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De Nichols v. Curlier: Revisited

Case Comment

DE NICHOLS v. CURLIER REVISITED

By DARRELL E. BURNS, JR.*

A. *DE NICHOLS v. CURLIER*

Generally, property rights between spouses in Canada and the United States are determined according to one or the other of two legal regimes. Spouses are treated in such matters as if they were single persons in provinces or states that have their historical roots in the common law.¹ On the other hand, in jurisdictions that have their historical connections in the civil law, spouses are treated as joint owners of the assets of the marriage.² The ambulatory ways of life today often result in the transposition of married couples from one of these regimes to the other. In such an event, conflict of law problems arise, and considering the disparate characteristics of these two regimes, the solution adopted by the courts can have a great impact on the nature and extent of each spouse's interest in the matrimonial property.³ Are the spouses' property rights immutably fixed by the law of their matrimonial domicile notwithstanding subsequent changes in their domicile? Or do their property rights vary with changes? Or indeed perhaps the courts ought to respond by applying an amalgam of these two possibilities?

This comment examines these problems solely in relation to the spouses' movable property.⁴ *De Nichols v. Curlier*⁵ is the leading case. *De Nichols*

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¹ The separate property regime was established by legislation: see, e.g., *Married Women's Property Act*, R.S.O. 1970, c. 262; *Married Women's Property Act, 1882*, 45 & 46 Vict., c. 75; *Married Women's Property (Scotland) Act, 1920*, 10 & 11 Geo. 5, c. 6. It has been criticized for its failure to adequately recognize and account for a wife's additions to the matrimonial property in the form of services and other indirect financial contributions: see, Eberts, *A Synopsis of Proposals for Family Property Reform* (1973-74), 1 Estates & Trusts Q. 298. But, see, Goodman, *A Critique of Family Property Reform* (1973-74), 1 Estates & Trusts Q. 315. The Ontario Legislature responded to these criticisms by enacting *The Family Law Reform Act, 1975*, S.O. 1975, c. 41.

² Nonetheless, in community property regimes, the husband is imbued with extensive administrative powers over the matrimonial property. See, generally, W. De Funiak and M. Vaughan, *Principles of Community Property* (2nd ed. Tucson: University of Arizona Press, 1971); N. Lay, *The Recognition of Community Property in Common Law Provinces* (1969), 34 Sask. Law Rev. 264.

³ E.g., *Beaudoin v. Trudel*, [1937] O.R. 1; [1937] 1 D.L.R. 216. See, *infra*, note 56.

⁴ For conflict of laws purposes, Anglo-American courts generally adopt the civil law distinction between movables and immovables: see, J.-G. Castel, *Canadian Conflict of Laws* (Toronto: Butterworths, 1975) at 42-43.

⁵ [1900] A.C. 21; 69 L.J. Ch. 109; 81 L.T. 733; 48 W.R. 269; 16 T.L.R. 101. For immovables, see, *Re De Nichols*, [1900] 2 Ch. 410; 69 L.J.Ch. 680; 82 L.T. 840; 16 T.L.R. 461; 48 W.R. 602.

married Celestine in France in 1854 without a formal marriage contract; therefore, according to French law their property rights *inter se* were governed by the community property regime of the French Civil Code. In 1863, they emigrated to England with about £400 and became permanently domiciled in London. Through their "united personal intelligence and industry . . .,"⁶ they amassed a large fortune. De Nichols died in 1897, and purported to dispose of the fortune by will as if it were his own absolutely. His widow contended that by the community property regime of French law she had a half-interest in the movable property and that the change in domicile from France to England did not alter this result. Mr. Justice Kekewich agreed,⁷ but his decision was reversed by the Court of Appeal⁸ which felt itself bound by the earlier decision of the House of Lords, *Lashley v. Hog*.⁹ The House of Lords restored the order of Justice Kekewich.

The Lord Chancellor, the Earl of Halsbury, noted that under French law, the result of the marriage without a formal ante-nuptial contract was that the spouses were treated just as if they had incorporated the community property provisions of the Civil Code into an ante-nuptial contract.¹⁰ Then, the Lord Chancellor asserted:

[I]t is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations on the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change in domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.¹¹

By equating the community property regime imposed by French law

⁶ [1900] A.C. 21 at 38, *per* Lord Brampton.

