of Scotland at the date of proof. The Court remitted to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit.[1]

Custody.—Means of compelling Return to Jurisdiction.—It is not decided whether, where a party has left the jurisdiction, and is in disobedience to the orders of the Court, property belonging to him, which is within the jurisdiction, may be seized in order to compel obedience.

Ill.—A husband petitioned for the custody of two children, and alleged that his wife had left the country with them, and that he was unable to discover her address. He also presented a supplementary petition craving the Court to sequestrate the separate income of his wife under her marriage-contract, in order that she might be compelled to return to Scotland. The competency of the petition was discussed, and it was argued that it was without precedent and amounted to a new form of diligence. It was found unnecessary to determine the question, as the wife returned to Scotland.[2]

Interim Custody.—Whether Petition should be to Lord Ordinary or to Inner House.—The Conjugal Rights Act, 1861, § 9, provides for the Court making interim orders as to custody, pending the issue of an action of separation or divorce. This does not take away the *nobile officium* of the Inner House, and a petition to them to make such an order is not incompetent. But, unless on special cause shown, the Court will decline to make an order, on the ground that it is more convenient that the petition should be presented to the Lord Ordinary, who, from his knowledge of the divorce or separation proceedings, is in a better position to decide which parent is entitled to the interim custody.[3]

Weight to be attached to extra-judicial Confession of Defender.—As stated in an earlier part of this work,[4] great weight will naturally be assigned to confessions of guilt volun-

[1] *Whyte* v. *W.*, 1891, 18 R. 469.
[2] *Ross* v. *R.*, 1885, 12 R. 1351.
[3] *M'Callum* v. *M'C.*, 1893, 20 R. 293.
[4] p. 47, *supra*.

tarily emitted by the defender *ante litem motam*. In a recent action of divorce by a husband on the ground of his wife's adultery, it was proved that she had registered a child in 1892, and had stated to the registrar that her husband was not the father, and that she had had no personal communication with him since 1889, when they had ceased to live together. The husband deponed that he had had no communication with his wife since 1889. They had lived in the same town at the time when the child must have been conceived, and it was not proved that there was no opportunity of access by the husband. There was no other evidence of adultery, but the action was undefended, and decree of divorce was granted.[1]

Specification of Name of Paramour and of Time of Acts of Adultery.—The name of the paramour must be stated if known.[2] But a summons is relevant in which it is stated that the adultery was committed with a person unknown to the pursuer,[3] if there are distinct averments as to the cause of his want of knowledge, and circumstances clearly pointing to adultery, such as—*e.g.*, the birth of a child which must have been conceived at a time when the husband was in a different country from the wife. And where the pursuer is not able to condescend upon the precise time and place of acts of adultery, it is relevant to aver that the adultery was committed between certain dates. In one case a latitude of three months was taken in averments of specific acts.[4]

[1] *Duncan* v. *D.*, 1893, 30 S.L.R. 435, *per* L. Low; *cf.* *Fullarton* v. *F.*, 1873, 11 M. 720.

[2] *Nicolson* v. *N.*, 1770, M. 12,639; *see* *Steel* v. *S.*, 1835, 13 S. 1096.

[3] *Tulloh* v. *T.*, 1861, 23 D. 639.

[4] *Walker* v. *W.*, 1871, 9 M. 1091.

CHAPTER XXXVII.

A SKETCH OF THE ENGLISH LAW OF HUSBAND AND WIFE.

I HAVE thought it might be of convenience in a work of this kind to present in a few pages an outline of the English law of the subject. It is often an advantage to know upon what parts of the subject the English authorities may be profitably consulted. And even the merest skeleton may be useful, as indicating in what branches of the law of husband and wife a general similarity with the law of Scotland may be expected.

Constitution.—There is not now in England any form of marriage which is valid but not regular. In contrast to Scotland, however, there is now a form of *regular* marriage, purely civil, and without a minister. By the old law a contract of matrimony, *per verba de praesenti*, or *per verba de futuro*, followed by *copula*, was to certain effects binding, and either party could raise a suit in the spiritual court to compel the other to solemnise the marriage *in facie ecclesiae*. It was the opinion of many lawyers that it consituted complete marriage. But the contrary must be regarded as settled by a case of the very highest authority, in which the whole learning of the subject will be found fully discussed.[1] By the statute of 1753, commonly called Lord Hardwicke's Act,[2] it was enacted that "in no case whatever should any suit or proceeding be had in any ecclesiastical court to compel a celebration of any marriage, *in facie ecclesiae*, by reason of any contract of matrimony whatsoever, whether *per verba de praesenti*, or *per verba de futuro*." Irregular or clandestine marriages have,

[1] *The Queen* v. *Millis*, 1844, 10 C. and F. 534.
[2] 26 George II. c. 33.

therefore, been entirely abolished in England. Their only effect would be to ground a suit for breach of promise of marriage.

Regular Marriage.—The requisites are—

1. Consent of parties of proper age—*i.e.*, at least twelve in girls and fourteen in boys.

2. Where either of the parties is under twenty-one, and is not a widower or widow, the consent of the father or guardian is required.[1] This consent is presumed after banns have been proclaimed or a licence obtained, and the clergyman will be justified in proceeding with the ceremony if he have received no notice of dissent. But if he have received such notice from the person whose consent is legally required, the publication of banns or the licence will be utterly void. And in that case it is a felony for the clergyman to perform the ceremony; and if the parties are aware that there has been no valid publication of banns or licence granted, the marriage is null.[2] Want of consent of father or guardian does not involve nullity unless dissent be intimated to the clergyman after publication of banns, or a *caveat* lodged to prevent the issuing of a licence. A marriage will not be found null on proof that at its date one of the parties was a minor, and that his or her father or guardian had not consented.[3] But if one of the parties know that consent was legally necessary, and has not been given, he or she may forfeit all property accruing through the marriage if the Attorney-General bring a suit for that purpose.[4]

In addition to consents, there must be either banns, or licence, or registrar's certificate.

1. Banns. — Banns are in England proclaimed on three successive Sundays. The clergyman may, but need not, insist on seven days' residence by one of the parties in his parish before the first publication.[5] The ceremony must be in one of the churches in which banns have been proclaimed.[6]

[1] For the rules, see 4 Geo. IV. c. 76, § 16.

[2] 4 Geo. IV. c. 76, § 22.

[3] *The King* v. *The Inhabitants of Birmingham*, 1828, 8 Barn. and Cress. 29.

[4] 4 Geo. IV. c. 76, § 23; *see Att.-Gen.* v. *Mullrey*, 4 Russ. 329; and *Att.-Gen.* v. *Clements*, 1871, L.R 12 Eq. 32.

[5] 4 Geo. IV. c. 76, § 7; *see* Eversley's "Domestic Relations," p. 106, *note*.

[6] 4 Geo. IV. c. 76, § 2.

2. Licence.—A licence is a dispensation by a bishop, or some one having authority from him, to be allowed to marry without banns. A licence may be—(*a*) special; or (*b*) common.

(*a.*) *Special Licence.*—The Archbishop of Canterbury alone has the right to grant a special licence. He inherited the power from the Pope.[1] This licence costs about £30, and enables the parties to be married at any place or at any time within three months from its date, without the necessity of residing in any particular parish.

(*b.*) *Common Licence.*—In each diocese there are surrogates appointed by the bishops, who have power to grant these licences. One of the parties must take an oath before the surrogate that he or she knows of no impediment, that one of the parties has for fifteen days resided within the parish in which the marriage is to be celebrated, and if either of them requires the consent of father or guardian, that such consent has been given.[2]

A false oath involves the same forfeitures as are incurred by the person who fraudulently conceals the fact that a consent, legally required, was not given.[3]

Where both parties knowingly and wilfully marry without due publication of banns, or a valid licence, the marriage is null.[4]

3. Registrar's Certificate.—Where the parties desire to be married in a nonconformist place of worship, they may obtain a certificate from a registrar for that purpose, specifying the place of celebration. But the building must be registered for marriages, and the registrar must be present. The notice is exposed to view for twenty-one days. The procedure is statutory.[5] And a clergyman of the Established Church may, if he choose to do so, marry persons who have obtained a registrar's certificate in preference to proceeding by banns or licence.[6]

Marriage by Registrar's Licence.—Where the parties

[1] 25 Hen. VIII. c. 21, § 4.
[2] 4 Geo. IV. c. 76, § 14.
[3] *Ibid.*, § 23.
[4] *Ibid.*, § 22.
[5] 19 & 20 Vict. c. 119.
[6] *Ibid.*, § 11; *see R.* v. *James*, 1851, 3 C. and K. 167, where a clergyman indicted for refusing to marry was acquitted.

desire to be married without any ecclesiastical ceremony they may obtain a licence from the registrar.

A notice must be delivered to him, declaring that there is no impediment, and that the party giving the notice has resided for fifteen days in the registrar's district. One clear day thereafter the registrar may grant a licence.[1]

The parties may then declare their mutual consent to be man and wife in the presence of the superintendent registrar, and some district registrar and two other witnesses. Wilful misstatements by the parties in the declaration involve the pains of perjury, but do not render the marriage null.[2]

Jews and Quakers.—Members of these religious communities are permitted to marry according to the forms in use among them. Their marriages were even at common law accounted valid, and have since received statutory recognition.[3]

Dissolution.—Until the year 1857 no English Court of law had power to pronounce a decree of divorce *a vinculo*. The only mode of obtaining a dissolution of the marriage was to get a private bill passed through Parliament.

The Ecclesiastical Court possessed sole jurisdiction in matrimonial causes, and had power to pronounce decree of divorce *a mensa et thoro*, corresponding to the modern decree of judicial separation.[4]

In 1857 the jurisdiction of the Ecclesiastical Court was transferred to the Court of Divorce and Matrimonial Causes,[5] now the Probate and Divorce Division of the High Court of Justice.[6]

Divorce.—Under the Divorce Act[7] the marriage may be dissolved on the petition of either husband or wife. Where the husband is petitioner, it may be on the ground of the wife's adultery. Where the wife is petitioner, it may be on the

[1] 19 & 20 Vict. c. 119, §§ 5 and 6.

[2] *Holmes* v. *Simmons*, 1868, L.R., 1 P. and D. 523.

[3] *Queen* v. *Millis*, *supra*; 6 & 7 Will. IV. c. 85, §§ 2, 39; 3 & 4 Vict. c. 72, § 5; 19 & 20 Vict. c. 119, § 21; 23 Vict. c. 18; 35 Vict. c. 10. As to Jewish marriages and divorces, *see Moss* v. *Smith*, 1840, 1 Man. and Gr. 232.

[4] For the history, *see* Macqueen's "Law of Husband and Wife," 3rd Ed., pp. 154 *seq.*

[5] 20 & 21 Vict. c. 85.

[6] 36 & 37 Vict. c. 66, §§ 3, 34. As to appeals, *see* 44 & 45 Vict. c. 68, § 9.

[7] 20 & 21 Vict. c. 85.

ground that he has been guilty, since the marriage, of incestuous adultery, or of bigamy with adultery, or of rape or of unnatural crime; or of adultery coupled with such cruelty as would, without adultery, formerly have entitled her to a divorce *a mensa et thoro* from the Ecclesiastical Court; or of adultery coupled with desertion without reasonable excuse for two years or upwards.[1] The Court cannot decree divorce if the petitioner (whether husband or wife) has been accessory to, or connived at, or has condoned the adultery; or if the petition is presented or prosecuted by collusion. But collusion to operate as an absolute bar must be in reference to the particular petition presented.[2] The Court is not *bound* to decree the divorce, if the petitioner has been guilty of adultery during the marriage; or of unreasonable delay in the petition, or of cruelty to the other party; or of desertion or wilful separation from the other party before the adultery and without reasonable excuse; or of such wilful neglect or misconduct as has conduced to the adultery.[3]

The decree of divorce is first a decree *nisi* not to be made absolute in less than six months, and then only on the application of the innocent spouse.[4] During this interval any person may show cause why the decree should not be made absolute, either by reason of collusion, or of some material facts not brought out at the hearing; and on cause being so shown, the case shall be dealt with either by making the decree absolute or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise, as justice may require.[5]

On decree of dissolution the Court possesses a power much to be desired in Scotland of varying ante-nuptial or post-nuptial settlements, and making such order as shall seem fit with regard to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents.[6]

[1] 20 & 21 Vict. c. 85, § 27.

[2] *Butler* v. *B.* [1893], P. 185.

[3] 20 & 21 Vict. c. 85, § 31; *Cunnington* v. *C.*, 1 S. and T. 475; *Baylis* v. *B.*, L.R., 1 P. and D. 395.

[4] *Ousey* v. *O.*, 1875, 1 P.D. 56.

[5] 23 & 24 Vict. c. 144, § 7. As to the position of the Queen's Proctor, *see Hudson* v. *H.*, 1875, 1 P.D. 65.

[6] 22 & 23 Vict. c. 61, § 5; 20 & 21 Vict. c. 85, §§ 17, 32, 45; 22 & 23 Vict. c. 61, § 4. Also, after a decree of *nullity* of marriage, *ibid.* § 5, and where there are no children, 41 Vict. c. 19, § 3; *Farrington* v. *F.*, 1886, 11 P.D. 84.

By the law of England the effect of divorce is not, as in Scotland, to carry to the innocent spouse the same patrimonial rights as would have accrued to him or her on the natural death of the other.[1] And provisions secured by ante-nuptial or post-nuptial settlement remain unaffected by the dissolution of the marriage,[2] but are subject to be varied by the Court as above stated. The Court will not, in the general case, allow even a wife who has been divorced for adultery to be left destitute. Unless she has separate estate, or is able and has been accustomed to support herself, or is being supported by the co-respondent, the Court will order a husband who is able to do so, to pay permanent alimony to the divorced wife.[3]

Judicial Separation.—Decree of judicial separation may be pronounced on the petition of either husband or wife, on the ground of adultery or cruelty; or on the ground of desertion without cause for two years and upwards.[4] During its continuance the wife shall acquire, as to property and to various other effects, the status of a *feme sole*.[5]

A very important and useful power is possessed by the Criminal Courts in England. If the husband has been convicted of an aggravated assault upon his wife, she shall not be bound to cohabit with him, provided the Court or magistrate before whom he has been so convicted shall be satisfied that her future safety would be in peril. And an order under this section is of the same force as a decree of judicial separation, and may include a direction to the husband to pay such weekly sum as shall be in accordance with his means, and that the wife should have the custody of children under ten. This power being in the hands of the magistrates, affords the wife of a poor man a ready means of self-protection and involves hardly any expense.[6] There is an appeal to the Divorce Court.

[1] Macqueen, H. and W., 3rd Ed. 175; *see Prole* v. *Soady*, 1868, L.R. 3 Ch. App. 220.

[2] *Burton* v. *Sturgeon*, 1876 (C.A.), 2 Ch.D. 318.

[3] *Robertson* v. *R.*, 1883, 8 P.D. 94.

[4] 20 & 21 Vict. c. 85, § 16; *Goodden* v. *G.* [1892], P. 1 (cruelty by wife).

[5] *Ibid.*, § 25.

[6] 41 & 42 Vict. c. 19, § 4; *see Woods* v. *W.*, 1884, 10 P.D. 172.

Rights of Wife in Husband's Estate during Marriage.—Neither at common law, nor by the Married Women's Property Acts, does a woman acquire by marriage any rights in her husband's estate, except, of course, that of being maintained by him.

Rights of Husband in Wife's Estate during Marriage.—The English Married Women's Property Act, 1882,[1] much more sweeping than the Scottish Act, entirely abolishes all the husband's rights in his wife's estate during coverture. To the extent of her separate property, a woman married after January 1st, 1883, or if married before then, to the extent of property acquired after that date, is as completely mistress of her fortune as if she had remained unmarried. She may contract, sue, and be sued, as a *feme sole*, and may dispose of her estate, whether real or personal, either by deed or will. The position of the husband at common law was on the whole similar to that of the Scottish husband.

Chattels personal in possession—*i.e.*, moveables in hand such as furniture, jewels, cash in the house, &c.—passed at marriage absolutely to the husband. Her *choses in action*, on the contrary, did not pass *ipso facto* to the husband. Under this expression fall debts, money on deposit, and cash at a banker's on account current,[2] arrears of rent, legacies, stock, bills of exchange, and other personal property which might be recovered by action As to these, the husband at the marriage acquired the right to appropriate them by reducing them into possession. But if he did not do so, and predeceased his wife, she remained the owner of her *choses in action* as if she had never been married.[3]

Chattels real, of which a lease in the wife's favour is the most familiar example, fell under the husband's control, except in one particular. He could alienate them *inter vivos*, but he could not by will exclude his wife's right to take them if she survived him.[4]

Real Estate of Wife.—If the wife possessed, at the time of the marriage, or during coverture became seised of a free-

[1] 45 & 46 Vict. c. 75.

[2] *Hill* v. *Foley*, 2 H.L. Cases, 28. In *re Lambert's Estate*, 1888, 39 Ch.D. 626.

[3] *Purdew* v. *Jackson*, 1 Russ. 1.

[4] Macqueen, H. and W., 3rd Ed., p. 21.

hold estate of inheritance not settled to her separate use, the husband took a freehold interest in it.

Before the birth of issue his interest was commensurate with the joint lives of himself and his wife. After the birth of issue he became tenant by the curtesy. During coverture, his interest was styled tenancy, by the coverture initiate; after the death of the wife it became tenancy, by the curtesy consummate. He could charge or alienate her lands for their joint lives, but could not affect them beyond the period during which his interest lasted. The rents and profits went to him. Without his consent the wife could not burden or alienate her lands, or dispose of them by will.

The concurrence of both husband and wife was required in order validly to alienate the wife's real estate. A special procedure was instituted by statute, under which the wife has to acknowledge the deed before a commissioner, who examines her as to the freedom of her consent.[1] But, as already stated, a woman married after 31st December, 1882, can dispose of her real estate by will or by deed without any acknowledgment, and a woman married before that date has a like freedom with regard to real estate which vested in her thereafter. But the Married Women's Property Act has not deprived the husband of the right, on his wife's death, to an estate by the curtesy in her undisposed of real estate.[2]

Liability of Husband and Wife respectively for the Wife's Ante-nuptial Debts.—By the common law the husband became liable for his wife's debts contracted before marriage, whether she brought him any fortune or not. But his liability ceased at the death of the wife, unless he was her personal representative, in which case it was limited to the value of her estate in his hands. This liability has been altered by various statutes, and it is now necessary in every case to know the date of the marriage, before the husband's liability can be determined.

[1] 3 & 4 Will. IV. c. 74, amended by 45 & 46 Vict. c. 39, § 7; *see Welch* v. *Tennant*, 1891, 18 R. H.L. 72. *See* also 20 & 21 Vict. c. 57, as to a married woman's power to dispose of reversionary interests in personal estate, and Rules of Court, 31st December, 1882, Macqueen, Appendix, 451.

[2] *Hope* v. *H.* [1892], 2 Ch. 336.

The law now stands as follows:—

1. Where the marriage was before 9th August, 1870, the husband is liable *in solidum* for his wife's ante-nuptial debts, and in respect of contracts entered into, and torts and breaches of trust committed by her before the marriage.

2. Where the marriage took place between 9th August, 1870, and 29th July, 1874, both days exclusive, the husband is completely released from liability for his wife's ante-nuptial debts, whatever fortune she may have brought him. The creditor's remedy is confined to the wife's separate property to the extent of which she is liable.[1] The husband's liability for her torts and breaches of contract was not changed.[2]

3. Where the marriage took place between 29th July, 1874, and 1st January, 1883, exclusive, the husband's liability for ante-nuptial debts, contracts, and torts of the wife was again put on the same footing. It was in all cases limited to the extent by which he was *lucratus* by the marriage.[3]

4. The husband married on or after 1st January, 1883, is liable "for the debts of his wife contracted, and for all contracts entered into, and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies, as aforesaid, *to the extent of all property whatsoever belonging to his wife, which he shall have acquired or become entitled to from or through his wife.*[4] The Court may direct any inquiry which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. As the husband now acquires none of the wife's property in virtue of the marriage, his liability will be limited to the amount to which he has been *lucratus* by gift or settlement before or during the coverture.

To the extent of her separate property, the wife married since the commencement of the Act is liable. And if married before the Act, she is liable to the extent of "any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for

[1] 33 & 34 Vict. c. 93, § 12. *Ibid.*, § 2.

[3] 37 & 38 Vict. c. 50, § 5.

[4] 45 & 46 Vict. c. 75, § 14.

her separate use under the Acts hereby repealed or otherwise, if this Act had not been passed."[1]

Liability of Husband to be placed on List of Contributories in respect of Wife's Shares.—It would appear that the Act does away with the liability of a husband to be himself placed on the list of contributories of a company in which his wife holds shares, if she was married after the Act.[2] The English statute, like the Scottish, is not well drawn, and leaves in doubt many questions of great importance. It would appear that the married woman is not personally liable, not being subject to bankruptcy, except when carrying on a trade separately from her husband, and then only in respect of her separate estate.[3] A married woman having separate estate, and an unsatisfied judgment against her, but not trading separately, is not subject to the bankruptcy laws.[4] This being so, it would probably follow that property acquired by her after the dissolution of the marriage, is not liable for her contracts or torts entered into, or committed during the marriage.[5] For this property never had the quality of "separate property," which always refers to property held by a married woman during coverture.

Liability of Husband and Wife respectively for the Wife's Contracts, Torts, or Breaches of Trust during the Marriage.

The husband's liability for the contracts of the wife as *præposita negotiis domesticis* is the same in England as in Scotland.

Wife's liability in contract.—A wife may now render herself liable on any contract, a term which includes acceptance of a trust or of the office of executrix or administratrix.[6] And "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to,

[1] § 13.

[2] *Ex parte Hatcher*, 1879, 12 Ch.D. 284 (*see* Lindley on Company Law, 5th Ed., p. 809, and p. 42).

[3] § 1 (5). *See* remarks of Jessel, M.R., in *Robinson* v. *Pickering*, 1881, 16 Ch.D., at p. 662.

[4] *Re Gardiner, ex parte Coulson*, 1887, 20 Q.B.D. 249.

[5] *See Pike* v. *Fitzgibbon* (C.A.), 1881, 17 Ch.D. 454.

[6] 45 & 46 Vict. c. 75, § 24.

and to bind her separate property, unless the contrary be shown.[1]

A wife purchasing necessaries for the household is still presumed to do so as her husband's agent, and such contracts do not affect her separate estate unless it is proved that it was to her that credit was given.

But in contracts in which the presumption that she is her husband's agent does not arise, she is now taken to be contracting in respect of her separate estate, unless she can prove the contrary.

She is not personally bound, and she is not liable to imprisonment under the Debtors Act, 1869, § 5, for default in payment of a sum due under a judgment.[2] But her capacity hinges on the question whether she had separate estate at the date of the contract.[3]

And it must be separate estate of such nature and amount as she might reasonably be supposed to have intended to bind. Every married woman possesses some separate estate. But if it is merely her wedding ring or her personal clothing, she will not be presumed to have contracted on the faith of these assets.[4] There must not be an unreasonable disproportion between the value of the separate estate and the sum due on the contract. Thus where a wife possessed only £3 or £4 in hand, the fruit of her separate estate which was subject to a restraint on anticipation, it was held that she was not liable for a mortgage of £400 executed by her and her husband.[5]

It would appear that a married woman entitled to an income subject to a restraint on anticipation is not capable of contracting on the faith of future income. The debtor must show that she had such a reasonable amount in hand at the

[1] § 1, sub-section 3.

[2] *Scott* v. *Morley*, 1887, 20 Q.B.D. 120.

[3] *Palliser* v. *Gurney*, 1887, 19 Q.B.D. 519; *Stogdon* v. *Lee* [1891], 1 Q.B. 661.

[4] *Leak* v. *Driffield*, 1889, 24 Q.B.D. 98; *see* also *Harrison v. H.*, 1888, 13 P.D. 180. A bill has been introduced in the present session to remedy the injustice of the existing law in this matter. It provides that the contracts of a married woman shall not be invalid because she had no separate estate at the date of the contract, and shall bind her separate property subsequently acquired. But this will not render available to satisfy the debt property subject to the restraint on anticipation.

[5] *Braunstein* v. *Lewis*, June 2, 1891, 7 *Times'* L.R. 566.

date of the contract that she might be supposed to be contracting with respect to this sum.[1] Jewellery and dresses and furs worth £200 may be separate property to the effect of validating a contract.[2] But not alimony.[3] If the married woman had no free alienable estate of a nature and amount which makes it not unreasonable to assume it was with the intention to bind this property that she made the contract, the contract is bad. The fact that at the date of the action she has separate estate acquired subsequently to the alleged contract is immaterial. If the contract was good *ab initio*, this subsequently acquired property is liable.[4] But if she had no separate property in the meaning of the Act at the time of the alleged contract, she had no contractual capacity and cannot be made liable because she has at the date of action acquired capacity in virtue of estate which has subsequently accrued to her.[5]

Torts.—A husband by the law of England was always liable for his wife's torts committed during marriage. In Scotland, on the contrary, his liability for her delicts is only when he himself participated in them or they may be presumed to have been done by his authority. The liability of an English husband in this respect was not changed by the Act of 1882.[6]

Wife's liability for her own Torts.—By the old law a wife's torts did not bind her separate estate, and she could not be sued for them during the coverture without her husband. Since the Act her torts bind her separate estate, and she may be sued alone or with her husband.[7]

Liability for Wife's Devastavits or breaches of Trust.—At common law a wife might be an executrix, administratrix, or trustee, but only by her husband's consent. If she committed any breach of trust or wrongfully wasted the assets, and was guilty of a "devastavit," her husband was liable.

[1] *Everitt* v. *Paxton*, April 23, 1891, 7 *Times'* L.R. 465.

[2] *Bonnor* v. *Lyon*, May 8, 1890, 38 W.R. 541.

[3] *Anderson* v. *Hay*, Nov. 26, 1890, 7 *Times'* L.R. 113.

[4] § 1, sub-section 4.

[5] *Palliser* v. *Gurney*, *supra*.

[6] *Seroka* v. *Kattenburg*, 1886, 17 Q.B.D. 177.

[7] *Seroka*, *supra*.

By the Act of 1882 she is enabled to accept any of these offices without the consent of her husband, and he is not liable for her breaches of trust or devastavits unless he has himself acted or intermeddled in the trust or administration.[1]

A married woman, who is now executrix, administratrix, or trustee, is liable to the extent of her separate estate for her devastavits, and may sue and be sued, and deal without her husband's concurrence with the trust estate, in all respects as a *feme sole*.[2]

Liability of Wife for maintenance of Husband and Children.—A married woman having separate property is bound to maintain her husband to the extent of preventing him becoming a pauper.[3]

She is also bound to maintain her children and grandchildren, "provided always that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children and grandchildren."[4] This probably means that she is only liable, *secundo loco*, and that as long as her husband is able, he must maintain the children and grandchildren, and can claim no relief from her.

Wills of Married Women.—A married woman had formerly no testamentary capacity to dispose by will, either of her real or her personal estate, except when it was settled to her separate use. As to realty the Statute of Wills[5] excepted wives, and the exception was preserved in the Wills Act.[6]

Her will, purporting to dispose of her estate which was not settled to her separate use, was only good if her husband assented to it, and survived her. And he could revoke his consent after her death, but before probate.[7] By the Act of 1882 a woman married before 1st January, 1883, can dispose by will of any property belonging to her at marriage, and a woman married before that date can dispose by will of any property, her title to which accrued thereafter.[8]

The scope of the Act is limited to "separate property," and cannot be extended to property which she acquires after the

[1] 45 & 46 Vict. c. 75, § 24.
[2] §§ 18, 24.
[3] § 20.
[4] § 21.
[5] 34 & 35 Henry VIII. c. 5, § 14.
[6] 1 Vict. c. 26, § 8.
[7] *Maas* v. *Sheffield*, 1 Rob. 364.
[8] §§ 1 and 5.

coverture. So a will made by a married woman will not, unless republished, carry property acquired by her during widowhood.[1]

Rights of Succession.—It is perhaps the most important distinction between the law of England and that of Scotland, that in England the surviving spouse and the children of the marriage have no rights of succession which cannot be defeated by will. The only exception is the right to curtesy, enjoyed by a husband who was married before 1st January, 1883, over lands the title to which accrued to his wife before that date.[2]

A husband possessing a large estate may bequeath the whole of it to a missionary society, leaving his widow and children destitute. It is only on the husband's dying intestate that the widow has any right in his estate.

1. Husband's rights of succession in Wife's estate on intestacy.

(*a.*) *In Wife's personal Estate.*—The husband is entitled to his wife's whole personal estate not disposed of by will. His right is sometimes said to rest on his being his wife's next and most lawful friend,[3] in the words of the statute 31 Edw. III. A more probable ground is that the quality of separate property ceases at her death. Her estate not held for her separate use passed to him at marriage. If held for her separate use the Court of Equity protected her in the enjoyment of it during her life, and allowed her to dispose of it by will. But if she did not choose to exercise this power, the wall which the Court of Chancery had built between the wife's separate estate and the husband fell at her death, and he took her estate *jure mariti*.

The Act of 1882 has not affected the devolution of a wife's estate. If she dies intestate her personalty, now separate estate by operation of law, falls, as under the old law, to her husband.[4] As her legal personal representative the husband is subject to the same liabilities as she would have

[1] *Willock* v. *Noble*, 1875, 7 E. and Ir. App. 580; in *re* Cuno, *Mansfield* v. *M.*, 1889, 43 Ch.D. 12.

[2] *See* next section.

[3] William's Executors, 8th Ed. i. p. 416.

[4] In *re Lambert's Estate*, 1888, 39 Ch.D. 626.

been subject to if living, and if he takes her estate must pay her debts. His liability is limited to the amount of such estate.[1]

(*b.*) *In Wife's real Estate.*—By the common law the husband was entitled to an estate for his own life as tenant by the curtesy in his wife's freeholds of inheritance. There are four conditions—(1) marriage; (2) seisin of the wife in fact if that were possible, in law if actual seisin had been unattainable; (3) the birth of a living child; (4) death of the wife.[2] When the wife's real estate was not held for her separate use, she could not defeat the curtesy. When it was her separate estate it was in her power to dispose of it free of the curtesy, and it was only on intestacy that the husband's right became indefeasible. The Act of 1882 makes her real estate separate property, and the husband will still be entitled to curtesy out of it, unless she disposes of it otherwise by will.[3]

In copyholds there is no curtesy except by the custom of the manor; and in gavelkind curtesy is of only half the lands, and ceases on re-marriage. It arises, however, without the birth of issue.[4]

2. Wife's rights of succession in Husband's estate on intestacy.

(*a.*) *In Husband's personal Estate.*—The widow of an intestate takes by the Statute of Distributions[5] one-third or one-half of his personal estate according as he does or does not leave children. To make a better provision for the widows of poor intestates, it was enacted by the Intestates' Estates Act, 1890,[6] that where an intestate husband left a widow but no issue, and estate, real and personal, not exceeding £500, the widow should take the whole.

Where the estate is above £500, the widow in the same case is to have a charge for £500. The above provision is in addition to her share in the residue, if any.

(*b.*) *In Husband's real Estate.—Dower.*—She is also entitled to a life interest in one-third of the hereditaments belonging

[1] 45 & 46 Vict. c. 75, § 23; *Surman* v. *Wharton* [1891], 1 Q.B. 491.

[2] *See* Stephen's Commentaries, 10th Ed. i. 264.

[3] *Hope* v. *H.* [1892], 2 Ch. 336.

[4] Blackstone, ii. 128.

[5] 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, § 7.

[6] 53 & 54 Vict. c. 29.

to her husband in fee simple or fee tail at law, or of an estate of inheritance in possession of which her husband was the *equitable* owner, which her issue, if any, might by possibility have inherited. But this right may be now barred by any deed of the husband or by will, and dower has become of little practical importance.[1]

Dower is also barred by acceptance of a jointure.[2] In copyhold lands there is no dower except by custom. In manors where the custom exists, the widow's right is called free-bench. It may be a life interest in a third, but is sometimes of the whole, of the copyhold lands, and is often only during viduity and chastity. The same limitation obtains in gavelkind lands. Here the dower, like the curtesy, is a life interest in one-half the lands.[3]

The right to dower is lost by divorce although at the instance of the wife, or by her adultery and elopement.[4]

[1] Dower Act, 3 & 4 Will. IV. c. 105.

[2] *Dyke* v. *Rendall*, 2 D., M. and G. 209.

[3] *See* Eversley, Domestic Relations, p. 356.

[4] *Frampton* v. *Stephens*, 1882, 21 Ch.D. 164; *Sidney* v. *S.*, 3 P.W. 276.

CHAPTER XXXVIII.

PRIVATE INTERNATIONAL LAW.

Introductory.

In relation to marriage and divorce it is frequently necessary to take account of the laws of foreign countries, and to seek in a foreign system of jurisprudence the answer to the question in dispute. It is eminently undesirable that the *status* of an individual should be altered on his crossing the political frontier between two countries; that he should be major in one and minor in another; married in one, and unmarried in another; legally divorced in one, still married in another; or that one State should hold him legitimate and another a bastard. The principle has, therefore, been adopted by all civilised countries of allowing questions of *status* to be determined by the personal law of the individual. Whether the "personal law" to be considered should be determined by domicil or political nationality, has been, among foreign jurists, one of the chief *quaestiones vexatae* of modern times. Generally speaking, it may be said that Italy and France have accepted nationality as the criterion, while Prussia and Austria have adhered to domicil. The Courts of Scotland and England have adopted the rule that a man's personal law is that of his domicil. This may have been partly due to the fact that Scotland has maintained her independent legal system, and that, in applying the rules of private international law to questions between Scotsmen and Englishmen, it has been impossible to adopt any other rule than that of the law of the domicil.

Domicil.—It would be beyond the scope of this work to attempt any systematic treatment of the subject of domicil,

which is not, in truth, a branch of the law of husband and wife.

The judgment of Lord Westbury in *Udny* v. *Udny*[1] is a *locus classicus*.

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity such as the duties of office, the demands of creditors, or the relief of illness, and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future duration. It is true that residence originally temporary, or intended only for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or the *animus manendi* can be inferred, the fact of domicil is established."

As an infant is incapable of choice, its domicil is that of its father at birth, or in the case of an illegitimate child, that of its mother; and in either case its domicil changes with that of the person from whom it is derived. At the age when puberty passes into minority the child may choose a domicil for itself,—at anyrate this must be the law as to a Scotch minor, for he can then marry and give a domicil to his wife and children.[2] The most recent case in Scotland of importance upon domicil is *Steel* v. *Steel*.[3]

Evidence of person whose Domicil is in dispute.—The person whose domicil is in issue is a competent witness, and his evidence, if distinct and consistent with the evidence from conduct, will be entitled to great weight. His *animus manendi* must be best known to himself. On the other hand, his interest in the action will make the Court jealously scrutinise his testimony, and inclined to seek proof of his

[1] 1869, 7 M. H.L. 89.

[2] *See Urquhart* v. *Butterfield*, 1887, 37 Ch.D., at p. 377.

[3] 1888, 15 R. 896.

intention, as far as possible, in his acts and words, *ante litem motam*.[1]

The Domicil of a Wife follows that of her Husband.—At the marriage the wife acquires the domicil of the husband, and that not by any fiction, but on the clear ground that, by consenting to the marriage, she evinces in the plainest manner her intention to take up her abode with her husband, *animo manendi*.[2]

Where the Marriage is afterwards declared Null.—So clear is the principle that the wife must be presumed to have intended to take the husband's domicil, that it was held, in an English case, that she had done so although the marriage was afterwards found null, on the ground of the husband's impotence.[3] And this must be the result in a case where the woman had actually taken up her abode with the man in his domicil. For the two facts necessary to prove domicil—viz., residence in a locality, and *animus manendi*—are thus established.

