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MATRIMONIAL PROPERTY REGIMES: YESTERDAY, TODAY AND TOMORROW

By H. R. Hahlo*

I Introduction

Some general observations by way of introduction may not be out of place. First, the laws that govern the position of women in any given country at any given time do not necessarily reflect the factual position. Until well into the nineteenth century wives in all European countries were in law subject to the well-nigh absolute authority of their husbands and there were, no doubt, husbands who exploited their legal superiority to the fullest. It is safe to assume, however, that since early days most couples lived together very much as they do today, and that, in the past as at present, authoritarian husbands dominated submissive wives, while wives of strong character ruled feeble husbands. Nor are women in office, trade or business a novel phenomenon. During the Middle Ages women often administered the family estates while their men-folk were away at war or at court. In the towns they helped their husbands in the management of their businesses. Most European countries allowed women to succeed to the throne — instances that come immediately to mind are Elizabeth I of England, and Mary, Queen of Scots. And what is perhaps even more significant, women were appointed to the highest offices. Blanche of Castile (1188-1252), wife of Louis VIII, became twice Regent for her son Louis IX. The German Emperor appointed Marguerite of Austria in 1507 as Governor-General of the Netherlands; she was succeeded in this high office by another woman, Mary of Hungary. The slogan "women's liberation" may be new, but there were "liberated" women in all ages.

Secondly, the practical importance of the matrimonial property regime during the subsistence of a marriage should not be overestimated. To the poor who have little of value to give, share in, or leave on death, it matters but little whether they are married in community or separate as to property. Nor does it matter very much to the well-to-do as long as their relationship is harmonious. As regards "family assets", more especially, most couples function as de facto partnerships and do not worry very much about what is his or hers (with bathroom towels a notable exception). It is only when a marriage collapses, is dissolved by death of one of the spouses, or one of the spouses (usually the husband) becomes insolvent, that the matrimonial regime becomes of importance. On the other hand, the governing regime may in itself contribute to the success or failure of a marriage. High-spirited women do not take readily to an order which reduces them to a state of legal inferiority or makes them dependent for every cent on the generosity or miserliness of their husbands.

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Thirdly, it is trite but true that no matrimonial property system can meet the circumstances of all people equally satisfactorily — the rich and the poor, the young and the old, the first-time married and the veterans who have passed through the fires of multiple divorces. The standard matrimonial regime must be designed with the "average couple" in mind: a young man and a young woman, starting out with hope and ambition but not, as a rule, with much money. Couples who do not fit into this category must be given an opportunity to cut their matrimonial cloth to their own measurements.

Fourthly and lastly, no description of a matrimonial property regime can convey a true picture unless it is supplemented by an outline of the law relating to the matrimonial home, duties of support (both during the marriage and after its dissolution), and succession rights between spouses. As long as she receives portion of her husband’s estate, it makes little difference to a widow (except, possibly, from the taxation point of view) whether she receives it as her share in a common estate, an inheritance portion, or a lump sum award under family provision (dependants’ relief) legislation.

II Early Days

To speak of a matrimonial property regime among the early Germanic peoples before, say, the Fifth Century A.D. would be a misnomer.¹ On the Continent, as in England, Scotland and Ireland, marriage in those remote days was closely akin to the customary union of the indigenous tribes of Africa before they came under the civilizing influences of European missionaries and settlers. Polygamy was permitted. The union was based on a contract between two families, rather than on the consent of a man and a woman. The bridegroom paid the father of the girl an agreed “bride price” (pretium nuptiale, wed — hence “wedding”). In return the father of the bride handed her over to him in solemn ceremony — traditio puellae.² As a result of the agreement, the husband acquired the guardianship (munt) over his wife, who was the subject matter of the transaction rather than a party to it.

Strictly speaking, the wife was not capable of property rights. It became, however, customary for the husband to give her, in consideration of her surrender to him, a substantial gift on the morning after the wedding night — morgengawe or “gift of the morning”. This was in accordance with the principle of early law that every gift requires a counter-prestation. Together with the jewellery and clothes which she had brought into the marriage, the “gift of the morning” was regarded as the wife’s separate property.

From the Sixth Century A.D., if not earlier, the general picture began insensibly to change.³ When the Synod of Macon of 585 A.D., not without opposition from some of the more conservative bishops attending, passed a

² The traditio puellae lives on in the modern wedding ceremony in the “giving-away” of the bride.
³ On marriage during the Frankish period, see H. R. Hahlo, supra, note 1 at 383-86.
resolution officially recognizing that a woman is a human being with a soul of her own, the legal and social emancipation of women was on its way. This manifested itself in several respects in the law of marriage. No longer the object of, but a party to the marriage, a girl could, at least in theory, no longer be married against her will. The “bride price” changed character. It no longer went to the girl’s father or guardian, but became a marriage settlement in her favour (wittum, dos). Thus, she became a puella dotata from a puella empta. Concurrently, she became capable of having an estate of her own. It would normally consist of (i) whatever she had brought into the marriage or acquired during the marriage from her family by gift or succession; (ii) whatever her husband had settled on her as morgengawe or dos. Both were usually stipulated for by means of a carta doris, predecessor of the modern marriage contract.

Failing adequate provision, a wife who survived her husband could claim a legal dos (dos legitima) out of his estate. Thus under the Lex Ribuaria a widow for whom no provision had been made by her husband by way of dos could claim, in addition to any morgengawe that had been settled on her, a legal dos of fifty solidi as well as a third share in the “acquests” of the marriage. Among the Saxons and Anglo-Saxons, the widow had a legal claim to a dos, for which a share in the acquests of the marriage was substituted on birth of the first child. Acquests consisted of property acquired by onerous title or as a result of the labour or industry of the spouses, and did not include acquisitions by way of donation or inheritance.

During the subsistence of the marriage the husband administered his wife’s property and took its “fruits” (income) as her contribution to the expenses of the household. The wife had to be represented in court by her husband, and could not, without his assistance, enter into valid legal transactions. He did not, however, become the owner of her property, which, in consequence, could not be attached by his creditors.

All in all, the matrimonial property régime of the Franco-Germanic period was a progressive system.

Little is known about the development of matrimonial property law between 900 and 1100 A.D. Our knowledge of legal developments during that period is, generally speaking, somewhat fragmentary. When the train of legal history emerged again from the tunnel of the “dark age”, the matrimonial property law systems of the Continent and England had parted ways.

4 The dos of the Frankish law is not the same as the Roman dos. The latter was a dowry which the wife provided for the husband, the former a marriage settlement which the husband effected in favour of his wife.

5 Ch. 37 (39).

6 The “third share”, in one form or other, flits like a ghost through matrimonial law. The wife’s common law dower was a life interest in one-third of her husband’s land. And though there is no legal rule to this effect, one-third of the combined incomes of both spouses has often been regarded as a fair measure of maintenance for a separated wife.