⁷ [1898] 1 Ch. 403, 67 L.J. Ch. 274.

⁸ [1898] 2 Ch. 60.

⁹ (1804), 4 Paton 581; 2 Coop. T. Cott. 449; 47 E.R. 1243, *Lashley v. Hog* is noted in Goldberg, *The Assignment of Property on Marriage* (1970), 19 I.C.L.Q. 557 at 580-84.

¹⁰ [1900] A.C. 21 at 24. Similarly, Lord Macnaughten at 31; Lord Shand at 37-38; Lord Brampton at 39-45 *passim*. Lord Morris concurred with the Lord Chancellor.

¹¹ *Id.* at 26. Similarly, Lord Macnaughten at 33, 36; Lord Shand at 37; Lord Brampton at 45-46. The accepted rule is that the terms of a marriage contract or settlement govern the rights of the spouses with respect to their present and after-acquired movable property: see, A. Anton, *Private International Law* (Edinburgh: W. Green and Son, Ltd., 1967) at 448; G. Cheshire and P. N. North, *Private International Law* (8th ed. London: Butterworths, 1970) at 570-78; A. Dicey and J. Morris, *The Conflict of Laws* (8th ed. London: Stevens and Sons Ltd., 1967) at 105; H. Goodrich, *Conflict of Laws* (3rd ed. St. Paul: West Publishing Co., 1949) at 390-92; H. Marsh, *Marital Property in Conflict of Laws* (Seattle: University of Washington Press, 1952) at 218-21; J. Morris, *The Conflict of Laws* (London: Stevens and Sons Ltd., 1971) at 394-400; J. Story, *Conflict of Laws* (8th ed. Boston: Little, Brown and Co., 1883) at 240; J. D. Falconbridge, *Conflict of Laws* (2nd ed. Toronto: Canada Law Book Co. Ltd., 1954) at 105.

with a marriage settlement or ante-nuptial contract, the House of Lords neatly side-stepped the principle that personal rights and obligations vary with changes in domicile.¹²

This would have ended the case were it not "embarrassed"¹³ by an earlier judgment of the House, *Lashley v. Hog*,¹⁴ the case that the Court of Appeal thought adverse to the widow's contentions.¹⁵ The facts of *Lashley v. Hog* are essentially those of *De Nichols v. Curlier* in reverse. Roger Hog, a Scot, settled in London and carried on business there as a merchant. In 1737 he married Rachel Missing. He prospered and acquired wealth. Some time prior to 1760, the year in which Rachel died, he had returned to Scotland and renewed his domicile there. He died in 1789 and left his fortune to his son. Roger's daughter Rebecca (then the wife of one Thomas Lashley) sued her brother claiming, *inter alia*, that portion of her father's movable property that was her mother's under the Scottish *communio bonorum* and that had descended to her on her mother's death in 1760.¹⁶ The House of Lords decided in the daughter Rebecca's favour. In his speech, Lord Eldon said that Rebecca had a claim in right of her mother to share in the movable estate of her father at the time of her mother's death.¹⁷ Lord Eldon saw the case as presenting the problem of whether the wife's rights were fixed immutably at the time of the marriage by the law of the matrimonial domicile or whether they varied with subsequent changes in the domicile of the spouses.¹⁸ This was an extremely important question, for under the law of England, the law of the matrimonial domicile, the wife had no interest in her husband's movable estate, while under the *communio bonorum* of Scotland, the spouses' domicile when the wife died, the wife had her *jus relictae*¹⁹ — a one-third interest in her husband's movable estate.²⁰ Lord Eldon stated that the spouses' matrimonial property rights were mutable with changes in their domicile.²¹ The Earl

¹² See, [1900] A.C. 21 at 46, *per* Lord Brampton. An individual's domiciliary law governs many of his important legal interests; in many senses, it is his "personal" law. On domicile, see, generally, Castel, *supra*, note 4 at 101-36.

