



SCOTTISH LAW COMMISSION

MEMORANDUM No: 41

FAMILY LAW

**OCCUPANCY RIGHTS IN THE MATRIMONIAL
HOME AND DOMESTIC VIOLENCE**

(Volume 1: Survey of Proposals)

17 April 1978

This consultative Memorandum is in two volumes, of which this is Volume 1. The Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 October 1978.

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AND DOMESTIC VIOLENCE

Volume 1: (Survey of Proposals)

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SCOTTISH LAW COMMISSION

Memorandum No. 41

on

Occupancy Rights in the Matrimonial Home
and Domestic Violence

PART I: INTRODUCTION

Scope and arrangement of Memorandum

0.1 In this consultative Memorandum,¹ we advance provisional proposals for reform of the law of Scotland relating to occupancy rights in the matrimonial home, and in particular the law on:

- (a) the right of a husband and of a wife to attain, retain or recover occupancy of the matrimonial home;
- (b) the possessory rights of a married couple in the furniture and plenishings of the home; and
- (c) the civil remedies available to protect a spouse and the children from the other spouse's violence in the home.

The Memorandum is the second of three consultative memoranda to be published having a bearing on family property law.² For the benefit of those primarily interested in broad issues of policy rather than detailed technical solutions, we have attempted to describe those issues simply and briefly in Part I which is in this volume.³ At the end of this volume, a summary of our provisional proposals is set out in numbered propositions to facilitate comment and criticism. Volume 2 contains a detailed account of the existing law and technical problems, the options for reform and the arguments underlying our proposals. We have attempted to link the two volumes by appropriate cross-references.

¹The Memorandum is issued in pursuance of Item 14 of our Second Programme of Law Reform, the Reform of Family Law - (1968) Scot. Law Com. No.8.

²In our Memorandum No. 22 on Aliment and Financial Provision, issued for comment on 31 March 1976, we proposed that the courts should have powers to adjust the property rights of spouses on divorce, including inter alia proprietary rights in the matrimonial home and its contents. We propose to issue a third consultative Memorandum on family property law in due course: see para. 0.11 below.

³See page 10 below.

Two social policy objectives

0.2 As its title implies, this Memorandum is mainly designed to promote two important objectives of social policy. The first objective is to protect so far as practicable a spouse who has no legal rights to the matrimonial home (usually the wife) from dispossession by the spouse who is owner or tenant. The second objective is to strengthen the protection which the civil law affords against a spouse's violence, whether the violence is directed at the other spouse or the children.

0.3 Occupancy of the matrimonial home: Under Scots law, there is nothing to stop the owner or tenant of a dwelling occupied as a matrimonial home from putting his wife out of the home. He may invoke the aid of the courts for this purpose or "he may take her by the shoulders and turn her out" himself. If he uses more force than is necessary he may be liable in damages and he will probably have to pay aliment to maintain her. But generally speaking, unless the wife has a legal interest in that house under the title deeds or tenancy agreement, she has no right to remain in the house which she can enforce against her husband if he is owner or tenant. Further, there is nothing to stop the owner from selling the home behind his wife's back or over her protests, and a tenant may likewise dispose of his tenancy in any manner permitted by the lease or authorised by the landlord. In the converse situation, where the title to the home is vested in the wife alone, she is entitled to eject her husband and to dispose of the home without his consent.

0.4 Among the legal systems of the Commonwealth and Europe,¹ Scots law is unusual in treating the spouses as if they were strangers when disputes arise about occupancy of the matrimonial home. In our view, the house which is occupied as the matrimonial home should not be regarded as a mere investment. It is the centre of family life. It is the place where the spouses cohabit and rear children, and where the members of the family can together enjoy the inestimable satisfactions of family life. It fulfils the basic human need for shelter. And its situation determines the environment in which the family develop roots and the community to which they belong and in which they are integrated, even in a world of social mobility.

¹Trends in these legal systems are described in paras. 0.15 to 0.17 below.

0.5 Having regard to these and other factors, we think that the spouse who happens to be owner or tenant should no longer have unfettered powers to put the other spouse out or to dispose of the home despite the other spouse's objections. We elaborate our reasons more fully below, but the gist of the argument is that the present law on occupancy rights is unjust to one or other spouse, usually the wife; that it is unrealistic insofar as it treats spouses as strangers; and that it has become out-of-date. Our proposals are therefore designed to confer occupancy rights on a spouse who has no legal interest in the home and to protect these rights against adverse dealings by the owner-spouse which might lead to loss of occupancy.

0.6 Protection against domestic violence: The case for conferring occupancy rights is primarily concerned with the provision of accommodation - giving a spouse and dependent children a secure roof over their heads. The problem is, however, entwined with the problem of domestic violence. Two of the main reasons why women remain in the home enduring repeated violence over the years are simply (a) that they have nowhere else to go, and (b) that they cannot protect themselves by ejecting their husbands because the title to the home is normally in his name or joint names. Further, if a wife has no right to occupy the home, she cannot protect herself by obtaining an interdict against the husband's violence because he can easily react by ejecting her from the home. For this reason, we think that reform of the civil law on domestic violence must be considered along with the law on occupancy rights. While, therefore, we suggest ways of strengthening the civil remedy of interdict against domestic violence, (as by attaching police powers of arrest to the interdict etc) these reforms would not go far enough. It is, we suggest, necessary also to enable the courts to exclude a violent spouse from the matrimonial home, even, in certain cases, where that spouse is the owner or tenant and where an exclusion order would therefore override his (or her) rights of property. For unless the spouses are compelled to live apart, protection of an injured wife and family by interdict against domestic violence will too often prove illusory.

0.7 Unmarried cohabiting couples: A more difficult and controversial question is whether similar protection should be given in cases of domestic violence involving unmarried cohabiting couples. We suggest a more limited change in the law whereby protection would be given for a limited period.

Request by Secretary of State for Scotland and Lord Advocate

0.8 The Secretary of State for Scotland and the Lord Advocate requested us¹ to give early consideration in our review of family law and to report on, first, possible changes in the law to give additional protection to a spouse threatened with violence by the other spouse and, second, on the question whether a statutory right of occupation in the matrimonial home should be introduced in Scotland.² The request was in part a response to the Report of the Select Committee on Violence in Marriage.³ The Government's request, however, and the proposals in this Memorandum are not confined to domestic violence. They also deal with non-violent exclusion from the home, for example, where a husband orders his wife to leave; or refuses to take her back; or relinquishes possession of a Rent Act tenancy by deserting her so that the landlord is able to evict her. The purpose of this Memorandum is to present tentative proposals for the amendment of the law dealing with those problems, to elicit comments from interested persons on these proposals, and to enable us, after consideration of these comments, to report as requested by Ministers.

¹ See Observations on the Report from the Select Committee on Violence in Marriage (1976) Cmnd. 6690, para. 68.

² We understand that the request relates to changes in the civil law and not the criminal law and we have therefore adverted to criminal proceedings only in two contexts which are both consequential on our examination of the civil law. Thus our proposals have implications for offences under the Rent Act 1965, s.30 (see Proposition 6 and para. 2.27) and we also suggest a new offence of criminal breach of certain interdicts (Proposition 16 and para. 2.85).

³ H.C. 553 (1974-75) paras. 55-57. The Committee was reconstituted as the Select Committee on Violence in the Family and has produced further reports on Battered Wives H.C. 473 (1975-76) and on Violence to Children H.C. 329 (1976-77)

The principles of separate property and equality of the sexes

0.9 The law on the occupancy rights of spouses in the matrimonial home is but a particular application of a wider principle known as the principle of separate property. Under this principle, each spouse owns the property which he or she brought into the marriage, or acquired during the marriage, as if the other spouse were a stranger. When the separate property principle was first introduced, it represented an important step forward in the movement towards the legal emancipation of women and the equality of the sexes before the law. For although the principle is apparently deeply embedded in Scots law, it is not historically a creation of the common law but a product of legislation (in particular the Married Women's Property (Scotland) Acts 1881 and 1920) which cut down the paramount rights of a husband over his wife's property which he had enjoyed under the older common law (and which had even enabled him to put his wife out of a home owned by her).

0.10 Where the matrimonial home is not in joint names, we think it probable that it will usually be in the name of the husband rather than the wife. If so, the separate property principle operates unfavourably to wives more often than it does to husbands, and one of the main arguments for reform in this domain is that the law in its practical operation infringes the principle of sex equality. For the equal legal capacity of the spouses to acquire property rights in the home is not in practice paralleled by equal opportunity to acquire such rights. The case for reform, however, does not depend wholly on sex equality principles since there are cases where a wife can eject her husband from the home without reasonable cause.

Future Memorandum on family property law; and co-ownership

0.11 Although the principle of separate property applies with minimal exceptions to all property owned by either spouse, this Memorandum deals only with possessory rights in the matrimonial home and its contents because it is in this context that the most urgent problems arise. Moreover, matrimonial homes of all types are the centre of family life, whether they are public or private sector tenancies, or owner-occupied dwellings. Chiefly in the owner-occupier sector, the matrimonial home is important in

another respect for it is usually the most valuable single marketable asset owned by the spouses or either of them.¹

O.12 Nowadays, most owner-occupied dwellings in Scotland, as in the United Kingdom generally, are acquired by a relatively small capital payment towards the price, the balance being financed by a loan, often from a building society, repayable with interest over a long period out of income. Under Scots law, the spouse who is owner will gain the whole benefit from the inflating value of the matrimonial home since the property rights in the home are fixed by the terms of the title at the time when it is acquired.² This is so even where the owner's wife has made financial contributions to repayment of the secured loan or to the initial purchase price. The most she will receive as a return will be recompense, or repayment of her contributions.³

O.13 In these circumstances we have anxiously considered whether to advance in this Memorandum proposals for co-ownership, or an automatic equal sharing of the value, of the matrimonial home on the lines of the co-ownership proposals of the Law Commission for England and Wales.⁴ While this further breach in the separate property principle would have been a logical extension of the proposals in this Memorandum, we think that it should be considered in the context of a review of family property law as a whole. To introduce equal sharing of the matrimonial home would pre-empt other possible options, such as full community or deferred community of property, or judicial discretionary vesting orders, or equal sharing of family assets. It would be necessary to consult interested bodies on these alternative solutions and to do so here would overload the Memorandum and delay essential reforms which may be possible in the shorter term. We have therefore decided to consider property sharing in the home and its contents in our third Memorandum on

¹All tenancies have a pecuniary value of a kind, for example in a question between the spouses - even public sector tenancies under which the tenant has no legal security of tenure. And a private sector tenant can renounce his tenancy at a premium. But only owner-occupied property is a freely marketable investment.

