COMMENTS
COMMENTAIRES

TORTS — NEGLIGENT STATEMENTS — LIABILITY OF REAL ESTATE AGENT IN ABSENCE OF CONTRACTUAL RELATIONSHIP.—A decision of the Supreme Court of British Columbia, *Dodds and Dodds* v. *Millman*,[1] illustrates the difficulties that can arise from the application of the decision of the House of Lords in *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[2] to arm's length dealings, where in the usual course of things one would expect the parties to define their respective duties and obligations, or keep their peace.

There can be little doubt now that an accountant who prepares a financial statement with actual or presumed knowledge that his client will use it to portray his business in dealings with third parties is liable to a third party in damages for careless inaccuracies appearing in it. But to extend liability of this sort to real estate agents who are employed by the same businessman to sell his business is to take the *Hedley, Byrne* case very far indeed.

In *Dodds and Dodds* v. *Millman*, the plaintiffs bought an apartment house on the strength of an "operating statement", which was prepared by the vendor's agent, and which proved to be carelessly incorrect. There was no element of fraud. The court dismissed the action against the vendor because the contract of sale and purchase contained a clause that excluded representations and warranties other than those contained in the writing, but allowed recovery against the real estate agent for breach of duty of care in the compilation of the operating statement. Maclean J. said:[3]

> . . .the doctrine enunciated in the *Hedley, Byrne* case is, in my view, accurately set forth in that part of the head note which reads as follows: "If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or

[1] (1964), 45 D.L.R. (2d) 472, (1964), 47 W.W.R. 690 (B.C.S.C.).
[2] [1963] 2 All E.R. 575 (H.L.).
[3] *Supra*, footnote 1, at pp. 475 (D.L.R.), 693 (W.W.R.).

> advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care, an action for negligence will lie if damage results."

and furthermore:[4]

> I respectfully adopt the principles enunciated in the *Hedley, Byrne* case and find that even though no contractual relationship existed between the plaintiffs and the agent, the relationship was such as to impose upon the agent the duty to exercise care in compiling the operating statement.

It is abundantly clear from the report that the operating statement was not a term of the contract of sale and purchase, and that the contents of this statement had effect only as an innocent misrepresentation made to induce the plaintiffs to enter into the contract of sale and purchase.[5] The truth of the contents of the operating statement, therefore, was not warranted by the vendor; nor is there any indication in the report that the purchasers made any inquiry of the vendor or of the agent to ascertain whether the operating statement was accurate.[6] The agent had mailed it to the intending purchasers in the first instance when the latter responded to the agent's newspaper advertisement.

If the facts in another case will permit, counsel may be able to distinguish the *Dodds* case by submitting that a vendor's agent cannot be taken to have been standing in such a position of independence and disinterest that it was reasonable for the purchaser to place reliance on his skill and judgment[7] without further inquiry and satisfaction, or stipulation that the vendor make the agent's representation a contractual term. In such a case, counsel might well argue that, viewing the facts objectively, and not sub-

[4] *Ibid.*, at pp. 477 (D.L.R.), 695 (W.W.R.).

[5] *Cf. Oscar Chess, Limited* v. *Williams*, [1957] 1 All E.R. 325 and *Bentley* v. *Smith*, [1965] 2 All E.R. 65; also Anson's Law of Contract (21st ed., 1959), p. 113 and Chitty on Contracts (22nd ed., 1961), p. 562.

[6] *Supra*, footnote 2, at p. 617, per Lord Pearce: ". . . To import (a duty of care) the representation must normally, I think, concern . . . a transaction whose nature makes clear the gravity of the inquiry and the importance and influence of the answer."

[7] *Ibid.*, per Lord Reid, at p. 583: ". . . no logical stopping place short of all these relationships where it is plain that the party seeking the information or advice was trusting the other to exercise such a degree of care as the circumstances required, *where it was reasonable for him to do that* (emphasis supplied), and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."

jectively, it is more probable than not that, first, the vendor's agent did not know and did not have reasonable means of knowing that the purchaser would rely on the accuracy of the representation, that is, in the sense that he knew or should have known that the purchaser would be looking to him to be responsible if the same proved to be carelessly inaccurate;[8] and, second, that it is more probable than not that the purchaser did not expect the vendor's agent to undertake any obligation towards him other than the common duty not to be deceitful.

A case where the purchaser has concurrent claims against the vendor for damages for breach of warranty and against the vendor's agent for damages for breach of duty of care with respect to the same representation that stood as a warranty vis-à-vis the vendor and purchaser may stand on a different footing. In the given case, an interesting question would be raised if the agent were to defend the action on the ground that his representation was a contractual warranty made by him as agent of the vendor, and that therefore the ordinary rule is applicable that agents who contract for principals are not personally liable.

In the absence of a contractual term relating to the truth of a statement made in the course of dealing, a vendor's duty to a purchaser is no higher than that of honesty, the breach of which would give rise to an action for damages for deceit. How can the courts impose a higher duty on the vendor's agent for the same statement? It is submitted that *Dodds and Dodds* v. *Millman*[9] must be considered as being a case with extra-ordinary facts, the details of which do not plainly appear in the Reports.

ROBERT J. HARVEY*

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TRADE MARK—LOSS OF DISTINCTIVENESS—INFRINGEMENT—PERMITTED USE—RIGHT OF REGISTERED OWNER.—Had you bought a "Cheerio" yo-yo between 1938 and 1955 manufactured and sold

[8] The purchaser's expectation in this respect is the corollary of the vendor's agent's voluntary assumption of responsibility in circumstances equivalent to contract.

See *supra*, footnote 2, per Lord Devlin, at p. 610: ". . . where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.": (*i.e.*, one of the terms of which, express or implied, would be an obligation to exercise care in the making of a statement.)

[9] *Supra*, footnote 1.

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by Cheerio Toys & Games Limited, you would have been entitled to assume that it was the same old familiar, first class "Cheerio" yo-yo to which you had been accustomed. If you bought your "Cheerio" yo-yo after 1955 from the same manufacturer such assumption would no longer be justified. These conclusions follow from a decision of the Exchequer Court of Canada,[1] recently affirmed by the Supreme Court of Canada.[2] The unusual aspect of this judgment is that in the period 1938 to 1962 Cheerio Toys & Games Limited was the sole manufacturer and distributor of "Cheerio" yo-yos.

In the Exchequer Court, it was held that during the period from 1955 to 1962, the quality of distinctiveness possessed by the trade mark "Cheerio" dissipated, notwithstanding that *in fact* the mark had been used exclusively on goods manufactured and distributed by only one person, Cheerio Toys & Games Limited.[3]

The ratio in the Exchequer Court decision is that the use by two persons of two similar trade marks upon the same yo-yo has the effect of dissipating the distinctiveness of the registered trade mark. The court also concluded that as one person's mark was registered, the use by the other of a similar mark on the same yo-yo was a use which infringed the rights of the owner of the registered mark.

