

A WIFE'S RIGHT TO OCCUPY THE MATRIMONIAL HOME — A COMPARATIVE STUDY

ISSUE IN THE FEDERATION

The question whether a deserted wife in occupation of the former matrimonial home owned by the husband has any rights therein against his successor in title has not yet been the pertinent issue in any reported case in the Federation of Malaysia.¹ If a case should arise which depends for its determination on whether or not such rights exist there is no lack of judicial pronouncement² or extra judicial speculation³ which the Court can call in aid. A deserted wife's right may be a right which, if recognised, would be entirely novel, or it may be but a new species of an established right. It may be that social circumstances differ from one jurisdiction to another, it may be that legislation in one jurisdiction will prevent the declaration of the right therein.⁴ In considering the question in a jurisdiction for the first time, the decisions of other jurisdictions and the reasons behind them are all worth some examination. In the one case in a Federation court where the rights of a deserted wife in this regard have been urged,⁵ *Chin Shak Len v. Lin Fah*⁶ a summons

1. This article is concerned with the general proposition of whether a wife ought to have any such rights, and particular statutory provisions of the Land Code of the former Federated Malay States (Laws of F.M.S. (1935) Cap. 138) and the Land Titles Ordinance of Singapore (No. 21 of 1956). Reference is also made to the Land Enactment of Johore (No. 1 1935 Revd. Laws of Johore).
2. See the cases cited in this article. Although the issue of a wife's rights in the matrimonial home has been confined to cases where the wife has been deserted it is submitted that the existence of such rights are not so confined. See *infra* pp.226-229.
3. See *e.g.*, Mitchell, "Learners Licence" (1954) 17 M.L.R. 211 and articles listed *ibid.* at p.211 note 1. *Cf.* Sheridan, "Licences to Live in Houses" (1953) 17 Conv. (N.S.) 440; Megarry, "Mere Equities the Bona Fide Purchaser and the Deserted Wife" (1955) 71 L.Q.R. 480; Crane, "The Deserted Wife's Licence" (1955) 19 Conv. (N.S.) 343; Jeffrey, "Protecting the Weaker Vessel" (1955) 29 A.L.J. 6; Jeffrey, "The Last Word on Deserted Wives?" (1958) 32 A.L.J. 105; Alan Milner, "Matrimonial Property: An English Comment" (1959) 32 A.L.J. 348; Delany, "Equitable Interests and 'Mere Equities'" (1957) 21 Conv. (N.S.) 195; for a suggestion as to legislation providing for security of tenure of the family home for its occupants on the line of "Homestead" laws of the U.S.A. and Canada see Alan Milner, "A Homestead Act for England" (1959) 22 M.L.R. 458.
4. *E.g.* a particular system of registration of title to land. As to this see *infra* p. 232 *et seq.*
5. In *Re Karuppiah* (1962) 28 M.L.J. 389, in which a landlord sought possession of premises leased to a bankrupt, counsel apparently argued that a wife (deserted or not) had an equitable interest in the matrimonial home (see *ibid.* at p.391). (See for comment *infra* note 61 at p.221; note 6 at p.226).
6. (1962) 28 M.L.J. 418.

was brought under s. 11 of the Married Women's Ordinance 1957⁷ by a wife (the applicant) against her husband (the respondent) for the determination of the title to, or possession of, an undivided interest in land in the town of Kajang. The land was purchased in March 1951 and of the purchase money \$1,200 was provided by the wife and \$400 by the husband. The husband obtained registration of title in his own name. The wife contended that the money was provided for the purchase of land in her own name but the husband alleged that the money was a loan which he had since repaid. In any event the husband had sold part of the interest in the land. Gill J. preferred the wife's evidence and held that there was a resulting trust in favour of the wife as to so much of the money she had provided. As the husband had disposed of more than the share of the interest due to him, the learned judge declared that the remaining undivided interest in the land of which he was the registered proprietor belonged to the wife by reason of the resulting trust. The husband had left the wife in 1955, and the wife also argued that, as a deserted wife, she had an equitable interest in the matrimonial home which had been built on the land. The learned judge, in dealing with this aspect of the case, cited⁸ a passage from the judgment of the Supreme Court of New South Wales in the case of *Dickson v. McWhinnie*:⁹

"...Notwithstanding the many expressions of opinion by Lord Denning, we think, with all respect, that a deserted wife has no interest, legal or equitable, in the matrimonial home, and no equity, as we understand the word, enforceable against a purchaser of the land whether with or without notice of her occupancy and that she is a deserted wife..."¹⁰

He held that "in view of the provision of section 42 of the Land Code"¹¹ this passage "set out the correct position as to the state of the law in Selangor on this point".¹² He added: "Needless to say the applicant's claim would fail if it were to be decided on this point alone."¹³ The judgment contains no examination of the many English and New Zealand decisions on the point, and no comment on the view of the New South Wales Court of those decisions. The learned judge appears to have accepted the decision in *Dickson v. McWhinnie*¹⁴ uncritically, because of the Land Code which he thought governed the matter. There is no indication in his judgment that the case on which he relied was actually not decided primarily on the ground of the complementary legislation of New South Wales, nor is there any attempt made to compare the legislation of New South Wales with the provisions of the Land Code. It is submitted, with all due respect, that if the point at issue in the case had been that at issue in the New South Wales case, it would call for as detailed an examination — from the Malayan view — as it received —

7. No. 36 of 1957.

8. (1962) 28 M.L.J. 418 at p. 429.

9. (1958) 75 W.N. (N.S.W.) 204.

10. *Ibid.* at p. 215.

11. Laws of F.M.S. (1935) Cap. 138.

12. (1962) 28 M.L.J. 418 at p. 420.

13. *Ibid.* at pp. 420-421.

14. (1958) 75 W.N. (N.S.W.) 204.

from the New South Wales viewpoint — in the earlier case. In this sense it is perhaps not unfortunate that Gill J.'s remarks as to the existence of the rights of a deserted wife were not only not directed to the main point of the case before him, but were not directed to any issue which came before him.

The decision in *Dickson's* case concerned the question whether a deserted wife could assert any rights in the matrimonial home against her husband's successors in title. The case before the learned judge involved the question whether a deserted wife as such had any rights against her husband in relation to the matrimonial home. *Dickson v. McWhinnie* therefore was relied upon to deny the very rights which it clearly admitted,¹⁵ and on the existence of which, the issue in that case depended.

The effect of the decision in *Chin Shak Len v. Lin Fah*¹⁶ is to invert what is submitted¹⁷ to be the correct proposition, that any rights of a wife in relation to the matrimonial home owned by her husband against her husband's successors in title depend for their existence on rights being exercisable against her husband. It involves the somewhat surprising notion that the rights against her husband are dependent on rights against his successors in title. It was open to the learned judge to decide against the wife, but only in the exercise of his jurisdiction under s.17 of the Ordinance, a discretion he clearly never considered on this point.¹⁸ Further, the learned judge evidently treated any right a deserted wife might have as an interest in land and therefore within the provisions of the Land Code¹⁹ accepting *Dickson's* case as law in Selangor because of s.42 of that Code.

An attempt will be made in this article to examine the decisions of other jurisdictions and the relevant legislation of Singapore and the Land Code (FMS) ; to suggest that a deserted wife in occupation of the former matrimonial home owned by her husband should have a right to remain in occupation, at least for a period of time, against his successors in title who acquire the home or an interest therein with notice of her position as a deserted wife;²⁰ and that the preferable view is that the

15. See *ibid.* at p.205.

16. (1962) 28 M.L.J. 418.

17. See *infra* pp.226-229.

18. Having decided that the applicant wife was entitled to the property as *cestui que trust* the learned judge exercised his discretion under the Ordinance on the basis that it overruled all legal and equitable interests, following Lord Denning's view of the discretion as expressed in *Hine v. Hine* [1962] 1 W.L.R. 1124 (see *infra* for discussion of this point). Had the applicant based her claim solely on her position of a deserted wife the learned judge apparently considered he would have had no discretion.

19. Laws of F.M.S. (1935) Cap. 138.

20. No attempt is made herein to discuss the rights of a purchaser of a house in which a deserted wife has rights, as against the vendor. Depending on the knowledge of the wife's right by the vendor, the purchaser may have a right to rescind, to have the contract rectified or set aside on terms, or damages, on the grounds of fraud, innocent misrepresentation or mistake.

deserted wife's right is not an interest in land²¹ and is therefore *prima facie* outside the provisions of any statute concerned with registration of title to land.²²

WIFES RIGHT AGAINST HER HUSBAND

The claim of a wife to possession of the matrimonial home as against her husband, or the claim of a husband to possession of the home against his wife, no matter what be the basis, in the former Federated Malay States would fall within the provisions of s.11 of the Married Women Ordinance, 1957²³ or s. 57 of the Singapore Women's Charter, 1961.²⁴ The relevant terms of the two Ordinances are identical, and are identical with the terms of complementary legislation in England,²⁵ New South Wales²⁶ and New Zealand.²⁷

"In any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in a summary way to any Judge of the High Court and the judge may make such order with respect to the property in dispute. as he think fit."

It has been said that the *only* action which a husband could bring against his wife for possession of land is one under this provision as the action would otherwise have to be in ejectment and a husband could not sue his wife in tort.²⁸ Whether or not this is correct, when matters of title to, or possession of, property are in issue the defendant spouse can always rely on the discretion conferred on the court by this provision. On one view this discretion enables the court, if not to ignore legal and equitable interests, to take them into consideration merely as elements in reaching a just and equitable decision in all the circumstances — or as it has been judicially summarised, in executing "palm tree justice."²⁹

21. See *infra* at pp.218, 223-225.

22. See *infra* at pp.231-232. This is not to say that it should necessarily fall outside such a statute. It would, of course, be preferable if a system of registration provided for its recognition. Cf. as to Singapore at *infra* pp.240-243 and see the remarks of Cross J. in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1936] 2 W.L.R. 1015 at p.1022. Neither is it to say that the rights discussed herein are confined to a "deserted wife". See *supra* note 2a at at p.213 and *infra* p.226-229.

23. No. 36 of 1957.

24. Ordinance No. 18 of 1961.

25. See Married Women Property Act, 1882 (45 & 46 Vict. c.75) as extended by the Matrimonial Causes (Property and Maintenance) Act, 1958 (6 & 7 Eliz. 2 c. 35) s.7.