²See generally Clive and Wilson, Husband and Wife (1974) pp. 289 et seq.

³Ibid., pp. 308-310.

⁴See First Report on Family Property Law: A New Approach (1973) Law Com. No.52. The detailed recommendations of the Law Commission on co-ownership in England and Wales will be made in a Report referred to at para. O.15 below which will be published shortly.

family property law (including succession). The question whether occupancy rights in owner-occupied property should extend beyond the owner's death is best considered in that Memorandum, and in this Memorandum it is only in the case of private sector tenancies (where the principle of transmission on death is already in force) that we have proposed changes in the law of succession to possessory rights in the matrimonial home.¹

O.14 We note in parenthesis that some of the worst social injustices resulting from the separate property principle are already mitigated partly by the law on alimentary obligations, and more especially by the power of the court to award financial provision on divorce.² One effect of introducing effective restraints on disposal, such as are suggested in this Memorandum,³ would be to ensure that the home and its contents are not disposed of during the marriage except with good cause, and will thus be included among the property which the court may allocate equitably as between the spouses on divorce. Moreover, sharing of the value of the home is primarily relevant to the owner-occupier sector, which forms only one third of the total housing stock in Scotland. In these circumstances, we think that legislation on ownership is less urgent than legislation on occupancy rights and their protection.

The United Kingdom context

O.15 In preparing this Memorandum, we have derived considerable assistance from the experience gained in England and Wales in operating the system of statutory occupation rights introduced by the Matrimonial Homes Act 1967. This Act implemented, with substantial modifications, recommendations made by the Morton Report⁴ which apply also to Scotland.⁵ We have also had regard to the amendments to the 1967 Act effected by the Domestic Violence and Matrimonial Proceedings Act 1976; to the further proposals of the Law

¹We deal with these points more fully at paras. 3.38-3.39 (death of public sector tenant); 4.21-4.24 (death of private sector tenant); and 6.6 (death of owner).

²See generally our Memorandum No. 22 on Aliment and Financial Provision (1976) Parts II and III.

³See Proposition 48 (para. 6.46) and see also paras. 1.12-1.23 below.

⁴Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, Recommendations 78-81.

⁵Ibid., Recommendations 59-62 (Scottish).

Commission for England and Wales for amending the law on occupation rights¹ and for strengthening the powers of magistrates' courts to deal with domestic violence;² and to the proposals of the Finer Report on the housing problems of one-parent families.³ In their Third Report on Family Property, (which has been submitted to the Lord Chancellor and will be published shortly),⁴ the Law Commission advance proposals for England and Wales on possessory rights relating to the furniture and plenishings and other 'household goods'. We have had the advantage of consulting them on these proposals and would express our indebtedness for their permission to rely on passages from their Report in advance of its publication.

The international context

0.16 Common Law systems. In contrast to Scots law, in the Common Law systems of the Commonwealth, the spouse of the owner or tenant of the matrimonial home has generally a right to remain there. Where the right depends on the common law, it is usually a purely personal right; that is to say, it is enforceable against the spouse who is owner or tenant but not against third parties such as purchasers, mortgagees or landlords. In some countries, legislation provides for the transfer of the title to the home or otherwise protects occupancy against third parties. In the Republic of Ireland, recent legislation has introduced occupancy rights protected by restraints on disposal and procedures for giving notice to third party purchasers by registration.⁴ Further, in almost all of those legal systems, the principle of separate property is under attack upon the express ground that married women do not have the same opportunity as their husbands to acquire property. Many Commonwealth legal systems have enacted or are officially examining legislation designed to achieve a more equitable division of "family assets" (eg the matrimonial home and its contents). As an incident or by-product of this legislation, provision is made protecting occupancy rights in the home.

¹Working Paper No. 42 on Family Property Law (1971) paras. 1.3 to 1.26; Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978) Law Com.No. 86.

²Report on Matrimonial Proceedings in Magistrates Courts, Law Com. No. 77 (1976), Part III. The Domestic Proceedings and Magistrates' Courts Bill giving effect to the Report was introduced in the House of Lords on 17 January 1978.

³Report of the Committee on One-Parent Families (1974) Cmnd. 5629, Part 6, Housing.

⁴See Note 1 above.

⁵Family Home Protection Act 1976: discussed in Volume 2.

0.17 European countries: A recent Council of Europe survey¹ shows that the majority of continental West European countries have legislative provisions of various kinds limiting to a greater or lesser degree the power of one spouse to dispose of property intended for the joint use of the spouses (such as the matrimonial home and its contents) without the consent of the other spouse. These states consist of or include Sweden, Denmark, and Norway, Belgium, the Netherlands and Luxembourg; West Germany and to some extent Austria and Portugal. On the other hand, Greece, Italy and Switzerland do not in general impose any restrictions of this kind. At the recent Council of Europe Conference at Vienna on Family Law, it was decided² to propose that the Council should inter alia "take the necessary steps to reach a harmonisation or at least to bring about a more common approach in the European laws concerning the powers of spouses over property for their common use, in particular with regard to the family home and the household contents; and the consideration of prohibiting either spouse from unilaterally disposing of this property, and the provision of effective sanctions". Our proposals are in consonance with these trends.

Choosing the matrimonial home

0.18 At present, the right to choose the place of the matrimonial home is vested in the husband, the only limitation being that he must exercise the right reasonably.³ The rule, however, is chiefly relevant to questions of desertion in consistorial or alimentary actions and not to the proprietary or possessory rights of spouses in the home. We shall therefore consider the matter in another Memorandum.

¹ Unpublished Council of Europe report on Powers of spouses over property for their common use and property rights of the surviving spouse (Rapporteur: Professor A Rieg, Strasbourg) being paper CJ-DF(77)3 prepared for the European Conference on Family Law held at Vienna on 19-22 September 1977.

² Report of Commission III of the Conference.

³ Clive and Wilson, Husband and Wife (1974) pp.174-6.

PART I: SURVEY OF PROVISIONAL PROPOSALS

1.1 In this Part, we briefly survey the provisional proposals which are advanced and argued more fully in Parts II to IX in Volume 2 and summarised at the end of this volume (see page 29).

Personal occupancy rights in the matrimonial home and remedies against domestic violence (Part II in Volume 2)

1.2 In Part II, we advance specific proposals (Propositions 1 to 17) for reform of the law on three inter-related topics:-

- (a) the question whether a spouse who has no possessory rights in the matrimonial home (eg as owner or tenant) should be given a personal right to occupy the home enforceable against the spouse who has such possessory rights;
- (b) the question whether and in what circumstances it should be possible for one spouse to exclude the other from the matrimonial home for the protection of the family or for some other reason; and
- (c) the civil remedies available to protect members of the family from the violence of one of the spouses.

Thus, at this stage we are concerned with those legal relationships which exist within the family in relation to the family home. We deal later with the protection of occupancy against the claims of third parties - such as purchasers, landlords, or heritable creditors - and with the transfer of title between the spouses.

A. Occupancy rights

1.3 We have already mentioned that, as a result of the principle of separate property in marriage, Scots law confers no entitlement upon a spouse to occupy the matrimonial home if it belongs to the other spouse. Where the title stands in the husband's name, for example, he may eject his wife with or without a court order. In the converse situation where the wife is owner or tenant, she may eject her husband. Our first proposal

therefore is to confer occupancy rights on a spouse of the owner or tenant.¹ We summarise the reasons as follows²:-

First, as the Morton Report said, "the strict application of the separate property principle is apt to lead to injustice, to one or other spouse and particularly to the wife".³ To many people, it seems unjust that the spouse who happens to have the proprietary title should be permitted by law to eject the other spouse from the matrimonial home. In many cases, the ejected spouse may have a moral claim to a proprietary stake in the home since she (or he) may have contributed as much to the home (or to the marriage) in money or money's worth as the owner or tenant spouse. Marriage raised reasonable expectations of secure family life within the home and the economically stronger spouse should not be able, at his merest whim, to disappoint those expectations and put the disadvantaged spouse out of the home. Because of the mutual trust which exists in a marriage before it breaks down, the spouse without title will often have made no preparations for the breakdown by acquiring alternative accommodation and in any event may not have the opportunity or resources to acquire it. Often the spouses will regard the home as "theirs". The law should treat it as "theirs" at least for the purpose of occupancy rights. Second, as the Morton Report suggested, it is unrealistic to treat the spouses as strangers. A spouse may be ejected from the home as if she were a squatter, trespasser or concubine, with only the uncertain and remote remedies of alimony or financial provision to fall back on. Spouses are not strangers and the law should not treat them as such. Third, we argue below that in cases of domestic violence the aggrieved spouse should have the right to obtain an order excluding the violent spouse from the matrimonial home. It is a necessary prerequisite of such a right that possession should not depend merely on title and that the injured spouse should have a right to occupy the home. Indeed, in many cases, the fact that the wife has no right of occupancy may encourage violence on the part of the tenant or owner husband because of the impunity with which he can use force to turn her out. Alternatively, he can make her life a misery until she leaves. Fourth, as we have indicated, the law favours husbands more frequently than wives because the former more often have the title. In the opinion of many, it thus in its practical operation infringes the principle of sex equality. Fifth, while the present law is an advance on the law in the 19th century under which a husband could turn his wife out of her own property, it is now arguably out of line with social opinion in this country and with the approach adopted by most of the other legal systems of the Commonwealth and Western Europe.