7 Lex Saxonum, chs. 47 and 48.
III Sketch of the Development of Matrimonial Property Law Prior to World War II

(a) The Continent

Whereas the law of marriage, which fell under the jurisdiction of the Church, was fairly uniform in Western Europe during the Middle Ages, matrimonial property law, which fell under the jurisdiction of the secular authorities, varied from country to country, district to district and town to town. In some parts, the old Frankish system survived, under which the estate of the wife remained her separate property but was administered by the husband. In others, such as the South of France, the Roman dotal system remained the standard system. In most regions, however, community regimes prevailed, ranging from a community of movables and acquests, and other partial community systems, to universal community of property and profit and loss. How these community systems developed, is controversial. Some historians believe that they grew out of the community of acquests of Saxon law, others that it became such a universal practice in many parts to establish community of some kind or other by marriage contract that eventually community became an institution of the common law.

Everywhere the wife was subject to her husband's marital power. By virtue of this power, he represented her in court, administered the joint estate as well as her separate estate (if any), and had the right to administer "moderate chastisement" to her. The husband's position as his wife's master and guardian was justified on three grounds: first, that there must be a head of the family and that, both on biblical authority and by the law of nature, the husband is cast for that role; secondly, that, on account of the weakness of their sex (fragilitas sexus), women require protection; and, thirdly, that by partaking of the forbidden fruit Eve had caused the expulsion of mankind from the Garden of Eden. "Adam was deceived by Eve, not Eve by Adam", said the Corpus Juris Canonici.

There were two exceptional cases in which a wife could, in most legal systems, contract on her own. She could bind her husband's credit by contracts for household necessaries, and if she carried on a public trade or profession in her own name, with her husband's express or tacit consent, she could validly contract in connection with such trade or profession.

Where the husband is a good businessman, a community system has distinct merit from the wife's point of view, in that it provides her with a stake in his success. The opposite is true where the husband is a prodigal, a crook, or just an inept administrator, for in this case he is likely to lose, together with his own estate, whatever she owns. Separation of goods by order of court was one of the devices that was developed to safeguard the wife in this kind of situation. Unfortunately, as often as not, the damage was done by the time the wife asked for the court's intervention.

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8 See text, supra, at p. 5.
9 Corinthians 1.11.3, 8 and 9.
10 Decr. Grat., c.33, quaestio V, c.18.
The instrument through which the legal position of married women on the Continent was gradually improved was the marriage contract (in England, the marriage settlement). At the instance of loving fathers, uncles and grandparents, lawyers worked out marriage contracts which protected girls from wealthy families against fortune-hunting husbands. Thus, in terms of a "standard form" marriage contract, which was deservedly popular in Holland during the seventeenth and eighteenth centuries, the wife on dissolution of the marriage had the option to share with her husband (or his heirs) in the profits of the marriage or to reclaim intact whatever she had brought into the marriage. Thus she was in a position where she could have her cake and eat it, too. If her husband died rich, she would elect in favour of community. And if he died poor, she would re-claim whatever she had brought into the marriage. If the husband went bankrupt, the wife could exercise the option during the marriage, and if she was the first to die the option could be exercised by her heirs. In security of her claim, the wife had a tacit hypothec over her husband's assets.

There was another device by which fathers could protect gifts and testamentary benefits which they gave to their daughters against the greed or mismanagement of husbands, present or future. They could expressly stipulate in the deed or testament that the gift or bequest should be excluded from the common estate and the husband's administration. Whether this device was as effective as the English settlement in trust, may be doubted. Still, it was a safety measure, which has survived in most civilian systems to this day.

All the civilian systems adopted the Roman Law rule prohibiting donations between spouses. Its purpose was, not so much, as is frequently thought, to protect the creditors of the spouses against fraudulent donations (this can be achieved by other means), as to protect the spouses against their own generosity. In every marriage, there is, in the words of an old saying, one who loves and one who allows himself (or herself) to be loved. It was feared that if donations between spouses were freely permitted, the more loving (or otherwise weaker) spouse might end up by being a very much impoverished man or woman.

As regards intestate succession, civilian systems generally placed the widow or widower at the bottom of the list of heirs, ranking only before the State. Since most spouses were married in community, the surviving spouse was assured of receiving a substantial portion of the estate of the first dying, not by way of succession, but as his or her share in the joint estate. If intending spouses chose to exclude community by marriage contract, the wife, or her family, would see to it that she was protected by marriage settlements or succession clauses.

Community, universal or partial, remained the prevalent matrimonial property regime in most Western European countries until well into the
twentieth century. Universal community was the legal regime of, inter alia, Roman-Dutch law, and was taken over from there by South African law, where it has remained the legal regime to this day. (In practice the well-to-do almost invariably exclude it by antenuptial contract.) It is also the legal regime of the Nordic countries. Community of movables and acquests was adopted as the standard system by the Code Napoléon and, following it, by the Civil Code of Quebec.

The Napoleonic Code in its original form,\(^1\) provided that the wife (even where the consorts were separate as to property), was to have no capacity to give, alienate, hypothecate or acquire, by gratuitous or onerous title, without her husband's consent in writing.\(^1\) An exception was made where she was a public trader.\(^1\) In legal proceedings she required her husband's authority even for an action concerning her business or separate property.\(^1\)

The legal regime, as previously stated, was one of community of movables and acquests.\(^1\) There were three estates: the common estate, the husband's separate estate, and the wife's separate estate. All three were administered by the husband, who was the 'chef' of the family. He was not, however, permitted to act in fraud of his wife or to make gifts of land or movables of value to third parties. Although the wife herself could alienate, burden or otherwise dispose of her separate goods, she required her husband's authorization for the purpose.

On dissolution of the marriage by death or divorce the wife's separate property was returned to her or her heirs, together with her share in the common estate. By renouncing her rights in the community she could escape liability for community debts.\(^1\)

Like other civilian systems, French law allowed intending spouses to vary or exclude the legal regime by marriage covenant, entered into before the marriage. They could choose one of several ready-made systems, from complete separation of goods to universal community of property, or adopt a regime of their own design, always provided that the rules they laid down for themselves were not contrary to good morals or public policy.\(^1\) The doctrine of the immutability of the regime established at the time of marriage applied.\(^\) 20

Donations between spouses during marriage were always revocable.\(^\) If one of the spouses died intestate the Code, in accordance with the civilian

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\(^1\) See G. Basteman in *Comparative Law of Matrimonial Property*, A.K.R. Kiralfy (ed.) (Leiden: Sijthoff, 1972) at 1, [thereafter cited as *Kiralfy*].
\(^1\) CN (ancien) art. 217. See also arts. 218, 219.
\(^1\) CN (ancien) art. 220.
\(^1\) CN (ancien) art. 215.
\(^1\) CN (ancien) arts. 1400 et seq.
\(^1\) CN (ancien) arts. 1453 et seq.
\(^1\) CN (ancien) arts. 1387 et seq.
\(^1\) CN (ancien) art. 1395.
\(^1\) CN (ancien) art. 1096.
tradition, treated the surviving consort in a rather miserly way. He or she took no share in the estate of the first-dying spouse, if the latter left children, parents or collaterals entitled to succeed.\(^2\) Nor was there provision for a reserve or legitimate portion in favour of the surviving consort.