It is interesting to observe that because there is infringement, it follows that the use by two persons of similar marks on the same yo-yo is confusing.[4] Section 6(2) of the Trade Marks Act[5] defines "confusing" in relation to a trade mark as follows:

> The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares associated with such trade mark are manufactured, sold, . . . by the same person . . . .

The use, therefore, of these two similar trade marks upon the same yo-yo is likely to cause confusion because the consumer might infer that the yo-yo was made by one person. This, of course, would be an accurate inference, as in fact Cheerio Toys

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[1] *Samuel Dubiner* v. *Cheerio Toys & Games Limited* (1965), 28 Fox Pat. C. 1, per Noel J.

[2] *Cheerio Toys & Games Limited* v. *Samuel Dubiner* (unreported). In a judgment given on December 14th, 1965, the Supreme Court of Canada by a majority of 4 to 1 dismissed the appeal and cross appeal. The opinion of the majority was delivered by Hall J.

[3] *Supra*, footnote 1, per Noel J., at p. 32.

[4] Trade Marks Act, S.C., 1953, c. 49, s. 20. In order that there be infringement, it is necessary that there be a use of trade marks which is likely to cause confusion.

[5] *Ibid.*

& Games Limited was the only person manufacturing and distributing "Cheerio" yo-yos. Under the Trade Marks Act, therefore, in the particular fact situation in issue in the "Cheerio" case the truth is likely to cause confusion.

The Exchequer Court held, nevertheless, that the badge of quality, the trade mark "Cheerio", no longer possessed that characteristic distinctiveness that it had originally possessed, notwithstanding that it was being used in the same manner, by the same company, on the same type of yo-yos, which were being produced and sold exclusively by that company. On appeal, the Supreme Court of Canada concluded that this was an inevitable result.[6]

How was this "inevitable result" reached?

The facts giving rise to the dispute were as follows: Cheerio Toys & Games Limited was incorporated in 1938 and the majority shareholder at that time was one Dubiner. Dubiner transferred control in the company to one Krangle in 1955. Just prior to the completion of the transfer of the controlling shares all of the trade marks owned by the company, including the trade mark "Cheerio", were transferred by the company to the former controlling shareholder, Dubiner, and thereafter a licence back in favour of the company was executed. The company was subsequently registered as a registered user under the provisions of the Trade Marks Act by Dubiner, the registered owner. The terms of the licence were such that the registered owner, Dubiner, maintained a degree of control over the use of the trade marks by the licensee, Cheerio Toys & Games Limited. In 1962, pursuant to the terms of the agreement Dubiner terminated the licence.

Thereafter Cheerio Toys & Games Limited continued to sell yo-yos bearing upon them the trade mark "Cheerio" and as a result Dubiner sued them for infringement.[7]

Cheerio Toys & Games Limited, by its defence, argued:

1. That the registered owner had abandoned the trade mark "Cheerio".[8]
2. That the trade mark "Cheerio" did not actually distinguish the wares of Dubiner from the wares of others, but in fact was used to distinguish wares of the company from wares of others,[9] or in short, that in the hands of Dubiner the trade mark was not being used as a trade mark.

[6] Hall J., *supra*, footnote 2, in dismissing the cross appeal of Dubiner on the issue of the validity of the registration of the "Cheerio" trade mark said in part: ". . . the result which the learned Exchequer Court arrived at was inevitable."

[7] *Supra*, footnote 1, at pp. 4 to 11 for a summary of the facts of the case.

[8] *Ibid.*, at p. 18.

[9] *Ibid.* and also at p. 23.

3. That the registration of the trade mark "Cheerio" was invalid.[10]

Noel J. disposed of the first two arguments of the defence by relying upon section 49(3) of the Trade Marks Act.[11] This section provides that the permitted use (that is, use by a registered user) of a trade mark has the same effect for all purposes of the Act as a use thereof by the registered owner. He therefore held and, properly so it is submitted, that use of the trade mark "Cheerio" by the defendant, Cheerio Toys & Games Limited, was a use attributable to the registered owner Dubiner.[12] In concluding that use by a registered user is attributable to the registered owner, it is submitted that the court found a relationship to exist between a registered owner and registered user which is analogous to the relationship that exists between a principal and agent. Under the Act the registered user is empowered to use the trade mark of the registered owner and the registered owner shares legal responsibility for that use. It was accordingly held that the registered owner could not be said to have abandoned the trade mark "Cheerio",[13] and further if the registered user was maintaining the distinctiveness of the trade mark, it could not be said that the registered owner was not maintaining its distinctiveness.[14] Accordingly, the registered owner was held to be using the trade mark "Cheerio" as a trade mark.

On the third ground of defence, the learned judge encountered some difficulty.[15] Under section 18(1)(b) of the Act[16] the registration of a trade mark is invalid if the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced. The defendant argued that the trade mark "Cheerio" had lost its distinctiveness by 1962 and its registration was therefore invalid. The Exchequer Court concluded that this submission was correct.[17] Noel J.'s reasoning was as follows: Cheerio Toys & Games Limited were using two trade marks upon its yo-yo. In its capacity as a licensee of the registered owner, they were lawfully using the trade mark "Cheerio". The court attributed this use to the registered owner, Dubiner.[18] In addition, in its personal capacity the company was using its trade name

[10] *Ibid.*

[11] *Supra*, footnote 4.

[12] *Supra*, footnote 1, at pp. 21, 23 and especially at p. 31: ". . . the trade mark 'Cheerio' was owned by Mr. Dubiner and when it was used by the defendant company as a permitted use [sic] was use attributable to Dubiner."

[13] *Ibid.*, at pp. 21 and 23.

[14] *Ibid.*, at p. 23.

[15] *Ibid.*, at p. 28: "I now come to deal with a matter which has given me considerable trouble and which I believe requires some elaboration."

[16] *Supra*, footnote 4.

[17] *Supra*, footnote 1, at p. 32.

[18] See *supra*, footnote 12.

"Cheerio Toys & Games Limited" as a trade mark upon the yo-yo.[19] As a result of this use of similar trade marks by two separate persons Noel J. held that the distinctiveness of the word mark "Cheerio" had been dissipated. In his opinion the use by the company of its trade name as a trade mark was one not by virtue of any user agreement, but was one in its own right.[20] This use infringed the registered trade mark "Cheerio" and therefore was unlawful and should have been objected to by the registered owner, Dubiner.[21] Because Dubiner did not so object in 1955 when the licensing agreement was executed this continued wrongful use for a period of seven years was held to have dissipated the distinctiveness of the trade mark "Cheerio".