¹ See Proposition 1, para. 2.13.

² Para. 2.13.

³ Cmd. 9678 (1956) para. 682.

1.4 The next four proposals are designed to solve problems which must arise if one spouse is owner and the other has statutory occupancy rights. These proposals concern such matters as the conferment of new powers on the court to restrict or regulate rights of occupancy and management; the regulation of occupancy in the absence of such orders;¹ and judicial powers to make interim orders allowing an ejected spouse to recover clothes and belongings left in the home.² We also think that the court should have wide powers to make orders binding the other spouse or third parties to protect or restore a spouse's occupancy, including orders awarding compensation to a spouse deprived of occupancy rights.³ One result of our proposals may be to make a spouse with statutory occupancy rights a "residential occupier" protected from harassment or eviction by the Rent Act 1965, s.30. We invite comments on this.⁴

1.5 While we are not mainly concerned with cases where both spouses are joint tenants or co-owners, we propose legislation which would make it clear that in such a case, one spouse cannot eject the other except by way of an exclusion order and would assimilate the rights of occupancy and management of co-owning spouses to the rights proposed above.⁵

B. Exclusion of spouse from matrimonial home

1.6 The policy of the proposals so far discussed has concerned the provision of accommodation - giving a wife (or husband) without property rights a roof over her head, and a measure of security of tenure in the home, in a question with the owner spouse. Our next proposal (which is probably more controversial since it involves the exclusion of owners or tenants from their own homes) is concerned primarily with the protection of a spouse from domestic violence. If, as we have argued, a wife without a proprietary title should have a personal right of occupancy, then the only way to ensure that she enjoys that right in certain cases may be to give her a further right to obtain a court order excluding

¹Propositions 2 (para. 2.20) and 3(para. 2.22).

²Proposition 4 (para 2.24).

³Proposition 5 (para. 2.25).

⁴Proposition 6 (para. 2.27).

⁵Propositions 7 and 8 (paras. 2.29 and 2.30).

her husband. We discuss later the civil remedies (interdict and lawburrows) affording personal protection against a spouse's violence. As we comment in para 2.32 -

"These may be effective in some cases where a wife wishes to continue living with her husband in the matrimonial home. They will often be effective where the spouses are living apart. But both are in the relevant sense personal remedies and neither can be used to exclude a wife from the matrimonial home. Only the possessory remedies of removal or ejection can be invoked for that purpose. It seems to be widely accepted, however, that in many cases the only sure method of protecting a grievously injured wife from her husband's continuing violence is to exclude the husband from the home.

2.33 If this is right, then arguably it is most unsatisfactory that in Scotland the right of exclusion, and with it the right to adequate protection, should depend on the accident of proprietary title."

We discuss this controversial question at some length¹ and argue that exclusion orders may be necessary (a) where the spouses are residing together; (b) where the violent spouse has left the home temporarily; and (c) where the wife has been driven from the home and is tempted or feels compelled for one reason or another to return but cannot in safety do so.

1.7 Our specific proposals are that the court should have a discretionary power to make "an exclusion order" suspending for a period or until further order a spouse's right to occupy the home, the object being the protection of the other spouse or any children living with him or her.² But the court should not make such an order unless it is necessary for the protection of the applicant and dependent children, and before making an order, the court should have regard to the balance of hardship as between the spouses including the availability and suitability of any alternative accommodation for the spouse whose exclusion is in question.³ In addition the court should be given power to make certain ancillary orders to make its jurisdiction more effective and fair.⁴

¹ Paras. 2.31-2.51.

² Proposition 9 (paras. 2.49).

³ Proposition 10 (para. 2.51).

⁴ Proposition 11 and 12 (paras. 2.61 and 2.62).

C. Civil remedies against domestic violence

1.8 As already mentioned,¹ we are obliged to examine possible changes in the law to give additional protection to a spouse threatened with violence by the other spouse. Clearly, there are limits to the power of rules of the civil law to reduce the likelihood of violence by one spouse towards another, but our proposals relative to exclusion orders should go far to reduce a wife's need to continue to accept life in common with her violent husband. We have also considered other civil remedies² and suggest several ways in which one of these, the remedy of interdict, might be altered to strengthen the protection of spouses and children at risk.

1.9 In particular (i) we suggest that it should be made clear by statute that an interdict against violence or molestation can be obtained even though the spouses are cohabiting;³ (ii) we invite views on the question whether the requirement of corroboration⁴ should be relaxed;⁵ (iii) that the court should have power to pronounce an interdict prohibiting the other spouse from entering on or remaining in a specified area near the matrimonial home;⁶ and (iv) that breach of an interdict against violence or molestation, or a similar interdict protecting a spouse, should be a criminal offence so that an injured or aggrieved wife would not be required to enforce the interdict by a civil petition and complaint but enforcement would be undertaken by the police and the procurator-fiscal or Crown Office.⁷ But as a safeguard for the interdicted spouse, the present rule would continue under which an interdict does not bind him unless he has ^{intimation} of it or gets to know about it in some other way.⁸

¹Introduction, para. 0.8.

²Judicial separation (para. 2.64); lawburrows (para. 2.66); and interdict (paras. 2.67-86).

³Proposition 13 (para. 2.70).

⁴That is to say, the rule that, broadly speaking, every material fact must be proved by the evidence of two witnesses.

⁵Proposition 14 (para. 2.74).

⁶Proposition 15 (para. 2.80).

⁷Proposition 16 (para. 2.85).

⁸Proposition 17 (para. 2.86).

D. Consequential and connected problems

1.10 In section D of Part II¹ we deal with some consequential and connected problems, namely, the question of which matrimonial homes should be subject to the legislation, eg where there are two or more homes owned by one spouse;² whether waiver of occupancy rights and other agreements between spouses on occupancy should be legally enforceable;³ the duration, variation and recall of court orders regulating occupancy;⁴ and the conditions upon which a spouse should be entitled to recover expenditure on the home.

1.11 The last-mentioned question - recovery of expenditure - raises important problems. Under the present law, since property rights follow the title, a spouse's contributions to the purchase price or secured loan and expenditure on capital improvements do not by themselves give rise to any presumption of shared ownership with the spouse in whom the title is vested.⁵ To make ownership depend on contributions might lead to uncertainty in property rights and will be discussed in our future Memorandum on family property law. One alternative is to allow the spouse making the contributions a monetary claim to recover the cost of his or her expenditure on the outgoings or improvements. Under the present law, a spouse's claim is uncertain and the law is undeveloped.⁶ To remedy this defect in the law, we suggest that either the court should have a discretionary power to allocate or apportion liability for outgoings as between the spouses, or the spouse making the expenditure should have a statutory right to be reimbursed by the spouse who is owner.⁷

¹Paras. 2.87 et seq.

²Proposition 18 (para. 2.90).

³Proposition 19 (para. 2.93).

⁴Propositions 20 and 21 (para. 2.95).

⁵English law, and legal systems based on it, give the spouse who made the contributions or improvements a right of beneficial ownership by means of a constructive trust.

⁶Paras. 2.98-2.99 and Appendix A.

⁷Proposition 21 (para. 2.103).

PROTECTION OF OCCUPANCY AGAINST THIRD PARTIES (PARTS III TO VI IN VOLUME 2)

1.12 Part II of our Memorandum concerns personal rights, that is to say, rights of occupancy and the like which are enforceable against the spouse who is owner or tenant. In Parts III to VI, we deal with the protection of occupancy rights against adverse dealings with, or against enforcement proceedings by, third parties, such as landlords, purchasers and secured creditors. We also deal with the transfer of tenancies as between the spouses, a matter which affects third parties. Before summarising the main proposals in Parts III to VI, we would draw attention to two alternative approaches to the problem of protecting occupancy rights against third parties.

1.13 This problem presents difficulties against the background of Scots property law under which the owner of a dwelling house may dispose of or burden his (or her) interest in the property as he pleases. In relation to leases of dwelling houses, the law in theory permits a tenant of an unfurnished dwelling house to assign or to sub-let the tenancy as he pleases. In practice, however, there must be in local authority leases,¹ and there will usually be in other leases, a condition to the effect that the tenant shall not assign, sub-let or otherwise part with the possession of the property except with the landlord's consent. With the landlord's consent, nevertheless, a tenant may assign or renounce his tenancy without reference to the wishes of his or her spouse. Our proposals so far discussed would merely confer and regulate rights of occupancy. They would not prevent a spouse with a property or tenancy right in the home from conveying or burdening his interest by a deed in favour of third parties to the immediate or eventual prejudice of the other spouse's occupancy rights.

1.14 The problem of protecting a spouse's occupancy rights against third parties is clearly of even greater practical importance in relation to owner-occupied dwellings, and here the scheme which we provisionally propose is one whereby the non-owning spouse's occupancy rights can be protected from adverse dealings by the registration of a prescribed "matrimonial home notice" in the property registers (the Register of Sasines) which would, from the time of registration, bind subsequent purchasers from the owner

¹See Housing (Scotland) Act 1966, s. 151(6).

and subsequent secured creditors.¹ In a scheme on these lines, the right to register would arise by operation of law for so long as the spouse in question had occupancy rights and there would be no need for an application to the court. It would be a mere technical question whether the rights to be registered would be a statutory "charge" on the dwelling, as in the case of the (English) Matrimonial Homes Act 1967 or a right to withhold consent (ie a veto) as is a feature of homestead legislation in Canada and the USA, of many European systems, and of the Family Home Protection Act 1976 in the Republic of Ireland. We would prefer the latter. It would be a necessary feature of the scheme that in appropriate cases the court would have power to override the spouse's occupancy rights and allow a disposal or encumbrance. Since the wife's protection is to depend on priority of registration in the Sasines Register,² this scheme would render ineffective any dispositions or securities, even if granted in implement of a prior agreement (such as missives of sale), which are placed on the property registers after the registration of the matrimonial home notice disclosing the existence of occupancy rights.