¹³ [1900] A.C. 21 at 31, *per* Lord Macnaughten.

¹⁴ *Supra*, note 9.

¹⁵ *Supra*, note 8 at 69, *per* Sir Nathaniel Lindley, M.R.

¹⁶ The inheritable quality of the wife's share under Scottish law in her husband's movable property was abolished in 1855 so that the wife's interest becomes possessory only if her husband predeceases her: *The Intestate Moveable Succession (Scotland) Act, 1855* 18 & 19 Vict., c. 23, s. 6. Until 1855, this share was due the wife's heirs even on her predeceasing her husband: P. Fraser, *Treatise on Husband and Wife According to the Law of Scotland* (2 vols. 2nd ed. Edinburgh: T&T Clark, 1876) at 671; G. Bell, *Principles of the Law of Scotland* (3rd ed. Edinburgh: Oliver & Boyd, 1833) at 434.

¹⁷ 47 E.R. 1243 at 1257.

¹⁸ *Id.* at 1257-58.

¹⁹ *Id.* at 1259, *per* Lord Eldon. The Earl of Rosslyn, at 1263, noted that the term *jus relictae* was a misnomer in Scottish law — the wife's interest was not dependent on her surviving her husband. See, *supra*, note 16.

²⁰ The wife's *jus relictae* was one-third of her husband's moveable estate if there were children, one-half if there were none: Fraser, *supra*, note 16 at 976, 978; Bell, *supra*, note 16 at 430.

²¹ 47 E.R. 1243 at 1261.

of Rosslyn agreed, emphasizing that the decision did not turn on "a metaphysical idea of an implied contract arising from the situation in which the parties place themselves by a civil act [marriage]." ²²

Their Lordships in *De Nichols v. Curlier* purported to distinguish *Lashley v. Hog* on two grounds. The Lord Chancellor, who asserted *Lashley v. Hog* was "distinguishable both in principle and in circumstances," ²³ noted that under the law of Scotland the wife merely had a hope of coming into "rights" in her husband's movable property through the dissolution of the marriage on the husband's death. These rights were merely debts against the husband's executors and were not rights of division in a common fund. The *communio bonorum* of Scottish law was a mere fiction, while under French law there existed what was tantamount to an actual partnership of the spouses in the matrimonial property that could not be altered by the unilateral act of one of the spouses. *Lashley v. Hog* was merely an illustration of the accepted rule that the law of a person's domicile at death regulates succession to his movable estate. ²⁴

Lord Brampton took a slightly different tack in distinguishing *Lashley v. Hog*. *Lashley v. Hog* involved a change in domicile from a country (England) in which neither law nor the parties had made a settlement to a country (Scotland) in which there was some sort of settlement in the form of the *communio bonorum*. *De Nichols v. Curlier*, on the other hand, involved a change from a country (France) that provided, by law, an elaborate and binding settlement, to a country (England) that made no settlement at all. The existence of this settlement by virtue of the law of the matrimonial domicile distinguished *De Nichols v. Curlier* from *Lashley v. Hog*. ²⁵

Canadian courts generally have accorded a favourable reception to *De Nichols v. Curlier*. ²⁶ But there has not been a rigorous examination by the judges of the assumptions and rationale of the House of Lords. This is remarkable when one considers the serious doubts that have been raised by the writers about *De Nichols v. Curlier*. The modest goals of this comment is to set out the criticisms that may be levelled against *De Nichols v. Curlier* from the perspectives of fact, history and policy, and then to present and assess briefly the other options that exist.

²² *Id.* at 1263.

²³ [1900] A.C. 21 at 27. Lord Morris concurred with the Lord Chancellor's judgment.

²⁴ *Id.* at 27-30. The Lord Chancellor adopted Lord Fraser's views on the nature of the *communio bonorum* in Scottish law; see, Fraser, *supra*, note 16 at 648-78. Many writers have accepted this explanation of *Lashley v. Hog*; see, Cheshire, *supra*, note 11 at 566-67; Falconbridge, *supra*, note 11 at 106; Goldberg, *supra*, note 9 at 578-79; J. Westlake, *Private International Law* (7th ed. London: Sweet and Maxwell, Ltd., 1925) at 74.