26. See Married Women Property Act, 1901 s.22. (N.S.W. Statutes 1824-1957 Vol. 7 at pp.290-293).

27. See Married Women Property Act, 1952 s.19 (N.Z. Statutes Reprint 1908-1957 Vol. 9 at pp.403-404).

28. See: *Bramwell v. Bramwell* [1942] 1 K.B. 370 *per* Goddard L.J. at pp.373-374; *Bendall v. McWhirter* [1952] 2 Q.B. 466 *per* Denning L.J. at p.491. This view is questioned by Devlin L.J. in *Short v. Short* [1960] 1 W.L.R. 833 at p.848 (as to which see *infra*). See now Law Reform (Husband and Wife) Act, 1962 (10 & 11 Eliz. 2 c.48).

29. *Per* Bucknill L.J. in *Newgrosh v. Newgrosh* (June 28, 1950) *Unreported*, cited by Lord Evershed M.R. in *Rimmer v. Rimmer* [1953] 1 Q.B. 63 at p.68.

The opposing view is that the discretion is no wider than the court can exercise in any other dispute as to property, and therefore the exercise of the "discretion" presupposes a right which has its source not in the statute, but the matrimonial status.³⁰ A leading proponent of the first approach is Lord Denning, who summed it up in *Hine v. Hine*:³¹

"It seems to me that the jurisdiction of the court over family assets under section 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it, that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case."

The opposing view was expressed by Lord Devlin in a dissenting judgment in *Short v. Short*:³²

"The powers of the Court under s.17 are substantially the same as in any other proceeding where the ownership or possession of property is in question. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases."³³

On either view the wife has a right in relation to disputes as to property or possession.³⁴ If one takes the view that the wife's right has its source in the matrimonial status and not the statute, then the content of the right depends on the nature of the rights inherent in the status.

30. "Husband and wife have always each had their rights in a matrimonial home belonging to the other or to them both jointly. The court does not in its discretion confer their rights nor does it remove them. They arise from the status of marriage. They are not rooted in discretion and so are not terminable at discretion." *per* Devlin L.J. in *Short v. Short* [1960] 1 W.L.R. 833 at p.844.
31. [1962] 1 W.L.R. 1124 at pp.1127-1128. Lord Denning added that two principles have emerged in exercising the discretion. Where a clear intention is evident as to whether a piece of property should belong to husband or wife in any event that should prevail. When there is no such intention and a house is bought by money saved by joint efforts the beneficial interest is presumed to belong to both jointly (*ibid*). Megarry seems to be of the opinion that the wife's right in relation to the matrimonial home has its root in the statute (see Megarry "The Deserted Wife's Right to Occupy the Matrimonial Home" (1952) 68 L.Q.R. 379 at p.380).
32. [1960] 1 W.L.R. 833. The majority of the Court (Hodson and Willmer L.JJ.) held that the remedy provided by s.17 was discretionary, and therefore refused to interfere with a Registrar's adjournment of a summons taken out by the husband thereunder for possession of a flat let to the husband until after divorce proceedings then pending between the parties. Devlin L.J. took the view that any right the wife may have had had been terminated by her adultery.
33. *Ibid.* at p.18. As to disputes relating to title see also *Wirth v. Wirth* (1956) 98 C.L.R. 228 at pp.230-231 (*per* Dixon C.J.), at pp.247-248 (*per* Taylor J.).
34. For illustrations of both views see the judgments of the English Court of Appeal in *Wilson v. Wilson* [1963] 1 W.L.R. 601. New Zealand courts have developed a distinction between matters relating to title and matters relating to possession. "The question of title or ownership cannot be determined otherwise than in accordance with the legal or equitable rights of the parties and the Court has no discretion to interfere with those rights on the grounds of fairness and justice [but] the Court, in dealing with questions of possession or occupation. . . . has a discretion to make an order otherwise than in accordance with the rights of the parties at law or in equity." *per* Cooke J. in *Masters v. Masters* [1954] N.Z.L.R. 82 at pp.83-84. *Cf.* *Barrow v. Barrow* [1946] N.Z.L.R. 438; *Simpson v. Simpson* [1952] N.Z.L.R. 278. The distinction is a good example of judicial legislation.

If one takes the view that its source is the statute, then the content of the right depends on the view of any particular court of all the circumstances of the case, with peculiar emphasis on the wife's position as a wife. The dividing line is tenuous but real, depending on the issues whether a wife must have rights in existence at the time of the dispute, or whether she could succeed in an action despite the fact that she had forfeited all rights except, *ex hypothesi*, the right to ask for the court's discretion. The view that the wife's right is created by the provision conferring discretion on the court, makes the right possibly wider and possibly narrower than the view that a wife must first prove her right, apart from the statute in order to succeed under the statutory provisions. As regards the nature of the right, the second view is not necessarily contradictory of the first, but asserts merely that the right of the wife flowing from her matrimonial status is not increased in content by the statute. On both views the reason for the right is the status, and the right flows from that status. It depends for its nature and exercise on the conduct of the parties, and (on the latter view) the wife may deprive herself of the ability to come to court by her conduct. On the former view she can always ask for the court's discretion. It is submitted that both views when analysed, are consonant with, and indeed represent, the concept of an "equity", a concept which has been adopted in England as defining the deserted wife's right to occupy the matrimonial home owned by her husband against his successors in title.³⁵ It has best been expressed as "a right to appeal to the court for protection against unconscionable conduct on the part of the husband's successors in title".³⁶

It has been suggested that Lord Denning's view of the effect of section 17³⁷ is inconsistent with his view that a wife in certain circumstances may have a right against third parties, in that if the wife's right against her husband has its origin and depends for its effect on s.17, she can have no rights against a third party unaffected by the section.³⁸ This surely does not follow at all. The enactment of such a provision is clearly based on the recognition of the status. It may therefore (in Lord Denning's view) control the rights between husband and wife, but it does not destroy the reason for such control. It may widen the interest of the rights, but it does not mean that the concept of the rights cannot exist outside of the statute. Therefore the *origin* of the concept of the rights may be (and it is submitted is) the same, but as between husband and wife the content is (in Lord Denning's view) expressed in the statute, whereas as between the wife and other persons it remains directly dependent on the status.

35. See, e.g., *Woodcock v. Hobbs* [1955] 1 W.L.R. 152; *Westminster Bank Ltd. v. Lee* [1956] Ch. 7; *Churcher v. Street* [1959] Ch. 251; *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1963] 2 W.L.R. 1015. See generally *infra* pp.223-225, 226-229.

36. *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1963] 2 W.L.R 1015 at p.1021 (per Cross J.).

37. *I.e.* of the Married Women's Property Act, 1882 (45 & 46 Vict. c.75).

38. See *per* Devlin L.J. in *Short v. Short* [1960] 1 W.L.R. 833 at p.847.

It may also be argued that a wife has rights (equities) against third parties *because of* the statutory rights the wife has against her husband. Unless there were rights against her husband's successors in title it could render the rights conferred by statute nugatory.³⁹ The only difference between this line of reasoning and the first is the source of the wife's rights, and it is submitted that whether the source is considered to be the matrimonial status itself or the statute, it forms a sufficient answer to the suggestion of inconsistency.

WIFE'S RIGHT AGAINST HER HUSBAND'S SUCCESSORS IN TITLE

*Dickson v. McWhinnie*⁴⁰ and the English Law

The Supreme Court of New South Wales in *Dickson's* case reviewed⁴¹ the English cases relevant to the question whether a deserted wife had any rights against third parties that had been decided at the date of that case (with the strange but perhaps significant exception of *Westminster Bank Ltd. v. Lee*⁴²), and especially the judgments of Denning L.J. (as he then was). The Court concluded that it was Denning L.J.'s view that even in actions where there was no room for applications under the Bankruptcy Act, 1914⁴³ or the Married Women's Property Act, 1882⁴⁴ (where the Court would have a statutory discretion) a Court trying an action of ejectment where a deserted wife was the defendant would have a discretion similar to that given by those statutes.⁴⁵ The Court rejected the notion that such a discretion as that suggested had ever existed or did exist in New South Wales. It said,⁴⁶

" The utmost that can be said, in our opinion, is that where proceedings by that purchaser to recover possession are taken against the wife in a Court which has a discretion to postpone execution of its order, the facts that the premises sought to be recovered were the matrimonial home and that the wife is a deserted wife are circumstances to be considered in the exercise of whatever discretion there is to postpone the date for giving up possession."

39. See, e.g., Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.483. As to the deserted wife's right to an injunction to restrain her husband from selling the matrimonial home see *Hutchinson v. Hutchinson* (1947) 63 T.L.R. 645; *Lee V. Lee* [1952] 2 Q.B. 489n.
40. (1958) 75 W.N. (N.S.W.) 204. For support of this decision see Tarlo, "Possession of the Matrimonial Home in Australia" (1959) 22 M.L.R. 479; for disapproval on "policy" grounds see Milner, *op. cit.* (1958) 32 A.L.J. 348.
41. (1958) 75 W.N. (N.S.W.) 204 at pp.205-216.
42. [1956] Ch. 7.
43. 4 & 5 Geo. 5 c.59.
44. 45 & 46 Vict. c.75.
45. See *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.484 where Denning L.J., after referring to the Bankruptcy Act, 1914 and the Married Women's Property Act, 1882, said ". . . . even if a successor [to the husband]. . . . has himself to bring an action at law nevertheless I should have thought the court would have a discretion whether to order possession or not"
46. See *Dickson v. McWhinnie* (1958) 75 W.N. (N.S.W.) 204 at pp.215-216.

In relation to an action for possession, the Court said that if a defendant could establish facts which would entitle him to an injunction he would have a good defence in the action, but that there was no discretionary power in the Court to refuse to make an order for possession.⁴⁷

Not only did the Court put forward this view as the law of New South Wales but it sought also to show that the English cases did not establish a contrary view. The court approved of the decision in *Thompson v. Earthy*⁴⁸ in which Roxburgh J. held that a deserted wife had "no estate or interest legal or equitable" in the matrimonial home. Of *Ferris v. Weaven*,⁴⁹ *Savage v. Hubble*,⁵⁰ and *Street v. Denham*⁵¹ (all cases where a relative or friend of the husband purchased the matrimonial home with full knowledge of the deserted wife's occupation thereof) the court said that "unless these decisions can be regarded as being in a special category we are of the opinion with respect that they were wrongly decided".⁵² The Court approved of the remarks of Jenkins L.J. in *Bradley-Hole v. Cusen*⁵³ where the learned Lord Justice said that in his opinion "a husband was under a personal obligation to his wife to permit her to remain in the matrimonial home".

