"WITH ALL MY WORLDLY GOODS I THEE ENDOW"

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IN an essay entitled "The Human—not quite Human" Miss Dorothy Sayers said:

> "The first thing that strikes the careless observer is that women are unlike men. They are 'the opposite sex'—(though why 'opposite' I do not know; what is 'the neighbouring sex'?). But the fundamental thing is that women are more like men than anything else in the world. They are human beings. *Vir* is male and *femina* is female, but *homo* is male and female.
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> "This is the 'equality' claimed, and the fact that is persistently evaded and denied. No matter what arguments are used, the discussion is vitiated from the start, because 'man' is always dealt with as both *homo* and *vir*, but 'woman' only as *femina*.
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> "I have seen it solemnly stated in a newspaper that the seats on the near side of a bus are always filled before those on the off side, because 'men find them more comfortable on account of the camber of the road, and women find they get a better view of the shop windows'. As though the camber of the road did not affect male and female bodies equally! Men, you observe, are given a *homo* reason; but women a *femina* reason, because they are not fully human."[1]

In humorous vein, Miss Sayers pressed her theme that male and female are first of all humans and that their most striking characteristics are common ones. Only secondarily are their differences important.

My plea tonight depends largely upon an acceptance of that view in this mid-twentieth century society.

In Bracton's day, as far as private law was concerned, women were in equal state with men, with some differences, of which the most prominent perhaps was a partial subordination in the matter of inheritance. So far as public law was concerned, things were otherwise.[2]

Thus, at least seven centuries ago, male and female were treated as having private rights before the law which in most respects were the same and unaffected by their sex. The picture changed drastically, however, when the female decided to marry.

[1] *Unpopular Opinions*, pp. 116-17.
[2] See Pollock and Maitland, *History of English Law*, vol. 1, p. 465 *et seq.*

Bracton said, in the thirteenth century, that male and female when married were one person in the eyes of the law. That dictum has been repeated on many occasions, and was affirmed by Sir Edward Coke in the early part of the seventeenth century. In spite of suggestions[2*] that the underlying principle of the Common Law's view of husband and wife was not a unity of personality, that unity principle has now been affirmed in the law by modern cases,[3] and cannot be questioned in the courts.

If man and wife were to be merged in the eyes of the law it is not surprising, in our history, that it was the man who became the actor. Generally speaking, it was the man, and only the man, who was recognized as having the power to act so as to affect legal relations.

It is well known, of course, that at law, until comparatively recently, all the wife's property came within the husband's power on marriage. That was not only true of her tangible and visible assets, but also of her contractual rights, and, with some qualifications, her expectant rights or assets.

Her goods and chattels, with some minor exceptions, became her husband's property absolutely. Her real property he held during the marriage, and, if she died leaving issue, he held such property for his life with the delightful title of "tenant by the curtesy–". She could not make a valid contract, with the exception of certain special contracts of a personal nature–e.g. she could acquire rights to payment for personal services rendered. But her power to enforce such rights was subject to the limitations of her marriage and required action by her husband.

The picture then is one of wifely subservience. At the same time, although the wife was subservient, her husband had imposed on him by common law certain fairly onerous duties towards his wife.

Those duties were such as one might expect to see imposed upon any responsible individual who had human beings dependent upon him for their welfare. The husband was required to provide sustenance for his wife, and shelter consistent with his means. He did not ever have her life and welfare in his discretion, as he would have had those of a farm animal. It is now considered that, even in the bad old days, a husband had no right to beat his wife for her chastisement, or even to confine her to enforce her obedience.[4]

Thus, the wife had some compensation for her loss of legal personality. Her husband could be made liable for her civil wrongs. She had none of the onerous duties which go with the acquisition or

[2*] *e.g.* by Pollock and Maitland.

[3] *Butler v. Butler* (1885) 14 Q.B.D. 831; *Edwards v. Porter* [1925] A.C. 1; *Bayliss v. Blackwell* [1952] 1 All E.R. 74.

[4] See *R. v. Jackson* [1891] Q.B. 671

ownership of property. She was the beneficiary of another person's duty to care for her and provide for her welfare.

Even so, her position, at least the position of those women who came of a property owning class, was considered to be inequitably insecure by a sufficient number of people; and the Chancellor developed rules specially protecting some of the interests of married women and their property.

Thus, where property was settled on a woman for her separate use, then the Chancellor, by means of the developed doctrines of use and trust estates, enabled a wife to own property separately from her husband so far as beneficial enjoyment of such property was concerned, even though, in the eyes of the law, she owned nothing.

Similarly, the Chancellor provided limited contractual powers for married women. If the married woman had, at the date of a contract entered into by her, some separate equitable property of her own which was not subject to a restraint on anticipation, and if the contract did not bind her personally but merely her separate equitable property which she had at the date of the contract, then the Chancellor recognized and enforced the contract.

In the eyes of the common law, on the other hand, the position had remained largely unchanged right up to the latter half of the nineteenth century. But the Chancellor's activities meant that when, in 1870, the era of legislative reform affecting married women's rights was ushered in, it was no strange idea to Englishmen that a wife should have the right to own her own property separately from her husband, and to have contractual capacity. The Chancellor had provided for those things for a long time.

But I imagine that the women of England who in fact had been able to benefit from the protection provided by the Chancellor were limited in the main to those who were members of the propertied classes of society. They were the women who were members of families accustomed to measure their security in terms of land, who could lay out their future by employing skilled lawyers and the devices of settlements contrived by those lawyers. They must surely have been a very small minority of the married women of England.

In the forty odd years after 1870, the Married Women's Property Acts which provide the framework of law in this State for married women, were passed. Those Acts enabled married women to own their own property, to make their own contracts, to conduct their own businesses, and generally to behave in material things as though they were single women having legal personality within their own right, and unaffected by the existence of their husbands.

