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A Modern Marriage?

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A. INTRODUCTION

The last two centuries have produced radical change in the legal regulation of marriage in Scotland,¹ and, much more recently, developments in relation to civil partnership² and legal rights and obligations for unmarried cohabitants³ have once again focused attention on the relationship of husband and wife. The process of statutory reform, begun in the nineteenth century, has been carried on and extended by the Scottish Law Commission and now the Scottish Executive to the extent that the law relating to marriage is almost entirely contained within legislation. Much of this change, and the need for continuing reform, have been presented in terms of a process of modernisation: of making the law fit with the needs of contemporary families. In tracing the pattern of statutory reform we can discern a shift from the “traditional” marriage of Scots law to a “modern” marriage relationship. Contemporary family legislation principally regulates the process of formation and then retreats until the point when marriage comes to an end, through death or divorce. Statutory reform has removed prescriptive rules as to the legal roles of husband and wife with the effect that they are left free to negotiate their own relationship. Even where the relationship becomes untenable

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1 The focus in this article is on private law and the way in which marriage is viewed within its traditional confines and not on the treatment and increasing assimilation of marriage and cohabitation within public law – e.g. in the context of social security or tax.

2 Civil Partnership Act 2004.

3 Family Law (Scotland) Act 2006 ss 25-29. For background to these reforms see, e.g., Scottish Law Commission, Report on *Family Law* (Scot Law Com No 135, 1992); Scottish Executive, *Family Matters: Improving Family Law in Scotland* (2004).

and the parties wish to dissolve their legal commitment, the focus is principally on compliance with a requirement of non-cohabitation rather than on detailed scrutiny of intimate failing.⁴

One of the consequences of the gradual codification of common law rules of marriage into clear statutory provisions has been a reduction in the opportunity for judicial scrutiny of marriage and comment on the nature of the relationship. In a decision of the Outer House of the Court of Session, *Thomson v The Royal Bank of Scotland*,⁵ a case concerning a standard security granted by a husband and wife over the matrimonial home, Lord Clarke described the couple as having had a “thoroughly modern type of marriage”. While the facts of the case, and the legal decision, are reasonably familiar in that they fit within a stream of similar actions concerning the use of the matrimonial home as security for borrowing and the duties of lenders and advisers to those granting cautionary obligations,⁶ Lord Clarke’s comment on the nature of the marriage represents a noteworthy departure for the Scottish courts which in recent times have rarely been permitted to look within the personal relationship. This comment, within the current wider context of social, political and legal discussion of marriage and other domestic relationships, merits fuller reflection.

It might be argued that a modern marriage is no more than a legal status which has been established in accordance with the current rules for the solemnisation of marriage in Scots law. All that is required, assuming legal capacity, is compliance with a series of clearly stated and relatively rarely challenged provisions for notification, celebration and registration of marriage.⁷ Within the context of *Thomson*, however, it is clear that Lord Clarke’s description relates not to how the marriage was formed but to how the couple lived. The word “marriage” may be used to describe the ceremony or process by which a man and woman exchange consent and are declared husband and wife but it may also be used to describe their subsequent cohabitation as husband and wife. It is clear that the statutory regulation of marriage has been transformed by a process of modernisation but less clear that this has been reflected in our understanding of the factual cohabitation of husband and wife. It is within this process of living together as husband and wife, cohabiting at bed and board, that the question is asked – what is a modern marriage?

4 Divorce (Scotland) Act 1976 s 1.

5 2003 SCLR 964 at para 16.

6 E.g. *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Smith v Bank of Scotland* 1997 SC (HL) 111; *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773; *Clydesdale Bank plc v Black* 2002 SC 555.

7 Marriage (Scotland) Act 1977: cf the approach of the Inner House in *SH v KH* [2005] CSIH 70, 2006 SC 129.

B. THE PROCESS OF REFORM

The modernisation of marriage is perhaps most clearly discerned within statutory reform. Legal equality of the spouses has replaced the supremacy of the husband, and legal regulation has gradually been reduced to the extent that it now focuses on the formation and dissolution of marriage with little apparent concern for the conduct of the relationship itself.⁸ Since the early nineteenth century there has been extensive statutory reform in Scotland of the laws relating to marriage. This can be seen in the reform and removal of many of the legal consequences of marriage: the abolition of the wife's domicile of dependence;⁹ the removal of the husband's right to select the matrimonial home;¹⁰ and the abolition of the action of adherence.¹¹ Modernisation of the relationship of husband and wife is, however, most evident and most radical in the rules which relate to matrimonial property.

(1) From community to separate property

At common law, the marriage relationship was signified by the *jus mariti* and the right of administration, and during marriage both the person and the property of the wife were subsumed within her husband. As expressed by Lord Justice Clerk Braxfield in 1791,¹² "in law a wife has no person". On marriage, the property of husband and wife was consolidated automatically into a single fund. The fund was to some extent owned,¹³ and entirely administered, by the husband.