While the basic structure of the Code Napoléon remained unchanged until the comprehensive reforms of 1965,\(^2\) a number of exceptions were introduced during the second half of the nineteenth and the first half of the twentieth century to the rule that a married woman could not act without her husband's authorization. Thus, she was empowered to open, deposit moneys on, and make withdrawals from a savings account without his assistance, and if she carried on a profession or trade, she could join a professional syndic or association without having to ask for his consent.\(^2\) Amendments effected to article 767 of the French Code in 1891, and again in 1925 and 1930, gave the surviving spouse greater rights of succession \textit{ab intestato} in the estate of the first-dying spouse. If there were children of the marriage, the survivor could claim a life usufruct in a quarter of the estate. Failing children of the marriage, he or she was entitled to a life usufruct in part or all of the estate, or to part or all of the \textit{corpus} of the estate, depending upon whether there were children of a previous marriage, "natural" children, brothers or sisters (or their descendants by representation), or ascendants of the deceased.\(^2\) And while there was no departure from the principle that the surviving spouse is not entitled to a legitimate portion or reserve, under an amendment effected to article 205 in 1891, a surviving spouse, who is in need, is entitled to claim alimony out of the estate of the first-dying consort.\(^2\)

The matrimonial regime of the Quebec Code of 1866 was designed on the model of the Code Napoléon in its original form, but there were many differences.\(^2\) Thus, where the first-dying spouse left no will, the surviving consort was treated more generously than under the Code Napoléon. He or she received a portion of the estate of the first-dying (and not only a usufruct in it) even if the latter was survived by children or ascendants.\(^2\) In addition, if the spouses were married under the statutory regime of community of movables and acquests, the survivor had a usufruct in the property of the community coming from the deceased spouse to the children of the marriage, which lasted as to each child until he was of the age of 18 years or emancipated.\(^2\) The 1891 amendments to article 205 of the Napoléonic Code, which

\(^2\) CN (ancien) art. 767.
\(^2\) See text, infra, at p. 25.
\(^2\) See the annotation to art. 217 in the 1935 edition of the Code Civil in Petite Collection Dalloz.
\(^2\) CN art. 767, as amended.
\(^2\) CN art. 205, as amended.
\(^2\) On the matrimonial property system of the Quebec Code, see J.E.C. Brierley in II Studies in Canadian Family Law, Mendes da Costa ed. (Toronto: Butterworths, 1972) at 819 [hereafter cited as Studies].
\(^2\) CC art. 614, later arts. 626a-c.
\(^2\) CC arts. 1323-1332, since repealed.
empowered the courts to award maintenance out of the estate of the pre-deceased spouse to a needy surviving spouse were not taken over.

The German BGB, which came into force on January 1, 1900, struck out along new lines. Departing from the community idea, it established a system of separation of goods, with common administration by the husband. Whatever the wife brought into the marriage or acquired thereafter otherwise than by her own labour was her eingebrachtes Gut, which became subject to her husband's administration and usufruct, but remained her separate property and could not be attached by his creditors. Her reserved goods (Vorbehaltsgut), which included, inter alia, things destined for her personal use, such as clothing, jewellery and tools for employment and trade, as well as her earnings from employment or business, did not become subject to her husband's administration. As in French and Quebec law, the spouses could regulate their property rights by marriage contract, but, unlike French and Quebec law, German law permitted, subject to certain safeguards, variation by postnuptial, as well as by antenuptial contract. As conventional regimes, the BGB offered separation of goods, universal community, community of acquists and community of movables. The fact that very few couples choose to contract out of the legal regime of the BGB is a tribute to the perceptive-ness of its authors.

If the first-dying spouse died intestate and there were children of the marriage, the surviving spouse took one quarter of his or her estate. Competing with parents or their descendants (brothers and sisters, or their descendants by representation), the survivor took half, and, failing any of the aforementioned, the lot.

Half of the intestate portion constituted the legitimate portion (Pflichtteil), of which the surviving spouse could not normally be deprived.

Amendments made prior to the great reforms of the 1950's allowed the wife to carry on a trade or profession without her husband's consent, and to open and operate on her own savings account.

On the matrimonial property regime of the BGB, see E.D. Graue in Kiralfy at 115. While the French regime of community of movables and acquists was taken over from the Coutume de Paris, the German legal regime was supposed to be in accordance with Germanic tradition, see E.D. Graue, Ibid.

BGB §1363.
BGB §1366, 1370.
BGB §1365, 1371.
BGB §1432.
BGB §1414-1557.
On the present regime, see text, infra, at p.23.
BGB §1931. See also §1932.
BGB §2303. For the grounds on which a widow or widower can be deprived of the legitimate portion, see §2335.
Matrimonial Property Regimes

(b) England

English matrimonial property law (England has never had a matrimonial property regime in the Continental sense) had its roots in the law of Normandy, which differed in many respects from the laws of other parts of France. The well-known tag that "husband and wife are one and that one is the husband" conveys a general idea of the position at common law.

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything.

On marriage the wife's personal chattels, with the exception of clothing and other personal articles, became her husband's property absolutely, to descend on his death to his heirs. The seisin of any freehold lands owned by the wife at the time of the marriage or acquired by her during the marriage passed to the husband, who took their rents and profits. He could not, however, alienate them without her consent, supplied in a separate examination by the levy of a fine. On his death, the seisin of the wife's lands reverted to her or her heirs. The husband had the right to enjoy and dispose of his wife's chattels real during coverture, but on his death those still in his possession reverted to her. Choses in action vested in the husband if he reduced them into possession during coverture.

Spouses could not contract with each other or sue each other in tort. The husband was liable for his wife's antenuptial debts, as well as for any torts she committed during coverture.

The wife had no contractual capacity but could enter, by virtue of implied agency, into contracts for household necessaries. With her husband's consent, she could dispose of her personality by will, but even with his consent she could not make a devise of her freehold lands.

If the husband died first, the wife had a life interest in one-third of his freehold lands as "dower". Lands subject to dower could not be alienated by the husband during coverture, unless the wife joined in the transfer. If the wife died first, the husband had a life interest in the wife's lands, provided issue had been born of the marriage — "tenancy by the curtesy".

The widow's rights of dower did not extend to her husband's chattels, but from the twelfth century onward she was entitled to one-third of her husband's personality if there were children of the marriage, and to one-half if there were none. By the end of the seventeenth century, the partes rationales had fallen into desuetude, leaving only dower and curtesy.

The harshness of the common law, in which the wife's personality was

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41 According to Theron G. Strong, Joseph M. Choate, New York, 1917, 22, it was first used by Professor Loring.

merged in that of her husband, was mitigated in equity, which permitted settlements "for the separate use" of the wife, first on trustees, later on the wife directly. The wife could dispose of property settled on her by act *inter vivos* or *mortis causa*, and bind it by her contracts. By attaching a "restraint on anticipation" to the settlement, the settlor could put it beyond the wife's power to dispose by act *inter vivos* of future income, thus making it impossible for her to anticipate or alienate such income for her husband's benefit.