However, the court ignored the decision in *Westminster Bank Ltd. v. Lee*⁵⁴ where Upjohn J. held that a deserted wife had an equity (as distinct from an equitable interest)⁵⁵ in the matrimonial home. Since the decision in *Dickson v. McWhinnie*⁵⁶ Roxburgh J. in deciding the case of *Churcher v. Street*,⁵⁷ in which it was conceded before him that a deserted wife had an equity valid against a purchaser of the matrimonial home with notice, said:

"If, when I decided *Thompson v. Earthy*⁵⁸ I had thought of the possibility of some such transaction as was carried out in this case as between the husband

47. *Ibid.* at p.211.

48. [1951] 2 K.B. 596.

49. [1952] 2 All E.R. 233.

50. [1953] C.P.L. 416, "The Times", June 11th, 1953.

51. [1954] 1 W.L.R. 624.

52. See *Dickson v. McWhinnie* (1958) 75 W.N. (N.S.W.) 204 at p.215.

53. [1953] 1 Q.B. 300.

54. [1956] Ch. 7.

55. As to this distinction see *infra* pp.223-225.

56. (1958) 75 W.N. (N.S.W.) 204.

57. [1959] Ch. 251. The house of which possession was sought was also the subject of *Street v. Denham*, *supra*. The earlier case concerned the sale of the matrimonial home by a husband to his mistress to get his (deserted) wife out. The mistress then charged the property to the plaintiffs in the later case, who therein sought to recover possession against the mistress and the wife.

58. [1951] 2 K.B. 596.

and the deserted wife I should have given further reflection to the case.”⁵⁹

In that case the learned judge was concerned only with the execution and not the existence of the deserted wife's equity. He reviewed the decisions of the Court of Appeal in *Bendall v. McWhirter*⁶⁰ (where the court held that the husband's trustee in bankruptcy had no better right to revoke the wife's licence to remain in possession of the matrimonial home than the husband,⁶¹ and *Woodcock (Jess B.) v. Hobbs*⁶² (where the court was concerned primarily with the exercise of its discretion to order a deserted wife to vacate the matrimonial home). The learned judge pointed out that the discretion which he was called upon to exercise was not the statutory discretion exercisable under the Married Women's Property Act.^{62a} He thought that it was a “recently judge-made” discretion, which springs *ex necessitate rei* and which is limited only by that “limitation which applies to all exercise of judicial discretion, that is to say, that it must be exercised judicially, or in the light of judicial common sense.”⁶³

Of *Woodcock v. Hobbs*⁶⁴ the court in *Dickson's* case⁶⁵ said⁶⁶ that that case decided only “that in an appropriate case a County Court trying an action for possession may postpone to some future date the execution of the order for possession” and that the discretion so to do was presumably that given to a County Court Judge by Order 24 Rule 11 made under the County Courts Act, 1934.⁶⁷ With the greatest respect it is just not possible to read any of the judgments in *Woodcock v. Hobbs*⁶⁸ as deciding the case on that ground.⁶⁹

59. [1959] Ch. 251 at p.258. It seems clear that the learned judge is here referring to the transaction between the husband and his mistress. There does not appear to have been any transaction between the husband and his wife.

60. [1952] 2 Q.B. 466.

61. In *Re Karuppiah* (1962) 28 M.L.J., 389 Gill J., at p.391, expressed the opinion that “the right of the bankrupt's wife and children to remain on the premises flows from and is tied up with the bankrupt's right to remain on the premises”. While in the particular case this may have been so, for the bankrupt had not deserted his wife (see note 5 *supra*) the general proposition would deny any right in a wife at any time apart from, or inconsistent with, that of her husband. It is respectfully submitted that this does not represent English law, and ought not to be adopted in Malaysia. (see also *infra* note 6 at p.226).

62. [1955] 1 W.L.R. 152.

62a. See *supra* note 25.

63. *Churcher v. Street* [1959] Ch. 251 at pp.259-260, 263.

64. [1955] 1 W.L.R. 152.

65. (1958) 75 W.N. (N.S.W.) 204.

66. See *ibid.* at p.214.

67. 24 & 25 Geo. 5 c.53. Order 24 Rule 11 (as quoted in *Jones v. Savery*, as to which see *infra* p.225) reads “Every judgment or order requiring any person to do an act other than the payment of money or costs, shall state the time within which the act is to be done.”

68. [1955] 1 W.L.R. 152.

69. For a view supporting the narrow interpretation see Guest, (1955) 33 Can. Bar R. 610. Jeffrey, *op. cit.* (1958) 32 A.L.J. 105) thinks it a permissible interpretation. Finlay J. in *Shakespear v. Atkinson* [1955] N.Z.L.R. 1011 thought that the case “definitively decided that a *bona fide* purchaser for value with knowledge of a deserted wife's occupancy and, in the circumstances, with notice of her right to remain so, takes subject to the rights of the wife” (*ibid.*, at p.1019)

In that case Denning L.J. (after reviewing the cases of *Ferris v. Weaven*,⁷⁰ *Savage v. Hubble*⁷¹ and *Street v. Denham*⁷²) said⁷³ “ the wife’s right is an equity. It does not arise on marriage but only on the actual desertion. it does prevail against a subsequent purchaser with knowledge, or I would add, with notice of the facts.” The learned judge continued: “The deserted wife has no right to stay indefinitely in the house. Her right is only to stay until such time as the court in its discretion orders her to go out. That is the only right she has against her husband and it is the only right she has against his successors.” Birkett L.J. agreed⁷⁴ with Denning L.J. and apparently agreed with the County Court judge in applying the doctrine of *Bendall v. McWhirter*⁷⁵ to the facts of *Woodcock v. Hobbs*,⁷⁶ (which concerned a purchaser from a husband with notice that his wife was in occupation of the premises in dispute as a deserted wife). He thought that the issue was solely whether the Court could deal in its discretion with the date that the wife ought to leave the matrimonial home in proceedings for possession of the home, or whether a further application was necessary. Parker L.J. saw “great difficulty in extending the wife’s protection so as to give her rights against a *bona fide* purchaser whether with or without notice” but he thought that even if the wife was protected against a purchaser with constructive notice “nevertheless a wide discretion must exist in the Court to order her to go”.⁷⁷

All these members of the Court therefore connected up the discretion to be exercised with the right of a deserted wife to remain in the matrimonial home against her husband’s successors in title. The case turned on the recognition (or concession) of the right in the wife which presupposed the exercise of the court’s discretion.⁷⁸ There is nowhere in the case a hint that the discretion had (or has) as its source anything other than that right, or in particular (as alleged by the Supreme Court of New South Wales) some statutory power of a County Court entirely independent of the right of a deserted wife.

70. [1952] 2 All E.R. 233.

71. [1953] C.P.L. 416, “The Times” June 11th, 1953.

72. [1954] 1 W.L.R. 624.

73. *Woodcock v. Hobbs* [1955] 1 W.L.R. 152 at p.156. Denning L.J. later compared the discretion to that exercised under certain statutes (*ibid.* at p.157).

74. *Ibid.* at pp.158-159.

75. [1952] 2 Q.B. 466.

76. [1955] 1 W.L.R. 152.

77. *Ibid.* at pp.159-160.

78. Lord Denning said that if the Court had found for the plaintiffs on either the contention (i) that the wife had no equity or (ii) that the plaintiff had no notice of it, the order would have been possession in 4 weeks. However, counsel for the plaintiffs did not press his argument on these points after the Court had told him that they were in his favour on the question of discretion. The issue therefore became how the discretion should be exercised (see *ibid.* at p.157).

Although it is true that both Lynskey J. in *Street v. Denham*⁷⁹ and Upjohn J. in *Westminster Bank Ltd. v. Lee*⁸⁰ expressed personal views contrary to the view that a deserted wife has any other than a personal right against her husband, in both cases the learned judges felt constrained to follow authority and hold that such a wife has an equity enforceable against purchasers taking with notice. It is respectfully submitted that the correct view of English law, as it now stands, is set out by Cross J. in the latest decision on the subject, *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*⁸¹ where he said of the wife's right:⁸²

“. . . . her equity is not anything which can properly be described as a *right in rem* at all but is simply a right to appeal to the court for protection against unconscionable conduct on the part of the husband's successor in title.”

Nature of an equity

The Supreme Court of New South Wales in *Dickson v. McWhinnie*⁸³ denied that a deserted wife had an equity “as we understand the word”⁸⁴ but at no time did they indicate just what was their understanding. They were content to explain away or dissent from the English cases, but did not consider whether the deserted wife ought in any circumstances to have any kind of right.

In *Westminster Bank Ltd. v. Lee*⁸⁵ (which was not referred to in *Dickson v. McWhinnie*⁸⁶) Upjohn J. decided that “the right of a deserted wife to remain in the matrimonial home put at its highest, is a mere equity and no equitable estate or interest in that home is created in her favour upon desertion”.⁸⁷ Relying on *dicta* expressed in *Phillips v. Phillips*⁸⁸ as to the meaning of an equity, he concluded that in the case before him, an equitable mortgagee, the creation of whose interest was later than that of the deserted wife, nevertheless took the interest free of any claims by the wife, as the mortgagee had neither express nor constructive notice of the wife's equity.

The distinction between an equitable interest and an equity is no new one and has been applied in a number of cases apart from those concerning

79. [1954] 1 W.L.R. 624.

80. [1956] Ch. 7.

81. [1963] 2 W.L.R. 1015.

82. *Ibid.* at p.1021.

83. [1958] 75 W.N. (N.S.W.) 204.

84. *Ibid.* at p.215.

85. [1956] Ch. 7.

86. [1958] 75 W.N. (N.S.W.) 204.

87. [1956] Ch. 7 at pp.20-21. For an application of the distinction see *Garrard v. Frankel* (1862) 30 Beav. 445.

88. (1862) 4 De G. F. & J. 208.

a deserted wife. In *Cave v. Cave*⁸⁹ Fry J., after citing *Phillips v. Phillips*,⁹⁰ held that the right of *cestuis que trust* is an equitable estate or interest and not “an equity as distinguishable from an equitable estate”. In *Scott v. Scott*⁹¹ O’Connor M.R. termed a right to follow assets improperly applied by an administrator into other property, an equity rather than an equitable estate. He added:

“It is not like a vendor’s lien for unpaid purchase money or an equitable mortgage of specific property or a claim by a *cestui que trust* arising out of a trust for specific property. It is rather a right of action the assertion of which may result in a capture of property for a particular trust.”⁹²

Cross J. summed up the nature of the wife’s equity in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*⁹³ when he said that it was not a *right in rem* at all “but is simply a right to appeal to the court for protection against unconscionable conduct on the part of the husband’s successor in title”.