The Husband is entitled to choose and to change the matrimonial Domicil.—It is undoubted law that it is the right of the husband, whose duty it is to support the wife and children, to determine in what place the matrimonial home shall be situated. In entering into the marriage the wife is presumed to have irrevocably consented to follow him wherever he goes, and to make his home hers.[4] No principle in the law of domicil is more settled than this, that a wife can, in no circumstances, have any other domicil than that of her husband.

[1] *See* the following *dicta per* L. Kinloch, in *Bell* v. *Kennedy*, 1863, 1 M., at p. 1132; *per* L. Cowan, delivering judgment of Court, *ibid.*, at p. 1138; same case in H. of L., 1868, 6 M. H.L., *per* Cairns, L.C., at p. 72; *per* L. Colonsay, at p. 79; *Steel* v. *S.*, 1888, 15 R., *per* Inglis, L.P., at p. 911; *per* L. Mure, at p. 912; *per* L. Shand, at p. 913; *Wilson* v. *W.*, 1872, L.R., 2 P. and D., *per* L. Penzance, at p. 444; *Carswell* v. *C.*, 1881, 8 R., *per* L. Craighill, at p. 913; *Low* v. *L.*, 1891, 19 R., *per* L.J.C. Macdonald, at p. 120.

[2] St. i. 4, 9; Ersk. i. 2, 21 *note*; Bell's Prin. ii. 1537; Fr. ii. 867.

[3] *Turner* v. *Thompson*, 1888, 13 P.D. 37.

[4] *See per* L. Eldon in *Lashley* v. *Hog*, 1804, 4 Pat., at p. 617. For the effects of the change on the rights of the spouses, *see infra*.

In Stair's words, "her abode and domicil followeth his."[1] Even when she has been judicially separated from him *a mensa et thoro*, it is not certain that she can acquire a domicil for herself.[2] In a leading case Lord Brougham expresses the doctrine thus: "For actual residence—residence in point of fact—signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicil could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where in all ordinary circumstances she would be—with her husband."[3] So, in one case where a wife had separated from her husband, and lived in Paris for thirty years, until her death, it was held that she could not have acquired a French domicil, different from that of her husband.[4]

Even the fact that the husband's motive in changing his domicil is to obtain a divorce, on a ground not recognised by the law of the domicil which he abandons, makes no difference, except in so far as it may make the Court inquire more anxiously into the facts before concluding that he has truly changed his domicil.[5] "If he comes here," it was said, "and makes Scotland his home—comes *animo remanendi*—then the domicil is changed not only for himself but for his wife. And I know of no exception to that proposition. For it is not the case of a substitution of one country for another for himself alone. His household are subject to the change. It is h[illegible]me that he changes, and his wife must change with him."[6] It is not equally clear that the Court of the former domicil would be bound to recognise the divorce as valid, and

[1] St. i. 4, 9; *Warrender* v. *W.*, 1835, 2 S. and M. 154; Dicey, p. 107; Bishop, i. 1714.

[2] *Infra*, next section.

[3] *Warrender*, *supra*, at p. 192.

[4] In *re Daly's* settlement, 1858, 25 Beav. 456.

[5] *Carswell* v. *C.*, 1881, 8 R. 901.

[6] *Ibid.*, *per* L. Young, at p. 911.

it may be doubted whether this doctrine would be carried to its logical conclusion. If a domiciled Scotsman goes to Prussia for the sole purpose of obtaining a divorce, on the ground of incompatibility of temper, and acquires a domicil there, would the divorce be treated as valid in this country?[1]

Where there is a voluntary Separation.—A contract of voluntary separation, even upon grounds which might found a decree of divorce or of judicial separation, gives the wife no power to acquire a domicil distinct from that of the husband. For such contracts are essentially revocable, and although adultery or cruelty may be founded on in answer to an action of adherence brought by the party revoking the separation, it is not until decree in the adherence has been pronounced that the spouses are separate in the eye of the law.[2]

Where the Husband has deserted the Wife.—It is not settled whether a wife who has been deserted by her husband can acquire a new domicil for herself. In two cases, one in England and one in Scotland, a deserted wife has brought an action for divorce in a domicil which she claimed to have acquired after the desertion. In the English case Sir R. Phillimore indicated the opinion that the wife might have obtained a domicil distinct from her husband, but that she could not make her husband amenable to the *lex fori* of her new domicil.[3] The same result was reached by Lord M'Laren, who gave no opinion as to the wife's domicil, but held that whether she had changed it or not the Court had no jurisdiction over the husband, and could not dissolve the marriage.[4]

The American Courts have held that a wife can acquire a domicil apart from her husband for the purpose of instituting a suit against him for divorce, and it was observed by Hannen,

[1] *See per* James, L.J., in *Harvey* v. *Farnie*, 1880, 6 P.D., at p. 47, and *per* Cotton, L.J., *ibid.*, at p. 49; *per* L. Westbury in *Pitt* v. *P.*, 1864, 4 Macq., at p. 640; *per* Hannen, J., in *Briggs* v. *B.*, 1880, 5 P.D., at p. 165; Dicey, p. 239, and *see infra*, under Jurisdiction.

[2] *Dolphin* v. *Robins*, 1859, 7 H.L.C. 390; *per* L. Cranworth, at p. 417; *per* L. Kingsdown, at p. 420; and *per* Campbell, L.C., at p. 423. *Warrender* v. *W.*, 2 S. and M'L., *per* L. Brougham, at p. 196; *Low* v. *L.*, 1891, 19 R. 115; *see* Westlake, p. 302.

[3] *Le Sueur* v. *Le S.*, 1876, 1 P.D. 139.

[4] *Redding* v. *R.*, 1888, 15 R. 1102.

J., in a recent case: "In such a case, if the substance is looked at and not the form, it does not matter whether it is said that a wife can acquire a separate domicil for that purpose, or that residence short of domicil under certain conditions shall entitle the wife to institute a suit for divorce." [1]

The rule that after a cause of action has arisen the wife is entitled to her remedy in the Scottish Court, although the husband has subsequently changed his domicil, is admitted in this country [2] but this does not imply any capacity in her to acquire a domicil of succession distinct from his if she does not apply to the Court for a divorce.

In *Dolphin* v. *Robins*, Lord Cranworth suggested that it was possible a wife may acquire a separate domicil "when the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported." [3] But Lord Kingsdown was clearly of an opposite opinion.[4]

In a poor law case it was held by a majority of the whole Court that a deserted wife could not acquire a settlement in any parish different from that where the husband's settlement was at the time he left the country.[5] There are *dicta* in this case opposed to the view that a deserted wife can change her domicil.[6] But such a case depends on considerations of residence and not domicil, and the argument that the wife had power to acquire a new settlement was pressed against the wife by a parish seeking to be relieved from the obligation of support.[7] This case, therefore, has but a distant application.

Where there has been a judicial Separation.—It is not definitely settled that even after a decree of judicial separation a wife has the capacity to acquire a domicil distinct from that of her husband. Lord Fraser thinks she can do so.[8] It would seem a curious result if it should be held that a

[1] *Harvey* v. *Farnie*, 1880, 5 P.D., at p. 157.

[2] *Redding*, *supra*. *Cf.* Bishop, Ed. 1891, ii. 55 *note*, and *infra*, under Jurisdiction.

[3] 7 H.L.C., at p. 419.

[4] *Ibid.*, p. 420; *see* Westlake, p. 302.

[5] *Gray* v. *Fowlie*, 1847, 9 D. 811.

[6] *See per* L.J.C. Hope, at p. 821, and *per* Ls. Ivory, Cockburn, and Murray, at p. 824.

[7] *See per* L.J.C. Hope, at p. 821.

[8] ii. 907 and 1254.

husband who, after the decree, has no right to compel his wife to cohabit with him, and has no interest in property subsequently accruing to her, should have the power to change her domicil and subject her estate to a foreign law of succession. After the separation she may sue and contract as an unmarried woman, and it is thought she is free to acquire a domicil for herself.[1] But the question has on several occasions been expressly reserved by learned judges.[2] In *Dolphin* v. *Robins*, Lord Cranworth seemed in favour of admitting the wife's capacity and Lord Kingsdown against it, but the point was left open. Phillimore, J., in a more modern case, has expressed an opinion that even less than a decree of separation may entitle the wife to acquire a new domicil.[3] Mr. Westlake and Mr. Dicey regard the question as still unsettled.[4]

Domicil of widow, divorced wife, or wife judicially separated.—It is hardly necessary to say that the mere fact that a woman is free to choose a new domicil infers of itself no abandonment of that which she shared with her husband at the date of his death, or of the divorce or separation. Until she abandons this domicil it will still adhere to her.[5]

Summary of following Chapters.—The questions of private international law treated of in the following pages may be thus summarised.

What law will be applied in the Scottish Courts in determining :—

1. The capacity of persons domiciled in Scotland to contract a lawful marriage abroad, and the capacity for contract of a married woman resident in Scotland.

2. The forms required for the solemnisation of a valid

[1] *See* Conjugal Rights Act, 1861 [24 & 25 Vict. c. 86], § 6.

[2] *Per* L. St. Leonards, in *Geils* v. *G.*, 1852, 1 Macq., at p. 259; *per* L. Cranworth, 7 H.L.C., at p. 418; *per* L. Kingsdown, *ibid.*, p. 420, and *see* opinion of Ls. Ivory, Cockburn, and Murray in *Gray* v. *Fowlie*, 9 D., at p. 824; and *see Low* v. *L.*, *supra*.

[3] *Le Sueur* v. *Le S.*, 1876, 1 P.D., at p. 141.

[4] Westlake, p. 302; Dicey, p. 105.

[5] *Warrender* v. *W.*, 1835, 2 S. and M'L., *per* L. Brougham, at p. 194; Dicey, p. 108.

marriage abroad in order to entitle it to recognition in our Courts, and the requisites for the validity of a marriage by foreigners in Scotland.

3. The effects of the marriage, including the patrimonial rights of the spouses, and the legitimacy of children, and the modification of these effects by a subsequent change of domicil.

4. The jurisdiction of the Scottish Court in matrimonial questions.

CHAPTER XXXIX.

CAPACITY.

By what Law is Capacity to be determined?—The present position of the law on this subject is one of much uncertainty, and the cases are difficult, if not impossible, to reconcile. Somewhat different considerations arise in the three different classes of cases which may present themselves. These are :—

1. The contracts of a person in a foreign country who is in minority by the law of his domicil, but has attained majority by the law of the country in which the contract is made, or conversely.

2. Contracts or alienations of her estate made by a married woman abroad, which she would be competent to make by the law of her domicil, but which a married woman domiciled in the place of contract could not make, or conversely.

3. Marriages entered into outside the domicil between parties who are disabled from intermarrying by the *lex domicilii*, but who could lawfully marry if they were domiciled in the place of celebration.

The cases which have occurred fall almost exclusively within the last category. It is, however, obvious that in this class of cases the reasons in favour of allowing the *lex domicilii* to prevail are much more cogent than in the two other classes. It is reasonable that the country in which persons are domiciled should claim the right of fixing the age at which they may alter their status by marriage, and of determining within what degrees of consanguinity or affinity the marriages of its subjects shall be forbidden. But it may well be doubted whether the decisions, to be adverted to immediately, with regard to marriages celebrated abroad

between persons who are within the prohibited degrees by the law of their domicil, really involve the question of capacity at all. A minor is *incapax* because in the eye of the law he has not arrived at maturity of judgment. A married woman is under certain disabilities because her legal *persona* is sunk in that of her husband. But a Scotsman who marries his deceased wife's sister in Denmark, or a Portuguese who marries his first cousin in London, is not under any legal disability of a like nature. Unlike the minor he is as *capax* with regard to contracts generally, as are the rest of his adult fellow-countrymen. Unlike the married woman, he has not voluntarily renounced any part of his contractual freedom. He is simply entering into a contract which the law of his own country has expressly prohibited and declared to be ineffectual, whatever view may be taken of its legality by the law of the country in which it is attempted to be made. It is perfectly plain that any country is entitled to prohibit the marriages of its subjects with certain persons, wherever celebrated, and equally plain that the foreign country may regard or disregard the prohibition as shall seem to it to be right. It is well said by a recent writer: "If the wisdom of our legislators should impel them to it, Parliament at Westminster could to-morrow pass a law inflicting extreme penalties on all who had at any time previously gambled at Monte Carlo; and the English Courts of law would presumably be bound to enforce the penalties when an offender was brought before them."[1]

When the validity of such a prohibited marriage is called in question in the Courts of the domicil of the parties, at least when the domicil of both is the same, no point of private international law really arises. The only question for the Court to decide is whether the prohibition is intended to have effect beyond the territory. The solution of this difficulty may be sought for in the words of the enactment, where the prohibition is statutory, as, *e.g.*, in the case of a marriage in breach of the Royal Marriage Act,[2] or in the grounds for the prohibition when it rests on common law, as in *Brook* v. *Brook*,[3] where the view taken was that marriage

[1] Piggott on Exterritoriality, p. 5.

[2] *Sussex Peerage Case*, 1844, 11 C. and F. 85.

[3] 1861, 9 H.L.C. 193.

with a deceased wife's sister was regarded by the law of England as "contrary to God's law," and could not therefore be thought to be prohibited merely within the territory. Lord Cranworth expresses the same doctrine in *Fenton* v. *Livingstone*, where he says: "Where it has been the policy of the law in any country to prohibit marriage in any particular circumstances, the prohibition attaches on the subjects of that country wherever they may go."[1] There is this further consideration in regard to marriage, that even looked at merely as a contract, it is a contract which is to be performed in the husband's domicil. The doctrine laid down by Story is well recognised in our law. "But where the contract is, either expressly or tacitly, to be performed in any other place, then the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance."[2] It is true that this principle can have no application where one of the parties was, according to the *lex loci contractus*, incapable of giving consent on account of minority.[3] But in such a case as *Brook* v. *Brook*, the parties were capable by the *lex loci*. And in addition to these grounds, no country will recognise a contract between its subjects which it regards as contrary to public policy. Lord Campbell's statement of the law in that case seems, therefore, unassailable. "It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicil, if the contract is forbidden by the law of the place of domicil as contrary to religion, or morality, or to any of its fundamental institutions."[4] It might at first sight seem that this reasoning would extend to such cases as the Gretna Green marriages, which were admitted to be valid in England although the parties had resorted to Scotland to evade the provisions of the English Marriage Act as to consents and the like.[5] But here

[1] 3 Macq., at p. 543.

[2] Story, Confl. of Laws, § 280.

[3] *See per* Lord Watson in *Cooper* v. *C.*, 1888, 15 R. H.L., at p. 29; and *per* Halsbury, L.C., *ibid.*, at p. 25.

[4] 9 H.L.C., at p. 212.

[5] *Compton* v. *Bearcroft*, 1769, in note to *Middleton* v. *Janverin*, 2 Hagg. C.R., at p. 444.

the view taken was that Lord Hardwicke's Act was not intended to have extra-territorial effect, and further, that its regulations only referred to matters of form, and did not touch the essentials of the contract.[1]

It is probable that upon whatever legal ground the validity of these marriages was based, the real motive was drawn from public policy. It would have revolted the feelings of the community to have found such marriages null, and to have bastardised the issue.

It cannot therefore be assumed with certainty that the judgments which relate to marriage abroad will be regarded as applicable to cases in which the question is one of capacity in the proper sense. In other words, the Courts may hold that the capacity of a person to enter into an ordinary mercantile contract must be referred to the *lex loci*, while the right to contract a marriage with a particular person must be governed by the *lex domicilii*.

In *Cooper* v. *Cooper*[2] Lord Macnaghten said: "It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made, or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule." It must be kept in mind that the question here related to a marriage-contract, and that, although a Scotch appeal, the governing law was held on the clearest grounds to be the law of Ireland.

I shall accordingly deal first with the right of parties to marry abroad who are barred from intermarriage by the law of the domicil, and afterwards advert briefly to the rules of private international law applicable to capacity in general.

Marriage forbidden by the *lex domicilii*.—A marriage, wherever contracted, will be regarded in Scotland as invalid if the parties are absolutely forbidden to marry each other by the law of their domicil.

[1] *See per* Lord Campbell, *Brook*, *supra*, 9 H.L.C., at p. 215; and *per* Lord Brougham in *Fenton* v. *Livingstone*, 1859, 3 Macq., at p. 535.

[2] 1888, 15 R. H.L., at p. 30.

No express decision of the question is to be found in the Scotch books, and there are undoubtedly *dicta* of eminent judges to a contrary effect. But these were expressed in cases of a different class, and go much further in the direction of making the *lex loci* supply the rule in all cases than is borne out by the more modern authorities. Lord Meadowbank, in *Gordon* v. *Pye*,[1] in general terms refers all questions of status, including "the competency to contract marriages," to the *lex loci contractus*. Lord Fraser, speaking especially of capacity to marry, says the view "which refers capacity to contract to the law of the place of celebration or contract, is that which has been adopted in the British dominions and in America."[2] The generality of this language does not suggest that Lord Fraser entertained the opinion that the matter would be regarded as one in which there was any conflict of principle between the jurisprudence of Scotland and that of England. This is affirmed by the learned editor of Bar,[3] but no authority is quoted, nor have I been able to find any trace of the existence of such a conflict. No hint to this effect is to be found in the recent case of *Cooper* v. *Cooper*.[4] The law as to capacity appears to have developed in both countries on parallel lines. In both the earlier *dicta* are in favour of applying the *lex loci contractus*, while the later decisions tend towards the recognition of the *lex domicilii*. In dealing with the closely allied subject of the incapacity of a minor, Lord Fraser supports with much learning the theory that the *lex domicilii*, with certain limitations, ought to govern.[5] The *dicta* in *Edmonstone* (June 1, 1816, F.C.) are referred to by him as conflicting with this opinion, and it is difficult to see why they should be treated as overruled as to the capacity of a minor, and still regarded as sound as to capacity to marry. This difficulty is increased by the fact that there are many subsequent cases in England and America in which the law in the case of marriage has been much elaborated, while in the case of minority there is no modern

[1] 1814, Fergusson's Rep., p. 361; *see* also *Rose* v. *Ross*, 1827, 5 S., *dicta* by L. Meadowbank, at p. 639, by L.J.C. Boyle, at p. 656.

[2] ii. p. 1299; and *see* his criticism of *Sottomayor* v. *De Barros* in the Supplement, p. 1537.

[3] Mr. Gillespie's note to Bar, 2nd Ed., p. 373.

[4] 15 R. H.L. 21.

[5] Parent and Child, 2nd Ed., p. 576.

decision of importance. The following important *dicta* on the subject occur in Scottish cases, and must be regarded as entitled to more weight than the much earlier expressions of judicial opinion in *Edmonstone* and *Rose*. In *Udny* v. *Udny*, Lord Westbury said: "Domicil, or the place of settled residence of an individual, is the criterion established by law for the purpose of determining the civil condition of the person, for it is on this basis that the personal rights of the parties,—that is, the law which determines his majority or his minority, marriage, succession, testacy or intestacy,—must depend."[1]

In *Fenton* v. *Livingstone*, Lord Brougham said: "Now it must be granted that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled."[2] Lord Cranworth said, speaking of the person whose legitimacy was in question: "If, as I think, the marriage of his parents was not a good marriage in England, where they were domiciled and were married, he could not be their legitimate child in the view of a Scotch Court."[3]

In *Harvey* v. *Farnie*, Selborne, L.C., said: "Let it be granted (and I think it is well settled) that the general rule, internationally recognised, as to the constitution of marriage is, that *when there is no personal incapacity* attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*."[4]

In *Cooper* v. *Cooper*, Halsbury, L.C., said, speaking of the capacity of a minor: "The capacity to contract is regulated by the law of domicil."[5] In that case Lords Watson and Macnaghten reserved their opinion as to the law governing a minor's capacity to enter into an ordinary contract. As regards marriage, however, the English authorities are much stronger, and if the *dicta* quoted from Scotch cases are sufficient to indicate that up to the present time there has been

[1] 1869, 7 M. H.L., at p. 99.
[2] 1857, 3 Macq., at p. 531.
[3] *Ibid.*, at p. 542.
[4] 1882, 8 App. Ca., at p. 50 (*the italics are mine*).
[5] 15 R. H.L., at p. 25.

upon this subject no difference of principle between the law of the two countries, these recent cases in England cannot fail to carry great weight.

But before adverting to them, I desire to refer to the well-known case of *Fenton* v. *Livingstone*,[1] in which, although the actual question was not raised, the reasoning upon which the judgments are based points clearly to the conclusion which has since been arrived at by the Courts in England. In that case a son born in England of a marriage with a deceased wife's sister claimed to succeed as a child "lawfully procreate" to entailed estates in Scotland. It was held that the domicil of the parents at the marriage was in England. Proceeding on technicalities unnecessary for the present purpose to notice, the learned judges of the Court of Session found that by the law of England such a marriage was voidable but not void, and could not be challenged after the death of one of the parties. The alleged wife had died before the action was raised, and the Court of Session therefore held that the marriage had become unassailable, and the claimant being legitimate by the law of England—the law of his father's domicil at his birth, and at the marriage—must be regarded as legitimate by the law of Scotland also. The argument in the Inner House was, by consent of counsel, taken on the footing that marriage with a deceased wife's sister was incestuous and criminal by Scotch law, and contrary to Holy Writ; and that if the parents of the claimant had come to Scotland, they would have been liable to capital punishment, under the Act 1567, c. 15, against incest.

The Court of Session went on the somewhat curious ground that they could recognise the legitimacy of the claimant without admitting the validity of the marriage of which he was the issue.[2] "What is here in issue," said Lord Ivory, "is not the validity of the marriage, but the status of the defender as a legitimate child."

The foundation of this argument was struck away by the House of Lords, as they found that by the law of England—the law of the domicil—the marriage was incestuous and illegal,

[1] 1857, 3 Macq. 497; in C. of S. 1856, 18 D. 865.

[2] 18 D., at p. 896; and *see per* L.P. M'Neill, at p. 892; *per* L. Curriehill, at p. 902; and *per* L. Deas, at p. 905.

and that the fact of its having passed beyond challenge by the death of one of the parties, did not make the son the issue of a lawful marriage. Such a union was not valid till challenged, it was invalid *ab initio*, and all that the Court could do, if the question was timeously raised, was to declare, and not to make, it invalid.[1] In *Fenton*, there was no conflict between the *lex domicilii* and the *lex loci contractus*, because England happened to be the country in which both parties were domiciled, and also that in which the ceremony was performed. The doctrine, however, which had been laid down by the judges of the Court of Session that they were bound to refer the question of status to the *lex domicilii*, was affirmed by the learned lords, subject only to the limitation that no country was compelled to recognise a marriage, wherever celebrated, which was by the theory of its law incestuous or contrary to morality.[2] The case cannot fairly be used as a direct authority in favour of the *lex domicilii* as against the *lex loci*, but on the whole it foreshadows not faintly the principle laid down in *Sottomayor* v. *De Barros*,[3] and suggests that the same conclusion would have been arrived at, the domicil of the parties being English, if the celebration had taken place in a country, such as Denmark, where marriage with a deceased wife's sister is not forbidden. This further step, as will be seen, was taken in England in *Brook* v. *Brook*.[4]

But the first of the English cases which it is necessary to examine is *Simonin* v. *Mallac*.[5] That was a petition for nullity of marriage, presented in the following circumstances:—A Frenchman and French woman came to England and went through a marriage ceremony. The marriage would have been null if it had been celebrated in France, because the formal requests to the parents for their consent, *actes respectueux et formels*, had not been made. Subsequently

[1] *See per* L. Cranworth, 3 Macq., at p. 541.

[2] *See per* L. Brougham, 3 Macq., at p. 531; *per* L. Wenslaydale, *ibid.*, at p. 549. In C. of S., *per* L. Ardmillan, 18 D., at p. 874; *per* L. Curriehill, at p. 899; *per* L. Deas, at p. 904. L. Cranworth says we must look to the law of the place "where (the marriage) has been contracted, or where the parties were domiciled," thinking of a case like the one presented, where the two places were identical, 3 Macq., p. 543.

[3] 3 P.D. 1.

[4] 1861, 9 H.L.C. 193.

[5] 1860, 2 S. and T. 67.

the lady, desiring to be free, petitioned the French Court for a decree of nullity. That Court found the marriage null, on the ground that the parties came to England expressly to evade the French law. The lady afterwards took up her residence in England, and brought a petition for nullity there. But the Full Court[1] held that the contract, being made in England, its validity fell to be determined by English law. They found the marriage good. The reasoning is very striking. After stating that Gretna Green marriages had been recognised in England, although the parties had crossed the Border to evade the necessity of obtaining the consents required by 26 Geo. II., the judgment proceeds:—"The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law. Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage. Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent, whether both parties are French or one only. Assume, then, that a French subject comes to England, and there marries, without consent, a subject of another foreign country, by the law of which such a marriage would be valid, which law is to prevail? to which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must

[1] Sir C. Cresswell; Channell, B.; and Keating, J.

have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law, as a foreigner to the benefit of foreign law? But it may be said that in the case now before the Court both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognised, it must be followed out to all its consequences; the cases put are, therefore, a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium* this Court is bound to adopt the law of France as its guide."[1]

In *Brook* v. *Brook*[2] a marriage celebrated in Denmark between a domiciled Englishman and his deceased wife's sister, a domiciled Englishwoman, was held by the House of Lords to be void. The argument that marriage as a contract was valid or invalid according to the *lex loci contractus* was strongly pressed.

At first sight it might seem that *Brook* v. *Brook* would have no application to Scotland, as it was based on the extra-territorial effect of an English statute (5 & 6 Will. IV. c. 54), which does not extend to Scotland. That Act provided that marriages which might thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void, and not merely voidable. But such marriages were in Scotland always *ipso facto* void; and, even as regards England, the rubric to *Brook* v. *Brook* which runs, "Held that under the provisions of the 5 & 6 Will. IV. c. 54, the marriage in Denmark was void," does not adequately express the effect of the judgment. Lord Campbell clearly laid down that the Act had not rendered any marriage illegal in England which was not illegal before, but had merely remedied a defect in English procedure.[3] It cannot be doubted that in Scotland the same result would be reached by applying the principle of *Fenton* v. *Livingstone*, and find-

[1] 2 S. and T., at p. 84.
[2] 1861, 9 H.L.C. 193.
[3] 9 H.L.C., at p. 206.

ing that the marriage of a domiciled Scotsman with his deceased wife's sister being void in Scotland, and regarded as incestuous, and in the language of the Act 1567, c. 14, as "vile, filthy and abominable in presence of God," could not be sustained, although celebrated in a country in which such unions were permitted.

This leads to the case of *Sottomayor* v. *De Barros*, in which the whole law of the subject in England was fully discussed. The judgment of the Court of Appeal in that case has had the misfortune to meet with severe disapprobation in various quarters.[1] But in spite of all the respect due to the eminent authorities who have unfavourably criticised it, I venture to think that it is in accordance with the stream of authority, and that it would be followed in our Courts unless *Brook* v. *Brook* should be regarded as laying down principles of law which do not extend to Scotland, a position exceedingly difficult to maintain in view of the case of *Fenton* v. *Livingstone*.

Sottomayor v. *De Barros*,[2] which was a suit for nullity of marriage at the instance of the woman, came originally before Sir R. Phillimore. The parties were first cousins. At the time of the marriage the wife was fourteen years old and the husband sixteen. Their parents were Portuguese subjects, and in the view of the Court had not lost their Portuguese domicil. It was averred that the girl had most reluctantly consented to the marriage, in the belief that it would relieve her father from certain pecuniary embarrassments, and, relying on the assurance that the marriage, being contracted before a civil officer in England, and being illegal in Portugal on account of consanguinity, would not be binding. But the learned judge found, as the result of the evidence, that the girl perfectly understood that she was about to contract a marriage, and that no such pressure was put upon her as to amount to coercion or fraud. The fact that she might have an erroneous view of its future consequences could not vitiate the contract. It was, however, proved by the evidence of a

[1] *See* Sir James Hannen's opinion in the same case at the later stage, 5 P.D. 94; L. Fraser, Supplement, ii. 1535; Bishop, Ed. 1891, i. 849.

[2] 1877, 2 P.D. 81; rev. 3 P.D. 1; remitted to Probate Division, and finally decided by Sir J. Hannen, 1879, 5 P.D. 94.

Portuguese advocate that first cousins were by the law of Portugal incapable of contracting marriage on account of consanguinity, and that such a marriage being by the law of Portugal regarded as incestuous, would be invalid wherever celebrated. But first cousins might contract a valid marriage if they had previously obtained a dispensation from the Pope.

The averments to the effect that there was no genuine matrimonial consent being out of the way, the pure question of law presented itself, whether a marriage held as incestuous by the law of the domicil of both parties, was valid in the country where it was celebrated, the parties not being under any prohibition by the *lex loci actus*.

Sir R. Phillimore adopted the distinction drawn by Story between marriages universally regarded as incestuous, unnatural, and destructive of civilised life, and so considered by laws *quae humano generi universo sunt datae*, and those which some Christian nations treat as incestuous and others as permissible.[1] The marriage of first cousins, being permitted in many Christian countries, could not be incestuous according to the general law of Christendom, and the prohibition could not be put higher than a prohibition by the positive law of the country of the domicil.

The learned judge rather indicated an opinion that the *lex domicilii* ought to prevail, but considered himself bound by the judgment of Sir C. Cresswell in *Simonin* v. *Mallac*,[2] where it was held that the marriage of two domiciled French people, celebrated in England, was valid in that country, although pronounced null in the French Court, as contracted in evasion of the French law, which required the consents of parents.

Sir R. Phillimore's decision was reversed by the Court of Appeal (James, Baggallay, and Cotton, L.JJ.), whose judgment was delivered by Cotton, L.J. It is, undoubtedly, founded on a statement of law much broader than was necessary for the decision of the case. "If the parties had been subjects of Her Majesty, domiciled in England, the marriage would undoubtedly have been valid. But it is a well recognised principle of law that the question of personal capacity

[1] *See* Story, Conflict of Laws, § 116.

[2] 1860, 2 S. and T. 67.

to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This in our opinion is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects, within certain degrees of consanguinity, from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised."[1] The portion of this extract which deals with prohibited marriages was sufficient for the foundation of the judgment, and is completely in accordance with the reasoning of the House of Lords in *Brook* v. *Brook*. It was there plainly indicated that if the Danish Courts had been called upon to determine the validity of the marriage of a domiciled Englishman with his deceased wife's sister, celebrated in Denmark, they would have been bound to refer the question to the law of England, and to find the marriage invalid, if by that law it was prohibited as incestuous.[2] The passage, however, in which it is declared to be a well-recognised principle of law that capacity to contract in general is to be decided by the law of the domicil, can hardly be relied on in the face of the *dicta* in *Cooper* v. *Cooper*,[3] and in many earlier cases.[4]

[1] 3 P.D., at p. 5.

[2] *See* 9 H.L.C., p. 213, *per* L. Campbell, and p. 224, *per* L. Cranworth.

[3] 15 R. H.L. 21.

[4] *Scrimshire* v. *S.*, 1752, 2 Hagg. C.R., *per* Sir Ed. Simpson, at p. 419; *Simonin* v. *Mallac*, 1860, 2 S. and T., *per* Sir C. Cresswell, at p. 77; *Male* v. *Roberts*, 1800, 3 Esp. 163, *per* L. Eldon; and *see* especially judgment of Hannen, J., in *Sottomayor* v. *De Barros*, 1879, 5 P.D. 94.

Sottomayor v. *De Barros* was remitted to the Probate Division in order that certain questions of fact, raised by the Queen's Proctor's pleas, might be determined. The result of further inquiry was to lead Sir James Hannen to the conclusion that the husband's domicil, at the time of the marriage, was in England. The Court of Appeal had carefully limited their judgment to a case where the domicil of both parties was in a country which prohibited the marriage. Sir James Hannen availed himself of this limitation, and held that the marriage was valid. He took the opportunity of expressing his strong dissent from the law laid down by the Court of Appeal. He founded his judgment on the view expressed as to the law governing capacity in *Male* v. *Roberts*, *Scrimshire* v. *Scrimshire*, and *Simonin* v. *Mallac*. *Male* v. *Roberts* was not a case of marriage, but that of the capacity of a minor to contract. *Scrimshire* was entirely a question of the validity of a marriage in point of form. Sir E. Simpson said: "From the doctrine laid down in our books —the practice of nations—and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the *jus gentium*, that the *solemnities* of the different nations, with respect to marriage, should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made."[1] The reasoning of Sir Cresswell Cresswell in *Simonin* v. *Mallac* is, no doubt, conflicting with that of the Court of Appeal in *Sottomayor*. Sir James Hannen declined to accept the explanation of the learned lords-justices that *Simonin* also related to form and not to essence, seeing that the parties were not absolutely prohibited from marrying each other, but only bound to obtain certain consents. But *Simonin* was explained in the same way, by Lord Campbell, in *Brook* v. *Brook*,[2] who assimilated it to the Gretna Green cases,[3] and the Irish case of *Steele* v. *Braddell*.[4] And that Sir C. Cresswell himself thought that marriages absolutely forbidden by the law of the domicil fell into a different category from those in which the parties

[1] 2 Hagg. C.R., at p. 416.
[2] 9 H.L.C., at p. 217.
[3] *Compton* v. *Bearcroft*, 1767, 2 Hagg. C.R. 430.
[4] 1838, Milw. 1. *See* Cresswell, J.'s, judgment in 3 Sm. and G. 481.

could have lawfully married in their own domicil, if they had obtained certain consents, seems sufficiently clear from the fact that this eminent judge was a party to the decision in *Brook* v. *Brook*, which was affirmed by the House of Lords,[1] and by his judgment in *Mette* v. *Mette*,[2] decided while the appeal in *Brook* was pending. There he found a marriage void, contracted by a German domiciled in England, with his deceased wife's sister, who was domiciled in Germany, although by the law of the German State where the celebration took place, such marriages were not forbidden.

It seems difficult to hold with Hannen, J., that the marriage of a foreigner in England is, as regards capacity as well as ceremony, valid or invalid by the *lex loci*, whereas the validity of a domiciled Englishman's marriage abroad, must be referred to the *lex domicilii*.

The American decisions vary in different States. The Courts of Virginia, North Carolina, and Louisiana, do not admit the validity of a marriage between persons domiciled in these States if prohibited there, although celebrated in a place where it is lawful, while the Courts of Massachusetts and Kentucky have adopted the principle of referring the question in all cases to the law of the place of celebration.[3]

Where the Parties have different Domicils.—Is a marriage valid if one of the parties is prohibited from entering into it by the law of his or her domicil, but the other party is under no corresponding prohibition? This question, as already stated, was reserved by the Court of Appeal in *Sottomayor*, and afterwards answered in the affirmative by Hannen, J.[4] It is suggested by the learned editor of Story that the cases can be reconciled on the theory that the marriage will be valid if permitted by the law of the husband's domicil, as that is the matrimonial domicil.[5] But, with submission, this seems to rest on a fallacy. If the question is truly one of *status*, and on that ground referred to the *lex domicilii*, regard must be paid to the law of the domicil of each of the parties severally. This was expressly laid down by Sir C. Cresswell in *Mette*,

[1] 3 Sm. and G. 481.