By virtue of the *jus mariti*, the husband was given ownership of the moveable property of his wife, which right extended to all of her moveable assets, regardless of how they had been acquired. It applied to all moveable property which the wife might own at the point of entry into marriage and to all moveable property which she might subsequently acquire, including any money which she personally earned. The husband's right to such property was complete. He was free to use and abuse it as he wished and it could be attached by his creditors. The wife

8 The obligation of aliment continues to apply between husbands and wives: Family Law (Scotland) Act 1985 s 1.

9 Domicile and Matrimonial Proceedings Act 1973 s 1.

10 Law Reform (Husband and Wife) (Scotland) Act 1984 s 4.

11 Law Reform (Husband and Wife) (Scotland) Act 1984 s 2(1). For fuller discussion of the changing consequences of marriage, see E M Clive, *The Law of Husband and Wife in Scotland*, 4th edn (1997) chs 10-13 (henceforth Clive, *Husband and Wife*).

12 *Harvey v Chessels* (1791) Bell Oct Cas 255 at 258.

13 By virtue of the *jus mariti*, ownership of the wife's moveable assets passed to the husband. Ownership entailed the power to "sell or squander, or wastefully destroy" the property: *Gowan v Pursell* (1822) 1 S 418; "to dispose of and use them as he would any property he had acquired by gift or purchase": P Fraser, *Treatise on Husband and Wife according to the Law of Scotland*, 2nd edn (1876) vol 1, 797 (henceforth Fraser, *Husband and Wife*).

could claim maintenance from her husband¹⁴ but her claim would rank second to his other creditors.¹⁵ The only other restriction on the husband's disposal of his, or his wife's, property was that on marriage he became liable for all of his wife's ante-nuptial debts in so far as they related to her moveable property.¹⁶ The question of post-nuptial debts did not arise as a wife could not become a debtor: "a married woman can grant no personal obligation: such obligation is null and void, because in law a wife has no person."¹⁷

The right of administration governed all of the wife's property although its significance lay principally in relation to heritable property.¹⁸ While Scots law stopped short of granting full ownership of heritage to the husband, it vested in him all practical powers of control and management: "[t]he right of administration may be defined to be ... not a right of property, but a right of managing property, whereby the husband's consent must be obtained to every act of administration."¹⁹

Although the nineteenth century witnessed a great enthusiasm for law reform, "in the law of personal and domestic relations ... [the reformers] saturated with Roman ideas of *patria potestas*, lagged further behind public feeling and opinion".²⁰ Increased participation of women in employment, claims for female suffrage and the changing relevance of different forms of property finally resulted in a slow and piecemeal process of statutory reform. By the late nineteenth century, demands for change on a general, statutory basis, rather than as a consequence of individual marriage contracts, were answered by a series of Acts which, following the lead of English law, removed the legal disabilities previously placed upon married women.

The Conjugal Rights (Scotland) Amendment Act 1861 allowed a wife who had been deserted by her husband to petition the Court of Session for a protection order in respect of property which would fall under the *jus mariti* and which had been acquired by her own industry or by inheritance.²¹ The effect of such an order was to protect the property from both the husband and his creditors. Where a decree of judicial separation had been obtained, both the *jus mariti* and right of administration were excluded in respect of any property acquired by the wife after the separation and which would otherwise have fallen to the

14 "The husband by the marriage becoming proprietor of all the wife's personal estate ... is bound to provide her in all the necessaries of life": Fraser, *Husband and Wife* vol 1, 837.

15 D Murray, *The Property of Married Persons* (1891) 8.

16 Fraser, *Husband and Wife* vol 1, 586.

17 *Harvey v Chessels* (1791) Bell Oct Cas 255 at 258 per Lord Justice Clerk Braxfield.

18 I.e., immovable property.

19 Fraser, *Husband and Wife* vol 1, 796.

20 W C Smith, "Scots Law in the Victorian Era" (1901) 13 JR 152 at 156.

21 Conjugal Rights (Scotland) Amendment Act 1861 ss 1-5.

husband by virtue of the *jus mariti*.²² Should the couple resume cohabitation, the husband's rights would revive although any property obtained during the period of separation remained the separate property of the wife.²³ By section 16 of the 1861 Act, where a husband failed to provide reasonable maintenance for his wife from property acquired by her through gift or succession, his *jus mariti* and right of administration were excluded from such property.

A further step was taken by the Married Women's Property (Scotland) Act 1877, section 3 of which stated that:

The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman ... in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name ...

Section 3 went on to provide that the husband's rights would similarly be excluded from "any money or property acquired by her ... through the exercise of any literary, artistic or scientific skill". Perhaps to redress the balance, section 4 limited the husband's liability for his wife's ante-nuptial debts to the value of any property received from or through her "at, or before, or subsequent to, the marriage". By means of the Married Women's Policies of Assurance (Scotland) Act 1880, a married woman was entitled to take a policy of assurance on her own or her husband's life and state that it was for her own separate use. Any such policy would vest directly in her and all benefits would be paid to her, thus providing for some further extension of a married woman's separate estate.