1.15 In relation to private sector tenancies, we suggest that the tenant should be prohibited from assigning his interest to a third party or from renouncing directly or indirectly his interest in the tenancy in favour of the landlord without the consent in writing of the other spouse or the approval of the court.³ A similar proposal is made in relation to public sector tenancies.⁴ We envisage that these prohibitions would be effective against assignees if intimation had been made to the landlord before intimation of the assignation.⁵

1.16 This scheme would have a number of advantages. First, it would give virtually complete protection to a spouse's occupancy rights against third parties who subsequently acquired rights.⁶ Second, the protection would

¹ See Proposition 48 (para. 6.34).

² Idem.

³ See Proposition 31 (para. 4.11).

⁴ See Proposition 25 (para. 3.30).

⁵ See Proposition 33(3) (para. 4.16).

⁶ There are certain possible gaps: see para. 6.48 and Proposition 52. Heritably secured loans by building societies would normally have priority because of priority of registration.

be acquired quickly and cheaply by one positive act, namely, registration of a notice. Third, some may take the view that, since the dwelling is the matrimonial or family home and not merely an investment, the wife of the owner or tenant should not be required to establish the need for protection in court proceedings. On this view, the onus should rather rest on the owner to establish that the wife's withholding of consent is unreasonable. Fourth, it may also be argued that the process of achieving protection against adverse dealings should, if possible, not be regarded as a hostile act but should be treated rather as a routine matter which is not necessarily confined to situations of marital crisis or breakdown (by which time it may be achieved too late). If protection is made to depend for example on a court order rather than registration, then it could never be seen in this light: it would always be a hostile act. In some cases, registration might not be so regarded and much would depend on conveyancing practice.

1.17 The scheme, however, suffers from certain disadvantages. It concedes protection at some expense to the interests of the owning or tenant spouse and at some potential risk to third parties. First, delivery of a disposition of the home to a third party in implement of prior missives might not effectively transfer ownership to the third party because of the recording of a matrimonial home notice in the interval between the missives of sale and the recording of the disposition. No doubt the risk of disrupting contractual rights of third parties would be minimised since conveyancers acting for the seller and for the purchaser would make enquiry as to the existence of occupancy rights before concluding the contract. But the effect would be to complicate every conveyancing transaction relating to a dwelling house.

1.18 Second, it is also a disadvantage of this scheme that it requires a complex armoury of supporting rules evidencing the consent of the spouse with occupancy rights,¹ stating the powers of the court to dispense with consent inter alia where it has been unreasonably withheld,² and providing for the discharge or judicial cancellation of matrimonial home notices.³ But the third and principal disadvantage of this scheme from the owner's standpoint is that whatever may be the precise state of the matrimonial relationship of the parties, whatever other property the spouse with occupancy rights may possess, it enables that spouse at her (or his) own hand to place on the property registers a notice, of potentially unlimited duration, precluding the owning spouse from dealing with

¹ See para. 6.24 and Proposition 43.

² See para. 6.29 and Proposition 46.

³ See para. 6.34 and Proposition 48.

the property as his own. A wife could veto not merely conveyances designed to defeat her occupancy rights but also unexceptionable and harmless transactions undertaken in good faith whereby the husband simply wishes to sell his house in order to provide a home for his family in a different dwelling. If the policy of the legislation is to secure accommodation for the wife and family, this consequence goes beyond that policy. Further the onus will be on the owning spouse to demonstrate to the court that the notice should be discharged, and this clearly places a powerful weapon in the hands of the unscrupulous or even the merely disenchanted spouse. It is arguable that the onus should be the other way round and that the normal rights of the owner or tenant should be displaced only where, after a review of the circumstances of the individual case, the court is prepared to say that the spouse of the owner or tenant requires protection.

1.19 Thus a system designed to deal with a problem which arises only in a minority of marriages, may be thought to alter significantly the relations of buyer and seller, security-holder and borrower, and landlord and tenant. It would also complicate materially the processes of selling and buying heritable property¹ and of lending or borrowing² on the security of such property. These considerations have led us to consider a possible alternative system.

1.20 The Royal Commission on Marriage and Divorce recommended that a spouse with occupancy rights:³

"should be able to apply to the court for an order restraining (for such period as it thinks fit or until further order) [the other spouse] from disposing of any interest in the home or in the essential contents, or surrendering the tenancy; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation."⁴

¹ See, for example, para. 6.32.

² See para. 6.45 and Proposition 51.

³ This recommendation was limited to cases where one spouse had left the other in the matrimonial home, but the limitation is not intrinsic to the scheme developed by the Commission.

⁴ Cmd. 9678, 1956, para. 685.

Pending the hearing of the application by the spouse with occupancy rights, the Royal Commission envisaged that that spouse should be enabled to obtain immediate protection by an interim interdict.¹ (As Lord Keith of Avonholm pointed out, there is no register in Scotland appropriate to the case of tenancies. We have already indicated, however, that it would be practicable in such cases to preclude assignation or renunciation of leases enabling the affected spouse to intimate her (or his) occupancy interest to the landlord.)

1.21 This scheme would have the advantages that the normal proprietary or tenancy rights of the owning spouse or tenant spouse would be disrupted only when the circumstances required it, usually but not necessarily in the case of the breakdown or imminent breakdown of the party's marriage. They would be disrupted, moreover, only when the court, after a review of the circumstances of the case, decided that the occupancy rights of the applicant needed protection. The Royal Commission's proposals, therefore, would operate with fewer derogations from the general law of landownership and leases. While the Royal Commission envisaged² that a spouse with occupancy rights should be entitled to apply to the court to restrain or inhibit the other spouse "from selling or mortgaging the home or in any other way disposing of an interest in it, or from surrendering the tenancy", it does not appear to have contemplated that the order should affect third parties until registration nor that registration might have a retrospective effect on prior contracts.³ These proposals, clearly, would interfere less with the ordinary currency of house property transactions and diminish considerably the risk that the spouse with occupancy rights could use these rights for ulterior purposes in the difficult times which precede the breakdown of a marriage. The protection by the Royal Commission's scheme would be substantial and would endure throughout the marriage. Even if the court's order for protection were limited in point of time, the mere existence of procedures for invoking the protection of the court would be of great assistance to the spouse with occupancy rights.

1.22 The main disadvantage of the Royal Commission's proposals stems from their apparent assumption that plans on the part of (say) a husband to dispose of or burden his interest in the matrimonial home will be come known to his

¹Ibid., para. 672.

²In para. 670.

³See para. 671 of the Report and the latter part of para. 685.

wife in sufficient time to permit her to apply to the court for protection. While it is possible that in some cases the wife's suspicions will have been alerted in sufficient time for her to make an application to the court, there will undoubtedly be cases where she is unaware of her husband's plans, and in such cases the wife is left with such personal remedies as may subsequently be available to her under the general law of aliment or financial provision on divorce. We do not view this result as satisfactory. Moreover in cases where a court order has been obtained, an armoury of supporting rules would be needed similar to that required by the alternative scheme which we propose. Provision would still require to be made for registration of the court's order in the property registers and for consents to the waiver or discharge of that order. For these reasons, we propose to advance as our preferred solution the scheme described summarily in para. 1.14 above and more fully below¹ and have drafted the remainder of this paper on the basis that this scheme, in its general outlines at least, will be accepted by those whom we consult. We would, nevertheless, appreciate views as to whether a system resembling that of the Morton Commission would be preferable.²

1.23 We now turn to review the specific proposals in Parts III to VI on protecting occupancy and on transfer of tenancies.

PUBLIC SECTOR TENANCIES OF THE MATRIMONIAL HOME (PART III IN VOLUME 2)

1.24 Public sector tenancies are considered first because of their numerical importance. It is well known that, for so long as public authority tenants have no security of tenure, the landlord authority is master of the situation with a complete discretion to terminate a tenancy on four weeks' notice and re-let the dwelling to the other spouse or a third party.³ Public sector landlords may become involved in matrimonial disputes in one of two ways.

¹See paras. 1.32 to 1.36 below, and paras. 6.8 to 6.35 in Volume 2.

²See Proposition 41 (para. 6.9).

³Para. 3.2.

(a) The wife of the tenant may request the landlord to transfer the matrimonial home to her name (a "transfer").

(b) The wife of the tenant, whether or not she is living apart from him, may apply for the allocation of another dwelling as a home for herself and any children (a "new allocation").

It seems that the increase in overt marital breakdown has caused a significant increase in applications for transfers and new allocations.

1.25 The main problems of policy which have to be faced are whether decisions on the transfer of a tenancy should be regarded primarily as a question of housing management to be decided by the local authority; or as a problem of family law to be decided in accordance with principles identical or similar to those applicable to transfers of private sector tenancies; or by co-operation between the court and the public authority concerned.

1.26 We advance ^{nine} proposals relating to public sector tenancies,¹ of which some are negative advocating no change in the law in present circumstances.² The main problems are (i) whether the court should have power to make a vesting order assigning a public sector tenancy, and if so, whether that power should be subject to the landlord authority's objection or withholding of consent;³ (ii) whether the court should have power to render the transferee spouse liable for rent arrears;⁴ and (iii) whether a public authority should have power to request or require payment of rent arrears as a condition of the "transfer" of the tenancy to the tenant's spouse.⁵

1.27 As regards the important question whether the court should have power to assign a public sector tenancy to the tenant's spouse, we should welcome views. We have already suggested that the court should have power to assign council house tenancies in divorce actions⁶ and the present proposal would extend that

¹Propositions 22 to 30.

²Propositions 27, 28 and 29.

³Proposition 22 (para. 3.21).

⁴Proposition 23 (para 3.23).

⁵Proposition 24 (para. 3.27).