The judgment appears to be open to criticism upon two grounds. One of the grounds was advanced by counsel for Dubiner in the Supreme Court of Canada. It was maintained by the appellant that the right to make a trade mark use of the word "Cheerio" in the trade name of the company was a right which was granted to the company by the registered owner under the terms of the licensing agreement executed in 1955. Counsel for Dubiner argued that an implied term should be incorporated into that agreement to the effect that the trade mark owner consented to the use of this trade name as a trade mark upon the goods.[22] It is submitted that this right was expressly granted to the company under the terms of the licensing agreement and that the company had the right to make all legitimate trade mark uses of the word "Cheerio" by virtue of that agreement. However, this argument did not prevail in the Supreme Court of Canada.[23]

The major and more obvious ground of criticism of the decision is as follows: How can a trade mark be said to be any less distinc-

[19] *Ibid.*, at p. 29 *et seq.*

[20] *Ibid.*, at pp. 31 and 32.

[21] *Ibid.*, at p. 32: ". . . The plaintiff has allowed or tolerated the defendant company to use its trade name as a trade mark over a long period of time. . . ."

[22] In the reasons for judgment of the Supreme Court of Canada, Hall J. said: "Counsel for the Respondent (Dubiner) as cross Appellant submitted that it was the duty of the court to ascertain the true intention of the parties at the time of the transaction and if such true intention was to give to the Respondent Dubiner the property in the 'Cheerio' trade marks, then it should enforce that intention by declaring the validity of the trade mark despite the fact that the assignor company was not required in the assignment to Dubiner to alter its corporate name, as the parties could not have intended to adopt a course which would result in the invalidity of the name."

[23] *Ibid.*, per Hall J.: "I am of the opinion that the court would not be justified in writing into the contract of assignment from Cheerio to Dubiner of March, 1955, any covenant that Cheerio should change its corporate name. That covenant having been omitted, then the result which the learned Exchequer Court judge arrived at was inevitable."

tive on the basis of concurrent use when *in fact* it has been exclusively used for the entire period of time under consideration upon the goods of one person? Ownership of the trade mark is the only interest that changed in this case. Noel J., in the Exchequer Court specifically points out that the "origin theory" of trade mark law has in effect been modified to a certain extent by the enactment of the registered user provisions in the Trade Marks Act, and that the "warranty" or "quality" theory is the governing consideration under the present Act.[24]

If we apply this general theory to the fact situation in the "Cheerio" case we need only ask:

"Did the badge of quality 'Cheerio' lose any of its distinctiveness over the seven year period from 1955 to 1962?" Clearly it did not as it was throughout that period being exclusively used by one person in association with goods exclusively manufactured and distributed by that person. The use of the trade mark "Cheerio" *actually* distinguished the goods of Cheerio Toys & Games Limited from the goods of others.

The judge's finding as to concurrent use was based upon the conclusion that the use of the trade mark "Cheerio" by the company in its capacity of licensee, was a use attributable in law to the registered owner and licensor by virtue of section 49(3) of the Trade Marks Act.[25] As suggested earlier where the use by one is in law attributed to another, the situation is analogous to the legal relationship that exists between a principal and agent. The legal relationship between a principal and agent confers upon the agent a power to bind his principal.[26] Where the agent performs a physical act on behalf of his principal, the principal himself does not perform the physical act. *In fact*, the act of the agent is not the act of the principal although legal responsibility for the act of the agent is borne by the principal.

It is submitted that use of a trade mark by a registered user is a

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[24] *Supra*, footnote 1, at pp. 12 to 15 and especially at p. 15 where his Lordship concludes: "It therefore now appears that the whole purpose of the conditions underlying Registered User provisions is that the quality of the goods would not be reduced if the marks were permitted to be used by other persons than the owner and that by so placing the accent on the characteristic of quality of the goods, if the public interest is protected, the matter of origin would not be of too much concern."

[25] *Supra*, footnote 4.

[26] W. E. Hohfeld, Fundamental Legal Conceptions (1923), p. 52: "By the use of some metaphorical expression such as the Latin *qui facit per alium facit per se*, the true nature of agency relations is too frequently obscured. The creation of the agency relation involves *inter alia* the grant of legal powers to the so called agent and the creation of co-relative liabilities in the principal."

use in law for which the registered owner shares legal responsibility, or in the words of the trial judge is a use which is attributable to the registered owner. But the registered owner need not *in fact* use the trade mark in association with any wares which he produces. If his Lordship found that *in fact* two persons were using the trade mark, it is submitted that this finding was incorrect. Only one person used the trade mark "Cheerio" from 1955 to 1962, and this trade mark continued to distinguish the goods of that person from the goods of others.[27] No other goods were on the market that had affixed to them the same or a similar mark. Even assuming that the use by the company of its trade name as a trade mark was an unauthorized use, nevertheless the fact still remains that only one person used the trade mark. How a trade mark can lose its distinctiveness when in fact it is being exclusively used by one person in relation to one set of goods is something which is difficult to comprehend. This is so even if one assumes that the person uses that trade mark and similar or confusing trade marks in two different capacities. Under section 2(f) of the Act[28] "distinctive" in relation to a trade mark is defined as a trade mark that actually "distinguishes the wares in association with which it is used . . . from wares of others . . .". It follows from this definition that in order for a mark to lose its distinctiveness by virtue of concurrent use it is necessary that *other persons* be in fact engaged in affixing the same or a similar mark to goods which they themselves have manufactured and distributed. In other words, in order to properly conclude that a mark has lost its distinctiveness, it is submitted that there must be a use by at least two separate persons in con-

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[27] Noel J., himself acknowledges this to be the fact situation when in a subsequent case, *Cheerio Toys & Games Limited* v. *Cheerio Yo-Yo & Bo-Lo Company Limited* (1965), 28 Fox Pat. C. 40, he found that the word "Cheerio" was used by Cheerio Toys & Games Limited, remained distinctive throughout the purported period of concurrent use. See at p. 46: ". . . as . . . the goodwill in 'Cheerio' remained in the Plaintiff throughout the whole period of twenty-six years, there can remain no doubt in my mind that regardless of the concurrent use of the trade mark as a permitted use from 1955 to December 28th, 1962, the said mark 'Cheerio' has clearly been distinctive only of the wares of the Plaintiff and, therefore, is available to it in the present action."

It is submitted that the two decisions standing together are contradictory.

[28] *Supra*, footnote 4. To ultimately confound this question of validity the Supreme Court of Canada on appeal held that: ". . . . the Appellant [Cheerio Toys & Games Limited] is estopped from disputing the validity of any trade marks assigned by it to the Respondent [Dubiner]." Nevertheless the Supreme Court of Canada went on to affirm the Exchequer Court decision that the trade mark "Cheerio" was invalid. This is rather interesting in the light of the fact that the trade mark "Cheerio" was one of the marks assigned to Dubiner by the company in 1955.

nection with separate wares or products respectively manufactured and distributed by each. So long as one trade mark is used exclusively in connection with the wares of one trader and distributor, it is immaterial that other similar trade marks appear on those goods in addition to the prime mark. By being similar to the prime mark, the public would be likely to draw the inference that the goods were of a quality characteristic of goods upon which the prime trade mark appeared. As the similar marks appear on the wares of one trader the public is not confused nor does the prime mark fail to distinguish those wares from the wares of others. The mark, therefore, remains distinctive and upon this ground at least its registration ought not to have been declared invalid.