Much greater reform was occasioned by the Married Women's Property (Scotland) Act 1881 which in certain circumstances excluded both the *jus mariti* and the right of administration. With regard to marriages contracted after the 1881 Act, the *jus mariti* was excluded from all of the wife's moveable property, whenever acquired, although the right of administration remained, subject to a number of restrictions. In respect of income derived from the wife's moveable estate, she was permitted to give her own receipt for such property but could not further administer it without her husband's consent.²⁴ Both the *jus mariti* and the right of administration were, however, expressly excluded from the rents and produce of any heritable property situated in Scotland.²⁵ The result was that all of the wife's moveable property was placed in the position of her *paraphernalia* and *peculium*: it formed part of her separate estate and remained under her ownership but continued to be subject to the husband's right of administration. This change was subject to the two specific restrictions on the right of administration. With

22 Conjugal Rights (Scotland) Amendment Act 1861 s 6.

23 Conjugal Rights (Scotland) Amendment Act 1861 ss 3, 6.

24 Married Women's Property (Scotland) Act 1881 s 1(2).

25 Married Women's Property (Scotland) Act 1881 s 2.

regard to marriages contracted prior to the date of the Act, section 3 provided that the husband's *jus mariti* and right of administration would not be excluded to any extent by the Act if he had executed an irrevocable deed prior to the passing of the Act which made reasonable provision for the wife in the event of her surviving him. In the event that such a deed had not been executed, the *jus mariti* and right of administration were excluded in respect of any property acquired after the date of passing of the Act. The Act would therefore apply to property acquired subsequent to the Act on the same terms as it applied to the property of women who married after the Act was passed. Secondly, section 4 provided that it was open to spouses who married before the Act to declare in a mutually executed deed that all of the wife's estate would be regulated by the Act. In other words it was open to spouses who married before the Act to agree to be governed by it.

(2) Separate and equal

This process of statutory reform was completed in 1920 by the Married Women's Property (Scotland) Act which abolished the right of administration.²⁶ Married women were now free to deal independently with their property and retained all rights and responsibilities in relation to it. From this legislation, a number of insights may be gained into the changing nature or perceptions of marriage. As Clive has said, "the statutory changes which have been effected in the legal consequences of marriage ... amount to nothing less than the legal emancipation of the married woman".²⁷ This legal equality of husband and wife fits well with the growth of feminism, the increasing participation of women in employment, and the general development in law and society of the principle of equal treatment. The possible injustices of granting legal equality to individuals who lack economic equality are well known and subsequent modifications of the matrimonial property regime have given some recognition to this. In particular, the principles of the Family Law (Scotland) Act 1985, in section 9, allow for deferred sharing on divorce of a common fund of matrimonial property with particular regard to the situation where husband and wife have not participated equally in employment.²⁸ Significantly, however, this recognition of possible inequality (or difference) is delayed until the dissolution of the relationship.

As a consequence of the reform of matrimonial property, not only were husband and wife to be treated as equal, they were most importantly to be legally separate. Of the old system, Fraser, writing in 1876, said:²⁹

26 Married Women's Property (Scotland) Act 1920 s 1.

27 Clive, *Husband and Wife* para 01.019.

28 See in particular s 9(1)(b).

29 Fraser, *Husband and Wife* vol 1, 509.

Nature inculcates the utmost possible identity of interests and community of will between married persons; the husband being lord and master or, as it is expressed in Scripture, being “the head of the wife”; and this natural subordination upon the part of the wife has led to the positive law, that in all civil matters having reference to their united means, the husband should represent both.

Fraser thus gave expression to a widely held view of the position of husband and wife under common law: “a communion of goods betwixt the married persons”;³⁰ “a communion of ... mutual civil interests ... styled in our law the communion of goods”.³¹ There has been debate as to the nature of the regulation of matrimonial property, centring to a large extent on the lack of common rights which were provided to the fund but, despite doubts as to whether or not the Scottish system was a true *communio bonorum*, there was a tendency for it to be discussed in terms of community.³² When reform was considered, the existing system was categorised as a community system and the shift brought about by the reforms was perceived as a shift from community to separate property. In reforming the common law, all aspects of community in relation to property were rejected, resulting in “the replacement of a primitive system of community of goods ... by a separate property system”.³³ Modern marriage in Scots law is therefore tied to a system of separate property.³⁴

These reforms, which created the basis for modern marriage, have been modified and perfected in the ensuing decades but the fundamental principles have remained and are now set out in section 24(1) of the Family Law (Scotland) Act 1985 which states that:

Subject to the provisions of any enactment (including this Act), marriage shall not of itself affect –

- (a) the respective rights of the parties to the marriage in relation to their property;
- (b) the legal capacity of the parties to the marriage.

In the process of statutory reform of matrimonial property there is a major change in the presentation – if not always in the practical nature – of the marriage relationship. It has shifted from a status involving the combination of two into one to a relationship of two legally separate and equal individuals. In the deconstruction of the old framework and the omission, or deliberate decision, to put no new

30 Stair, *Inst* 1.4.9.

31 Erskine, *Inst* 1.6.12

32 See e.g. discussion in Murray, *Property of Married Persons* (n 15) 669.

33 Scottish Law Commission, Consultative Memorandum on *Matrimonial Property* (Scot Law Com CM No 57, 1983) 5.

34 The focus here is on the change from community to separate property during the existence of the relationship of husband and wife and not on the system of “deferred community” which may be described as applying on divorce: Family Law (Scotland) Act 1985 s 9.

structure in its place, the reforms have also contributed to the creation of marriage as a private and unregulated space.