The married woman was relieved, however, from burdens which the man at the time had to shoulder, and burdens which any single woman had to shoulder. For example, generally speaking the enforcement of a judgment based on a contract could only be made against her property and not against her personally. Furthermore, if she contracted as an agent, then she could not be made liable on the contract, even in circumstances, so it would appear, where a single woman would have been made liable.[5]

That is the briefest and most inadequate summary of the early position, and of the effect of the Married Women's Property Acts; but it will serve for present purposes.

My first plea is not a new one. It is that the provisions adopted by the legislatures in the Married Women's Property Acts to remove the disabilities which attached to married women, have imposed injustices upon husbands.

I know that there are some inequalities still existing which work against the wife. I know that there are some organizations still dedicated to fighting the cause of women's rights. I do not propose here to enter into such problems as "equal pay for equal work". There are anomalies still existing which have to be examined and dealt with. A wife, in basic legal theory, is still tied to her husband's domicile, and cannot acquire a domicile of her own. A wife in Victoria is still the subject of a humiliating differentiation with respect to adultery as a ground for divorce. The wife may not bring an action against a third person for causing the loss of her husband's *consortium,* whereas a husband may bring such an action for the loss of his wife's *consortium.* This may well be a point of law which is open to review in Australia, but at this stage, the High Court's decision in *Wright v. Cedzich*[6] is authority for the view expressed. In that case, the majority justices said:

> "The right of a husband in the consortium of his wife is entirely different in character from the right of the wife in the consortium of her husband, the right of the husband being of material value capable of being estimated in money, while the right of the wife is no more than a right to the comfort of the husband's society and attention."

A militant feminist, no doubt, could list many other inequalities without pause for breath.

Generally speaking, however, women have been treated very well by the legislatures of the common law world in the last seventy odd years, and most of the private law disabilities under which they suffered in past centuries have been removed. The point is, that the

[5] *Paquin v. Beauclerk* [1906] A.C. 14[c]. [6] (1930) 43 C.L.R. 493.

provisions which removed those disabilities and redressed the wrongs of married women pre-supposed an obsolete substratum of legal rules and left that substratum largely unaffected.

The provisions which relieved married women of their disabilities were drawn in a fictional form. Nowhere do those provisions abrogate the common law rule of unity.[7] Everywhere they leave the basic idea untouched, and deal with the married woman's disability by saying that, with respect to such and such a matter, she is to be treated "as though she were a single woman". Nowhere is she in terms given a legal personality of her own.

As a consequence the Common Law rule of unity remains to darken the interstices, and all of the older rules by which husbands were charged with onerous duties (where not expressly varied) are left untouched.

I said that this reproach was not new. As early as 1875 the following passage appeared in an American work on the law relating to husband and wife. The author, referring to new legislation not unlike ours, said:

> ". . . it yields to wives the double advantages of matrimony and single bliss, and lifts from the shoulders of their husbands none of the burdens borne when the law gave them compensatory advantages. It remains only to add a provision compelling every young man to marry instantly the girl who chooses him, and the end of domestic woes has come . . . Then she can have, as she can have now if the man will submit to the marriage, for her sole and separate use, to accumulate till her husband dies, all that she owned before marriage, all that comes to her afterwards, and all that she can acquire through her labour and skill; while he provides for her house-room, meals, clothing, and the other necessities of life . . . If she chooses, she may employ her time with domestic cares; or if she chooses, she may leave her babes for him to look after them and nurse, and her meals for him to prepare with his own, while she engages in business on her separate account, and accumulates money, not a cent of which (or its increase) is she required to appropriate to the support of her family or even of herself—all must be borne by the husband."[8]

And again, to jump more than fifty years, McCardie J. in the case of *Gottliffe v. Edelston,* having listed a number of inconsistencies and injustices in the law, said:

"The above and many other aspects of injustice spring from the

[7] See the very valuable analysis by Professor O. Kahn-Freund in his article "Inconsistencies and Injustices in the Law of Husband and Wife"(1952) 15 *Modern Law Review* 133.

[8] Bishop, *The Law of Married Women,* vol. 2, p. 526.

> fact that various changes in favour of married women have not been accompanied by the adjustments that were needed to secure a proper and adequate code for the regulation of the relations between the spouses."[9]

Some of the injustices mentioned by the learned Judge never disgraced the symmetry of the law in Australia and others have been removed from it, but the words quoted remain true for us to-day.

In the last thirty odd years, the attitude not merely of society, but of our legislators and judges demonstrates clearly that the idea of equality between the sexes with which I began this address is now very largely accepted.

Our Marriage Act,[10] by s. 95, gives the Court power to order, on making a decree *nisi* for the dissolution of a marriage, that the husband *or* the wife shall secure to his or her ex-spouse such sum of money as seems to be reasonable. That section, it must be noted, relates only to property held by husband or wife, and not to future earning power. It does not, however, put the husband and the wife in complete equality so far as the powers given are concerned.

The modern Testators' Family Maintenance Act puts husbands and wives in equal positions. A wife's will may be challenged by her widower as not providing sufficiently for his welfare, just as a husband's will may be challenged by his widow for not doing so.[11] Though of course the court's approach to such applications will naturally be affected by the different circumstances. The widower has a harder case to establish than a widow.

It is now possible to force a married woman who has separate property to pay money towards the support of her children detained in certain institutions.[12] The provisions which make that possible do not, of course, relieve the husband of his more onerous duties in respect of his children, but they do go some way towards casting duties upon the wife which did not exist before.

The Statute of Distributions[13] provides for complete equality in the position of husband and wife in the case of one or the other dying intestate. Our Mental Hygiene Act[14] casts equal liabilities upon husbands and wives for the support of each other if one or the other is committed to an institution for the insane. Other examples could, no doubt, be given.