It is, of course, possible that the Exchequer Court took judicial notice of the unique characteristic of a yo-yo in that it is composed of two spherical halves joined by a small wooden axle. Perhaps one half of the yo-yo was attributed to the registered owner of the trade mark while the other half was attributed to the registered user of the trade mark and that therefore each half of the yo-yo constituted a separate ware within the meaning of the Trade Marks Act. Thus, two persons would be engaged in producing separate wares upon which confusing trade marks appeared—assuming of course that the mark "Cheerio" appeared on one half of the yo-yo while the trade name "Cheerio Toys & Games Limited" appeared on the other half of the yo-yo. If this was the evidence upon which the Exchequer Court proceeded, then, of course, it was open to the court to find that the trade mark "Cheerio" had lost its distinctiveness.

But, by doing this the court would be dividing a yo-yo, and it is submitted that you cannot take the hyphen out of yo-yo! Who has ever heard of a yo?

PETER C. P. THOMPSON*

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SUCCESSION OF SURVIVING HUSBAND TO ALL PERSONALTY OF INTESTATE WIFE—*JUS MARITI*—DEVOLUTION OF ESTATES ACT (ONT.), s. 29(2).[1]—It is not readily clear in Ontario what share a surviving husband takes in his intestate wife's personal property where he can and does take an estate by the curtesy (a life estate) in her real property.[2] It is understood to have been "taught" law that, in these

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[1] R.S.O., 1960, c. 106.

[2] Curtesy is preserved by the Conveyancing and Law of Property Act,

circumstances, he takes all of her personal property, regardless of the relationship to the deceased of the other possible claimants.[3] In this comment it is submitted, on this rather basic point,[4] that if a child or children of the marriage survive the wife then the husband takes one-third and the child or children two-thirds. If no children survive he will take all.

The Devolution of Estates Act, first enacted in Ontario in 1886,[5] dealt with the intestacy of married women as follows, in sections 4(3) and 5:

> 4.—(3) Any husband who, if this Act had not passed, would be entitled to an interest as tenant by the curtesy in any real estate of his wife, may . . . elect to take such interest, in the real and personal property of his deceased wife as he would have taken if this Act had not passed, in which case the husband's interest therein shall be ascertained in all respects as if this Act had not passed, and he shall be entitled to no further interest under this Act.
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> 5. The real and personal property of a married woman in respect of which she has died intestate, shall be distributed as follows: one-third to her husband if she leave issue, and one-half if she leave none; and subject thereto, shall go and devolve as if her husband had pre-deceased her.

R.S.O., 1960, c. 66, s. 29 as follows: "29. Where a husband has issue born alive and capable of inheriting land to which his wife is entitled in fee simple and the husband survives his wife, whether such issue live or not, the husband is, subject to The Married Women's Property Act, entitled to an estate for his natural life in such land as has not been disposed of by her deed or will, but, if he has no such issue by his wife, he is not entitled to any further or other estate or interest in such land in the event of surviving his wife, except such as is devised to him by her will, or such as he becomes entitled to under The Devolution of Estates Act."

[3] See F. C. Auld, Matrimonial Property Law in the Common Law Provinces of Canada in Matrimonial Property Law, edited by W. Friedmann (1955), p. 261: "The widower may . . . take curtesy . . . in which case he takes the wife's personalty; . . . ." No reasoning or authority is cited in support of this statement.

[4] Not only is there no reported judgment on the point but also a dearth of extra-judicial writing. One would expect it to be considered in such works as Armour on Devolution (1903), and Holmested, The Married Women's Property Act of Ontario (1905) but, although Armour comes close on pp. 241-242, it is not. It may be that the "all personalty to the husband" disposition was considered to be so clear that it was not necessary to expressly state it. However, this is hardly likely in view of J. N. Fish's article in (1899), 35 Can. L.J. 94 entitled The Husband's Interest in the Estate of his Intestate Wife, which indicates a complete unawareness of any notion of the all personalty to the husband "rule". In fact, the main purpose of this article is to submit that the Statute Law Amendment Act, S.O., 1897, c. 14, ss. 32 and 33, referred to *infra*, did not effect any change in the pre-existing law and not to deal with any all personalty to the husband argument. The article comes to the same conclusion as this comment but on reasoning which, it is submitted, is unacceptable. See, *infra*, footnotes 35 and 36. If its reasoning is preferable to that in this comment then this article can be considered to be a strong, if unintentional, refutation of the "taught" law.

[5] S.O., 1886, c. 22; now see *supra*, footnote 1, s. 29(2) and (1).

These two statutory provisions, with their order reversed, now appear as subsections 1 and 2 of section 29 in the current Devolution of Estates Act and, except for the addition of "whether separate or otherwise" after "the real and personal property" in section 29(1), the significance of which is discussed below, they remain substantially unchanged.

Section 29(2) makes it clear that, unless the husband would have been entitled to claim curtesy, if the Act had not passed, he does not have the right to make an election under it. If a widower is entitled to curtesy and so elects it is clear that his "interest in the real . . . property of his deceased wife" is the curtesy itself. The Devolution of Estates Act, which came into force on July the 1st, 1886, in its key section, section 4, provided that estates in fee simple, *inter alia*, "not disposed of by deed, will, contract or other effectual disposition, . . . shall be distributed as personal property not so disposed of is hereafter to be disposed of". Further, section 5, quoted above, specifically stated how the real property of a married woman was to be distributed. Prior to July the 1st, 1886, the real property of a married woman descended to her heir, subject to her husband's estate by the curtesy, if he was entitled thereto.[6] Therefore, if the Devolution of Estates Act "had not passed" a surviving husband's interest in the real property of his deceased wife, where the necessary preconditions[7] for that estate were met, would have been an estate by the curtesy. Just what his interest was in her personal property "if this Act had not passed" is not as clear.

The "all personalty to the husband" answer to the question must find its basis in the old common law *jus mariti*—the right of the husband to absolute property in the wife's chattels upon the marriage. Two consequences of this right, which illustrate its nature, were: (1) the husband could not give his wife anything during the marriage; and (2) if the husband predeceased his wife, all of "her" chattels passed under his will or intestacy. On the other hand, marriage operated only as an incomplete gift to the husband of her choses in action, but he did have the right to make them absolutely his by reducing them to possession either during her lifetime, or, after her death, on administration being granted to him as her "next and most lawful friend".[8] Her chattels real, lease-

[6] The Ontario history of descent and devolution has been considered recently by Kelly J.A. in *MacWilliams* v. *MacWilliams*, [1962] O.R. 407, at pp. 409-411, 32 D.L.R. (2d) 481, at pp. 483-485.