Beginning in 1857 with the Married Women's Reversionary Interest Act,43 and the first Divorce and Matrimonial Causes Act,44 the restrictions on the wife's capacity to own and dispose of property, and to contract with, or sue her husband, were slowly removed. Milestones in this long drawn-out process were the first Married Women's Property Act 1870,45 which provided that a married woman's wages, earnings and deposits in a savings account were to be deemed to be her own property, to do with as she pleased; the Married Women's Property Act 1882,46 which rendered a married woman 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 *femme sole*; and the Law Reform (Married Women and Tortfeasors) Act 1935,47 which gave full effect to the principle of separation of goods between husband and wife. The Law Reform Act also prohibited the creation of new restraints on anticipation.48 The last remnants of dower (rendered largely ineffective by the Dower Act 183349 and curtesy were abolished by the Administration of Estates Act 1925,50

The Intestates Estates Act 1890,51 gave widows the right of intestate succession in the estates of their husbands. It was superseded by section 46 of the Administration of Estates Act,52 which entitled a widow or widower, whose spouse had died without leaving a will, to share in both the real and personal property of the first-dying spouse.53 As there are no legal rights of inheritance in English law, either spouse can disinherit the other by will. The Inheritance (Family Provision) Act 1938,54 introduced family maintenance provision on lines first laid down in New Zealand, allowing a widow or widower, for whom no reasonable provision has been made in the will of the first-dying spouse, to claim maintenance out of his or her estate as a 'dependant'.

43 (1857), 20 & 21 Vict., c.57.
44 (1857), 20 & 21 Vict., c.85.
45 (1870), 33 & 34 Vict., c.93.
46 (1882), 45 & 46 Vict., c.75.
48 The last existing restraints on anticipation were abolished in 1949. See text, *infra*, at p.27.
49 (1833), 3 & 4 Wm. IV, c.105.
50 (1925), 15 Geo. 5, c.23.
51 (1890), 53 & 54 Vict., c.29.
52 (1925), 15 Geo. 5, c.23.
53 On the present law, see text, *infra*, at p.29.
54 (1938), 1 & 2 Geo. 6, c.45.
The general principles of English matrimonial property law were taken over in all the Canadian common law provinces. Thus, Ontario has been trailing English developments in this area ever since English civil law was first introduced, as of October 15, 1792. The 1859 Act To Secure to Married Women Certain Separate Rights of Property enabled a married woman to hold, have and enjoy all her real and personal property as if she were unmarried, and empowered her to devise and bequeath her separate property to her husband and children. The Married Women's Property Act, 1872, protected the personal earnings of married women (section 2) and empowered them, inter alia, to insure their own and their husband's lives (section 3), to hold and vote stocks (section 5), and to make deposits in, and withdraw them from, a bank (section 6). It was replaced by The Married Women's Property Act, 1884, which was modelled on the English Married Women's Property Act, 1882. It has remained the basic law of Ontario to this day.

Many of the reforms that were subsequently effected in England have not, so far, been taken over in Ontario. Thus, the historical concept of the wife's "separate property" has, in theory at least, been preserved. Section 3 still provides that a married woman can contract "in respect of and to the extent of her separate property". Section 7 precludes actions in tort between husband and wife, except those necessary for the protection and security of the wife's separate property. (For a tort committed against her by her husband before the marriage, the wife may sue even for personal injuries). Dower and curtesy still exist, though the practical importance of dower is very much diminished, while that of curtesy has dwindled to next to nothing.

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57 22 Vict. (Can.), c.34.
58 35 Vict. (Ont.), c.16.
59 47 Vict. (Ont.), c.79, now R.S.O. 1970, c.262.
60 The Married Women's Property Act, 1884, s.2. In fact, a married woman in Ontario has the same capacity in law as a man, see id., s.4.
61 Otherwise in Alberta, Manitoba, Saskatchewan, British Columbia, New Brunswick and Newfoundland, which have abandoned the concept of a wife's separate property, and provide in their respective Married Women's Acts that a married woman is capable of acquiring, holding and disposing of any property in all respects as if she were unmarried. As early as 1924 Beck JA could say of Alberta that "... in the state which our legislation has reached there is now no such thing in this jurisdiction as the separate estate of a married woman in the traditional and historical sense of that expression ...", Quinn v. Beales, [1924] 3 W.W.R. 337 at 344; [1924] 4 D.L.R. 635 at 641. See M.C. Cullity, supra, note 55 at 183, n.10
63 As to dower, see the Dower Act, R.S.O. 1970, c.114. It was first thought that s.1 of the Married Women's Property Act, 1872 (supra) had abolished the husband's tenancy by the curtesy, but it was held in Furness v. Mitchell (1879), 3 O.A.R. 510 that, while curtesy initiate was abolished by the Act, curtesy consummate was not. An 1877 amendment to the 1872 Act expressly preserved curtesy, but only as an interest that a husband might have in his wife's land after her death intestate: R.S.O. 1877, c.125, s.4. See the Baxter Report (Family Law Project of the Ontario Law Reform Commission), Vol. I at 157-59.
It is still possible to have restraints on anticipation,\textsuperscript{64} but they, too, are of little importance in modern practice.

\textit{The Devolution of Estates Act}\textsuperscript{65} and \textit{The Dependants' Relief Act}\textsuperscript{66} were modelled on the corresponding English statutes, but here, too, some subsequent English amendments have not been incorporated in the laws of Ontario.

Pre-war development in the other common law provinces has proceeded along similar, though not identical, lines,\textsuperscript{67} but in Alberta, Manitoba, Saskatchewan and British Columbia dower and curtesy have been replaced by homestead legislation on the American model.\textsuperscript{68}

\section*{IV THE POST WORLD WAR II ERA}

The passion for law reform, which has gripped the Western World since the end of the Second World War, has left no branch of the law untouched. Yet in no area, with the possible exceptions of civil rights and consumer protection, have demands for radical reform been more insistent or met with such ready response, as in the law of husband and wife. It soon became clear that in order to be acceptable to enlightened public opinion, a matrimonial property system must meet two requirements: it must not reduce the wife to a status in any way inferior to her husband's, but leave her with the independence which she enjoyed before marriage;\textsuperscript{69} and it must establish, in some way or other, an economic partnership between the spouses, with the aim, primarily, of giving non-working wives a share in the acquests of their husbands. \textit{A capitulare} of Duke Adelchis of Lombardy of the ninth century A.D., in providing that widows were to receive a share in the estates of their husbands, stated that it was "iniquitous and reprehensible" for husbands to keep everything for themselves, without making adequate provision for their wives.\textsuperscript{70} If this was true more than a thousand years ago, it is equally true today. Despite the great increase in the number of working wives, the position still is that most married women, having to devote themselves to husbands, children and households, do not take on paid outside work, while those who do earn, as a rule, substantially less than their husbands and have, in con-

\textsuperscript{64} \textit{The Married Women's Property Act}, 1884, ss.4, 6, 10.
\textsuperscript{65} Now R.S.O. 1970, c.129.
\textsuperscript{66} Now R.S.O. 1970, c.126.
\textsuperscript{67} See \textit{supra}, note 61.
\textsuperscript{68} See for Alberta, the Dower Act, R.S.A. 1970, c.114; for Manitoba, the Dower Act, R.S.M. 1970, D-100; for Saskatchewan, the Homestead Act, R.S.S. 1965, c.118; for British Columbia, the Homestead Act, R.S. 1960, c.175.
\textsuperscript{69} Unless marriage can be shown to blunt the intelligence or shake the emotional stability of women, it is hardly arguable that a married woman, but not her unmarried sister, must be protected from the "weakness of her sex" (cf. text, \textit{supra}, at p.8). See G. Baeteman in \textit{Kiralfy} at 1. For a recent comparative study on the status of women generally, see Ruth Ginsburg, ed., \textit{A Symposium on the Status of Women} (1972), 20 Am. J. of Comp. Law 585, dealing with the position in Great Britain, Sweden, Norway, France, the Soviet Union, Israel and Senegal.
sequence, no opportunities equal to those of their husbands to build up an estate.