While the recognition of individual personality and gender equality is welcome, it should nonetheless be noted that, with the Married Women's Property legislation, a clear and regulated notion of the marriage relationship disappeared from statutory family law in Scotland. In the absence of the *jus mariti* and right of administration, no new regime for the regulation of matrimonial property was imposed. Instead the property of husband and wife came to be treated separately according to the normal rules of property law. From a system of matrimonial property, based very firmly on unequal and gendered treatment, Scots law moved to a system which did not distinguish between husbands and wives and which, increasingly, did not distinguish between spouses and strangers. The abolition of community property was the first and most radical change in the legal model of marriage. In its reform of marriage, Scots law may be seen to have moved away from a clear, imposed view of marriage: a model of male supremacy and strict regulation. In its place the legislation provided for equality and liberty for individual spouses. By the second half of the twentieth century, the legislative pattern had been set for a marriage relationship where regulation and restriction were largely confined to the points of formation and dissolution. The modern law tells us how to create and terminate a marriage but it tells us little of what happens, or is expected to happen, in between. Modern marriage, according to Scots family legislation, is a relationship largely open to personal interpretation. The provisions for divorce suggest in retrospect some expectations of how the couple might have behaved towards each other³⁵ although the overriding ground of irretrievable breakdown³⁶ fits well with the notion that it is for the individual parties to decide on the nature and function of their relationship. The statutory framework for financial provision on divorce similarly encompasses, within the section 9 principles,³⁷ a range of relationship models. It may be argued that this is as it should be in the legal regulation of modern marriage. If marriage is to be retained as a legal concept, it should be a simple matter of status with a minimum of intervention in the personal behaviour of the couple.³⁸

Throughout this process of statutory reform, however, the legal concept of living together as husband and wife has survived. Occasionally, some consideration of the marriage relationship has taken place within the context of property disputes concerning husband and wife. Applications for declarator of marriage arising from

35 Divorce (Scotland) Act 1976 s 1(2).

36 Divorce (Scotland) Act 1976 s 1(1).

37 Family Law (Scotland) Act 1985.

38 Clive identifies this as one of the benefits of the legal concept of marriage: see E M Clive, "Marriage and Cohabitation", in J Scoular (ed) *Family Dynamics: Contemporary Issues in Family Law* (2001) 129.

cohabitation with habit and repute³⁹ required and may still require the court to scrutinise the nature of marital cohabitation. From these decisions, what picture emerges of the relationship of marriage: of cohabitation as husband and wife? Does Scots law encompass a clear image of the factual relationship of marriage, is it consistent with the framework which emerged from statutory reform, and can it be described as “modern marriage”?

C. DOMESTIC STRANGERS

In relation to their property, it is well established that husband and wife are treated as strangers. When issues of marriage and property have arisen, they have frequently been situated within the confines of the matrimonial home. The vulnerability of the non-entitled spouse⁴⁰ and the compelling problem of domestic violence and, more recently, the dilemma of the wife who has guaranteed her husband's debts by granting a security over the matrimonial home, have given the courts an opportunity to comment on the nature of the marriage relationship. Their generally consistent approach, however, has been to apply the rules of separate property and to ignore the matrimonial relationship. In so doing, they might be described as upholding the modern nature of marriage, but in the facts and circumstances there can be signs of uncertainty.

In *Maclure v Maclure*⁴¹ Lord President Dunedin stated that “the husband's right to ask for [his wife's removal from the matrimonial home] depends, not upon his right as a husband, but upon his ordinary right of property in the house”. This case brought together the husband as property owner with the husband as spouse, and the court favoured the protection of his patrimonial right over enforcement of his conjugal duty. The argument was rejected that, by granting warrant to eject the wife from the matrimonial home, the court would be interfering with the matrimonial obligation of adherence – a conclusion made easier in this particular case by reference to the destructive nature of the wife's alleged intemperate habits. More generally, however, the Lord President indicated his reluctance to mix marriage and property, stating that “it is safer to rest the matter upon the mere right of property and not to mix it up with that which ... it has nothing to do, namely, the question of the inter-conjugal relations which are enforced by consistorial process”.⁴² In dealing with questions of the property of husband or wife, in

39 This form of marriage is abolished by the Family Law (Scotland) Act 2006 s 3. For a discussion, see D below.

40 As opposed to an “entitled spouse”, or in other words a spouse who has a title to the matrimonial home. The terminology derives from the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 1(1).

41 1911 1 SLT 6 at 11.

42 1911 1 SLT 6 at 11.

the absence of clear and specific rules such as those of the common law, the court took the view that the matrimonial relationship should simply be ignored. In this case, the court was content to proceed on the basis of the husband's patrimonial rights, reassured by his commitment to provide financial support to his wife in the form of aliment. Not only was the court reluctant to mix property and personal relations, it further signalled its unwillingness to pry too closely into the obligations of the relationship itself: "[t]he Court has never gone in for what I may call the nice measuring or weighing of the precise amount of the conjugal duty which the husband is bound to give to his wife or a wife to her husband."⁴³

The Inner House similarly, in *Millar v Millar*,⁴⁴ stressed the split between marriage and property with Lord President Normand stating that the question "should be dealt with from the patrimonial point of view ... without consideration of their relation as husband and wife".⁴⁵ The property question should be treated in fact "in exactly the same way as when it arises between strangers".⁴⁶ In their separation of property and marriage, the courts are applying the statutory rules of separate property, and beyond that, the guiding principle that the legal status of marriage has no effect on property. Such treatment may be argued to uphold modern marriage within Scots law: the modern marriage of separate and gender-neutral equality. What is not so clear is the way in which cohabitation as husband and wife might affect property.