An equity is clearly a “discretionary right” exercisable only when and where the Court declares. It gives no right of property (save in the chose in action) and certainly no interest or estate in land. It is a right which takes no account of the boundary between contract and property, but the reason for which lies in the interest (or status) of the deserted wife which surely is “a sufficient interest to warrant the intervention of equity”.⁹⁴

By its very nature the concept of “equity” defies generalisation, and is not confined to sets of circumstances. An application to a set of circumstances however gives a certain authority for the view that in similar circumstances the appropriate person can ask for the Court’s discretion based on a similar equitable right.

A right entirely dependent on the discretion of the Court is different only in degree from a right dependent on satisfying the Court that certain principles ought to be applied to the facts before it. The difference lies in the area available for the exercise of the Courts discretion, and in

89. (1880) 15 Ch.D. 639.

90. (1862) 4 De G. F. & J. 208.

91. [1924] 1. Ir.R. 141.

92. *Ibid.* at p.151. See also *Re Ffrench’s Estate* (1887) L.R. 21 Ir.R. 285 at p.312 (per Porter M.R.).

93. [1963] 2 W.L.R. 1015 at p.1017.

94. The phrase is used by Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.482. Denning L.J. relied on the *Strathcona* case [1926] A.C. 108 as authority for the general proposition that a party with a sufficient interest under a contract can enforce that contract against a person not a party thereto. It is not sought here to rely on that case as an example of when such an interest exists, nor the learned judge’s interpretation of a sufficient interest; but it is submitted that the deserted wife’s interest is an interest which calls for more than a remedy bounded by the rules of privity of contract.

the result, the existence of the right cannot be as accurately foreseen as rights dependent on the application of accepted principles. Conversely the discretion remains dependent on the existence of the right for its exercise⁹⁵ the existence of the right being dependent (in this case) on the position of the deserted wife. Because of her position she has a right to go to the court. The court may then exercise its discretion.

Court's general discretion to postpone possession

The concept which the Supreme Court of New South Wales in *Dickson v. McWhinnie*⁹⁶ adopted as the basis of the decision in *Woodcock v. Hobbs*,⁹⁷ would give a court power by its discretion to postpone the execution of a judgment to prevent the exercise of a right possessed by one party against the other who has no right. It follows that a trespasser would have the *right* to ask a court to exercise its discretion in preventing his ejection. This means that a trespasser has a "right" in relation to occupation against the owner of the property on which he is trespassing, a conclusion which it is submitted is startling.

The Supreme Court referred to the case of *Jones v. Savery*⁹⁸ as an authority for the view that a judge has a general discretion to postpone the execution of an order for possession. In that case an order for possession was made against the defendant who was a trespasser, but the execution of the order was postponed for three months. The Court of Appeal held that, assuming the judge had a discretion, the postponement in the case before them should not be for more than one month. Singleton L.J. thought that "it may be that under that rule there is power to postpone for a short period the operation of an order for possession".⁹⁹ Denning L.J. pointed out that the owner of the land had a right at law to take possession, and agreed that the courts had no power to limit that right by providing that it should not be exercised for three months.¹

95. This conclusion is consistent with the views of both Lords Devlin and Denning discussed above (at pp.216-219). Lord Devlin in *Short v. Short* [1960] 1 W.L.R. 833 at pp.842-846 was concerned to deny that the wife had a right to remain in the matrimonial home against her husband until the court ordered her out, and to establish that she could by her conduct forfeit whatever right she had. Lord Denning seems to be of the view that a deserted wife could always come to court. The views differ, if at all, only in the establishing of the right and not, once it is established, its exercise or its nature. The right (or any exercise of it) as against a husband's successors in title could presumably be forfeited, as any other, by delay or by the wife deliberately standing by until the husband had sold the house, and then claiming her "equity".

96. (1958) 75 W.N. (N.S.W.) 204.

97. [1955] 1 W.L.R. 152.

98. [1951] 1 All E.R. 820.

99. *Ibid.* at pp.821-822.

1. *Ibid.* at p.822.

It is submitted that the case is no authority for the proposition propounded by the New South Wales Supreme Court, and that Court in trying to limit the effect of English authorities would introduce into English law the general discretion denied by it.² As Lord Devlin said in *Short v. Short*,³

“Fundamentally, a plaintiff who proves his case is entitled to an order *ex debito justitiae* and there is no room for discretion.”⁴

Essential connection of wife's rights against husband and his successor in title

Is there any reason to confine the rights of a wife who is the victim of a matrimonial wrong to the circumstances of desertion? Perhaps more fundamentally do the rights of a wife against her husband arise only on the commission of the wrong or, being dependent on the matrimonial status, do the rights arise at the commencement of that status?

The contention that a wife had an inchoate right from the commencement of the matrimonial status, so as to give her an “interest” prior in time to a mortgagee taking his interest after the marriage, was made to and rejected by Upjohn J. in *Lloyds Bank Ltd. v. Trustee of the property of O*⁵ who held that

“the earliest moment at which the right of the wife to continue to reside in the house of the husband against his will arises is when the husband deserts the wife”.⁶

It is suggested that the rights of a wife against third parties are in the present context dependent on a right existing against her husband, and that the rights in both instances stem from recognition of the matrimonial

2. See also *Sheffield Corpn. v. Luxford* [1929] 2 K.B. 180. This conclusion is supported by the decisions holding that if a mortgagee has a right to possession under a mortgage the court's only discretion to postpone the exercise of such a right depends on the probability of the mortgagor paying off the debt. (See *Four Maids Ltd. v. Dudley Marshall* [1957] Ch. 318; *Birmingham Citizens Permanent Building Society v. Caunt* [1962] Ch. 883.) There is no hint of a general discretion to postpone.
3. [1960] 1 W.L.R. 833. The issue in this case, which was the extent of the discretion conferred on a court under the Married Women's Property Act, s.17 (see *supra* p.216), would surely never have arisen if there was a general discretion as was suggested in *Dickson v. McWhinnie* (1958) 75 W.N. (N.S.W.). Devlin L.J. (dissenting) stressed the limited powers of postponement a judge has without express words permitting such postponement. ([1960] 1 W.L.R. 833 at pp. 846-847).
4. *Ibid.* at p.846.
5. [1953] 1 W.L.R. 1460.
6. *Ibid.* at p.1467. This decision was followed in *Barclays Bank v. Bird* [1954] Ch. 274. In *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.477 Denning L.J. said that the authority conferred on the wife to stay in the house “flows from the status of marriage coupled with the fact of separation owing to the husband's misconduct”. This is a sufficient retort to the argument put forward in *Re Karupiah* (1962) 28 M.L.J. 389 that a wife, deserted or not, has an equitable interest in the matrimonial home.

status and the obligations and rights that flow from it.⁷ By recognising that in certain circumstances a wife can rely on her status against third parties unconnected directly with creation of the status, a society merely recognises the importance of the status, and the dependence of a wife upon it.

As against her husband a wife is entitled to claim support, and as Lord Denning has said,⁸ she is entitled to pledge his credit for necessities, if circumstances render this applicable. The rights are dependent on (i) the existence of the matrimonial status and (ii) the failure by the husband to carry out the obligations which flow from it.

It is the occurrence of the second element which vests an enforceable interest in the wife. Prior to that, but after the occurrence of the first element, all that exists are conditions prerequisite to that interest arising. Until there is a right to go to court there can be no right in the "claim" sense and certainly no enforceable interest. The identical analysis can be applied to the protection of the wife's interest against third parties, which are an extension to, and in this sense dependent on, the interest which she seeks to enforce being enforceable against her husband.

The "equity" therefore is called into play where a wife would be left without a roof over her head without it. It protects her right to a necessary, to a claim that her interest in the circumstances outweigh those of a purchaser with notice. It is submitted, however, that the limitation could best be expressed by emphasising the dependence of the "equity", on the wife's ability to obtain an injunction against her husband, had she been able so to do.⁹ To tie the equity to the commission of a particular matrimonial wrong or even to the commission of any matrimonial wrong, would enable a husband to sell the matrimonial home to a purchaser with notice one day prior to leaving his wife (or committing the wrong), a situation raising the same issues in equity as that where the desertion (or other wrong) occurs prior to the sale. Whether a court would issue an injunction against the husband and whether it would recognise an equity against his successor in title (once the existence of the equity is conceded) surely involves the same question.¹⁰

7. In *Ryan v. Ryan* ("The Times", May 4th, 1963) Pennycuik J. refused to listen to a contention that a deserted mistress had an equity similar to that of a deserted wife.

8. See *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.476.

9. This does not refer to an injunction prohibiting the husband from selling the matrimonial home (as a Court may order, see *supra* note 39) but an injunction prohibiting him from ejecting his wife from the home. It does not necessarily follow that the remedy must in content be the same, *i.e.* that a wife would obtain protection for the same length of time against her husband's successor in title as against her husband.

10. A husband and wife could agree to defraud a purchaser, *e.g.* a husband (although deserting his wife) might sell the house and obtain the price in cash, while the wife might assert her right against the purchaser. The proposition in the text would hold good as the wife could not in such circumstances have obtained an injunction against her husband.