[7] See *supra*, footnote 2.

[8] (1357), 31 Edw. III, stat. i, c. 11.

holds, exhibiting "the double character of this class of property"[9] were absolutely alienable by the husband during his lifetime but, if he did not so alienate them, they "survived" to the wife on his death if he predeceased her.[10]

Around the beginning of the eighteenth century, in England, the Court of Chancery permitted property to be settled for "the sole and separate use" of the wife. During the marriage such equitable separate property was free from the control of the husband and the grasp of his creditors. However, if the wife predeceased her husband, and the terms of the settlement did not provide otherwise,[11] this separate property went entirely to him. Such was the holding in two cases decided in the Court of Chancery in the 1830's.[12] The reasoning, which led to this result, is stated in the reasons for judgment in one[13] of these cases, as follows:

> Mrs. Molony's annuity of £800 [which had been settled to her separate use] and everything that arose from it was exempt from the control of her husband during her life; and as the cash and bank notes which were found in her possession at her death arose from that annuity, they were part of her separate property, and she might have disposed of them either by deed or by her will. But, as she made no disposition of them, the quality of separate property ceased at her death; and if it ceased at her death, the consequence is that Mr. Molony is entitled to them in his marital right.

Before going further with this account, mention should be made, parenthetically, of the non-applicability of the Statute of Distribution, 1670,[14] to the distribution of the estates of married women. The distribution sections in this statute, sections 5 to 7, are worded in such a way as not to be applicable to the estates of married women. These sections provide that distribution shall be made ". . . one-third of the said surplusage to the *wife* of the intestate, and all the residue by equal portions, to and amongst the children . . . And in case there be no children or any legal representatives of them, then one moity . . . to the wife, the residue of the said estate to . . . the next-of-kindred . . . [A]nd in case there be

[9] 3 Holdsworth, History of English Law (3rd ed., 1923), p. 527.

[10] See generally 3 Holdsworth, *op. cit., ibid.*, pp. 520-527; Blackstone's Commentaries (1765), Vol. 1, pp. 442-444; Vol. II, pp. 433-436. Thorough discussions of the common law property relations between husband and wife can be found in *Re Cleveland* (1890), 29 N.B.R. 70, aff'd, *sub. nom. Lamb* v. *Cleveland* (1891), 21 S.C.R. 78.

[11] As they did, for example, in *Watt* v. *Watt* (1796), 3 Ves. Jun. 244, 30 E.R. 992.

[12] *Proudley* v. *Fielder* (1833), 2 My. & K. 57, 39 E.R. 866; *Molony* v. *Kennedy* (1839), 10 Sim. 254, 59 E.R. 611. See also *Bird* v. *Peagrum* (1853), 13 C.B. 639, 138 E.R. 1350 (C.P.).

[13] *Molony* v. *Kennedy*, *ibid.*, at pp. 254-255 (Sim.), 611-612 (E.R.).

[14] 22-23 Car. II, c. 10.

no wife, then . . . to the children; . . . and in case there be no child, then to the next-of-kindred". The surviving husband was obviously not "the wife" of the intestate, within the meaning of these provisions, and he was also not her next-of-kindred.[15] To have held the Statute of Distribution applicable to the estate of a married woman would have been to cut the husband off entirely from his wife's personalty. Any possible argument on this point was put to rest by the 25th section of the Statute of Frauds, 1677,[16] which read:

> XXV. And for the explaining one act of this present parliament, entitled, *An act for the better settling of intestates estates;* (2) be it declared by the authority aforesaid, that neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

It may be noted here that the provisions of the Statute of Distributions, referred to above, form the basis of the present section 30 of the Devolution of Estates Act which governs the distribution of all estates except those of married women.

Returning to the account of the law's treatment of married women's estates we turn from the activity of the Court of Chancery to that of the Legislature. In England section 25 of the Divorce and Matrimonial Causes Act, 1857,[17] provided that, in cases of judicial separation the wife was to be considered as a *feme sole* with respect to property of every description which she may acquire, "and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead". Upper Canada, which did not provide for judicial separation, in section 18 of its Married Women's Property Act, 1859,[18] enacted a provision with a much more pervasive operation than the English section. It read:

> 18. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is to be distributed; and if there be no child or children living at

[15] This latter appears to be the predominant view. The English authorities on this are conveniently collected in Boyd C.'s judgment in *Dorsey* v. *Dorsey* (1898), 29 O.R. 475, aff'd (1899), 30 O.R. 183 (D.C.), which held that, regardless how a husband's rights in his wife's estate should be characterized, he can, and, in the instant case, did, validly contract himself out of them.

[16] 29 Car. II, c. 3.

[17] 20 & 21 Vict., c. 85. See now Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25, s. 21(1)(a).

[18] S.U.C., 1859, c. 34.

> the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not passed.

This provision, which was law in Upper Canada and Ontario from May the 4th, 1859, to September the 1st, 1897,[19] and which is hereinafter referred to as the Married Women's Property Act distribution provision, was intended to re-route the distribution of separate personal property from that which it would have followed under the cases, that is all to the husband, except in cases where no child or children of the marriage were living at the death of the wife. The reference to the manner in which the personal property of a husband was to be distributed was an incorporation of part of the Statute of Distribution, 1670, which was law in Upper Canada by virtue of an Act Introducing English Civil Law into Upper Canada, 1792, which provided that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same".[20]

In the Married Women's Property Act, 1884,[21] Ontario preserved, to some extent, its previous married women's property legislation and adopted many of the main provisions of the English Married Women's Property Act, 1882.[22] The key provision in these statutes, dealing with the property rights of married women, read as follows:

> A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.[23]

By virtue of this provision married women became legally, as contrasted with equitably, entitled, for the first time, to separate property. Her property, which was separate because of the Act, became known as her statutory separate property and the practice of creating equitable separate property, because it was no longer necessary, fell into disuse.

Did this provision effect any change in the devolution rules governing an intestate married woman's property? Two approaches were open. First, the provision could be given a narrow construction by emphasizing the qualifying phrase "in accordance with the provisions of this Act" and the three verbs "acquiring, holding

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[19] When it was repealed by the Statute Law Amendment Act, *supra*, footnote 4, s. 33.

[20] S.U.C., 1792, c. 1, s. 3. See now Property and Civil Rights Act, R.S.O., 1960, c. 310, s. 1.

[21] S.O., 1884, c. 19.

[22] 45 & 46 Vict., c. 75.