As the President of the Probate, Divorce and Admiralty Division, succinctly put it on an extra-judicial occasion:

The cock can feather the nest because he does not have to spend most of his time sitting on it.\textsuperscript{71}

Yet, "the wife's contribution to the joint undertaking in running the home and looking after the children is just as valuable as that of the husband in providing the home and supporting the family."\textsuperscript{72}

Equality (with its concomitant of mutual independence) and some form of profit-sharing are the two essential requirements a matrimonial property system must satisfy if it is to be in conformity with the ethos of our time. Continental pre-war regimes generally fell short of the first, English law of the second one. The problem was how to establish an economic partnership between husband and wife without depriving the wife of full powers of disposition over her own assets.

The response to the challenges of the post-World War II era in the matrimonial property law area came in Germany with the Gesetz iiber die Gleichberechtigung von Mann und Frau of June 18, 1957, and in France with Loi No. 65-570 of July 13, 1965 (portant roforme des rdgimes matrimoniaux). In England, numerous important piecemeal reforms have taken place, but a root-and-branch branch reform is still in the making. The 1971 Working Report of the Law Commission\textsuperscript{73} has laid the basis for it.

In Germany, the principle of the equality of the sexes was inscribed as fundamental law in 1949.\textsuperscript{74} The Gesetz iiber die Gleichberechtigung von Mann und Frau of June 18, 1957, which came into force on June 30, 1958, applied the principle of equality to husband and wife, and established Zugewinngemeinschaft as the statutory regime, which takes place if the spouses do not provide otherwise by antenuptial or postnuptial contract.\textsuperscript{75}

Zugewinngemeinschaft is a deferred community or participation system, on the model of the Swedish legislation of 1920.\textsuperscript{76} In the German version the spouses are, during the subsistence of the marriage, in the same position as

\begin{itemize}
  \item \textsuperscript{71} Quoted from Lord Hodson's statement in Pettit's case, [1970] A.C. at 811.
  \item \textsuperscript{72} Quoted from the Royal Commission Report on Marriage and Divorce, Cmd. 9678, para. 644 at 175. See also M. C. Cullity, supra, note 55 at 271.
  \item \textsuperscript{73} No. 42 (1971), discussed by Professor O. Kahn-Freund in (1972), 35 M.L.R. 403. See further, text, infra at p.35.
  \item \textsuperscript{74} On German law, see E.D. Graue in Kiralfy at 114.
  \item \textsuperscript{75} BGB §1363.
  \item \textsuperscript{76} The Swedish system was taken over during the 1920ies by the other Scandinavian countries. The idea of sharing on dissolution of the marriage is not a novel one. Something similar has existed for some time in Swiss and Hungarian law. In Austrian law a "community on death" could be established by way of marriage settlement. See, especially, Karl H. Neumayer, Die Kombination von Vermögensstrennung und Vermögenstilhabe im ehelichen Güterrecht (1953), 18 Rabel Zeitschrift 376; also E. D. Graue, supra, note 30 at 164-66.
\end{itemize}
if they were separate as to property, but neither spouse may, without the other's consent, dispose of his or her whole estate or of household goods.\textsuperscript{77}

On dissolution of the marriage (and in exceptional cases even during marriage), the profits of the marriage are divided. The gains made by each spouse... are calculated by subtracting his initial estate from his final estate. Inheritances and gifts received during the marriage are added to the initial estate. The gains (if any) made by the spouses are then added up and equalized by a compensatory payment. It is, in essence, a system of community of profits, deferred until the dissolution of the marriage.

The spouse, who has made the greater gains, can refuse to make the compensatory payment if it would, in the circumstances, be grossly inequitable to ask him to do so, e.g. where the other spouse has persistently failed to carry out the economic obligations flowing from the conjugal relationship.\textsuperscript{78}

A feature peculiar to the German participation system is that in the event of the dissolution of the marriage by death (still, despite the increase in the divorce rate, by far the most frequent end to marriages) the surviving spouse receives, in lieu of a compensatory payment, a quarter of the estate of the first-dying, in addition to whatever he or she is entitled to as intestate share or legitimate portion. Thus, where the first-dying spouse has died intestate and there are children of the marriage, the widow or widower will receive one-half of the estate — one-quarter in lieu of his or her share in the Zugewinngemeinschaft and one-quarter as intestate portion. If there are no children, but there are parents, or brothers or sisters, the surviving spouse will receive three-quarters of the estate of the first-dying — one-quarter in lieu of his share in the Gemeinschaft and one-half as intestate portion.\textsuperscript{79}

This rule was adopted in order to avoid the need for detailed accounting on death which, it was felt, might lead to family quarrels and create a lasting rift between the surviving spouse and his or her children.

In France, Loi No. 65-570 of July 13, 1965, which came into force on February 1, 1966, established the principle of the legal equality of the spouses.\textsuperscript{80} The wife has full legal capacity,\textsuperscript{81} and can engage in any trade or profession without requiring her husband's consent,\textsuperscript{82} but neither spouse may, without the other's consent, dispose of the family home or household furniture.\textsuperscript{83}

\textsuperscript{77} BGB §§1365, 1369. See also §1367.
\textsuperscript{78} BGB §1381.
\textsuperscript{79} BGB §1371.
\textsuperscript{80} On modern French matrimonial property law, see Professor A. Colomer in Kiralfy at 80 ff. See further the report of the proceedings of the Société de Législation comparée, held in Paris on 17 and 18 March, 1972, on La réforme des régimes matrimoniaux in France and Switzerland in (1972), 24 Revue Internationale de Droit Comparé 449.
\textsuperscript{81} CN art. 216.
\textsuperscript{82} CN art. 222.
\textsuperscript{83} CN art. 215.
The legal regime is a community of after-acquired property. Each spouse retains the ownership and administration of the assets brought into the marriage. Acquests, other than gifts and inheritances, are pooled in a common estate, which unless the spouses agree to administer it jointly, is administered by the husband. He cannot, however, without his wife's consent, alienate or burden inmovables or a business forming part of the common estate, or grant a lease of immovable property for commercial or industrial use; nor can he, without his wife's consent, dispose of community assets inter vivos by gratuitous title. He can, however, sell shares and other securities.