It may be said that this reintroduces the confusion between contract and property for which the case of *Hurst v. Picture Theatre Ltd.*¹¹ has been justly criticised.¹² The Supreme Court in *Dickson v. McWhinnie*¹³ referred to the comparison that has been made between the deserted wife's right and that of the contractual licensee.¹⁴ The comparison is relevant only in this instance if a contractual licensee can enforce the licence or contract against third parties. It was implied in *Hurst's* case¹⁵ that this could be done because of the licensee's interest granted by the agreement. It was said in *Errington v. Errington and Woods*¹⁶ that it could be done, but no reason or authority was given.¹⁷ If a person occupying land under a contract can enforce his "interest" upon a successor in title a deserted wife should *ex hypothesi* have a similar power.¹⁸ However, it is by no means necessary to assert the general proposition in order to argue the particular. The basis of the wife's right is in a sense the reverse of that contended for in *Hurst's* case.¹⁹ It is said that she has a right not because she has an interest in land or in any thing taking place thereon but despite the fact that she does not. Her claim to possession rests on her position, *i.e.* that in the particular circumstances the law recognises her interest as one which should be protected at the expense of the interest of the purchaser.²⁰

11. [1915] 1 K.B. 1. This confusion may have been introduced into Malayan law. See *Julaika Bivi v. Mydin* (1961) 27 M.L.J. 310 (approved in *Mohamed Said v. Fatimah* (1962) 28 M.L.J. 328).
12. See *Cowell v. Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605.
13. (1958) 75 W.N. (N.S.W.) 204.
14. *Ibid.* at p.211.
15. [1915] 1 K.B. 1 at pp.6-7, 13-14.
16. [1952] 1 K.B. 290. See especially (per Denning L.J.) at p.298.
17. As to the binding effect of licences (apart from that of the wife) on third parties see Maudsley, "Licences to Remain on Land (Other than a Wife's Licence)" (1956) 20 Conv. (N.S.) 281. The action in *Hurst's* case was between the contracting parties whereas in *Errington's* case the plaintiff was no party to the agreement which was the basis of the defendant's claim. The remedy afforded *Hurst*, however, necessarily meant that he had (at common law) an interest in the land (or seat) apart from his contractual rights to be thereon. In *Errington's* case an equitable remedy (an injunction) was used to enforce the agreement against a third party. To avoid the old confusion any right a wife has against a trespasser ought to be in equity, *i.e.* if in equity she has a right and remedy against a person who has a title to the premises, *ex hypothesi* she has a right and remedy against one who has no right whatsoever to the premises.
18. In *Lee v. Lee* [1952] 2 Q.B. 489n Denning L.J. cited *Errington v. Errington* as authority for the proposition that a purchaser with notice of the wife's rights could not eject the wife (*ibid.* at p.492).
19. [1915] 1 K.B. 1.
20. Lord Evershed in "Reflections on the Fusion of Law and Equity after 75 Years" (1954) 70 L.Q.R. 326 expressed concern that the injunction should be used to enforce proprietary rights (see *ibid.* at p.341). He also remarked (*ibid.* at p.331) that "there has been a great change over from proprietary rights to personal rights" and that the injunction should be used to prevent "unconscionable conduct". This expresses the point attempted to be made herein — that it is the personal nature of the wife's right which is material and that to recognise the right is not necessarily to infer a proprietary interest (see further *infra* pp.229-232).

The exercise of the right against the third parties should depend on the ability to exercise the right against the husband not because of any interest in the land in relation to which the right is exercised but because the origin and nature of both rights are identical. They follow from the recognition of the matrimonial status.

DEPENDENCE OF RIGHT ON NOTICE

(i) *When title not registrable.*²¹

If a deserted wife is to have rights of possession of the matrimonial home against her husband's successors in title, those rights must depend on notice. If the right is an equity (as is here contended) the very basis of the right is notice. Unless a deserted wife can satisfy the court that a purchaser took from her husband with notice of her rights she will have no right.

Is it enough that the wife was in occupation of the house at the time of the purchase so that she can rely on the principle in the cases of *Hunt v. Luck*²² and *Barnhart v. Greenshields*²³ that a purchaser has notice of the rights of any person on the land at the time of purchase? In England and Singapore the principle has statutory recognition as regards land the title of which is not registered in the Law of Property Act, 1925²⁴ s.199 and the Conveyancing and Property Ordinance²⁵ s.70. In *Westminster Bank Ltd. v. Lee*²⁶ Upjohn J. refused to hold that the wife's occupation was in itself sufficient to give the wife a right on the basis of constructive notice to the purchaser. He, therefore, did not apply the principle of *Hunt v. Luck*²⁷ which he said (rightly it is submitted) was but an illustration of the statutory provision,²⁸ but held that there must be some additional factor which would put a purchaser (or mortgagee) on notice

21. Even where title is not registrable, notice may be dependent on registration, *e.g.* under the (Singapore) Registration of Deeds Ordinance (Laws of Singapore (1955) Cap. 255) and the English Land Charges Act, 1925 (15 & 16 Geo. 5 c.22). It is submitted that considering the wife's right as a personal right, and not as an interest in land, it does not fall within the terms of either Ordinance or Statute. Should it be considered an interest in land it could presumably be protected by a caveat under section 9 of the Ordinance; it has been suggested that it could be registered as a land charge under the English statute (see *e.g.* Mitchell, "Learners Licence" (1954) 17 M.L.R. 211).
22. [1902] 1 Ch. 428.
23. (1853) 9 Moo. P.C. 18.
24. 15 & 16 Geo. 5 c.20 s.199 (1) provides "A purchaser shall not be prejudicially affected by notice of . . . (ii) . . . any instrument [other than one capable of registration under the Land Charges Act, 1925] or matter or any fact or thing unless (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him. . . ."
25. Laws of Singapore (1955) Cap. 243.
26. [1956] Ch. 7.
27. [1902] 1 Ch. 428.
28. See *supra* note 24.

that a wife was in possession of premises as a deserted wife. Otherwise he said "it would mean that every intending purchaser or lender must enquire into the relationship of husband and wife and enquire into matters which are no concern of his and will bring thousands of business transaction into the area of domestic life and ties". He added, "That could not be right."²⁹

(ii) *When title registrable.*

Cross J., in *National Provincial Bank v. Hastings Car Mart Ltd.*,³⁰ in holding that the wife's right was not such a right as fell within the protection of the Land Registration Act, 1925,³¹ the English statute providing for registration of title, followed the reasoning of Upjohn J. It was the view of both the learned judges that the wife's right is an equity and therefore not an interest in land. It is clear that the principle of *Hunt v. Luck*³² applies only to interests in land³³ and therefore (in the case of unregistered land) Upjohn J. had to ask himself whether the purchaser (in that case, mortgagees) ought reasonably to have made inquiries which would have led to the discovery of the wife's position. He held that they were not so obliged. However, if there had been any fact of which the mortgagees had knowledge which ought to have put them on inquiry they would have been unable to maintain their plea of taking their interest without notice. In the later case Cross J. said that — if it had been necessary — he would regret having had to conclude that the mere possession of such a fact (in the case before him, an instrument upon which the address of the husband was not that of the matrimonial home) constituted notice to the purchaser or mortgagee, so as to render him unable to succeed in his plea that he was a *bona fide* purchaser for value without notice. However the learned judge was of the opinion that as the case before him concerned a house the title to which was registered the point of notice was not in issue as it had been before Upjohn J. The issue in the case before him was whether the wife's right was protected by a statutory provision which at first sight protects all the rights of any person "in occupation" of land.³⁴ By deciding that it was not protected, because it was not a right relating to or binding on the land the learned judge was reading the provision as referring (as the principle embodied in the Law of Property Act, 1925 s.199 applies) only to interests in land. He refused to read the subsection in a way which "would involve the ridiculous consequence that a position of a deserted wife is stronger if the matrimonial home is registered land than

29. *Westminster Bank Ltd. v. Lee* [1956] Ch. 7 at p.22.

30. [1963] 2 W.L.R. 1015.

31. 15 & 16 Geo. 5 c.21.

32. [1902] 1 Ch. 428.

33. *Reeves v. Pope* [1914] 2 K.B. 284. See also *Joseph v. Lyons* (1884) 15 Q.B.D. 280. In *Smith v. Jones* [1954] 1 W.L.R. 1089 Upjohn J. refused to apply the principle to include an equity of rectification.

34. *I.e.* Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21) s.70(1) (g)). S.70 lists interests to which land registered under the Act is subject. Subsection (g) states "The rights of every person in actual occupation of the land save where inquiry is made of such person and the rights are not disclosed."

if it is unregistered land".³⁵ It may be that because of the differing statutory provisions this conclusion could be said to be inescapable. Although the learned judge avoided the conclusion by reading the protection in a narrow sense, he then ignored the very definition he proposed. If the wife's right is a right relating to the conscience of the successor in title, surely the next question would be to see if the mortgagees were bound on that ground. However the learned judge, having held the wife's right had nothing to do with the land as such, dealt with the question of notice as if it were relevant only to land the title of which is unregistered. If the right is personal then surely it is irrelevant whether the land is registered or not. Having said that the right is not within the purview of a provision protecting a person in occupation as it is not an interest in land it can hardly be contended that a registered proprietor can take free of it simply because he is a registered proprietor. In other words either the interest is within the Act or it is not. If it can be said that it is not an interest in land but is within the Act, so that a registered proprietor takes free of it whether with notice or not, the wife's equity to registered land is non-existent.

(iii) *Registration of title prima facie irrelevant*

It is submitted that the wife's equity is *prima facie* outside the operation of the statutes concerning registration of title, that it operates on the conscience of the husband's successor in title and therefore the question of notice is all important whether or not the title to the land is registered or not.³⁶ If this be correct then the issues in *Westminster Bank Ltd. v. Lee*³⁷ and *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*³⁸ were identical, the decisions being in conflict as to the notice required and hence the creation of the equity.

It is submitted that the view of Upjohn J. is to be preferred to that of Cross J. in this regard. The essence of the wife's right is that it operates on the conscience of the successor in title. If that successor holds a document which is connected with the purchase of a charge on the land, and which if he read it ought to raise doubts whether the house is owned by a married man who is not living at the matrimonial home, he should be entitled to deal with the husband only at his (the purchaser's) own risk. Knowledge of the wife's position is relevant both to the binding nature of the equity and, once it is held to be binding, on its length.³⁹

35. *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1963] 2 W.L.R. 1015 at p.1020.

36. But see *supra* note 22 at p.216.

37. [1956] Ch. 7.

38. [1963] 2 W.L.R. 1015.

39. In *Cochrane v. Kneebone* [1957] N.Z.L.R. 456 Stanton J., after referring to *Woodcock v. Hobbs* [1955] 1 W.L.R. 152, said that "as against a purchaser with constructive notice — as opposed to actual knowledge — of the wife's right, the Court has a discretion . . .". It is respectfully submitted that even as regards a purchaser with actual knowledge the Court has a discretion. The nature of the wife's right is discretionary and there seems no authority for the distinction drawn by the learned judge.

It may be that possession of a fact which ought to have put a purchaser on inquiry is sufficient to make the equity binding, but such notice without more would aid the purchaser in contending that the equity should be of comparatively short duration. Actual knowledge of all the wife's circumstances would incline the court to allowing a long period of possession.⁴⁰ Whether a person has notice, or has deliberately refrained from asking reasonable questions from which he would have gained notice, is a question dependent upon each set of circumstances. To receive a "scarcely credible answer" to any question has been held by the English Court of Appeal to form no defence to an allegation of notice.⁴¹ The questions to be asked by a court in the Federation, it is submitted, are those which are suggested above; for if it be correct that the wife's right is a personal one, the statutes regulating transactions concerning land are as irrelevant here as they are anywhere else.⁴²

REGISTRATION OF TITLE AS POSSIBLY AFFECTING THE WIFE'S RIGHT

(i) *In General.*

A system of registration of title to land may provide for the registration of a deserted wife's right either by treating it as an interest in land, or simply recognising it whatever its nature.^{42a} Conversely however it may be argued that the existence of such a system precludes the recognition of the wife's right. Such an argument embraces two possible contentions (i) that the introduction of such a system implies that the only rights in regard to land which are recognised are those which are registerable or capable of being protected by caveat, and (ii) that the claims which if registered would be rights, have no force if unregistered.

