SCOTTISH LAW COMMISSION

MEMORANDUM No: 41

FAMILY LAW

OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME AND DOMESTIC VIOLENCE

(Volume 2)
17 April 1978

This consultative Memorandum is in two volumes of which this is Volume 2 (Volume 1 contains a survey and summary of the Scottish Law Commission's provisional proposals). The Memorandum is published for comment and criticism and does not represent the final views of the Commission.

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

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OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME AND DOMESTIC VIOLENCE

Volume 2

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

Scope of Part II

2.1 In Part II of our Memorandum, we consider 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 rights (Section A);

(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 (Section B); and

(c) the civil remedies available to protect members of the family from the violence of one of the spouses. (Section C).

Thus, in Part II we are primarily concerned with those legal relationships which exist within the family in relation to the matrimonial home. We are not concerned at this stage with the protection of the spouses' right to occupy the matrimonial home against the claims of third parties, such as purchasers, landlords or heritable creditors, nor with the transfer of title as between the spouses - a matter which generally affects third party rights. We deal with those matters in Parts III to VI.

2.2 In Section A, we discuss the law on personal occupancy rights; in Section B, the law on exclusion of a spouse from the matrimonial home; and in Section C the civil remedies for protection of a spouse. At one level, the purpose of these branches of law are different. The first is concerned with ensuring that a spouse with precarious possession, usually a wife, retains a roof over her head, and cannot be expelled at the whim of her husband, the owner or tenant. The last deals with the provision of protection rather than accommodation; and the second deals both with protection and accommodation reflecting the fact that these two topics are closely connected. If, as we argue in Section A, a wife without a proprietary title should have a personal right of occupancy, then, as we state in Section B, the only way to ensure that she enjoys that right in certain cases may be to

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[1] Paras. 2.3 to 2.30.

[2] Paras. 2.31 to 2.62.

[3] Paras. 2.63 to 2.86

give her a further right to obtain a court order excluding her husband. The personal remedies of interdict and lawburrows discussed in Section C may be insufficient. Section D deals with supplementary matters including the definition of the matrimonial home; contracting out and other agreements as to occupancy rights; the duration, variation and recall of orders; and personal rights to recover expenditure on the matrimonial home from the other spouse.

Section A: Personal occupancy rights in the matrimonial home

2.3 We examine first the situation where the matrimonial home is owned or tenanted by only one of the spouses (paras. 2.4-2.27) and then cases where it is owned or tenanted by both (paras. 2.28-2.30).

(1) Occupancy rights where matrimonial home owned or tenanted by one spouse

2.4 It is convenient to distinguish between the situation arising (a) while the marriage subsists; and (b) on divorce, declarator of nullity of marriage and judicial separation.[1A] Since there is no proper succession in occupancy rights independent of succession to title, and since we are only concerned at this stage with occupancy rights enforceable as between the spouses, we leave aside occupancy of the matrimonial home on the death of the spouse with the title until we deal with transfer of title and third parties' rights in Parts III to VI below.

(i) The separate property principle

2.5 In Scots law, the principle of separate property applies in its full vigour to the spouses' occupancy of the matrimonial home.[1] In the usual case, for example, where the title stands in the name of the husband, no possessory rights in the dwelling accrue to his wife by virtue of the marriage. The wife is in no better position than a mistress or a trespasser or squatter whom the husband can turn out of the home at will. The traditional term of art - "precarious possessor" - describes exactly such

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[1] See Clive and Wilson, Husband and Wife (1974) Chapter 10.

1A The latter topic has been considered in our Memorandum No.22 on Aliment and Financial Provision.

possession as she has, for on the withdrawal of her husband's consent to occupy the home, she is liable to be evicted. In the converse situation, a wife with a proprietary title may eject a husband with precarious possession.

2.6 The invariable rule that (in the absence of a personal contract) possessory rights follow the title has the merit of clarity and certainty and is easy to apply. But in modern times it appears harsh, unjust and unrealistic. A common criticism is that the rule infringes the principle of sex equality. This criticism is only partially justified because a wife with a proprietary title may eject her husband. But the title to rented or owner-occupied accommodation is more often in the husband's name than in the wife's, so the rule operates unfairly against women in practice more often than against men.

(ii) Development of the law

2.7 Unjust though the rule may seem to be from a non-owning wife's standpoint, it is in fact an improvement on the law in force before the Married Women's Property (Scotland) Acts 1881 and 1920. In a leading case in 1804, it was laid down by the Court of Session that a husband, as head of his family and proprietor of the matrimonial home, was entitled in the exercise of his powers of administration over his family, to direct that his wife should remove from the home.[1] Then, in 1820, the Court took what now would be regarded as an even more extreme step by conceding a power of ejection to the husband against his wife even where the matrimonial home was owned by the wife.[2] He could "take her by the shoulders and turn her out" or raise an action of ejection.[3] He could also interdict the wife from

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[1] Colquhoun v. Colquhoun (1804) Mor. App'x, voce "Husband and Wife" No. 5; also Logan v. Wood (1561) Mor. 5877; Walgrave v. Teviot (1703) 4 B.S. 568; and see also Baron Hume's Lectures 1786-1822, vol. 1, pp.100-103; Fraser, Husband and Wife (2nd ed; 1878) pp.869-872.

[2] McIntyre v. McIntyre (unreported) Hume's Session Papers, Summer 1820, No. 26; noted in Hislop v. Hislop (next note).

[3] Actions by a husband to eject a wife from the matrimonial home occur quite frequently in the early sheriff court reports: see Hislop v. Hislop (1879) 2 Guthrie's Select Sheriff Court Cases 205, (1878) 22 Jo. of Jur. 661; Sutherland v. Sutherland (1897) 13 Sh.Ct.Rep. 209; Parker v. Parker (1903) 19 Sh.Ct.Rep. 294; Angus v. Angus (1905) 21 Sh.Ct.Rep. 301; Barlow v. Barlow (1906) 22 Sh.Ct.Rep. 290.

returning to the home[1] and in one case it was even held that he could interdict her friends (including female friends) from visiting her there.[2] In this last case, the basis of the interdict was the husband's right as owner to the exclusive possession of his home. But the husband's right to eject his wife was generally treated as resting on his curatorial powers.[3]

(iii) The existing law

2.8 In 1911, the existing law was established on a different basis in MacLure v. MacLure:[4]

> The tenant of a hotel at Arisaig brought an action in the sheriff court in which he offered his wife aliment, craved an order on her to remove from the hotel which was the matrimonial home and at which they resided, and an interdict against her returning to the hotel. On appeal from the sheriff's decision, the First Division held that the husband, as tenant of the house, was entitled to exercise all the rights of a tenant against his wife in the same way as against strangers.

The decision established that the sole basis of a husband's power to eject his wife from the matrimonial home is not his right as a husband but his right as owner or tenant to the exclusive possession of his house. In particular, contrary to the former rule, it is not based on his power, either as his wife's curator or as 'head of the family', to regulate her residence.[5] Further, it follows from the emphasis on patrimonial (ie property) rights that where the title to the house is in the name of the wife as owner or tenant, then contrary to the old rule laid down in 1820,

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[1] See Hislop v. Hislop: Angus v. Angus and Barlow v. Barlow, cf. Parker v. Parker (all cited in previous note).

[2] Sharp v. Hannah (1891) 7 Sh.Ct.Rep. 10.

[3] See e.g. Hislop v. Hislop (supra); Sutherland v. Sutherland (supra).

[4] 1911 S.C. 200.

[5] McIntyre v. McIntyre (supra). In MacLure, the old case of McIntyre was "explained" (per Lord Dunedin at p.206) as based on the jus mariti which had been abolished by the Married Women's Property (Scotland) Act 1881, section 1. The trouble with this explanation is that the jus mariti did not extend to the wife's heritable property. An alternative, and perhaps more plausible, explanation of McIntyre's case is that the husband's power of ejection derived from his right of management of his wife's property, a right which was abolished by the Married Women's Property (Scotland) Act 1920, section 1. If so MacLure anticipated the Act.

the wife may eject her husband at her pleasure.[1] These principles have been applied in a large number of sheriff court actions of removing or ejection.[2]

2.9 There is no alternative legal basis in Scots law on which a wife could rely to claim a personal right of occupancy. In England and Wales, (before the introduction of statutory occupation rights)[3] her right was held to rest on a number of competing bases: a statutory judicial discretion; the obligation of the spouses to cohabit; the obligation to maintain; a deemed irrevocable licence; a wife's "equitable interest".

2.10 No weight can be placed on any of these bases in Scots law. First, the Scottish courts do not have a statutory power similar to that possessed by the courts in England and Wales[4] and in many other Commonwealth countries, which could be construed as conferring a discretion to adjust proprietary and possessory rights in the matrimonial home irrespective of the pre-existing rights of the parties.[5] Second, the Scottish courts have explicitly refused to deduce a possessory right from the spouses' obligation to cohabit in the matrimonial home. In MacLure v. MacLure, Lord President Dunedin remarked:[6]

> "It is really a confusion of thought to say that a decree for the removal of his wife, if she is molesting him in the hotel, has anything to do with the question of the duty of adherence ... It is not a necessary consequence of turning the wife out of the hotel that the husband will necessarily be in default in matrimonial duty. If the wife choose to establish herself, or if the husband choose to establish her, in a house near the hotel, and if, from time to time, he went to that house and performed the conjugal duty of seeing his wife and the other conjugal duty of cohabiting with her, I do not think that ... an action of adherence would be successful."