[9] [1930] 2 K.B. 378, p. 381.
[10] Marriage Act 1928 as amended by Act No. 4210, s. 4 (1930).
[11] Administration and Probate Act 1928, Part V, as amended by Testators' Family Maintenance Act 1937.
[12] Children's Welfare Act 1928, Div. 7, Part I, by Married Women's Property Act 1928, s. 26.
[13] Administration and Probate Act 1928, s. 47.
[14] Mental Hygiene Act 1928, Part VII.

In an increasing number of cases the courts are expressing hostility to rules which apply unequally as between husband and wife where the only explanations are historical ones.[15]

The Married Women's Property Act itself shows clear indications that the legislators were influenced by the idea even as long ago as 1884. Thus, the husband and wife are placed by that Act in precisely the same position with respect to larcency of each other's goods.[16] But that legislation for the main part, so intent were its framers on creating rights for women which they had not previously enjoyed, adopted the fictional forms to which I have referred, with resulting injustices.

I shall not attempt to list all such injustices for you; the tenor of some you will have already gathered. The following are some of the more striking:

(a) A wife may sue her husband for any tort committed before her marriage[17] and for a tort committed at any time if the action is to protect her separate property; whereas a husband cannot sue his wife for a tort at all.[17*]

Thus, if the wife threatens to damage his goods or his business he cannot obtain the assistance of the Court to prevent her. He is helpless.[18] If the positions are reversed, the wife has available to her all the remedies known to the law to protect her interests.[19]

(b) A husband is liable to support his wife and to pay for his wife's purchases if they are so called necessaries, even though his wife is a millionairess. She on the other hand may refuse to contribute a penny to the family expenses.

(c) The wife may take proceedings in the ordinary way to eject her husband from a house owned by her. She may even obtain an injunction to prevent him entering such house—at least in some circumstances. The ordinary process of the law is unavailable to the husband if he wishes to remove his wife from his house.[20]

(d) In New South Wales it seems that a husband may still be made liable for his wife's torts.[21] Enlightenment reached Victoria in this matter as early as 1915.[21*]

[15]See e.g. *Best v. Fox & Co. Ltd.* [1950] 2 All E.R. 798, and discussion of that case by Professor Zelman Cowen, 25 A.L.J. 390-94.

[16]Married Womens' Property Act 1928, s. 15 (2).

[17*] But husband and wife may sue each other on a contract—see Halsbury 2nd ed., vol. XVI, pp. 707-10. There may be occasions therefore when a husband by action on a contract can achieve much the same end as he could have in tort.

[18]*Webster v. Webster* [1916] 1 K.B. 714.

[19]See e.g. *Larner v. Larner* [1905] 2 K.B. 539.

[20]See discussion *infra.*

[21]See Walker & Walsh, *Married Women's Property Act,* for discussion, pp 9-11.

[21*]Married Women's Property Act 1915—now s. 19 of Married Women's Property Act 1928.

There are others with which I shall not disturb you tonight.

But it is not only injustices which mar the present position; it is the almost unbelievable complexities which have resulted in the actual administration of the law. I propose to deal with two problems to demonstrate those difficulties.

The first is the problem that arises with regard to husband's and wife's rights *inter se* in the law of torts, and in particular in respect to the most common of all torts these days, *i.e.* negligence occurring on the highway.

The second is the problem that arises from the present state of the law with regard to their respective real property rights.

S. 20 of the Married Women's Property Act provides to husbands and wives equally a summary procedure for the settlement of disputes as to title to or possession of property. In some cases such proceedings may serve the same purpose as an action in tort concerning property. The prohibition of actions in tort in s. 15 of the Act applies against husbands absolutely, but not against wives if the action is to protect her separate property. In any case, an old Common Law rule, left untouched by the statute and probably based upon the ancient unity of personality idea, would prevent any right of action arising in the husband against the wife for a tort committed by her during the marriage.[22]

Thus, for torts of a personal kind, such as negligence involving personal injury, defamation, assault, false imprisonment, etc., the husband has no proceedings whatever available to him against his wife, at whatever time the tort was committed. The wife has remedies available to her for any tort, if the action is to protect her separate property, and, in many cases, she may choose to stand on her strict legal rights or to proceed by way of the special summary procedure provided by the Married Women's Property Act.

But, and here is a startling injustice, in 1948 the Court of Appeal provided authority for the view that the wife may sue her husband for any tort whatever, if it was committed by him before the marriage. The typical modern factual situation is to be found in the case decided by the Court of Appeal: *Curtis v. Wilcox.*[23] The defendant (husband) injured the plaintiff (wife) negligently in a motor car accident, and subsequently married her. She, after the marriage, successfully sued him for damages for her injuries. The Court's reasons went like this: at the time of the accident, she had a valid claim against him for damages, and that was a thing in action, of value, and formed part of her separate property. Her subsequent proceedings were brought for the protection of that

[22] *Phillips v. Barnett* [1876] 1 Q.B.D. 436.
[23] [1948] 2 K.B. 474.

separate property, and were not therefore prohibited by s. 15 of the Married Women's Property Act.

With respect, I agree with Professor Kahn-Freund[24] that this reasoning is unsound and that the case should be overruled if ever the point is taken to the House of Lords. How can it be sensible to say that the action is brought to protect separate property when such separate property is the right of action itself? It may well be said that many things in action (in substance, a right of action) are treated in our law as property. But an action for a pure tort is a thing in action of a special kind. It has no market value. It cannot be sold or transferred or given away to third persons. Its true value can only be enjoyed by taking the action itself and succeeding therein.

Until the Lords speak, however, *Curtis v. Wilcox* lays down the law and marks another startling injustice between husband and wife.