It is against a background of property that Lord Clarke made his comments about "a modern marriage" in *Thomson*.⁴⁷ In a series of cases, beginning in Scotland with *Smith v Bank of Scotland*,⁴⁸ legal and banking practice has been scrutinised in relation to the obligations of a creditor in the situation where one spouse (in practice the wife) challenges the validity of a security granted over the matrimonial home in respect of borrowing by the other spouse (or jointly). While most of these cases involve little judicial comment on the private relationship of the couple, focusing instead on the interaction of the spouses with the public and commercial world of business and borrowing, the facts allow us to speculate on the way in which the spouses have lived their married lives and, in this speculation, there may be some doubt as to just how "modern" their relationships have been. The contemporary statutory ideal of the separate and equal spouses is significantly challenged by these insights into domestic interaction.

43 1911 1 SLT 6 at 11.

44 1940 SC 56.

45 At 58.

46 At 60.

47 2003 SCLR 964.

48 1997 SC (HL) 111. For further discussion of these cases see H Hiram and J Mair, "A leonine partnership: marriage, undue influence and the family home", in A Hudson (ed), *New Perspectives on Property Law: Human Rights and the Family Home* (2003).

In the facts of *Thomson v Royal Bank of Scotland*,⁴⁹ the extent to which this was indeed a modern marriage is questioned at an early stage by the evidence of the husband to the effect that “I earned the money and my wife looked after the children”; a description which was backed up by the wife’s comment that “my husband put money into the joint bank account and I spent it.” Their relationship was described as having been⁵⁰

a perfectly harmonious and thoroughly modern type of marriage, which was a true partnership, in the sense that [the husband] was the sole breadwinner, whose whole income and assets were shared with the [wife who acted] as the manager of the household, leaving financial decisions to [her husband].

As a social comment, and to the extent that there is evidence of a gendered division of labour, it seems surprising that their behaviour is described as modern. The husband is acting as the breadwinner while his wife is responsible for the domestic sphere: a model which the increased participation of women in the workplace and the emphasis on gender equality in employment might suggest is more traditional than modern. Is it the fact that they are described as forming a partnership which makes their relationship modern? A partnership with notions of joint enterprise and equal rights to profit and management (albeit in separate spheres) is a more modern way of viewing combined marital interests when seen in contrast to the unequal and enforced sharing of the previous system of community property. The analogy of the business partnership allows for the accommodation of separate individuals with a common purpose and encompasses well the idea of different skills being combined for shared benefit, but marriage as a partnership lacks clear legal rules. It might be argued that partnership is simply a modern term for a relationship which in its fundamentals is little changed.

In respect of the commercial background to the husband’s borrowing, it was clear that his wife placed her trust in her husband and that he took the view that he was acting not just for the benefit of his business but also, indirectly, for the benefit of his wife. In his dealings “he relied on [his wife] to trust his judgement”.⁵¹ In this case, as in others which have arisen from similar circumstances, the mutual trust inherent in the relationship of husband and wife is emphasised. Trust is essential in the context of a loving relationship and indeed there seems a considerable judicial reluctance to pry too closely into possible abuse of trust lest that should harm the mutual support of spouses. The relationship in *Thomson* is perceived as a partnership of equals and the trust which exists within it is welcomed as a positive sign of a healthy relationship but arguably only within its domestic setting. In Lord Clarke’s

49 2003 SCLR 964 at para 7.

50 Para 16.

51 Para 13.

opinion, there was no question of the wife being dominated by her husband: she was “a solid woman”, “a woman of intelligence, with a mind of her own”.⁵² While there was no suggestion of exploitation within the private sphere of marriage, it is clear that the husband took the lead in dealing with the outside world of business. In such a situation, “the wife has a lively interest in doing what she can to support the business ... her affection and self-interest run hand in hand”.⁵³

What emerges from *Thomson*, and from the facts of similar cases, is that the modern marriage – the day-to-day pattern of life – may not be so different from the relationships of previous centuries. The statutory framework for the regulation of marriage and property has seen a radical process of change but, in applying the modern rules, the enduring dilemma of how to accommodate separate individuals within the personal commitment of marriage is highlighted. As to how the spouses should operate, Lord Clarke said in *Thomson* that “a wife ... must be expected, to some extent, to be looking after her own interests by, at least, asking the questions that she thinks appropriate”.⁵⁴ The conclusion which emerges is that it is consistent with a modern marriage for the property and business interests of husband and wife to be combined and for the decisions about such matters to be taken principally by the husband. Altruism, support and commitment continue to be encouraged as good foundations for a strong and happy marriage but, simultaneously, in terms of business and property, and as insurance against the personal or commercial failings of their partner, the spouses must take care to protect their selfish interests. What distinguishes Mrs Thomson from her predecessors is not that the form of her marriage is more modern but that she is expected, while fulfilling the traditional role of a supportive wife, to show the commercial sense of a modern woman.