[2] 1859, 1 S. and T. 416.

[3] *See* note to Story, 8th Ed., p. 217, where the rule laid down in the English decisions is ably supported.

[4] 5 P.D. 94.

[5] Conflict of Laws, 8th Ed., p. 223.

where he says: "There could be no valid contract unless each was competent to contract with the other."[1] And the remark of Lord Macnaghten in *Cooper* v. *Cooper* seems irresistible, and not limited in application to the case then before the Court—viz., one in which the contract was made in the place where the person whose capacity was in question was domiciled. "It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal *status*, which would bring with it a change of domicil."[2]

The dilemma propounded by Sir C. Cresswell, in *Simonin* v. *Mallac:* "To which country is an English tribunal to pay the compliment of adopting its law? . . . Both cannot be observed," brings out clearly the expediency of leaving all questions of form to the *lex loci*, but no logical difficulty exists in referring the question of capacity to the law of each of the parties respectively.[3] Nor does the adoption of this principle appear so fraught with danger to British subjects as was feared by the learned judge who finally decided *Sottomayor* v. *De Barros*. It would probably not be extended to any prohibitions other than those grounded on too great nearness of kinship or affinity. Such prohibitions are not numerous, and it is unlikely that a domiciled Scotswoman or Englishwoman, *who has a Portuguese first-cousin*, should be ignorant that the law of Portugal forbids the marriage of persons so related. And public policy is surely against encouraging marriages in this country which will be treated as null in the husband's domicil, which is presumably the place contemplated by the parties as the matrimonial home.

Capacity of Foreign Minors.—There is no Scottish authority to the effect that minority, and the degree of incapacity resulting therefrom, is to be determined by the *lex loci actus* more modern than certain *dicta* in old cases decided at a time when the law as to status in general had been much

[1] 1 S. and T., at p. 423.
[2] 15 R. H.L., at p. 31.
[3] *See* Westlake, 3rd Ed., p. 57; Dicey, p. 221.

less considered than at present.[1] In none of these cases was the actual point determined, and it is thought that the rule that capacity must depend on the *lex domicilii* would now, with certain limitations, be accepted in Scotland.

Voluntary Deeds of Minor.—Where the question relates to the minor's power of managing his estate without the consent of a guardian, or of making a gratuitous alienation of moveables by deed, or of executing a will effectual to carry moveables, there can be little doubt that it will be solved by reference to the law of his domicil.[2] A person domiciled in a country where majority is fixed at twenty-five, cannot by coming to Scotland when he is twenty-one years of age free himself at a stroke from the disabilities of minority, unless he comes *animo manendi*, and thereby acquires a Scottish domicil. Capacity to take depends on domicil. In one case Lord Romilly directed executors that they might safely pay a legacy to a girl of eighteen, she being then major by the law of Hamburg, where she was domiciled.[3]

Contracts by Minor.—There is a greater difficulty in regard to the contracts entered into in this country by a person who is in minority by the law of his domicil. It is probable that the validity of such a deed as an ante-nuptial marriage-contract, by which a *universitas* was conveyed, would be determined in Scotland by the *lex domicilii*.[4] This would also be the rule with regard to contracts by the minor to perform personal services—*e.g.*, articles of apprenticeship. And in cases where a *restitutio in integrum* was possible, this would be allowed if the minor was entitled to it by the law of his domicil.

[1] *See per* L. Meadowbank, in *Gordon* v. *Pye*, Ferg. Con. Law, Apx. 17; *per* L. Glenlee, in *Rose* v. *Ross*, 15th May, 1827, F.C.; and *per* L.J.C. Boyle, in *Edmondstone* v. *E.*, Ferg. Div. Cases, 412. *See Udny* v. *U.*, 1869, 7 M. H.L., at p. 99; *Cooper* v. *C.*, 15 R. H.L. 21; *Sottomayor* v. *De Barros*, 3 P.D. 1; Fraser, Parent and Child, p. 570 *seq.*; Westlake, p. 43; Dicey, p. 177; Story, § 100 *seq.*; Gillespie's Bar, p. 310; Burge, i., p. 113.

[2] Fraser, P. and C., p. 583; Dicey, p. 179; Savigny, p. 152; but *see* Mr. Guthrie's note.

[3] *In re Hellmann's Will*, 1866, L.R. 2 Eq. 363.

[4] *See In re Cocke's Trusts*, 1887, 56 L.J. Ch., 637; *dicta* in *Cooper* v. *C.*, 15 R. H.L. 21.

On the other hand, where the other party to the contract had no reason to believe that he was dealing with a person subject to any legal incapacity, and there was nothing in the nature of the transaction which ought to have put him on his inquiry, and when matters are no longer entire, it would be unjust to allow the minor to shelter himself behind a law which the other party was not bound to know. In one case, where an English minor pleaded minority in defence to an action by an innkeeper in Scotland for the amount of his bill, Lord Fullerton said: "It is not pretended that either at the time of contracting the debt, or of granting the bill, the charger was informed of the suspender being under age. In these circumstances, the Lord Ordinary thinks that the plea of minority on the part of the suspender is truly a perversion of what was meant as a protection into an instrument of fraud. The present seems exactly a case for the application of the principle, *minoribus deceptis non decipientibus est subveniendum*," and the Court expressed a unanimous opinion that the minor was liable.[1]

On still clearer grounds a minor who fraudulently holds himself out as major, and induces another to contract with him, cannot afterwards plead minority as a defence. And it is certain that a foreign minor who was a trader and incurred obligations *in re mercatoria* would bind himself. Minority could not be pleaded in such a case by a Scottish minor, and it would be to the prejudice and not to the [illegible]age of foreign minors in business to place them under [illegible]y greater restrictions than our own subjects.[2]

It is thought that with these important limitations, suggested by Lord Fraser, the law of Scotland would admit the principle advocated by almost all foreign jurists, that capacity is part of status, and depends on the law of domicil.[3] If, for example, a person whose domicil was in a country where

[1] *Wilkie* v. *Dunlop*, 1834, 12 S. 506.

[2] Fraser, Parent and Child, p. 584; *see* remarks of Porter, J., in the great American case of *Saul* v. *His Creditors*, printed as an Appendix to Phillimore's Int. Law, iv., at p. 746. Somewhat similar exceptions to the rule that capacity is referred to the personal law, which in France generally depends on nationality not domicil, seem to be admitted by the French Courts. *See* Westlake, p. 28.

[3] Gillespie's Bar, p. 310, note by the translator. Bar himself supports a similar view, *ibid.*, p. 313.

majority is fixed at twenty years of age, came to Scotland, should we decline to regard him as of full age because he had not attained the age of majority according to our law?[1]

The question is in a very analogous position in England, the old case of *Male* v. *Roberts* being the only direct authority for the statement that an infant's capacity to bind himself by contract depends on the *lex loci contractus*, while the tendency of modern decisions is to treat capacity as part of the law of status, and to refer all questions of status to the *lex domicilii*. Mr. Dicey doubts whether, even if the *lex loci* is ultimately fixed upon as giving the rule, "it can be applied to cases where an infant domiciled in England has entered into a contract abroad either without any consideration or for which he had not received any consideration."[2] Mr. Westlake advocates the adoption of the rule of the *lex domicilii*, and says, "if therefore the English Courts should in future hold that the general rule to govern capacity, as affected by age, must be drawn simply from the personal law, they will put themselves far more nearly in accordance with the Continental rules than they would do if they drew their general rule from the *lex loci contractus*."[3]

The English case of *Male* v. *Roberts*,[4] which is the only authority in that country in favour of applying the *lex loci contractus* in all circumstances,[5] was an action for payment of a debt incurred by an English minor for liquors supplied to him in Scotland. Lord Eldon, at *Nisi Prius*, said, "the law of the country where the contract arose must govern the contract." Such a contract was one which would fall within the exceptions suggested by Lord Fraser, and might very naturally come under a different rule from a contract by which a minor undertook—*e.g.*, obligations by a marriage-contract affecting his whole estate.

The rule that a minor's capacity to contract depends on the law of the domicil was adopted by Stirling, J., in *In re Cooke's Trusts*.[6] There it was found that an ante-nuptial marriage-

[1] Story adheres to the rule of the *lex loci actus* in all cases. Conflict of Laws, § 103.

[2] Domicil, p. 179.

[3] Priv. Int. Law, 3rd Ed., p. 46.

[4] 1800, 3 Espinasse, 163.

[5] *See* Dicey, p. 179, and arg. in *In re Cooke's Trusts*, 56 L.J. Ch., at p. 638.

[6] 1887, 56 L.J. Ch., 637.

contract entered into in France by a domiciled Englishwoman was not binding upon her, she being at its date an infant and incapable of contracting by the law of England. *Male* v. *Roberts* was founded upon in argument, but the learned judge, without expressing any personal opinion, conceived himself bound to follow the doctrine of the Court of Appeal in *Sottomayor* v. *De Barros*.

Wife's capacity to Contract.—The importance for the present purpose of the question with regard to the law to be applied to the contracts of minors is that, whatever rule may finally be fixed upon, it may be thought to affect also the contracts of married women.[1] Lord Fraser appears to be of opinion that the two cases should be governed by different considerations, for he says the validity of the contracts of a married woman made in Scotland will be determined by the law of Scotland, though her domicil is in another country, and does not refer to his view that the capacity of minors depends in general on the *lex domicilii*.[2] He indicates no ground for the distinction. But the validity of a wife's contracts may be regarded from another point of view.

One reason, at any rate, for the so-called incapacity of married women is, that a wife without separate estate cannot as a rule incur obligations, because if valid they would fall to be discharged, not by herself but by her husband. In this case it is thought that the foregoing remarks with reference to the contracts of foreign minors are equally applicable to foreign wives. But a foreign wife who fraudulently holds herself out as unmarried, or who is engaged in trade, and enters into contracts *in re mercatoria*, or who incurs debts to hotel-keepers or tradesmen for articles supplied to her, could not plead in a Scottish Court that she was not bound because her contract was invalid by the law of her domicil. She would be treated in the same way as a married woman domiciled here who enters into similar obligations. Her capacity, however, to execute deeds alienating her moveable estate, or to test upon moveables, ought to be determined by the law of her domicil. Where the question is truly one of the degree of authority

[1] Westlake thinks it would, p. 47; and *see* Dicey, p. 193.

[2] *Cf.* H. and W., ii. 1318, with Parent and Child, 578 *seq.*

which the husband possesses over the wife, and of the extent to which she has placed her property under his control, it is conceived that the law of the actual domicil must in all cases govern, subject to such limitations as those suggested as applicable to the rights of foreign minors. Thus, where by the law of the domicil of the spouses there is a *communio bonorum*, any right which may exist in the wife of alienation or contract must depend on the law of the domicil.[1]

But it is no part of the public law of Scotland that a wife is merely by the fact of marriage incapable of dealing with property which is entirely her own, and in which during the marriage her husband has no legal interest. On the contrary, our law fully recognises the right of a woman before marriage to reserve to herself the full power of disposal of her estate, and to exclude the husband's rights, and the freedom of third parties to give or bequeath to her estate from which the husband's *jus mariti* and right of administration are excluded.

And it is settled that she may deal with such estate precisely as if she were an unmarried woman.[2] The question, therefore, with regard to a married woman's contracts or alienations, depends in many cases not on capacity but on patrimonial right. If the estate is absolutely her own, the fact of marriage will not render her incapable of dealing with it. Now, if the estate of a foreign wife is in this position either by contract, or by the law, common or statutory, of her domicil, why should her right to deal with it be impaired by her residence in Scotland?

Where Wife has separate Estate by the Law of her Domicil.—A married woman in Scotland, whose estate is held by her in virtue of the Married Women's Property Act, has no power to dispose of the capital without her husband's consent. But a married woman in England, whose estate is vested in her under the English Act, may dispose of it in the same manner as if she were a *feme sole*.[3] Is her power to do so diminished by the fact that at the date of the contract or alienation she is resident in Scotland? It seems clear that

[1] *See* Gillespie's Bar, p. 417.

[2] *Biggart* v. *City of Glasgow Bank*, 1879, 6 R. 470.

[3] 45 & 46 Vict. c. 75, § 1.

her rights in this respect suffer no diminution by her temporary residence in Scotland.

Where a Foreign Wife with separate Estate acquires a Scottish Domicil.—If the views elsewhere expressed are correct with regard to the effect of change of domicil upon the patrimonial rights of the spouses, it will follow that if by the law of her former domicil the wife had the power of dealing with her separate estate without her husband's consent, she will continue to have the same power. Her status has no doubt changed, and every question which truly relates to her personal status must now be answered by the law of Scotland. But the possession of estate of which she has the full power of disposal is not inconsistent with the status of a Scottish wife, and to diminish her rights of dealing with what was separate estate before her Scottish domicil was acquired, would be arbitrarily to deprive her of a right not of status but of property.[1]

This view is supported by the English case of *Duncan* v. *Cannan*,[2] although the point there was to a wife's power over estate conveyed by a marriage-contract. By the law of Scotland the wife had power to give a valid discharge for a sum of money comprised in the contract. It was held that the removal of her domicil to England did not superinduce a disability in her to give a receipt to trustees for the amount. The contention was that her capacity now depended on English law, by which, under a deed so expressed, she could not have given a valid receipt, the property not being expressed to be for her "separate use." Sir J. Romilly, M.R., held that the effect of the deed and the wife's powers under it must be governed by Scots law, and observed "to create a disability in one of two parties to a foreign contract, not existing according to the law which governs the contract, solely by reason of the change of domicil of the contracting parties to a country where such a disability exists, appears to me to be contrary to the principles governing such cases."[3] In affirming the judgment, Knight Bruce, L.J., said: "If we introduce it (the contract),

[1] *Cf.* Dicey, p. 195; but *see* Burge, i., p. 633.

[2] 1854, 18 Beavan, 128, aff. 1855, 7 De G., M. and G. 78.

[3] 18 Beav., at p. 141.

we must introduce it as a Scotch contract, with all the incidents of a Scotch contract, so far at least as not prohibited by the English law; and it is not, I repeat, prohibited by the English law that a married woman should have conferred on her the power and capacity just referred to."[1] The matter is no doubt clearer when the rights of parties stand upon contract, and the argument is hardly tenable that in changing their domicil they intended to innovate upon these rights. But it is conceived that the view that the question is, in the case of a wife, frequently one not of capacity but of patrimonial right, and that this will not be affected by change of domicil, is aided by cases turning on contract.[2]

Validity in point of form of transfer of moveables.—It must be borne in mind that a *bona fide* purchaser for value, who is in possession of a corporeal moveable, can generally defend his right to it by showing that it was effectually transferred to him on a title good by the *lex rei sitae*. The maxim *mobilia sequuntur personam*, as applicable to transfers of particular moveables by contract, has suffered many rude shocks in recent cases, and the learned editor of Story even suggests that the exceptions would probably be less frequent if the maxim were *lex situs mobilia regit*.[3] The rule expressed in an English case,[4] "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere," was approved of as a sound general rule though open to exceptions in *Castrique* v. *Imrie*,[5] and a similar doctrine underlies the judgment in the Scottish case of *Connal* v. *Loder*.[6] And in a recent case the purchaser of a stolen horse successfully defended his title against the person from whom it had been stolen, by proving that he bought it in Ireland in open market, although sale in market overt in Scotland would not have purged the *vitium reale*.[7]

[1] 7 De G., M. and G., at p. 91.

[2] *See Guépratte* v. *Young*, 1851, 4 De G. and S. 217; *Peillon* v. *Brooking*, 1858, 25 Beavan, 218; and *see* next section.

[3] 8th Ed., p. 543.

[4] *Cammell* v. *Sewell*, 1860, 5 H. and N. 728.

[5] 1870, L.R. 4 E. and I. App., at p. 429; *Lee* v. *Abdy*, 1886, 17 Q.B.D. 309.

[6] 1868, 6 M. 1095, *see per* Moncreiff, L.J.-C., at p. 1110. And *see* Westlake, 3rd Ed., p. 179 *seq.*

[7] *Todd* v. *Armour*, 1882, 9 R. 901.

CHAPTER XL.

THE FORM BY WHICH THE MARRIAGE IS CONSTITUTED.

***Lex loci actus* must be complied with as regards the forms of marriage.**—The Scottish Courts will not regard as valid a marriage which in point of form did not fulfil the requirements of the law of the place in which it was contracted. In other words, the *lex loci contractus* is the law which dictates the forms which are to be treated as conclusive evidence of matrimonial consent. No form of marriage is prescribed by the law of Scotland itself, and a marriage may be contracted in this country without the intervention of a minister or of a registrar. But an irregular marriage entered into abroad will not be valid,—although the evidence of consent would have been sufficient if it had taken place in Scotland,—if the *lex loci actus* be not satisfied. This doctrine has not been the subject of decision, and is not supported by much authority in Scotland.[1] But the rule is so settled in England and America, and it is submitted that it is in accordance with principle. Two exceptions are admitted:—1. where compliance with the *lex loci* was impossible; 2. where the marriage was celebrated in terms of some British statute dealing with marriages of subjects of the Queen contracted abroad. These will be considered later. Lord Fraser says a marriage invalid in the country where it is celebrated will be so in every other country.[2] Mr. Gillespie, in his valuable edition of Bar, maintains that this would not be so held in Scotland, although he does not dispute that the law is fixed in this sense both in England and America. "The marriage-contract being in Scotland so purely a matter of consent, and so entirely

[1] *See* Fr. ii. 1297; *Warrender* v. *W.*, 1835, 2 S. and M'L., at p. 198, *per* L. Brougham.

[2] ii. 1309.

independent of form, it would seem, with all deference to Lord Fraser's authority, to savour of absurdity to hold that Scots persons must, if they desire to enter into their contract abroad, go through the forms prescribed by the law of the foreign country. Is it to be said that, while the interchange of consent openly before witnesses in Edinburgh will constitute a marriage, the same consent cannot be interchanged before the same witnesses in Paris, and that the Scots Court will refuse to uphold the same contract proved in the same way? Lord Fraser cites no authority in support of his dictum, and principle seems to be against it."[1] The theory advanced here is supported by writers on private international law of great eminence. Bar says the rule "*locus regit actum*" is, as applied to marriage, merely permissive—*i.e.*, a marriage in accordance with the local forms will always be good, but the parties, if they prefer it, may legally avail themselves also of the forms of their own country, provided that be possible in fact.[2] This was held by the Supreme Court of Saxony. A marriage celebrated in Belgium between two Saxon subjects was sustained, although the law of Belgium, which required celebration before a civil official, had not been complied with.[3] Savigny expresses the same view, and thinks that in performing any juridical act, the person doing it has the choice between the form in use at the place of the act and the form of "the place to which the juridical act properly belongs,"—a curious phrase, apparently equivalent here to the *locus solutionis*. He says, "If inhabitants of a country where the ecclesiastical ceremony is required enter into a marriage in a country that prescribes a juridical form, and not a religious ceremony, and if they there get themselves married in the religious form, without observing the juridical form of the country, the marriage is valid, because they have used the form of their own country, the natural and permanent seat of the marriage."[4] But this is to place the contract of marriage in a different position from every other contract. It is a well-known rule of private international law that the formalities required for a contract by the law of the place where it was

[1] Gillespie's Bar, 2nd Ed., p. 371.
[2] *Ibid.*, p. 359.
[3] *Ibid.*, p. 359, *note*.
[4] Guthrie's Savigny, 2nd Ed., p. 325.

made are also necessary for its validity in this country.[1] So where an assignation of a debt was executed in England, but the assignation was null according to the English law, it was held that the assignee had no title to sue in the Scotch Court, though if the assignation had been made in Scotland it would have been valid.[2] In a case where it was averred that an agreement made in Surinam was invalid as being unstamped, Lord Ellenborough said: "I should clearly hold that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over."[3] Marriage has been assimilated to other contracts in this respect by judgments of high authority. A marriage celebrated between British subjects by the chaplain of the English Church at Antwerp, in presence of the British Consul there, was found by Shadwell, V.-C., to be invalid, on the ground that certain requirements of Belgian law, by which, *inter alia*, a civil ceremony was indispensable, had not been complied with.[4] And in a leading case[5] Sir Edward Simpson, in setting aside a marriage celebrated in France as invalid by the *lex loci*, said: "There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there they subjected themselves to have the validity of it determined by the laws of that country."[6] And in another passage the same learned judge said: "I apprehend that, by the law of England, marriages are to be deemed good or bad according to the law of the place where they are made."[7] This view is strongly supported by *Simonin* v. *Mallac*.[8] It may be looked upon as established in England that the validity of a marriage celebrated in that country is to be judged of solely by English law. In any English court the test of its validity is the *lex loci*. The only exception which has been admitted

[1] *See* Westlake, Private International Law, 3rd Ed., p. 251; Foote, Priv. Int. Law, 2nd Ed., p. 352.

[2] *Taylor* v. *Scott*, 1847, 9 D. 1504.

[3] *Clegg* v. *Levy*, 1812, 3 Camp. 166.

[4] *Kent* v. *Burgess*, 1840, 11 Simons, 361.

[5] *Scrimshire* v. *S.*, 1752, 2 Hagg. C.R. 395.

[6] p. 408.

[7] p. 402.

[8] 1860, 2 S. and T. 67; and *see* *Brook* v. *B.*, 1861, 9 H.L.C. 193.

is that of requiring, in addition to a form valid by the *lex loci*, that the parties shall be competent to marry each other by the law of their domicil.[1] This exception, in the opinion of Hannen, J., only applies to a case where both parties are domiciled in a country which prohibits their intermarriage.[2]

Now if this reasoning be applied to the case of an irregular Scots marriage celebrated in England, it is clear that such a marriage would not be regarded as valid in an English court, although it should be proved to them that no ceremony was required to constitute marriage in Scotland. And if invalid in point of form where it is celebrated, it will be invalid all the world over. Mr. Gillespie refers to various cases in which proof of cohabitation abroad was admitted, as supporting his view that an irregular marriage between two Scotch persons might be constituted in a country where some form, civil or religious, was essential. But, with respect, they do not appear on examination to lend much aid to that doctrine.

In *Forbes* v. *Countess of Strathmore*,[3] L.P. Dundas is reported by Elchies to have said that, "though nothing could have the civil effect of marriage in Scotland but celebration *secundum legem loci*, yet *consensus et copula* even in Scotland would make a good marriage in Scotland, and it was not an agreed point whether cohabitation in Holland would not have the same effect." This is ambiguous, and may mean merely that it was not admitted that such a marriage would not be valid by the law of Holland. The President refers to two cases not reported, in one of which proof of cohabitation in England was allowed, and in another "the Court refused a proof of cohabitation at Gibraltar only because they would not condescend on the witnesses." But these may have been cases in which there was an attempt to prove marriage by evidence of cohabitation and reputation according to the law of *England*, or the cohabitation may have been the continuance of previous cohabitation in Scotland. It is clear that where two persons have been reputed to be married and have cohabited in Scotland in equivocal circumstances, their conduct abroad may be fairly considered

[1] *Sottomayor* v. *De Barros*, 1877, 3 P.D. 1.

[2] Same case, 5 P.D. 94; and *see supra*, p. 359 *seq.*

[3] 1750, Elchies, ii. *v.* Proof p. 365, and 6 Paton, 684.

as throwing light on the issue whether the relation between them is concubinage or marriage. And in all the cases in which proof of cohabitation abroad has been admitted, it has been as evidence of prior consent to marry exchanged in Scotland.[1] In *Napier* the majority of the Court, who found no marriage, said "the cohabitation such as it was took place chiefly in Gibraltar, where they could not be married after that fashion,"[2] and the minority said of the cohabitation at Gibraltar that it "must be taken in connection with that in Scotland, which had produced two children, and was viewed in the same light by the few surviving witnesses."[3] In the *Breadalbane* case the ground of judgment, both in the Court of Session and in the House of Lords was that there was sufficient evidence apart from the cohabitation out of Scotland. Chelmsford, L.C., said: "If the case were confined to the period between the year 1793 and the death of James Campbell in 1806 (during which years the parties lived in Scotland), it would be amply sufficient to establish a conclusive presumption of marriage by habit and repute."[4] Lord Westbury, however, remarks that persons may marry in a foreign land, and from ignorance or mistake omit some essential requirement of the *lex loci*. Such persons may afterwards come to Scotland and reside there, and their continued cohabitation may found the presumption that they have exchanged matrimonial consent.[5] This language implies clearly the opinion that the want of ceremony was fatal to the validity of the marriage *ab initio*. And there are many *dicta* in the case of *Longworth* v. *Yelverton*, which conflict with Mr. Gillespie's view. Lord Deas says of marriages by promise *subsequente copula*, and by declaration *de præsenti*, "nor is it necessary that the parties should be what the law regards as domiciled in Scotland. It is enough that they are resident in Scotland for the time being, and that the requisites of the contract, as a purely

[1] *Forbes*, cit.; *Napier* v. *N.*, 1801, Hume's Decisions, p. 367; *Breadalbane Case*, *Campbell* v. *C.*, 1867, 5 M. H.L. 115 (in C. of S., 4 M. 867).

[2] p. 372.

[3] *Ibid.*, *sub fin.*

[4] 5 M. H.L., at p. 127; and *per* Lord Westbury, at p. 143.

[5] p. 141; and *see* opinion of L.J.-C. Inglis, and Lords Neaves and Mure, 4 M., at p. 926, where they seem to limit the power of being married without a ceremony to persons living in Scotland; and *per* L.P. M'Neill, at p. 946.

civil and consensual contract, have taken place in Scotland."[1] It is true, as Mr. Gillespie points out, that in that case the pursuer was an Englishwoman and the defender an Irishman, and the law of Scotland was invoked as the *lex loci contractus*. But the case cannot be distinguished in this way, and it is maintained that the *lex loci* must always be satisfied irrespective of the domicil of the parties.[2] The case of *Cullen* v. *Gossage*[3] is also instructive. Evidence of cohabitation in England was then looked at. But this was to set up a case of reputation sufficient by the law of England to create a presumption of marriage, although no register of the ceremony could be found. It appears, though not expressly stated, that Gossage was an Englishman, or the case would be a weighty authority against the recognition of irregular marriages not good by the *lex loci*. It is submitted that the true rule is that observance of the forms of the *lex loci* is the only sufficient evidence of genuine matrimonial consent.

Certain Cases in which Marriages are regarded as valid independent of the *lex loci contractus*. — These cases are of two classes—(1) where in virtue of the doctrine of exterritoriality the portion of the foreign country upon which the marriage is celebrated is regarded by a legal fiction as within the Queen's dominions; (2) where the marriage is celebrated in an uncivilised country, and it is not possible for the parties to go through any religious or civil ceremony, or where in a civilised country they are excluded from availing themselves of the *lex loci*.

Foreign Marriages Acts.—The marriages of British subjects abroad, unless celebrated in accordance with the *lex loci*, are now regulated by the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), and the Order in Council, dated 28th October, 1892.[4] This Act commences on 1st January, 1893. It is a consolidation of the statutory law on the subject; and repeals the following enactments:—4 Geo. IV. c. 91; the

[1] 1 M., at p. 170; and *see* at p. 172, top; and *per* L.P. M'Neill, at p. 175, foot; in House of Lords *per* Lord Westbury, 2 M. H.L., at p. 66; *per* L.C. Chelmsford, at p. 82; *per* L. Kingsdown, at p. 86.

[2] *See* also *Maccullock* v. *M.*, 1759, M. 4591, rev. 2 Pat. 33.

[3] 1850, 12 D. 633.

[4] Statutory Rules and Orders, 1892, p. 625.

Consular Marriage Acts of 1849 and 1868 (12 & 13 Vict. c. 68, and 31 & 32 Vict. c. 61); the Marriage Act, 1890 (53 & 54 Vict. c. 47); and the Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74).[1]

The Act applies to mixed marriages, but where one only of the parties is a British subject, the marriage officer must be satisfied either that the other is not a citizen of the country, or, if so, that sufficient facilities do not exist for solemnisation in accordance with the *lex loci*. And as it is possible that where the man is not a British subject the marriage would not be regarded as valid by the law of his own country, the marriage officer must be satisfied that by the law of the alien's country it would be a good marriage.[2] These provisions are very properly introduced, because in many European countries such marriages would not be valid, at least unless both parties were British subjects. It may be a matter of minor concern to an Englishman and a German woman who go through a ceremony of marriage at the British Consulate in Antwerp to know that the marriage would not be good by the law of Belgium. But it is of the greatest importance that the law of the future domicil should be satisfied, and highly undesirable that British consuls should facilitate ceremonies of marriage which would be legally null when the parties returned to the matrimonial home.[3]

Subject to compliance with the conditions as to notice,[4] and consents where required by the law of *England*,[5] such marriages may be solemnised by, or in presence of, any ambassador, consul, governor, or other person authorised in that behalf by warrant from a Secretary of State.[6]

The commanding officer of one of Her Majesty's ships on a foreign station may be authorised as a marriage officer under the Act.[7]

Marriages solemnised within the British lines by any chaplain or officer, or other person officiating under the orders

[1] It repeals also the words about marriage at embassies in § 11 of the Naturalisation Act, 1870 (33 & 34 Vict. c. 14).

[2] §§ 4 and 5 of the Foreign Marriages Order in Council, 1892.

[3] *See* Report of Marriage Laws Commission (1868), and the valuable account of the formalities required by foreign laws in the Appendix to Hammick's Marriage Law of England.

[4] § 2.

[5] § 4.

[6] § 11.

[7] § 12. *See* the Order in Council.

of the commanding officer of a British army serving abroad, are declared valid.[1]

Exterritoriality at Common Law.—Prior to the series of Acts above mentioned, of which the first was 4 Geo. IV. c. 91, certain marriages celebrated abroad had been regarded as valid at common law apart from reference to the *lex loci celebrationis*. Their validity depended on the theory of exterritoriality. The chapel of a British embassy,[2] the space occupied by a British factory,[3] or within the lines of a British army serving abroad,[4] were treated as outside the foreign territory, and a marriage, to which one at least of the parties was a British subject, in any of these places,[5] was held valid in England if it would have been good by the common law if celebrated there. The Act of 1892 declares that its provisions shall in no way affect the validity of any marriage solemnised beyond the seas, otherwise than is therein provided.[6] It would appear therefore that a marriage to which one of the parties was domiciled in Scotland would be valid in this country if contracted in a place falling within one of the above categories in any manner which would have made it a good marriage if Scotland had been the *locus celebrationis*.

No doubt, in England, on the authority of *The Queen* v. *Millis*,[7] a contract *per verba de præsenti*, unless before an episcopally-ordained clergyman, would not be a good marriage if it could not be brought under the validating clauses of the Foreign Marriages Acts, or justified at common law on the ground that there was no means available for more solemn celebration. But if the ground upon which these cases depends is that in our law embassies, factories, and the space within lines of our armies are part of the British territory, and

[1] § 22.

[2] *Este* v. *Smith*, 1854, 18 Beav. 112.

[3] *Rex* v. *Brampton*, 1808, 10 East. 282; *Ruding* v. *Smith*, 1821, 2 Hagg. C.R., at p. 385. There was a Scots factory at Campvere, in Zealand, subject to the jurisdiction of the Conservator of the Scottish Privileges in the Netherlands, who was "tied down to judge by the rules of the law of Scotland." The Court of Session had a cumulative jurisdiction, founded *ratione originis*, in cases between Scotsmen who were members of the factory. *See* Ersk. i. 4, 34, and note to i. 2, 19.

[4] *Waldegrave Peerage Case*, 1837, 4 C. and F. 639.

[5] *Lloyd* v. *Petitjean*, 1839, 2 Curt. 251.

[6] § 23.

[7] 1843, 10 C. and F. 543.

that our subjects in these places carry their common law with them, it would seem that a Scotsman would carry with him the common law of Scotland no less than an Englishman the common law of England. The question is hardly of more than academic interest, for a marriage *per verba de præsenti* at a consulate will be good by the Foreign Marriage Act if the requisite forms have been complied with, and British factories are superseded by consulates and embassies.[1] But a case is conceivable of a marriage at a consulate invalid on some ground, as not satisfying the statute, being held good in Scotland as a marriage *per verba de præsenti.* And the same might happen in the case of a marriage within the lines of a British army. Another view of the matter is possible—viz., that in such cases regard must be paid only to the common law of England. If the *locus* is theoretically outside the foreign country, in what country does the law regard it as situate? Does the doctrine of exterritoriality mean that where certain persons are contracting the territory is in Scotland or in Ireland, and where others are concerned it is in England? Or is it in the eye of the law part of the realm of England? This question is obscure, and appears to be bare of authority in Scotland. But it would seem on principle that, given the fact that the *locus contractus* is outside the foreign territory, the rights of British subjects there would fall to be determined by the law of their respective domicils.

In a case with regard to probate of the will of a British subject resident in a British factory at Smyrna, Dr. Lushington held that, in virtue of treaties with the Ottoman Empire, the validity of the will must be judged of by English law. The learned judge remarked: "I consider the deceased was domiciled in England, and not in Scotland, or in a colony; for great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question if he had been domiciled in British Guinea."[2] From a comparison of this case with the previous one, in which probate of an earlier will by the same testator had been refused, it would seem the difficulty felt by Dr. Lushington was that if the testator had been domiciled in Scotland this earlier will as holograph would have

[1] *See* Westlake, 3rd Ed., at p. 63; Piggott on "Exterritoriality," p. 88.

[2] *Maltass* v. *M.*, 1844, 1 Robertson Ecc. Ca. 67.

been good.[1] In thus finding it necessary to fix the domicil, he clearly indicated an opinion that the law of England would not have applied to the will of a Scotsman in a British factory.

The question has recently been stirred whether there might be what has been termed an "exterritorial domicil." Factories are now superseded, but British subjects in many Oriental countries are for many purposes not subject to the jurisdiction of the territorial sovereign. They remain subject to the jurisdiction of the Queen, exercised in virtue of the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), and by Orders in Council.[2] This privileged position can clearly only exist by favour of the sovereign to whom the territory belongs, and the extent and limits of the immunity are determined in nearly every case by treaty.[3]

The learned author of an admirable work on this subject is of opinion that the law of these communities is English law, introduced by an Order in Council. He says: "Now, in an Oriental country the law of the place as it affects British subjects between themselves is the law of England. . . . Therefore, with regard to two British subjects residing in an Oriental country, the *lex loci* to which the ceremonies of their marriage must conform is the law of England, and a marriage according to the native customs would be invalid."[4] This is to a certain extent supported by the fact that in the Orders in Council the term, "British law," is sometimes used in the sense of English law.[5] It is clear that the *lex loci* is not the law of the Oriental country, and equally clear that any provisions in British statutes and Orders in Council apply to all members of these communities, whatever may be their respective domicils.

But it is submitted that wherever reference to the common law has to be made this must be, in the case of a Scotsman, to the common law of Scotland; or in the case of an Irishman, to the common law of Ireland. The question

[1] *Maltass* v. *M.*, 1842, 3 Curt. 231.

[2] *See* Tarring's British Consular Jurisdiction in the East.

[3] *See* the interesting work of Mr. Piggott on Exterritoriality, in which the subject may be fully studied.

[4] Piggott on Exterritoriality, p. 175.