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[1] Millar v. Millar 1940 S.C. 56; Macpherson v. Macpherson (1950) 66 Sh.Ct.Rep. 125.

[2] See for example Morrison v. Morrison (1926) 42 Sh.Ct.Rep. 297; Scott v. Scott (1948) 64 Sh.Ct.Rep. 119; Donachie v. Donachie (1948) 64 Sh.Ct.Rep. 120; Lawson v. Lawson (1950) 66 Sh.Ct.Rep. 207; McLeod v. McLeod 1958 S.L.T. (Sh.Ct.) 31; cf. Labno v. Labno 1949 S.L.T. (Notes) 18.

[3] Matrimonial Homes Act 1967.

[4] Under section 17 of Married Women's Property Act 1882; the analogous Scottish Act of 1881 did not concede such a power to the courts.

[5] Cf. Hine v. Hine [1962] 1 W.L.R. 1124, per Lord Denning M.R. at p.1128. This interpretation of section 17 of the 1882 Act was later disapproved by the House of Lords.

[6] 1911 S.C. 200 at p.205.

Third, the Scottish courts have also rejected a spouse's claim to occupy the matrimonial home based on the obligation of the other spouse to provide aliment. Thus, in Millar v. Millar, Lord Moncrieff said:

> "It is for the husband to provide a home for his wife in which he may also require her to reside; but the subsistence of the obligation as of the right, is altogether independent of his residence at any particular address."[1]

Moreover, it is a general rule in the law of aliment that the alimentary obligant can discharge the obligation in the way least burdensome to himself or herself; he can choose between paying aliment in cash or providing aliment by way of board and lodging in the home.[2] As to the remaining English doctrines, a deemed irrevocable licence of occupation is pure fiction, while a wife's "equitable interest" is quite meaningless in our law.

2.11 In some cases a wife may have a financial claim for recompense if, for example, she has spent money from her own separate income or capital on improvements, repairs or maintenance.[3] She cannot, however, rely on such a claim to delay her removal or ejection from the home.[4] The separate property principle requires that she be treated like a squatter.

2.12 To sum up, the present law shows no potential for development in this sphere, for a spouse without title cannot rely on the common law principles as to matrimonial obligations, property rights, or obligations arising from unjust enrichment, nor on any statutory judicial powers, as a basis upon which to claim a right of occupancy in the matrimonial home.

(iv) Proposals for reform

(iv.a) Spouse without title to have personal right of occupancy

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[1] 1940 S.C. 56 at p.61.

[2] See our Memorandum No. 22 on Aliment and Financial Provision paras. 2.149 to 2.156 where we suggested that in the event of a dispute as to the method of fulfilling the alimentary obligation, aliment should be provided by means of a monetary allowance and not by giving the alimentary dependant a right to board and lodging.

[3] See Clive and Wilson, op.cit. pp.208–210. We deal below at paras.2.96 et seq with the question whether her claim would be successful.

[4] Ranking, Landownership (4th ed., 1909) p.22; and see Sinclair v. Sinclair (1829) 7 S.342.: (this case concerned an action between cousins but the same principles would apply between spouses).

2.13 The present law has some advantages. The invariable rule that (in the absence of a personal contract) possessory rights follow the title has the merit of clarity and certainty. The spouses, and third parties transacting on the faith of the records, know where they stand. It is also in practice easy to apply in most cases. We think, however, that its advantages are far outweighed by its defects. Different people will emphasise different defects and we summarise them without giving particular weight to any of them. 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".[1] To many people, it seems unjust that one 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 in money or money's worth as the owner or tenant spouse. Marriage raises 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 not often have prepared 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 aliment 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 a wife has no right of occupancy may encourage violence on the part of the tenant or owner husband because of the impunity

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[1] Cmd. 9678 (1956) para.682.

with which he can use force to turn her out.[1] 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. For these reasons, we propose that the law be changed so that 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 (Proposition 1). By the term "possessory rights" we mean possessory rights under a documentary title such as a conveyance, or lease, or a trust deed conferring a liferent interest or other right of occupancy, or rights arising by operation of law such as a statutory "tenancy" under the Rent (Scotland) Act 1971.

(iv.b) Nature of occupancy rights

2.14 We have considered whether it would be necessary or desirable to define by statute in more or less detail the nature or incidents of the new occupancy rights which we have proposed. Practical problems would be likely to arise relating to the extent of the new statutory occupancy rights; the rights to authorise third parties to use the premises; the rights to manage, repair and alter the property; liability for repairs, maintenance and other outgoings on the dwelling; and even the right to protect possession against encroachment, trespass or nuisance by third parties. These problems have two aspects, one relating to the internal sphere of family life involving questions between the spouses only; the other involving rights and obligations in questions with third parties.

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[1] In Sutherland v. Sutherland (1897) 13 Sh.Ct.Rep. 209 the sheriff observed that forcible ejection of the wife by the husband "might, and probably would, lead to assault or breach of the peace, repeated on every occasion when the wife tried to return to her husband's house". For this reason, the courts have said that decree of ejection is a 'more decorous' procedure than 'self-help' by the husband.

2.15 Where two persons have a right of occupancy and neither can exclude the other, there must be some means, short of an exclusion order, of resolving disputes between them as to the exercise of their occupancy rights.[1] The obvious way in which this can be done is by giving the courts power on application by either spouse to regulate or restrict the exercise of the occupancy rights or rights of management. This power might be essential, for example, where two spouses awaiting divorce are living in the same house but have set up separate households. Such cases occur especially in areas of housing shortage.

2.16 A more difficult question arises as to what should be the rights of the spouses in the absence of a court order. At one extreme, the law might confer a bare right of occupancy on the spouse without title. At the other extreme, the legislation might provide that the spouses should have the same rights to occupy and manage the dwelling as if it were vested in both spouses as common proprietors pro indiviso. There are no doubt compromise solutions. Some may think that definition of the rights of management ancillary to the primary right of occupancy is unnecessary and possibly too complex. Thus the statutory right of occupation introduced in English law by the Matrimonial Homes Act 1967 is left undefined and its incidents are left to be worked out by the courts. The background law is however different. For example, in Scotland the owner of the matrimonial home can prevent his wife from inviting her lady friends to afternoon tea;[2] and there seems no legal rule preventing him from introducing his mistress. In England, the owner could not control his wife's visitors, nor introduce his mistress in the home.[3] Further, there is a presumption that the common law continues in force except to the extent that it is abrogated by statute expressly or by necessary inference.

2.17 As regards maintenance or repairs or improvements to the home, or payment of outgoings such as rent, building society instalments and rates, a number of related problems arise for which some legislative solution will be needed. We have required to deal with these problems at different places in this Memorandum, and we summarise them here to show their inter-connection:-

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[1] In common property, for example, the Gordian knot is cut by recourse to an action of division or sale or appointment of a judicial factor.

[2] Sharp v. Hannah (1891) 7Sh.Ct.Rep. 10.

[3] Pinckney v. Pinckney [1967] 1 All E.R. 121 (husband ordered to remove his mistress who was living with him in the matrimonial home).

(a) Where a dispute arises between the spouses as to whether repairs or improvements to the dwelling should be effected, how should the dispute be resolved? Should the same rule apply whether the spouses are cohabiting or estranged? We deal with these questions in the next paragraph.

(b) Should a spouse with occupancy rights but no title as owner or tenant be able to protect his or her occupancy rights by compelling third parties such as landlords, building societies and local authorities to accept payment of outgoings? In Parts III to VI below we suggest that the spouse should have such a right.

(c) Assuming that either spouse has effected or paid for repairs or improvements, should the other spouse be (i) personally liable in any circumstances to the third party for the cost of his services in effecting the repairs or improvements; or (ii) liable to reimburse the spouse who effected or paid for the repairs or improvements? We examine (i) at paras. 2.18–19 below and (ii) at para. 2.96 et seq.

2.18 The first problem – the right to repair or alter in a question with the other spouse – is an aspect of the rights of management of the property. If the spouse without title (say the wife) had only a bare right of occupancy, this would leave the right to effect repairs with the owner or tenant and such a rule would be clear and certain. A disadvantage, however, would be that the wife would not be entitled to carry out necessary repairs eg to a leaking roof.[1] An alternative approach would be to adopt the rule, obtaining in common property, whereby one co-owner cannot make alterations to, or extraordinary uses of, the property without the consent of the other co-owners,[2] but one co-owner can unilaterally carry out necessary repairs or maintenance works on the property, or restore it or part of it, to its former condition, at any rate where he does not make a demand for a financial contribution from his co-owners.[3] Such a solution in this context would achieve equality of the marriage partners. At the same time, after marital

[1] While we suggest at para.2.25 below that the court should have power to prohibit conduct on the owner's part rendering the home unfit for use as a family home, this power would not strike at the owner's omissions.

[2] Bell's Principles (10th ed.) para. 1075.

[3] Bell, Principles para. 1075; Deans v. Woolfson 1922 S.C. 221 per L.J.C. Scott Dickson at pp.224-5; Brock v. Hamilton (1852) 19D. at p.703.

breakdown, the owner or tenant spouse would not be able to make alterations adversely affecting the other spouse's occupancy or prevent necessary repairs. The solution would also be consistent with our suggestions in Parts III to VI that a spouse with occupancy rights should be entitled to pay outgoings. As suggested in para. 2.15, a dispute about alterations which are not necessary would be resolved by an application to the court. We invite views on these alternative approaches.