This is not all, however. By far the commonest tort made the subject of action in our courts is that of negligence, and by far the greater number of such is for negligence on the highway. Almost all such actions for negligence on the highway are only nominally between the actual participants in the accident in which the injury was received. Almost always on one side or on both sides is an insurance company. Thus the present position is that a wife may obtain compensation from an insurance company for an injury caused by her husband before her marriage, but that a husband cannot obtain compensation from an insurance company for an injury caused by his wife before the marriage. And this is so in spite of the universal third-party insurance law applying to the vehicles upon our highways.

Similar absurdities abound in this part of the law, but the heights are reached through actions involving third parties.

Y, a husband, with his wife as a passenger, collides with another motor car driven by X. His wife is injured and proceeds against X. The facts are that both drivers were negligent. In such circumstances if husband and wife here were strangers, the law now provides that X may join Y in the action and ensure that he pays his fair share of the damages recovered.

But the plaintiff is married to Y, and, such is the wording of the Act, the old unity rule applies to save Y from liability for such share of the damages. That is the position in England,[25] and it flows directly from the rule prohibiting actions in tort between the spouses.

[24]See note 7, *supra*.

[25]See *Chant v. Read* [1939] 2 K.B. 346; *Baylis v. Blackwell* [1952] 1 All E.R. 74; *Drinkwater v. Kimber* [1952] 1 All E.R. 701.

That injusice to third persons was seen, however, when our Wrongs (Tort-feasors) Act 1949 was framed and a special subsection was inserted to remove it. That subsection provides in effect that when a third person finds himself in the predicament, as defendant, which I have described, he may join the husband as though he were not married to the injured wife.[26]

Here then is the circle squared. The wife may obtain damages from her husband for a personal tort committed during marriage so long as he was assisted (in injuring her) by a third person. More, the husband can obtain damages from his wife so long as her wrong-doing was contributed to by a third person.

Once again reform by fiction and by piecemeal patching has produced inconsistencies in the law.

Let me now turn to the second area of difficulty which I mentioned – the problems arising out of ownership of real property. I can give only glimpses, for the area is vast.

Our Married Women's Property Act, s. 4, provides that a wife shall be able to acquire, hold, and dispose of property, whether real or personal, as though she were a single woman, and also makes her capable of suing or being sued as if she were a single woman. If the wife should own a house, whether acquired before or after she marries, having no common law or statutory duties towards her husband with respect to that house, she can take action to prevent her husband damaging the house, to obtain damages from her husband if he does damage to the house, to prevent him from trespassing upon her property, and, in the last resort, with one qualification which I shall mention shortly, to eject him from that property.

If the positions are reversed, however, the situation is much more complicated. The husband has a common law duty to provide shelter for his wife. If he owns a house and has lived in it with his wife, and decides to leave, he cannot take action against his wife to remove her from it.

On the one hand, it is said that he cannot do so because the statute denies him an action in tort and that an action for ejectment of his wife would be one in tort.[27] That reasoning is denied by the New South Wales case of *Aaron v. Aaron*.[28] On the other hand, it is said that he cannot do so because the wife is not a wrongful occupier of such a house. It is said that she has a right to be there (but not the right of a tenant nor of a mere licensee) and that she has a special right or interest in the property which arises from

[26]See Act No. 5382, 1949, s. 2 (1) (d).

[27]See per Goddard L.J. in *Bramwell v. Bramwell* [1942] 1 K.B. 370, p. 374; and per Denning L.J. in *Hutchinson v. Hutchinson* [1947] 2 All E.R. 792.

[28](1944) 61 W.N. (N.S.W.) 93. With respect, it is submitted that the reasoning of Street J. in this case is unsound.

the husband's common law duties and the nature of the matrimonial home.[29]

But this makes for an absurd situation. If it is said that the husband should have a duty to provide shelter for his wife, and that it is a corollary of that duty that he should be denied an action in ejectment to remove his wife from his house, it may be answered that this denial does not work the purpose desired. The husband, being unable to eject his wife from the house, simply sells the house to an innocent stranger who is not inhibited as he is, and the new owner proceeds to eject her summarily. That situation demonstrates the absurdity of translating the wife's personal claim against the husband for shelter into a quasi proprietary right in some part of the husband's property.[29*]

A more fundamental conflict is revealed by the qualification of a wife's right to eject her husband to which I referred. The courts, when granting an order ejecting the husband, to protect the wife's right to her house, have expressly limited the effect of the order so as not to prejudice the husband's rights to *consortium*.

This seems to be a settled practice in the Australian States and in England, though in Scotland a slightly more realistic view has been taken.[30]

The practice is exemplified by referring to a typical order made by a court in Victoria – in *McTavish v. McTavish*[31] an order was made giving the wife, who owned the house and land in question, possession of the property in which the husband was then living, but "without prejudice to the husband's rights, other than proprietary rights, during any time that the owner occupied the property as a residence". By such methods the court seeks both to preserve the matrimonial rights of one party to the comfort and companionship of the other, and at the same time to give effect to the proprietary rights conferred by the Married Women's Property Act.

Understandable though the desire of the court might be not to interfere with the unity of the matrimonial relationship, the idea that you can enforce a wife's proprietary rights and still leave unim-

[29]e.g. per Denning L.J., *Errington v. Errington* [1952] 1 All E.R. 149, p. 155; and see also *Ferris v. Weaver* [1952] 2 All E.R. 233; *Thompson v. Earthy* [1951] 2 K.B. 596; and Denning L.J. in *Bendall v. McWhirter* [1952] 1 All E.R. 1307.

[29*]I am well aware that this understates the effect of the recent English cases but I am strongly of the opinion that Lord Justice Denning has led the Court of Appeal into doctrinal and social errors which will have to be corrected by the House of Lords and ought not to be followed in Australia. See the useful discussions and the cases cited in two recent articles: "Licences and Third Parties" by H. W. R. Wade 337; and "The Deserted Wife's Right to Occupy the Matrimonial Home" by R. E. Megarry (1952) 68 *L.Q.R.*, pp. 337 and 379 respectively.