The wife manages her separate property, including her own earnings, wages and savings. She can no longer renounce the community but can, in a proper case, sue for separation of goods. Alternatively, she can apply to court for an order substituting herself in place of her husband as head of the community. Unlike the rules of the old law, she can sue her husband for damages for fraudulent acts even during the marriage.

A deferred community or participation system — régime de participation aux acquêts — is offered to spouses as one of the conventional alternatives to the legal regime. The general principles are the same in the German Zugewinngemeinschaft, but there are numerous differences in detail. Most important, the German scheme of substituting in the case of the dissolution of the marriage by death one-quarter of the deceased's estate for the surviving spouse's share in the community has not been adopted. In the result, equalization of gains takes place irrespective of whether the marriage is dissolved by divorce or by death.

The rights of succession ab intestato of the surviving spouse were clarified and extended by Loi of 26 March 1957.

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84 CN art. 1401.
85 CN arts. 1403, 1428.
86 CN art. 1421.
87 CN art. 1424.
88 CN art. 1422. O. Kahn-Freund in his article on Recent Legislation on Matrimonial Property (1970), 33 M.L.R. 601 at 631, suggests that the new French community is no community in the traditional sense at all, but a system of separation. He says "It [matrimonial community of property] was also rejected in France (in fact if not in name) when in 1965 the new wine of separation was poured into bottles bearing the old label 'communauté, a cherished appellation contrôlée which Frenchmen did not want to miss. In the classical country of matrimonial 'community' a true community of goods can now exist only by virtue of a contractual arrangement."
89 CN arts. 224, 1425.
90 CN art. 1443.
91 CN art. 1426.
92 CN arts. 1569 et seq.
93 CN art. 767, as amended.
In Quebec, the laws relating to the capacity of married women and matrimonial property were reformed in 1964, and again in 1970. The 1964 reform established as a general principle that the legal capacity of married women is not diminished by marriage. Under the title of “Partnership of Acquests” — société d’acquêts — a deferred community of participation system was established in 1970. The prohibition of donations between spouses, formerly contained in arts. 770 and 1265 of the Quebec Civil Code, was abolished, and so was the legal usufruct of the surviving consort in community property, formerly contained in arts. 1323-1332.

The legal regime may be varied by marriage contract, entered into before the marriage or, subject to certain safeguards, during the marriage.

In England the last vestiges of the medieval order were swept away after the war. The Married Women’s (Restraint upon Anticipation) Act 1949, c. 78, abolished what little was left of restraints on anticipation. The Law Reform (Husband and Wife) Act 1962, c. 48, abrogated the rule that spouses cannot sue each other in tort, subject to the proviso that the court may stay such action if it appears that no substantial benefit would accrue to either party from the continuation of the proceedings or that the question in issue could be more conveniently dealt with under section 17 of the Married Women’s Property Act 1882. The wife’s age-old agency of necessity was abolished by section 41 of the Matrimonial Proceedings and Property Act 1970, c. 45.

Thus, it is true to say that in English law, husband and wife are no longer one, but emphatically two, separate as to property and economically independent, except of course for duties of support. They retain the ownership and control of their separate estates as if they were single, and can freely contract with and sue each other. There remains some measure of discrimination in favour of the wife. If property or money of hers is put by her into her husband’s name, there is a rebuttable presumption that he was to hold such property or money in trust for her, but if property or money to which the husband is entitled is put by him into her name or into the joint names of both spouses, a rebuttable presumption of advancement in favour of the

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04 See J.E.C. Brierley, supra, note 27 at 814.
05 J.E.C. Brierley, id., at 815.
06 CC arts. 1266c-1267d.
07 CC art. 1262.
08 CC art. 1265.
wife applies.\textsuperscript{100} Both presumptions have been considerably weakened by recent judicial pronouncements in the House of Lords.\textsuperscript{101}

While the married woman's emancipation has run its full course, progress towards participation has been piecemeal and hesitant. (This, of course, is in the best common law tradition.) Realizing that, in modern conditions, the needs of the surviving spouse are usually greater than those of the children of the marriage, who are in the normal course of events self-supporting by the time the marriage of their parents is terminated by the death of one of them, the legislature has substantially improved the rights of the surviving spouse on the death intestate of the first-dying spouse. Under section 46 of the Administration of Estates Act 1925, c. 23, as amended by the Intestates Estates Act 1952, c. 64, and the Family Provision Act 1966, c. 35, the surviving spouse, in competition with children, takes the first £8,500 of the estate of the deceased as a prelegacy. In competition with other heirs, the amount to which he or she is entitled as a prelegacy is £30,000. In addition, the widow or widower takes all "personal chattels", including clothing, jewellery, furniture, household goods, television sets and private cars. Nor do the survivor's rights end here. If there is a residue and the deceased has left issue, the widow or widower is entitled to a life interest in half the residue. If there are no children, but there are parents, brothers or sisters of the deceased, the surviving spouse takes half its capital value. Failing any of the aforementioned relatives, the whole residue goes to the surviving spouse. A widower or widow who has to share the inheritance with other heirs, may demand that the matrimonial home be appropriated to his or her share.

There is still no legitimate portion or other fixed right of inheritance of which the surviving spouse cannot be deprived, nor is there a participation system of any kind, but the discretionary powers of the courts to award maintenance under the Inheritance (Family Provision) Act 1938, c. 35, have been greatly enlarged. Three major changes were made.\textsuperscript{102} First, whereas under the original Act, the powers of the court were limited to cases where the deceased had left a will, they were extended to cases of intestacy. Secondly,
the former restrictions on awards of maintenance by means of a lump sum, as distinguished from periodic payments, were relaxed. And, thirdly, the survivor of a void marriage, who had entered into the marriage in good faith, was included among the "dependants" to whom maintenance may be awarded, and so was a former spouse, including one whose marriage to the deceased was annulled.

At common law savings made by the wife from her household allowance belonged to the husband unless there was clear evidence that he had donated them to her.\textsuperscript{103} The Married Women's Property Act 1964, c. 19, prescribes that in the absence of an agreement to the contrary, each spouse is entitled to an equal share of savings from a household or similar allowance, and property acquired with such money.

As regards the matrimonial home, the common law rules, as settled in \textit{National Provincial Bank v. Ainsworth},\textsuperscript{104} were superseded by the Matrimonial Homes Act 1967, c. 75, as amended by section 38 of the Matrimonial Proceedings and Property Act 1970, c. 45. This Act applies where either the husband or the wife is entitled to occupy a dwelling house by virtue of any estate, interest, contract or enactment, and the other spouse is not so entitled, and creates in favour of the second spouse a statutory right of occupation which, by registration of a charge, can be rendered effective against any person deriving title from the first spouse. It does not, though, avail against the trustee in bankruptcy of the first spouse.