²⁵ [1900] A.C. 21 at 44. Similarly, Lord Macnaughten at 33, 36; Lord Shand at 37.

²⁶ See, *Beaudoin v. Trudel*, [1937] 1 D.L.R. 216 at 217; *Re Parsons*, [1926] 1 D.L.R. 1160 at 1161-2; *Devos v. Devos* (1970), 10 D.L.R. (3d) 603 at 611-12 (*dictum*); *Pouliot v. Clothier*, [1944] 3 D.L.R. 737 at 741-42 (*dictum*); *cf.*, *Brooks v. Brooks* (1896), 2 Terr. L. R. 289 at 291-92 (S.C.N.W.T.). See, generally, J.-G. Castel, *Private International Law Rules Relating to Domestic Relations* (1958-59); 5 McGill L.J. 4-7; Lay, *supra*, note 2. But, see, *Re Heung Won Lee* (1963), 36 D.L.R. (2d) 177 at 183-84; *Pink v. Perlin & Co.* (1898), 40 N.S.R. 260 at 262 (N.S.S.C.).

B. FACTS

The House of Lords in *De Nichols v. Curlier* equated the community property regime imposed by French law — a consequence that spouses must know or be presumed to know as incidental to marrying without an express marriage contract²⁷ — with an express ante-nuptial agreement governing matrimonial property rights. In other words, the spouses are taken to have tacitly agreed to have their matrimonial property rights governed by the community property regime, and it is to this agreement that the English courts give effect.

This, of course, is fictional. It assumes a knowledge of the legal incidents of marriage that few lay persons possess. Stripping the *De Nichols v. Curlier* rationale to its essentials reveals its logical fallacy. English law provides for the determination of matrimonial property rights according to the community regime of France because the spouses have so contracted; the spouses are presumed to have so contracted because French law so provides. Such a rationale compels one to view a person's tort liability for assaulting another as a matter of contract between the tortfeasor and victim. The community property regime applies to the spouses not as a matter of contract, tacit or otherwise, but because French law prescribes such a system.²⁸

C. HISTORY

The Lord Chancellor distinguished *Lashley v. Hog* on the basis that under the Scottish *communio bonorum* the wife merely had a *spes successionis* in taking part of her husband's movable estate on his death, and, therefore, it was merely illustrative of the rule that succession to movables is governed by the law of the deceased's domicile at death. French law, on the other hand, created a real partnership relationship between the spouses in their property relations. Lord Brampton was less ambitious and distinguished *De Nichols v. Curlier* from *Lashley v. Hog* on the narrow ground that in the former there existed a tacit contract between the spouses that their property relations would be governed by the community regime. The inarticulate premise of Lord Brampton's assertion seems to be the same point urged by the Lord Chancellor, namely, the Scottish *communio bonorum* was a mere fiction and completely unlike the real community existent in France.

The nature and character of the *communio bonorum* of Scottish law is a subject of controversy. Three theories have been advanced:

- 1) the wife's *jus relictæ* and children's *legitim* were merely rights of succession;
- 2) the *jus relictæ* and the *legitim* were merely debts against the husband and father's movable estate; and,

²⁷ [1900] A.C. 21 at 26, *per* Earl of Halsbury, L.C.

²⁸ Goodrich, *supra*, note 11 at 387. See, J. Beale, *Conflicts of Laws* (3 vols. New York: Baker, Voorhis and Co., 1935) at 1015; Falconbridge, *supra*, note 11 at 108-09; Marsh, *supra*, note 11 at 106; Story, *supra*, note 11 at 249-50. Lord Fraser, on whom the House of Lords placed so much reliance in *De Nichols v. Curlier*, rejected the tacit contract theory relying in part on statements in *Lashley v. Hog*; Fraser, *supra*, note 16 at 1325. The Earl of Rosslyn emphatically rejected the tacit contract rationale in *Lashley v. Hog* (1804), 47 E.R. 1243 at 1263. See, text accompanying *supra*, note 22.