[5] *Ibid.*, p. 120.

might easily arise in a practical shape. If two British subjects domiciled in Scotland, but resident in China, intermarry there, having previously had an illegitimate child, if the law of the father's domicil governs the case, according to the ordinary rule, the child will be legitimated by the subsequent marriage. Is this effect excluded by the theory that the father, without losing his Scottish domicil, has become a member of a community the law of which, even in questions of status, is the law of England? Both principle and authority appear to be against this view. It would be much more easily maintainable if it were admitted that resident members of such a community might acquire a domicil there, and in such a case as the one figured, that the man had *de facto* acquired an Anglo-Chinese domicil. Even in that case, however, it is thought that the personal law of a Scotsman would still be Scottish and not English, and his domicil more correctly styled Scoto-Chinese.[1] But this difficulty does not arise, for it was said by Chitty, J., that "residence in a territory or country is an essential part of the legal idea of domicil,"[2] and held that although an Englishman's *animus manendi* at Shanghai was proved, he had not lost his English domicil, for in the eye of the law his residence was not on Chinese territory. This reasoning was approved of by the Judicial Committee of the Privy Council in a recent case.[3]

In that case it was said by Lord Watson, who delivered the judgment of the Judicial Committee, that "residence in a foreign state as a privileged member of an exterritorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice."[4]

Marriages on Board Ship.—1. *On a Merchantman.*—A British ship may be regarded as a floating part of the territory. On the high seas, or in a foreign tidal river below all bridges,

[1] *See per* L.P. Inglis in *Steel* v. *S.*, 1888, 15 R., at p. 909.

[2] *Tootal's Trusts*, 1883, 23 Ch. D., at p. 538.

[3] *Abd-ul-Messih* v. *Farra*, 1888, 13 App. Ca. 431. Mr. Westlake thinks this case clear, but both he and Mr. Piggott question the soundness of *Tootal's Trusts*: Westlake, 3rd Ed., p. 289 *seq.*; Piggott on Exterritoriality, p. 139 *seq.*

[4] At p. 445.

she remains subject to British jurisdiction. If she belongs to an English port, the law applicable will be English law, and if to a Scottish port, it will be Scottish.[1] A marriage by *verba de præsenti*, even upon an English ship, might be good on the principle that a regular ceremonial was impossible.[2] But in an Irish case it was held that a marriage on board a transport, celebrated by the civil commander between a soldier and a woman, was not valid at common law, so as to avoid a subsequent regular marriage of one of the parties.[3] On a Scottish vessel it would be good, because Scots law was the *lex loci*. By the Merchant Shipping Act, 1854, marriages are to be entered in the log-book.[4] Within foreign territorial waters the foreign *lex loci*, or the Foreign Marriage Acts must be complied with.[5]

2. *On a British Man-of-War.*—If the view expressed above (p. 379) be sound on the question of marriage in a place which, though locally outside the United Kingdom, is not legally within a foreign territory, it would follow that the validity of the marriage of a domiciled Scotsman on board a British man-of-war would be determined by the common law of Scotland. The only difference between the case of a merchantman and a Queen's ship would seem to be, that the latter preserves her exterritoriality even when in foreign territorial waters. Provision is made by the Foreign Marriage Act, 1892,[6] for the solemnisation of marriages, when one at least of the parties is a British subject in presence of the commanding-officer on one of Her Majesty's ships serving on a foreign station. Previous marriages so solemnised, either with a religious ceremony, or *per verba de præsenti*, are validated by 42 & 43 Vict. c. 29, in cases where both parties were British subjects. But, independent of this statute, they would be valid in Scotland at common law if one of the parties was domiciled in Scotland.[7] It is clear that a Scotsman entering

[1] See Westlake, 3rd Ed., p. 185; *Denholm*, 1887, 15 R. 152; *Lloyd* v. *Guibert*, 1865, L.R. 1 Q.B. 115, *see* esp. at p. 128.

[2] *See* next section, and *per* Willes, J., in *Beamish* v. *B.*, 1861, 9 H. of L. Ca., at p. 332.

[3] *Du Moulin* v. *Druitt*, 1860, 13 Ir. C.L. 212.

[4] 17 & 18 Vict. c. 104, § 280.

[5] *See* for a very elaborate account of territorial waters, *Reg.* v. *Keyn*, 1876, L.R. 2 Ex. D. 63.

[6] 55 & 56 Vict. c. 23, § 12.

[7] And *see* 12 & 13 Vict. c. 68, § 20. But *cf.* Dicey on Domicil, p. 208.

the British army or navy does not exchange his Scottish domicil for an English one; the British army and navy being Scotch and Irish no less than English.[1]

There is, however, the weighty opinion of Mr. Dicey to the contrary. He thinks, "in the cases to which the principle of exterritoriality applies, a British subject must be taken to be under the rule of the common law of England," and that a marriage between two persons both domiciled in Scotland, contracted *per verba de præsenti* on board a British man-of-war, with no minister present, would be probably invalid.[2] Mr. Dicey finds this view confirmed in the doctrine of Blackstone,[3] that British subjects settling in a newly-discovered country carry with them "so much of the English law as is applicable to their own situation, and the condition of an infant colony;" by the rules as to Anglo-Indian domicil; and by the language of 28 & 29 Vict. c. 63, § 3; 4 Geo. IV. c. 91; 12 & 13 Vict. c. 68, § 20.

But any such inference from the language of these Acts is very indirect. The rules as to Anglo-Indian domicil were really based on the view that service with the East India Company was practically equivalent to service under a foreign government. In words which Mr. Dicey himself quotes elsewhere[4] "persons who had contracted obligations with such government (the government of the East India Company) for service abroad, could not reasonably be considered to have intended to retain their domicil here. They, in fact, became as much estranged from this country as if they had become servants of a foreign government."[5] Such language would be quite inappropriate to the service of the state either in the forces or as a civilian. Blackstone in the passage cited is not contemplating any conflict of laws among the settlers. But, apart from this, there may be a presumption that a Scotsman.

[1] *Dalhousie* v. *M'Donall*, 1840, 7 C. and F. 817; *Brown* v. *Smith*, 1852, 15 Beav. 444. *See* also *in re Macreight*, *Paxton* v. *Macreight*, 1885, 30 Ch. D. 165; *Lauderdale Peerage*, 1885, 10 App. Ca., at pp. 692, 738; and *ex parte Cunningham*, *in re Mitchell*, 1884, 13 Q.B.D. 418.

[2] Domicil, p. 208.

[3] Blackstone, i. 107, as to which *see infra*, "Colonial Marriages."

[4] Domicil, p. 142.

[5] *Per* Turner, L.J., in *Jopp* v. *Wood*, 1865, 4 De G. J. and S., at p. 623. *See Wauchope* v. *W.*, 1877, 4 R. 945.

being a member of such a new community, consents to abandon his own law, and to become subject to the law of the settlement, which would naturally be the law of England in a case where the majority of the settlers came from that country. A Scotsman in the British army or navy stands in a different position, and no such presumption arises.

Validating Statutes.—Various Acts have confirmed the validity of foreign marriages already celebrated concerning which doubts may have existed. 4 Geo. IV. c. 91 declared marriages to be good which had been celebrated by a minister of the Church of England in British embassies or factories, and within the lines of a British army serving abroad by any person authorised by the commanding officer.

12 & 13 Vict. c. 68, § 20 confirms marriages abroad where one party was a British subject (*a*) by a minister according to the rites of the Church of England, or by a minister of the Church of Scotland; (*b*) in any form before a British consul, &c.; (*c*) on board a man-of-war on a foreign station in the presence of the commanding officer.

31 & 32 Vict. c. 61 removes doubts as to consular marriages in presence of consuls holding office merely *ad interim*.

42 & 43 Vict. c. 29 removes a doubt as to the validity of marriages on men-of-war by *verba de presenti*.

54 & 55 Vict. c. 74, § 12, removes a doubt as to the effect of 53 & 54 Vict. c. 47 upon such marriages on a British ship.

55 & 56 Vict. c. 23, § 26, removes doubts as to consular marriages arising from defects in the authority of the consul or from the celebration being elsewhere than at the consulate.

These Acts in no case validate marriages which, before the date of the Act, have been declared invalid by a Court of competent jurisdiction. And if one of the parties to one of these invalid marriages has, during the lifetime of the other, lawfully intermarried with any third person, the first marriage is not validated by any of the Acts from 1849 downwards.

They do not affect the validity of any marriage solemnised beyond the seas otherwise than provided in the Acts, and do not extend to the marriage of any of the Royal Family.[1]

[1] 12 & 13 Vict. c. 68, §§ 20 and 21; 55 & 56 Vict. c. 23, § 26.

The following statutes validate marriages, as to which doubts existed, celebrated in particular places abroad[1]:—

4 Geo. IV. c. 67, St. Petersburg.
5 Geo. IV. c. 68, Newfoundland.
3 & 4 Will. IV. c. 45, Hamburg.
17 & 18 Vict. c. 88, Mexico.
21 & 22 Vict. c. 46, Moscow, Tahiti, and Ningpo.
22 & 23 Vict. c. 64, Lisbon.
27 & 28 Vict. c. 77, Ionian Islands, before 1864.
30 & 31 Vict. c. 2, Odessa.
30 & 31 Vict. c. 93, Morro Velho, Brazil.
31 & 32 Vict. c. 61, China and elsewhere.

Where there is no *lex loci*, or it is impossible for the parties to avail themselves of the *lex loci*.—A marriage contracted abroad will be regarded as valid in the Scottish Courts if the evidence of matrimonial consent would have been sufficient had Scotland been the *locus celebrationis*, and if there was no *lex loci* of which the parties could have availed themselves.

(*a.*) It may happen that the parties are living in an uncivilised country where it is impossible to obtain the services of a priest or minister of religion, although the country belongs to a state by the laws of which a religious ceremony is prescribed for marriage. In one case the facts were these: A., a Christian, residing in a remote district of North America, married B., an Indian woman, according to the custom of the Cree tribe. In order to contract a marriage before a priest or a magistrate A. would have had to travel on foot and by canoes between three and four thousand miles. A. and B. cohabited for twenty-eight years, and A. introduced B. to Europeans as his wife. During B.'s lifetime A. contracted a Christian marriage with C. He had children by B., some of which were baptised as legitimate, but one was, with B.'s consent, baptised as illegitimate. After A.'s death it was held that his surviving child by B. was legitimate on the ground that A. had contracted a valid marriage with her *per verba de præsenti*.[2] The Crees admitted polygamy but it was held

[1] And *see* 49 & 50 Vict. c. 3 in Appendix. This Act authorises English clergyman to receive certificate of banns in Scotland, and confirms previous marriages.

[2] *Connolly* v. *Woolrich*, 1867, 11 Low. Can. Jur. 197, cited by Bishop Ed. 1891, i. 306.

that evidence pointed to A.'s intention to contract a Christian marriage.[1]

In such circumstances marriage by declaration is regarded as valid even in the Courts of England on the principle above stated, and, *a fortiori*, it would be so held in Scotland where no ceremony is required.

(*b.*) They may be in a country which makes no provision for marriage except according to a religious ceremonial which the parties are not able to adopt. *E.g.*, in the Pontifical States there appears at one time to have been no provision for the marriage of Protestants. In an anonymous case, said to be that of Lord Cloncurry, the law was thus stated :—

"In the discussion of a late divorce bill in the House of Lords, Lord Eldon intimated a doubt respecting the validity of the marriage, which was celebrated at Rome by a Protestant clergyman, both parties being Protestants, and said that where persons were married abroad it was necessary to show that they were married according to the *lex loci*, or that they could not avail themselves of the *lex loci*, or that there was no *lex loci*. Some days after, a Roman Catholic clergyman was produced at the Bar of the House, who swore that at Rome two Protestants could not be married according to the *lex loci;* because no Catholic clergyman would celebrate marriage between two Protestants. The marriage was held to be good." [2]

In some parts of South America there is still no mode of marriage available for Protestants.[3]

It would appear that in such cases a marriage *per verba de præsenti* would be valid in England, and, *a fortiori*, in Scotland.[4]

In *Ruding* v. *Smith*, Lord Stowell suggests that if, by the *lex loci*, persons could not marry without consents until an age greater than was required for that purpose by the law of their domicil, the want of such consents would not be recognised in this country as invalidating the marriage. *E.g.*, parties domiciled in Scotland are married in Holland. The Dutch

[1] *Cf. re Bethell*, 1888, 38 Ch. D. 220, where it was held such an intention was not proved.

[2] Anonymous, in Cruise on Dignities, p. 276.

[3] *See* Report on Foreign Marriages, App. 1899. Article by Sir H. W. Elphinstone, Bart., in *Law Quarterly Review*, 1889, Vol. v., p. 55.

[4] *Ruding* v. *Smith*, 1821, 2 Hagg. C.R. 371 : *Lautour* v. *Teesdale*, 1816, 8 Taun. 830.

law provides that persons under thirty must obtain certain consents. They are under that age and have not complied with this provision. It is probable that the marriage would be good in Scotland, if otherwise regularly celebrated. For, as Lord Stowell points out, the law in question was intended for the protection of Dutch parents and it would be strange indeed if Scots parents, whose consent is not required in Scotland, could claim that a marriage in Holland was invalid because their consent to it had not be obtained.[1]

Marriages in the Colonies.—It was held in England, at an early date, that British settlers in an uninhabited or uncivilised country took out with them the common law of England or at least so much of that law as was suitable to their condition. "Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony, such, for instance, as the general rules of inheritance, and of protection from personal injuries."[2]

This rule covers the forms of marriage which, in such a plantation, must conform to the requirements of the English law as it existed at the time the settlement was made. British statutes subsequently made do not, unless so expressed, extend to the colony, and the forms observed by the natives of the country are immaterial.[3] A domiciled Scotsman, being one of the members of such a settlement of colonists, must, in order to contract a valid marriage, satisfy the requirements of the English and not the Scottish common law. In the *Lauderdale Peerage Case*[4] the enquiry was as to the validity of the marriage of a domiciled Scotsman celebrated at New York in 1772. It was contended that the ceremony performed by a clergyman of the Church of England was invalid from the want of banns or license, and the argument does not seem to have

[1] *Ruding* v. *Smith*, 1821, 2 Hagg. C.R., at p. 389. But see as to consents being regarded as part of the ceremony, *Simonin* v. *Mallac*, 2 S. and T. 67 : *Sottomayor* v. *De Barros*, 3 P.D. 1, 5 P.D. 94.

[2] Blackstone, i. 107.

Lautour v. *Teesdale*, 1816, 8 Taunt. 830; *Catcrall* v. *C.*, 1847, 1 N. of C. 222, *ibid.* 466, 1 Rob. Ecc. Ca. 314, 580; *Maclean* v. *Cristie*, 1849 7 N. of C., Supp. xvii.; *per* L. Blackburn in *Lauderdale Peerage Case*, 10 App. Ca., at p. 744.

[4] 1885, 10 App. Ca. 692.

been submitted that, where the domicil was Scottish, interchange of consent, *per verba de præsenti*, would have been sufficient.[1]

Mr. Dicey thinks the rule that British settlers carry with them English common law is in favour of the view that Scots law has no application to the forms of marriage in cases to which the principle of exterritoriality applies.[2] But the position of a Scotsman in a new colony differs, *toto cælo*, from that which he occupies in a British army on board a British ship, or as a member of a British community in an Oriental country possessing the privilege of exterritoriality. As a settler he goes out *animo manendi*, and may naturally be presumed to consent to become subject to the law of the colony, a presumption not excluded by the fact that from being in the army (as in the Lauderdale case) or other causes his Scottish domicil may not be lost. In the other cases there is no similar presumption.[3]

Colonial Marriages Validity Act, 1865.—The Act 28 & 29 Vict. c. 64 provides that laws made and to be made by the colonial legislatures for the purpose of establishing the validity of any marriage contracted within the colony, shall have the same force in all parts of the British Empire as in the colony where they are passed, provided that no marriage shall be thereby made valid unless at the time of the marriage both of the parties thereto were, according to the law of England, competent to contract the same. The validity or non-validity of marriages with a deceased wife's sister, when the parties are domiciled in a colony where such unions are legal, is therefore unaffected by this statute.[4]

Many of the colonial legislatures have passed Acts prescribing the forms of marriage to be observed in their respective jurisdictions.[5]

Marriages in India.—By the law prior to 14 & 15 Vict. c. 40, and the Indian Act of 1852 (Act 5 of 1852), a marriage between British subjects was valid if made *per verba de præsenti*, though without a minister.[6] These statutes

[1] *See ibid.*, at p. 733.
[2] Domicil, p. 208.
[3] *See supra*, pp. 381, 384.
[4] *See* opinion of Lord Cairns, *infra*, at p. 393.
[5] For a Collection of these Acts see Hammick on Marriage, App. xiii.
[6] *Maclean* v. *Cristall*, 7 N. of C., Supp. xvii.

provided for the appointment of marriage registrars in India.

The validity of marriages celebrated since 1872 in India between European British subjects now depends on compliance with the Indian Marriage Act, 1872 (Act 15 of 1872). They are good if celebrated:—

1. By any minister episcopally ordained, or any clergyman of the Church of Scotland according to the rites of the Church to which he belongs.

2. By any minister who, under the provisions of the Act, has obtained a license to solemnise marriages.

3. By, or in the presence of, a marriage registrar under the provisions of 14 & 15 Vict. c. 40 (or Act 5 of 1852).

Exceptions to the Rule that a Marriage good where celebrated is good everywhere.—The general rule is that a marriage valid by the law of the place where it is celebrated is valid all the world over.[1] But to this rule there are certain well-recognised exceptions.

No country will admit the validity of a marriage which it regards as incestuous, and every country has a right to prohibit certain marriages to which one of its subjects may be a party, and to declare that it will not recognise such a marriage wherever celebrated, and whether it be lawful or unlawful in the view of any foreign country.

Moreover, a monogamous country will not regard as marriage a union entered into in a polygamous country, unless it be shown that the intention of parties was to contract a Christian marriage. In briefly discussing these exceptions, I shall commence with the last as being the most simple.

Marriage in Polygamous Country.—This is not in the view of our law marriage, if the husband could lawfully take a second wife during the lifetime of the first, although in fact he has not done so.[2] "Marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that

[1] *See per* Lord Stowell in *Herbert* v. *H.*, 1819, 2 Hagg. C.R., at p. 271, and the exposition of the law by Lord Brougham in *Warrender* v. *W.*, 1835, 2 C. and F., at p. 530.

[2] *Hyde* v. *H.*, 1866, L.R. 1 P. and D. 130; *in re Bethell*, 1888, 38 Ch. D. 220; and *see re Ullee*, 1886, 53 L.T. N.S. 711, aff. 54 L.T. N.S. 286.

we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations."[1]

But on proof that a marriage is not polygamous, which is contracted according to the *lex loci* in a non-Christian country, it will be recognised by our Courts as valid.[2] And it would seem that if there is sufficient evidence that the parties being in a polygamous country intended to contract a monogamous marriage, and took the best means in their power of declaring their consent to a Christian marriage, the marriage would be valid in this country.[3]

Marriage in a Country where Concubinage is sanctioned by Law.—In some countries, and among some more or less barbarous tribes, only one "chief wife" is allowed, but in addition to her the man is allowed to take concubines or lesser wives. The principal wife, therefore, contracts a marriage on the footing that the husband is not debarred from associating other women with her in this way, and that in so doing he will not be committing a breach of duty towards her, or guilty of any matrimonial offence for which she would be entitled to legal redress. It is pretty certain that a marriage on these terms would not be regarded by our Courts as a "Christian marriage," though in strict language it might not be called polygamous.[4]

Incestuous Marriages.—Marriage with Deceased Wife's Sister.—A marriage, which in the view of Scottish law is incestuous, is invalid if one of the parties be domiciled in Scotland, although celebrated in a country by the law of which the parties are not within the forbidden degrees.[5] As regards the succession to heritage which is governed by the *lex rei sitæ*, the issue of a marriage to which the parties were within the forbidden degrees in Scotland would not be entitled to take, although the domicil of the parents at the

[1] *Per* L. Brougham in *Warrender*, *supra*, at p. 532.

[2] *Brinkley* v. *Att. Gen.*, 1890, 15 P.D. 76.

[3] *See in re Bethell*, *supra*; *Armitage* v. *A.*, 1866, L.R. 3 Eq. 343; Bishop (Ed. 1891), i. 310.

[4] *See* Piggott on Exterritoriality, p. 161.

[5] *Fenton* v. *Livingstone*, 1859, 3 Macq. 497; *Brook* v. *B.*, 1861, 9 H.L.C. 193; *Mette* v. *M.*, 1859, 1 S. and T. 416, and *see supra*, under Capacity, p. 352 *seq.*

marriage was in a country where it was legal.[1] But from the opinions in *Brook* v. *Brook* it appears plain that the marriage — *e.g.*, of a Dane with his deceased wife's sister celebrated in Denmark where both were domiciled, would be regarded as a good marriage for every other purpose in Scotland if the parties afterwards came to reside in this country.

It may of course be argued that no tolerance can be extended to such unions, although contracted by persons owing no obedience to our laws, and in no way bound to respect our theories as to the propriety of the marriage of persons connected in this way.[2] But in *Brook* v. *Brook* Lord Campbell said: "Sir Fitzroy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark, while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages if examined would be held valid in all English Courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated."[3] And when the question next arises, the fact that the validity of such marriages has been declared by statute in several of our colonies, and that these Acts have received the royal assent, would seem to make it impossible to carry the argument to this length.[4]

Story distinguishes between marriages incestuous by the law of nature, and such as are incestuous by the positive code or customary law of a state, and there is American authority for this. It was observed "if a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage would not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one state and not of another, if

[1] *Fenton, supra.*

[2] This rather seems to be the view of L. St. Leonards, and perhaps of L. Wensleydale in *Brook* v. *Brook*, 9 H.L.C. 193.

[3] *Ibid.*, p. 213, and *see per* L. Cranworth, p. 224.

[4] *See* Dicey, p. 220. Lord Fraser thinks children of a marriage with a deceased wife's sister, whatever the domicil of the parents, will be illegitimate in Scotland with reference to moveable no less than to real estate. Parent and Child, p. 56. *See infra*, Legitimacy.

celebrated where they are not prohibited, would be holden valid in a state where they are not allowed."[1]

It is not very clear what test is to be used in distinguishing what the law of nature regards as incest, but if inductive reasoning is permissible, it is plain that no civilised country now allows marriages between ascendants and descendants in the direct line, or between brothers and sisters. Marriage between uncle and niece is permitted in Roman Catholic countries if a papal dispensation has been obtained, and there seems no logical ground for refusing to recognise the validity of such a marriage when not prohibited by the law of the domicil, and valid at the place of celebration.[2]

Lord Cairns, speaking not as a judge but as a legislator, expressed the following important opinion with regard to the validity in England of a marriage with a deceased wife's sister in the Colonies:—"My view of the law upon the point is this—that if a man, being domiciled in a colony in which it is lawful to marry a deceased wife's sister, does marry his deceased wife's sister, his marriage with her is good all the world over; whereas, if the man is a domiciled Englishman, not domiciled in the colony, but merely resident there, his marriage with his deceased wife's sister in such circumstances is bad everywhere, because he carries the impediment of his domicil to such a marriage with him."[3]

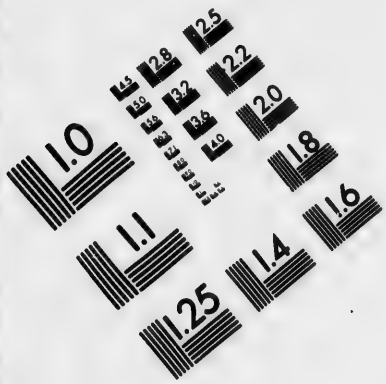
Marriage of Guilty Spouse with Paramour named in Decree of Divorce.—The Act 1600, c. 20, declares all marriages null "contractit heireftir be ony persones divorceit for thair awin cryme and fact of adulterie frome thair lauchfull spouses with quhome they ar declarit, be sentence of the ordinar judge to have committit the said cryme and fact of adulterie."

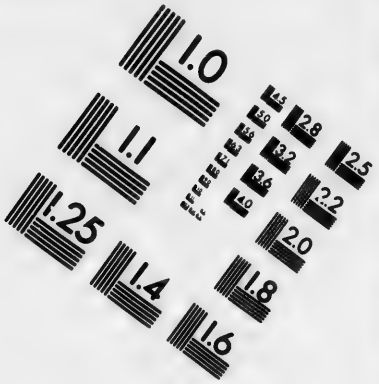
It is at present not finally decided whether the parties might

[1] *Greenwood* v. *Curtis*, 6 Mass. 37 (I have not access to this report, and cite from Story, 8th Ed., p. 195).

[2] A *dictum* of L. Brougham, in *Warrender* v. *W.*, 2 S. and McL., at p. 200, is sometimes cited as adverse to this view, but L. Brougham is probably to be taken as referring to a case where the marriage is void by the *lex domicilii*, but valid by the *lex loci contractus*.

[3] Hansard's Parl. Debates, 11th June, 1883 (Vol. cclxxx. p. 158). I am indebted for the quotation to Mr. Foote, Priv. Int. Jur., p. 80.





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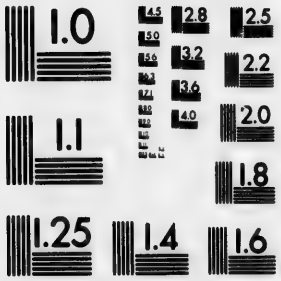

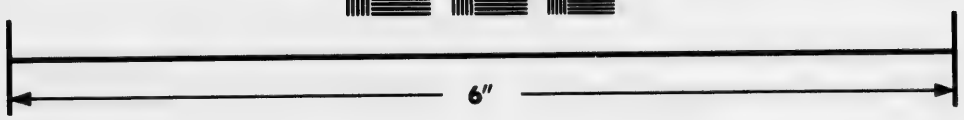



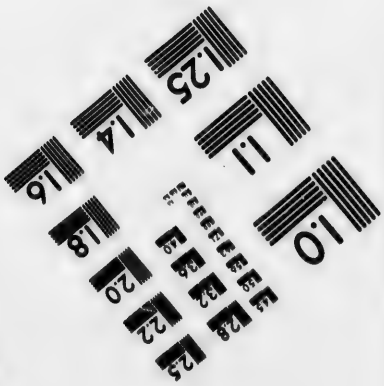

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lawfully marry in a country where no similar prohibition existed. In one case which occurred, the divorced wife and the paramour acquired a domicil in Lower Canada, and went through a form of marriage there. It was proved that by the law of that country persons who had knowingly committed adultery (*i.e.*, who knew at the time of the intercourse that one of them had a spouse living) could not afterwards marry each other. The marriage being bad by the *lex loci* was held invalid in Scotland. Lord Deas said: "If the marriage had been valid by the law of Canada a different question would have arisen, which would have required great consideration."[1] Lord Ardmillan said such a marriage "is not unlawful in Scotland, so as to preclude us from recognising such a marriage, if celebrated where it is lawful, on the ground of its being repugnant to our general policy and morality, as in the case of a marriage of an incestuous character."[2] L. P. M'Neill also was of opinion that the principle of *Fenton* v. *Livingstone* did not apply.[3] Lord Kinloch, Ordinary, was of an opposite opinion. In *Fenton* Lord Brougham said: "Suppose such a marriage contracted in England, where by our law it would not be invalid, can it be doubted that the issue of it, claiming an estate in Scotland, would be considered illegitimate."[4] But he is there speaking of succession to Scotch heritage. In a later case Lord Craighill, Ordinary, held a marriage with a paramour named in the decree to be null, the domicil of the parties being Scottish, although the place of celebration was in England.[5]

Will the Marriage if celebrated Abroad be good in the Foreign Country?—It is probable that a marriage between persons so prohibited, if celebrated in England, or in another country where no such disability existed, would be regarded as valid by the Courts of the *lex loci*, in accordance with the general rule that penal statutes are not extra-territorial in

[1] *Beattie* v. *B.*, 1866, 5 M., at p. 190.

[2] *Ibid.*

[3] *Ibid.*, p. 188.

[4] *Fenton* v. *Livingstone*, 3 Macq., at p. 537; and *see* also *per* L. Glenlee in *Edmonstone* v. *E.*, Ferg. Rep., p. 405.

[5] *Stewart* v. *De Voto*, April, 1878, not reported, cited by Mr. Mackay, Manual, p. 474.

their effect.[1] And this principle was admitted in a very instructive judgment in the American case of *Pennegar* v. *State of Tennessee*, referred to in the following section.

Will it be good in Scotland if valid by the *lex loci*?—It may be argued that on the same principle such a marriage celebrated outside the territory should be sustained.[2]

There is a similar prohibition in the States of Tennessee and Pennsylvania,[3] and in some of the American States the guilty spouse is prohibited from entering into a second marriage with any person during the life of the husband or wife of the dissolved marriage. It has been held that statutes of this kind are only effectual within the territory.[4] So, where a man divorced in Massachusetts, and unable there to marry again, went into Connecticut with a woman whose domicil, like his own, was in Massachusetts, and there married her, and then returned, the marriage was held good in Massachusetts.[5] But a decision to the contrary effect was lately pronounced by the Court of Tennessee. The guilty spouse and the paramour who were prohibited from marrying by the law of that State, had gone to England and been married there. It was held that the prohibition was part of the settled policy of the State, and that it would be *contra bonos mores* to sustain the validity of a marriage had by the guilty parties in a foreign country for the purpose of evading the statute.[6] And this was the view adopted by Lord Craighill in the case referred to.[7]

Marriages in Breach of the Royal Marriages Act.—The various statutes relating to marriage[8] which have been passed from Lord Hardwicke's Act[9] (26 Geo. II. c. 33) to the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23) have

[1] Westlake, p. 58; and *see Scott* v. *Att. Gen.*, 1886, 11 P.D. 128.

[2] Fr. ii. 1303. Bar adheres to the rule that the validity depends on the personal law, Gillespie's Bar, p. 351.

[3] Bishop, Ed. 1891, i. 706.

[4] Bishop, Ed. 1891, i. 869; ii. 1619.

[5] *Putnam*, cited by Bishop, *l.c.*

[6] *Pennegar* v. *State of Tennessee*, 1888, 10 American State Reports, 648.

[7] *Supra*, p. 394.

[8] But not the Married Women's Property Acts.

[9] The old common law of marriage in England may be studied in *R.* v. *Millis*, 1844, 10 C. and F. 534; and *Beamish* v. *B.*, 1861, 9 H.L.C. 274.

specially exempted members of the Royal Family from their operation. The validity of a marriage to which a member of the Royal Family is a party rests, accordingly, on the common law of England.

In 1771, the marriage of the Duke of Cumberland, brother of George III., with Mrs. Horton, excited the King's vehement disapprobation, and to prevent similar *mésalliances* in future, the Royal Marriages Act, 1772 (12 Geo. III. c. 11), was introduced and passed in spite of strong opposition in both Houses.

This Act provides "that no descendant of the body of his late Majesty, King George the Second, male or female (other than the issue of princesses who have married, or may marry, into foreign families) shall be capable of contracting marriage without the previous consent of his Majesty, his heirs or successors, signified under the Great Seal, and declared in Council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent, shall be null and void to all intents and purposes whatever." The sovereign has not, however, absolute power to prevent the marriage, for section 2 provides—"That in case any such descendant of the body of his late Majesty, King George the Second, being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the King, his heirs or successors, that then such descendant, upon giving notice to the King's Privy Council, which notice is hereby directed to be entered in the books thereof, may at any time after the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage. And his or her marriage with the person before proposed and rejected may be duly solemnised without the previous consent of his Majesty, his heirs or successors, and such marriage shall be good, as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of twelve calendar months, expressly declare their disapprobation of such intended marriage." Penalties of Præmunire are provided against

persons solemnising or being present at any marriage in contravention of the Act.

It was decided in the *Sussex Peerage Case*[1] that this statute was extra-territorial in its scope, and that the marriage of the Duke of Sussex with Lady Augusta Murray, celebrated in 1793 at Rome, was invalid. It would appear on the principle of *Brook* v. *Brook* and *Sottomayor* v. *De Barros*[2] that when a member of the Royal Family is married abroad, the Courts of the *lex loci* ought to give effect to the prohibition if the domicil of such member was in England. The English Courts would probably hold the marriage invalid, whatever the domicil of the party in question, on the ground that consideration of general rules of private international law cannot control the express words of a British statute, but the foreign Court would not be bound by the Act, and might only be expected to give effect to it in a case where the English domicil subsisted.[3]

Descendants of George II., not being British subjects, have applied for and obtained the Royal consent to their marriages —*e.g.*, the consent of the Queen in Council was given on 27th November, 1878 to the marriage of the Duke of Cumberland with Princess Thyra of Denmark.[4]

Validity in Scotland of the Marriages of Foreigners celebrated in this Country.—The general rule is that the marriage is good if the evidence of consent interchanged in Scotland be such as to satisfy the requirements of Scotch law.

An irregular marriage between two foreigners in Scotland is valid here, and, therefore, valid all the world over, provided one of the parties has had his or her usual place of residence there, or has lived in Scotland for twenty-one days preceding the marriage.[5]

A marriage however attempted to be constituted will be invalid if the parties were absolutely forbidden to marry each other by the law of their domicil, and it seems that this would be held if the parties had different domicils, and the prohibi-

[1] 1844, 11 C. and F. 85 and App.

[2] 9 H.L.C. 193; 3 P.D. 1.

[3] *See* Dicey, p. 215.

[4] Geary on Marriage and Family Relations, p. 121.

[5] 19 & 20 Vict. c. 96. *See Lawford* v. *Davies*, 1878, 4 P.D. 61.

tion existed only by the law of one of them.[1] But the marriage is not invalid because by the *lex domicilii*, certain consents were necessary and have not been obtained, although the lack of them may cause the Courts of the domicil to regard the marriage as null. Such consents will be looked upon as part of the forms, as distinguished from the essentials of the marriage, and the laws enjoining them as without effect beyond the territory.[2] And disqualifications of the following kind will not invalidate the marriage in Scotland :—

Penal Disqualifications not recognised.—Although it appears from the preceding remarks that marriages deemed incestuous by the law of the domicil of both (and perhaps even of one), of the parties will not be valid if celebrated here, there are certain disabilities for marriage which our Courts will decline to recognise. The rules as to degrees of consanguinity or affinity within which marriages are unlawful, are not widely divergent in civilised countries, and it is in accordance with the doctrines of international law that we should respect a prohibition of the marriage of first cousins imposed by the law of a Catholic country on its own subjects, and on our part expect a foreign country, by whose law marriage with a deceased wife's sister is lawful, to decline to admit the validity of such a marriage celebrated between British subjects who have not acquired a domicil in the country where the celebration takes place, and where, but for the prohibition of the *lex domicilii*, the marriage would be valid.

But prohibitions which have their origin in institutions repugnant to the spirit of our laws, will not be recognised by our Courts.

Marriage of Blacks and Whites.—In some American states marriages between whites and "persons of colour"[3] are prohibited by statute, and the validity of such marriages contracted outside the territory has been the subject of decision

[1] *Supra*, Capacity, p. 352 *seq.*

[2] *Simonin* v. *Mallac*, 1860, 2 S. and T. 67 ; *Brook* v. *B.*, 1861, 9 H.L.C. 193 ; *Steele* v. *Braddell*, 1838, Milw. 1 (Irish) ; *Sottomayor* v. *De Barros*, 1877, 2 P.D. 81, 3 P.D. 1, 1879, 5 P.D. 94.