[30]e.g. *Millar v. Millar* [1940] S.C. 56. [31][1940] V.L.R. 350.

paired the husband's matrimonial rights without producing hopeless confusion, is untenable.

The classic situation arose before the Married Women's Property Act was passed. In the case of *Symonds v. Hallett*,[32] the husband and wife had resided in a house which had been settled upon the wife for her separate use. Disagreements arose between them; the wife left the house and commenced divorce proceedings. She asked for, and was granted, an interim injunction to restrain her husband from entering or remaining in the house. He appealed from the granting of that injunction.

The Court found the problem posed too difficult for resolution. Here was the wife, owning in equity a house which was supposedly protected by the equitable rules to her separate use. It would seem to follow that she was entitled to exclude from it anyone whom she pleased, including her husband. At the same time, by ordinary matrimonial law, the husband was entitled to the companionship and presence and the intercourse of his wife.

If the court gave effect to her proprietary rights in the normal way, was it not assisting her in a wrongful refusal of her husband's existing matrimonial rights? The court evaded the issue, because after all in this case only an interim injunction was concerned. No permanent interests were likely to be affected, therefore.

None the less the court expressed concern at the dilemma. Brett M.R. said:

> "I am unwilling to express any opinion – although it would not be final, I know – on the very important question which has been raised before us on such a motion as is now before the court. I should wish that any expression I have to give on such a matter should be given on an occasion when the decision could be, with all possible formality, at once taken to the House of Lords. I think, therefore, it is more convenient that this injunction should for the present stand as it is."[33]

Lord Justice Cotton, having agreed that under the circumstances the injunction should stand, however, went on to state the dilemma in a classic form and to set the tendency of the courts for future times up to the present. He said:

> "Undoubtedly Courts of Equity have said that where property is settled to the separate use of a married woman, she is, as regards that property, to be considered as if she were a feme sole; that is so, as regards protecting the property against the interference by the husband; if he wishes to deal with it as his property and to deprive his wife of the property in it, then un-

[32](1883) 24 Ch. D. 346. [33]at p. 350.

doubtedly Courts of Equity will interfere, and it is their duty so to do. But where it is not interference with the property, assuming it to be the property of the wife and that the husband has no right to interfere with it qua property, it is a very different thing to say that she, a married woman, can insist on a Court of Equity preventing her husband entering the house. To say that she is a feme sole is a mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a feme sole. Expressions have been used that she is entitled to be there in all respects as a feme sole, and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is her husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove. No doubt it does seem to be the principle of those decisions to which we have been referred; but it is a principle which I do not in any way favour."[34]

Dicta in subsequent cases suggest that the view of the courts has hardened into one which may be stated as follows: that, even although the wife is entitled to protection of her separate property, the husband may none the less enter or remain upon the property of his wife upon which she is residing, but only for the purpose of *consortium.* It is suggested that such an entry or remaining by the husband is not to be considered a breach of the wife's proprietary rights. It follows, of course, that if the husband by any form of misconduct has lost his right of *consortium,* or enters or remains for the purpose of interfering with the wife's proprietary rights, he is on the same footing as a stranger.

It is submitted that this view makes nonsense of the law. Imagine the situation at the front gate – the wife meeting the husband as he proposes to enter. The wife says, "You can't come in here, it is my house and I don't want you in here." The husband replies, "I'm not interested in your house, I'm coming into the house because I want to give you a kiss, and because I want to talk in the sitting-room with you."

The law says he is entitled to do those things; but at what point is he enjoying the sitting-room, and at what point is he sitting merely to enjoy the companionship of his wife? It is submitted that such a distinction as this cannot be supported or applied, in reality.

Where the matter in issue is an application for an injunction, the

[34]at p. 351.

remedy is discretionary in any case and the courts may well take into account the state of the matrimonial relationship in exercising their discretion and thus successfully avoid the dilemma.

But where the action is a common law one to vindicate proprietary rights only, there is no discretion and the apparent dilemma must be faced. I suggest the Scottish approach is the better and the more realistic one. There it was held, in a case where the wife had made her husband tenant of her house, that the matrimonial relationship was irrelevant to the wife's right to obtain an order giving her possession of the house in a form appropriate as between strangers.[35]

Such an order vindicates her rights as owner; it says nothing as to her obligations as wife. If, having obtained possession of her house by such an order, a wife refused to live with her husband and refused to let him see her in her house, could it be said that she was not guilty of a matrimonial offence because the court protected her rights in the house? The suggestion is absurd.

The difficulty is largely created, it is suggested, by the loose use of the word "right". The matrimonial rights involved are not enforceable rights on the same plane as the proprietary rights: they are, at the highest, privileges for the denial of which the law attaches consequences which may well be the untying of the primary bond which effected their creation.

With the positions reversed, the considerations change importantly. If the husband seeks to obtain possession of his house from his wife (and it will be remembered that he cannot normally do that by action claiming his legal rights as the wife can, but only by application under the Married Women's Property Act invoking the discretionary jurisdiction of the courts), the court, if it makes an order in his favour, will, as I have said, make reservations protecting the wife's so-called right to *consortium*.

But the husband's duties are special. He is not merely subject to a general matrimonial duty to accord his wife *consortium*, but is under a specific duty to provide her shelter and sustenance. It is submitted, however, that that duty is a personal one only, and the moment an attempt is made to secure its purpose by creating proprietary and correlative rights in the wife, trouble is encountered, as the difficulties mentioned earlier show.

As has been seen, there is a tendency for the courts to fix the wife's right to shelter to some particular property and to do so by reference to a shaky concept of the matrimonial home. Thus, in a 1951[36] case the Supreme Court of New South Wales held that a

[35] *Millar v. Millar* [1940] S.C. 56.
[36] *Henderson v. Henderson* (1950) 51 S.R. (N.S.W.) 2: 7.

husband could not obtain possession of his house from his wife because they had set up house together there and had so made it their matrimonial home in which the wife had a right to reside. Needless to say the husband was not living in the house at the time.