- 3) the *jus relictae* and *legitim* were rights of division of a common stock of property held by the husband, wife and children of the marriage.²⁹

1. *Rights of Succession*

Some support for this theory is found in Bell,³⁰ but otherwise there appears to be no constructive evidence to support it.³¹ Indeed, there are several serious objections to such a theory. Firstly, *jus relictae* and *legitim* were indefeasible and overrode any contrary disposition by will.³² Secondly, before 1855 the wife's *jus relictae* could be claimed by her representatives if she predeceased her husband.³³ *Nemo est haeres viventis*. Treating the wife's *jus relictae* as merely a right of succession leads to the absurd conclusion that the dead may inherit from the living.³⁴ This latter point of itself, demonstrates that the *jus relictae* was something more than a mere right of succession.

2. *Debts*

The Lord Chancellor embraced Lord Fraser's views that the *jus relictae* and *legitim* of Scottish law were merely debts against the husband and father's estate.³⁵ Lord Fraser's chapter on the *communio bonorum* has been described as "very unconvincing"³⁶ though it has also been characterized as the "now

²⁹ See, G. C. Paton, "Husband and Wife Property Rights and Relationships," in *An Introduction to Scottish Legal History* (Vol. 20, Stair Society Edinburgh: R. Cunningham, (1958) at 113 (theories and authorities reviewed); J. Gardner, *The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession* (1928), 40 *Jurid. Rev.* 72.

³⁰ Bell, *supra*, note 16 at 431, ss. 582 (*legitim* a right of succession to a share of father's movable estate vesting in children on father's death). See, Gardner, *id.* at 72-74 (argument in support of theory set out).

³¹ Gardner, *id.* at 75.

³² F. P. Walton, *The Relationship of the Law of France to the Law of Scotland* (1902), 14 *Jurid. Rev.* 17 at 20-21, 24; Gardner, *id.* at 75.

³³ See, *supra*, note 16.

³⁴ Gardner, *supra*, note 29 at 75; Marsh, *supra*, note 11 at 105; Walter, *supra*, note 32 at 24. Thus, the Lord Chancellor's characterization of *Lashley v. Hog* as a succession case seems remarkable, especially as this point was expressly noted by Sir Nathaniel Lindley, M. R. in the Court of Appeal, [1898] 2 Ch. 60 at 68. The latter said:

But when the question is, as it was in *Lashley v. Hog*, whether on the wife's death in her husband's lifetime any part of his property became hers or became payable to persons claiming through her as if it were her property, it is very difficult to understand upon what principle recourse is had to the law of succession.

³⁵ [1900] A.C. 21 at 30. See, text accompanying *supra*, note 24. The Lord Chancellor's reliance on Lord Fraser's views is nothing short of amazing. Fraser had reached his conclusion that *jus relictae* and *legitim* were mere debts by noting that by his reading of history the *communio* had originated among the Germanic nations, and among those people it was a partnership proper between the spouses. Fraser asserted, however, that in France and Scotland, the *communio* was a mere fiction: Fraser, *supra*, note 16 at 650-55, 669-70. Fraser clearly equated the *communio bonorum* of Scotland (a fiction imported in the seventeenth century into Scottish law from France) with the community regime of France. The Lord Chancellor was inconsistent in relying on Fraser for support that the *communio* of Scotland was a mere fiction, and then asserting that there existed a true community regime in France. See, De Funiak & Vaughan, *supra*, note 2 at 37.

³⁶ Walton, *supra*, note 32 at 23.

generally accepted views."³⁷ The prevalence of Fraser's views must be attributable solely to the high esteem his works generally command, for his argument that there never existed a *communio* in Scotland save in name alone may be persuasively criticized on almost every point.³⁸

Firstly, though usually the wife's *jus relictæ* and children's *legitim* were satisfied by the husband's executor, these claims were never treated as debts in the ordinary sense: the wife and children could not compete with the claims of even ordinary creditors of the deceased husband and father.³⁹ Furthermore, Lord Fraser never articulated what the juridical bases of these debts were. Moreover, he never explains how these claims of the wife and children as creditors are reconcilable with his assertion that the husband and father was an absolute owner of the property subject to these claims. Fraser's commitment to perceiving the husband and father as an absolute owner would seem to ineluctably lead him not only to reject the notion of a real *communio* but also to reject his own theory. If the husband and father was an absolute owner, the wife and children would seem to have no claims whatsoever against his property.⁴⁰