D. LIVING TOGETHER AT BED AND BOARD

In adjudicating on matters of property involving spouses, the court’s focus is on individual rights and any insights given as to the personal matrimonial relationship are incidental. The possibility, however, that irregular marriage may be formed by cohabitation with habit and repute has required the courts to look directly at the relationship and consider the extent to which a couple has lived together as husband and wife – at bed and board – and even with the abolition of the doctrine by the Family Law (Scotland) Act 2006,⁵⁵ cases may still arise for some time.

⁵² Para 15.

⁵³ *Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at 799 per Lord Nicholls of Birkenhead.

⁵⁴ 2003 SCLR 964 at para 52.

⁵⁵ Family Law (Scotland) Act 2006 s 3.

At the outset it may be argued that irregular marriage is in itself anachronistic – the antithesis of a modern marriage. Even with the eventual demise of this legal concept, however, the factual test of living together as husband and wife seems set to continue. Unmarried cohabitants may seek to regulate occupancy of a shared home by first establishing that they are living together “as if they were husband and wife”;⁵⁶ and the Family Law (Scotland) Act 2006 extends limited legal rights to unmarried couples who can similarly persuade the court that they have lived together as husband and wife.⁵⁷ In these situations the court must look not at the legal status or consequences of marriage, but at the factual evidence of commitment and marriage-like existence. Those who have formed a regular marriage have by consequence acquired the status of husband and wife while those who seek to share the legal protections granted to spouses must show “by fact and intention”⁵⁸ that they have lived as spouses should.

In order to be married by this form of irregular marriage, it is essential that the parties have cohabited “as husband and wife”: that they have behaved towards each other (and to the outside world) as if they were married. This notion of acting as husband and wife is interesting within the context of a statutory framework which sets few prescriptive rules for the marriage relationship. In judicial analysis of that relationship is there evidence of a process of modernisation, as we have seen in legislation, or are there established truths of marriage which remain unchanged? In many of the cases there are comments which suggest a shared and enduring understanding of marriage and of how a married couple should live. In *Campbell v Campbell* it was stated that:⁵⁹

[C]ohabitation as husband and wife is a manifestation by daily conduct of the parties having consented to contract that relation inter se. It is a holding forth to the world, by the manner of daily life, by the conduct and demeanour of the parties, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife.

In decisions since then, witnesses appear to remain confident as to their ability to recognise this conduct. The son in *Nicol v Bell*⁶⁰ agreed that his parents “lived together like normally married people”, an impression shared by a friend of the couple who thought “they were just like an ordinary married couple”.⁶¹ In *Walker v Roberts*,⁶² the Lord Ordinary seemed equally sure in his conclusion that the

56 Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 18(1).

57 Family Law (Scotland) Act 2006 s 25.

58 *Armour v Anderson* 1994 SC 488 at 495 per Lord President Hope.

59 (1867) 5 M (HL) 115 at 140 per Lord Westbury.

60 1954 SLT 314 at 316.

61 1954 SLT 314 at 317.

62 1998 SLT 1133 at 1135.

parties had not held themselves out to be husband and wife: “nor did they behave to each other as such”. What is required to satisfy this shared understanding of marriage or marital cohabitation? In the daily cohabitation of husband and wife, what is legally expected?

It seems clear that the parties must actually live together as opposed simply to having a sexual relationship. Many of the older cases sought to distinguish between mere sex and the situation of sexual relations within the context of a shared and socially acceptable domestic life.⁶³ In line with social change, more recent cases have placed less emphasis on the couple’s sexual relationship although it was noted in *MacGregor v MacGregor*⁶⁴ that the couple cohabited “firstly, committing adultery”. In *Vosilius v Vosilius*,⁶⁵ by means of introduction to the evidence, it was stated by the pursuer that they “started to cohabit, sleeping together and enjoying sexual relations”. The existence of a sexual relationship appears to be almost assumed as the basis for cohabitation as husband and wife, and many cases involve evidence to the effect that the parties shared a bed, or at least a bedroom. It is not, however, clear whether this would be an essential requirement of cohabitation as husband and wife. While the continued possibility of adultery as a means of establishing irretrievable breakdown, and the acceptance that refusal of sexual intercourse might constitute unreasonable conduct in the context of divorce, imply that there should be faithful sex within marriage, there is no positive obligation placed on a married couple.

In establishing the necessary cohabitation for irregular marriage, the presence of a ring is often an important indicator of commitment.⁶⁶ In *Walker v Roberts*⁶⁷ the couple exchanged rings, and in *Shaw v Henderson*⁶⁸ Lord Stott thought it significant that the man gave the woman a wedding ring which she wore throughout the period of cohabitation. In *Low v Gorman*,⁶⁹ the woman was given an engagement ring and a brooch but both at a time when the man was not yet free from his previous marriage. Much emphasis in *Ackerman v Blackburn*⁷⁰ was placed by the pursuer on the purchase of a ring and the fact that the ring had been placed on her finger during a special champagne dinner. There was, however, disagreement as to whether what was described as an eternity ring – a gold band set with diamonds – signified engagement or marriage. Ultimately the court concluded that it was

63 E.g. *Cunningham v Cunningham* (1814) 2 Dow 482; *Lowrie v Mercer* (1840) 2 D 953.

64 Outer House, 17 Jan 2001, unreported; see www.scotcourts.gov.uk/opinions/tgc2812a.html at para 12.

65 2000 SCLR 679 at 681-682.