The English system of registration of title exists alongside a system where the title need not be registered, and retains the same substantive law for registered land as for unregistered land.^{42b} The system makes no attempt to deny the existence of rights outside it although within its sphere of operation (*i.e.* unregistrable rights^{42c}) or the existence of

40. Megarry, *op. cit.* 71 L.Q.R., at pp.176-177 queries the principle of any such distinction. It simply means however that in considering the equity's determination the Court considers all the circumstances of the case. A deliberate or "prudent" abstention from inquiry will help a purchaser no more as to the second issue than the first.

41. *Woodcock v. Hobbs* [1955] 1 W.L.R. 152 (see *supra* pp.221-222).

42. It was not suggested in *Dickson's case* or in *National Provincial Bank v. Hastings Car Mart Ltd.* [1963] 2 W.L.R. 1015 that the wife's right against her husband is affected by registration of title of the matrimonial home. In *Shakespear v. Atkinson* [1955] N.Z.L.R. 1011 the land was subject to the Land Transfer Act, 1952, and the title registered, but Finlay J. held that a transferee from a husband was bound by the wife's right. There was no discussion of the effect (if any) of the registration of title on the existence of such a right.

42a. *E.g.* the Singapore Land Titles Ordinance, 1956 (No. 21 of 1956) (as to which see *infra* at pp.240-243).

42b. See generally Curtis and Ruoff, *Registered Conveyancing* (London, 1958).

42c. See especially Land Registration Act, 1925 (15 & 16 Geo. 5 c.21) Part IX and (*re* the deserted wife's equity) *Hastings Car Mart Ltd. v. National Provincial Bank Ltd.* [1963] 2 W.L.R. 1015.

rights where steps to benefit from a protection available under the system have not been taken (*i.e.* unregistered registrable rights^{42d}). Indeed, a registered title in England is in general less absolute or indefeasible than for example one under the legislation of New South Wales, due to the long list of overriding interests to which an English title is subject.^{42e}

Even in Australia the Courts have not taken the view that the system of land registration therein adopted precludes the recognition of any interests or rights in land save those specified in the statute or code. It "must now be taken. . . .to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the Statutes. The recognition is indeed the foundation of the scheme of caveats.".⁴³

In *Barry v. Heider*⁴⁴ the High Court of Australia held that a provision that "no instrument until registered. . . . shall be effectual to pass any estate or interest in any land"⁴⁵ did not mean that until registration no person could acquire any interest in that land. The effect of the statutes is therefore not to create an all embraceable system of statutory rights, but merely to recognise that persons using the protection available to them can rely on that protection against persons ignoring it. But the courts have also taken the view that the statutes do not affect equities between parties to a transaction.⁴⁶ Therefore a registered proprietor cannot plead his indefeasible title under the statute to defeat a person having a contractual claim against him.

The basic provision of the F.M.S. Land Code is of even more enveloping nature, *viz.*:

"All land. . . . shall not be capable of being transferred, transmitted, charged or otherwise dealt with except in accordance with the provisions of this Enactment."⁴⁷

- 42d. See Land Registration Act, 1952 s.2(1) 3(xv) defining minor interests and providing for their effect "in equity". See generally Curtis and Ruoff, *op. cit.*, at pp.143-144, 567-568. Cf. Potter, *Principles of Land Law under the Land Registration Act, 1925* (London, 1941) at pp.21, 76 and as to minor interests in general Chapter 4 pp.66-85.
- 42e. See Land Registration Act, 1925 s.70.
43. *Per* Griffiths C.J. in *Butler v. Fairclough* (1917) 23 C.L.R. 78 at p.91, cited and approved in *Abigail v. Lapin* [1934] A.C. 491 at p.501.
44. (1914) 19 C.L.R. 197. In this case it was contended that until registration all interests were merely choses in action. All that is here contended is what is implied by that decision — that a chose in action is outside the scope of a statute relating to registration of title.
45. Real Property Act, 1900-1956 (N.S.W.) s.41.
46. See *Bakers Creek Gold Mining Co. v. Hack* (1894) 10 W.N. (N.S.W.) 217 at p.219 (per Owen C.J.).
47. See F.M.S. Laws (1935) Cap. 138 s.55. S.42 provides for the indefeasibility of the title of the registered proprietor (as to which see *infra* p.239). The Johore Land Enactment (No. 1 1935 Revd. Laws of Johore) contains provisions akin to the F.M.S. Land Code, and has been said to have been based thereon (see *Alagappa Chetty v. Ng Guan Yin* (1921) 5 F.M.S.L.R. 236 at p.239). The complementary section to s.55 is s.63. There is also a section (s.65) complementary to s.41 of the Real Property Act (N.S.W.).

It would, therefore, seem clear that no interest in land can be created except according to the procedure of the Code; and this would seem the implication of the decision of the Privy Council in *Haji Abdul Rahman v. Mohammed Hassan*.⁴⁸ In that case the Board were of the opinion that a provision in the Selangor Registration of Titles Regulation, 1891,⁴⁹ similar to section 55 of the Land Code,⁵⁰ did not “profess to prohibit or strike at contracts in reference to land provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself.”⁵¹ Despite this clearly sensible interpretation, implying that the section did prohibit all interests in land except under the Code, the courts have not always clearly distinguished between contractual and proprietary interests, and on occasion while purporting to follow the Privy Council’s decision have rather followed the Australian system.⁵²

Both under the Land Code and the Australian system the courts have recognised that a contract, though concerned with land, is as such, outside the system of the relevant statute providing for registration of title. In *Bachan Singh v. Mahinder Kaur*⁵³ Thomson J. (as he then was) referred to the purchasers right under a contract of a sale of land as a “right *ad rem* and *in personam*”.⁵⁴ He said that he was

“not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a *chose in action*”.⁵⁵

It has been suggested (in a case concerning an agreement for the sale of land) that a contractual right itself “may be sufficient to give a person an ‘interest’ in the land for the purposes of protection by restrictive entry in the register”.⁵⁶ If this be so, it destroys the reasoning

48. [1917] A.C. 209.

49. *I.e.* s.4. The section contains identical words to s.55 of the Land Code (as set out *supra*) with the additional provision that every attempt to transfer the land except as permitted by the Regulation “shall be null and void and of no effect.”

50. *Sec supra* p.233.

51. *Haji Abdul Rahman v. Mohammed Hassan* [1917] A.C. 209 at p.214.

52. The courts have often referred to *Loke Yew v. Port Swettenham* [1913] A.C. 491 when emphasising the importance of notice of an unregistered interest, but that case was concerned with fraud. As to decisions impliedly recognising unregistered interests see, *e.g.*, *Arunasalam Chetty v. Toah Ah Poh* (1936) 6 M.L.J. 17; *Vallipursam Sivaguru v. Palaniappa Chetty* (1937) 6 M.L.J. 59; *Wilkins v. Kannamal* (1951) 17 M.L.J. 99 (though this case could have been based on fraud); *Haroon bin Gurasmar v. Nik Mah binte Nik Mat* (1951) 17 M.L.J. 209.

53. (1956) 22 M.L.J. 97. Thomson C.J. cited his own judgment in the Court of Appeal decision of *Margaret Chua v. Ho Swee Kiew* (1961) 27 M.L.J. 173 where the Court held an unregistered agreement for a lease good as a contract.

54. See *Bachan Singh v. Mahinder Kaur* (1956) 22 M.L.J. 97 at p.98.

55. *Ibid.*

56. *Per* Buhagiar J. in *Chin Cheng Hong v. Hameed* (1954) 20 M.L.J. 169 at p.170. This case, and three unreported decisions on the subject are referred to in *Tee Chin Yong v. Ernest Jeff* (1963) 29 M.L.J. 118 where Ismail Khan J. discussed the question without finding it necessary to decide it. Such a view would appear contrary to that of Murray Ansley J. in *Liew Siew Yin v. Lee Pak Yin* (1940) 9 M.L.J. 135 (as to which see *infra* note 87). As to the presenting of caveats under the Land Code see *ibid.* ss.134, 166.

behind the decision in *Haji Abdul Rahman v. Mohamed Hassan*,⁵⁷ for obviously all dealings in interests in land fall within the provision of the Land Code cited in that case. It is precisely because a contract does not create an interest in land (and therefore a person claiming under a contract cannot be claiming such an interest) that contractual claims can be recognised alongside and outside the Code.

It is submitted that the approach of Thomson C.J. is to be preferred — and a contractual right considered (as it is) as a *right in personam*. However, whichever view is taken, the wife's right is not a claim to an interest in land (in the way that a contract to purchase land might be) for there is no intention to create any right other than the one the subject of her claim. The "claim" is identical with the interest, whereas in the case of a contract to purchase land it can be argued that the "claim" (the contract) is to the conveyance (the interest in land). To adopt the language of Thomson C.J. the wife's right is a chose in action, though in this instance an equitable right of that nature. The learned judge when referring to "an equitable right" seems to have been referring rather to a concept similar to an "equitable interest",⁵⁸ but the wife's right against her husband's successor in title is an equitable chose in action simply because of the basis of that right. Her right against her husband, stemming from the matrimonial status, is a chose in action but one which in the learned judge's terms, would be a legal or statutory chose in action.⁵⁹

The Australian system permits rights to exist outside the system even though as such there are provisions for their registration or protection by caveat. Under the Land Code, on what is submitted is the more preferable view, rights exist outside the Code only in so far as they are not specifically referred to in the Code.

(ii) *Wife's right.*

If the deserted wife's right is not an interest in land it does not appear to be registerable or caveatable either under the Australian system or the Land Code.⁶⁰ Therefore it is not merely an unregistered right taking effect as a right of a different nature. It is an unregisterable right taking effect as the right it purports to be.⁶¹

It is therefore submitted that the preferable general approach is that *prima facie* the right is one which is entirely outside the ambit of statutes relating to registration of title unless the wording of a particular

57. [1917] A.C. 209.

58. *I.e.* a property right, in the sense of an interest in land rather than a chose in action.

59. *I.e.* being based either on the common law or statute (as to which see *supra* pp.216-219).