2.19 Where one spouse has contracted with a third party to effect repairs or improvements to the home, it is for consideration whether the other spouse should be personally liable to the third party for the cost of his services in effecting the repairs or improvements. Even having regard to the wife's praepositura and the doctrine of agency of necessity,[1] (both now rarely invoked), it will rarely happen that a wife with occupancy rights has an implied power to pledge the credit of her husband in effecting necessary repairs. At para. 2.96 below we suggest that the court should have power to apportion, as between the spouses, liability for expenditure on the home. Having regard to this, we do not think that a further power to pledge the owner's credit is necessary or would be of much value. It is suggested that each spouse should have the right to enforce his or her occupancy rights against the other by the ordinary remedies of declarator, interdict or damages.[2] A wife wrongly excluded by her husband should be able to obtain a declarator of her occupancy rights and interdict prohibiting him from obstructing her entry into the home and excluding her in future.[3]

2.20 To sum up, we suggest that (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

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[1] See Clive and Wilson, Husband and Wife (1974) pp.253-265; also our Memorandum No.22 para. 2.80.

[2] Cf. Matrimonial Homes Act 1967, s.1(2) as amended under which, so long as a spouse has a right of occupation, either spouse may apply to the court for an order declaring, enforcing, restricting or terminating the right.

[3] Cf. Lee v. Lee [1952] 2 Q.B. 489; Halden v. Halden [1966] 3 All E.R. 412 C.A. We suggest at para. 2.25 below that she should be able to obtain damages for patrimonial loss incurred by her as a result of her exclusion eg reimbusement of hotel bills.

have the same right to occupy and manage the property as if the two spouses were co-owners; or whether some other solution should be adopted. (Proposition 2.) We discuss below (paras. 2.21-2.22 and 2.50-2.51) whether the court's powers should be subject to statutory guidelines.

(iv.c) Principles affecting orders regulating occupancy rights

2.21 There are several approaches to the definition of the grounds of an order regulating occupancy rights. We think that the circumstances will differ greatly from case to case so that the court should have a discretion. But we have some difficulty in determining whether the discretion should be controlled by statutory guidelines. The powers which we suggest are novel powers and it is envisaged that they will be exercised in some 50 sheriff courts. It may be long before guidelines are evolved in reported decisions, and that at the expense of litigants or the legal aid fund. In any event, it may be thought appropriate for the legislature to give the judges guidance on the purpose and direction of the powers which it confers.

2.22 In deciding similar applications under the Matrimonial Homes Act 1967, the English court is required by the Act to:

> ".... make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case ....".[1]

We think that similar criteria should be applied in Scotland and we suggest that in making the orders mentioned in Proposition 2 the court should be directed to have regard to all the circumstances of the case including:

(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.

(Proposition 3)

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[1] Section 1(3).

(iv.d) Interim orders

2.23 Where a wife ejected from the home applies for a court order adjusting occupancy rights, there may well be an unavoidable delay of weeks or even months before her application is determined. In the meantime, there may be an urgent need for her to retrieve clothes and other belongings for herself and her children from the matrimonial home; and she may need aliment. We think that the court should be empowered to make interim orders allowing the excluded spouse to enter the matrimonial home and uplift her belongings.[1] In some cases it may be preferable for the court to order that the defender spouse in occupation should deliver the pursuer's belongings to the pursuer or her nominee. In the light of legal uncertainties as to the correct procedure in enforcing delivery orders by search and entry warrants,[2] and other legal uncertainties,[3] we think that the court should be given an express power to grant, at the same time as a delivery order, a warrant for entry and search to enforce the order if it is disobeyed and a power to refuse or restrict an application for such a warrant in an undefended case. The court should also have power to grant interim interdict prohibiting the defender from keeping the pursuer out of the matrimonial home pending the proceedings. These proposals can be justified on the basis of the long-standing principle of law that, in cases of recent wrongful dispossession, the status quo ante should be restored as soon as possible and before the time-consuming process of finally determining the property rights of parties is completed.

2.24 To summarise our proposals, we advance for comment the following propositions:

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[1] In their Report on Matrimonial Proceedings in Magistrates Courts, (1976) Law Com. No.77, the Law Commission suggest at para. 3.40(d) that in making an exclusion order "the court should have power to authorise entry into the home for a temporary and limited purpose, such as, for example, the collection and removal of personal belongings".

[2] In United Dominions Trust (Commercial) Ltd v. Hayes 1966 S.L.T. (Sh.Ct.) 101; Napier v. Reed (1943) 59 Sh.Ct.Rep. 117: it was held that, having regard to the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, s.1 a search warrant could not be granted at the same time as a delivery order. For the contrary view see George Hopkinson Ltd v. Carr 1955 S.L.T. (Sh.Ct.) 80; North Central Wagon & Finance Co Ltd v. McGiffen 1958 S.L.T. (Sh.Ct)62.

[3] See United Dominions Trust (Commercial) Ltd v. Hayes, supra; George Hopkinson Ltd v. Carr, supra; North Central Wagon and Finance Co Ltd v. McGiffen, supra, for doubts as to the court's powers ex proprio motu to restrict or vary craves for search warrants in undefended cases.

(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 on application to make the following interim orders pending disposal of the proceedings:

(i) an interim order authorising the pursuer, or her or his nominee in appropriate cases, to enter the matrimonial home temporarily eg to collect and remove her 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 (eg 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 (i) or (ii) 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 enter the matrimonial home, 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.[1] (Proposition 4).

(iv.e) General judicial power to protect spouse's occupancy

2.25 It is for consideration whether the right of a spouse to occupy the matrimonial home should be supplemented by a general discretionary power conferred on the court to make orders protecting that right. The Family Home Protection Act 1976 of the Republic of Ireland confers such a power. Section 5(1) provides:-

> "5.-(1) Where it appears to the court, on the application of a spouse, that the other spouse is engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence

[1] This proposal follows the provisions of Rule 71 of the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 which is the latest precedent on the matter.

in the family home, the court may make such order as it considers proper, directed to the other spouse or to any other person, for the protection of the family home in the interest of the applicant spouse or such child."

Commenting on this power, Mr A J Shatter observes:[1]

"The jurisdiction conferred by this section on the court may be invoked by a wife for example if a husband

(i) attempts to demolish part of the family home or to remove slates from the roof, or

(ii) cuts off or has cut off the electricity, gas, water and any other essential supplies, or

(iii) suffers a judgement in collusive proceedings brought by a friend with the intention of ultimately being "forced" to sell the home to meet the award made in the judgement, or

(iv) refuses to pay any further mortgage instalments due on the home, or

(v) breaches covenants in the lease of the home which could result in forfeiture, or

(vi) simply advertises that the family home is for sale, or puts it onto an estate agent's books.

Behaviour such as that outlined in (i) and (ii) could be such as to render a house "unsuitable for habitation as a family home", whilst (iii) to (vi) could be regarded as conduct likely to lead to the loss of an interest in the family home. Such conduct by itself will however be insufficient for a successful invocation of the court's jurisdiction. For the court to intervene in such circumstances, the section requires proof that a husband acted in such a fashion 'with the intention of depriving his wife or a dependent child of the family of his or her residence in the family home.'"

The court's powers are not confined to prohibitory orders, and it could order a third party who had taken slates off the roof to restore the roof to its former condition. Subsection (2) of section 5 enables the court to award compensation to a spouse who has been deprived of occupancy by making an order against the other spouse or a third party. The subsection provides:-

"(2) Where it appears to the court, on the application of a spouse, that the other spouse has deprived the applicant spouse or a dependent child of the family of his residence in the family home by conduct that resulted in the loss of any interest therein or rendered it unsuitable for habitation as a family home, the court may order the other spouse or any other person to pay to the applicant spouse such amount as the court considers proper to compensate the applicant spouse and any such child for their loss or make such other order directed to the other spouse or to any other person as may appear to the court to be just and equitable."

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[1] Family Law in the Republic of Ireland (1977) pp.290-291.

Under this section, too, the court seems to have power to make orders ad factum praestandum (eg to restore the dwelling to its former condition) instead of compensation. We think that powers on the lines of the foregoing might be useful additional weapons enabling the court to protect a spouse's occupancy. To elicit views, therefore, we provisionally propose that 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 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 the 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. (Proposition 5).

(v) Criminal law safeguards against harassment or eviction of spouse without title

2.26 One result of our proposals might be to make a spouse with occupancy rights a "residential occupier" protected from harassment or eviction by the criminal sanctions in section 30 of the Rent Act 1965. Subsection (1) of the section enacts:

> "30.-(1) If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof or attempts to do so he shall be guilty of an offence ..." (emphasis added).

The words "any person" would seem to include a tenant spouse in occupation at any rate in the application of the section to Scotland. But subsection (5) of the section defines "residential occupier" to mean:

> "a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises."

Thus, because of cross-border differences in the law on occupancy rights, a wife in England appears to be protected by the Act from ejection by her husband whereas in Scotland she is not at present protected.

2.27 Section 30 of the 1965 Act was passed to stamp out the practice of "Rachmanism" in English cities whereby tenants were terrorised and evicted from their homes by unscrupulous landlords. It may be therefore that section 30 was not designed to strike at conduct by a person within the family circle interfering with the family's peaceful enjoyment of the home. Nevertheless, one effect of our proposals will apparently be to extend the 1965 Act in Scotland to disputes between spouses and a decision is required on whether this would be appropriate. Accordingly views are invited on the following questions: 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? (Proposition 6).