66 It is also significant in establishing repute.

67 1998 SLT 1133.

68 1982 SLT 211 at 212.

69 1970 SLT 356 at 357.

70 2002 SLT 37 at 40.

nothing more than an engagement ring. Although Scots law requires no exchange of rings, and modern social customs and changing fashion no longer dictate the wearing of a particular type of ring, such judicial comment continues to suggest a confident ability to distinguish a sign of commitment, signifying marital intent, from some lesser pledge.

In Scots law, marriage has no effect on the name by which either party to a marriage is known although it has been common practice for a married woman to adopt her husband's surname.⁷¹ More recently, social change has resulted in an increasing number of women retaining their own surname for all purposes or at least in relation to their professional life. Within the context of irregular marriage, the adoption by the woman of her partner's name is in many cases a strong sign of the couple holding themselves out as being married. In *Nicol v Bell*,⁷² it was thought significant that invitations to their son's wedding were sent out in the names of Mr and Mrs Bell, and in more recent decisions the way in which correspondence has been addressed continues to form a substantial part of the evidence. There is some indication that the courts consider this as a sign of personal acceptance of marital status. In *Gow v Lord Advocate*,⁷³ where declarator of marriage was refused, it was thought that, while not conclusive, the fact that the woman had retained her previous signature throughout the period of cohabitation may have been "a pointer to her state of mind". In *Walker v Roberts*,⁷⁴ where again declarator was refused, it was noted that the woman did not adopt the man's name. "This was not the case of a woman keeping her name for professional purposes", as was emphasised by the fact that during her previous, regular, marriage she had changed her name to that of her husband. In identifying this as one of a number of factors pointing towards cohabitation rather than marriage, there was no apparent recognition of the fact that a woman who had already changed her name once might, for various reasons unrelated to personal commitment, have decided to continue with the name by which she was by that time known. Greater understanding of the modern practicalities of family names was shown in the case of *Vosilius*.⁷⁵ The pursuer was, as the result of a previous marriage, known as Mrs Cunningham, which matched with the surname of her two sons from this relationship. During her period of cohabitation with Mr Vosilius, he, largely as a result of his willing adoption of the practical role of father to the boys, was known by many as Mr Cunningham. Dismissing evidence of the pursuer's inconsistent use of names, Lord Macfadyen, in a refreshingly modern tone, concluded that the

71 See discussion in Clive, *Husband and Wife* paras 11.019-11.024.

72 1954 SLT 314.

73 1993 SLT 275 at 276.

74 1998 SLT 1133 at 1135.

75 2000 SCLR 679.

man's acceptance of the name Cunningham "pointed at least as strongly" to the couple being regarded as husband and wife as the woman's adoption of Vosilius would have done.

In many cases of irregular marriage, issues of rings, names and social behaviour are understandably more relevant to the question of repute than to the nature of the cohabitation itself. There is also some indication that these external signs might be regarded as evidence of matrimonial intent. In seeking to distinguish between mere cohabitation and cohabitation as husband and wife, however, a recurrent theme is the extent to which the commitment of the couple can be discerned in their joint property. In *Low v Gorman*,⁷⁶ there was evidence of commitment in the form of choosing a site where the intended matrimonial home would be built but at this time the man lacked capacity to consent to marriage as he was not yet divorced from his previous wife. In *MacGregor v MacGregor*,⁷⁷ the woman gave evidence to the effect that their "respective incomes were regarded as joint family income" but ultimately this was rejected on the basis that there was no joint bank account. Similarly, in *Dallas v Dallas*,⁷⁸ the lack of clear evidence of a joint bank account tended towards the suggestion of a lack of matrimonial commitment. This absence was compounded by the fact that, although ownership of the home in which the couple lived had been acquired during the relationship, title had been taken in the man's name alone: "[H]ad there been more than mere cohabitation a joint title might have been taken."⁷⁹ In *Walker v Roberts*,⁸⁰ the apparent absence of repute proved fatal to the pursuer's attempt to secure declarator of marriage, but the Lord Ordinary also identified a number of factors relating to the way in which the parties had lived which pointed away from the conclusion that they lived as husband and wife and which "were in combination consistent with cohabitation rather than a married state". First, it was noted that during the relationship the parties maintained separate bank accounts. Secondly, various properties, both business and residential, which were obtained by both parties during the period of cohabitation, were acquired in separate names. The facts that both worked in a pub owned in the name of the pursuer and that the development of a property bought by the defender "was to some extent a joint venture" were not sufficient to "suggest a marital relationship".⁸¹

These considerations run counter to the statutory concept of marriage which is based on separate property and the independent legal personality of husband

76 1970 SLT 356.

77 Outer House, 17 Jan 2001, unreported; see www.scotcourts.gov.uk/opinions/tgc2812a.html at para 12.

78 2002 GWD 26-898.

79 Para 20.

80 1998 SLT 1133 at 1135.