⁶Memorandum No. 22 on Aliment and Financial Provision (1976) paras. 3.25-3.27; 3.34 and 3.35.

principle to a stage before divorce proceedings have commenced. Local authorities and other public sector landlords are understandably reluctant to intervene in matrimonial disputes and they often delay a decision on transfer or new allocation till after a court order in matrimonial or custody proceedings. Moreover, possession of the home is relevant to custody of the children and aliment and there is advantage in all three matters being determined in one forum and according to legal principles rather than administrative discretion. Further, it seems inappropriate to deprive members of such a large section of the community¹ of the protection which is or might be conferred by the application of the principles of family law.

1.28 We also invite views on the question whether the consent of the public authority-landlord should be essential to a transfer between the spouses, or at least whether it should be a requirement that the landlord should not object. In favour of a landlord's veto, it may be argued that property transfers between spouses should not infringe third party rights, such as the power of the landlord to prohibit assignments; that a veto would avoid unseemly contests between the court and the public authority; that for so long as tenants have no security of tenure, the landlord authority can always impose its own determination in lieu of the court's decision; and that the local authority can have regard to a variety of factors, such as the housing needs in the area, which the court cannot consider. On the other hand, a judicial order made after representations by the public authority would not deprive the authority of its ultimate power to disregard the court's decision; it would ensure that the authority had the benefit, and in some cases the support, of the court's views; and it would allow one rule to be enacted for public sector and private sector tenancies.

PROTECTED AND STATUTORY TENANCIES UNDER RENT (SCOTLAND) ACT AND OTHER
TENANCIES OF URBAN DWELLINGS: (PART IV IN VOLUME 2)

1.29 Our next group of proposals relate to protection of a spouse's occupancy in the case of Rent Act tenancies, ie unfurnished tenancies and furnished tenancies with non-resident landlords.² The first five proposals

¹About 54% of the population of Scotland live in public sector tenancies.

²See Propositions 31 to 37.

concern the period when the marriage subsists. Since we are dealing mainly with cases where the tenant has security of tenure, occupancy may be protected by allowing the tenant's spouse a right to veto adverse dealings and a right to stand in the tenant's shoes and to make payments of rent for so long she or he remains in possession;¹ and a right to defend enforcement proceedings raised by the landlord.² Moreover, there is a case for allowing the court to make an order assigning the tenancy.³ Further, in the case of common or joint tenancies, each of the spouses should be able to prevent adverse dealings whereby the tenancy may be lost.⁴

1.30 We have dealt elsewhere with orders as to tenancies in divorce actions.⁵ Where the marriage is terminated by death, we think that a widow in occupation after her husband's departure should succeed to the tenancy,⁶ and that a widower should have the same rights of succession as a widow.⁷

FARMHOUSES, CROFTHOUSES AND DWELLINGS USED IN CONNECTION WITH A TRADE, PROFESSION OR OCCUPATION (PART V IN VOLUME 2)

1.31 In Part V, we draw attention to some of the special considerations which arise in the case of farmhouses, homes on crofts or small holdings, and of homes which are used, or closely connected with property which is used, for the purpose of a profession, trade or occupation. Thus, if the matrimonial home is subject to a residence clause requiring that the tenant or contractual occupant should reside there, it is for consideration whether the court should be precluded from making an exclusion order against him.⁸ Tenanted homes on agricultural holdings, crofts and small landholdings also present problems.

¹Propositions 31 and 32 (paras. 4.11 and 4.12).

²Proposition 33 (para. 4.14).

³Proposition 34 (para. 4.18).

⁴Proposition 35 (para. 4.19).

⁵Memorandum No. 22 on Aliment and Financial Provision (1976) Proposition 67(f) at para. 3.35.

⁶Proposition 36 (para. 4.23).

⁷Proposition 37 (para. 4.24).

⁸Proposition 38 (para. 5.3).

We provisionally consider that homes which are part of an agricultural holding should be neither assignable by court order nor subject to a restraint on disposal to protect the occupancy of the farmer's spouse,¹ and we invite views on whether the spouse of a crofter or tenant of a small landholding should be able to apply for a judicial assignation of the home or to veto adverse dealings.²

OWNER-OCCUPIED HOMES (PART VI IN VOLUME 2)

1.32 Owner-occupied homes differ from tenancies insofar as they are freely marketable investments of great value to the owner. But we do not on that account think that a spouse with occupancy rights should be denied the right to protect his or her occupancy from adverse dealings by the owner in favour of third parties. The protection of occupancy during marriage is the main problem dealt with in Part VI. At paras. 1.13 to 1.22 above, we compared our preferred approach - a veto enforceable against third parties after registration of a prescribed notice - with the approach of the Morton Report (which made protection depend on registrable court orders). In Part VI in Volume 2, we give a detailed account of the specific rules which would be required if our preferred approach were to be adopted.

1.33 Protection of occupancy by registration in the property registers without the need for a court order might be effected either by making occupancy rights a registrable charge or real burden running with the lands or by allowing the spouse with occupancy rights a right to withhold consent to adverse dealings and to register that right in the property registers. The choice is a technical one and for the reasons given at paras. 6.11 to 6.21 we prefer the latter alternative.³

1.34 At paras. 6.22 to 6.55, we set out for comment a detailed scheme providing for protection of occupancy by a registrable restriction on unilateral disposal. This scheme deals with such matters as the form

¹Proposition 39 (para. 5.7).

²Proposition 40 (para. 5.9).

³Proposition 42.

in which a spouse should give consent;¹ judicial orders allowing disposal;² the disclosure of occupancy rights to third party purchasers and lenders in security by means of registration in the property registers;³ payment of outgoings on the matrimonial home;⁴ protection of occupancy on enforcement or calling-up of a heritable security;⁵ the effect of sequestration and diligence on occupancy rights;⁶ the civil liability of the owner for adverse dealings without consent;⁷ the need for the owner's solicitor to ensure discharge of occupancy rights lest he be unable to implement his letter of obligation to deliver to the purchaser a search showing clear records;⁸ and the questions whether and how occupancy rights should be protected if the title is in the name of trustees.⁹

1.35 Of particular importance is the fact that protection of occupancy rights would depend on registration in the Register of Sasines and priority of registration would govern priority of rights. Thus it would, as already noted, be necessary for conveyancers to make inquiry as to the existence of occupancy rights lest their contracts are adversely affected by the recording of a matrimonial home notice. It would be advantageous if registration came to be regarded as a routine matter rather than a hostile act, and, to facilitate this, we think it would be desirable if there were a prescribed statutory formula whereby the owner of the matrimonial home could, at its purchase, disclose the existence of occupancy rights in the title deeds. On recording, this would have the same effect as a registered matrimonial home notice.¹⁰

¹Paras. 6.23 to 6.25, Propositions 43 and 44.

²Paras. 6.29 to 6.30, Propositions 45 to 47.

³Paras. 6.31 to 6.34, Propositions 48 and 49.

⁴Paras. 6.35 to 6.38, Proposition 50.

⁵Paras. 6.39 to 6.45, Proposition 51.

⁶Paras. 6.46 to 6.48, Proposition 52.

⁷Paras. 6.49 and 6.50.

⁸Para. 6.51.

⁹Paras. 6.25 to 6.55, Proposition 53.

¹⁰Proposition 49 (para. 6.34).

1.36 We also think that the owner's spouse should so far as possible be given an opportunity to protect occupancy on the enforcement or calling-up of a heritable security. Thus, if the occupancy rights are registered, the spouse with those rights should receive intimation of the relevant default or calling-up notices and obtain the opportunity to purchase the dwelling at a fair value fixed by an independent surveyor before the property is advertised for sale to third parties.¹

1.37 Consistently with these proposals, we suggest that, in cases where the home is vested in both spouses as owners in common (common property), there should be restraints on the right of either spouse to dispose of his or her own share to a third party, and on the right to compel a sale in an action of division and sale.²

THE FURNITURE, PLENISHINGS AND OTHER HOUSEHOLD MOVEABLES (PART VII IN VOLUME 2)

1.38 Under Scots law, the right to possess the furniture and plenishings in the matrimonial home follows the ownership of each individual item. The furniture and plenishings are, however, essential to its use as a home. We have already suggested that possessory rights in the matrimonial home should be conceded to spouses independently of ownership and in Part VII we suggest that a similar approach is needed in relation to the furniture and plenishings. There are uncertainties in the present law of ownership and also difficulties in its practical operation, eg in ascertaining which spouse owns what item given that no record may be kept of ownership and that the goods are mingled. But we agree with the Law Commission³ that reform of the law on ownership would not necessarily provide adequate protection for a spouse since the market value of household goods is usually far less than the cost of their replacement. In this Memorandum, we therefore deal only with possessory rights in the contents of the home.

1.39 In Part VII we describe the existing law in outline;⁴ and explain the need for reform.⁵ We refer to the solutions suggested by the Morton Report and the Law Commission for England and Wales and to foreign legislation

¹ Proposition 51 (para. 6.45).

² Proposition 54 (paras. 6.56-6.62).

³ Working Paper No. 42, para. 2.25, quoted at para. 7.18.

⁴ Paras. 7.2-7.7.

⁵ Paras. 7.8-7.9.

which makes special provision for protecting a spouse's use of the furniture and furnishings;¹ and we compare two alternative schemes for reform² and invite views on which of these should be adopted.³ One of these (that adopted by the Law Commission) would make possessory rights depend on court orders; the other would make such rights available by law without the need for a court order. We suggest that there should be possessory rights in the family car based on court orders⁴ but goods subject to hire or consumer credit agreements should be excluded from the legislation meantime.⁵

UNMARRIED COHABITING COUPLES (PART VIII IN VOLUME 2)

1.40 In Part VIII, we consider the difficult and controversial question of how far (if at all) our proposals should extend to the "unmarried spouse" of the owner or tenant of a dwelling in which they both cohabit. Our provisional views are that the unmarried cohabiting companion of the owner should not have the same occupancy rights as we proposed for spouses⁶ but that he or she might be given the protection of the reformed remedies against domestic violence proposed at Propositions 14 to 16; that he or she should have a right not to be excluded except by court order, a right to apply to the court for temporary exclusion of the other partner,⁷ and also a statutory right to reimbursement of the cost of any financial contributions or physical improvements made by him or her in respect of the joint residence where it belongs to the other partner to the relationship.⁸

MISCELLANEOUS PROBLEMS (PART IX IN VOLUME 2)

1.41 In the final part - Part IX - of the Memorandum, we consider briefly the possible application of our proposals to caravans or mobile homes, and we also examine a number of miscellaneous problems relating to the jurisdiction and procedure of the courts in dealing with the matters mentioned in the Memorandum.