[3] In N. Carolina, a person one of whose great-grandparents was black is a "person of colour." *See per* Hannen, J., in *Sottomayor* v. *De Barros*, 5 P.D., at p. 104.

in several cases. The judgments vary according to the degree of prejudice with which such alliances were regarded. In Massachusetts, if the parties went into a state where they could lawfully marry and then returned, the marriage was held good.[1] In Louisiana, a marriage in France between a Frenchman and a "person of colour" was held bad irrespective of the domicil.[1] In North Carolina, the Court took up the intermediate position that the marriage was good if the parties were domiciled in the place of solemnisation, and it was lawful there.[2] It can hardly be doubted that a prohibition of this kind would not affect the validity of a marriage celebrated in this country.[3] The incapacity would be regarded as of a penal nature, and traceable to the institution of slavery. So in a French case it was held that a Frenchman married to a negress in Louisiana could not plead in France that the marriage was null by the law of Louisiana—a case which goes much further, for there the marriage was invalid by the *lex loci actus*.[4]

Marriage of Priest or Nun.—In like manner the disability imposed in Catholic countries on persons who have taken religious vows or orders would not be recognised as invalidating a marriage celebrated here.[5] The *Tribunal Civil de la Seine* has held the marriage of a Catholic priest celebrated in London invalid.[6]

[1] *Medway* v. *Needham*, 8 Am. Dec. 131.

[2] Bishop, i. 865.

[3] *See per* Hannen, J., in *Sottomayor*, *supra;* Dicey, p. 224.

[4] *Roger* v. *R.*, Trib. Civ. de Pontoise, 1884, Journal du Droit International Privé, Vol. xii., p. 296; cited in note to Gillespie's Bar, 2nd Ed., p. 356. Bar thinks the correct rule is that such a marriage is bad wherever celebrated, if invalid by the personal law of the husband, *ibid.*

[5] *Per* Hannen, J., in *Sottomayor*, *supra;* Dicey, p. 224; Story, § 94; Westlake, p. 58; *Cf.* Stephen's Comm., 11th Ed., i. 146, *Metcalfe's Trusts*, 1864, 2 De G. J. and S. 122.

[6] *Rouet* v. *R.*, Journal du Droit International Privé, Vol. xiv., p. 66. *See* Gillespie's Bar, p. 324.

CHAPTER XLI.

THE ESSENTIALS OF MARRIAGE.

As the form of Marriage is judged of by the *lex loci*, so the Essentials depend on the *lex domicilii*.—In entering into a marriage the wife acquires the husband's domicil, because she evinces by her mere consent to the union, the clear intention to make his home her own. From the moment of the marriage her domicil becomes the domicil of the husband. It is, therefore, natural that, in the absence of express contract to the contrary, the effects of the marriage—the rights of the husband with regard to the person of the wife or her property, and *vice versa;* the grounds upon which the marriage may be dissolved; the *status* and rights of the children; and, in fine, all the results flowing from the marriage—shall be determined by the law of the country in which the parties intend to establish their home. In the words of Selborne, L.C., in a Scottish case: "When a marriage has been duly solemnised according to the law of the place of solemnisation, the parties become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to that matrimonial domicil which results from her placing herself, by contract, in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled, and contemplating permanent and settled residence abroad. Therefore, it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law,

subject to it in respect of the consequences depending upon the law of the husband's domicil." [1]

And in a leading case, where a domiciled Scotsman had married an Englishwoman, the marriage being celebrated in England, Lord Brougham said: "A domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract according to the law of that country, their home; a connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most particular reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of their union; in a word, their domicil." [2]

Where the Parties contemplate a change of Domicil after the Marriage.—It may happen that the intention of parties is to acquire a new domicil immediately after the marriage, as—*e.g.*, if two persons domiciled in Scotland marry with the intention of going out to America, directly after the ceremony, to settle down there. In such a case it might be urged that the incidents of the marriage must be determined by the law of the State in which they intend to reside. Let us suppose that the husband dies on the voyage. Is the widow entitled to her legal rights by the law of Scotland? The question does not seem to have been determined, but the opinion is expressed, by writers of high authority, that when a change of domicil is contemplated at the marriage, the rights of parties will depend on the law of the intended home. Thus Pothier says, in a passage which may be thus translated:—

"If the husband at the marriage intended to fix his domicil in the country of the wife—*e.g.*, if a citizen of Lyons came to Orleans to marry a woman, with the purpose of establishing his domicil at Orleans, he would be taken in this case to have abandoned his domicil at Lyons, and to have acquired one at

[1] *Harvey* v. *Farnie*, 1882, 8 App. Ca., at p. 50.

[2] *Warrender* v. *W.*, 1835, 2 Sh. and M'L., at p. 204.

Orleans, to the law of which place he must be considered to have subjected himself.

"Must we come to the same conclusion if the same citizen of Lyons had married the woman of Orleans at Paris, with the purpose of going to establish his domicil at Orleans?

"The ground of doubt is that, as domicil can only be acquired *facto et animo*, the man had not in this case, at the marriage, already lost his domicil at Lyons, or acquired one at Orleans, to which place he had not, at that time, gone. Notwithstanding, we must say that, although at the marriage he had not yet acquired a domicil at Orleans, it is sufficient that his intention was to establish his domicil there, in order to make Orleans rightly regarded as the matrimonial domicil, and that he should be taken, in consequence, to have wished that the marriage should fall under the laws of Orleans rather than under those of the domicil which he was on the eve of quitting."[1]

Story supports this theory. "But suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is then to be deemed the matrimonial domicil? Foreign jurists would answer that it is the domicil of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicil would be in New York."[2] And after citing various jurists, he thinks the conclusion they arrive at is sound. But it is to be observed that Cujas, Huber, and Le Brun, to whom he refers, are contemplating a marriage in which the intended domicil is the husband's actual domicil at its date, though the ceremony is performed abroad. And the same remark applies to the American cases cited by Story. Here, it is clear law that the husband's domicil is to govern the rights of parties. But in the case where the marriage is contracted with a view to the husband's changing his domicil, it is submitted as not doubtful that the wife acquires first the actual domicil of the husband at the marriage. Mere *animus* will not change his

[1] Traité de la Com. Art. Prelim., n. 15, 16.

[2] Conflict of Laws, § 194. *See* also Burge, For. and Col. Law, i., p. 245; and Westlake, 3rd Ed., p. 68.

domicil, and hers must be the same as his.[1] The case of *Udny*[2] settles that if his domicil is one of origin, it is not lost except *animo et facto*, and if it is an acquired domicil, which may be abandoned, his domicil of origin reverts till he has acquired a new domicil of choice. The notion that the wife could maintain that part of the contract of marriage was that the matrimonial domicil should be in the new country, and that, therefore, her rights must be fixed by that law, seems untenable.[3]

Where the Husband's Domicil is changed during the Marriage.—It is maintained by some writers that the husband cannot by changing his domicil prejudice the wife's rights, as they existed at the marriage. On general grounds of principle there is much to be said for this view. Savigny puts it thus: "A second controversy relates to the case in which the domicil of the husband is changed during the marriage. Here one opinion is that the local law of the earliest domicil remains decisive at all periods, and cannot therefore be changed by the election of a new domicil. The reason is generally stated to be that in the inception of the marriage there is included a tacit contract, that the conjugal rights of property shall be immutably settled according to the law of the present domicil. This opinion I hold to be correct. . . . A second opinion refuses to assume a tacit contract, and makes the matrimonial rights of property depend solely on the law of the domicil. Hence it is concluded that in the case where a new domicil is chosen, its law must decide, and that therefore every change must have as its consequence a different law as to the matrimonial rights of property. Finally, a third and intermediate opinion rejects, like the second, the theory of a tacit contract, and likewise allows only the law of the existing domicil to decide, but with the reservation, that the estate acquired at the time of the marriage remains unchanged (*jus quæsitum*), and that only future acquisitions shall be governed by the law of the new domicil. Let us examine the arguments for these opinions a little more closely. Our unprejudiced sense of right certainly speaks in favour of the first.

[1] *Warrender* v. *W.*, 1835, 2 S. and M'L. 154; Dicey, p. 104.

[2] *Udny* v. *U.*, 1869, 7 M. H.L. 89.

[3] *See* the *dictum* of Halsbury, L.C., in *Cooper* v. *C.*, 1888, 15 R. H.L., at p. 25.

When the marriage was about to be contracted, it was entirely in the wife's option, either to abstain from it altogether, or to add certain conditions touching patrimonial rights. She has made no such contract, but has accepted the conjugal rights as fixed by the law of the domicil, and naturally has reckoned on its perpetual continuance." [1]

Mr. Westlake cites this passage with approval, and, while admitting that it is not borne out as yet by English authorities, predicts that future cases will be decided in this sense.[2] He says the principle has been adopted in the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21), which provides (§ 1): "Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicil in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall by operation of law be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*." It is true that by the language of this Act its effect is limited to marriages in which the husband was at the time of the marriage domiciled in Scotland. Apparently it would not extend to the case of a domiciled English husband who after his marriage acquired a domicil in Scotland. But it does not determine whether in these circumstances the law of Scotland prior to the Act, or the law of England, as that of the matrimonial domicil at the marriage, would be applied. Suppose after the Scottish domicil has been acquired the wife becomes entitled to a legacy. Would it fall under the *jus mariti*, subject to the doctrine of reasonable provision,[3] or would it vest in the wife as her separate property in virtue of the English Married Women's Property Act, 1882?[4]

The consideration of the general question is much complicated by the difficulty of distinguishing proper rights of succession from the patrimonial effects of marriage. It might appear on principle that a woman who marries a domiciled Scotsman, relies on her right to *jus relictae* no less than on her

[1] Priv. Int. Law, Guthrie's Translation, 2nd Ed., p. 293.

[2] Westlake, 3rd Ed., p. 68.

[3] Conj. Rights Act, 1861, § 16. Mr. Murray thinks the *jus mariti* would apply, Property of Married Persons, p. 69.

[4] 45 & 46 Vict. c. 75, §§ 2, 5.

right to have her moveable estate vested in herself. In most cases it would probably be more prejudicial to her that her husband should, by acquiring a new domicil, obtain and exercise the power of excluding her by will from any share in his succession than that her property should fall under the *jus mariti* during the marriage. Accordingly Savigny says: "Intestate succession between spouses is regulated, as between strangers, by the last domicil of the deceased. In many cases, however, it may be doubtful whether the claim to the inheritance is to be deduced from the rules of proper intestate succession, or from the mere continuance of the relations as to conjugal property which subsisted during the marriage (*communio bonorum*). In the first case the last domicil determines: in the second case the domicil at which the marriage began." [1]

Rights which have been held to be merely Rights of Succession.—1. It has long been settled after great variety of opinion, that the moveable succession of an intestate is regulated by his domicil at death, irrespective of any previous domicil, or of the place in which the funds may be *de facto* situate. *De jure* they must be in the country of his domicil, according to the brocard, *mobilia sequuntur personam*. The long controversy on this subject was put at rest by the case of *Bruces* v. *Bruce*,[2] in which it was held that the moveable estate of a Scotsman, who had acquired a domicil in India, was to be distributed according to English law, though the estate was partly in India and partly in Scotland, and that a brother-consanguinean was, according to the English rule, entitled to share equally with brothers of the full blood.[3] This was followed in the great case of *Hog* v. *Lashley*,[4] in which it was held that the daughter of a man who had acquired a Scottish domicil after his marriage, and died domiciled in Scotland, was entitled to *legitim*,[5] a decision which was repeated in *Trevelyan* v. *Trevelyan*.[6]

[1] Guthrie's Translation, 2nd Ed., p. 298.

[2] 1790, 3 Paton, 163.

[3] *See* a full and interesting *résumé* of the earlier cases in Robertson on Personal Succession, pp. 80-118.

[4] 1792, 3 Paton, 247; and *see per* Lord Eldon in the later case, *Lashley* v. *Hog*, 1804, 4 Paton, at p. 614.

[5] For the statement that Mr. Hog had lost his Scottish domicil *of origin* at his marriage, *see* p. 604.

[6] 1873, 11 M. 516.

It was further settled that the right which prior to the Intestate Moveable Succession Act, 1855 (18 & 19 Vict. c. 23), § 6, was enjoyed by the wife's representatives of claiming on the dissolution of the marriage by her predecease, that the husband should account to them for her share of his moveable property, was a right which existed when the husband's domicil was in Scotland at the date of the wife's death, although at the marriage he was domiciled in a country—*e.g.*, England, where no such right obtained. But it is to be remarked that as to *legitim* there appears to be no case in which it has been held that a husband domiciled in Scotland at his marriage could defeat the claim of the children by acquiring a new domicil. But *legitim* would probably be held so defeasible as being a right of succession.[1]

In *Trevelyan's* case, L.J.-C. Moncreiff said: "There can be no doubt that the right to *legitim*, although in a certain sense a debt, is so far a right of succession, that it is to be determined by the domicil of the defunct,"[2]—an important *dictum*, though the case was the converse one of Scots domicil at death, but not at marriage. Neither *legitim*, however, nor the obsolete claim of a predeceasing wife's representatives, stand in the same position as *jus relictae*, the presumption being far stronger with regard to the last that it was part of the implied contract under which the wife consented to the marriage.

Lord Fraser[3] refers to two cases, one in England and one in Scotland, as settling that *jus relictae* is also defeasible by the husband acquiring a new domicil. On examination it will be found that neither of these cases supports the proposition. In *Munroe* v. *Douglas*[4] a widow claimed *jus relictae* on the ground that her husband died domiciled in Scotland. His domicil of origin was Scottish, but it was held by Sir John Leach, V.C., that he had acquired an Anglo-Indian domicil, and that the widow's claim must be rejected. But the marriage took place in India, and his domicil was more clearly Anglo-Indian at that date than at his death.

[1] *Lashley* v. *Hog*, 1804, 4 Pat. 581; *Kennedy* v. *Bell*, 1864, 2 M. 587, rev. on the fact of domicil at wife's death, 1868, 6 M. H.L. 69; *Donaldson* v. *M'Clure*, 1857, 20 D. 307; aff. *sub. nom.* *Maxwell* v. *M'Clure*, 1860, 3 Macq. 852.

[2] 11 M., at p. 519.

[3] ii. 992.

[4] 1820, 5 Maddock, 379.

The same result was arrived at in closely similar circumstances in a recent case in Scotland.[1] In *Chiene* v. *Sykes*,[2] the wife's claim was sustained, but the domicil was Scots both at marriage and death, as was the case also in the meagrely reported case of *Colville* v. *Lauder*.[3] In *Nisbett* v. *Nisbett's Trustees*[4] a widow's claim to *jus relictae* was rejected on the ground that the husband died domiciled in England. The marriage was in America, and the report gives no clue to the husband's domicil at its date. But no argument was submitted as to the effect on the rights of parties of a change of domicil, and the husband may have been domiciled in England at the marriage. Bell says *jus relictae* is "a share of the moveables of the husband domiciled in Scotland," a statement for which he refers to the case of *Nisbett* only.[5] The point can hardly be said to be conclusively settled by the authorities, still less, with Lord Fraser,[6] to be settled by *Hog* v. *Lashley*, where the question did not arise, as the widow predeceased. But the reasoning of Lord Eldon, who assimilates *jus relictae* to *legitim* as both being rights of succession, would probably prevail. Lord Eldon there said: "But, it is said, that if there be no express contract when the marriage is entered into, there must be an implied contract, and it is assumed that that implied contract is this:—That the distribution which the law would make of the property of the husband if he were to die *eo instanti* that the marriage was celebrated, is the distribution which must be made of the property of the husband dying intestate at any distance of time from the period that the marriage was contracted, and under all the circumstances of mutation and change which might have taken place. It appears to me, that those who say that there is such an implied contract, beg the whole question, because the question is, whether the implied contract is not precisely the contrary? This being a contract attaching upon property, in consequence of its being personal estate, whether the true implied contract must not be taken

[1] *Wauchope* v. *W.*, 1877, 4 R. 945.

[2] 1811, reported as a note to *Munroe*, 5 Maddock, at p. 394.

[3] 1800, M. App. *v.* Succession, No. 1.

[4] 1835, 13 S. 517.

[5] Prin. ii. 1591. Also L. M'Laren, founding on the same case, M'Laren on Wills, i., p. 126.

[6] ii. 992.

to be, that the condition of the wife, in respect to her expectation should change as the condition of the husband changes with reference to the law of the country in which they are resident."[1] This view seems supported by the language of the Married Women's Property Act, 1881, § 6, which provides that the husband of any wife *dying domiciled in Scotland* shall be entitled to *jus relicti*.

Effect of Change of Domicil upon the Personal Rights of the Spouses.—It is clear that the *lex fori* must decide any question that may arise with regard to rights personal, as distinguished from patrimonial. Persons, whether domiciled or merely temporarily resident in any country, are subject to its public law, and cannot plead that they are entitled to break the law because their conduct would have been lawful in the country in which they were married, or in which they chance to be domiciled. It was said by Lord Meadowbank in one case: "If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the judge's finger, would it be a justification, in any Court, to allege that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?"[2] And in the same case Lord Glenlee said: "We would not imprison a married woman in Scotland for debt, wherever she was married, though she might have been imprisoned by the law of the country in which she was married."[3]

Effect of Change of Domicil on the Patrimonial Rights of the Spouses in their Moveable Estate, ***stante matrimonio.***—It appears from the preceding remarks that where

[1] *Lashley* v. *Hog*, 1804, 4 Pat., at p. 615; *see* the whole passage. In this very complicated case unnecessary confusion is created by using the phrase *jus relictae* as meaning the right of the representatives of the predeceasing wife to her share of the moveable estate of the husband. *See Robertson*, Pers. Succession, p. 418, and 4 Paton, at p. 606, *note*.

[2] *Gordon* v. *Pye*, 1814, Ferg. Rep., p. 361, cited with approval, *per* Lord Robertson, in *Edmondstone* v. *E.*, 1816, Fergusson's Reports, at p. 399.

[3] *Ibid.*, p. 404; and *see per* Lord Bannatyne, *ibid.*, 402; and *per* L.P. Hope, in *Munro* v. *M.*, 1840; 1 Robin., at p. 556; Fr. ii. 1318; Bishop, ii. 26; Burge, i. 683; Dicey, p. 193; Phill. iv. § 486.

the effect of change of domicil has been considered, it has been with reference to rights such as *legitim*, *jus relictae*, or the obsolete right of a predeceasing wife's representatives. These rights may probably be looked upon as proper rights of succession, and, therefore, subject to the general rule that the distribution of moveable estate must be according to the law of the domicil of the deceased person. The doctrine of an implied contract that the law of the domicil at marriage should supply the governing rule, is hardly maintainable as regards *legitim* or the claim of the wife's representatives, for neither they nor the children *nascituri* were parties to the marriage. The right of a wife to claim *jus relictae* irrespective of a change of domicil has, as already stated, not been the subject of judicial decision, but such a claim would probably be rejected on the ground that *jus relictae* was also a right of succession, and that the same rules of law had always been applied to it as to *legitim*.

Different considerations, however, arise with regard to the mutual rights of property of the spouses during the marriage. On this subject the authorities are meagre in the extreme, and opinions of legal writers of reputation may be found to support every view of the matter which is conceivable.[1] A *dictum* of Lord Eldon in *Lashley* v. *Hog* speaking of the case of *Foubert* v. *Turst*, in which the domicil of the spouses had been changed from France to England, has sometimes been cited as bearing on this point. But it is quite plain that Lord Eldon was speaking of rights of succession only, and that such rights alone were considered in this branch of *Lashley* v. *Hog*.[2]

In a more recent case L.P. Hope made some important observations which may be thought to apply to rights both during the marriage and at its dissolution. His Lordship is not, however, considering any question between the spouses of the nature under discussion. "The status of married persons is indelibly stamped upon them, and no previous domicil or subsequent change of domicil could affect it. But the

[1] The fullest review of them is in Story, § 137 *seq.* *See* also Burge, For. and Col. Law, i., p. 619 *seq.*; Dicey, p. 270; Westlake, 3rd Ed., p. 65.

[2] 1804, 4 Paton, at p. 613; and *see* Westlake, 3rd Ed., p. 74.

personal and patrimonial consequences resulting from this status so effectually and indelibly constituted, may be different in different countries. If they continue in the country where they were legally married, the husband and wife may have certain personal prerogatives and privileges, and certain rights and powers over their respective properties peculiar to that country. If they return to their own country, or remove into a third country, all these may be totally changed ; but no consequences of this kind affect the constitution and subsistence of the status of marriage originally and legally stamped upon them. Married they were, and married they must remain. No previous domicil or change of domicil can unmarry them; they carry that status with them wherever they go, as Boullenois says, and if they have not settled their rights by a contract, they must take their chance of the effect which change of residence may produce."[1]

The international question as to the effect of foreign law on the rights of spouses *stante matrimonio* has been glanced at in several cases to which I shall briefly advert. In *Newlands* v. *Chalmers' Trustees*[2] bonds bearing interest and forming part of the succession of a man domiciled in Jamaica, fell to a married sister of the deceased as next-of-kin. The question which arose was whether these bonds fell under the *jus mariti* of her husband. By the law of Scotland they would have been excluded as being heritable. But it was held that as by the law of Jamaica they were moveable, they fell under the *jus mariti*. The foreign law was only referred to ascertain what was heritable and what was moveable, and that being proved as a fact in the case, it was held that the rights of the spouses domiciled in Scotland must be determined by their own law.

In *Clarke* v. *Newmarsh*[3] the facts were these : An English officer was governor of Fort-Augustus, and lived there from 1746 to 1797. He married in 1779 a domiciled Scotswoman, who survived him. A legacy under an English will was left to the wife, which was not realised in any way during the husband's lifetime, and after the death of both spouses a question arose between their respective executors as to which

[1] *Munro* v. *M.*, 1840, 1 Robin., at p. 556.

[2] 1832, 11 S. 65.

[3] 1836, 14 S. 488.

of them was entitled to this legacy. By the law of England it would not have vested in the husband, because he had not "reduced it into possession," and it would have become the absolute property of the wife on her survivance. But the Court held that the husband's domicil was Scottish, and that the legacy having vested in the wife during the marriage, fell under the *jus mariti.*

Again, in *Hall's Trustees* v. *Hall*,[1] a question arose between the trustees of a deceased wife and the surviving husband as to the right to the proceeds of a heritable bond. The bond had belonged to the wife before marriage, and was converted into money while the spouses were in Scotland. The domicil of the spouses at the wife's death was in England. It was pleaded by her trustees that the money being *surrogatum*, did not fall under the *jus mariti*, and the right to it was not affected by the change of domicil. It was held that the question was one of succession to a domiciled Englishwoman, and must be determined by the law of England. The international question should have been raised in the English Court. The report suggests that the allegation as to the husband's domicil at marriage being in Scotland was without foundation, and Lord J.-C. Hope remarked: "It cannot be said, and was not pretended, that he contracted marriage with a view to the law of Scotland, as in the case of *Warrender*." The chief value of the case is in showing that change of domicil might not have been treated as immaterial in a question between the spouses during the marriage. In none of these cases was the question considered whether a husband could by changing his domicil prejudice the wife's rights during her lifetime. The point in England also is open.[2]

It appears certain that as regards *acquisita* the change of domicil will not affect their respective rights. If an English husband acquires a domicil in Scotland, the capital of his wife's estate, which was vested in her for her separate use in virtue of the English Married Women's Property Act, will not fall under the *jus mariti* when the Scottish domicil is acquired.[3]

[1] 1854, 16 D. 1057.

[2] Westlake, 3rd Ed., p. 68.

[3] *See* Fr. ii. 1325; Westlake, p. 68; Dicey on Domicil, p. 271; Guthrie's Savigny, 2nd Ed., p. 293; Gillespie's note to Bar, 2nd Ed., p. 419; Story, § 171 *seq.*, and § 185, with Editor's note at p. 268 of 8th Ed.

But will *acquirenda*, including the income of her moveable estate, and the rents of her heritage, accruing after the change of domicil, fall under the *jus mariti?* They are not protected by the Act of 1881. Mr. Westlake thinks in such a case the true rule is, that the law of the former domicil, the "matrimonial domicil," still governs. This is supported by Savigny, and stated by Mr. Dicey to be the prevailing view.[1]

In America the rule seems to be that the change of domicil does not affect the respective rights of the spouses in property already belonging to them at their migration, and that subsequent acquisitions are governed by the general law of the new domicil.[2] This proceeds on the theory that in changing their domicil the spouses have implied or agreed to submit future acquisitions to the law of their new home. This doctrine would be more intelligible if a change of domicil could only be made by the joint consent of the spouses. It is an unfair presumption when the husband can change the domicil of both, *suo arbitrio*, and with the express purpose of increasing his rights in his wife's estate.[3] The subject was very elaborately discussed in the great American case of *Saul* v. *His Creditors*, which is printed in full as an appendix to Phillimore's International Law, Vol. iv., p. 734. In that case the Supreme Court of Louisiana held that where a married couple had removed from Virginia (their matrimonial domicil), where community between spouses did not exist, into Louisiana, where community did exist, the acquests and gains after their removal were to be governed by the law of community in Louisiana. The Court said, "We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the

[1] Westlake, Savigny, and Dicey *l.c.* on preceding page. Mr. Eversley says, if the husband changes his domicil, the conjugal rights as to moveable property will vary. He draws no distinction between *acquisita* and *acquirenda*. (Domestic Relations, 1885, p. 488, and *see* p. 242.)

[2] Bishop, Ed. 1891, i. 915; Story, § 170 *seq.*; *Saul* v. *His Creditors*, printed as an appendix to Phillimore's "International Law," Vol. iv., p. 734.

[3] Mr. Eversley (Domestic Relations, 1885, p. 242) suggests that the husband's motive for the change is material. But he gives no authority for this. *See Carswell* v. *C.*, 1881, 8 R. 901.

presumption must be, they intended their rights to property should be governed by the laws of the country where they married. [The learned judge must no doubt be taken to mean the laws of the country of the matrimonial domicil, which, in the case of *Saul*, coincided with the place of celebration.] This is admitted. But then this presumption as to their agreement cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the state where they were passed ;—then it cannot be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted, if it was real and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so ; and they are presumed to have contracted in relation to the law, such as it was, to have *known its limitations*, as well *as its nature*, and to have had the one as much in view as the other. . . . The most familiar way of treating the idea of tacit contracts, being made in relation to the laws of the country where they are entered into, is to say that the agreement is to be construed the same way as if those laws were inserted in the contract. Now, supposing parties to marry in Louisiana, and that our statute providing for that community of acquests and gains is real and not personal—that it divides the property acquired while in this state equally between the husband and wife, but does not regulate that which they gain in another country to which they remove—the insertion of this law in a contract would be nothing more than a declaration, that while residing *within this state* there should be a community of acquests and gains. An agreement such as this could not have the same force as an express one by which the parties declared there should be a community of acquests and gains *wherever they went*, for the one has no limitation as to place and the other has. The maxim, therefore, which was so much pressed on us in argument, *taciti et expressi eadem vis*, is only true when the law to which the tacit agreement refers contains the same provisions as the written contract" (p. 749). I have quoted this judgment at such length on account of its great importance, and because

the American report (5 Martin, N.S. 569), is not readily accessible. But it must be borne in mind that, although the reasoning would extend to the rights of the spouses *inter se*, during the marriage, the judgment itself does not go further than the Scotch cases of *Lashley* v. *Hog*, 1804, 4 Paton, 581, and *Kennedy* v. *Bell*, 1864, 2 M. 587. The question in *Saul's* case arose after the dissolution of the marriage, and the decision affirmed the right of the children as their mother's next of kin to claim, as against the husband's creditors, one half of the goods in communion.

It is submitted that in Scotland it would be held that neither *acquirenda* nor *acquisita* will fall under the *jus mariti*, if they would have been the wife's separate property by the law of the original domicil of the spouses. In the case —*e.g.*, of an English wife whose estate is vested in her by the English Act of 1882, it is provided that she shall hold as her separate property "all real and personal property which shall belong to her at the time of the marriage, or shall be acquired by or devolve upon her after marriage."[1] It is thought that a man who marries a woman whose estate is subject to this Act, and subsequently acquires a domicil in Scotland, would be regarded as in the same position as if he had by an ante-nuptial marriage-contract renounced his *jus mariti* and right of administration over her estate as at the marriage, and also over *acquirenda*.[2] In addition to the equitable reasons against allowing the husband by a change of domicil to acquire greater rights in his wife's property than he had before, the adoption of this rule would obviate the great practical difficulty of fixing on any *punctum temporis* as that at which the change of domicil had been completed.[3]

Effect of Change of Domicil on the Rights of the Spouses in their Heritable Estate.—Every right to heritage of whatever nature is regulated by the *lex rei sitae*. It can only be acquired or transmitted according to the rules of the country in which it is situated.[4] Any right, therefore, which is enjoyed

[1] 45 & 46 Vict. c. 75, § 2.

[2] As to renunciation of rights over *acquirenda*, *see M'Dougall* v. *City of Glasgow Bank*, 1879, 6 R. 1089.

[3] *See supra*, Effect of change of domicil on wife's capacity, p. 368 *seq.*

[4] Ersk. iii. 2, 40; *Purvis' Trs.* v. *P.'s Exors.*, 1861, 23 D. 812; Fr. ii. 1322.

by a husband in his wife's heritage situated abroad, or by a wife in her husband's, will subsist unaltered by any change of domicil. And whatever be the law of their former domicil, it will not be imported to regulate their rights as to Scottish heritage acquired after they have become domiciled in this country. In the absence of contract their respective rights will be in all respects the same as if their original domicil had been in Scotland.[1]

Where there is a Marriage Contract.—If the parties have competently declared their intention with regard to their mutual rights of property, either *stante matrimonio* or at the dissolution of the marriage, the contract will be effectual after a change of domicil. This must, of course, be taken with the limitation that no right will be given effect to which conflicts with the public law of the country in which it is sought to be enforced.[2] There is no rule of construction peculiar to marriage contracts. Like other deeds, their interpretation will be referred to that law which the parties appear to have had in view at the time. In general, this will naturally be the place in which they contemplated the performance of the contract.[3] But it may appear, from the phraseology of the deed, the nature of the provisions as to trust-machinery, or other circumstances, that the parties meant it to be construed by the *lex loci contractus*, although this does not coincide with the law of the intended domicil. In such a case, their intention will receive effect.[4] And where this seems to have been the intention of parties, one set of provisions may be construed by the one law and another set by the other.[5] It has been held in England that, where a marriage settlement was made between a domiciled Turk and an Englishwoman, on the faith of his promise to reside in England, that the effect and operation of the contract must be governed by English

[1] Westlake, 3rd Ed., p. 192; and *see per* L. Wensleydale in *Fenton* v. *Livingstone*, 3 Macq., at p. 549, and *per* L. Brougham, *ibid.*, at p. 532.

[2] *See per* Lord Eldon in *Lashley* v. *Hog*, 1804, 4 Pat., at p. 617; *Stair* v. *Head*, 1844, 6 D. 904.

[3] *Stair* v. *Head*, *supra*; *Durrant Steuart's Trs.* v. *Durrant Steuart*, 1891, 18 R. 1114; *see Duncan* v. *Cannan*, 1854, 18 Beav. 128, aff. 1855, 7 De G., M. and G. 78.

[4] *Corbet* v. *Waddell*, 1879, 7 R. 200.

[5] *Chamberlain* v. *Napier*, 1880, 15 Ch. D. 614.

law, and that the settlement could not be annulled by a Turkish decree of divorce pronounced without due notice to the persons interested under the settlement.[1]

What Law decides whether Estate is Heritable or Moveable?—The character of estate situated in a foreign country—*i.e.*, the question whether it is heritable or moveable, is referred to the law of the foreign country.[2] Story admirably expresses the doctrine thus: "For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose, and no other nation can impugn or vary that character. So that the question in all these cases is not so much what are or ought to be deemed *ex sua natura* moveables or not, as what are deemed so by the law of the place where they are situated."[3] Thus English mortgages, being personal estate by the law of England, will be moveable in a question between Scottish spouses. The clause in the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, § 117), which provides that heritable securities, though rendered moveable *quoad* succession, shall continue heritable between the spouses, has been held not to apply to foreign securities.[4]

Effect of change of Domicil on Donations *inter virum et uxorem*—(1.) Where Donations between Spouses are forbidden.—In some states the prohibition, derived from the Roman law, of donations between husband and wife, is still in observance.[5] A law of this kind, being based on considerations of public policy, and intended to preserve the purity of the domestic relations, will apply to all spouses domiciled within the territory at the date of the donation, irrespective of their domicil at the marriage.[6] A gift of moveables made

[1] *Colliss* v. *Hector*, 1875, L.R. 19, Eq. 334.

[2] *Downie* v. *D.'s Trs.*, 1866, 4 M. 1067; Fr. ii. 1319; and *see per* L. Fraser, Ordinary, in *Tennent* v. *T.'s Exrs.*, 16 R., at p. 881.

[3] Conflict of Laws, § 447. The English rule is the same, Dicey, p. 244.

[4] *Monteith* v. *M.'s Trustees*, 1882, 19 S.L.R. 740, a judgment strongly dissented from by Lord Young.

[5] *See* D. 24, i. 1; Phillimore, iv., p. 318; Gillespie's Bar, p. 420; Guthrie's Savigny, p. 297; Burge, i., p. 639.

[6] Savigny, *l.c.*

inter conjuges will be valid or invalid, according as the law of the domicil at its date allows or prohibits it.[1] It is disputed whether a gift of immoveables, situated in a territory where the prohibition exists, is valid if made between spouses domiciled in a country where the donation is lawful. Pothier holds that this will be decided by the *lex rei sitae*, while Savigny thinks that in this case the *lex domicilii* should prevail, on what appears the sound ground that the law of the territory has no concern with the purity of the relation of spouses domiciled in another state. And this view has the approval of Bar. (Gillespie's Bar, p. 420.)

(2.) Donations which are revocable when made.—It has not been decided whether a donation made *inter conjuges*, in a country where such donations are revocable—*e.g.*, in Scotland, will become irrevocable if the spouses afterwards acquire a domicil in a country where this rule does not obtain, as—*e.g.*, in England.

It appears clear that, if the subject of the gift were Scotch heritage, it would be revocable by the donor, notwithstanding a change of domicil. And it is thought, with deference to the contrary opinion of Lord Fraser,[2] that the foreign Court would give effect to the law of Scotland if the gift were one of moveables. The intention of the donor was to make a conditional gift, and there is no presumption that, in changing his domicil, he meant to render the donation absolute.[3]

Effect of Change of Wife's Domicil on Husband's Liability for Wife's Debts.—A husband's liability for his wife's debts contracted before marriage is now limited in Scotland, where the marriage took place after 1st January, 1878, "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."[4]

If a domiciled Scotsman marries in a foreign country a woman domiciled there, it would seem that his liability for

[1] Guthrie's Savigny, p. 297; Pothier, Traité des Donations entre mari et femme, Art. 2, n. 19.

ii. 1322.

Cf. Tennent v. *T.'s Executor*, 1889, 16 R. 876, rev. *sub. nom. Welch* v. *Tennent*, 1891, 18 R. H.L. 72, where, however, the domicil was Scottish throughout.