It is submitted that the concept "matrimonial home" has meaning only when the spouses are in fact using a house together as a home, or, having done so, if there is an intention that they will again so use it and of course have not established another permanent home elsewhere.

The problem of a husband's duty to provide for his wife, it is submitted, should be met not by giving her special property interests but in the way the New Zealand court met a similar problem in *Kain v. Kain.*[37] There a husband was given an order for vacant possession of the matrimonial home, and it was held that such an order should not be subject to a condition that the husband should first find another home for the wife, if the periodical payments ordered to be paid to the wife were sufficient to enable the wife to install herself in a furnished house.

Thus, the wife is entitled to have sustenance and shelter provided by her husband consistent with his means. She is, *prima facie,* free to join him in such house as he may be living in, and he commits a matrimonial offence if he refuses her.

In the last resort, she has the choice of such house as is provided by him, or, if her refusal to live in that house is justified, the choice of demanding sufficient money from him to enable her to provide her own residence. An adult twentieth century woman should demand no more from the law.[37*]

It may well be said that the treatment I have given those matters reveals little support for the security of the family. There is much to be said for such a view.

It may be that we have been retrogressing for the last hundred years and that the legal ties of marriage ought not to have been loosened. It is submitted, however, that the point of no return has been passed, in our civilization. The primitive rigidity of family ties has been shattered, and the consequential relationships must now be rationalized accordingly. Those who do not like it can only bemoan the fact, they cannot turn the clock back.

[37][1943] N.Z. L.R. 342.

[37*]There may be cases where the only way to secure to a deserted wife shelter is to secure for her enjoyment the house owned by her husband. Let the courts have power to make an order (registerable as an encumbrance on the title accordingly) in those cases. But then, the wife's proprietary rights in the house will spring from the court's order and not from an awkward new idea of the effect of the matrimonial bond.

For consolation it is well to remember that in most cases involving family disintegration the evil has been done before the law is resorted to. It is only in the last resort that a wife will seek an injunction against her husband, to prevent him entering her house, for example. By the time she does that, the damage to the marriage has already been done.

It is also well to remember that for the most part it is not the law that sustains the strength of the family or gave rise to it. Rather has the strength of family ties, backed by the undefined pressures of society generally, given rise to and supported the law.

Those, then, are some of the problems, some of the injustices which have been met to a large degree because of the reforms of the last century in favour of married women.

What should be done about it?

So far as the purely legal and rule-working problems are concerned, and particularly those which consequently affect third persons, a rejection of the fictional method by which wives' property rights have been protected in the past would solve most problems. It may not have been an unfortunate thing that those methods were adopted initially. At the outset of a great change, such as that which took place in the eighties of last century, it is difficult, perhaps impossible, to foresee all of the difficulties which will arise as consequences. We have now had seventy years' experience, however, and can see our way more clearly. The United States experience may well be useful to us.

The early Acts in America tended to adopt a similar method to that adopted by England (though they were earlier). As time progressed, other methods were tried. The Acts to be seen in the American States may, for our purposes, be classified generally into four main types.

First: Acts which declare that wives' property at marriage or after-acquired property should remain their own or to their separate use, etc. (such as the statute in Alabama).

The second: Acts which expressly abrogated the husband's common law rights with respect to the wife's property (as in Connecticut). Such acts appear to have been drawn with the same general ideas in mind as were in our legislators' minds when our Married Women's Property Acts were passed.

The third: Acts which confer new, defined capacities upon wives with respect to their property and earnings, and those capacities are defined by reference to male capacities. This (as in Illinois) type of Act partakes of the fictional defects of the system adopted by our acts.

> And *the fourth:* Acts which both remove the disabilities of coverture, and expressly establish the independent and complete legal personality of the wife or do one or the other. (Such acts may be seen in the States of Oklahoma, Oregon, and Mississippi). These latter acts are the most recent and indicate a modern view which would evade the technical inconsistencies which arose out of the older methods adopted.[38]

Acts of the latter kind, particularly those which both remove disabilities of coverture and establish positively the independent and complete legal personality of the wife, by destroying once and for all the old common law rule of unity of personality, it is obvious, will remove many of the legal inconsistencies mentioned tonight.

Thus, we would establish a new starting point for our legal thinking. In place of the ancient unity rule involving wifely subservience, we would start with the idea that husband and wife remained complete legal personalities bearing all the ordinary legal rights and duties, but subject to such special qualifications or special rules by way of exception as are thought necessary to secure the important relationship created between them.

But that is only the beginning. That would enable the easy removal of some specific legal injustices. Two basic problems remain to be settled. One is a fundamental question of substance; the other is a matter of procedure.

The first is the question whether we ought to adhere to our principle of separate property in marriage – the present situation where every single thing is his or hers and nothing is theirs, or whether some principle of community of property might be accepted, and if so, to what extent.

The second is the question of what procedure to provide for the settlement of disputes between husband and wife should be adopted.

I can only touch upon those problems lightly and indicate a view.

Dr. Edith Summerskill, in England, has recently urged the introduction of at least a partial community of property, and the question is a live one in that country.

The advocates of community of property say it will make for a greater unity of the married state. The two unities – unity of the married state, and unity of property – provide a certain verbal attractiveness for this argument. But is there any reality in it? It is suggested that there is not.

True community of property would involve that all decisions with respect to such property should be joint. It would not provide for a diversity of interests between the husband and the wife, except

[38] Vernier, *American Family Law*, vol. III, p. 168.

by specific agreement. It would not provide for the ordinary give-and-take between parallel activities of husband and wife.