[23] S. 1(1) of the English Act and 2(1) of the Ontario Act.

and disposing" and saying that these indicated the only changes which were intended regarding the property position of married women thitherto existing. The Act says that a married woman may dispose of her property by "will or otherwise" but indicates no intention that the devolution of the property not so disposed of is to be in any way affected. On the other hand, it could be said that the principle of the provision is clear, and that is to put the married woman, as far as her relationship to her property was concerned, in the same position as a *feme sole*, with the same consequences flowing from an intestacy. Since the husband takes nothing in his marital right during the marriage, which is undeniable, how could it be said that he had any marital right after the coverture is at an end?[24] The point soon arose for decision in England in *In re Lambert*[25] in 1888 where a deceased wife's surviving husband and children vied for her undisposed of separate property. Stirling J. embraced the narrower construction of section 1(1) of the Married Women's Property Act, 1882, and buttressed by the two Chancery cases decided in the 1830's and a judgment of Jessell M.R.'s holding that a surviving husband had the right to curtesy in equitable separate property, "the separate use" being "exhausted when the wife has died without making a disposition",[26] decided that the husband was entitled to all of the property in question to the exclusion of the children. He said:[27]

> . . . [T]he title of husband is clear. So far as the property is undisposed of the quality of separate property ceases on the wife's death, and consequently the right of the husband accrues just as though the separate use had never existed. . . .
>
> It remains to be considered whether [the Married Women's Property Act, 1882] has made any alteration in this respect. . . . The Act simply confers on married women the capacity to acquire, to hold and dispose of by will or otherwise of property as if they were *femes sole*. None of these matters are in question. The acquisition and holding of the property are past and gone. The dispute is as to the devolution of property undisposed of. Now with this the Act does not purport to deal.

He referred specifically to the absence in the 1882 Act of a provision such as that contained in the Divorce and Matrimonial Causes Act, 1857, laying down intestacy rules for judicially separ-

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[24] The opposing approaches are set forth in Thicknesse, The Law of Husband and Wife (1884), pp. 186-190 (marital rights preserved on death) and Wolstenholme, Conveyancing Acts (3rd ed., 1883), pp. 7-8 (marital right destroyed completely).

[25] (1888), 39 Ch. D. 626. Followed in *Re Streidel Estate* (1902), 5 Terr. L.R. 303 (N.W.T. Sup. Ct.).

[26] *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, at p. 296.

[27] *Supra*, footnote 25, at pp. 633-634.

ated married women. It is of interest to note that the 1882 Act, before it was amended in Select Committee, did contain a provision to the effect that a husband should take the same distributive share in the separate personal estate of his wife as she would take in his personal estate.[28] Evidently it was the purpose of those who struck out the clause as to intestacy to favour the husband. If such was their desire then *In re Lambert*[29] establishes that they acted advisedly. However, if it had been held that the Married Women's Property Act had put an end to the marital right for all purposes, that is, if the second approach to the Act mentioned above had been followed, then the husband, without the benefit of such an intestacy provision, would have been altogether excluded from her estate since he clearly had no claim under the Statute of Distribution.[30]

If the facts of the *Lambert* case had arisen in Ontario, the husband, under the Married Women's Property Act distribution provision, would have taken one-third of the undisposed of personalty and the children two-thirds, being "the same proportions . . . as the personal property of a husband dying intestate is to be distributed between his wife and children; . . .".[31]

Section 4(3)[32] and section 5[33] of the Devolution of Estates Act, 1886 (Ontario),[34] set forth at the beginning of this comment represent the next, in point of time, legislative treatment of the question under consideration. It will be noted that section 5, providing for the distribution of "the real and personal property of a married woman in respect of which she has died intestate" was thus placed alongside the Married Women's Property Act distribution provision which dealt with the distribution of "the separate personal property of a married woman". The schemes of distribution of these two provisions were not exactly the same and it was argued that the Devolution of Estates Act, section 5, had impliedly repealed the Married Women's Property Act distribution provision.[35] It is suggested that it is the better view that both sections co-existed with full effect and that since the Married Women's Property Act distribution provision dealt specifically with separate personal property, section 5 of the Devolution of Estates Act should be read

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[28] See Thicknesse, *op. cit.*, footnote 24, p. 189, note 3.
[29] *Supra*, footnote 25.
[30] Thicknesse, *op. cit.*, *ibid.*, pp. 189-190 says that this would have been an "irony of fate".
[31] *Supra*, footnote 18.
[32] Now s. 29(2).
[33] Now s. 29(1).
[34] *Supra*, footnote 1.
[35] See correspondence in (1893), 29 Can. L.J. 566, 567 and J. N. Fish, *loc. cit.*, *supra*, footnote 4, at p. 97.

as applying solely to non-separate property.[36] A married woman in Ontario, after the enactment of the Married Women's Property Act, 1884, could still "have" non-separate property if she was married before this Act came into force and the property in question had been "acquired" by her before this time. In fact, section 5 of the Devolution of Estates Act would have operated only on the deceased wife's non-separate choses in action, because the marriage itself would have vested her other non-separate personalty in her husband during her lifetime. Thus, if a married woman died between 1886 and 1897, her separate personalty was distributed according to the Married Women's Property Act distribution provision and her non-separate personalty went according to the Devolution of Estates Act, section 5. If the surviving husband elected to take his estate by the curtesy under section 4(3), as far as the personalty was concerned, if it was separate, its devolution was governed by the Married Women's Property Act distribution provision, because the Devolution of Estates Act, during this period, did not apply to separate property, but if it was non-separate it went as "if this Act had not passed", that is all to the husband according to the common law. Obviously, with each succeeding year after 1884 there would be a steady decrease in the incidence of non-separate property.

In 1897, the Statute Law Amendment Act,[37] sections 32 and 33, amended section 5 of the Devolution of Estates Act by the addition of "whether separate or otherwise" after "the real and personal property" (by s. 32) so that for the first time it covered separate personal property and then repealed (by s. 33) the Married Women's Property Act distribution provision. Since 1897 there has been no further legislative treatment of the point under discussion.

By these 1897 amendments the Legislature swept into one statute, the Devolutions of Estates Act, all of the provisions governing the distribution of a married woman's personal property. Did the amendments, where the husband elected to take curtesy, effect any changes in the law? First, with regard to any existing non-separate property, it is safe to say that they did not, for the reason set forth above: "if this Act had not passed" the wife's non-separate property, being choses in action, would have gone to the husband according to the common law.

The situation respecting separate property is not as simple. We

[36] See Notes in (1893), 35 Can. L.J. 466, 545. This was the view of Armour, *op. cit.*, footnote 4, p. 240.