Lord Fraser also asserted that the doctrine of *communio bonorum* was a late-comer to the law of Scotland. His thesis was that it came to Scotland in the seventeenth century as a result of the practice of Scottish lawyers to acquire a knowledge of their profession in France, and the *communio bonorum* was introduced into Scottish law by these lawyers.⁴¹ The doctrine gained acceptance when it received the imprimatur of two of Scotland's great institutional legal writers, Lord Stair in 1681, and Erskine in 1773.⁴² But Lord Fraser fails to demonstrate that this new terminology employed by Stair and Erskine reflected any substantive alteration in the law of Scotland as it had been applied up to their time.⁴³ It is arguable that the *communio bonorum* phraseology was adopted merely as a compendious term, borrowed from French sources, to describe the wife's *jus relictæ* and children's *legitim*.⁴⁴

Why then did as eminent a writer as Lord Fraser err? This occurred because Lord Fraser was unable to reconcile the extensive administrative

³⁷ Paton, *supra*, note 29 at 113.

³⁸ See, Gardner, *supra*, note 29; Walton, *supra*, note 32.

³⁹ Gardner, *id.* at 76.

⁴⁰ See, *id.* at 77.

⁴¹ Lord Fraser's view of the *communio* as a late introduction into Scottish law is shared by Paton, *supra*, note 29 at 100; De Funiak, *Equity and Community of Property in Scots Law* (1965), 10 S. D. L. Rev. 70 at 73-74; De Funiak & Vaughan, *supra*, note 2 at 36.

⁴² See, Fraser, *supra*, note 16 at 656-66 where he refers to Sir James Dalrymple (Viscount of Stair), *Institutions of the Law of Scotland* (1681) and John Erskine, *An Institute of the Law of Scotland* (1773).

⁴³ Gardner, *supra*, note 29 at 78.

⁴⁴ Indeed, Gardner and Walton have argued persuasively that these rights had their roots in an older community regime that was part of the customary law of Normandy. These customs were introduced into England after the conquest, and then to Scotland: see, Gardner, *id.* at 80-86; Gardner, *An Historical Survey of the Law of Scotland Prior to the Reign of David I* (1945), 59 Jurid. Rev. 34, 65 at 69-71; Walton, *supra*, note 32 at 21-22.

powers and control accorded the husband under the *communio* of both Scotland and France with the notion that the wife had property rights. He saw the wife as having no control over the property, and concluded that she could not be an owner in any real sense.⁴⁵

[H]e saw only the present, not the future, the present unity of the mass, not its future division into shares. And so he said boldly that the whole mass belonged to the husband.⁴⁶

In other words, Lord Fraser misapprehended the whole nature of the *communio bonorum*. The husband's administrative powers were not equivalent to the control that the common law once gave a husband over his wife's property rendering him the owner thereof. Indeed, on dissolution of the marriage, the wife or her representatives acquired the same administrative powers that had formerly been in the husband over her share.⁴⁷

3. *Rights of Division*

Much of what has been written above regarding the inadequacies of the other theories about the nature of the *communio bonorum* supports the theory that the Scottish *communio* prevalent at the time *Lashley v. Hog* was decided⁴⁸ was in fact analogous to the community regime that exists in France.⁴⁹ Treating the *jus relictæ* and *legitim* as rights in division is consistent with the right prior to 1855 of the wife's representatives to immediately claim her share in the movable property on her predeceasing her husband. Furthermore, such a theory does not force one into formulating a vague and inconsistent theory that the *jus relictæ* and *legitim* were merely debts. Finally, this theory that the *jus relictæ* and *legitim* were rights in division is congruent with what is known about their origin.