(2) Occupancy rights where matrimonial home owned or tenanted by both spouses (common property and tenancies)

General remarks

2.28 Where the matrimonial home is owned or tenanted by both spouses as co-owners or co-tenants, each has a legal interest in every inch of the dwelling which entitles him or her to use and occupy every inch of it and each have joint powers of management. While each can dispose of his pro indiviso share unilaterally, neither can dispose of both pro indiviso shares without the consent of the other. The main problem for a spouse wishing to continue in occupation of the home will be to prevent a transfer of the property to third parties which the other spouse can compel in an action of division and sale. We revert to this problem below.

Competence of action of ejection

2.29 While it is a general rule that one common owner or tenant cannot be ejected by the other common owner or tenant, there is some authority for the view that the rule is not absolute. In Price v. Watson,[1] an action of ejection was raised by one co-owner against the singular successors of the other co-owner in her pro indiviso share. The defenders claimed the right to exclusive possession of part of the common property. The First Division

[1] 1951 S.C. 359.

sisted the action of ejection in order that an action of division and sale might be brought holding that it would be unsafe to affirm in absolute terms that one co-owner pro indiviso can never in any circumstances obtain decree to eject another co-owner from the common property. In a dissenting judgment Lord Keith argued persuasively that the action should be dismissed because ejection is only competent against one who is in possession without a title to possess. His Lordship said:[1]

> "That (ejection) can be used against a co-owner who has a right to possess, flowing from his property title, is in my opinion, a plain impossibility ... That disputes may arise as to the manner of possession in many cases is undoubted. This is but one aspect of differences between co-owners in the management of the subjects. When such differences arise, our law has recognised two methods of cutting the Gordian knot - the appointment of a judicial factor and recourse to an action of division and sale. Nowhere will a trace be found in textbook or decision that a dispute about possession by co-owners can be solved by an action of ejection, though down the centuries countless such cases must have occurred."

In view of the unsatisfactory degree of uncertainty in the present law, we tentatively suggest that 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. (Proposition 7)

Regulation by court of spouses' occupancy rights

2.30 It would, we think, be unfortunate and anomalous if the rules which govern the occupation and management of the matrimonial home when the title is in the name of both spouses should be different from the rules which govern those matters when the title stands in the name of one spouse and the other has a personal right of occupancy. We have already suggested at Propositions 2 and 3 that, in the latter case, the court should have power to regulate occupancy. To complete the assimilation of the two types of case, we propose that where the home is vested in both spouses, the court should have the same powers to regulate or restrict the exercise of rights

[1] 1951 S.C. at p.366.

of occupancy or management as we suggest should be available when the title is vested in only one spouse. There is a precedent in England and Wales where the Matrimonial Homes Act 1967 originally applied if only one spouse had the title,[1] but similar provision is made by section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 in relation to the case where the title is vested in both spouses.[2] Accordingly we suggest that 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. (Proposition 8).

Section B: Exclusion of spouse from the matrimonial home
Possessory remedies as protection against domestic violence

2.31 In Section A, we advanced proposals designed to remove the social injustices stemming from the precarious possession of spouses, especially wives, who have no contractual or legal right to occupy the matrimonial home. That branch of the law concerned the provision of accommodation - giving a wife (or husband) without title a right to a roof over her head, and a measure of security of tenure in her own home, in a question with her owner husband. In this Section, we are concerned to examine the different but connected problem of defining the circumstances in which the law should allow one spouse the right to exclude the other from the matrimonial home.

2.32 In our view the main, and perhaps the sole, situation in which exclusion is justified is where it is necessary for the protection of the remaining members of the family. In Section C we deal with the civil remedies affording protection against a spouse's violence. These may be effective 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

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[1] Section 1(1).

[2] Section 4 provides that "Where each of two spouses is entitled by virtue of a legal estate vested in them jointly, to occupy a dwelling-house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling-house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant."

exclude a spouse from the matrimonial home.[1] Only the possessory remedies of removal or ejection can be invoked for that purpose.[2] 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. The anomalies can be seen if we consider the situations (i) where the title stands in the name of the spouse who inflicts the violence; (ii) where it stands in the other spouse's name; and (iii) where it stands in the name of both spouses.

2.34 (a) Title in name of violent spouse. Often a 'battered wife' living in a house owned or tenanted by her husband may endure his violence for a very long period because it seems to her that she has no alternative. Even if she does go the length of consulting a solicitor or raising an action (and many 'battered wives' never do) she may find her legal remedies useless because the husband may respond to proceedings against him for lawburrows or interdict by thrusting her out of the home. If Proposition 1 above is implemented by statute, he would no longer be able to do that, but an interdict or decree of lawburrows may not deter him from violence. Where this is so, the only solution is to compel the spouses to live apart. We doubt whether most people nowadays would regard it as just that it is the injured wife who must seek alternative accommodation in order to protect herself. Likewise, if a tenant or owner endangers his or her children by violent conduct, it seems wrong that the other spouse should be required to seek a home elsewhere in order to protect them.

2.35 (b) Title in name of aggrieved spouse. Where the title is in the name of the non-violent spouse, she (or he) can protect herself from injury by an action of ejection. But our proposals at Proposition 1 above would

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[1] Burn-Murdoch Interdict (1933) p.5; Rankine, Leases (3rd ed.) p.312; Paton and Cameron Landlord and Tenant (1967) pp.248-9; Walker, Civil Remedies (1974) p.252. (In English law injunctions have frequently been used for the purpose of ejection of an occupier).

[2] Idem.

deprive her of this right because they would concede a personal right of occupancy to the husband. It is necessary to ensure that the aggrieved spouse is not placed in a worse position than under existing law.

2.36 (c) Title in name of both spouses. Where the title stands in the name of both spouses, generally neither can exclude the other, though there are ill-defined exceptions to this general rule.[1] Again, this may put the wife and children at risk from the violent spouse or parent.

2.37 Before elaborating the need for reform more fully, it may be useful to consider English law which affords greater protection to a wife in cases of domestic violence.

English law

2.38 In England and Wales, the law on exclusion of spouses from the matrimonial home is highly developed[2] and has recently been extensively reformed. It is, however, complicated by the fact that there is a three-tiered hierarchy of courts - High Court, county courts and magistrates' courts which exercise matrimonial jurisdiction. There were differences between the remedies available at each tier of the hierarchy, but recently the powers of the county court have been assimilated to the reformed powers of the High Court.[3] Both courts can now grant injunctions without a preliminary conclusion for damages or for a matrimonial order. In Scotland, an interdict without a preliminary conclusion for damages was always competent since interdict is not regarded as supplementary to reparation[5] in the same way as in English law under which 'Equity follows the Common Law'. On the other hand, the magistrates' courts exercise jurisdiction under a separate statutory code, and in proposing a revision of that code (including extensive new powers to protect wives and children at risk), the Law Commission for England and Wales envisage that the separate code will continue in a revised form.[6]

2.39 In the High Court and county court, there seems to be four categories of jurisdiction to exclude a spouse from the matrimonial home.

(a) Where one spouse has a legal interest in the matrimonial home and the other spouse does not, the position is governed by the Matrimonial Homes Act 1967. This Act was originally designed to secure that a spouse

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[1] Price v. Watson 1951 S.C. 359, discussed at para.2.29 above.

[2] See generally Bromley, Family Law (5th ed., 1976) pp.481-2; Evelyn Ellis, "The Right of Occupation of the Matrimonial Home and its Enforcement by the Courts" (1975) 4 Anglo-American Law Review 59; Susan Maidment, "The Law's Response to Marital Violence in England and Wales" (1977) 26 I.C.L.Q. 403; Mary Hayes "Evicting a Spouse from the Matrimonial Home" (1978) Family Law 4,41.

[3] Domestic Violence and Matrimonial Proceedings Act 1976.

[4] As to county courts, see Domestic Violence and Matrimonial Proceedings Act 1976, s.1; in the High Court, the reform has been effected by Rules of the Supreme Court.

[5] See e.g. Burn-Murdoch, Interdict (1933) pp.106-107.

[6] Report on Matrimonial Proceedings in Magistrates Courts (1976) Law Com. No.77.

without title was not excluded from the home, and as originally enacted the Act merely gave the court power to "regulate" the exercise of rights of occupation by either spouse. "Regulate" did not include "prohibit" and accordingly the court could not exclude a spouse. The Domestic Violence and Matrimonial Proceedings Act 1976[1], however, amended the 1967 Act; section 1(2) of the 1967 Act, as so amended, now provides:

> "So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or prohibiting, suspending or restricting the exercise by either spouse of the right to occupy the dwelling-house."

As we indicated above, the court is required to:

> "... make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case ..."

These provisions apply while the marriage subsists.

2.40. (b) Where both spouses had an interest as joint tenants or owners in the matrimonial home, the 1967 Act did not apply and the position was governed by the common law which enabled the court to exclude a violent husband. Thus, in Gurasz v. Gurasz,[2] Lord Denning M.R. declared:[3]

> "In an extreme case, if (the husband's) conduct is so outrageous as to make it impossible for (the spouses) to live together, the court will order him to go out and to leave her there. This is a personal right which belongs to the wife as a wife. It is not a proprietary right. It is not available against third persons. It is only available against the husband. No matter whether the house is in the wife's name, or in the husband's name, or in the names of both jointly, nevertheless she has this personal right which the court will protect."