60. As to this point see *infra* pp.238-240.

61. There are instances where Courts seem to have given more force to unregistered registerable interests than non-registerable rights. See, *e.g.*, *Vallipuram Sivaguru v. Palaniappa Chetty* (1937) 6 M.L.J. 59; *Chin Cheng Hong v. Hameed* (1954) 20 M.L.J. 169. It is submitted that this is contrary to the idea of a Land Code and in effect makes nonsense of its provisions.

statute is wide enough to include it. This is the view apparently taken by Cross J. in the most recent English relevant decision, and the only one concerning land the title to which was registered — *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*⁶² In holding that a deserted wife's equity was not an "overriding interest"⁶³ (so that a chargee took subject to her rights because of her occupation of the house) he said that a wife's equity was not a *right in rem* at all but a right to appeal to the court for protection. To say that a successor in title to the husband has no higher right to possession than the husband he said, is different to saying that the wife has a "correlative legal right in respect of the house".⁶⁴

It is not clear however whether the learned judge was holding that (i) the right fell completely outside the scope of the Act or (ii) as it was not capable of being an overriding interest, not being an interest in land, the chargees took free from it by virtue of being a chargee under the Act. If the former course was being followed, as has been said above,⁶⁵ the next question the learned judge should have asked was whether the conscience of the successor was affected in the instant case. But he simply discussed the question of notice from the hypothetical viewpoint of what the issues would have been if the land had been outside the sphere of the Act. At no point did he seem to think the issue of notice relevant to the facts before him. It is respectfully submitted that if this omission was based on the theory that it was irrelevant, it is inconsistent with his definition of the right, by which he excluded it from the scope of an "overriding interest". If it be correct that the equity is excluded from being an overriding interest it is difficult to appreciate how it is to be thought of as within the Act at all, especially having regard to the wide provision regarding overriding interests.⁶⁶ If it is outside the Act then it is equally as difficult to see why the question of notice should be any different in content whether or not the title to the land is registered. Yet, Cross J. treated the issues as quite separate.

If the learned judge was holding that although the wife's interest cannot be registered, a registered chargee takes free of it because he is a registered chargee, he was in effect destroying the wife's equity in regard to land the title of which is registered. This in turn seems inconsistent with his general approach of recognising the validity of the equity as he defined it, and his obvious recognition that the wife in the instant case had some sort of right to possession if only for a limited period.⁶⁷

62. [1963] 2 W.L.R. 1015.

63. As to the definition of such an interest see *supra* note 34 at p.230.

64. [1963] 2 W.L.R. 1015 at p.1021.

65. *Supra* at p.231.

66. As to this provision see *supra* note 34 at p.230.

67. The learned judge thought that it would not be right to make an order for possession in 28 days, because of certain proceedings by the wife which were pending. Although the plaintiff was willing to accept an order for possession in 3 months Cross J. obviously thought he had the power to make such an order without the defendant's consent, and it appears that he based this power on the existence of the wife's equity. There is no hint that he based it on any general discretion to postpone the execution of the order, such as the case of *Dickson v. McWhinnie* (1958) 75 W.N. (N.S.W.) 204 suggests exists (as to which see *supra* pp.225-226).

It is not clear which view the Supreme Court of New South Wales adopted in *Dickson v. McWhinnie*⁶⁸ when they relied on provisions of the Real Property Act, 1900-1956⁶⁹ as a secondary ground for declaring that a deserted wife in New South Wales had no rights of possession of the matrimonial home against her husband's successors in title. The Supreme Court of New South Wales treated the wife's right as an "un-registerable proprietary interest", thereby giving the wife the worst of all worlds, and seemed to imply that therefore it was an interest in land. After citing various sections of the Real Property Act, 1900-1956 the Court said that

"a caveat by a wife claiming to have an interest in land because it had been the matrimonial home and that she was occupying it as a deserted wife would be something of a novelty to conveyancers in New South Wales".⁷⁰

The Court relied on the reasoning of Ligertwood J. in the South Australian case of *Maio v. Piro*⁷¹ who thought that the complementary Act of that State (Real Property Act, 1886-1945) did not

"leave room for the recognition of a new type of interest in land under the Act arising by operation of law which would place a clog on the otherwise indefeasible title of a registered proprietor".

He thought it "much more consonant with the general scheme of the Act" that the wife's right's

"should be treated as personal rights binding her husband as long as he owns the property but not affecting his powers of disposition over land to which he has an indefeasible title".⁷²

It is submitted that by construing the wife's right as an equity, and therefore not an interest in land, all these objections are avoided and the points made become irrelevant. The Court, as has been said,⁷³

68. (1958) 75 W.N. (N.S.W.) 204.

69. See N.S.W. Statutes 1828-1957 Vol. 9 p.682.

70. *Dickson v. McWhinnie* (1958) 75 W.N. (N.S.W.) 204 at p.217. The Court thought the Registrar General would be similarly surprised (*ibid.*). Perhaps a novelty to conveyancers ought to be a factor in favour of recognising the right.

71. [1956] S.A.S.R. 233.

72. *Maio v. Piro* [1956] S.A.S.R. 233 at p.238. This conclusion was reached despite s.249 of the Real Property Act of South Australia which provides "nothing contained in this Act shall affect [the Court's jurisdiction] over equities generally". The learned judge thought this referred only to "equities which would have been recognised by the former Courts of Chancery". It is submitted this interpretation ignores the nature of equity generally and "an equity" in particular. The very idea of an equity is an intervention by the Court where circumstances of the time call for it. Perhaps the learned judge had not been referred to the alleged remark of Harman L.J. to the effect that equity is not to be presumed to be past the age of child-bearing adopted by Lord Evershed in *Simpsons Motor Sales (London) Ltd. v. Hendon Corpn.* [1963] 2 W.L.R. 1187 at p.1209. At all events he must disapprove of the remark.

73. *Supra* at p.223.

at no time investigated the nature of an "equity". They were concerned to destroy any notion that the English courts recognised any right at all, and as a secondary ground argued that if the right was recognised as an interest in land, it did not fit in with the system of registration of title. As has been said, there is nowhere mentioned in the case the English decision of *Westminster Bank Ltd. v. Lee*⁷⁴ which had been decided prior to *Dickson v. McWhinnie*⁷⁵ and would have given the court a helpful clue as to the meaning of an equity. It is submitted that the view adopted by Cross J. in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*⁷⁶ is a logical conclusion from the English decisions reviewed in *Dickson v. McWhinnie*,⁷⁷ and in any event represents a view of the nature of the right preferable to that adopted by the Supreme Court.

PARTICULAR PROVISIONS POSSIBLY AFFECTING WIFE'S RIGHT

(i) *Real Property Act, 1900-1956 New South Wales.*

It seems clear that in order to be protected under the Real Property Act of New South Wales an interest must be an interest in land.⁷⁸ If the wife's equity were held to be such an interest and a wife failed to lodge a caveat the terms of s.43(i)⁷⁹ would appear a full answer to any contention that a purchaser taking with notice of her position would be bound thereby by way of analogy to a contractual interest.⁸⁰

Because of the view it took, the question whether the provisions of the Act conferring an indefeasible title on the registered proprietor, could operate so as to defeat an interest unregistrable and not caveatable because it was outside the Act, was never before the Supreme Court in *Dickson v. McWhinnie*.⁸¹

By s.42 of the Act a registered proprietor of land of an estate or interest in land holds the same free from any "encumbrances liens estates or interests" except those notified on the *folium* of the register-book. It is clear that this does not mean that he holds free from any contractual obligations under which he may be in respect of the land,⁸² and it is sub-

74. [1956] Ch. 7.

75. (1958) 75 W.N. (N.S.W.) 204.

76. [1963] 2 W.L.R. 1015.

77. (1958) 75 W.N. (N.S.W.) 204.

78. See *ibid.* ss.41, 72 and Sch. 16. See also Baalman, *Commentary on the Torrens System in N.S.W.* (Sydney, 1951) at pp.7-9; 276-278.

79. By that section a transferee from a registered proprietor is not to be affected "by notice direct or constructive of any trust or unregistered interest any rule of law or equity to the contrary notwithstanding."

80. It is submitted for the reasons set out *supra* (pp.232-233) that the section should not be read as if "unregistered" included "unregistrable".

81. (1958) 75 W.N. (N.S.W.) 204.

82. See *supra* p.233.

mitted that, wide though the words are, they refer essentially to interests in land, and should not be construed to include equities as distinct from equitable interests.⁸³

(ii) *F.M.S. Land Code*

In *Chin Shak Len v. Lin Fah*⁸⁴ Gill J. held that the decision of *Dickson v. McWhinnie*⁸⁵ represented the law of Selangor because of s.42 of the (FMS) Land Code.⁸⁶ The relevant provisions of that section are:

42 (i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.

In adopting the New South Wales decision Gill J. did not examine whether the wife's right (whatever its nature) came within the Land Code at all (assuming presumably that if it fell within the Real Property Act it fell within the Land Code) and completely ignored s.42(vi) of the Code.

The meaning of subsection (vi) is quite uncertain. If the word "indefeasible" is construed to mean "affected", as presumably it should be, then the proviso is necessary if the scheme of the Act is to be recognised in one of its main provisions; and it is submitted that the proviso is wide enough to allow the recognition of the wife's equity, if that right were recognised apart from the Act. As has been stated s.55 of the Code provides that land is

"not capable of being transferred, transmitted, charged or otherwise dealt with except in accordance with the provisions of this Enactment".

It is submitted that the reference to a dealing in land implies firstly, action of the parties as opposed to operation of law, and secondly a *right in rem* as opposed to an equity. Therefore neither of the basic provisions of the code includes within its terms (or its prohibitions) the right of the deserted wife as here contended.

As with the New South Wales statute it seems clear that only in-

83. The basis of this contention is set out above (see *supra* pp.232-233, 237-238).

84. (1962) 28 M.L.J. 418.

85. (1958) 75 W.N. (N.S.W.) 204.

86. F.M.S. Laws (1935) Cap. 138. There does not appear to be a complementary section in the Johore Land Enactment (No. 1 of 1935 Revd. Laws), although the definition of "transfer" in s.62 by excluding the "passing of land by operation of law" achieves the same result as s.42 (vi) of the Land Code (F.M.S.).

terests in land are registerable or caveatable under the Land Code.⁸⁷ Therefore if the view is taken that the wife's right, being an equity, is not such an interest the right is outside the scope and the express provisions of the Code.

It is submitted that if the right is unregistrable it should be recognised just as is a contractual right. It has been submitted that the Code, though it may prohibit the recognition of an unregistered registrable interest as such, allows its recognition if it is also an unregistrable interest, as that interest. It can hardly be contended therefore that the Code affects unregistrable rights.