¹ Paras. 7.10-7.17.

² Paras. 7.27-7.31.

³ Proposition 55 (para. 7.32).

⁴ Proposition 56 (para. 7.33).

⁵ Proposition 57 (para. 7.38).

⁶ Proposition 58 (para. 8.9).

⁷ Proposition 59 (para. 8.13).

⁸ Proposition 60 (para. 8.15).

SUMMARY OF PROVISIONAL PROPOSALS

PART II: PERSONAL OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME AND
REMEDIES AGAINST DOMESTIC VIOLENCE

Para.

A. Personal occupancy rights in the matrimonial home

(1) One spouse owner or tenant

1. A spouse who has no possessory rights in the matrimonial home (eg as owner or tenant) should be given a personal right to occupy the home enforceable against the spouse who has such possessory rights, and should no longer be treated by law as a mere precarious possessor. 2.13

2. (1) The court should have power on application by either spouse to make orders restricting or regulating the exercise by either or both of the spouses of their rights of occupancy or management. (2) In the absence of a court order regulating occupancy or management, it is for consideration whether the spouse who has no possessory rights in the home should be conceded a bare right of occupancy or should have the same right to occupy and manage the property as if the spouses were co-owners; or whether some other solution should be adopted. 2.20

3. In making the orders mentioned in Proposition 2 the court should be directed to have regard to all the circumstances of the case including: 2.22
 - (a) the needs and resources of the spouses;
 - (b) the conduct of the spouses in relation to each other and the state of their matrimonial relationship;

- (c) the needs and interests of any dependent children living with either spouse; and
- (d) the extent (if any) to which the dwelling is used for the purpose of a business, trade or profession.

4. (1) Where one spouse raises an action to enforce his or her occupancy rights in the matrimonial home, or applies to the court for an order regulating such rights, the court should have power to make the following interim orders pending disposal of the proceedings: 2.24

- (i) an interim order authorising the pursuer, or her or his nominee in appropriate cases, to enter the matrimonial home temporarily e.g. to collect and remove her or his goods and effects, or to reside there till the action is disposed of;
- (ii) an interim order for delivery of those goods and effects;
- (iii) if the pursuer is prima facie entitled to aliment, an interim order awarding interim aliment pending disposal;
- (iv) an interim interdict (e.g. against a husband excluding his wife).

(2) The court should also have express power of its own motion to restrict or refuse in an undefended case a crave for an order mentioned at head (i) or (ii) of the foregoing paragraph as well as the usual discretion to refuse interim interdict.

(3) When a sheriff orders delivery of goods left in the matrimonial home specified in the order as proposed at paragraph (1)(ii), the sheriff should also be able at the same time to grant warrant to sheriff officers to search for and take possession of the goods, and to open shut and lockfast places. But the warrant should only be executed after expiry of a charge to deliver.

5. The court should have power to make, on the application of a spouse, (a) orders prohibiting the other spouse or a third party from conduct which might deprive the applicant or dependent children of occupancy of the matrimonial home or 2.25

render it unsuitable for habitation as a home; (b) orders awarding compensation to a spouse deprived of occupancy payable by the other spouse or a third party whose conduct led to the loss; (c) orders against the other spouse or a third party to make good damage to the home done by him; and (d) any other order which is necessary or expedient to protect or restore the occupancy of the applicant and any dependent children. But these powers should not affect third parties acquiring property, security or tenancy rights under any deed or other writing since more appropriate safeguards against such transactions are set out below.

6. Should it be made a criminal offence for one spouse to harass the other spouse in his or her occupation of the matrimonial home or to evict him or her from it? If so, should section 30 of the Rent Act 1965 (which makes it a criminal offence for any person to evict or harass the residential occupier of premises) apply in such cases with or without modification? 2.27

(2) Both spouses owners or tenants

7. For removal of doubt, it should be declared by statute that where both spouses have occupancy rights in the matrimonial home, a conclusion or crave by one spouse for ejection of the other spouse from the matrimonial home is incompetent except as ancillary to an exclusion order such as we propose at Proposition 9 below. 2.29

8. The court's powers proposed at Propositions 2 and 4 above to regulate and restrict the exercise by spouses of occupancy rights or rights of management should apply also to the case where the matrimonial home is held by both spouses as co-owners or co-tenants. 2.30

B. Exclusion orders

9. The court should be given a discretionary power to make an order suspending for a period or until further order a spouse's right to occupy the matrimonial home (which may be called an exclusion order) for the protection of the other spouse or any children living with him or her. 2.49

10. The court should not make an exclusion order unless it is necessary for the protection of the applicant or any dependent children, and before making such an order the court should have regard to all relevant circumstances including where appropriate those specified in Proposition 3 above; but in addition it should have regard to the balance of hardship as between the spouses including the availability and suitability of any alternative accommodation for the spouse whose occupancy rights are sought to be suspended. 2.51
11. When making an exclusion order, the court should also have power to make any one or more of the following ancillary orders:- 2.61
- (i) a warrant for the defender's summary ejection from the matrimonial home;
 - (ii) an interdict prohibiting his re-entry to the dwelling without the pursuer's express permission and possibly other interdicts designed to keep him out;
 - (iii) where the defender is prima facie entitled to aliment from the pursuer, an order continuing the proceedings or deferring decree or superseding extract of the exclusion order or warrant of ejection or both until the pursuer lodges a bond, or finds caution, or gives an undertaking, for payment of aliment to the defender or until alternative accommodation is provided for her or him;
 - (iv) where warrant of ejection is granted in the defender's absence, an order giving directions for the preservation of the defender's goods and effects left in the matrimonial home; and
 - (v) an order making the exclusion order or the warrant of ejection or the interdict subject to terms and conditions, or requiring undertakings from either spouse.

12. (1) It should not be competent for the court to grant an interim order excluding a spouse from the matrimonial home pending the disposal of an application for an exclusion order; but (2) the court should be empowered to grant an interim interdict against assault or molestation for the protection of a spouse or children pending disposal of an application for an exclusion order whether or not the court is requested also to grant a perpetual interdict. 2.62

C. Civil remedies against domestic violence

13. It should be expressly provided by statute that proceedings for an interdict prohibiting one spouse from wrongfully injuring or molesting the other spouse should not be treated as incompetent or irrelevant by reason only of the fact that the spouses are living together as man and wife. 2.70

14. Views are invited on the question whether in proceedings for a perpetual interdict against assault or molestation between spouses, or in proceedings for breach of such an interdict, the court should be empowered to pronounce the interdict, or as the case may be to find the breach proved, on the uncorroborated testimony of one witness even if that witness is a party. 2.74

15. In order to protect a spouse the court should have power to pronounce an interdict prohibiting the other spouse from entering on or remaining in a specified area surrounding the matrimonial home, or a street, common stair or other place in its neighbourhood. 2.80

16. (1) It should be provided by statute that where the court pronounces an interdict prohibiting one spouse (the defender) from - 2.85
- (i) injuring or molesting the other spouse (the pursuer) or the children living with him or her; or

- (ii) entering a specified area or place surrounding or near the pursuer's home; or
- (iii) entering the pursuer's home without his or her permission,

then breach of the interdict by the defender in the knowledge that it has been granted should be a criminal offence for which he may be arrested and prosecuted by the competent authorities in the normal way. (2) It should not be competent for the injured spouse to seek to enforce the interdict by a civil petition and complaint. (3) It is for consideration whether the clerk of the court which pronounced the interdict should be under a duty to intimate the interdict forthwith in a manner prescribed by statute to the police force for the area in which the home is situated.

17. No change should be made in the present rule whereby, when the court pronounces interdict prohibiting one spouse from assaulting or molesting the other, the interdict does not bind the interdicted spouse unless he either receives formal intimation of the interdict or gets to know about it in some other way. 2.86

D. Consequential and connected problems

18. (1) The legislation conferring occupancy rights should apply to a dwelling in which a married couple ordinarily reside or have ordinarily resided together. (2) Where there are two homes in which the couple reside or resided, it is for consideration whether occupancy rights should be available in both. (3) But our proposals set out below for enforceability of occupancy rights against third parties by registration should apply only to one home. 2.90
19. (1) It should only be possible for a spouse to waive statutory occupancy rights in the matrimonial home, or to make an agreement on occupancy rights ousting the court's powers, if the waiver or agreement is in 2.93

writing. (2) The writing should be subject to the same formalities or safeguards as (under Proposition 43 below) might apply to a spouse's consent to disposal of the home. (3) It should not, however, be possible for a spouse to make a general waiver of occupancy rights in future matrimonial homes before these rights have accrued.

20. (1) The court should have power, on the application of either spouse, to vary or recall an order regulating or suspending rights of occupancy (including rights of management) and other orders introduced under our proposals set out in the foregoing Propositions. 2.95
- (2) Unless an order regulating or suspending occupancy rights is recalled by the court, the order should continue to have effect until:
- (a) the expiry of a period or the occurrence of an event specified in the order; or
 - (b) the termination of the marriage; or
 - (c) the spouse with the legal interest in the home disposes of that interest or is otherwise divested; or possibly
 - (d) the spouses agree to different arrangements.
21. (1) The law on the recovery by a spouse of his or her expenditure on the matrimonial home is unsatisfactory in cases where he or she is not co-owner. He or she is generally not entitled to recover from the owner spouse the cost of improvements or financial contributions to the purchase of the home or repayment of a building society loan or other secured loan. 2.103
- (2) Views are invited on the appropriate solution. It is suggested that either (a) the court should be given a general discretionary power to apportion liability for outgoings on the home as between the spouses (subject perhaps to statutory guidelines), or (b) in the case of owner-occupied property at least, a spouse without title making improvements or financial contributions to

outgoings on the home should be entitled to be reimbursed by the spouse who owns the home provided (i) that the latter consented to or acquiesced in the expenditure, and possibly (ii) that in all the circumstances it would be fair and reasonable to allow the claim. (3) In either case, should it be a requirement that the claim must be made within the short prescriptive period of five years?