It was felt to be unfortunate to have two codes applying according to title and section 4 of the Domestic Violence and Matrimonial Proceedings Act 1976 assimilates the position where both spouses have a proprietary title to the case where only one is owner or tenant.

2.41. (c) The third ground is the court's inherent power to exclude a spouse pending matrimonial proceedings such as divorce or judicial separation (ie until decree absolute). "The rationale for this jurisdiction has been expressed in various ways, such as the preservation of the status quo and the protection of the petitioner's right to bring legal proceedings."[4] The

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[1] Section 3.

[2] [1969] 3 W.L.R. 483.

[3] At p.485.

[4] Ellis, loc.cit. at p.60.

jurisdiction may be invoked by either spouse irrespective of which spouse has the title though ownership strengthens the claim for an injunction.[1] The court, however, is slow to make an order excluding a spouse and will do so only in extreme cases.[2]

2.42. (d) At common law it was a ground of jurisdiction to order the exclusion of a spouse that the order was required to protect the children's physical or mental well-being.[3] Now that the common law has been almost wholly superseded by the Acts of 1967 and 1976, it may be that this ground is subsumed under those Acts, which as we have seen direct the court to have regard inter alia to "the needs of any children".[4]

2.43 The lay magistrates' courts do not have jurisdiction to make orders under the Matrimonial Homes Act 1967 or the Domestic Violence and Matrimonial Proceedings Act 1976, nor do they possess power to make injunctions. In their Report on Matrimonial Proceedings in Magistrates' Courts,[5] however, the Law Commission recommended that:-[6]

> "A magistrates' court should have power, if it is satisfied that the complainant or a child of the family is in danger of being physically injured by the respondent and that the respondent has used violence against the complainant or a child of the family, or that the respondent has threatened violence against the complainant or a child of the family and also has used violence against some other person, or that the respondent has disobeyed a personal protection order by threatening violence, to make one or both of the following orders:-
>
> (i) an order that the respondent should vacate the matrimonial home;
>
> (ii) an order that the respondent should not enter the matrimonial home."

The magistrates' courts powers as proposed by the Commission are narrower than those of the higher courts. The court would not for example have power to grant an exclusion order on proof of psychological damage as opposed to physical injury.[7] The Commission further recommend that an exclusion order should be capable of being made generally or subject to exemptions and conditions and for either an indefinite or specified period;[8] and that in making an exclusion order, the court should have power to authorise entry into the home for a temporary or limited purpose such as, for example, the collection and removal of personal belongings."[9]

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[1] Boyt v. Boyt [1948] 2 All E.R. 436; Silverstone v. Silverstone [1953] p.174; Maynard v. Maynard [1969] P.88; Jones v. Jones [1971] 1 W.L.R. 396.

[2] Stewart v. Stewart [1947] 2 All E.R. 813, 814; Hall v. Hall [1971] 1 W.L.R. 404, at 406 and 407.

[3] Ellis, loc.cit. pp.63-64.

[4] 1967 Act, s.1(3).

[5] Law Com. No.77.

[6] Para. 3.40(b).

[7] Para. 3.12: giving reasons, the Commission explained that "adjudication on an allegation of psychological damage is a very difficult matter which may involve the assessment of expert evidence by psychiatrists. This is a highly skilled task which we do not think can appropriately be placed on magistrates."

[8] Para. 3.41.

[9] Para. 3.40(d).

The need for reform

2.44 We have already noted at paras. 2.33 to 2.36 the anomalies which can arise where the power of ejection follows the title. The next question is: in what situations does a wife, threatened by her husband's violence, require the protection of an order excluding the husband from the matrimonial home? Three such situations may be identified:

(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.

We consider these in that sequence.

2.45 Where the husband and wife are living together in the matrimonial home and the husband is behaving violently towards the wife, a personal interdict or decree of lawburrows may be insufficient to deter the husband from violence. In this situation, we think that the court should have power to make an order excluding the husband.

2.46 Where a violent husband has left the matrimonial home temporarily and there is a risk that he may re-enter the dwelling and injure or threaten his wife or children, then again interdict or lawburrows may be insufficient. They cannot be used to override a proprietary right,[1] and once the husband has re-entered the home, they may not deter him from violence. In this situation we also think that the court should have power to make an order excluding the husband from the matrimonial home.

2.47 The third situation arises where the wife has been turned out of the home by the husband's violent conduct. The wife may return to her parents' house, or reside with another relative or a friend, or in a hostel for "battered wives". Dealing with the question whether, in a situation of this type, the magistrates' court should be able to make an order excluding the husband, the Law Commission for England and Wales observed:[2]

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[1] See para. 2.32 and authorities cited there.

[2] Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, para.3.9.

"It might be thought that, if the wife has physically removed herself from the home, the only remedy required is an order prohibiting the husband from using or threatening violence against her. We take a different view. The accommodation in which the wife has taken refuge may only be available for a few days' stay and in any case it is scarcely likely to offer the same kind and standard of amenities as she had in her own home. Consequently, as time passes, the wife may find herself under increasing pressure to patch up her differences with her husband and return home. We think it most undesirable that the law should in effect encourage a woman to expose herself in this way to the risk of further violence from her husband. We therefore conclude that, in appropriate circumstances, the magistrates' court should have power to order the husband to quit the matrimonial home."

2.48 We appreciate that the exclusion of a spouse from the matrimonial home is a very grave matter which the courts should be slow to order. First, there is a view that whatever a man may have done, he should not be evicted from his own home especially if he is owner or tenant. Second, it may be objected that a husband owner or tenant will cease to pay building society payments or rent so that unless the wife has funds or income she will usually lose her right of occupation to the claims of third parties. As regards the first of these objections, it must be conceded that exclusion from the home seriously breaches property rights. On the other hand, over half of the population of Scotland live in public sector tenancies provided under the Housing (Scotland) Acts and even in the usual case where the tenancy is granted to the husband, the true position is that the local authority are providing housing for the family as a whole (as indeed housing authorities have said in justifying the charging of rent arrears on transfer to the wife). Nor is there a large proprietary stake in Rent Act tenancies. In any event the emphasis of the law has perhaps been shifting from ownership values to personal values, and not many people are bold enough nowadays to prefer the former to the latter in formulating legislative policy. The second objection is not conclusive and in Parts III to VI below, we suggest ways in which a wife can protect herself from third parties' claims.

Proposals for exclusion orders

2.49 We conclude that the court should have power to exclude a spouse from the matrimonial home to protect the other spouse. We tentatively suggest that this power should be exercised to protect a spouse from psychological damage as well as bodily injury, since the one can be as injurious to health as the other. Interdicts against molestation provide

an analogy.[1] Accordingly, we provisionally propose that 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. (Proposition 9).

2.50 We have already suggested at Proposition 3 (para.2.22) certain guidelines which should control the court's power to regulate occupancy and management. These guidelines are relevant also to exclusion orders. But it is potentially a more serious matter to suspend occupancy rights than to regulate them and before such a decision is made, we think that the courts should consider certain further factors.

2.51 In these circumstances we suggest that 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. (Proposition 10).

2.52 Although an exclusion order is not intended to be necessarily a once-and-for-all settlement of the parties' rights of occupancy, it would certainly have continuing effect and provision would have to be made as to its variation and recall by the court. We revert to this at paragraph 2.94 below.

Other remedies ancillary to exclusion orders

2.53 A wife or husband applying for an exclusion order should also be able to claim certain other remedies. These are of two kinds. Some remedies, such as orders regulating the custody of children, are not truly ancillary to the order for ejection because in an action for both an exclusion order and a custody order, the pursuer should be able to continue

[1] See para.2.65, and 2.67 et seq.

his action for custody though his claim for an exclusion order is refused by the court or abandoned. Such remedies are truly collateral, not ancillary,[1] and their combination in one action with a claim for an exclusion order is strictly a matter of procedural competence which we deal with in Part IX below.[2]

2.54 Other remedies are accessory or ancillary to the exclusion order, viz. (a) a warrant for ejection; (b) an interdict against re-entry; (c) an order that the pursuer find security for the defender's aliment; (d) an order for preservation of the defender's goods and effects left in the home; and (e) an order imposing terms or conditions. We briefly explain the role of each of these.

2.55 We have said that the effect of an exclusion order will be to suspend the defender-spouse's right to occupy the matrimonial home. In some cases the defender will not be living in the matrimonial home but in other cases he will. If he does not leave, then the pursuer should be able to instruct officers of court to eject him. The warrant for ejection should be granted along with the exclusion order and, as in actions for ejection, the warrant should be summary, ie capable of execution without the need for a prior charge to remove.

2.56 The pursuer should also be able to obtain an interdict prohibiting the defender from re-entering the former matrimonial home without the pursuer's express permission[3] after he has left or been ejected.

2.57 Where the defender is prima facie entitled to aliment from the pursuer, as may be the case where a husband obtains an exclusion order against his wife, the question arises whether the defender should be able to request the court to supersede extract of the exclusion order or warrant of ejection until the pursuer provides security for the defender's aliment.

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[1]The distinction between collateral and ancillary claims is illustrated by O'Brien v. O'Brien (1957) 73 Sh.Ct.Rep. 129 esp. at p.133.

[2]See Proposition 64 (para.9.13).