Sections 1 and 2 of the Matrimonial Proceedings and Property Act 1970, c. 45, conferred on the courts discretionary powers, on a petition for divorce, nullity of marriage or judicial separation, to order either spouse to make provision for the maintenance of the other by periodic payments or payment of a lump sum, both pending suit and after the decree has been made. Section 4 of the same Act empowers the court to order that a spouse shall transfer to the other spouse or to a child of the marriage property to which the first-mentioned spouse is entitled, to order a settlement for the benefit of the other spouse, or to vary or extinguish an antenuptial or postnuptial settlement. Section 37 lays down that a spouse who has contributed to the acquisition or improvement of property acquired by the other spouse is entitled to such share in the beneficial interest in that property as the court may determine.

While the legislature has thus gone some way towards bridging the chasm of separateness, the courts in their turn have found the rules governing trusts and joint ventures useful tools to do justice between husband and wife. In cases where both spouses were found to have contributed to the purchase of a matrimonial home or a farm which was conveyed into the

\textsuperscript{103} On the unsatisfactory results of this rule, see \textit{Hodginott v. Hodginott}, [1949] 2 K.B. 406 (C.A.) (Bucknill LJ and Cohen LJ, Denning LJ diss.).

\textsuperscript{104} [1955] A.C. 1175 (H.L.).
name of one spouse alone, they have readily inferred a resulting trust in favour of the other spouse. Thus, where it was found that the wife had made, directly or indirectly, substantial financial contributions to the purchase of a house, which was conveyed into the husband’s name, they have held that, in the absence of a specific agreement to the contrary, the wife was entitled to a beneficial interest in the house or its proceeds, proportionate to her contributions. Where a business had been built up over years by the joint efforts of both spouses, they have held that the wife was entitled to a share in the profits of the business and any property acquired with those profits. On occasions, when it was clear that the wife had made a significant financial contribution, but it was not possible to determine exactly how much, the courts, relying on the old maxim that “equity leans towards equality”, have cut the Gordian Knot by holding that the division should be half and half.

There are limits to what the courts can do. If there was a trend to establish ownership of the family home and family assets by judicial law-making, it was stopped by the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing. And it must now be taken for settled that a trust will not be inferred where the wife’s or husband’s financial contribution has been minimal.

The present position in England, then, is that the spouses are separate as to property during the marriage, but that, on dissolution of the marriage by divorce, the courts have far reaching discretionary powers to order the payment of maintenance and a redistribution of property. Their powers on

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109 [1970] 2 A.E.R. 780, [1970] 3 W.L.R. 255 (H.L.). This point was strongly made by J. C. Hall in (1970), 28 C.L.J. 210, where he states that Pettitt and Gissing “mark the ending of judicial attempts to introduce almost universal community of family assets”.

dissolution of the marriage by death of one of the spouses are not equally far-reaching. They may award maintenance out of the estate of the pre-deceased spouse but have no powers to order a division of property.

The Canadian common law provinces have, by and large, continued to follow in the footsteps of English law, though they have occasionally fallen behind or moved ahead or away from it. They have faithfully continued to resort to the presumptions of resulting trust and advancement.¹¹¹ In appropriate circumstances, they have decided that the wife was entitled to a beneficial interest in the matrimonial home or her husband's business or farm, but, following recent English judgments, they have held that in the absence of a substantial financial contribution by the wife or an agreement that she should acquire a joint interest in property acquired by the husband, the mere facts of marriage and cohabitation did not entitle her to a proprietary share either in the matrimonial home or household personalty.¹¹²

Under sections 10 and 11 of the Divorce Act, RSC 1970, c. D-8, the courts, on granting a divorce order, can make an order for the payment of maintenance in favour of one of the spouses, but they have, unlike the English courts, no power to order a sale or transfer of property.¹¹³ By ordering payment of maintenance in the form of a substantial lump sum payment, in lieu of, or in addition to, periodic payments they have, however, occasionally, achieved a redistribution of property.¹¹⁴


¹¹² Klutz v. Klutz (1969), 2 D.L.R. (3d) 332 (Sask.); Hunnings v. Hunnings (1972) 7 R.L.F. 85 (B.C.). But see also Trueman v. Trueman, [1971] 2 W.W.R. 688 ( Alta. A.D.), where the wife was held to be the beneficial owner of a half-share in a farm, in view of her indirect contribution by working on the construction of the farm house and on the cultivation and harvesting of the crops.


The English Law Commission in its Working Report (No. 42 of 1971) recommends that the power to make maintenance orders under the family provision legislation should only be used for the purpose of providing support for a surviving spouse who is in need, and not for the purpose of giving a spouse, who is not in need, a share in “family assets” or property of the first-dying spouse. See text, infra, at pp.35, 36.

Under Quebec CC art. 208 the courts, on separation or divorce, may declare gifts promised or executed under a marriage contract to be wholly or partially forfeited.

In British Columbia ss.8 and 9 of the Family Relations Act 1972 (B.C., c.20), evidently inspired by s.4 of the English Matrimonial Proceedings and Property Act 1970, c.45, empower the courts making an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, to order a redistribution of property or vary an antenuptial or postnuptial settlement.
In contrast to the English courts, the powers of the Canadian courts to make a maintenance order under the Divorce Act can only be exercised "upon granting a decree nisi of divorce," and not thereafter.\footnote{The Divorce Act, s.11(1).}

In Ontario, perhaps the most conservative as well as the most prosperous of the provinces, development in the matrimonial property area has been slow. There is no legislation as yet dealing with rights in the matrimonial home, with the result that issues, that were settled in England in National Provincial Bank v. Ainsworth,\footnote{Lee v. Lee (1972), 7 R.F.L. 140 (B.C.). This was also the original position in England, but was subsequently changed. See s.16(1) of the Matrimonial Causes Act 1965, c.72: "On granting a divorce or at any time thereafter . . .".} continue to cause difficulties.\footnote{[1965] A.C. 1175, now superseded by the Matrimonial Homes Act, 1967, c.75, see text, supra, at p.30.} Dower, curtesy and restraints on anticipation, though little more than weak images of their former selves, are still part of the law,\footnote{See e.g., Carnochan v. Carnochan, [1953] O.R. 887, [1954] 1 D.L.R. 87, aff'd [1954] O.W.N. 543, [1954] 4 O.L.R. 448, [1955] S.C.R. 669, [1955] 4 D.L.R. 81; Korolev v. Korolev (1972), 7 R.F.L. 162 (B.C.). For a full discussion, see H.W. Silverman, The Deserted Wife's Dilemma (1970) 18 Chitty's Law Journal, 3 R.F.L. 235; M.C. Cullity, supra, note 55 at 207-250.} and so is the bar on tort actions between husband and wife, except those necessary for the protection of the wife's separate property.\footnote{See text, supra, at p.20.}

The Ontario Dependants' Relief Act\footnote{See text, supra, at p.20.} still fails to recognize a former spouse of the deceased as a dependant to whom maintenance may be awarded, and still does not allow for awards where the deceased departed this life intestate.

The Family Relations Act 1972 of British Columbia\footnote{S.B.C. 1972, c.20.} may serve as an example of more up-to-date provincial legislation. Under section 8 the court, on making an order of divorce or annulment, may order a division of property, and under section 15 a former spouse of the deceased may be awarded maintenance out of his or her estate, provided the marriage was dissolved not more than two years before application was made.