PART III: PUBLIC SECTOR TENANCIES

22. (1) The court should be given power, on the application of the spouse of the tenant of a public sector tenancy, to make an order assigning the tenancy to the applicant. (2) Before the court makes such an order, the public authority should be given an opportunity to be heard but should not have power to oust the jurisdiction of the court by withholding consent or objecting. (3) In deciding whether to make such an order the court should have regard to the same factors which (as we suggest at Propositions 3 and 10 above) would be relevant to the regulation or suspension of occupancy rights. (4) It should be competent to make interim orders pending disposal of the application. 3.21
23. On making an order assigning a public sector tenancy from the tenant to the tenant's spouse, the court should have power to make a further order rendering the transferee spouse liable, jointly and severally with the transferor spouse, for the whole or part of any rent arrears accrued up to the time when the assignation is completed by intimation to the public authority landlord. 3.23
24. (1) Provision should be made by statute to clarify the question whether or not a public authority landlord has power to request or require, as a precondition of re-let to the spouse of a tenant, that the spouse clear off the tenant's arrears of rent. (2) The clarifying legislation would require to state a positive rule and accordingly views are invited on the question of which of the following two solutions is to be preferred: 3.27

(a) that only the outgoing tenant (say the husband) should be liable for rent arrears accrued up to the date of termination of his tenancy, and that the wife should be liable for rent due for the period after the re-let to her; or

(b) that after the re-let to the wife, she should be liable jointly and severally with her husband for the rent arrears accrued up to the termination of his tenancy but only if and so far as she was resident in the home when the arrears accrued.

25. If (as we propose at Propositions 31 and 42 below) the spouse of a private sector tenant or an owner-occupier of the matrimonial home is conceded a right to give or withhold consent to its disposal, then such a right should also be conceded to the spouses of public sector tenants. 3.30
26. If a rule is introduced whereby the spouse of a private sector tenant has the right to make payments of rent which would be treated in law as if made under an irrevocable mandate given by the tenant (see Proposition 31(b)), the same rule should apply to public sector tenancies. 3.31
27. For so long as public sector tenants have no security of tenure, it would be inappropriate to afford legal protection to tenants' spouses who are in occupation. If however a measure of security of tenure is afforded to such tenants, consideration should be given by the competent authorities to provisions enabling the spouse of the tenant to apply to the court for time to pay arrears of rent or otherwise to remedy a default in the obligations under the lease. 3.35
28. For so long as public sector tenants have no security of tenure, no change should be made in the law on succession to the tenancy on the tenant's death. 3.38

29. No change should be made in the present legal position whereby the grant of joint tenancies to spouses in the public sector is within the discretion of the public authority landlords who are free to accept applications by spouses for joint tenancies, or to require that dwellings under their management should be in joint names. 3.44
30. Where a public sector tenancy is vested in both spouses as co-tenants, it is for consideration whether our provisional proposals in Proposition 35 below should apply, to preserve consistency with private sector tenancies, that is to say - 3.45
- (a) neither spouse should be entitled, except with the consent of the other spouse, to prevent tacit relocation by notice of removal but the court should have power to dispense with the consent;
 - (b) it is for consideration whether one spouse should be entitled to veto an assignation by the other spouse of his or her share in the tenancy;
 - (c) each spouse should be able to apply for an order vesting the other spouse's interest in the tenancy in him or her (subject to the conditions in Proposition 22).

**PART IV: PROTECTED AND STATUTORY TENANCIES UNDER RENT (SCOTLAND)
ACT AND OTHER TENANCIES OF URBAN DWELLINGS**

31. (1) If the matrimonial home is held under a private sector urban tenancy (including a protected or statutory tenancy under the Rent (Scotland) Act 1971), and one spouse is tenant and the other spouse has occupancy rights, then - 4.11
- (a) it should not be legally possible for the tenant to assign his interest to a third party or to renounce the tenancy in favour of the landlord or to prevent tacit relocation by notice of removal without either the consent in writing of the other spouse or (in certain prescribed circumstances such as the unreasonable withholding of consent) the consent of the court; and

(b) the spouse with occupancy rights should be entitled to make payments of rent and other outgoings which should be treated in law as if made under an irrevocable mandate given by the tenant.

32. In the case of a statutory tenancy of the matrimonial home under the Rent (Scotland) Act 1971, where the statutory tenant abandons the home and his or her spouse remains in possession, the tenancy should nevertheless continue for the benefit of the spouse left in the home. 4.12
33. (1) In the case of a protected or statutory tenancy under the Rent (Scotland) Act 1971, a spouse with occupancy rights left in possession by the tenant should have the same right as the tenant to defend an action of removing by the landlord. In particular, he or she should be entitled to apply to the sheriff for an order under section 11 of the Rent (Scotland) Act 1971 suspending execution of a decree of removing or ejection or postponing the date of ejection to allow the tenant's spouse time to pay or to purge the default. If it is accepted that the court should have power to make a vesting order assigning a private sector tenancy to the tenant's spouse (see next Proposition), then it should be competent for the court to make such an order on application by the tenant's spouse in the course of enforcement proceedings by the landlord. (2) A spouse's right to veto a renunciation or notice of removal by the tenant should be effective against a subsequent conveyance or lease of the dwelling by the landlord only if the right had been intimated to the landlord before the conveyance or lease (or possibly the agreement to convey or to lease) was made. (3) A spouse's right to veto an assignation by the tenant should be effective against the assignee only if the right had been 4.16

intimated to the landlord before the intimation to him of the assignation.

34. (1) When one spouse is tenant of a private sector urban tenancy of the matrimonial home, whether it is a Rent Act tenancy or not, the other spouse having occupancy rights should be entitled to apply to the court for a vesting order assigning the tenancy to him or her. (2) Before making an order, the court should have regard to the capacity of the assignee to perform the obligations under the lease and to the factors mentioned in Propositions 3 and 20 above. (3) The landlord should have an opportunity of being heard before an order is made. (4) The order would have the same effect as an assignation of a tenancy and title would be completed by intimation of the vesting order to the landlord. (5) On the date of intimation, a protected tenancy should vest in the transferee spouse subject to all the liabilities under the lease. In the case of a statutory tenancy, the transferee spouse should become the statutory tenant in place of the dispossessed spouse. In particular, the principle of Schedule 1 to the Rent (Scotland) Act 1971 (that there should be two transmissions on death but no more) should apply according as there have been, or not been, transmissions of the statutory tenancy already. (6) The court should have power to adjust liability for rent arrears accrued to the date of making the order. (7) A spouse dispossessed by an order should be entitled to apply to the court for a further order recalling the original order and revesting the tenancy in him or her. Such an application should only be competent if (a) there has been a material change of circumstances since the original order, or (b) on the death of the spouse in whose favour the original order was made, provided that the death did not terminate the tenancy under the transmission rules in Schedule 1 to the Rent (Scotland) Act 1971 or otherwise.
- 4.18

35. Where both spouses are co-tenants of the matrimonial home - 4.19
- (a) neither spouse should be entitled, except with the consent of the other spouse, to prevent tacit relocation by notice of removal but the court should have power to dispense with the consent;
 - (b) it is for consideration whether one spouse should be entitled to veto an assignation by the other spouse of his or her share in the tenancy;
 - (c) each spouse should be able to apply for an order vesting the other spouse's interest in the tenancy in him or her.

36. A wife who remains in occupation of the matrimonial home after her husband's permanent departure should be entitled to succeed to the tenancy under the transmission rules in Schedule 1 to the Rent (Scotland) Act 1971. 4.23

37. A widower should be given the same right as a widow to succeed to a protected or statutory tenancy under the transmission rules in Schedule 1 to the Rent (Scotland) Act 1971. 4.24

PART V: FARMHOUSES, CROFTHOUSES AND DWELLINGS USED IN CONNECTION WITH A TRADE, PROFESSION OR OCCUPATION.

38. In a case where the matrimonial home is subject to a requirement that the tenant (or in the case of a service occupancy, the occupant) must reside in the dwelling, it is for consideration whether that requirement should preclude the court from making an exclusion order against the tenant (or occupant). 5.3

39. A matrimonial home which is part of an agricultural holding should not be assignable by court order and the tenant's spouse should not be enabled to protect his (or her) occupancy by withholding consent to its disposal. 5.7
40. It is for consideration whether the spouse of a crofter should be entitled to apply to the court for a vesting order assigning the tenancy of the croft house if it is the matrimonial home, and whether the spouse should be entitled to veto adverse dealings in favour of third parties. Similar problems arise in the case of landholder's tenure. 5.9

PART VI: OWNER-OCCUPIED HOMES

Section B: Protection of occupancy rights during marriage where matrimonial home owned by one spouse

41. We have considered whether protection of a spouse's occupancy rights in a matrimonial home owned by the other spouse should depend on a court order recorded in the property registers and supplemented by interim protection pending the application for the order by registration in the personal registers. It is provisionally concluded that this solution should not be adopted. 6.9
42. Where one spouse is owner of the matrimonial home and the other spouse has only statutory occupancy rights the owner spouse should not be entitled to grant a disposition of the home or to convey it in security without the consent of the other spouse. 6.21
43. (1) There should be a requirement that consent to a disposition of the matrimonial home or a heritable security over it must be given by a prior probative deed, or in the disposition or security deed itself. (2) It is for consideration whether it should be a condition of the 6.24

validity of the consent (i) that the consenting spouse has received separate independent legal advice and (ii) that the spouse's signature is witnessed by a solicitor who certifies that he has explained the nature and effect of the consent.