[3]See Dobie, Sheriff Court Styles p.242 following the crave in Sharp v. Hannah (1891) 7 Sh.Ct.Rep. 10.

2.58 In some of the older sheriff court actions of ejection or removing between spouses, the sheriff required the husband, as a pre-condition of the decree ejecting the wife, to find caution, or to lodge a probative bond, or to give an undertaking, for payment of aliment.[1] In MacLure v. MacLure[2] the First Division held that the court had no power to attach conditions of this kind to possessory remedies such as ejection or removing. It could, however, attach them to an interdict. Explaining the distinction, Lord President Dunedin remarked:

> "... although as I have put it the matter depends on patrimonial rights and nothing less, still I do not think this Court is ever bound to exercise an equitable jurisdiction (which it always does when it deals with interdict) without being sure that the result of its own judgment is not necessarily to cause another wrong, I think here that we should not have pronounced such an order [scil. as interdict] if there had not been at the same time an undertaking on the part of the husband to give a certain sum in name of aliment to the wife."[3]

Since then, such conditions have been restricted to interdict cases. The question whether the amount of the sum proffered is sufficient is determined by the court, but if the parties disagree as to the amount, it can be constituted after proof in a subsequent action of aliment.[4]

2.59 Under our proposals, occupancy rights will no longer depend on patrimonial right and there seems no reason why the court should not have power to insist on a husband (or wife if she is an alimentary debtor) providing security for aliment as a pre-condition of an exclusion order or warrant for ejection.

2.60 If the defender does not enter appearance, it may be that he has no knowledge of the proceedings for an exclusion order and his ejection. On the analogy of other sheriff court proceedings,[5] we think that the court

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[1] See for example Sutherland v. Sutherland (1897) 13 Sh.Ct.Rep. 209; Parker v. Parker (1903) 19 Sh.Ct.Rep. 294; Angus v. Angus (1905) 21 Sh.Ct.Rep. 301; Barlow v. Barlow (1906) 22 Sh.Ct.Rep. 290.

[2] 1911 S.C. 200.

[3] Ibid. at p.206. (By "equitable jurisdiction" is meant simply discretionary judicial powers.)

[4] Idem.

[5] Sheriff Courts (Scotland) Act 1907, Sch. 1, Rule 117; Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, Rule 70.

should have power to give directions for the preservation of the defender's goods and effects left in the matrimonial home. The court should also have power to make the exclusion order and the warrant of ejection, as well as the interdict, subject to terms and conditions such as a condition authorising the defender or his or her agent to enter the matrimonial home temporarily to collect and remove his goods and effects.[1]

2.61 In short, we suggest that, when making an exclusion order, the court should also have power to make any one or more of the following ancillary orders:-

(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. (Proposition 11).

Interim interdict pending application for exclusion order

2.62 We do not think that in proceedings for an exclusion order, the court should have power to make an interim order excluding the spouse from the home pending disposal of the application. The Court of Session and the sheriff have power in interdict and matrimonial proceedings to grant interim

[1] Cf. Proposition 4 at para.2.24 above.

interdict against assault or molestation.[1] Such interim interdicts may be granted either de plano on the pursuer's (or petitioner's) ex parte averments or at an early sitting of the court fixed for hearing parties. If an interim order is refused, the motion may be made again at any stage, eg if the assault or molestation is repeated or new evidence emerges. We think that an interdict affords sufficient interim protection and that, in a defended case, the defender should not be ejected or refused entry to his home except after a full proof of the allegations against him. We therefore propose that (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. (Proposition 12).

Section C: Civil remedies against domestic violence

(1) Preliminary

2.63 As we mentioned in the Introduction in Volume 1,[2] the Government in response to the Report of the Select Committee on Violence in Marriage[3] asked this Commission "to examine and report on possible changes in the law to give additional protection to a spouse threatened with violence by the other spouse."[4] The proposals in Section B above would give a wife some additional protection but it is also necessary to consider three other civil remedies which are designed in some measure to afford protection, namely -

(a) judicial separation;
(b) interdict against assault or molestation; or against re-entry to the pursuer's home; and
(c) lawburrows, a remedy which we explain below.

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[1] See para. 2.67 below, et seq.

[2] Para. 0.8.

[3] H.C. 553 (Session 1974-75).

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

2.64 While it is true that a decree of separation a mensa et thoro (from bed and board) is in form a judicial order requiring one spouse to live apart from the other, and while it is also frequently said that the decree is granted for the protection of the pursuer, the decree does not in fact adequately protect the pursuer. If the defender attempts to resume cohabitation, the attempt is not visited by the court with any sanction for contempt of the court's decree. In truth, the decree is a mere declarator that the pursuer is entitled to live apart from the defender, and the main legal effect is to entitle the pursuer to live apart without desertion and to enable her (or him) to claim aliment. The remedy is best dealt with in that context[1] and in connection with the question whether the remedy of separation should be retained in our law, a question to be canvassed in a future Memorandum.

2.65 This leaves the remedies of interdict and lawburrows, both of which are specifically designed to protect a person from physical violence or molestation and are backed by sanctions. "Molestation" covers conduct ranging from mere pestering and annoyance to threats of violence putting a person into a state of fear, distress and alarm.[2] The interdict is obtainable either from the Court of Session or the sheriff having jurisdiction in the area of the threatened wrong.[3] It is available in consistorial actions[4] or in independent proceedings for interdict or declarator and interdict. No other conclusion or crave is required and, in this respect, recent reforms effected by the Domestic Violence and Matrimonial Proceedings Act 1976[5] and Rules of the Supreme Court have brought the English law on injunctions into line with the Scots law on interdict. A decree of lawburrows is an order by the sheriff compelling the defender, on pain of a fine or imprisonment, to find caution, or grant a bond, for a specified sum as security that the defender will not inflict bodily injury on the pursuer or his or her family, or damage the pursuer's property.

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[1] See Memorandum No.22 on Aliment and Financial Provision.

[2] See eg Murdoch v. Murdoch 1973 S.L.T. (Notes) 13 discussed at para.2.77 below.

[3] Sheriff Courts (Scotland) Act 1907, s.6.

[4] See Gunn v. Gunn 1955 S.L.T. (Notes) 69; Murdoch v. Murdoch 1973 S.L.T. (Notes) 13; Gribben v. Gribben 1976 S.L.T. 266.

[5] Section 1 (county court).

(2) Lawburrows

2.66 The remedy of lawburrows last received full official consideration when it was examined by the Select Committee of the House of Commons on the Bill which became the Civil Imprisonment (Scotland) Act 1882.[1] The Bill as originally drafted made provision to abolish lawburrows as part of a general attack on civil imprisonment and also because the remedy was abused since it had been granted too easily, on the pursuer's oath that he or she feared injury. There was, however, an exception in cases between spouses or between parent and child. The application had, in such cases, to be served on the party complained of and the pursuer had to lead evidence corroborating her allegation that she feared bodily harm.[2] The Committee advocated retention of the remedy since it appeared to them

> "desirable to preserve or provide a means by which persons in fear of violence may obtain security by means of a judicial order compelling the persons from whom they apprehend violence to find caution or binding them over to keep the peace."

Since then, the remedy of interdict against assault or molestation (which had not been mentioned by, or in evidence to, the Committee) has been developed by the Courts and has become the usual modern remedy. In recent years, nevertheless, decrees of lawburrows have been relied on in several sheriffdoms in a number of cases, including cases between spouses.[3] We shall be examining the process more fully in the context of diligence. Suffice it to note here that if the recent case of Morrow v. Neil is followed, lawburrows will lose some of its previous advantages. The wife will, as in interdict proceedings, require to satisfy the court of the existence of a real risk of injury, though as we have seen an enquiry was always needed in cases between spouses. More importantly while lawburrows retains the great advantage that corroboration of the pursuer's allegations is not required to satisfy the formal test of sufficiency of evidence, nevertheless, the court will generally insist on corroboration

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[1] In the recent case of Morrow v. Neil 1975 S.L.T. (Sh.Ct) 65, the historical background and main features of the remedy were expounded by Sheriff Macphail in an outstanding judgment.

[2] See A v. B, 10 June 1749, Elchies' Decisions, voce "Husband and Wife", No.32 (wife against husband); Thomson, Petitioner 7 March 1815, F.C.; Calder, Petitioner (1841) 3 D615 (husband against wife); and see also Taylor v. Taylor (1829) 7 S.794 (rule applicable between spouses extended to parent-and-child).

[3] In an earlier Report (Scot.Law.Com.No.25, 1972) we mentioned that "of 17 applications for lawburrows in the sheriff court at Edinburgh between 1966 and 1970 inclusive, 9 involved disputes between spouses", H.C. 488 (1971-72) page 41, note 22.

first, as a test of the pursuer's credibility if corroborative evidence is available and, second, in determining whether the evidence establishes the risk of injury.[1]

(3) Interdict against assault or molestation

2.67 There are several ways in which the law on interdicts against assault or molestation might be altered to strengthen the protection they afford to 'battered wives'.

(a) Interdicts between cohabiting spouses

2.68 First, in many cases, a wife may wish to obtain protection from her husband while living with him as man and wife. There is authority that a cohabiting spouse may obtain a decree of lawburrows[2] but there is no reported decision on the question whether interdict against assault or molestation is competent while the consortium subsists.