[37] *Supra*, footnote 4.

have seen that when "this Act" was passed in 1886 it did not effect any change in the law respecting the devolution of a married woman's separate personal property. This species of property continued to be governed by the Married Women's Property Act distribution provision. Therefore, regarding the law governing separate property, "this Act" must refer to the Devolution of Estates Act as amended in 1897. Now, if the Devolution of Estates Act as amended in 1897 had not passed, how would separate personalty have devolved? It is submitted that it would have devolved according to the Married Women's Property Act distribution provision and under it the husband would have taken all the personalty only where no children survived the wife. It could be said that this interpretation goes too far in that it extends the meaning of "if this Act had not passed" to "if this Act had not passed and the Married Women's Property Act, s. 23 [the then Married Women's Property Act distribution provision] had not been repealed". The answer to this is that the legislative history on this particular point fully justifies this construction. In 1859 the Legislature of Upper Canada, being apparently impressed with the unfairness of the common law rule that all personalty, both separate and non-separate, was to go to the husband to the exclusion of any child or children, legislated otherwise with respect to separate personalty; husband and children were to share in the same proportions as wife and children would have shared if the husband had died first. In 1897 when the Legislature moved separate personalty under the Devolution of Estates Act, and therefore repealed the Married Women's Property Act distribution provision because it no longer served any purpose, it is difficult to conceive that the Legislature in using the expression "if this Act had not passed" intended to take the retrograde step of returning to the pre-1859 common law rule. Sections 32 and 33 of the 1897 Act are in a separate division of that Act which is entitled "MARRIED WOMEN". As a plain matter of fact it is reasonable to say that if section 32, which moved separate personalty under the Devolution of Estates Act, had not been passed, then section 33, which repealed the Married Women's Property Act distribution provision would also not have been passed. It is difficult to see any possible reason why section 33 would have been passed in the absence of a provision such as section 32. The two sections are inextricably parts of one legislative scheme and it is for this reason that it is submitted that if the Devolution of Estates Act, as amended in 1897, had not passed, then the wife's separate personalty would have gone according to the

Married Women's Property Act distribution provision.

It is rather strange that section 29(2), in cases where no children of the marriage survive (or, if the "taught" law be correct, in all cases) should have the effect of preserving the "all personalty to the husband" doctrine long after its rational foundation has disappeared. It was based not as much on the fictional unity of husband and wife ("husband and wife were one, and the one was the husband")[38] as on a principle of the husband's guardianship of the wife.[39] "[L]et it be remembered that in the rough-and-tumble of feudal times the husband's function of protector involved something more than a hand under the elbow at street crossings and a scowl at too appreciative glances."[40] Both of these bases, at least in their original form, have now largely disappeared.[41] Further, whatever the purpose was for the husband assuming control of all the wife's personal property during her lifetime, it logically should not have been operative after her death. The fact that it was has been explained by Holdsworth as a consequence of the ecclesiastical courts acquiring jurisdiction over succession to moveables. "This meant that the common law lost sight of the wife's rights to chattels on the death of her husband. . . . If the common law had been obliged to consider the rights of the husband and wife to each other's chattels after death, as they were obliged to consider their rights to each other's land, we may well doubt whether they would have laid it down that marriage gives the wife's chattels absolutely to the husband."[42] England, by the Administration of Estates Act, 1925,[43] as far as succession to personalty was concerned, put an end to the common law rights exemplified in the *Lambert* case, and as far as the status of married women was concerned, in 1935 put an end to the concept of "separate" property by legislating simply that "all property . . . shall belong to her in all respects as if she were a *feme sole*".[44] In Ontario, it appears, we are, as far as the *jus mariti* is concerned, "preserving [the English] legal history for them—as the hill folk of the South have preserved

[38] Casner & Leach, Cases and Text on Property (1st Standard ed., 1959), p. 284.

[39] 2 Pollock and Maitland, History of English Law (2nd ed., reprinted 1923), pp. 405-407. Haskins, The Estate by the Marital Right (1948), 97 Univ. of Penn. L. Rev. 345, at pp. 346-347.

[40] Casner & Leach, *op. cit.*, footnote 38, p. 284.

[41] But see Williams, Legal Unity of Husband and Wife (1947), 10 Mod. L. Rev. 16 and *Kowbel* v. *The Queen*, [1954] S.C.R. where it was held that husband and wife being one, were legally incapable of conspiring with each other.

[42] *Op. cit.*, footnote 9, p. 524. [43] 15 and 16 Geo. 5, c. 23, s. 46.

[44] Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, s. 2(1).

Elizabethan English and the south cantons of Switzerland have preserved the purest form of classical Latin".[45]

If the preservation of the husband's rights in his deceased wife's personalty stems from a desire to put personalty on the same footing as realty (where the husband has an estate by the curtesy) that is, both based on unadulterated common law, it can be immediately suggested that the abolition of curtesy itself is long overdue. In a recent judgment in the Supreme Court of Canada it was remarked that "it may well be that the whole problem of dower should be dealt with by the Legislature in view of the present existence of legislation for the relief of dependants and the decreasing importance of real property in a modern estate as compared with earlier times".[46] This observation would apply *a fortiori* to common law curtesy which, even in the earliest times, had little to commend it logically. Pollock and Maitland call it "an anomolous 'specialty', a concession to husbands' made by the courteous, but hasty, law of England".[47] It has been abolished in six of the nine common law provinces in Canada,[48] in the Northwest Territories and the Yukon Territory,[49] and almost completely abolished in England.[50]

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[45] W. B. L., Book Note on Megarry, A Manual of the Law of Real Property, in (1946), 60 Harv. L. Rev. 681, lamenting the real property survivals of which England has ridden itself by statute, which still existed in the United States.

[46] *Re Grant, Abbott* v. *Grant*, [1965] S.C.R. 628, at p. 632, 52 D.L.R. (2d) 313, at p. 316, per Judson J.

[47] *Op. cit.*, footnote 39, p. 420. See pp. 414-420 which support this conclusion. Farrer, Tenant by the Curtesy of England (1926), 43 L. Q. Rev. 87, at pp. 90-91 "with profound diffidence," note 7, takes issue with Pollock & Maitland: "I would suggest that the true origin of curtesy is nothing but the common-sense view that it is against the child's and the family's moral interest that the child shall be brought up to despise his father, the head of the family, as knowing that on its mother's death it can turn its father out."

[48] Alberta, Transfer and Descent of Land Act, R.S.A., 1955, c. 342, s. 5 and Intestate Succession Act, R.S.A., 1955, c. 161, s. 14 (subject to the Dower Act); British Columbia, Administration of Estates Act, R.S.B.C., 1960, c. 3, s. 112; Manitoba, Law of Property Act, R.S.M., 1954, c. 138, s. 10 (subject to the Dower Act); New Brunswick, Devolution of Estates Act, R.S.N.B., 1952, c. 62, s. 32 (subject to the Married Women's Property Act, R.S.N.B., 1952, c. 140, s. 8 which provides that curtesy is abolished in respect to property acquired by a woman after April 29th, 1916, or belonging to a woman thereafter); Saskatchewan, Devolution of Real Property Act, R.S.S., 1953, c. 118, s. 18 and Intestate Succession Act, R.S.S., 1953, c. 119, s. 15. In Newfoundland the Intestate Succession Act, R.S.N., 1952, c. 153, makes no provision for dower or curtesy and both are understood to have been abolished. See Bowker, Succession to Property in Common Law Provinces, Canadian Jurisprudence, edited by E. McWhinney (1955), p. 253, note 70.