44. A minor wife with occupancy rights should have the legal capacity to give a valid consent without the need for the consent of a curator, provided that the safeguards in the previous Proposition become legal requirements. 6.25
45. Where the court makes an order suspending a spouse's right of occupancy, it should also have power to dispense with that spouse's continuing right to withhold consent to dispositions and security deeds by the owner spouse. 6.29
46. (1) The court, on application by the owner-spouse, should also have power to make an order dispensing with the consent of the other spouse (say the wife) to a disposition or security deed: 6.29
- (a) if her consent is unreasonably withheld;
 - or
 - (b) if she is prevented from giving consent by physical or mental disability; or
 - (c) if she cannot be found; or
 - (d) though her whereabouts are known, if she has left the matrimonial home for a prescribed minimum period of (say) six months.
- (2) In considering whether consent is unreasonably withheld, the court should have regard to all relevant circumstances including the needs, interests and resources of the spouses, the availability of suitable alternative accommodation, and the needs and interests of any dependent children of the spouses or either of them.
47. As a consequential of the foregoing Proposition, it should be made clear by statute that section 5 of the Married Women's Property (Scotland) Act 1881 should not be 6.30

invoked by a wife as an alternative to the special procedure suggested in the proposition.

48. (1) Registration in the property registers of a prescribed notice of a spouse's entitlement to give or withhold consent (which may be called a matrimonial home notice) should have the effect of rendering invalid a disposition or security deed made without that consent if the disposition or deed is recorded in the property registers subsequent to the date of registration of the notice. But it should not affect a conveyance implementing an obligation incurred before the marriage. (2) The spouse with occupancy rights should be entitled to discharge the notice. (3) The court should have power to make an order cancelling the registration of a matrimonial home notice when dispensing with a spouse's consent or if the notice had been improperly registered. A spouse's deed of discharge and a judicial cancellation order would be registrable. (4) A spouse would be entitled to register only one matrimonial home notice at any one time. (5) A spouse's deed of discharge should be subject to the same safeguards as are proposed for the giving of a valid consent under Proposition 43 above. 6.34
49. It would be desirable if there were a prescribed statutory formula whereby the purchaser of a dwelling to be used as a matrimonial home could disclose, as a matter of standard conveyancing practice, his or her intention of using the home for this purpose. This would be a statutory facility rather than a mandatory requirement, and would have the same effect as registration of a matrimonial home notice. 6.34
50. Consistently with our proposals on rented homes (see Propositions 26 and 31(b) above), the spouse of the owner of the matrimonial home should be entitled to discharge the owner's liabilities to third parties by paying rates, 6.38

secured loan payments and other outgoings on the matrimonial home which should be treated in law as if made under an irrevocable mandate given by the owner.

51. (1) Where a matrimonial home is subject to a standard security, and a notice disclosing the occupancy rights of the owner's spouse has been recorded in the property registers, the secured creditor should serve on the spouse a copy of any calling-up notice, or notice of default, or application to the court for a remedy on default, at the same time as it is served on the spouse who is owner. 6.45
- (2) The owner should not be entitled to dispense with or shorten the period for complying with a calling-up or default notice without the consent in writing of the spouse with occupancy rights. (3) It should be provided by statute that where a heritable creditor in a loan secured over a matrimonial home acquires power of sale following a default or calling up notice, or court order, and the owner's spouse has registered occupancy rights before the expiry of the period allowed by the notice, or as the case may be before the order has been made, then the creditor should be under a duty to offer to sell the dwelling to the owner's spouse at a fair value fixed by an independent surveyor. (4) These proposals should apply also in relation to the enforcement and calling-up of the other types of heritable security (ex facie absolute dispositions, and bonds and dispositions, or assignations of registrable leases, in security) with any necessary modifications.
52. (1) A spouse's occupancy rights should not prevail against 6.48
- (a) the claims of the trustee for the owner's creditors if he is sequestrated or grants a trust deed for creditors, or (b) a diligence (such as an adjudication or declarator of irritancy) affecting the home. (2) Ancillary provision might be required for setting aside a collusive sequestration, trust deed for creditors, or diligence, designed to circumvent occupancy rights.

53. (1) Where -

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(a) a spouse (say the wife) has statutory occupancy rights in a matrimonial home which is held by trustees on behalf of the husband as beneficiary, and

(b) no third party has an actual or contingent beneficial

interest under the trust, (other than a contingent interest under a general power of appointment),

then the trustees should not be entitled to grant a disposition of the home or convey it in security without the consent of the spouse with occupancy rights. (2) The spouse with occupancy rights should be entitled to register a prescribed matrimonial home notice which would bind subsequent singular successors and lenders in security deriving title from the trustees.

(3) The spouse with occupancy rights should be entitled to stand in the trustee's shoes and pay outgoings on the home as if she had an irrevocable mandate given by the trustees.

Section C: Where title to matrimonial home vested in both spouses (common or joint property)

54. (1) Where the title to the matrimonial home is vested in both spouses as owners in common (ie in common property,

6.62

not joint property), then (a) neither spouse should be entitled to dispose of his or her undivided share without the consent of the other spouse or of the court, and (b) the court should have a discretion to refuse or delay decree, or to grant decree subject to conditions, in an action of division and sale of the home raised by one of the spouses. (2) In making an order dispensing with a co-owning spouse's consent, or in exercising its discretion as to division and sale, the court should have regard to the factors mentioned at Proposition 46(2) above.

PART VII: THE FURNITURE, PLISHINGS AND OTHER HOUSEHOLD MOVEABLES

55. (1) Where a spouse has occupancy rights in the matrimonial home, should that spouse have a right to use and enjoy the household furniture and plishings even where they are

7.32

owned by the other spouse? (2) Assuming that the spouse should have such a right, should that right be available only if conferred by a court order made on an application by the spouse (or on an interim basis after service of the application) in accordance with the scheme to be proposed by the Law Commission for England and Wales in a future Report (described in outline at para 7.12 of this Memorandum). Alternatively, should the right be made available by operation of law in accordance with a legislative scheme on the lines proposed in paragraph 7.26 of this Memorandum?

56. Whether or not the regulation of possession of furniture and plenishings depends on a court order (see previous Proposition), the court should have power on the application of a spouse to make orders regulating the use and possession of the family car, orders preventing its disposal, and orders for delivery or restitution of the car as between the spouses. 7.33
57. Moveables which are subject to a hiring, hire purchase or conditional sale agreement should be excluded from any legislation conceding possessory rights to a spouse as proposed in Propositions 55 and 56 above. 7.38

PART VIII: UNMARRIED COHABITING COUPLES

58. The law should not concede to an "unmarried spouse" with whom the owner or tenant of a dwelling is co-habiting, the same occupancy rights as are proposed for spouses. 8.9
59. (1) In cases of domestic violence involving unmarried cohabiting couples (a) the court might be empowered to grant an interdict on the uncorroborated testimony of one witness (see Proposition 14); (b) if the unmarried partner requiring protection has the title to the joint residence as owner or tenant, the court should have the same powers to pronounce interdicts 8.13

prohibiting entry to an area near the home as are proposed at Proposition 15; (c) further, the proposals on criminal breach of interdict mentioned in Proposition 16 should apply.

(2) Where the unmarried partner requiring protection has no title, or has a common title, to the joint residence, it is for consideration whether (a) she (or he) should be entitled to remain in the home until removed by a court order; (b) the court should be empowered (i) to grant her a right of occupancy and possessory rights in the furniture and plenishings belonging to the other partner for a maximum prescribed period of (say) two or three months; and (ii) to exclude the other spouse from the joint residence for that period; and (iii) to apportion liability for outgoings incurred by either party during the period when the orders are in force.

(3) It is also for consideration whether the limited entitlement outlined in para.(2) of this Proposition should be available only where the couple in question had cohabited for a minimum period of (say) one year.

60. Where an unmarried couple are cohabiting in a dwelling of which 8.22 one only is the owner the other should have a **clear statutory right to recover her (or his) expenditure on the dwelling from the owner or recompense for physical improvements, provided the expenditure or improvements were made with the owner's consent or acquiescence.**

PART IX: MISCELLANEOUS PROBLEMS

Caravans used as homes

61. (1) Where a mobile home is owned or hired by one spouse and used as a matrimonial home, in principle the other spouse should be conceded possessory rights enforceable against the owner or hirer. (2) Depending on the outcome of our consultations and the possible revision of the legislation on mobile homes following the Report of the
- 9.7

Armstrong Committee, it will be for consideration how far the specific legislative proposals should follow the model of occupancy rights in heritable dwellings or possessory rights in the furniture and plenishings.

Jurisdictional and procedural problems

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|-----|--|------|
| 62. | Proceedings for orders relating to occupancy rights and domestic violence should be competent in the Court of Session and the sheriff Court. | 9.9 |
| 63. | Where one spouse raises an action against the other to enforce his or her occupancy rights in the matrimonial home, or applies to the court for an order regulating or restricting the exercise of such rights, then on the analogy of the Law Reform (Husband and Wife) Act 1962, the court should have (i) a power to dismiss the proceedings, on application or of its own motion, if it appears that no substantial benefit would accrue to either spouse or any children involved from their continuation; and (ii) a duty to consider at an early stage of the proceedings whether the power to dismiss the proceedings should or should not be exercised. | 9.12 |
| 64. | It should be competent to combine proceedings for orders as to occupancy rights, exclusion orders, and interdicts, with other related proceedings competent in the sheriff court, such as actions for custody of children or aliment. | 9.13 |
| 65. | There should be a right of appeal on a point of law from the sheriff to the sheriff principal and from either to the Court of Session but no other appeals should be competent. | 9.14 |

Para.

66. The sheriff having jurisdiction in the place where the matrimonial home is situated should have jurisdiction to entertain proceedings as to occupancy rights, and in addition the general grounds of jurisdiction specified in section 6 of the Sheriff Courts (Scotland) Act 1907 should apply.

9.15