2.69 There seems in principle to be no legal impediment to the grant of that remedy. Assault or threats of violence, perpetrated by one spouse against the other, are no less civil wrongs because they happen to be made during the spouses' cohabitation. If the interdict is "sharply defined and related specifically to the particular risks which justify its grant",[3] then its grant would seem to be competent. It is fair to say, however, that we have not traced any case in which such an interdict has been granted. There is, moreover, nothing to stop the court in a particular case adopting the view that it should not intervene in a matrimonial dispute between cohabiting spouses except in a proper consistorial process, for the court has a discretion to refuse interdict even when it is competent.

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[1] Morrow v. Neil 1975 S.L.T. (Sh.Ct.) 65 at p.70.

[2] See Fraser, Husband and Wife (1878 - 2nd ed.) vol. 2 p.910 "If instead of proceeding to the extreme measure of judicial separation, the injured spouse should still wish the conjugal society maintained and at the same time receive the highest measure of protection which the law can afford under such circumstances, the proceeding adopted is to swear a law-burrows against the wrong-doer".

[3] Murdoch v. Murdoch 1973 S.L.T. (Notes) 13.

2.70 Accordingly, to emphasise the availability of the remedy and to remove any doubts about its competence in a case between cohabiting spouses, we suggest that 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. (Proposition 13). The court could still in its discretion refuse an interdict between cohabiting spouses in an appropriate case but there would have to be some reason other than cohabitation for the refusal. There would continue to be safeguards against trivial or vexatious actions.[1]

(b) Corroboration

2.71 The Report of the Select Committee on Violence in Marriage stated[2]

> "In criminal charges of assault the law requires that there be evidence from two different sources, which in practice usually means that there must be a witness to the assault other than the woman concerned before a conviction can be obtained. Evidence of injuries is not in itself corroboration. As the Lord Advocate says in his evidence "Lack of evidence is a considerable check on taking proceedings". Despite the Lord Advocate's view that the need for corroboration is an essential safeguard for the accused person, we recommend that the law of evidence be amended in respect of assaults between husband and wife in the matrimonial home, since while such a rule may be generally justifiable protection for the accused it makes it too difficult for the law to protect the battered wife. Moreover there is already a precedent in the relaxation of the law of corroboration in the case of the law of reparation."

It is not clear from this passage whether the recommendation was intended to extend to interdict proceedings. We have seen that in lawburrows (which the Committee did not discuss), the requirement of corroboration does not apply and this was a relaxation of the old rule applying between spouses or parent and child. Section 6(4) of the Civil Imprisonment (Scotland) Act 1882 provides:

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[1] Law Reform (Husband and Wife) Act 1962, s.2(2); see para.9.10 below.

[2] Para. 55: (recommendation 23 states: "The Scottish law of evidence should be amended in respect of assaults taking place between husband and wife in the matrimonial home.")

> "In every application for lawburrows the parties shall be competent witnesses, and (the sheriff) may grant the prayer of the [initial writ] upon the sworn testimony of one credible witness, although such witness may be a party."

We have also seen that corroborative evidence may nevertheless be required especially if it is available and is not led.[1] In actions of contravention of lawburrows, corroboration is required and the standard of proof may possibly be the criminal standard of proof beyond reasonable doubt.[2] In applications for interdict in matrimonial proceedings, interim interdict pending disposal of the proceedings may be granted on uncorroborated testimony or ex parte statements but a full proof is required before the interdict is made perpetual. In breach of interdict, corroboration is also required but the burden of proof is the criminal standard of proof beyond reasonable doubt.[3]

2.72 A proposal to relax the requirement of corroboration in proceedings for interdict, or petitions and complaints (or motions) for breach of interdict, is likely to be controversial. First, it may be thought anomalous to make an exception of this kind in proceedings between members of the same family, which alone lie within our terms of reference. The anomaly would be especially obvious in proceedings for breach of interdict in view of its quasi-criminal nature and the higher standard of proof. Lawburrows does, however, provide a precedent. The justification for the exception would be partly the difficulty of obtaining corroborative evidence in cases of domestic violence in the home and partly the considerations of public policy favouring the protection of wives at risk. There is also a view that corroboration is an artificial doctrine.

2.73 On the other hand, many people in Scotland view with concern the piecemeal erosion of the requirement of corroboration which they regard as an important safeguard. This is a matter which we shall consider generally in a comprehensive review of the law of evidence in a future

[1] Para. 2.66 above.
[2] Morrow v. Neil 1975 S.L.T. (Sh.Ct.) 65 at p.69 (obiter).
[3] Gribben v. Gribben 1976 S.L.T. 266.

Memorandum. The requirement may be thought especially justifiable in proceedings which may lead to imprisonment for contempt and where quasi-criminal standards of evidence already apply. Those who take this view often tend to regard the cases in which some corroboration cannot be obtained as very infrequent. The requirement does not demand a second eye-witness to the assault. All that is needed is direct evidence (eg of noises and shouts or sounds of scuffles) or evidence of surrounding facts and circumstances from a source other than the pursuer herself. However slender the evidence from a second source, it will be sufficient if the evidence of the pursuer is believed.

2.74 As at present advised, we take no concluded view on either side in this debate but merely state: 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. (Proposition 14).

(c) Scope of interdicts

2.75 In at least one respect, the powers of the English courts to make injunctions are much wider than the powers of the Scottish courts to grant interdicts. In Scotland, as we have seen, the courts have power to pronounce an interdict:

> (a) prohibiting conduct of a specified description on the part of one spouse which amounts to the delicts of assault on, or molestation of, the other spouse; or
> (b) prohibiting the entry of the spouse without title into a dwelling owned or tenanted by the other spouse.

In England and Wales, the courts can grant injunctions of a similar kind. In addition the county courts have a statutory jurisdiction, on application by a spouse, to grant an injunction containing a provision excluding the other spouse "from a specified area in which the matrimonial home is included",[1] for example, a street or block of flats. The English High Court possesses a similar power at common law.

[1] Domestic Violence and Matrimonial Proceedings Act 1976, section 1(1)(c).

2.76 In Scotland, the courts have never assumed power to grant interdicts of a comparably wide scope. It is, however, not easy to state in a breath why such an interdict is incompetent. An interdict prohibiting entry into the neighbourhood of the matrimonial home would render unlawful conduct which, apart from the interdict, would not be tainted with illegality in the remotest degree. It is not unlawful merely to visit the street containing the former family home, although to do so obviously enhances the risk of assault, molestation or wrongful entry. The test of competence seems to be that the interdict must be no wider than is necessary to curb the illegal actings complained of.

2.77 This was the test laid down in Murdoch v. Murdoch.[1] The pursuer in a divorce action for cruelty concluded for interdict in the following terms:

> "For interdict of the defender from telephoning the pursuer calling at her house and molesting her in any way at her house or elsewhere in Scotland and from removing or attempting to remove said children from the care of the pursuer and for interdict ad interim".[2]

On a reclaiming motion against refusal of the interdict, Lord President Emslie said:

> "Interdict, as is well known, is an equitable remedy designed to afford protection against an anticipated violation of the legal rights of the pursuer. In all cases, however, where interdict is granted by the court the terms of the interdict must be no wider than are necessary to curb the illegal actings complained of, and so precise and clear that the person interdicted is left in no doubt what he is forbidden to do. ..... In general, ... the court will require to be satisfied that the pursuer, unless interdict is granted, is likely to be exposed, without other adequate protection, to conduct on the part of the defender which will put her at risk or in fear, alarm or distress; and where an interim order is made it must be sharply defined and related specifically to the particular risks which justify its grant."[3]

The court refused to grant interim interdict against a husband telephoning the wife-pursuer or calling at her house, upon the grounds that such conduct on the part of the husband was not illegal and might even, in certain circumstances, be thought desirable. Instead, interim

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[1] 1973 S.L.T. (Notes) 13.

[2] Idem.

[3] Idem.

interdict was granted to prohibit the defender -

> "... from molesting the pursuer by abusing her verbally, by threatening her, by putting her into a state of fear and alarm or distress, and by using violence towards her ..."[1]

This was held to satisfy "the twin demands of competency and precision ..."

2.78 In a second common category of interdict case, viz. where the interdict sought is ancillary to a decree of ejection, the approach adopted by the courts is illustrated by MacLure v. MacLure[2] in which the pursuer's conclusions were firstly for summary ejection of his wife from the hotel (which was the matrimonial home) and secondly[3]

> "to interdict her from returning to said hotel or such other hotel or dwelling-house the pursuer may occupy or from molesting or interfering with pursuer or any member of his family ..."

Commenting on this conclusion, Lord President Dunedin observed:[3]

> "I think that that goes too far. In the first place, to interdict her from 'such other hotel or dwelling-place' is looking too much to the future. One does not know that she would molest him in any other hotel or dwelling-house; and accordingly I think those events must be left until they occur. And then 'from molesting or interfering with the pursuer or any member of his family' is also inexpedient more especially as there are children of very tender years. It is quite clear that we are not here in any consistorial[5] matter and therefore we are not to decide, and cannot decide, upon the question of access to children. That, if parties do not agree about it, will have to be regulated in the ordinary way in a consistorial[5] application."

The Court revised the interlocutor so that it provided:[4]

> ".... ordain the defender to remove from said hotel, and that on a charge of seven days; Interdict her from returning thereto."

Even this restricted interdict arguably lacks precision. In Sharp v.

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[1] Ibid. at p.14.

[2] 1911 S.C. 200.

[3] Ibid., at p.206.