Thus, it is asserted that the House of Lords in *De Nichols v. Curlier* failed to advance any cogent reasons for distinguishing *Lashley v. Hog*.⁵⁰

⁴⁵ Fraser, *supra*, note 16 at 673-78. Indeed, the husband's administrative powers, though characterized as absolute, were in reality limited. Indubitably, he was accorded extensive powers, but he could not defeat the rights of the wife or children by fraud, deeds *mortis causa* or deeds on his deathbed: Bell, *supra*, note 16 at 426.

⁴⁶ F. Pollock and F. Maitland, *The History of English Law* (2d ed. Cambridge: Cambridge University Press, 1898) at 432 (describing a similar error made by English lawyers). See, Gardner, *supra*, note 29 at 78-79.

⁴⁷ De Funiak & Vaughan, *supra*, note 2 at 6, 258-59.

⁴⁸ It, of course, would be absurd to contend in the face of the numerous legislative amendments since 1855, that the *jus relictæ* and *legitim* in current Scottish law are rights in division. For the current law, see, D. Walker, *Principles of Scottish Private Law* (Oxford: Clarendon Press, 1970) at 1895-1910; Anton, *The Effect of Marriage Upon Property in Scots Law* (1956), 19 Mod. L. Rev. 653.

⁴⁹ The *communio bonorum* of Scotland applied only to movable property; the community regime of France is much more extensive.

⁵⁰ It has been noted that on strict constitutional grounds there is no need for the House of Lords to reconcile these two cases. *Lashley v. Hog* went on appeal to the House from the Scottish Court of Session, and the House was sitting as a Scottish court when it laid down a Scottish conflict rule. *De Nichols v. Curlier* arose in the English Courts, and was decided by the House of Lords as an English court articulating an English conflict rule: Marsh, *supra*, note 11 at 108.

D. POLICY

Is the result in *De Nichols v. Curlier* nonetheless defensible on the ground that it fosters the attainment of desirable policies in the conflict of laws?⁵¹ Among the learned writers in the conflict of laws, *De Nichols v. Curlier* is characterized as a decision that represents the immutability principle for governing matrimonial property rights. Under this principle, the law of the spouses' matrimonial domicile determines the spouses' property rights for all their property whether it was acquired before or after a change in their matrimonial domicile.⁵² The immutability principle does advance the policy favouring the treatment of the property of each spouse as a unit governed by a single set of legal rules.⁵³ However, it runs counter to the policy of fulfilling the normal expectations of spouses, especially where they are compelled to change their domicile through political or economic pressure and acquire a domicile of choice elsewhere. Under the immutability principle, their matrimonial property rights would continue to be governed by the law of their matrimonial domicile — a country with which they would have only a tenuous connection.⁵⁴

Additionally, in terms of efficiency it is desirable to maximize the opportunities for the forum court to apply its own law. Under the immutability doctrine, all immigrant couples would be subject to foreign matrimonial property regimes.⁵⁵

Finally, the immutability doctrine may give rise to questions of characterization the resolutions of which are more nice than obvious. This point is illustrated neatly by *Beaudoin v. Trudel*,⁵⁶ a decision of the Ontario Court of Appeal. The spouses, whose original matrimonial domicile was Quebec, moved to Ontario where all the matrimonial property was acquired. The wife died intestate. In accord with *De Nichols v. Curlier*, the husband took one-half of the wife's property under the Quebec community property regime. As to the remaining half, the Court of Appeal decided that as entitlement thereto was a matter of succession, the law of the wife's domicile at death, Ontario, governed. Under Ontario law relating to intestate succession, half of the remaining half devolved to the husband. In total result, by interaction of the conflict rules relating to matrimonial property and succession, the husband received more of his wife's estate than he would have received had the problem been governed exclusively by either Quebec or Ontario law.⁵⁷

⁵¹ The policies are set out in Castel, *supra*, note 4 at 7-11; Marsh, *id.* at 94.

⁵² See, Dicey, *supra*, note 11 at 392-93; Marsh, *id.* at 106; Morris, *supra*, note 11 at 640-41.

⁵³ Marsh, *id.* at 106.

⁵⁴ Dicey, *supra*, note 11 at 641; Marsh, *id.* at 106-07. Marsh also notes that this principle may thwart the expectations of creditors of the spouses.