[4] 40 & 41 Vict. c. 29, § 4.

her ante-nuptial debts will fall under this statutory restriction. But the point is not free from doubt. The ground of a husband's liability at common law was that at marriage the wife's moveable estate passed to him by universal assignation. But since the Act of 1881 the wife's estate remains separate if she marries a domiciled Scotsman, whatever may be the law of the wife's domicil before marriage, or the law of the place of celebration in regard to the patrimonial effects of marriage (44 & 45 Vict. c. 21, § 1). It would seem, therefore, that as the husband's rights in his wife's estate are determined by the law of Scotland, the same law ought to regulate his liability for her ante-nuptial debts.[1]

But in England the liability is similarly limited,[2] and in a recent case the facts were these:—An Englishman married a woman who had contracted debt in Jersey, and appears to have been domiciled there, though the report is defective on this point. A husband, by the law of Jersey, is liable, *in solidum*, for his wife's ante-nuptial debts. The marriage took place in England, and the husband received no such property with the wife as to make him liable under the English Act. It was held that the husband was not liable, on the ground that as the marriage took place in England, which was his domicil, the liabilities arising from the contract must be determined by the *lex loci contractus*. But it was observed by both Grove, J., and Lopes, J., that the husband would have been liable if he had married in Jersey.[3] But these remarks were *obiter*. The reason for the husband's liability *in solidum* in Jersey being that the wife's property passes to him by the universal assignation of marriage, as it did in Scotland at common law, and that the wife is withdrawn from the diligence of her creditors, it is not very easy to see why a foreign husband to whom her estate does not pass by marriage, the law of his domicil allowing the wife to retain her estate as separate property, should, notwithstanding, be liable for her debts. It would seem more natural to hold that the place where the

[1] *See* Westlake, p. 68 and p. 273; Fr. ii. 1321; Burge, i. 636 *seq.* Neither Westlake nor Fraser gives a distinct opinion. Mr. David Murray thinks the law of the wife's domicil before marriage will fix the husband's liability. Property of Married Persons, p. 58.

[2] 45 & 46 Vict. c. 75, § 14.

[3] *De Greuchy* v. *Wills*, 1879, 4 C. P.D. 362.

ceremony is performed is immaterial, and that the husband's liability depends in every case on the law of his domicil, by which his rights are ascertained.

Change of Husband's Domicil will not affect his Liability for Wife's Debts.— It is clear that the husband's liability for antenuptial debts must be fixed at the marriage, and cannot be altered by a subsequent change of domicil.[1] And on the ground that the incidents of marriage depend on the *lex domicilii*, it seems that his liability for her debts incurred *stante matrimonio* should be governed by that rule.[2]

[1] Burge, i., p. 637; Fr. ii. 1322.
[2] *See supra*, p. 368.

CHAPTER XLII.

LEGITIMACY.

THE general rule is settled that if by the law of a child's domicil at birth it has the status of legitimacy, this status will be recognised all the world over. It is well expressed by Lord Ardmillan thus: "The status of legitimacy is a personal quality, and, when once impressed by the law of appropriate jurisdiction, *qualitas personam sicut umbra sequitur*."[1] As will be seen, this rule suffers an exception when the inquiry is as to the right of a person to succeed to heritage. Here the *lex rei sitae* is alone regarded, and if the claimant has not the status demanded by that law, it will not avail him that he is legitimate by the law of his domicil.[2]

Does the Rule apply to Children of a Marriage which would have been prohibited as incestuous if the parties to it had been domiciled in Scotland ?—Issue of a marriage with a deceased wife's sister could not succeed as heir to Scotch heritage.[3] "The question of legitimacy, having relation to real estate, is a question which each country will answer for itself, and will not ask the aid of another country to determine it."[4] In a question of succession to moveables it is probable that the status of legitimacy impressed by the law of the domicil would be now accepted. In *Fenton*, Lord Wensleydale said: "The law of the domicil regulates also the personal qualities which take effect from birth, such as

[1] *Fenton* v. *Livingstone*, 1856, 18 D., at p. 875. *See* this case in 3 Macq. 497, and the cases afterwards cited in this chapter.

[2] *Fenton, supra.*

[3] *See Fenton* v. *Livingstone*, 3 Macq., at p. 544, *per* L. Cranworth.

[4] *Ibid.*, *per* L. Chelmsford, at p. 559.

legitimacy or illegitimacy, or absolutely as to the succession of personal property."[1] *Fenton* v. *Livingstone* was remitted to the Court of Session, and the opinions finding the claimant illegitimate are carefully limited to the right to succeed to heritage.[2] The doctrine that as regards personal succession the status assigned by the domicil will be universally accepted is indicated distinctly in the more recent cases in England.[3] So in *In re Goodman's Trusts* it was held that a child born before wedlock of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents, was entitled to take as one of the next of kin of an intestate dying domiciled in England. And the ground of the judgment of Jessel, M.R., which was there reversed, and that of Lush, L.J., who dissented, was not that status as a rule must be determined by the *lex domicilii*, but that in distributing the estate of a domiciled Englishman the English Statute of Distributions must be strictly construed. "I am, therefore, of opinion," said Lush, L.J., at the end of his very elaborate judgment, "that this Statute, like any other, must be construed in the sense which the common law puts upon its words, and that children means such, and such only, as are recognised in our table of consanguinity." The opinions which went on this view have, therefore, no application in a country in which, as in Scotland, the distribution of an intestate's estate does not rest upon statute. The question as to the legitimacy of the issue of polygamous marriages in countries in which polygamy is recognised has lately been expressly reserved.[4]

In *Hyde* v. *Hyde*,[5] the Mormon marriage case, Lord Penzance said: "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons

[1] *Ibid.*, p. 547; *see per* L. Brougham, *ibid.*, p. 532. L. Cranworth's opinion suggests he would regard the issue as illegitimate for all purposes, p. 544. L. Chelmsford reserves his opinion, p. 557.

[2] *See per* L.P. M'Neill, 23 D., at p. 372; *per* L. Curriehill, at p. 375; *per* L. Deas, p. 380 and p. 385.

[3] *See Shaw* v. *Gould*, 1868, L.R. 3 E. and I. App., *per* L. Cranworth, at p. 70; *in re Goodman's Trusts*, 1881, 17 Ch. D. 266.

[4] In *re Ullee*, 1885, 53 L.T. N.S. 711; 54 L.T. N.S. 286.

[5] 1886, L.R. 1 P. and D., at p. 138.

which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

The question as to the legitimacy of the children of the English wife of an Indian prince, who had other wives at the date of the marriage, was reserved in *re Ullee*.[1] The argument was there submitted that the father had acknowledged the children, and thus made them legitimate. The Mohammedan law is that if a man acknowledges another to be his son, and there is nothing which obviously renders it impossible that he should be his son, the parentage is established.[2] It was contended that the status of the children being fixed by Mohammedan law it would be admitted by the law of England, no less than that of a child legitimated *per subsequens matrimonium*. Chitty, J., said: "I am by no means satisfied that, according to the principles of international law as now understood, I ought to hold the infants now in question to be for the purposes of this application (one relating to custody) illegitimate, but it is immaterial to give any decision on that point."[3]

Legitimation, *per subsequens matrimonium*, in its International Aspect.—Questions of considerable difficulty arise in considering to what extent the application of this rule may be affected by the principles of international law. There can be no doubt that the rule will apply where the domicil of the father is in Scotland both at the date of the child's birth and of the marriage. It is immaterial that the marriage takes place in a country, the law of which does not admit legitimation *per subsequens matrimonium*, if the father was not domiciled there. For we look to the *lex loci* merely to discover if the marriage is good in point of form. The incidents and effects of the marriage depend upon the law of the husband's domicil. The child born in England of a domiciled Scotsman and an English woman was held legitimated by the

[1] 1886, 53 L.T. N.S. 711, aff. 54 L.T. N.S. 286.

[2] *See* Macnaghten's Principles of Mohammedan Law (1870), p. 61.

[3] 53 L.T. N.S., at p. 713.

subsequent marriage of its parents in England.[1] It is equally clear on the same principle that where the domicil of the father is in a country which does not admit of the doctrine—*e.g.*, in England, the fact of the marriage taking place in Scotland will not have the effect of legitimation.[2] But is the date of the marriage the only *punctum temporis* to be regarded? There is considerable authority for the proposition that the father's domicil, both at the date of the child's birth and at the marriage, must be in a country, the law of which recognises legitimation *per subsequens matrimonium*. And this is the law of England where it is held that an indelible status attaches to a child at its birth. If it is born when the putative father is domiciled in a country which does not admit of legitimation in this way, it is *filius nullius*, and has no capacity of legitimation. But if born when the father's domicil was in a country which admits the rule, the child is *filius nullius* at birth, but has a potentiality of being legitimated by the subsequent marriage of its parents, at a time when the father is domiciled in a country where legitimation can be effected in this way. This distinction between illegitimate children born with this *spes* or capacity, and illegitimate children born without it, is now fixed in the law of England.[3]

In Scotland the point is still open.[4] In the cases of *Munro* and *Udny*, it was found that the father's domicil was Scottish both at the child's birth and at the marriage, and it was therefore unnecessary to decide what would have been the law if his domicil at the child's birth had been English.[5] Lord Brougham in *Munro* appears to think that domicil at marriage would be sufficient.[6] L.C. Cottenham is more guarded, and

[1] *Munro* v. *M.*, 1840, 1 Rob. 492 (in C. of S., 16 S. 18).

[2] *Per* Cottenham, L.C., in *Munro* cit., at p. 602.

[3] *See per* Hatherley, L.C., in *Udny* v. *U.*, 1869, 7 M. H.L., at p. 94. The cases referred to appear to be *re Wright*, 1856, 2 K. and J. 595; and *Boyes* v. *Bedale*, 1863, 1 H. and M. 798; *see* argument in *In re Goodman's Trusts*, 1881, 17 Ch. D., at p. 268; *Goodman* v. *G.*, 1862, 3 Giff. 643; *re Goodman's Trusts*, cit.; *re Grove*; *Vaucher* v. *Solicitor to Treasury*, 1888, 40 Ch. D. 216; Westlake, 3rd Edition, p. 90.

[4] *Per* Hatherley, L.C., in *Udny* v. *U.*, *supra*, at p. 94; *per* L. Chelmsford, *ibid.*, at p. 98, foot.

[5] So also in *Aikman* v. *A.*, 1859, 21 D. 757, aff. 1860, 3 Macq. 854.

[6] 1 Rob., at p. 614, and pp. 621 and 624, where he says he agrees with almost the whole of the judges in the C. of S. on the question of law.

states the rule thus: "The child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland, by the subsequent marriage of the parents in England, if the domicil of the father was and continued throughout to be Scotch.[1]

The majority of the judges in the Court of Session seem in *Munro's* case to have been of opinion that even if the father's domicil at the child's birth had been in England the subsequent marriage would have had the effect of legitimation, if the father's domicil had become Scottish at the date of the marriage.[2] And this is the view of Lord Fraser, although he admits that the question is difficult and disputed.[3] It has also the weighty authority of Savigny, who says, "legitimation by subsequent marriage is regulated according to the father's domicil at the time of the marriage, and in this respect the time of the birth of the child is immaterial."[4] But the *dicta* in *Munro* were, as already stated, *obiter*, and it is submitted that the express judgment of the Court of Appeal in *In re Grove*[5] would now be followed in Scotland. Although not binding upon them the Scottish Courts would naturally attach great weight to a judgment of such high authority, based not upon specialties of English law but on principles of general jurisprudence.

A Child legitimated, *per subsequens matrimonium*, cannot succeed as heir, *ab intestato*, to English real estate.—It is settled in England that in order to succeed to real estate the heir must have been born after an actual marriage between his parents. Legitimacy, *per subsequens matrimonium*, in accordance with the rules of private international law, with the limitation above explained, will entitle him to succeed to moveables, but it has been authoritatively determined, that as regards realty, the Statute of Merton, which requires that he

[1] 1 Rob., at p. 605.

[2] *See per* L.J.-C. Boyle, and Lords Meadowbank, Fullerton, Jeffrey, and Cuninghame, in 16 S., at p. 27; *per* Lords Glenlee, Medway, Moncreiff, and Cockburn, at p. 44, top; *per* Lord Gillies, at p. 54; *per* Lord Mackenzie, at p. 56; *per* Lord Corehouse, at p. 56, *ad finem*.

[3] Parent and Child, 2nd Edition, pp. 49 and 52.

[4] Private Int. Law, Guthrie's Translation, 2nd Edition, p. 302.

[5] 1888, 40 Ch. D. 216.

shall be born in lawful wedlock, must be complied with.[1] So also a father legitimated, *per subsequens matrimonium*, cannot succeed to his son's English land.[2]

[1] *Birtwhistle* v. *Vardill*, 1826, 5 B. and C. 438, aff. 1840, 7 C. and F. 895, 1 Rob. 627; *see Fenton* v. *Livingstone*, 1856, 18 D. 865, rev. 1859, 3 Macq. 497; and *Shaw* v. *Gould*, L.R., 3 E. and I. App. 55.

[2] *Don's Estate*, 1857, 4 Drew, 194.

CHAPTER XLIII.

JURISDICTION.

Divorce.—What may almost be described as a revolution has taken place in regard to the question of jurisdiction in actions for divorce raised in the Court of Session.

In the older cases jurisdiction was held to exist when there was residence for forty days by the husband in Scotland, coupled with personal citation of the wife there, or in actions on the ground of adultery, where there was such residence coupled with the fact that Scotland was the *locus delicti*.[1] But these grounds of jurisdiction have now been expressly renounced, and the tendency of recent cases is to hold that the Court has no jurisdiction unless Scotland is the domicil of the husband at the time of raising the action.[2] This rule is subject to the qualification that when a husband who was domiciled here has committed adultery or has deserted his wife, and has left the country, his wife remaining here may apply for her remedy to the Court of Session, although the husband may since the offence have acquired a new domicil.[3]

I have said the tendency of recent cases is to hold that nothing short of permanent domicil—domicil for succession—will now found jurisdiction, because it cannot be regarded as conclusively settled that the rule will be carried quite to this length. It is still possible that it may be held to be sufficient if the parties have lived in Scotland for a considerable time, not as casual visitors but as residents, so that this country

[1] *See Ringer* v. *Churchill*, 1840, 2 D. 307.

[2] Mr. Bishop, with his usual eloquence, says of this change of position: "The result is a signal triumph of the erect and deathless soul of law over an inert and worn-out body of ill-considered decisions," Ed. 1891, ii. 64.

[3] *See infra.*

may fairly be regarded as the "matrimonial home," although the husband may not have acquired here a domicil which would regulate his succession.

In a very recent case in England, Lopes, L.J., explaining the grounds of jurisdiction, said: "The English divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this, independently of the residence of the parties, the allegiance of the parties, the domicil of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed."[1]

The jurisdiction of the Court of Session over persons domiciled in Scotland coincides at all points with this description.

***Locus delicti* immaterial.**—(1.) *Adultery.*—It has never been doubted as regards adultery, that when the husband's domicil was Scottish, the fact that the adultery founded on was committed abroad, did not affect the question of jurisdiction.[2] The view at one time entertained that the Scottish Courts had jurisdiction where Scotland was the *locus delicti*, and the defender had been personally cited there is now overruled.[3]

(2.) *Desertion.*—It is likewise immaterial that the desertion was not from Scotland, or that the husband has not been domiciled there during the statutory four years. In two recent cases the desertion consisted in the wife's refusal to join the husband in Scotland where he had acquired a domicil, or was found to have retained his domicil of origin, and in neither case had she ever lived with him in this country.[4] In *Carswell* v. *Carswell* the husband changed his domicil from Canada to Scotland, and had only been resident here for a year and a-half prior to the raising of the action.

Doctrine of "Matrimonial Home."—The older cases are

[1] *Goulder* v. *G.* [1892], P., at p. 243.

[2] *Warrender* v. *W.*, 1835, 2 S. and M'L. 154, and *see* argument at p. 171.

[3] *Stavert* v. *S.*, 1882, 9 R. 519.

[4] *Carswell* v. *C.*, 1881, 8 R. 901; *Steel* v. *S.*, 1888, 15 R. 896.

referred to in *Jack* v. *Jack*,[1] which was decided by the whole Court. In that case the doctrine was affirmed by a majority that the Courts of the country which had been the matrimonial home of the spouses had jurisdiction, although that country might not be at the date of the action the husband's domicil for succession.

The material facts were these: The husband had a Scottish domicil of origin, and was married in Scotland, where he afterwards resided with his wife. He went to America, leaving his wife in Scotland, and became a minister. Subsequently he raised an action of divorce in the Court of Session on the ground of his wife's adultery in Scotland, where she had continued to reside. It was not argued for the pursuer that he had any *animus revertendi*, and the case consequently went on the footing that his domicil for succession might be at the date of action in America.[2] L.P. M'Neill, L.J.-C. Inglis, and Lords Ivory, Curriehill, Neaves, Mackenzie, and Benholme held it was sufficient to give the Court jurisdiction that the matrimonial home of the spouses had been continuously in Scotland. Lord Deas dissented, and held that the jurisdiction could not be sustained unless it were proved that the husband had a domicil in Scotland. On the authority of the old cases his Lordship was inclined to hold, however, that for this purpose a domicil based on forty days' residence would be sufficient.[3]

In *Pitt* v. *Pitt*[4] the subject of matrimonial domicil was again discussed, but the circumstances were so different from those in *Jack's* case that the latter cannot, it is thought, be regarded as overruled by that decision. In *Pitt* v. *Pitt* the husband's domicil was English, and he resided in England with his wife. In 1854 he came to Scotland to evade his creditors, leaving his wife in England. He resided in Scotland apart from his wife for about six years, and in 1861 raised an action of divorce against her on the ground of adultery. The Second Division, affirming Lord Kinloch's judgment, held that

[1] 1862, 24 D. 467.

[2] But L. Kinloch and L. Jerviswoode held it not proved that the husband had lost his Scottish domicil for all purposes. *Ibid.*, at pp. 479 and 480.

[3] *Ibid.*, at p. 473.

[4] 1862, 1 M. 106, rev. 1864, 2 M. H.L. 28, 4 Macq. 627.

the Court of Session had jurisdiction, on the ground that the matrimonial domicil was in Scotland. This judgment was reversed by the House of Lords. In considering the result in that House, it is necessary to notice the somewhat unusual course adopted at the debate. "Sir R. Phillimore, with whom was Sir Hugh Cairns, on behalf of the respondent (the husband), said, that after much consideration he and his learned friend had come to the resolution of abandoning as untenable the ground on which the Second Division of the Court of Session had rested their decision, namely that divorce *a vinculo* might be validly granted to strangers not domiciled, though temporarily resident within the jurisdiction."[1]

The only question, therefore, before the House of Lords, was whether Colonel Pitt had acquired a domicil for succession in Scotland, and the learned Lords, finding he had not done so held that the Court of Session had no jurisdiction to grant a divorce. It is humbly thought that the concession made by the respondent's counsel was completely justified in the circumstances of *Pitt* v. *Pitt*. The spouses there had never resided together in Scotland, and the contention appears untenable that the husband, by residence short of domicil, in a foreign country, apart from his wife, could subject her to the jurisdiction of a foreign Court. The advocates of the doctrine of "matrimonial home" do not need to maintain that the Courts of a country have jurisdiction in which the husband had a home, which was the wife's merely constructively, and *ex fictione legis*.[2] An entirely different question is raised where the real matrimonial residence of both spouses—the home of the marriage—has been within the jurisdiction, and this question was not touched in *Pitt* v. *Pitt*.

That it is still open, appears from the opinion of L.P. Inglis in *Stavert* v. *Stavert*,[3] where, as in *Pitt's* case, there was no matrimonial residence in Scotland, and from the *dictum* of Selborne, L.C., in *Harvey* v. *Farnie*. His Lordship is there referring to an English case, to be presently noticed, in which

[1] 4 Macq., at p. 633.

[2] This, however, has been held in England, but the decision was based on the terms of the English Divorce Act, *Niboyet* v. *N.*, 1878, 4 P.D. 1. *See infra*, p. 432.

[3] 1882, 9 R., at p. 527, *infra*, p. 430.

jurisdiction had been sustained by the Court of Appeal, on the ground that England was the matrimonial home, although not the husband's domicil for succession, and he remarks: "I do not say that the case of *Pitt* v. *Pitt* would, of necessity, govern cases like *Niboyet* v. *Niboyet*, for example, if they were to arise in Scotland." [1]

The theory of jurisdiction founded on "matrimonial home," is supported by Lord Colonsay, in the English case of *Shaw* v. *Gould*.[2] His Lordship says, speaking of a case in which both parties, by agreement, resort to a foreign country merely for the temporary purpose of obtaining a divorce: "But if you put the case of parties resorting to Scotland, with no such view, and being resident there for a considerable time, though not so as to change the domicil for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the Court in Scotland, where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognised in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the Court of Divorce here. How would the Court of Divorce have dealt with the converse case?" [3] His Lordship's query, as will be seen, has been answered by the English Court of Appeal in *Niboyet* v. *Niboyet*.

It is important to notice that, although *Shaw* v. *Gould* was an English case, Lord Colonsay was contemplating the position of the law in Scotland, and evidently thought the Court of Session would not find it had no jurisdiction to grant a divorce in a case where the matrimonial home had been in Scotland. His Lordship could hardly have expressed himself thus, if he had regarded *Pitt* v. *Pitt* as having exploded the doctrine of "matrimonial home" as a basis of jurisdiction in divorce in Scotland.

In *Stavert* v. *Stavert* [4] L.P. Inglis observed: "Now, a very important question arises in some such cases, whether the domicil necessary to found jurisdiction in consistorial causes is

[1] 1882, 8 App. Ca., at p. 56.
[2] 1868, L.R. 3 E. and I. App. 55.
[3] *Ibid.*, at p. 96.
[4] 1882, 9 R., at p. 527.

the same as that which would regulate the intestate succession of the husband, or whether it is not sufficient that Scotland has been the settled home of the marriage for some period, with no intention of leaving the country, where the spouses have settled down to live, where their household goods have been set up for the time, and which, if a separation, judicial or otherwise, has been arranged, and afterwards annulled, would be the place where one party owes to the other the duty of returning for restitution of the conjugal relation. There has been a good deal of speculation on this point, but fortunately it is not necessary to deal with the question here. It has not yet been decided, in the Court of last resort, and I merely notice the matter in passing. If it depended on the decisions pronounced by this Court, it is pretty clear what the result would be; but, as I have said, there is no reason now to consider the matter, for I am of opinion that the defender here has not acquired a domicil either of one sort or the other."

His Lordship evidently meant that the result of previous decisions in the Court of Session was to require less than a domicil of succession in order to found jurisdiction. He is so understood by Lord Shand, who, however, was of a different opinion, and says: "In the case of what has been called a 'matrimonial' domicil, however, I should have great difficulty in knowing what standard to look to, and all I can say is, that I think it would be most unsatisfactory to leave it as a jury question for the Court to say, in each case, what is or is not to amount to a 'matrimonial domicil.'"[1] Lord Deas shared the view of Lord Shand.

In the latest case,[2] Lord Trayner expressed a clear opinion that nothing less than domicil for succession would be sufficient. Lord Young expresses himself not so much in favour of the doctrine of a matrimonial home, distinct from the husband's domicil of succession, as of the theory that a domicil for all purposes may be obtained by a man, in spite of an *animus revertendi*, to his native country. Opinions against

[1] *Ibid.*, at p. 533; and *see* for opinions in favour of a matrimonial domicil distinct from a domicil of succession, *Pitt* v. *P.*, 1862, 1 M., *per* L. Cowan, at p. 117, and *per* L. Neaves, at p. 118.

[2] *Low* v. *L.*, 1891, 19 R., at p. 123.

the doctrine of matrimonial home have also been expressed in the cases undernoted.[1]

The English authorities on this subject are to be referred to with caution, from the fact that in the leading case of *Niboyet* v. *Niboyet*,[2] James, L.J., and Cotton, L.J., who formed the majority of the Court of Appeal, rested their judgment on the construction of the English Divorce Act.[3] That Act (20 & 21 Vict. c. 85) runs: "It shall be lawful for any husband to present a petition to the said Court praying that his marriage may be dissolved,"[4] and the view taken by the learned Lords Justices was that these words removed the doubts which might exist in the case before them with regard to their jurisdiction. And in the later case of *Harvey* v. *Farnie*, when in the Court of Appeal,[5] Cotton, L.J., speaking of *Niboyet*, said the decision of the majority of the Court "turned entirely upon the construction of an English Act of Parliament."

But although this deprives the judgment of much of the weight which it would otherwise have had as an exposition of principles of private international law, the doctrine of "matrimonial home" as a basis of jurisdiction was fully discussed, and the authorities referred to.[6]

Niboyet v. *Niboyet* arose in the following circumstances:— The husband, whose domicil of origin was French, married a domiciled Englishwoman at Gibraltar, and cohabited with her at various places abroad. In 1859 he deserted her, and she came to reside in England, where she lived, apart from him, until the raising of the action in 1878. The husband came to England, and resided there for some years as French vice-consul. The wife sought for divorce, and alleged adultery committed in England, and desertion.

It was clear, from the nature of his occupation and other circumstances, that the husband had not lost his French domicil.

[1] *Per* L. Lee in *Watts* v. *W.*, 1885, 12 R., at p. 897; *per* L. M'Laren in *Redding* v. *R.*, 1888, 15 R., at p. 1103; and *see per* L. Lyndhurst, in *Warrender* v. *W.*, 1835, 2 S. and M'L., at p. 231.

[2] 1878, 3 P.D. 52, rev. 4 P.D. 1.

[3] *See per* James, L.J., 4 P.D., at p. 7; and *per* Cotton, L.J., *ibid.*, at p. 25.

[4] § 27.

[5] 1880, 6 P.D., at p. 51.

[6] And *see* dictum of Selborne, L.C., in *Harvie* v. *Farnie*, 1882, 8 App. Ca., at p. 56.

Sir R. J. Phillimore held on these facts that the Court had no jurisdiction. His judgment was reversed by the Court of Appeal, Brett, L.J., dissenting.

In the very elaborate opinion of Brett, L.J., his Lordship stated with great force the argument in favour of the rule that to found jurisdiction, the husband's permanent domicil at the date of action must be within the territory. "By the universal independence of nations, each binds by its personal laws its natural-born subjects, and all who may become its subjects. By the universal consent of nations, every one who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it, as if he were a natural-born subject of it. It follows, then, from the nature of the subject-matter, that laws which, for certain enacted or predicated causes, as distinguished from causes agreed upon between the parties, alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural-born subjects of the enacting country, or foreigners who have become domiciled in it; but they may, consistently with principle and the universal consent of nations, bind both of these. The law, then, which enables a Court to decree an alteration in the relation between husband and wife, or an alteration in the status of husband and wife as such, is as matter of principle the law of the country to which by birth or domicil they owe obedience. The only Court which can decree by virtue of such law is a Court of that country."[1] The previous English authorities are fully referred to in the same opinion.[2]

Apart from the principle expressed by Brett, L.J., and from the fact that the case turned on the construction of the English Act, upon another ground it appears unlikely that the case of *Niboyet* v. *Niboyet* would be followed in Scotland—viz., that there was no matrimonial cohabitation within the territory. This, it is thought, sufficiently distinguishes that case from the one figured by L.P. Inglis in *Stavert* v. *Stavert*. Whatever may ultimately be held in such a case as is there suggested, in which Scotland has been the settled home of the marriage, "where the spouses have settled down to live, where their

[1] 4 P.D., at p. 12.

[2] *See* especially the opinion of L. Penzance, in *Wilson* v. *W.*, 1872, L.R. 2 P. and D., at p. 441.

household gods have been set up," it seems safe to assert, after the judgments in *Pitt* and *Stavert*, that jurisdiction will not be sustained in the Court of Session in a case where the husband's domicil is not in Scotland, and where the home of the marriage has only been within the territory by a legal fiction that the wife must be presumed to be at the home of the husband. In another English case, in which an English lady, who married an Italian, stipulated that they should reside for six months in each year in England, the jurisdiction was sustained.[1]

It appears to be settled in America that at common law nothing short of domicil will found jurisdiction.[2] But in some states there are statutes authorising the Courts to grant divorce where the parties are merely resident. But such divorces are not recognised as having extra-territorial validity, even when the parties have submitted to the jurisdiction.[3]

Exception to the Rule that the Husband's Domicil must be in Scotland.—Where the spouses were domiciled in Scotland, and the husband is guilty of a matrimonial offence, he cannot by abandoning his Scottish domicil compel the wife to seek her remedy in the foreign country. It is matter of daily practice that divorce for desertion is granted where the facts point to the husband having gone to Australia or America *animo manendi*.[4] And it is not doubtful that the same rule applies where the husband has been guilty of adultery and has afterwards left the country.[5] In such a case

[1] *Santo Teodoro* v. *S. T.*, 1876, 5 P.D. 79.

[2] Bishop, Ed. 1891, ii. 43 *seq.*

[3] Story, 8th Ed., p. 308, *note*.

[4] *See per* Lords Neaves and Mackenzie, in *Jack* v. *J.*, 1862, 24 D., at p. 476; *per* L. Ardmillan, *ibid.*, p. 477.

[5] *Hume* v. *H.*, 1862, 24 D. 1342; *per* L. M'Laren, in *Redding* v. *R.*, 1888, 15 R. 1102; Fr. ii. 1212, 1254, and so in England. *See per* Brett, L.J., in *Niboyet* v. *N.*, 1878, 4 P.D., at p. 14; *per* Phillimore, J., in *Le Sueur* v. *Le S.*, 1876, 1 P.D., at p. 141; Westlake, p. 80; Phillimore, iv. § 497. An English case, which appears otherwise anomalous, is perhaps to be supported on this ground. The spouses separated by consent, and after the separation the husband went to America, where he became domiciled, and bigamously married another woman. The wife, who had not left England, petitioned for a divorce, and the Court sustained its jurisdiction, on the ground that the husband, although he had changed his domicil, had not shaken off his allegiance, and was still amenable to the laws of the British Empire. In no other case does jurisdiction appear to have been rested on allegiance. *Deck* v. *D.*, 1860, 2 S. and T. 90.

it cannot be the law that the husband might bar the wife's remedy by acquiring a domicil in a country in which divorce is not permitted.

If the Husband be domiciled in Scotland, it is immaterial that his motive in acquiring a Domicil was to obtain a Divorce.—In *Stavert* v. *Stavert*,[1] the Lord President (Inglis) said: "I do not think that, if an Englishman or a foreigner shall acquire a domicil in Scotland sufficient in character to found jurisdiction in a consistorial cause, it is a ground of objection to that domicil or to the jurisdiction of this Court, that the husband has come to Scotland with this view among others—namely, to subject himself to the jurisdiction of this Court, or even that that is his main or only object, provided that it is proved that there is a complete and sufficient change of domicil and acquisition of one in this country. The domicil must not in any way be fictitious; it must be real, and must be acquired *animo et facto*."[2] In a more recent case, Lord Fraser, Ordinary, used language equally broad: "The motive of the pursuer in coming to Scotland is, in my opinion, totally irrelevant. The husband is the master of the situation. He can determine the domicil of the spouses, and according to that domicil the rights of the spouses must be settled."[3]

And in *Carswell* v. *Carswell*,[4] the husband obtained a divorce from his wife on the ground of her desertion, although he admitted that one of his main motives in coming to this country was to obtain a divorce which he could not get by the law of Canada.

Jurisdiction cannot be founded by Consent.—It is clear that where the Court has no jurisdiction over the parties, it would be an invasion of the rights of the country in which they were domiciled, to claim to alter their status on the ground that the parties were not opposed to this course. The doctrine of jurisdiction as dependent upon domicil is based on the theory that each community is entitled to determine the

[1] 1882, 9 R. 519.
[2] *Ibid.*, at p. 527.
[3] *Steel* v. *S.*, 1888, 15 R., at p. 904.
[4] 1881, 8 R. 901; *cf. Stavert* v. *S.*, 1882, 9 R. 519, where it was found the change of domicil had not been effected.

status of its members. This right residing in the state cannot be waived by the agreement of the parties.[1]

But where the husband appeared by counsel, without lodging defences, and stated no objection to the jurisdiction, it was held in one case that it was not *pars judicis* to inquire strictly into the question of domicil.[2] This was a case where the married life was in Scotland, and there was no clear indication that the husband's domicil was in another country, though the facts proved rather seemed to point to that conclusion. But such a case seems open to the observation that the divorce is liable to be treated as invalid if ever questioned in the country in which on fuller inquiry the husband might be found to have been domiciled at its date.[3]

Jurisdiction over Co-Defender.—The question of jurisdiction against a co-defender is not regarded as one primarily affecting his status. Jurisdiction will, accordingly, be sustained against him on any ground which would make him liable to be sued in Scotland for a personal debt. But the Conjugal Rights Act (24 & 25 Vict.), § 7, has not extended the jurisdiction of the Court against a man who would not have been subject to it in an ordinary personal action. In a case where the co-defender was domiciled in England, jurisdiction was sustained against him on the ground that he was tenant of shootings and a shooting-lodge in Scotland.[4]

Recognition of Foreign Divorces.—Every country has, in virtue of its independence, the power to exercise such jurisdiction to grant divorce as shall seem to it to be fitting. It may claim to dissolve the marriages of persons domiciled in another country, but long resident within its jurisdiction, and may even go so far as to divorce spouses who are merely casual visitors. Whatever rule upon the matter it may adopt, its decrees are valid within the territory. But every independent country in

[1] *Ringer* v. *Churchill*, 1840, 2 D. 307; *see per* L. Deas in *Jack* v. *J.*, 1862, 24 D., at p. 472; *per* Lords Neaves and Mackenzie, *ibid.*, p. 474; *per* Brett, L.J., in *Niboyet* v. *N.*, 1878, 4 P.D., at p. 12; Bishop, Ed. 1891, ii. 56, 187.

[2] *Watts* v. *W.*, 1885, 12 R. 894; *cf. Bond* v. *B.*, 1860, 2 S. and T. 93; and *Callwell* v. *C.*, 1860, 3 S. and T. 259.

[3] *See* note to 8th Ed. of Story, p. 308, for a similar case in America.

[4] *Fraser* v. *F.*, and *Hibbert*, 1870, 8 M. 400; *see Grange* v. *G.*, and *Arendt* [1892], P. 245.

which the validity of the divorce is called in question, is entitled to admit or reject it according as it appears to have been granted upon a sound application of the rules of private international law or the reverse. In the words of Lord Westbury: "The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the judge who pronounced it. It may *there* fix the legal status of persons, and conclude the right and title to property; but it may still not be such a sentence as by the comity of nations (that is by the general principles of jurisprudence which are recognised by the Christian States of Europe) has an extra-territorial effect and authority."[1]

Divergent views with respect to the sound basis of jurisdiction led at one time to very unfortunate conflicts between the Courts of England and Scotland. A substantial agreement has, however, been arrived at. The Scottish Courts no longer claim to exercise jurisdiction based on forty days' domicil of the husband in Scotland, with personal citation of the wife there, or adultery committed in Scotland; and, on the other hand, the doctrine that a marriage solemnised in England is indissoluble even by the Courts of the country in which the parties are domiciled is now exploded.

In *Stavert* v. *Stavert*, Lord Shand said: "In sustaining the jurisdiction of the Courts of this country, it is clearly desirable that we should proceed only on principles which would command the assent of the Courts of other countries, else results might arise most disastrous to the parties."[2]

And it would appear to be clear that, whatever standard of jurisdiction should be adopted in this country, the same standard ought to be applied in determining the validity of a foreign divorce. If the fact that Scotland is the "matrimonial home," in the sense explained above, is to be regarded as a sound basis of jurisdiction here, it could hardly be logically maintained that a foreign divorce was invalid because the husband had not a domicil for succession within the foreign territory.[3] At present it rather seems that there is some

[1] *Shaw* v. *Gould*, 1868, 3 E. and I. App., at p. 81, *ibid.*, *per* L. Cranworth, at p. 98.

[2] 1882, 9 R., at p. 534.