[49] Land Titles Act, R.S.C., 1952, c. 162, s. 13.

[50] Except as to the wife's entailed equitable interests. See Administration of Estates Act, 1925, *supra*, footnote 43, c. 23, ss. 45(1)(b), 51 (2) and Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, s. 130(4).

In Nova Scotia and Prince Edward Island where, in addition to Ontario, it is still preserved, it is accommodated into schemes of distribution in ways which do not involve a reverter to common law rules regarding personalty.[51]

There are possible features of the continued existence of these common law rights which may be of interest. As mentioned above, they have their roots, as did the estates of dower and curtesy, in the fact of marriage; further, in varying degrees, the husband's rights in his wife's property took effect from the time of marriage. It may well be that this is one reason why relevant death duty legislation has specifically deemed dower and curtesy to be "property passing on death".[52] If, as Mr. Justice Stirling says in *In re Lambert*, the right of the husband on the wife's death accrues "*just as though the separate use had never existed*",[53] what tax or duty is attracted by the husband taking personalty *jure mariti*? Further, if the husband's rights are not of "succession" their true nature could be of importance from a conflict of laws standpoint.[54] Also, but for a generous interpretation of "legal personal representative", the English Queen's Bench Division in 1891 would have been unable to hold a husband liable for his deceased wife's debts, to the extent of the property involved, where he had taken a leasehold interest *jure mariti* without taking out administration.[55]

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[51] Nova Scotia provides by s. 7(a) of the Descent of Property Act, R.S.N.S., 1954, c. 69, that if a married woman dies intestate leaving issue, her husband "in addition to his estate as tenant by the curtesy in her real property, shall take one third of her personal property . . .". Section 7(b) provides that "(i)f she leaves no issue, one half of her real and personal property shall go to her husband . . .". Section 16 provides: "Nothing in this Act shall affect the title of the husband as tenant by the curtesy". Laskin's, Cases and Notes on Land Law (rev'd ed., 1964), p. 71 queries whether s. 7(b) is affected by or subject to s. 16.

Prince Edward Island, in the Probate Act, R.S.P.E.I., 1951, c. 124, s. 109, provides simply that ". . . the value of any dower or estate by the curtesy shall be considered as a portion of the share inherited by the wife or husband to whom it passes and shall be deducted from the total of such share in computation of the balance thereof. Provided, however, that the wife or husband may elect to waive such dower or estate by the curtesy and thereupon shall be entitled to receive her or his full share of the distributable estate."

[52] Succession Duty Act, R.S.O., 1960, c. 386, s. 1(p)(xi) and Estate Tax Act, S.C., 1958, c. 29, s. 3(1)(*q*).

[53] *Supra*, footnote 27, italics mine.

[54] See Kahn-Freund, Matrimonial Property Law in England, in Friedmann, *op. cit.*, footnote 3, p. 282.

[55] *Surman* v. *Wharton*, [1891] 1 Q.B. 491. Section 9 of the Married Women's Property Act, R.S.O., 1960, c. 229, "For the purposes of this Act, the legal personal representative of any married woman has, in respect of her separate estate, the same rights and liabilities and is subject to the same jurisdiction as she would have had or been subject to if she were living" is the same as section 23 of the English Married Women's Property Act, 1882, under consideration in *Surman* v. *Wharton*.

Legislation by reference, of which section 29(2) is an extreme example, is often a weak and ineffective method of expressing rules. In a fairly recent Ontario case it was characterized by one of the judges as "a vexatious legislative practice [which] will continue to grow . . . until an aroused public demands that our public statute law be codified".[56] Under section 29(2), it has been submitted, we are referred to the Married Women's Property Act distribution provision, although not by name. This provision refers us, via the Property and Civil Rights Act,[57] if there are children surviving, to the Statute of Distributions, 1670, although not by name. This Statute furnishes the rule to be applied. If there are no children surviving the Married Women's Property Act distribution provision refers us, it appears, to the common law. The recent English committee on the Law of Intestate Succession reported that any differentiation between the rights of widow and widower on an intestacy would appear unjust "and would, moreover, add complications to the law of intestacy, a law in which brevity and simplicity are particularly desirable".[58] Most Canadian provinces, in providing one set of clearly expressed rules on the face of their intestacy statutes which are applicable to the estates of all intestate persons, including those of married women, comply with both of these requirements of satisfactory intestacy laws.[59]

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[56] Lebel J.A., dissenting, in *Brown and the City of Peterborough*, [1957] O.R. 224, at p. 243.

[57] See *supra*, footnote 20.

[58] Report of the Committee on the Law of Intestacy (Lord Morton, Chairman), Cmd. 8310 (1951), p. 4. In this part of the Report the Committee was considering the injustice to husbands resulting from not making the increased provisions which it was recommending for widows equally applicable to widowers.

[59] These statutes follow the model Intestate Succession Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada. They are: Alberta, Intestate Succession Act, *supra*, footnote 48, s. 18; British Columbia, Administration of Estates Act, *supra*, footnote 48, s. 114; Manitoba, Devolution of Estates Act, R.S.M., 1954, c. 63, s. 16; New Brunswick, Devolution of Estates Act, *supra*, footnote 48, s. 35; Newfoundland, Intestate Succession Act, *supra*, footnote 48, s. 17; Prince Edward Island, Probate Act, *supra*, footnote 51, s. 113; and Saskatchewan, Intestate Succession Act, *supra*, footnote 48, s. 19. Brevity and simplicity, of course, do not require rigidity. See Bowker, *op. cit.*, footnote 48, pp. 243-244, where legislative provisions in other jurisdictions enabling courts to alter the statutory distribution in order to benefit a spouse or child on an intestacy, are discussed.

[60] In Ontario, if a widow takes dower, a life interest in one-third of her husband's real property, she takes only her distributive share of the personalty. Devolution of Estates Act, sections 8 and 30 and see *MacWilliams* v. *MacWilliams*, *supra*, footnote 6. On taking dower, in no circumstances would she take all the personalty. Furthermore, while a husband cannot lose his right to curtesy by adulterous conduct, a wife who is guilty of the same conduct, uncondoned, is deprived of her right to dower. Dower Act, R.S.O., 1960, c. 113, s. 8. In this respect, in six of the common law

Ontario, insofar as section 29(2) of the Devolution of Estates Act is concerned, complies with neither.[60]

J. W. MORDEN*

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provinces if either spouse is living in adultery at the time of death of the other "she (or he) shall take no part in his (or her) estate". See Alberta, Intestate Succession Act, *ibid.*, s. 19; British Columbia, Administration of Estates Act, *ibid.*, s. 115; New Brunswick, Devolution of Estates Act, *ibid.*, s. 36; Newfoundland, Intestate Succession Act. *ibid.*, s. 18; Prince Edward Island, Probate Act, *ibid.*, s. 114(2); Saskatchewan, Intestate Succession Act, *ibid.*, s. 20.

[60] See preceding page.

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