⁵⁵ Marsh, *id.* at 107.

⁵⁶ [1937] O.R. 1; [1937] 1 D.L.R. 216.

⁵⁷ See, also, Dicey, *supra*, note 11 at 641-42.

E. OPTIONS

As there is little to say in favour of *De Nichols v. Curlier*, what principle ought to apply? The obvious option is what has been described as the full mutability principle as illustrated by *Lashley v. Hog*. The law of the spouses' current domicile determines their matrimonial property rights with respect to all their property whether acquired before or after a change in domicile.⁵⁸ This principle, however, cuts athwart the policy of protecting and continuing the vested interests of the spouses.⁵⁹

The final, and in this writer's view, optimal solution is to adopt the partial mutability doctrine. The authors of Dicey and Morris formulate the doctrine in this manner:

Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicile, except insofar as vested rights have been acquired under the law of the former domicile.⁶⁰

The advantages of such a doctrine are many. It allows the interment of the tacit contract theory with its fallacious suggestion that the courts are merely implementing the agreement of the spouses. The courts may admit that they are deliberately sculpting a rule that maximizes the fulfillment of the policies of private international law.

Partial mutability is the amalgamation of the full mutability and immutability doctrines that are displayed respectively in *Lashley v. Hog* and *De Nichols v. Curlier*. It stands up well under a policy evaluation. Although it raises the possibility of more than one set of legal rules governing the division of the matrimonial property, it does seem to foster the fulfillment of the spouses' expectations in a situation where they have not unequivocally expressed their intentions. Their personal law, the law of their domicile when the property was acquired, determines the manner in which the property will be divided.

Unquestionably, although it would be more efficient and economical for a court to apply its own regime of matrimonial property to the case before it, the prospect that such a rule would defeat vested rights requires that it be rejected. The partial mutability doctrine, however, does allow the court to apply its regime to property acquired by the spouses while they were in its jurisdiction.

In a nutshell, the immutability doctrine fails because of its inflexibility; it ignores the changed circumstances of the spouses. On the other hand, full mutability tampers with vested rights. Partial mutability is an effective compromise between the two.

In the cases, there is authority that supports the partial mutability

⁵⁸ See, Cheshire, *supra*, note 11 at 566; Marsh, *supra*, note 11 at 104.

⁵⁹ Marsh, *id.* at 105.

⁶⁰ Dicey, *supra*, note 11 at 640; Goodrich, *supra*, note 11 at 385; Marsh, *id.* at 108-10; Morris, *supra*, note 11 at 394. Cf., Falconbridge, *supra*, note 11 at 109.

doctrine. In *Re Heung Won Lee*,⁶¹ the spouses' original matrimonial domicile was Korea, a separate property regime. They acquired a domicile in Brazil, a community regime, where the husband died. Although noting that the law was unsettled, the British Columbia Supreme Court decided that the wife's interest in the proceeds of her husband's life insurance was governed by Brazilian law.⁶²

An early articulation of the partial mutability doctrine is found in *Pink v. Perlin & Co.*⁶³ Creditors of the husband seized the family furniture. The wife claimed that the furniture was her own; she had purchased it with money earned before her marriage in Ohio in 1887. Mr. Justice Meagher asserted that under the common law in force in Ohio the money became her husband's on marriage. The fact that they later moved to and became domiciled in Nova Scotia where Married Women's Property legislation was in force would not defeat the husband's vested rights in the money with which the furniture was bought. Mr. Justice Meagher said:

The law appears to be that the mutual rights of the husband and wife as to their personal property are governed by the law of their matrimonial domicile, and such rights are not affected by a subsequent change, but rights acquired after such change are, of course, governed by the law of the actual domicile.⁶⁴

The creditors had merely seized the husband's furniture.

It is hoped that this doctrine of partial mutability will gain further acceptance in the courts.

⁶¹ (1963), 36 D.L.R. (2d) 177; 40 W.W.R. 152 (B.C.S.C.).

⁶² *Id.* at 183-84. This case may also be characterized as a matter of succession.

⁶³ (1898), 40 N.S.R. 260.

⁶⁴ *Id.* at 262.