[3] *See per* L. Chelmsford in *Shaw* v. *Gould*, 1868, 3 E. and I. App., at p. 76; and *per* L. Colonsay, *ibid.*, at p. 96.

inconsistency in this regard in England. Mr. Westlake, while accepting the rule laid down in *Niboyet* v. *Niboyet*, limits the recognition of foreign divorces to those pronounced by the Court of the domicil of the parties.[1]

In one case, a husband who had already obtained a divorce in Scotland, brought a petition for dissolution in England. It appeared that the matrimonial cohabitation had been principally in Scotland, but it was found that the husband had not lost his English domicil of origin. In giving the judgment of the Full Court, it was said, "If a valid divorce has already been had by the proceedings in Scotland, it would be idle and unfounded to come to the Court for a further remedy; but without going into the question of the effect of the divorce in Scotland, in respect of the second marriage there contracted, and the children of that marriage, sitting here as an English Matrimonial Court we cannot recognise that divorce as putting an end to the marriage bond of a domiciled Englishman."[2]

But this case was prior to *Niboyet*, and was practically undefended, the husband simply requiring the English judgment *ob majorem cautelam*.

A Divorce pronounced by the Courts of the Parties' Domicil, and possibly by those of their matrimonial home will be valid in Scotland.—The Court will recognise the validity of a decree of divorce pronounced by a competent foreign tribunal, if the husband was at the time domiciled in the country where such tribunal had jurisdiction, and the decree is not impeached by any species of collusion or fraud.[3] There has never been any doubt of the soundness of this doctrine in Scotland, although it is somewhat singular that the point appears never to have arisen. But as the Scottish Courts are in the constant practice of divorcing spouses whose domicil at the time of the marriage was in another territory, they would be bound to admit the equal right of a foreign tribunal to grant a divorce at the instance of a husband

[1] 3rd Ed., p. 83; and *see per* L. Penzance in *Manning* v. *M.*, 1871, L.R. 2 P. and D., at p. 226.

[2] *Tollemache* v. *T.*, 1859, 1 S. and T. 557; but *see Shaw* v. *Gould*, 1868, L.R. 3 E. and I. App. 55.

[3] *Harvey* v. *Farnie*, 1882, 8 App. Ca. 43. As to divorce for a cause not admitted in Scotland, *see infra*, p. 442.

formerly domiciled in Scotland, who had at the date of the action acquired a domicil within the foreign jurisdiction. And applying this converse rule it would seem that the validity of the foreign divorce would be admitted although granted for a cause upon which a decree of divorce cannot be grounded in Scotland.[1] In England the opinion was at one time entertained that an "English marriage" was in its nature indissoluble and could not be severed by any foreign decree. This notion was supported by the fact that the English Courts had not, until 1857, any jurisdiction to pronounce a divorce *a vinculo*. As the complete dissolution of the marriage tie was only possible by the direct action of the legislature, it was thought that no Foreign Court could claim a power which was not possessed by the English tribunals themselves.

The opinion was also regarded with favour by those who accepted the sacramental theory of marriage, and it is on similar grounds that the Austrian Courts still decline to recognise the divorce of an Austrian Catholic even when he has embraced Protestantism and become domiciled in a Protestant State.[2] The doctrine was thought to be supported by *Lolley's* case,[3] and by the opinion of Lord Brougham in *M'Carthy* v. *Decaix*.[4] The latter was not a matrimonial question, but it was there necessary, in an action concerning a wife's property, to consider whether a Danish divorce was valid in England. The husband was a Dane, and had married an Englishwoman in England. The matrimonial cohabitation was throughout in Denmark, and a divorce was pronounced by the Danish Court. Lord Brougham conceived himself bound by *Lolley's* case to hold that the Danish divorce could have no effect in England. His Lordship said, "If it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established."[5] But it has since been laid down by the House of Lords that this was a complete misapprehension of *Lolley's* case. There the domicil of the parties was English throughout, and the husband came to Scotland temporarily, and merely for the

[1] *See Carswell* v. *C.*, 1881, 8 R. 901.

[2] *See* Gillespie's Bar, p. 404.

[3] 1812, Russ and Ry. 237.

[4] 1831, 2 Russ and My. 614.

[5] *Ibid.*, p. 619.

purpose of obtaining a divorce. It was decided in *Harvey* v. *Farnie*[1] that the fact of England being the *locus contractus* did not render the marriage indissoluble, and that it might be dissolved in Scotland for a cause which would not have been sufficient to obtain a divorce in England.

In *Harvey* v. *Farnie* the husband's domicil was Scottish throughout, and it had been long settled that whatever the English doctrine of indissolubility might be, the solemnisation in England did not prevent a divorce in Scotland, which in that country at least would be valid.[2] But the reasoning of the learned Lords seems to imply that the result would have been the same if the domicil had been originally English, but had become Scottish at the date of action. This doctrine is expressed by Lord Westbury in an earlier case. "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's* case."[3]

A Divorce will not be recognised which is granted by the Courts of a Country in which the Husband was never Domiciled.—The Court is entitled to disregard the divorce if it appears that the husband's domicil was not within the territory.[4]

In some of the American States it appears to be the law that a wife, whose husband has deserted her, or been guilty of conduct which justifies her in living apart, may acquire a separate domicil for divorce, and may raise an action against the husband in the Court of the country in which she has

[1] 5 P.D. 153; aff. 6 P.D. 35; aff. 1882, 8 App. Ca. 43.

[2] *Warrender* v. *W.*, 1835, 2 S. and M'L. 154.

[3] *Shaw* v. *Gould*, 1868, 3 E. and I. App., at p. 85; and *see Turner* v. *Thompson*, 1888, 13 P.D. 37; and *Scott* v. *Att.-Gen.*, 1886, 11 P.D. 128, in which the validity of foreign divorces was recognised.

[4] *Briggs* v. *B.*, 1880, 5 P.D. 163; *Shaw* v. *Att.-Gen.*, 1870, L.R. 2 P. and D. 156.

acquired a separate domicil.[1] But a divorce so obtained will not be recognised in this country.[2]

In a recent case in England a husband raised an action for divorce on the ground of his wife's adultery, and obtained a decree nisi, although the marriage had been previously dissolved in America at the instance of the wife. The husband, a domiciled Englishman, had married an American lady, and lived with her a few months in London. She returned to the United States, and refused to resume cohabitation. Subsequently she brought a suit for divorce in Pennsylvania on the ground of cruelty, claiming that having been resident twelve months within the jurisdiction, she had recovered her American domicil, and was entitled to relief in terms of an Act of Pennsylvania. The husband, acting under advice, did not appear, and decree of divorce was pronounced.

The lady afterwards married again, thereupon the English husband raised an action of divorce in England, on the ground that her second marriage was adulterous, the American divorce not being valid.

This view was sustained by Gorell Barnes, J., who remarked that there was no English case in which it had been decided that a man could be divorced from his wife by the law of a country in which he had never been resident or domiciled.[3]

This case is in accordance with the principle of *Redding* v. *Redding*, decided by Lord M'Laren, 15 R. 1102. There, in similar circumstances, the Scottish Court found it had no jurisdiction. It would not, therefore, recognise as valid a divorce pronounced on these facts by a foreign Court.

A Divorce obtained by Collusion or by Fraud on the Foreign Court is Invalid, and possibly it may be a sufficient ground for so treating it, that due Notice was not given to the Defender.—Where the parties go by concerted agreement to a foreign country, without acquiring a domicil there, and obtain a divorce, the Courts of their domicil will regard the divorce so obtained as of no effect.[4]

[1] Bishop, Ed. 1891, ii. 116.

[2] *Shaw* v. *Att.-Gen.*, 1870, L.R. 2 P. and D. 156.

[3] *Green* v. *G.* (1893), P. 89.

[4] *Shaw* v. *Gould*, 1868, L.R. 3 E. and I. App. 55; *see per* L. Westbury, at p. 82; *Dolphin* v. *Robins*, 1859, 7 H.L.C. 390; *see per* L. Kingsdown, at p. 422.

In a recent case, where the co-defender took an office in Glasgow for the husband (the pursuer) and paid all his expenses, it was proved that the fact that the husband was not domiciled in Scotland had been carefully concealed from the Scottish Court, and that the parties had acted throughout collusively. In a petition in England to declare the marriage of the co-defender with the divorced wife null, it was held that the divorce in Scotland must be treated as invalid, the Court having no jurisdiction, and the divorce having been obtained by collusion.[1]

In *Shaw* v. *Attorney-General*,[2] the judgment was based partly on the ground that the defender received no notice "except an advertisement which he never saw, and was never likely to see." It was observed: "A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte*, and take place in the absence of the party affected by them." It must be observed that in the cases which have occurred a sufficient ground for the invalidity has always existed in the want of jurisdiction, apart from the question of fraud or irregularity.

Is the Divorce Invalid because the Husband acquired the Foreign Domicil to obtain a Divorce, or because it was granted for a cause not recognised by our law?—Applying the principle of reciprocity, it would seem that the Scottish Court would not regard a foreign divorce as invalid on either of these grounds.[3] Lord Fraser says: "The Scottish Courts will not recognise as valid the decree of divorce of a foreign Court unless the ground of divorce be adultery or desertion."[4] But it can hardly be doubted that the divorce of persons never domiciled in Scotland must be valid or invalid by the law of their domicil. In *Birt* v. *Boutinez*,[5] upon which Lord Fraser relies, a domiciled Belgian married an Englishwoman at Gretna Green. The parties lived in Belgium, where they went through a second ceremony of marriage. This marriage was dissolved by a

[1] *Bonaparte* v. *B.* [1892], P. 402.

[2] 1870, L.R. 2 P. and D. 156; *Briggs* v. *B.*, 1880, 5 P.D. 163; *cf. Colliss* v. *Hector*, 1875, L.R. 19 Eq. 334, where the question was as to the effect on marriage settlements of a divorce so obtained; and *see* Gillespie's Bar, p. 400; Dicey, p. 239.

[3] *Carswell* v. *C.*, 1881, 8 R. 901; *Stavert* v. *S.*, 1882, 9 R., *per* Inglis, L.P., at 527; *Steel* v. *S.*, 1888, 15 R., *per* L. Fraser, at p. 904.

[4] ii. 1331; and see Ferg. Reports, pp. 137 and 156.

[5] 1868, L.R. 1 P. and D. 487.

competent Court in Belgium by the mutual consent of the parties, nothing being said of the Scotch marriage.

Lord Penzance held it was not dissolved, and remarked: "Whether, if it had been brought forward, and application made to dissolve it by mutual consent, the Belgium tribunal would have held itself competent to that act, this Court has no means of knowing. Had such a divorce been pronounced, it would have been necessary to consider how far the law of this country would adopt and act upon the dissolution of a valid Scotch marriage by a foreign Court; and that upon a ground unknown to the law of this country, the mutual consent of the parties."

It seems clear, after *Harvey* v. *Farnie*,[1] that a Belgian divorce of the Scotch marriage upon any ground recognised by Belgian law, would have been good, and entitled to extra-territorial recognition. The marriage, though contracted in Scotland, was not a "Scotch marriage," except in the sense that Scotland was the place of celebration. It was a Belgian marriage, and subject to dissolution by Belgian law. The case would have been identical with *M'Carthy* v. *Decaix*, which was overruled in *Harvey* v. *Farnie*.

It is, notwithstanding, doubtful whether the divorce would be valid if the husband, domiciled in Scotland at the marriage, had afterwards acquired a domicil in a country where marriage was dissoluble at the instance of the husband, without the commission of any grave matrimonial offence on the part of the wife. In the case of a domicil being acquired in an Oriental country in which the husband has the right of putting away his wife without fault on her part, it would seem that such a divorce would not be regarded in this country as effectual on the ground that the wife had entered into a "Christian marriage," which could not be converted at the will of the husband into a status essentially different.[2] There would be more difficulty where the change of domicil was to a European country or an American State in which divorce can be obtained on the ground of incompatibility of temper. In *Jack* v. *Jack* Lord Deas observed: "I do not look upon the rule, that the wife follows the domicile of her husband, as so absolute that there can be no exception to it, however palpably the husband may be attempting to turn the rule to the purposes of injustice."[3]

[1] 1882, 8 App. Ca. 43. [2] *See* next section. [3] 24 D., at p. 472.

In *Pitt* v. *Pitt* the contention was that the husband, who had come to Scotland without his wife, and lived there apart from her, had acquired a Scottish domicil, and Lord Westbury, C., observed: "If it had been necessary, which I trust it will not be, to arrive at a different conclusion as to the fact of his domicil (*i.e.*, to find it was in Scotland), I should still have had the greatest possible difficulty in holding that the domicil of the husband was, in a case of this kind, to be regarded in law as the domicil of the wife, by construction or by attraction, so as to compel the wife to follow the husband, and to become subject, for the purposes of divorce, to the jurisdiction of the tribunal, of any country in which the husband might choose, even for that purpose alone, to fix and to declare that he intended to acquire an absolute domicil."[1] His Lordship's doubt was, however, not shared by Lord Kingsdown.[2]

The exception is supported by *dicta* in *Ringer* v. *Churchill*. These *dicta* were, it must be remembered, spoken in a case where the question was whether the husband, by forty days' residence in Scotland, could make his wife amenable to the jurisdiction. But the remarks of Lord Mackenzie seem capable of application to a case where genuine domicil has been acquired: "It is laid down, indeed, by jurists, that the husband can settle and fix his proper domicil where he pleases, without regard to the effect which any change of it may produce in the *status* of his wife. But it would be going very far to hold that a husband, in virtue of this rule, may look round the world for the country where divorce is most easily, or most advantageously for himself, obtained against his wife, and then, by going there himself for a short time, compel her to defend herself against an action of divorce in the *forum* of that country, the effect of the judgment being to affect her *status* generally in all countries. If that be the rule, the maximum of facility of divorce existing in any country, must practically rule marriage in all countries, considering the facility of locomotion now existing."[3]

And Lord Medwyn said: "Would she be bound to go with him to Prussia, for example, if his view was, by a temporary residence there, to obtain a divorce from her for incompati-

[1] 4 Macq., at p. 640, where *see note*. *Ibid.*, at p. 647.

[3] 1840, 2 D., at p. 316.

bility of temper."[1] Even if we read, "by acquiring a permanent domicil there to obtain a divorce," it is by no means clear that the answer must be in the affirmative.

Similar doubts have been expressed by learned judges in England. In *Harvey* v. *Farnie*, James, L.J., said: "I am not, however, prepared to say that an English husband could, by going to a foreign country for the sole purpose of domiciling himself in a place where a marriage could be dissolved at pleasure, be enabled to obtain a valid and binding dissolution of his own marriage."[2]

Must the Divorce, in order to be recognised, be pronounced by the Courts of a Christian Country?—The rubric to the case of *Harvey* v. *Farnie*[3] limits the decision to the recognition of divorce pronounced by "Christian" tribunals. This limitation is not borne out by the opinions in the House of Lords, though it may be thought to be supported by *dicta* in the judgment of the Court of Appeal.[4] No more, however, is implied in these *dicta*, than that the decree must be by the Court of a country in which marriage is understood to mean a monogamous union. It can hardly be doubted that the validity of a divorce in a monogamous, but non-Christian country, would be admitted. In one case relating to marriage, Lord Brougham said: "But at anyrate, this is certain, that if the laws of one country, and its Courts, recognise and give effect to those of another, in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved."[5]

In the recent case of *Brinkley* v. *Attorney-General*,[6] it was held that a Japanese marriage was a "Christian marriage" in the sense in which that term had been used in previous cases, and it should follow that a Japanese divorce would be entitled to recognition.

[1] 1840, 2 D., at p. 323.

[2] 1880, 6 P.D., at p. 47; *ibid.*, *per* Cotton, L.J., at p. 49; and *see per* James, L.J., in *Niboyet* v. *N.*, 1878, 4 P.D., at p. 8; and *per* Hannen, J., in *Briggs* v. *B.*, 1880, 5 P.D., at p. 165. The point was not noticed in the opinions expressed in the House of Lords in *Harvey* v. *Farnie*, 8 App. Ca. 43.

[3] 8 App. Ca. 43.

[4] *See per* Cotton, L.J., 6 P.D., at p. 48, and *per* Lush, L.J., *ibid.*, at p. 53.

[5] *Warrender* v. *W.*, 1835, 2 S. and M'L., at p. 213.

[6] 1890, 15 P.D. 76.

Moreover, it seems clear that to any ext[illegible]o which recognition may be accorded by our Courts to marriages in polygamous countries, equivalent recognition must be given to divorces there obtained. In one case where an Englishwoman had married a domiciled Turk, the effect of a Turkish divorce upon settlements was disregarded by an English Vice-Chancellor. But this appears to have been on the ground that due notice had not been given to the wife or the persons interested under the settlements, and that they were thus deprived of the opportunity of appearing to defend.[1]

Actions of Separation and Actions of Adherence.—Judicial separation completely alters the relation of the spouses, by freeing the injured party from the [illegible]igation to fulfil the primary duty of conjugal adherence. Fraser is of opinion that jurisdiction might be sustained in such actions, on grounds less than would be necessary in the case of divorce.[2] But, with respect, it is thought that the same rule must apply. If jurisdiction is eventually sustained for divorce, on the ground of "matrimonial home," this will extend to actions for separation. If, on the other hand, domicil alone is to be taken as the test in the one case, no other criterion will be applied to the other.

It may be said that judicial separation does not, strictly speaking, involve a change of status. The parties remain married persons. But it is surely a question for the law of the domicil of the parties to say upon what grounds it will allow persons subject to its jurisdiction to occupy the position of husbands without wives, or wives without husbands. A position so unfortunate and so dangerous to the welfare of the community is one which should be under the control of that community of which the parties are members.[3]

In the old cases of *Gordon* v. *Pye*, and *Duntze* v. *Levett*,[4] the commissaries thought that they would have had jurisdiction to grant a separation but not a divorce *a vinculo*. But this was on the *ratio* that the parties being domiciled in England, where separation was permitted, but not divorce, the

[1] *Colliss* v. *Hector*, 1875, L.R. 19 Eq. 334.

[2] ii. 1294.

[3] But *see per* Cotton, L.J., *Niboyet* v. *N.*, 1878, 4 P.D., at p. 21.

[4] Ferg. Reports App., pp. 301, 320, 435, and text, pp. 111, 122, 220.

Scottish Court must apply the English law, and could give the injured party no higher remedy than was possible by the law of his domicil. But it is now completely settled that the nature of the remedy depends on the *lex fori*, and no Court can give itself jurisdiction by saying it will limit the remedy to one permitted by the competent tribunal.[1] For the principle that jurisdiction for divorce and for separation is co-extensive, there appears to be no direct Scottish authority. But no distinction is suggested in *Stavert* v. *Stavert*,[2] and in England and America the identity seems to be admitted.[3]

In *Niboyet*, Brett, L.J., said: "The same rule" (that without domicil the Court has no jurisdiction), "I confess seems to me to apply, for the same reason, to its power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies, therefore, as it seems to me, to suits for judicial separation, and to suits for the restitution of conjugal rights. I do not think it does apply to suits for a declaration of nullity of marriage, or in respect of jactitation of marriage."[4]

A Declarator of Nullity of Marriage, or a Putting to Silence.—An action of this nature stands in a different position. If the woman is the pursuer, she is denying the fact upon which her domicil would depend. She cannot, therefore, be bound to sue in the domicil of the man, which may or may not be her domicil according as the marriage is found valid or invalid. Such an action, therefore, can be competently raised by the pursuer in his or her own domicil if the defender is resident within the jurisdiction.[5] But if the woman who seeks for declarator of nullity have already taken up her residence and cohabited with the man in his domicil on the faith of what she believed to be a valid marriage, she has acquired his domicil and may sue in its Courts.[6] And if she is defender and main-

[1] *See per* L. Brougham in *Warrender* v. *W.*, 1835, 2 S. and M'L., at p. 203.

[2] 1882, 9 R. 519.

[3] *Manning* v. *M.*, 1871, L.R. 2 P. and D. 223; *Niboyet* v. *N.*, 1878, 4 P.D., *per* Brett, L.J., at p. 19; *Firebrace* v. *F.*, 1878, 4 P.D. 63 (a suit for restitution of conjugal rights), Westlake, p. 81; Bishop, Ed. 1891, ii. 69.

[4] 4 P.D., at p. 19. But *see per* Cotton, L.J., *ibid.*, at p. 21.

[5] *See Niboyet* v. *N.*, 1878, 4 P.D., *per* Brett, L.J., at p. 19, *per* James, L.J., *ibid.*, p. 9; Westlake, p. 82.

[6] *See Turner* v. *Thompson*, 1888, 13 P.D. 37; Gillespie's Bar, p. 175.

tains the validity of the marriage, she cannot plead she was improperly cited, if the citation was at the husband's domicil.[1]

Aliment.—An action by a wife concluding for aliment only, does not involve questions of status unless the marriage is denied. But the decree will be limited to "so long as the defender shall refuse to receive and entertain the pursuer."[2] It would appear that the Court has jurisdiction where the marriage is admitted, or the woman has *ex prima facie* the status of wife, although the husband is not domiciled in Scotland.[3] But care would be taken to ensure that the relief so granted was only of a temporary character, and until the right of the wife to live separate could be determined by the Court of the husband's domicil.

In an American case where a foreign wife raised such an action, the Court refused to entertain jurisdiction, and it was observed that alimony "is an incident of the marriage, and is a right entirely depending upon the status of the parties, and each state has the right to determine the status and condition of those who are domiciled within its limits. The Courts of this state have, therefore, no jurisdiction to pass upon, and determine the relative duties of husband and wife, both of whom are residents of another state."[4] But this was a case in which the parties were not even resident within the territory, and the wife pleaded that jurisdiction existed merely because the husband had property within the state.[5]

It is thought a different result would be reached in a case where the parties were resident but not domiciled in the territory, and that, subject to the limitation suggested above, the jurisdiction would be sustained. The principle would, in fact, be the same as that upon which the sheriff, although having no jurisdiction in matters of status, may award interim aliment until the rights of parties can be ascertained by the Court, which possesses universal jurisdiction.[6]

[1] *Chichester* v. *Donegal*, 1822, 1 Add., at p. 19.

[2] *Williamson* v. *W.*, 1860, 22 D. 599. *See* Mackay's Manual, p. 494.

[3] Fr. ii. 1295, *see per* L. Mackenzie in *Ringer* v. *Churchill*, 1840, 2 D., at p. 316.

[4] *Keerl* v. *K.*, 34 Md. 21, cited by Bishop, Ed. 1891, ii. 71; and *see* Story, 8th Ed., 230, *a*, *note*.

[5] This fact appears from the note to Story.

[6] *See M'Donald* v. *M'D.*, 1875, 2 R. 705; and *cf.* Bishop, ii. 71, and Bar 380 and 381.

APPENDIX.

APPENDIX.

APPENDIX I.—SELECTED STYLES OF SUMMONSES AND ISSUES.

1. Procedure before Sheriff to obtain Warrant to Register an Irregular Marriage *under* 19 & 20 *Vict. Cap.* 96, § 2.

In the Sheriff Court of The Lothians and Peebles, at Edinburgh,
John Brown (*design*), and Mary Smith or Brown.

The above-named petitioners submit to the Court the condescendence and note of plea in law hereto annexed, and pray the Court, on considering the petition and the proof to be adduced in support thereof, in terms of the second section of the Act 19 & 20 Victoria, c. 96, to certify that the petitioners have been married to one another, and that both petitioners had resided in Scotland for twenty-one days immediately preceding the date of the marriage (*or one of them had so resided for twenty-one days, or had his or her usual residence in Scotland, as the case may be*), and also to grant warrant to the registrar of the district of St. Andrew, in the burgh of Edinburgh, to enter such marriage in his registers for the present year, in terms of the Act 17 & 18 Victoria, c. 80.

The Proof consists of a declaration signed by the parties and by two witnesses, in this form, and of evidence in support of it:—

We, John Brown and Mary Brown (*design*), hereby declare that we this day, within Number 10 York Buildings, Edinburgh, in the registration district of St. Andrew, in the burgh of Edinburgh, accepted, as we do hereby accept, of each other as husband and wife, and declare ourselves to be married persons. In witness thereof, this declaration is subscribed by us, at Edinburgh, the day of , before these witnesses (*names and designations of two witnesses*).

The two witnesses appear before the sheriff with the parties, and depone that they were present at the declaration, and are aware that the parties (*or one of them, as above*) have been more than twenty-one days in Scotland.

Their depositions are signed by them, and by the sheriff, whose decree is a warrant to the registrar.

2. Declarator of Marriage *at instance of the Woman.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, C. L. or M., wife of A. M (*design him*), *Pursuer;* against the said A. M., her husband, *Defender;*—in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE the Lords of our Council and Session OUGHT and SHOULD FIND facts, circumstances, and qualifications proven relevant to infer marriage between the pursuer and the defender, and FIND them married persons accordingly: AND therefore ORDAIN the defender to adhere to the pursuer as his lawful wife, her society, fellowship, and company, and to treat, cherish, and entertain her at bed and board, and to perform the other conjugal duties as becometh a husband to his wife, and to cohabit with the pursuer, and nowise leave or desert her company in time coming: AND our said Lords OUGHT and SHOULD DECERN and ORDAIN the defender to make payment to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

Conclusions when necessary :—

(*a.*) *For Aliment.*

AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling yearly, for aliment, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, half-yearly in advance, beginning the first term's payment of said sum of aliment, as at the term of Whitsunday last, 18 , for the half-year immediately following, and so forth half-yearly thereafter during the joint lives of the pursuer and defender, or until the said parties adhere to each other, with interest at five per centum per annum, on each half-year's aliment, from the term of payment until payment. (*When more desirable, conclude for quarterly, monthly, or weekly payments.*)

(*b.*) *Alternative conclusion for Damages*—(1) *for Breach of Promise of Marriage, and* (2) *for Seduction.*

But if it shall be found that the pursuer is not married to the defender, then, and in that case, the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, in name of damages and solatium, on account of the defender having refused to implement and fulfil a promise of marriage made by the defender to the pursuer: and the further sum of £ , on account of the defender having seduced the pursuer.

3. Summons of Adherence and Aliment
at instance of the Wife.

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., wife of B., pursuer; against the said B., defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED ~~by decree of the Lords of our Council and Session~~ that, the pursuer, being the lawful wife of the defender, the defender is bound to adhere to the pursuer, and to cohabit with her and to treat and entertain her at bed and board, as becomes a husband to do to his wife: THEREFORE, the defender OUGHT and SHOULD be DECERNED and ORDAINED, ~~by decree foresaid~~, to adhere to the pursuer, his wife, and to cohabit with her, and to treat and entertain her at bed and board, as a husband should do to his wife, and that during their joint lives.

Conclusion for aliment as in 2 (*a*).

4. Summons of Declarator of Freedom and Putting to Silence, *and for Damages.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., pursuer; against B., defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by decree of the Lords of our Council and Session, that the pursuer is a free unmarried person, and that the defender has falsely and calumniously given out and alleged to various persons that she (*or* he) is married to the pursuer: AND it OUGHT and SHOULD be FARTHER FOUND and DECLARED, by decree foresaid, that the pursuer is free of any marriage with the defender, and that the defender ought to be put to perpetual silence thereanent in all time coming: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling in name of damages and solatium: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ , or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

5. Summons of Declarator of Nullity of Marriage
on the ground of Previous Marriage of the Defender.

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., pursuer; against B., defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by decree of the Lords

of our Council and Session, that at the time when a pretended marriage was entered into between the pursuer and the defender, the defender was married, and still is, to C., residing at : AND it OUGHT and SHOULD be FARTHER FOUND and DECLARED, by decree of our said Lords, that a pretended marriage entered into betwixt the pursuer and the defender, on or about the day of , was from the beginning, is now, and in all time coming shall be, null and void, and of no avail, force, strength, or effect: AND that the pursuer is free to marry any free person: AND FURTHER, the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to restore and deliver back to the pursuer ALL and SUNDRY lands and heritages, sums of money, goods, gear, and others whatsoever which he (*or* she) received from the pursuer on occasion of, or by or through said marriage: FURTHER, the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ in name of damages and solatium: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

6. Summons of Declarator of Nullity of Marriage *at the instance of the Woman against the Man on the ground of Impotency.*

Same form as 5, except that the conclusion for damages will be omitted, and the declaratory conclusion will be: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by decree of the Lords of our Council and Session, that the defender was at the time when the pretended marriage between him and the pursuer was entered into, and still is, impotent and unable to consummate marriage by carnal copulation.

7. Summons of Aliment *to Wife and Children.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., wife of B., pursuer; against the said B., defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, it OUGHT and SHOULD be FOUND and DECLARED, by decree of the Lords of our Council and Session, that though the defender, as the husband of the pursuer, is bound to adhere to her, and receive and entertain her as his wife, he has in place thereof deserted her (*or*, has turned her out of his house and refuses to receive and entertain her as aforesaid): AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ yearly, for aliment to herself so long as the defender shall refuse to receive and entertain the pursuer,

and of the sum of £ yearly, for aliment to each of C., D., and E., the children of the marriage between the pursuer and defender, so long as they shall be unable to earn a livelihood and the defender shall refuse to receive and support them and they shall reside with and be supported by the pursuer, payable the said several sums of aliment at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment as at the term of last, for the half-year immediately following, and so forth half-yearly thereafter during the foresaid periods, so far as regards the aliment of the pursuer and of her said children respectively, with interest, at the rate of five per centum per annum, on each half-year's aliment, from the term of payment until payment: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

8. Summons of Separation and Aliment *at instance of Wife, and for Custody of Children.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., wife of B., pursuer; against the said B., her husband, defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, the Lords of our Council and Session OUGHT and SHOULD find it proven that the defender has been guilty of cruelly maltreating the pursuer, his wife (*or* that the defender has been guilty of adultery, *as in next style*): AND THEREFORE FIND that the pursuer has full liberty and freedom to live separate from the defender, her husband: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, ~~by decree of our said Lords~~, to separate himself from the pursuer, *a mensa et thoro*, in all time coming: AND the pursuer OUGHT and SHOULD be FOUND entitled to the custody and keeping of C., D., and E., the children of the marriage between the pursuer and defender: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, ~~by decree foresaid~~, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, yearly, for aliment to herself, and of the sum of £ yearly, for aliment to each of her said children, payable ~~at two terms in the year, Whitsunday and Martinmas, by~~ equal portions, ~~beginning the first term's payment of said several sums of aliment as at the term of last for the half-year immediately following, and so forth half-yearly thereafter~~, during the joint lives of the pursuer and defender, so far as regards the pursuer's aliment, and as regards the aliment for each of their said children, so long as they shall be unable to earn a livelihood and shall remain in the custody of the pursuer, with interest, at the rate of five per centum per annum, on each ~~half-year's~~ aliment from the term of payment until payment: AND the defender OUGHT and SHOULD be INTERDICTED, PROHIBITED, and

DISCHARGED from interfering in any way with his said children, or any of them, or the pursuer as the custodier of them: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, ~~or such other sum as our said Lords shall modify~~, as the expenses of the process to follow hereon, ~~conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.~~

9. Summons of Divorce *for Adultery, at instance of Wife, with Conclusions for Custody of and Aliment for the Children.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., wife of B., pursuer; against the said B., defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE, the Lords of our Council and Session OUGHT and SHOULD FIND facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with C. (*design her*), (or with a woman, whose name and address are unknown to the pursuer), and therefore FIND him guilty of adultery with her, accordingly: AND our said Lords OUGHT and SHOULD DIVORCE and SEPARATE the defender from the pursuer, and from her society, fellowship, and company, and FIND and DECLARE the defender to have forfeited all the rights and privileges of a lawful husband, and that the pursuer is entitled to live single, or to marry any free man, as if she had never been married to the defender, or as if he were naturally dead.

Conclusions for custody and aliment to children as in 8, *omitting aliment to wife.*

Note.—When aliment for children is concluded for, their names and ages must be condescended on.

10. Summons of Divorce for Adultery *at instance of Husband.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A. B. (*design him*), pursuer; against Mrs. E. C. or B., his wife, defender, in terms of the condescendence and note of plea in law hereunto annexed: THEREFORE the Lords of our Council and Session OUGHT and SHOULD FIND facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with X. Y. (*design him*), (*or with a person or persons whose names, occupations, and places of residence are unknown to the pursuer*), and therefore FIND her guilty of adultery with him (*or them*) accordingly: AND our said Lords OUGHT and SHOULD DIVORCE and SEPARATE the defender from the pursuer, and from his society, fellowship, and company, and FIND and DECLARE the defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to live single, or marry any free woman, as if he had never been married to

the defender, or as if she were naturally dead: conform to the laws and daily practice of Scotland, used and observed in like cases as is alleged: OUR WILL IS HEREFORE, &c.

Conclusions when necessary:—

(*a.*) *For Damages against the Co-defender when named.*

AND the said X. Y. OUGHT and SHOULD be DECERNED and ORDAINED, by decree of our said Lords, to make payment to the pursuer of £ , in name of damages and solatium.

(*b.*) *For expenses against Wife and Co-defender conjunctly and severally, when the Wife has Separate Estate, and the Co-defender is named.*

AND the said X. Y., and the said E. C. or B., OUGHT and SHOULD be DECERNED and ORDAINED, conjunctly and severally, to make payment to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

(*c.*) *For Aliment to Children, when the Wife has, or is likely to have, Separate Estate.*

As in 8 (omitting words relating to aliment for pursuer).

11. Summons of Divorce for Desertion *at instance of Wife, when Husband's Address is known.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, Mrs. A. B. or C., residing at , wife of H. C., residing at , pursuer; against the said H. C., her husband, defender, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE it OUGHT and SHOULD be FOUND and DECLARED, by decree of our said Lords, that the defender has, without reasonable cause, obstinately and continuously withdrawn himself from the pursuer his wife, and her society, fellowship, and company, and has wilfully and maliciously persisted in his desertion of her for a period of more than four years: AND the said defender OUGHT and SHOULD, by sentence and decreet of our said Lords, be DIVORCED and SEPARATED from the pursuer in all time coming: AND it OUGHT and SHOULD be FOUND and DECLARED that the pursuer is loosed, acquitted, and freed of the marriage contracted between the defender and her, and that he has forfeited all the rights and privileges of a lawful husband, and that the pursuer is entitled to live single, or to marry any free man, in the same manner as if she had never been married to the defender, or as if he were naturally dead: AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree

foresaid, to make payment to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

Conclusions when necessary:—

(*a.*) *Alternative conclusion for Separation and Aliment, and, if required, Custody of Children and Aliment for them.*

As in 8.

12. Summons of Divorce for Desertion *at instance of Wife against Husband and Children and Next-of-Kin, the Husband being Abroad, and Address unknown.*

VICTORIA, &c.—WHEREAS it is humbly meant and shewn to us by our lovite, A., wife of B., now in the United States of America, or elsewhere furth of Scotland, and whose place of residence is unknown to the pursuer, pursuer; against the said B., defender, and also against C. and D., the children of the marriage between the pursuer and the defender, and E., the brother (*or as the case may be*), one of the next-of-kin of the defender, for any interest they may have, and who are here called under and in virtue of "The Conjugal Rights (Scotland) Amendment Act, 1861," section 10, in terms of the condescendence and note of pleas in law hereunto annexed: THEREFORE it OUGHT and SHOULD be FOUND and DECLARED, by decree of the Lords of our Council and Session, that the defender has been guilty of wilful and malicious non-adherence to, and desertion of, the pursuer for the space of four years: AND, THEREFORE, the defender OUGHT and SHOULD, by decree of our said Lords, be DIVORCED and SEPARATED from the pursuer in all time coming: AND it OUGHT and SHOULD be FOUND and DECLARED that the pursuer is loosed, acquitted, and freed of the marriage contracted betwixt the defender and her, and that it is lawful for her to marry any other free person whom she pleases, in the same manner as if she had never been married, or as if the defender were naturally dead; and also, that the defender has forfeited all the rights and privileges of a lawful husband, and lost and amitted all goods, gear, money, and others whatsoever which he received with or on account of the pursuer, or which were anyways contracted or agreed to be paid to the defender in respect of the said marriage, or whatever he had right to claim in virtue thereof (*a conclusion for custody of children may also be inserted here, if desired*): AND the defender OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, TO MAKE PAYMENT to the pursuer of the sum of £ sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland, used and observed in the like cases as is alleged: OUR WILL IS HEREFORE, &c.