Furthermore, in any partnership, or in almost all partnerships, one partner tends to be dominant. It is usually assumed in the history of our law that that dominant partner is a male. I question that assumption. But one dominant partner is almost inevitable. A community of property in the long run merely adds to that dominance.

In all but one of the many states in the world which have developed community of property rules, either from their civil law or their primitive family law origins, and whose laws I have looked at, the husband alone is designated the manager or the administrator of the common property during marriage.[39] That is the very situation from which the women of England thought they had escaped in 1884.

In any case, the onus of persuasion must be on those who propose a change from our separate property system; and, as all community of property involves a gift from one to the other, the onus must lie on those who urge the gift.

There is one argument which carries weight. The wife who does her job fully as expected by the community, as wife and mother, has for a long period of time little opportunity to accumulate any money. The only opportunity to do so is the husband's. Thus, if after twenty-five years of wifely duties, the marriage disintegrates, the accumulations are the husband's and the wife has nothing.

To provide by a community of property for that natural inequality of wives meets two major difficulties, however; the first is that it requires only a partial community of property and that only such as is acquired by personal effort. I doubt our ability to devise workable rules to provide merely for that period of their lives and for such property. The German Civil Code included such a provision, but it remained a dead letter. The Soviet Civil Code includes such a provision now, but we have little knowledge of how or to what extent it works.[40]

The second objection is that, for the vast majority of people in our community, and, I suspect, in any community in the world today, such partial community of property really would mean very little. At the most it would mean a share in a few hundred pounds or a part-share in a small house or an old car. It would not provide any real security to either party.

The real recompense for a wife who does her duty as the com-

[39]e.g. It appears that in every state of the U.S.A. where community of property is the rule, the husband alone may dispose of personal community property without consulting the wife.

[40]Vladimir Gsouski, *Soviet Civil Law* (1949), pp. 242 *et seq.*

munity expects it of her (and the real security for her) is in the personal obligations which the law casts on the husband to provide for her welfare and her shelter and sustenance, and also upon the fact that after her duties as a mother are over she still has some twenty years of active life when her obligations are slight, and when she can if she wishes earn money for herself and accumulate it for herself without obligations to her husband. If the husband must accept those obligations for his wife's maintenance, and I submit that so long as the wife bears the children, he must, why should he in addition lose half his, in most cases, meagre property to the same end? That would be surely the proverbial last straw.

But even at this point there is injustice to the husband under the present law. I have said that the wife's security is to be found in her husband's obligation to support her. For the most part, wives enforce that obligation, if legal assistance is needed, by invoking the provisions of the Maintenance Act.

That Act requires a court to consider whether or not the wife is left without means of support. In considering that question, the court is not permitted to take into account the wife's earnings from personal exertion.

In the old days, perhaps that had reason behind it. As recently as 1937, Mr. Paul in his well-known book *Maintenance Orders* said:

> "Ordinarily most adult men maintain themselves, and their wives and families by their own exertions, or from their own resources. Most adult women are maintained by their husbands or by their relatives or friends—that is, where they do not possess a private fortune or independency."[41]

That is, without question, no longer true, and I suggest it was untrue in 1937.

The impossible situation arises where a court is asked to decide whether £200 which a wife has saved is sufficient to deprive her of her right to support from her husband under the Maintenance Act. Quite naturally, the court is reluctant to say that it is, as the £200 may well have been accumulated from her personal exertions, and to say that it is means that she must spend it before she can obtain the support the law provides for her.[42]

Not in all, but certainly in very many cases, Courts of Petty Sessions have to hear petitions under the Maintenance Act by a young woman who either has no children or a single child which is being very satisfactorily cared for by its grandmother, for maintenance against her husband. In a large number of cases, although the fault is proved in the husband to the satisfaction of the court,

[41]at p. 11.
[42]See *e.g.* the discussion in *Ploog v. Ploog* [1947] V.L.R. 12

the substantial reason why the young woman is not keeping house for her husband is that they simply "don't get on any more". The partnership has ceased to work.

The wife, in effect, claims a third of her husband's income. That is not a rule of law, but as a working rule of thumb it achieves reasonable accuracy.

The situation may well be, and frequently is, that she is earning say £12 a week in a knitting factory, while her husband is earning £10/12/6 as a labourer in a neighbouring factory. The court, as I have said, is not entitled to take into account the earnings that the young woman receives, and unless she admits to owning or it is proved that she owns considerable property of a capital nature, she will obtain an order which may bind her husband (unless circumstances change) for his life.

It may be argued that before such an order is made, the husband's fault must have been proved to the court, and that therefore this is nothing more than a punishment for his fault. The first thing to be said about that is that in most cases the punishment is too heavy, and that the order can only be supported on the basis that the woman requires such maintenance for her reasonable support.

But there is a further factor that must be taken into account. That factor is that, though the law may make the husband's fault a condition, the realities are that such a condition is not effective to ensure that only an innocent wife will obtain maintenance.

I think it is fair to say that all practitioners in this State who have experience of maintenance proceedings would agree that in the vast majority of cases to appear for a husband in a maintenance application is to undertake a steep, uphill battle. In most Courts of Petty Sessions the scales of Justice are heavily weighted in favour of the wife. There are, no doubt, some basic common sense reasons which explain that general attitude. There are some other reasons which assist in the explanation also. Not the least, I suspect, is that the formal and objective atmosphere of the court room tends to make the behaviour of a husband sound outrageous, which in the heated atmosphere of the kitchen might merely seem natural though undesirable.

The fact remains, and I assert it confidently, that many husbands are paying maintenance today to support wives who neither need the maintenance to support themselves nor are entitled to it from any but the most superficial application of the legal rules to the factual background which preceded the break-up of the matrimonial home.