If the wife's right is thought of as an interest in land, or something akin to a lien⁸⁸ and therefore caveatable⁸⁹ the only controversial question would then be whether, if unregistered, the right should be recognised by analogy with contractual rights, *i.e.* although no interest in land is created the equity should be recognised on the grounds of conscience. It can be argued with some force that the recognition of contractual rights outside the Code is itself contrary to the wording of the relevant provisions of the Land Code, and that that wording is wide enough to prevent the recognition of any rights concerning or relating to land. However, if such rights are admitted (as they have been⁹⁰), there seems no reason why such recognition should not extend to an equity such as that of the deserted wife.⁹¹ The basis of and reason for recognition of the rights is identical, and, as has been said, s.55 (which could refer to contracts made in relation to land) can be stretched to rights not directly created by acts of the parties only by unduly straining its language.

(iii) *Singapore Land Titles Ordinance, 1956.*

It seems just as clear from the provisions and scheme of the Singapore Land Titles Ordinance, 1956⁹² that only interests in land can be

87. Laws of the F.M.S. (1935) Cap. 138. See *supra* pp.233-235 and *Liew Siew Yin v. Lee Pak Yin* (1940) 9 M.L.J. 135 per Murray Ainsley J. "... it seems clear that the only estates that could be registered are terms of years and what are called in recent English legislation fee simples absolute" (*ibid.* at pp.137-138). The learned judge was of the opinion that the system of caveats was intended to give protection to (in English terms) "holders of particular estates and equitable interests" (*ibid.*).

88. Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p.478 likened the wife's interest to a "clog or fetter like a lien". It is similar to a lien only in so far as the owners of property cannot convey it (under certain circumstances) free of the lien. Its nature is quite unlike a lien in that it is a right exercised over the property for no other purpose than that exercise. The provision allowing a lien to be protected by a caveat (s.134) is by its wording unsuitable to include a deserted wife's right.

89. See Laws of the F.M.S. (1935) Cap. 138 s.134.

90. See *Haji Abdul Rahman v. Mohammed Hassan* [1934] A.C. 491 and *supra* pp.234-235.

91. There is no section complementary to s.43 of the N.S.W. Real Property Act (as to which see *supra* pp.238-239).

92. No. 21 of 1956. All the Ordinance has now been brought into force with the exception of s.114 (see G.N. Nos. S. 167/59; S. 265/60).

registered.⁹³ Further, it is only claims to interests in land which can be made the subjects of caveat,⁹⁴ but under s.74(2) where "a licence relating to the use or enjoyment of land is by law binding on the assigns of the licensor" the licensee is deemed to have a caveatable interest.⁹⁵

Apparently this provision was introduced to bring within the scheme of the Ordinance the "new interest in land" created by the English courts⁹⁶ exemplified in the decisions of *Errington v. Errington*⁹⁷ and *Bendall v. McWhirter*.⁹⁸ Whether or not a contractual licensee has an interest in land by virtue of an ability to enforce a right gained by the contract against a person not a party thereto, it seems clear that in England at any rate a deserted wife has no such interest;⁹⁹ and it has been submitted that the preferable view is that she has an equity which is a personal right. The question therefore arises whether if a similar right were to be recognised in Singapore, it could be protected by a caveat even though it is not an interest in land.

It was apparently assumed by the draftsman that if the wife has a right it is akin to, and may be described as, a licence. This view has the support of Lord Denning who has likened the right to that of a contractual licensee in that both may be binding on third parties.¹ If licences *are* binding on third parties it is because of identical reasons that a deserted wife can enforce her right to possession of the matrimonial home against persons other than her husband. It would be inequitable to allow a person to take over the interest, knowing of the obligation of the original party and be able to ignore that obligation. This is the basic principle of the binding effect of restrictive covenants, of licences where the licensee has expended money because of the agreement (or permission), and (if they are so binding) simple contractual licences.² The content of the wife's interest is the same as that of a licensee. She has a right to possession of the land, a right of use and occupation but she has no assignable interest.

The interest however is available to her because of her status, as

93. See *ibid* ss.19, 27 and Baalman, *The Singapore Torrens System* (Singapore, 1961) at pp.54-57.

94. Land Titles Ordinance, 1956 s.93(i) Cf. Baalman, *op. cit.*, at pp.195-196. In addition, any person authorised by any Ordinance (whether or not claiming an interest in land) may lodge a caveat (Land Titles Ordinance, 1956 s.93(i)).

95. Licences not creating an interest on land do not appear to be either registrable or caveatable under the Australian system (See *In re Ridgeway and Smith's Contract* [1930] V.L.R. 111 and Baalman, *op. cit. supra* note 78 (pp.30-31, 157-158), and by parity of reasoning under the F.M.S. Land Code. (See *supra* pp.233-235 and note 87).

96. See Baalman, *op. cit.* (note 93) at p.162.

97. [1952] 1 K.B. 290.

98. [1952] 2 Q.B. 466.

99. See *supra* at pp.219-223.

1. See *Bendall v. McWhirter* [1952] 2 Q.B. 466 at pp.478-485.

2. See generally Maudsley, *op. cit.*, (1956) 20 Conv. (N.S.) 281.

a result of the obligations imposed on the husband on entering that status. It may be that that status is a result of agreement, but the wife's right flows from the status and is not the subject of direct agreement. In this sense her right is not dependent on the recognition of the right of contractual licensees to enforce the contract against third parties. It has a wider basis, being a right flowing from the status of marriage, a status which of itself affects third parties and the incidents of which affect the members of society as a whole.

Further, the right of a licensee is (if anything) to enforce an agreement or to recover damages for its breach. The right of a wife, as it is here defined, is simply to have confirmed in any particular circumstances a possible incident of the marriage status.

The content of the right, *i.e.* possession of land without an interest is exactly that of a licensee. The ultimate origin of her right is agreement, although it is submitted that it is preferable to regard it as an incident of the marriage status. The existence and exercise of the right depends on the discretion of the Court simply because its origin is not in any definite agreement but flows from a status itself the product of agreement.

The nature of the right must be considered in conjunction with its content. If it is regarded as a personal right does that either alone, or together with any other characteristics, put it outside the provision's operation? It is submitted that the content of the right is adequately described as a licence and that its personal nature should not exclude it from the sphere of section 74(2). The provision was inserted specifically to include it,³ and being brought within it, avoids the awkward problem of fitting into the scheme an unregistrable right in relation to land exercisable against persons other than the grantor.

That the provision was introduced in the belief that the right was an interest in land is irrelevant, provided its wording is sufficiently wide to include the right as it is. In fact, the wording of the provision belies the reason for its introduction. A licensee is "deemed to have an interest in land", *i.e.* presupposing that the interest either is not, or may not be, such an interest. Although the Registrar is prohibited from notifying on the register "any transaction the legal effect of which is personal only or which does not create a recognised interest in land",⁴ it is submitted that the wording of section 74(2) necessarily means that all rights falling within its sphere are for the purposes of protection by caveat "interests in land". That being so, the prohibition referred to can have no application; if it were not so it would make nonsense of the sub-section.⁵

3. See *supra* note 96 at p.241.

4. See Land Titles Ordinance, 1956 s.19(2).

5. A further argument against the application of the prohibition to the deserted wife's right is that the right can in no sense be said to be a "transaction".

The wording of the Ordinance as to the general effect of registration⁶ is nearer to the Real Property Act, 1900-1956 of New South Wales⁷ than to the relevant provisions of the FMS Land Code,⁸ and the argument as to whether an unregistered registrable interest or an unprotected caveatable interest within the scope of that Act can be recognised apply to similar interests within the scope of the Ordinance.⁹ The Ordinance (contrary to the New South Wales Act) lists a number of rights which are not affected by the granting of a title free "from all encumbrances liens estates and interests whatsoever except such as may be registered or notified on the land register".¹⁰ It may be argued that the listing of these exceptions operates by exclusion and supports the argument that the only unregistered rights in relation to land recognised are those listed therein.

If the wife is held to have a right, but an unregistrable right, the same considerations apply in regard to its enforcement as were set out in regard to the New South Wales Act,¹¹ with the additional argument that the Ordinance in listing certain rights and remedies unaffected by the indefeasibility of the title of the registered properties includes therein an unregistrable interest — "a contract to which the proprietor was a party".¹² Again the argument could be used that the only unregistrable interests recognised as valid against a registered proprietor are those listed in the Ordinance.

CONCLUSIONS

It is submitted therefore:

- (1) That a wife has a right according to (or subject to) Married Women's Property legislation to ask a Court to exercise its discretion to allow her to remain in possession of the matrimonial home owned by her husband contrary to his wishes.
 - (i) That the basis of the right is the matrimonial status, although its exercise is now controlled by legislation.
 - (ii) This right can arise only when the need for the court's protection arises.
 - (iii) The right may be forfeited (or it may be prevented from arising) by the wife's conduct.

6. See Land Titles Ordinance, 1956 (No. 21 of 1956) ss.27-31.

7. As to which see *supra* pp.238-239.

8. Laws of F.M.S. (1935) Cap. 138.

9. For such arguments see *supra* pp.238-239.

10. See Land Titles Ordinance, 1956 (Singapore) s.28.

11. See *supra* pp.238-239.

12. Land Titles Ordinance, 1956 (Singapore) s.28(2).

or *alternatively* the wife's conduct is material in exercising the discretion.

- (2) That a wife has a right to ask a Court to exercise its discretion to allow her to remain in possession of the matrimonial home against her husband's successors in title who take their interest in the home with notice of the wife's position.
 - (i) That the basis of the right is the matrimonial status.
 - (ii) That the existence of the right is dependent on notice of the wife's position. Notice is a question of fact in each case and it must be determined whether a purchaser (or mortgagee) has deliberately (or carelessly) abstained from making proper inquiries.
 - (iii) That the length of period of possession must be determined in the exercise of the Court's discretion, considering *all* the circumstances of the case.
- (3) That statutes providing for registration of title to land are *prima facie* irrelevant to the issue of the existence and exercise of the wife's right. Such a statute would become relevant if not only did it establish an exclusive system of estates and interests in land, but prohibited all rights concerning land other than provided for therein.
- (4)
 - (i) That the FMS Code is (following (3) above) irrelevant to the wife's right.
 - (ii) That as regards Singapore the right should be regarded as being within the scheme of the Land Titles Ordinance, being in essence a licence binding on the licensor's assigns and it could therefore be protected by a caveat under s.74(2) of the Ordinance.

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