13. Forms of Issues *in actions for Breach of Promise of Marriage and for Seduction.*

(1.) *Damages for Breach of Promise of Marriage.*

Whether, in or about the month of , 18 , the defender promised and engaged to marry the pursuer, and whether the defender wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer?

DAMAGES laid at £ .

(2.) *Damages for Seduction.*

Whether, for some time previous to the month of , 18 , the defender courted the pursuer, and professed intention to marry her (or, *if no specific promise of marriage is averred*, say professed honourable intentions towards her), and whether, by means of such courtship and professions, the defender, in or about the month of , 18 , seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage?

DAMAGES laid at £ .

N.B.—When damages are asked both for breach of promise and for seduction, and both the above forms of issue are used together, there should be a separate schedule of damages for each issue. See *Paton* v. *Brodie*, 20 D. 258.

(3.) *Damages for Seduction of Married Woman and Adultery.*

Whether, between the month of , 18 , and , 18 , the defender did seduce and commit adultery with A. B. or C., then the wife of the pursuer, in the house at (specify place) and did maintain an adulterous connection with her in said house (specify other places if any), to the loss, injury, and damage of the pursuer?

DAMAGES laid at £ .

Note.—I have not thought it necessary to print the statutes dealing with Registration. They are:—

(1.) 17 & 18 Vict. c. 80.
(2.) 18 Vict. c. 29.
(3.) 23 & 24 Vict. c. 85.
(4.) 41 & 42 Vict. c. 43.
(5.) 42 Vict. c. 8, § 2 (Army).

The marriage schedule now in use is the following:—

SCHEDULE OF MARRIAGE (C).

Pursuant to 17 & 18 VICTORIÆ, Cap. 80, Sec. XLVI., and 23 & 24 VICTORIÆ, Cap. 85, Sec. XV.

Note.—The Registrar-General has power to alter the Schedule. This is the form now in use.

(1) When, Where, and How Married.	(2) Signature of Parties. Rank or Profession, whether Single or Widowed, and Relationship (if any).	(3) Age.	(4) Usual Residence.	(5) Name, Surname, and Rank or Profession of Father. Name and Maiden Surname of Mother.	(6) If a Regular Marriage, Signature of officiating Minister and Witnesses. If Irregular, Date of Conviction, Decree of Declarator, or Sheriff's Warrant.	(7) When and Where Registered, and Signature of Registrar.
1892,	* *John Macdonald,*	*34*		*William Macdonald,*	* *George White.*	*1892,*
on the Twenty-first	*Writer to the Signet,*		*21 Moray*	*Advocate.*		*22nd December,*
day of December,	*Bachelor.*		*Place,*			
At St. George's Church,			*Edinburgh.*	*Jane Macdonald,*		*At Edinburgh.*
Charlotte Square, Edinburgh,				*M. S. Shaw.*		
After Banns	* *Mary Smith,*	*29*	*18 Ainslie*			
According to the Forms	*Spinster*		*Place,*	*Henry Smith,*	* *William Brown,*	*John Aitchison, jr.*
of the Church			*Edinburgh.*	*Chartered Accountant*	*Witness.*	*Assistant*
of Scotland.				*Mary Smith,*	* *Harriet Jackson,*	*Registrar.*
				M.S. Hay (deceased).	*Witness.*	

In all cases of regular marriage, upon production of certificate of proclamation of banns [or of publication of notice of marriage], a copy of Schedule (C) shall be procured by the contracting parties, previous to solemnisation of their marriage, *from the Registrar of the Parish (or District) within which it is intended to be solemnised*, and such Registrar is bound, as far as possible, to fill up the said Schedule. After all the requisite information, with the exception of the signatures, has been inserted, the Schedule shall be produced, on the solemnisation of the marriage, to the officiating Minister, or to the person solemnising any marriage according to the rites and forms observed by Jews and Quakers, or shall be filled up in the presence of such Minister or other person, and thereafter shall be signed—(1) by the married parties, (2) by the Minister or other person officiating, and also (3) by not less than two witnesses (male or female) present at the marriage. When so filled up, the Schedule shall be given to the married parties, who, WITHIN THREE DAYS THEREAFTER, shall either deliver it or send it by post to the Registrar of the Parish (or District) in which the marriage was solemnised; and in case of failure to do so, the husband, and failing the husband the wife, shall be liable to a **Penalty not exceeding Ten Pounds.** On being received by the Registrar, the contents of the Schedule shall forthwith be entered by him in the Registers; and all such Schedules shall be ultimately transmitted by the District Examiner, along with the duplicate registers, to the Registrar-General, for preservation in the General Registry Office.

APPENDIX II.—STATUTES.

No. I.

ACT ALLOWING DIVORCE FOR DESERTION, 1573. CAP. 55.

Anent thame that divertis fra vtheris being joynit of befoir in Lauchfull Mariage.

IT is fundin and declarit be our Souerane Lord my Lord Regentis grace, the thre Estatis, and haill bodie of this present Parliament, That in all times bypast sen the trew and Christiane religioun was publictlie preichit, awowit, and establischit within this realme, namelie sen the moneth of August the yeir of God ane thousand five hundreth threscoir yeiris, it hes bene, is, and in all tyme cuming salbe lauchfull, that quhatsumeuer persoun or persounis joynit in lauchfull matrimonie, husband or wife, divertis fra utheris companie without ane ressonabill caus alledgeit or deducit befoir ane judge, and remanis in thair malicious obstinacie be the space of four yeiris, and in the meane time refusis all preuie admonitiounis, the husband of the wife, or the wife of the husband, for dew adherence, that than the husband or the wife sall call and persew the obstinate persoun offendar befoir the Judge Ordinar for adherence; and in case na sufficient causis be alledgeit quhairfoir na adherence suld be bot that the sentence procedis aganis the offendar refusand to obey the samin, the husband or the wife sall mene thameselfis to the superiour magistrate, *videlicet*, the Lordis of Sessioun, and sall obtene letteris in the four formes conforme to the sentence of adherence; quhilk charge being cotempnit and therefoir being denuncit rebell and put to the horne. Than the husband or the wife to sute the spiritual jurisdictioun and power, and require the lauchfull archibischop, bischop, or superintendent of the countrie quhair the offendar remanis, to direct preuie admonitiounis, to the said offendar, admonisching him or hir as befoir for adherence: quhilkis admonitiounis gif he or scho contempteouslie disobeyis, that archibischop, bischop, or superintendent to direct charges to the minister of that parochin quhair the offendar remanis, or in case thair be nane, or that the minister will not execute to the minister of the nixt adiacent kirk thairto, quha sall proceid aganis the said offendar with publict admonitiounis, and gif they be contempnit to the sentence of excommunicatioun: quhilk anis being pronuncit, the malicious and obstinat defectioun of the partie offendar to be ane sufficient caus of diuorse, and the said partie offendar to tyne and lois thair tocher, *et donationes propter nuptias.*

No. II.

19 & 20 VICTORIÆ REGINÆ, CAP. 96.

An Act for amending the Law of Marriage in Scotland.

[29th July, 1856.]

WHEREAS it is expedient to amend the law touching Marriages in Scotland: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Declaring under what circumstances marriages solemnised in Scotland shall be valid.

1. After the thirty-first day of December One thousand eight hundred and fifty-six, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in *Scotland* for twenty-one days next preceding such marriage; any law, custom, or usage to the contrary notwithstanding.

Certificated copy of entry by sheriff-depute that parties were married, and that one of them lived in Scotland twenty-one days preceding such marriage, conclusive as to its validity.

2. If any persons who shall have contracted an irregular marriage in Scotland after the day and year aforesaid shall within three months thereafter present a joint application for a warrant to register such marriage to the sheriff or sheriff-substitute of the county where such marriage was contracted, and shall prove to his satisfaction that they have been married to one another, and that one of them had lived in Scotland for twenty-one days next preceding such marriage, or had his or her usual residence in Scotland at the date thereof, such sheriff or sheriff-substitute shall certify the same under his hand, and shall thereupon grant warrant to the registrar of the parish or burgh in which the marriage was contracted, who shall forthwith enter such marriage in the register of marriages kept by him, in terms of an Act of the seventeenth and eighteenth years of Her present Majesty, chapter eighty; and any certified copy of such entry, signed by such registrar, and which such registrar is hereby required and empowered to give, charging for the same the sum of five shillings, shall be received in evidence of such marriage, and of such residence or of such previous living twenty-one days in Scotland, in all Courts in the United Kingdom and dominions thereunto belonging.

No conviction for, nor registration of irregular marriage, without proof of previous residence.

3. It shall not be lawful, after the date aforesaid, to convict any parties of having irregularly contracted marriage, unless there shall be adduced to the justice or justices of the peace, magistrate or magistrates, before whom the complaint against such parties has been brought, sufficient proof, other than the acknowledgment of such parties, that one of them had at the date thereof his or her usual residence in Scotland, or had lived in Scotland for twenty-one days next preceding such marriage; nor shall it be lawful for any registrar

of births, deaths, and marriages in Scotland to register any marriage under the provisions of the said recited Act, on the production of an extract of a conviction for having irregularly contracted marriage, unless such conviction shall bear that such sufficient proof as aforesaid was so adduced.

No. III.

49 VICTORIÆ REGINÆ, CAP. 3.

An Act to remove Doubts as to the Validity of certain Marriages. [29th March, 1886.]

WHEREAS doubts have been entertained as to the validity of certain marriages solemnised in England, one of the parties to such marriages being resident in Scotland: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. No marriage solemnised, or to be hereafter solemnised, in any church in England, after publication of banns in such church, shall be, or be deemed to have been, invalid by reason only that one of the parties to such marriage was at the time of such publication resident in Scotland, and that banns may have been published or proclaimed in any church of the parish or place in which such party was resident, according to the law or custom prevailing in Scotland, and not in the manner required for the publication of banns in England.

2. This Act may be cited as the Marriages Validity Act, 1886.

No. IV.

24 & 25 VICTORIÆ REGINÆ, CAP. 86.

An Act to amend the Law regarding Conjugal Rights in Scotland. [6th August, 1861.]

WHEREAS it is expedient to amend the law of Scotland relating to Husband and Wife: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. A wife deserted by her husband may, at any time after such desertion, apply by petition to any Lord Ordinary of the Court of Session, or in the time of vacation to the Lord Ordinary on the Bills, for an order to protect property which she has acquired or may acquire

A wife deserted by her husband may apply for an order to protect property

which she has acquired or may acquire by her own industry, or which she may succeed to.

by her own industry after such desertion, and property which she has succeeded to or may succeed to or acquire right to after such desertion, against her husband or his creditors, or any person claiming in or through his right; and the Lord Ordinary shall appoint such petition to be intimated in the Minute-Book of the Court of Session, and to be served upon the husband; and the husband, or any creditor of the husband, or any other person claiming in or through his right, shall be entitled to lodge answers to the said petition, and if the husband be furth of Scotland, the petition shall be executed edictally against him on an inducia of twenty-one days; and upon considering such petition the Lord Ordinary shall require evidence of such desertion, and on being satisfied thereof pronounce an interlocutor giving to the wife protection of her property as aforesaid against the husband and all creditors or persons claiming under or through him; and if answers be lodged to the said petition, the Lord Ordinary may, on considering the same, and, if he consider it necessary, after hearing parties, allow a proof to them of their respective averments, which proof he shall take himself, and either write the evidence with his own hand, in which case it shall be read over to the witness by the judge, and signed by the witness, if he can write, or the Lord Ordinary shall record the evidence by dictating it to a clerk, in which case it shall, when taken down, be read over and signed as above; or the Lord Ordinary shall cause the evidence to be taken down and recorded by a writer, skilled in short-hand writing, in manner after-mentioned, and it shall be competent to the Lord Ordinary, in special cause shown, instead of taking such proof, to grant a commission to take said proof elsewhere than in Edinburgh, in which case he may pronounce an interlocutor setting forth such special cause, and granting commission to take such proof, and if satisfied after proof of the fact of such desertion, and that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid, and he shall appoint intimation of the said interlocutor having been pronounced to be made in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as the Lord Ordinary may appoint.

Husband or creditor may apply by petition for recal of order.

2. It shall be lawful for the husband, or any creditor or other person claiming in or through his right, if such creditor, husband, or other person have not lodged answers as aforesaid, to apply by petition to the Lord Ordinary by whom such order was made for the recal thereof; and the Lord Ordinary shall appoint such petition to be answered by the wife, and thereafter dispose of the application as he shall think just; but such recal shall not affect any right or interest onerously and *bona fide* acquired by any third party from the wife before said recal; and the Lord Ordinary shall direct that publication of his interlocutor be made in manner hereinbefore provided.

Interlocutors may be reviewed. How long order of protection to continue

3. All interlocutors of the said Lord Ordinary may be brought under review of either Division of the Court of Session, by lodging and boxing within twenty-one days after the pronouncing of such interlocutors, if in session; and if the said twenty-one days shall expire during vaca-

tion, by lodging in the Bill Chamber a reclaiming note and boxing the same at the first box day after the expiry of the said twenty-one days: Provided always, that, notwithstanding such reclaiming note, the interlocutor of the Lord Ordinary granting protection shall take effect when intimated as aforesaid, unless the Lord Ordinary, either at the time of the pronouncing thereof or within forty-eight hours thereafter, order that his interlocutor shall not take effect till the advising of the reclaiming note, or such other period as he may think fit; and such order of protection shall, where there has been appearance by the husband, continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion, and cohabits with his wife; and the Lord Ordinary may require him to find security for such period as may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and security found, if required, he shall recal the order of protection; but such recal shall not affect any right or interest acquired by the wife while the said order subsisted, which right and interest shall remain vested in her, exclusive of her husband's *jus mariti* and right of administration; nor shall it affect any right or interest acquired by a third party during such period, or any third party through or from her, while the said order subsisted; and until such order be recalled it shall not be competent for the husband to institute an action of adherence against his wife; and the Lord Ordinary shall direct that publication of its recal be made in manner hereinbefore provided.

operative. No action of adherence competent while order subsists.

4. After an interlocutor of protection is pronounced and duly intimated, the property of the wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such protection shall not extend to property acquired by the wife of which the husband or his assignee or disponee has before the date of presenting said petition obtained full and complete lawful possession, nor shall such protection affect the right of any creditor of the husband over property which he has before the date thereof duly attached by arrestment, followed by a decree of forthcoming, or which such creditor has before the said date duly poinded, and of which he has carried through and reported a sale.

After interlocutor of protection is pronounced, property of wife to belong to her as if unmarried.

5. If any such order of protection be made and intimated, it shall have the effect of a 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.

Order of protection to have effect of decree of separation.

6. After a decree of separation *a mensa et thoro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried,

In case of separation the property of the wife to belong to her, exclusively of the *jus mariti* and right of ad-

ministration; also for purposes of contract and suing.

and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband; and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation and during the subsistence thereof; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use.

In action of divorce adulterer to be co-defender.

7. In every action of divorce for adultery at the instance of the husband, it shall be competent to cite, either at the commencement or during the dependence thereof, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court in such action to decern against the person with whom the wife is proved to have committed adultery for the payment of whole or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client: Provided always, that it shall be competent to examine the person with whom the wife is said to have committed adultery as a witness in the cause, notwithstanding he is called as a co-defender in the action, and in the power of the Court, on cause shown, to dismiss such action as regards such co-defender, if in their opinion such a course is conducive to the justice of the case.

Lord Advocate may enter appearance in actions for nullity of marriage and divorce.

8. It shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and it shall be competent to him to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the Court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter appearance therein; and expenses shall not be claimable by or against the Lord Advocate with reference to such cases.

In action for separation Court may make interim orders with respect to children.

9. In any action for separation *a mensa et thoro* or for divorce the Court may from time to time make such interim orders, and may, in the final decree, make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates.

10. In every consistorial action the summons shall be served upon the defender personally, when he is not resident within Scotland: Provided always, that if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient; but in every case where the citation is edictal the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when the said children and next-of-kin are known, and resident within the United Kingdom, and such children and next-of-kin, whether cited or so resident or not, may appear and state defences to the action.[1]

In every consistorial action the summons to be served on defender personally when not within Scotland.

11. It shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere.

Not necessary to institute an action of adherence against defender prior to action for divorce.

12. The widow of any person who shall, after the passing of this Act, die infeft in property held by burgage tenure shall be entitled to terce therefrom; and the like proceedings as to service and kenning before the sheriff shall be competent in such a case as are competent with reference to property in respect of which terce might have been claimed prior to the passing of this Act.[2]

Terce claimable for burgage property.

13. The forty-first section of the Act of the first year of His late Majesty William the Fourth, chapter sixty-nine, in so far as it enacted that "it shall be lawful for His Majesty's Principal Secretary of State for the Home Department to appoint, from time to time, such number of persons, being sheriffs-depute of counties, as he shall think fit, to take proofs in consistorial causes, which duty the persons so appointed shall perform;" and the second section of the Act of the sixth and seventh years of His late Majesty William the Fourth, chapter forty-one, shall be and the same are hereby repealed; and in place thereof it is hereby enacted, That where proof in consistorial actions shall be allowed, a Diet of Proof shall be appointed, at which the evidence shall be led before the Lord Ordinary, and he shall take himself, and either write down with his own hand the oral evidence, in which case it shall be read over to the witness by the judge in open Court, and shall be signed by the witness, if he can write, or the Lord Ordinary shall record the evidence by dictating it to a clerk, in which case it shall in like manner be read over and signed; or the Lord Ordinary shall cause it to be taken down and recorded in shorthand by a writer skilled in shorthand-writing, to whom the oath *de fideli administratione officii* shall be administered, and the Lord Ordinary may, if he think fit, dictate to the shorthand-writer the evidence which he is to record; and the said shorthand-writer shall afterwards write out in full the evidence so taken by him; and the

Lord Ordinary to take proofs in consistorial actions.

[1] Personal service need not be by a messenger-at-arms. Court of Session Act, 1868, § 100.

[2] *See* Conveyancing Act, 1874, § 25.

notes of the Judge, or the extended notes of such writer, certified by the presiding Judge to be correct, shall be the record of the oral evidence in the cause; and the Lord Ordinary shall take a note of the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection; and any ruling of the Lord Ordinary in reference to the admission or rejection of evidence may be recalled or altered by the Inner House, under a reclaiming note against the final interlocutor of the Lord Ordinary, disposing of the merits of the cause; and the diet of proof may be adjourned by the Lord Ordinary, if he shall consider it proper and reasonable so to do; but the proofs shall be taken, as far as may be, continuously, and with as little interval as the circumstances or the justice of the case will admit of: Provided always, that it shall be competent to the Lord Ordinary, where any witness or haver is resident beyond the jurisdiction of the Court, or by reason of age, infirmity, or sickness is unable to attend the diet of proof, to grant commission to any person competent to take and report in writing, according to the existing practice, the evidence of such witness or haver.[1]

Payment to certain sheriffs.

14. The Commissioners of Her Majesty's Treasury shall annually pay to each of John Cay, Esquire, Sheriff of the County of Linlithgow; John Tait, Esquire, Sheriff of the Counties of Kinross and Clackmannan; Erskine Daniel Sandford, Esquire, Steward of the Stewartry of Kirkcudbright, and Sheriff of the County of Wigton; Robert Hunter, Esquire, Sheriff of the Counties of Dumbarton and Bute; and Benjamin Robert Bell, Esquire, Sheriff of the Counties of Banff, Elgin, and Nairn, out of monies to be voted by Parliament for that purpose, a sum equal to one-fifth of the total amount which shall be ascertained by the Queen and Lord Treasurer's Remembrancer in Exchequer, to have been paid annually, on an average of the last three years, to the sheriffs-commissary, in respect of proofs taken by them in consistorial causes; but such sum shall only be paid as long as the said persons shall hold the office of sheriff in any county in Scotland, and no longer.

Actions of aliment.

15. Actions of aliment in the Court of Session between husband and wife shall not be considered Inner House causes, but shall be considered and disposed of in like manner as other consistorial causes, except as hereinafter provided as to decrees in absence; and actions of aliment at the instance of other parties shall not be considered Inner House causes, but shall be disposed of by the Lord Ordinary (subject in both cases to reclaiming note in common form against his interlocutors) in the same way as such causes are at present disposed of by the Judges of the Inner House: Provided always, that all actions for aliment shall be deemed summary causes both in the Outer and in the Inner House, and that where no appearance is entered for the defender, decreet shall be pronounced in absence without proof, as in other cases before the Court of Session.

[1] It is now competent to grant a commission to take the deposition of a haver although he may be resident in Scotland. Court of Session Act, 1868, § 100.

When a married woman succeeds to property, &c., husband or creditor not entitled to claim the same.

16. When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*: Provided always, that no claim for such provision shall be competent to the wife if before it be made by her the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has before such claim is made by the wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has poinded and carried through and reported a sale thereof.

Court of Session empowered to make acts of sederunt.

17. The Court of Session are hereby authorised and empowered to make from time to time such orders and regulations as to forms of process by acts of sederunt as they may consider necessary for carrying into execution the purposes of this Act.

Repeal of laws inconsistent with this Act.

18. All laws, statutes, and usages are hereby repealed in so far as the same are inconsistent with the provisions of this Act, but no further or otherwise.

Interpretation of terms.

19. The following words and expressions, when used in this Act, shall, in the construction thereof, be interpreted as follows, except where the nature of the provision or the context of the Act shall exclude or be repugnant to such construction; that is to say, the expression "Lord Ordinary" shall include his successor; the word "property" shall include and apply to all property falling under the *jus mariti*; the expression "consistorial action" shall include actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, actions of separation *a mensa et thoro*, of divorce and of adherence, and of putting to silence, and actions of aliment between husband and wife instituted in the Court of Session.

Short title.

20. This Act may in all proceedings be cited as the "Conjugal Rights (Scotland) Amendment Act, 1861."

Commencement of Act.

21. This Act shall come into operation on the first day of November now next ensuing, and not before.

No. V.

37 & 38 VICTORIÆ REGINÆ, CAP. 31.

An Act to amend the Conjugal Rights (Scotland) Amendment Act, 1861. [16th July, 1874.]

WHEREAS an Act was passed in the twenty-fourth and twenty-fifth years of the reign of her present Majesty, intituled "An Act to amend the Law regarding Conjugal Rights in Scotland:"

And whereas the expense of procedure under that Act prevents many persons from availing themselves of its benefits, and it is desirable to amend the same:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,

Definition of "sheriff."

1. The word "sheriff" shall include sheriff-substitute.

Sheriff's jurisdiction extended to applications for orders to protect property of deserted wives, and for the recall of such orders.

2. The sheriffs of counties in Scotland shall have all jurisdictions, powers, and authorities necessary for hearing, trying, and determining applications by wives deserted by their husbands for orders to protect property that they have acquired or may acquire by their own industry after such desertion, and property which they have succeeded to or may succeed to or acquire right to after such desertion, against their husbands or creditors of their husbands or any persons claiming in or through the rights of their husbands, and applications by the husbands of such wives, their creditors, or others claiming in or through the rights of such husbands for the recall of such orders: Provided as follows:

1. All such applications in the sheriff court shall be made by petition in common form, and subject to any orders and regulations which the Court of Session are hereby authorised to make from time to time as to procedure in such applications, the procedure in every such petition, including the procedure in appeals taken therein within the sheriff court or to the Court of Session, shall, as nearly as may be, be the same as in an ordinary action in the sheriff court:
2. The conditions on which orders to protect property as aforesaid may be granted or recalled in the sheriff court shall be the same as those on which such orders may be granted or recalled in the Court of Session. The provisions of the recited Act relating to the intimation of interlocutors granting or recalling such orders in the Court of Session shall apply to the intimation of such interlocutors when pronounced in the sheriff court; and the effects of the grant or recall of any such order duly intimated shall be the same when made in the sheriff court as when made in the Court of Session:

3. An application for the recall of any such order to protect property granted in a sheriff court shall be competent only when made in the sheriff court to whose jurisdiction the deserted wife is for the time amenable, or in the Court of Session.

It shall be the duty of the clerk of the court in which any such order was granted, to transmit the process in which it was granted to any other court on receiving written notice from a clerk thereof of the dependence therein of an application for the recall of such order:

4. It shall not be necessary to print the petition, answer, or evidence in order to the disposal by the Court of Session of any appeal taken thereto from a sheriff court in any application by this Act made competent in the sheriff court:

5. Any warrant of citation granted by a sheriff in any such application may, when necessary, be executed edictally (without the concurrence or authority of the Court of Session), by delivery of a copy thereof at the office of the keeper of edictal citations according to the mode established by the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, in regard to the execution edictally of citations on warrants of the Court of Session, and by an act of sederunt of the Court of Session, dated the twenty-fourth day of December one thousand eight hundred and thirty-eight, and by sending a copy thereof by post to the last known address of the person to be cited.

The keeper of edictal citations or his clerk shall register an abstract of every such copy so delivered, in the record for edictal citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior courts of Scotland; and such abstract shall exhibit such particulars as are required to be exhibited in an abstract of any copy citation by law appointed to be made or registered by the said keeper or his clerk.

Short title. **3.** This Act may be cited as the Conjugal Rights (Scotland) Amendment Act, 1874.

No. VI.

40 & 41 VICTORIÆ REGINÆ, CAP. 29.

An Act for the Protection of the Property of Married Women in Scotland. [2nd August, 1877.]

WHEREAS it is just and expedient to protect to the extent hereinafter provided for the property of married women in Scotland:

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

Commencement of Act.

1. This Act shall commence and take effect from and after the first day of January, one thousand eight hundred and seventy-eight.

Extent of Act.

2. This Act shall extend to Scotland only.

Protection of earnings of married women.

3. The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof.

Liability of husband for wife's ante-nuptial debts limited to amount of property received through her.

4. In any marriage which takes place after the commencement of this Act, the liability of the husband for the ante-nuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage, and any Court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property.

Savings, 24 & 25 Vict. c. 86; 37 & 38 Vict. c. 31.

5. This Act shall not affect the rights conferred upon a married woman by the Conjugal Rights (Scotland) Amendment Act, 1861, or the Conjugal Rights (Scotland) Amendment Act, 1874.

Short title.

6. This Act may be cited as "The Married Women's Property (Scotland) Act, 1877."

No. VII.

43 & 44 VICTORIÆ REGINÆ, CAP. 26.

An Act to extend to Scotland the Facilities for effecting Policies of Assurance for the Benefit of Married Women and Children now in force in England and Ireland.

[26th August, 1880.]

WHEREAS by the Married Women's Property Act, 1870 [33 & 34 Vict. c. 93], increased facilities are given for effecting policies of assurance for the benefit of married women and children in England and Ireland:

And whereas it is expedient that such increased facilities for effecting policies of assurance for the benefit of married women and children should be extended to Scotland:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman may effect policy of assurance for her separate use.

1. A married woman may effect a policy of assurance, on her own life or on the life of her husband, for her separate use; and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband; and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.

Policy of assurance may be effected in trust for wife and children.

2. A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency: And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.

Application and short title of Act.

3. This Act shall apply only to Scotland, and may be cited as the Married Women's Policies of Assurance (Scotland) Act, 1880.

No. VIII.

44 & 45 VICTORIÆ REGINÆ, CAP. 21.

An Act for the Amendment of the Law regarding Property of Married Women in Scotland. [18th July, 1881.]

WHEREAS an Act was passed in the fortieth year of the reign of Her present Majesty, entitled the Married Women's Property (Scotland) Act [40 & 41 Vict. c. 29], and it is just and expedient to protect, to the further extent herein-after provided for, the property of married women in Scotland:

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

Wife married after date of Act to have separate estate in moveables.

1. (1.) Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*.

Income.

(2.) Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate.

Liability to arrestment.

(3.) Except as herein-after provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband.

Bankruptcy.

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

Contracts of marriage.

(5.) Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage.

Rents of heritable property to be separate estate in wife.

2. Where a marriage is contracted after the passing of this Act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband.

3. In the case of marriages which have taken place before the passing of this Act: **How far Act to apply to marriages contracted before its passing.**

(1.) The provisions of this Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him:

(2.) In other cases the provisions of this Act shall not apply except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.

4. It shall be competent to all persons married before the passing of this Act to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act, and upon such deed being registered in the register of deeds at Edinburgh or in the Sheriff Court register of the county or counties in which the parties reside, and being advertised in terms of the schedule in the *Edinburgh Gazette* and three times in two local newspapers circulating in such county or counties, the said estate shall be vested in her as hereinbefore provided, and subject to the provisions of this Act; provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured, in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband; but no such deed shall be of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered. **In case of marriages contracted before Act, parties may come under its provisions by deed.**

5. Where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate. **Husband's consent dispensed with in certain cases.**

6. After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be. **Right given to husband in wife's moveable succession.**

7. After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be. **Children of women dying domiciled in Scotland to have right of legitim, &c.**

Exempting contracts and certain legal rights from operation of Act.

8. This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act.

Short title.

9. This Act may be cited as the Married Women's Property (Scotland) Act, 1881.

SCHEDULE.

FORM OF NOTICE PRESCRIBED BY SECTION 4.

Notice is hereby given that on the day of a deed by *A.B.* of *C.* [*designation*] and *E.F.* his wife has been registered in the Register of in terms of the Married Women's Property (Scotland) Act, 1881.

No. IX.

THE ENGLISH ACT.

45 & 46 VICTORIÆ REGINÆ, CAP. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

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

Married woman to be capable of holding property as a *feme sole*.

1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property;

and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Property of a woman married after the Act to be held by her as *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post-office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank

of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stocks, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married women and others.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks, or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, com-

pany, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

Husband need not join in transfer.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

The margin of the Act has "as to stock, &c., standing in the joint names of a married woman and others."

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in

favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her

before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent, and also for her contracts and torts.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong), contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt

or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.[1]

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute), in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of

[1] By 47 & 48 Vict. c. 14 the husband and wife are declared competent and admissible witnesses in proceedings under this section, and, except when defendant, compellable to give evidence.

Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

Married woman to be liable to the

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren

parish for the maintenance of her children [and grandchildren].

as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Repeal of 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Interpretation of terms.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January, one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

27. This Act may be cited as the Married Women's Property Act, 1882.

No. X.

16 VICTORIÆ REGINÆ, CAP. 20.

An Act to alter and amend an Act of the Fifteenth Year of Her present Majesty for amending the Law of Evidence in Scotland. [9th May, 1853.]

3. It shall be competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage. As to examination of witnesses, whether named in the record or not.

5. The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: Provided always, that it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause or any part of it to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland. Adducing of party as a witness not to have effect of reference to his oath.

Note.—Sections 1 and 2 repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66); section 4 by 37 & 38 Vict. c. 64.

No. XI.

37 & 38 VICTORIÆ REGINÆ, CAP. 64.

An Act to further alter and amend the Law of Evidence in Scotland, and to provide for the recording, by means of Shorthand Writing, of Evidence in Civil Causes in Sheriff Courts in Scotland. [7th August, 1874.]

2. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be com- Parties and their husbands

and wives to be witnesses in proceedings on account of adultery.

petent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Law as to proof of promise of marriage in declarator of marriage founded thereon, *cum copula subsequente*, not to be altered.

3. Nothing in this Act contained shall be construed to alter or affect the law of Scotland in force at and prior to the passing of this Act relating to the proof of a promise of marriage in any action of declarator of marriage founded upon promise of marriage, *cum copula subsequente*.

Shorthand writers may be employed to record evidence in Sheriff Courts.

4. In every case of a proof in a civil cause or proceeding in a Sheriff Court in Scotland, and in every case of evidence being taken in any such cause or proceeding to lie *in retentis*, the following provisions shall have effect:

(1.) It shall be competent to the sheriff, on the motion of any party to the cause or proceeding and if he sees fit, to cause the evidence to be taken down and recorded in shorthand by a writer skilled in shorthand writing, to whom the oath *de fideli administratione* shall be administered, provided that the sheriff shall himself dictate to the shorthand writer the evidence which he is to record, and a note of the documents adduced and any admissions made by the parties:

(2.) When a shorthand writer is so employed he shall be appointed by the sheriff and paid by the parties in the first instance equally, and the extended notes of such shorthand writer, certified by him as correct, shall be the record of the oral evidence in the case; provided that, should the correctness of the said record of evidence be questioned, it shall be competent to the sheriff to satisfy himself in regard thereto, by the examination of witnesses or otherwise, and, if necessary, to amend the said record.

Note.—Section 1 repealed by Statute Law Revision Act, 1883 (46 & 47 Vict c. 39).

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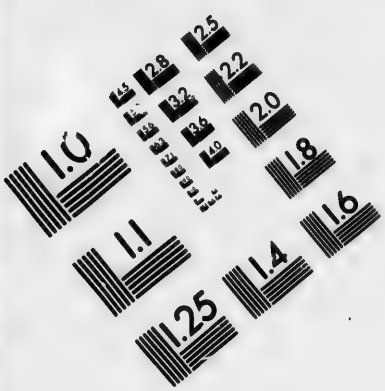



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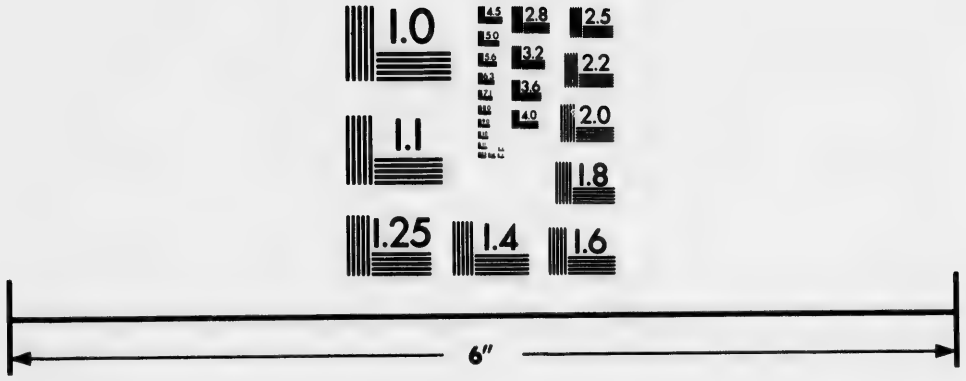



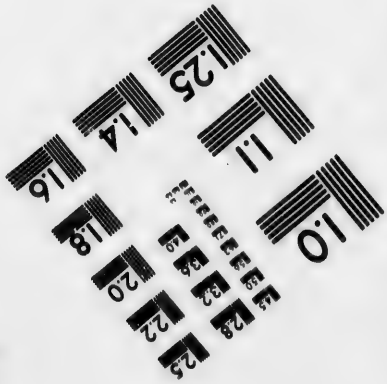

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