The situation calls for redress. Fortunately, the redress is easily

supplied. We have reached the stage where a vast majority of women in our community are able to earn their own livings, usually prefer to earn their own livings, and are, I submit, better people if they do earn their own livings. In such circumstances, it seems only just and highly desirable that their actual earnings be taken into account as a factor in deciding just what the scope of the husband's duty to support, in terms of money, might be when the matrimonial relation ceases to exist *de facto*.

There is at present a Bill before the House (Maintenance [Amendment] Act 1952) which recognizes this need. That Act *(inter alia)* will require the Court, having decided that an order should be made against a defendant husband, to take into account in fixing the amount to be ordered "any moneys which she is then earning" along with a number of other relevant factors (including style of living, their financial position, his ability to pay). This is not good enough. Under this Act no wife applicant will be earning anything at the time of the hearing.

The second major problem is the problem of how to sort out disputes between husband and wife.

Section 20 of the Married Women's Property Act provides a summary procedure for resolving disputes between husband and wife as to title to or possession of property. The Section gives the judge a very wide discretion to resolve the dispute.[43] So far as this Section is concerned, the rights of the husband and the wife to take proceedings against each other, are rights of complete equality.

It is suggested (*e.g.* by Professor Kahn-Freund in a recent article entitled "Inconsistencies and Injustices in the Law of Husband and Wife"[44]) that all disputes between husband and wife should be settled by a procedure such as this. At first glance, such a suggestion has a verbal attractiveness. "Trials by battle", with rights opposing rights, and duties, duties are to be avoided between husband and wife, for such proceedings hamper the unity of the matrimonial bonds. Let husband and wife when they have a dispute go before a judge in Chambers, not in a formal proceeding, but to let the judge be a Solomon in respect of the problem between them. So the argument might run.

In practice, I suggest, this is no solution. Such proceedings in my experience (and I think in the experience of most practitioners) are more unpleasant and more difficult than formal court proceedings.

[43]Section 20 of Married Women's Property Act 1928 provides *(inter alia)* that "the Judge . . . may make such order with respect to the property in dispute . . . as he thinks fit. . . ."

[44](1952) 15 *Modern Law Review* 133.

Furthermore, the very informality of the proceedings means that the judge is faced with a conflicting mass of unsorted, frequently irrelevant, evidence on which to decide, not in accordance with strict rules of law from which a decision may sometimes flow more or less inexorably, but in the last resort as Solomon. As Solomon in these circumstances is less likely to satisfy either party, he is less likely to satisfy himself that he is right. I suggest that such a solution would cast in the long run an intolerable burden of judgment upon our courts.

Let me revert to what I said earlier, that it is almost the last resort for husband and wife to take court proceedings against each other, and that in most cases when that is done the damage to the matrimonial bonds is already complete. If the damage is not final, I suggest that the court proceedings will not confirm it. If the bonds are to be mended, they will be mended in spite of and sometimes even because of the court proceedings. If that is so, then surely it is better, if husband and wife have a dispute which is resolvable by legal proceedings, to treat them as ordinary strangers in respect of that dispute and to permit the dispute to be decided by the ordinary rules of law. Those rules in more cases than not provide a reasonable certainty of result, a reasonably efficient procedure for sorting the evidence and the issues for decision, and a reasonable task to ask a human judge to perform.

It may be that some matters of dispute ought to be denied husbands and wives. It may be that here some special rules ought to set off husbands and wives from other legal persons because of their special relationship. Thus it might be thought that the tongues of wives and the hands of husbands are so uninhibited that suits for slander and assault ought to be denied them. Those are matters for careful consideration before decisions, however.[44*]

I have reviewed some of the inconsistencies and injustices that exist today so far as property relations are concerned between husband and wife. I have attempted to suggest some of the more important questions for consideration if those injustices and inconsistencies are to be removed and the law made to serve the needs of twentieth century society.

The problem arises, what body or what person or persons in this State can or ought to undertake the task of investigation and reform? There is no Governmental Department charged with keeping legislation of this kind up to date and in accord with society's needs.

[44*]For myself I think that view is assumed too easily. We permit criminal proceedings for assault between husband and wife and such proceedings are common in our Courts of Petty Sessions. Might it not inhibit a husband more if his wife could say—not "Hit me again and I'll prosecute you", but "Hit me again and I'll buy a new hat with the damages I'll get"?

The Chief Justice's Law Reform Committee is not staffed or organized to undertake tasks of such magnitude.

Any body which undertakes a survey of the problems involved here with a view to reform must not merely do a very considerable amount of work on the legal rules involved, but also undertake an investigation of the social implications of a change in those rules, and obtain information as to the actual impact of the existing rules and the likely impact of suggested rules upon society and, in particular, upon the structure of the family.

Further comparative studies ought to be undertaken of other advanced legal systems, and, in particular, those which have modern community of property systems. Perhaps the answer is that there should be a Royal Commission here, to study the problems of married women and the law relating thereto, as there is at present in England.

No doubt the matter is not one of national urgency compared with some other questions confronting the government today, but it is a matter which must be dealt with, else the law, the courts, and the family will be brought into greater disrepute than they are at the moment.

In conclusion, I would say this: if there are ladies who think the tenor of my thoughts has assumed too great an independence for women and that they would cling to the older comfort of dependence, then, remembering that they cannot for long have it both ways, let them consider whether they would return even forty years in time.

It is less than forty years since Sir Almroth Wright was able to write the following in his book *The Unexpurgated Case against Woman Suffrage,* and yet to live honoured and unharmed into old age:[45]

> "The failure to recognize that man is the master, and why he is the master, lies at the root of the suffrage movement. By disregarding man's superior physical force, the power of compulsion on which all government is based, is disregarded. By leaving out of account those powers of the mind in which man is the superior, woman falls into the error of thinking that she can really compete with him, and that she belongs to the self-same intellectual caste."

[45] at p. 71.