81 1998 SLT 1133 at 1135.

and wife.⁸² In regarding these factors as “reasonably strong contra-indicators of cohabitation as husband and wife”, the Lord Ordinary in *Walker*⁸³ contributes to an image of married life which is not entirely consistent with that which results from statutory reform. The modern marriage found in statute is firmly tied to separate property, and while many couples, regardless of marital status, may make use of joint banking facilities and may choose to combine their resources in a variety of ways, it seems strangely inconsistent with statute to consider the maintenance of separate bank accounts as a contra-indication to marriage. Similarly, in relation to the way in which a couple acquire property, it is difficult to fit the underlying statutory principle that marriage shall not in itself affect the property rights of either party with the importance placed by the courts on joint title as external evidence of appropriate personal commitment. As in earlier discussion of property disputes involving husband and wife, judicial comment on the nature of the marriage relationship does not always correspond to the modern model of marriage as set out in statute.

In irregular marriage, judicial comment frequently indicates the impact of social change but it remains a prerequisite of irregular marriage that the courts can recognise cohabitation as husband and wife. In so doing they are signalling their ability to distinguish between marital cohabitation and other forms of relationship. One effect of modernisation in social behaviour, which has brought an equalising of the legal position of men and women, a diminution in the outward signs of status and increasing acceptance of a diversity of relationships and family forms, has been to make it ever more difficult for any such distinction to be drawn. In the older case of *Nicol v Bell*,⁸⁴ the precise nature of a changing relationship was an issue of central importance. Here there was uncertainty as to whether the relationship was one of employment, concubinage or marriage and Lord Patrick explained that “where the cohabitation commences as concubinage, some subsequent event must be found which differs totally from the facts of the pre-existing cohabitation and indicates that the character of the relationship [has] changed”.⁸⁵ With the growth of unmarried cohabitation and, more importantly, its social acceptance, it appears increasingly difficult to draw such a clear distinction between living together as husband and wife and simply living together. Despite acknowledgement of the diversity of relationships “in modern social conditions”,⁸⁶ the assumption persists that the courts are capable of recognising cohabitation which has the quality of

82 Family Law (Scotland) Act 1985 s 24.

83 1998 SLT 1133 at 1135.

84 1954 SLT 314.

85 1954 SLT 314 at 322.

86 *Gow v Lord Advocate* 1993 SLT 275 at 276 per Lord Caplan.

marriage, with the court concluding in *Walker v Roberts*,⁸⁷ for example, that “the couple were merely a modern cohabiting couple rather than husband and wife”.

E. MODERN RELATIONSHIPS?

Statutory reform of the legal consequences of marriage, and in particular reform of matrimonial property, have contributed to the dismantling of prescriptive legal roles for husband and wife. In their place is freedom and equality for spouses to design their own pattern of living together. Such freedom and equality fits well with social change but, just as it may be argued that there is increasing uncertainty as to the basis of personal commitment within relationships,⁸⁸ so there is evidence of a similar struggle within judicial analysis.

Much focus in recent discussion of family law and its reform has been on the diversity of relationships in society and the future role of marriage in relation to these other family forms. While the introduction of civil partnership and of some property rights for unmarried cohabitants might be construed as challenging the supremacy of marriage, it seems clear that marriage remains the legal model for these other relationships. Civil partnership is marriage by another name, and heterosexual cohabitants are to access legal rights by establishing that they have lived together as husband and wife.⁸⁹ Thus at a time of further modernisation through legal reform, it seems appropriate to question the suitability of the underlying model. Entry into and exit from marriage have been made legally clear and relatively simple but much less attention has been placed on the intervening relationship of husband and wife. Freedom to negotiate one's own matrimonial way of life may be the hallmark of modern legal marriage, but an absence of engagement with notions of commitment and mutual dependence within and during intimate relationships suggests that Scots law may not yet have developed an acceptably modern accommodation of person and property. Where the courts have looked at personal relations, there persists a belief that the relationship of marriage is something distinct from other intimate connections. The factors which point to the existence of this special relationship, however, often fail to fit with the modern ideal of the separate and independent spouses.

In terms of property, there is clear and conclusive evidence of modernisation. A grossly unequal system of community has been eradicated and replaced with a system of strictly equal separation. It is a system, however, which does not always

87 1998 SLT 1133 at 1135.

88 See e.g. J Eekelaar and M MacLean, “Marriage and the moral bases of personal relationships” (2004) 31 *Journal of Law and Society* 510.

89 Family Law (Scotland) Act 2006 s 25.

match the way in which husbands and wives arrange their affairs throughout their cohabitation. A framework has emerged within which husbands and wives are encouraged to be independent and commercially aware during marriage and yet may be compensated on divorce if they fail.⁹⁰ At times the modern framework of separation of assets struggles to accommodate the age-old problem of combining love and money, while the modern way of life of many couples fails to satisfy legal norms of commitment. To continue to cling to the familiar legal concept of living together as husband and wife may offer stability at a time of rapid diversification in relationships, but there is little shared understanding of what it means and there is much to suggest that it is not a model fit for modern lives.

90 For an interesting discussion of this issue, see M Thornton, "The judicial gendering of citizenship: a look at property interests during marriage" (1997) 24 *Journal of Law and Society* 486.