V Vistas of the Future

German and French matrimonial property law, having been thoroughly reformed in 1957 and 1965 respectively, are unlikely to undergo further major changes in the foreseeable future. Whether the introduction of a deferred community system, in Germany as the legal,\footnote{See text, supra, at p.21.} in France as an optional regime,\footnote{S.B.C. 1972, c.20.} has been a success is still an open question to which only
time can give the answer. The same holds true of the Quebec partnership of acquests.

In England it is generally recognized by now, that, in the words of Professor O. Kahn-Freund, "the problem of sharing between the spouses and of the protection of the non-earning housewife (which is part of it), can no longer be solved through the law of maintenance", but that a systematic reform of matrimonial property law is required. The Law Commission, in its deservedly well-received Working Report, considers the merits of several possible solutions, singly or combined, and suggests, inter alia: the adoption of a deferred community or participation system, on recent Continental models; joint ownership of the matrimonial home; and joint use and enjoyment of household goods. Though it does not feel strongly in the matter, it is not opposed to the idea of a legal right of inheritance of some kind or other. It advocates a further extension of the discretionary powers of the court under the family provision legislation, but stresses that these powers should be exercised only for the purpose of making reasonable provision for the maintenance of the spouse or a former spouse of the deceased, and not for the purpose of giving a surviving spouse, who has no need for maintenance, a share in the "family assets". Finally, it proposes that the courts should have the same powers to order a division of the property of the spouses or a settlement which it at present has on divorce, on dissolution of the marriage by death, or indeed at any time during the marriage.

Legitimate portion and family provision are not mutually exclusive. Both have their advantages and disadvantages. The great advantage of a legitimate portion is that the amount due to the surviving spouse can be ascertained by a simple calculation, and that there is no need for him or her to go, hat-in-hand, to court and ask for relief. As Edmond A. Bodkin remarks:

The decisions of the courts, both in this country and in the Dominions, show that the consideration of the moral obligations attaching to the circumstances of

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125 Professor O. Kahn-Freund in (1970), 33 M.L.R. at 604, 605 remarks that "the problem of matrimonial property has never been tackled systematically [in England], the way it was tackled — with debatable success — in Germany in 1957 . . . and in France in 1965". [My italics]. It would seem that in Germany, where it was almost unknown for spouses to contract out of the legal regime of the BGB prior to 1957 (see text supra, at note 37) many couples chose to contract out of Zugewinngemeinschaft. As regards France, at a meeting of the Société de Legislation Comparé held in Paris on 17 and 18 March, 1972, the question was put whether the regime of participation aux acquêts as a conventional system had encountered any difficulties in practice. Professor Patarin, in reply, said that no full statistics were as yet available, and added: "Le régime est parfois adopté par les futurs époux, mais il semble que le notariat français se montre méfiant à son égard", (1972), 24 Rev. Intern. de Droit Comparé at 453.


127 No. 42 of 1971, discussed by Professor O. Kahn-Freund in (1972), 35 M.L.R. 403, and by Mr. M. D.A. Freeman in (1972), 25 Current Legal Problems 84. Mr. Freeman is convinced that English law is "moving inevitably towards community of property". "Community spells justice, security and equality, all goals for which contemporary society strives." But see note 129a, below.

128 Testator's Family Maintenance (1941), 27 Journ. of Comp. Legislation and International Law, 3rd series, Part III, 155 at 162.
the testator imposes a heavy burden on the judicature. The only alternative seems to be for the legislators to take responsibility for giving the right to the spouse and children to a definite proportion of the estate.

Giving the courts discretionary powers to order a division of property on death, is subject to the same criticisms.

But the very fixity of the legitimate portion, which is its major advantage, is also its most serious disadvantage. It gives the same portion to the poor and the rich widow (or widower), to a widow who has lived happily with her late husband for a quarter of a century and the widow who was married to him for a few months only or who had lived apart from him for years. A fixed right of inheritance was the right solution as long as marriages were reasonably stable. It does not go well with the divorce-prone unions of our day.

Nor is a deferred community or participation system the answer to all problems. Apart from the fact that it puts a premium on accurate bookkeeping between spouses, not exactly a practice to be encouraged, it does not even ensure that the surviving spouse will always receive a fair share in the estate of the predeceased spouse, no matter how rich the latter, and how poor the former may be. Assuming the woman is the survivor, participation in acquests guarantees her participation in her husband's estate, where he has become wealthy during the marriage by his own efforts. But where his wealth was acquired before the marriage or inherited during the marriage, there are no "acquests" in which she could share. Finally, and most important, the best participation regime is not worth much, if most couples contract out of it. In this respect, the German and French experience so far has not been exactly encouraging, though it is perhaps too early to form a judgment.\footnote{See supra, note 125.}

There is of course no reason why, in order to cover the ground fully, a deferred community system should not be combined with a legal right of inheritance, as well as with co-ownership of the matrimonial home, and why, in addition, the courts should not have wide discretionary powers to award maintenance and order a division of property either during the marriage or on its dissolution by death or divorce, and it would appear that the Commission would not be adverse to such a combination. One cannot help wondering, however, whether this would not amount to piling Ossa on Pelion, to going from the former extreme of complete separation to the other extreme of creating a surfeit of fixed and discretionary remedies which, at best, would make the law complicated and, at worst, get into each other's way. Discretionary maintenance and property redistribution, with or without a deferred community system, but without a legal right of inheritance or joint ownership of the matrimonial home, would appear adequate to ensure equitable solutions in all circumstances.

Whatever system Parliament at Westminster may finally decide to adopt, it is now clear that, sooner or later, England will have a code of matrimonial
property law, bearing witness to the fact that it is not only in its accession to the European Economic Community that Great Britain is moving closer to the Continent. That such a code will have a profound impact on lawmakers in Canada cannot be doubted, but it by no means follows that its solutions will be adopted in the Canadian common law provinces. The days when Canada, Australia and other parts of the now defunct British Empire slavishly followed the lead of Westminster are long past. Some years ago Ontario was briefly flirting with the idea of a deferred community system, but so far has not displayed much enthusiasm for it. It is not sure that there would be a change in this respect even if such a regime were adopted in England. The concept of a community regime, universal or partial, instant or deferred, is alien to the common-law tradition.129a

Reforms which will, no doubt, be effected in the fullness of time include the abolition in those provinces where they still exist of fossils such as dower, curtesy and restraints on anticipation, and of restrictions on the capacity of spouses to sue each other in tort.

A major obstacle to the creation of a cohesive matrimonial property system in Canada or any of her provinces, which is not encountered in unitary England, is that "marriage and divorce" fall under federal jurisdiction,130 while "property and civil rights" fall under the jurisdiction of the provinces.131

129a In the light of developments subsequent to the time when this was written, it now appears unlikely that a deferred or indeed any community regime will be adopted in England.
130 B.N.A. Act s.91(26).
131 B.N.A. Act s.92(13).