[4] Ibid. at p.209.

[5] Here the word "consistorial" is not used in a technical sense. Proceedings for regulating the custody of children are not and never have been "consistorial" since jurisdiction derives ultimately from the nobile officium or specific statutes.

Hannah,[1] the sheriff granted interdict against the defender entering the dwelling in question without the express permission of the owner or tenant spouse.

2.79 Having regard to these authorities it seems clear that an interdict excluding a spouse from a specified area surrounding the matrimonial home, or from a street or common stair, goes further than is necessary to curb an illegal act. In general, all interdicts prohibiting entry into an area have been confined to land or premises in which the pursuer has a legal interest.

2.80 It is for consideration whether Scots law should be altered to give the court wider powers to prohibit a spouse from approaching the dwelling where the pursuer resides. One alternative would be a legislative provision in general terms enabling the court to grant an interdict prohibiting conduct which though not in itself unlawful enhances the risk that the defender will inflict injury on the pursuer. Another alternative is a provision on the lines of the 1976 Act. To elicit views we suggest that 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. (Proposition 15).

(d) Enforcement of interdicts: criminal breach of interdict

2.81 The wider scope which we have suggested for interdicts protecting injured wives would give them a much greater protection than is afforded at present by the criminal law. If the husband is merely found on the premises, he is not guilty of an offence. It is not an offence in Scotland to trespass in a dwelling unless the accused lodges there for the night.[2] Housebreaking even with intent to assault is not a crime.[3] Still less is it an offence to enter into the vicinity of the matrimonial home. We have noted above that harassment or eviction by a spouse of the other spouse having occupancy rights might be made an offence.[4] But that may not go

[1](1891) 7 Sh.Ct.Rep. 10, cited in Dobie Sheriff Court Styles p.242.

[2]Trespass (Scotland) Act 1865, s.3; Gordon, Criminal Law (1972) p.487.

[3]Housebreaking, however, is an aggravation of an actual assault, and of course a crime such as breach of the peace may be committed in the course of housebreaking.

[4]Proposition 6 at para. 2.27 above.

far enough. The protection afforded by interdict may be ineffective unless the procedures for enforcing the interdict are improved. At least four related defects in the present system of enforcement can be identified.

2.82 First, interdict is not generally enforceable by preventive measures before a breach of interdict has occurred but only after the breach has occurred and indeed after it has been established in a petition and complaint to the court[1] that the breach took place.

2.83 Second, the procedure of petition and complaint for breach of interdict requires a full proof if it is defended and so may take a long time to complete. It is therefore perhaps too slow to afford adequate protection to the women concerned. The Select Committee on Violence in Marriage found a similar problem in England and Wales and said that they:[2]

> "... accepted the evidence from women and lawyers that civil injunctions restraining husbands from assaulting their wives, or ordering husbands to leave and keep away from the matrimonial home, were on occasions 'not worth the paper they were written on', as the present enforcement procedure of applying for the men to be committed to prison was too slow adequately to protect the woman concerned."

In implement of paragraph 17 of the Committee's recommendations, section 2 of the Domestic Violence and Matrimonial Proceedings Act 1976 enables a High Court or county court judge to attach a power of arrest to an order restraining a spouse from using violence towards the other spouse or their children, or excluding the other spouse from the matrimonial home or its surrounding area, if the judge is satisfied that there have been assaults occasioning actual bodily harm which are likely to be repeated. A police constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of a relevant condition of the injunction. When a husband (or wife) is arrested for a suspected breach of the condition, he must be brought before a High Court or county court judge within 24 hours after the arrest, and cannot be released within that period except by direction of the judge. He cannot, however, be detained in custody beyond that period, unless under an order of the court punishing him for disobedience to the injunction.[3]

[1] With the concurrence of the public prosecutor: Gribben v. Gribben 1976 S.L.T. 266.

[2] Op. cit. Q.1299 at p.283.

[2A] The power may be exercised in divorce proceedings Lewis v. lewis [1978] 1 All E.R. 729 (C.A)

[3] Rules of the Supreme Court 1965, Order 90, rule 17(4) (inserted by S.I. 1977/532) enables the judge to punish the violent spouse for disobedience notwithstanding that no copy of the injunction has been served on him and no application for his committal has been made.

2.84 Third, the policy underlying the recent English Act is based on the view that adequate protection to injured wives can be given only if the law is enforced by the police. At the present time, where a civil court in Scotland grants a warrant for imprisonment for breach of interdict, the warrant is executed by civil officers of court - messengers-at-arms or sheriff officers. The police only become involved to back up the civil officers if violent resistance (which amounts to the crime of deforcement) to these officers is anticipated. There would frequently have to be an emergency application for legal aid to cover the expenses of the civil officers. If under our proposals a husband were to be interdicted from entering the neighbourhood of the matrimonial home, and if the civil officers of court were to have the function of arresting without warrant the offending spouse who was found within the prohibited area, the civil officers would almost certainly find it difficult to discharge the functions. Their numbers are relatively small and the injured spouse is unlikely to be able to instruct them easily or quickly. Fourth, the normal process of enforcement by petition and complaint for breach of interdict seems to impose too onerous a burden on the injured wife in cases of domestic violence. She may be afraid or unable to pursue the case. If on the model of the recent English legislation, the police were to have powers of arrest for breach of the civil interdict, and on arrest to bring the offending spouse before the court on the next lawful day, the arrest would require to be intimated to the wife (as well as the public prosecutor) and she would require to assume the role of a quasi-prosecutor at short notice. Such a procedure seems inappropriate and likely to be ineffective.

2.85 For these reasons, arguably it should be provided by statute that breach of the interdict by the interdicted spouse should be a criminal offence which could be prosecuted in the High Court or sheriff court. The police would have powers to arrest an interdicted husband found in the wife's house or a prohibited area in breach of the interdict or suspected of a past breach of the interdict. The procurator-fiscal or Crown Office should have the power to bring the prosecution and the injured wife should not be required to act as a quasi-prosecutor. On the one hand the proposal should meet the views of those who believe that an interdict of the type envisaged should have the status of a warrant of arrest. On the other

hand the proposal would not infringe the principle that civil warrants should be executed by civil officers of law while the police enforce the criminal law - a principle with which we have much sympathy. We therefore advance for discussion the proposal that (1) it should be provided by statute that where the court pronounces an interdict prohibiting one spouse (the defender) from -

(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.

(Proposition 16). We think that the possibility of criminal proceedings should cut off the wife's right to bring a petition and complaint. It seems prima facie more appropriate that the clerk of court, rather than the pursuer's solicitor, should notify the police of the interdict[1] but we invite views.

(e) Service of interdict on defender

2.86 An interdict granted in the defender's absence does not interpel him from assault or molestation unless and until the interdict order has been intimated to him or he receives informal notice.[2] Given the quasi-criminal consequences of interdict, this rule seems necessary, and the more so where breach of interdict would, as we propose, be a criminal offence. For this reason, service is normally made personally by a messenger-at-arms or, as the case may be, a sheriff officer. Where the

[1] Under Rules of Supreme Court 1965, Order 90, rule 17(2) and (3), [inserted by S.I. 1977/532] a copy of an English High Court injunction with a power of arrest under the Domestic Violence and Matrimonial Proceedings Act 1976, and any order varying the injunction, is served by the tipstaff on "the officer for the time being in charge of any police station for the applicant's address."

[2] Henderson v. Maclellan (1874) 1R.920; Matheson v. Fraser 1911 2 S.L.T. 493; Neville v. Neville (1924) 40 Sh.Ct.Rep. 151.

spouses are living apart and the defender's whereabouts are unknown, or he is difficult to locate at his residence, problems obviously arise. It was represented to the Select Committee on Violence in Marriage that many more rigorous attempts should be made to find the person concerned to get the interdict served.[1] The problem may well differ according to whether it arises in the large cities, or in smaller burghs. There does not seem to be any easy solution to this problem. We do not think that it would be appropriate to invoke the aid of the police for the service of a civil interdict. At this stage we simply advance for consideration the proposition that 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. (Proposition 17).

Section D: Consequential and connected problems

2.87 In this final Section of Part II, we briefly consider certain problems which are consequential on or connected with the proposals which we have so far advanced. These problems are discussed under the following heads:

(1) the definition of the matrimonial home;
(2) contracting out and other agreements between spouses as to occupancy of the matrimonial home;
(3) the duration, variation and recall of orders; and
(4) the personal rights of a spouse to recover expenditure on the matrimonial home from the other spouse.

(1) The definition of the matrimonial home

2.88 The expression 'matrimonial home' is not a legal term of art and its definition in legislation will present certain problems. In most cases there will be no difficulty in identifying the home, but there will be a significant number of cases where difficulties arise. This is the more

[1] H.C. 553 (Session 1974-75, vol. 2, Q.1299).

important because in Parts III to VI below, we advance proposals which may affect third party rights and conveyancing procedures. It is essential that the dwellings to which the legislation applies are sufficiently well defined as to avoid unnecessary litigation or conveyancing difficulties.

2.89 It is not possible at this stage to identify all the problems. It can, however, be said that broadly speaking occupancy rights should be available in relation to a dwelling house in which the married couple in question reside. It is for consideration whether the concepts of "ordinary" or "habitual" residence should be used. In certain cases, where one spouse has left the matrimonial home voluntarily or otherwise, occupancy rights will continue to be available to that spouse or, as the case may be, the spouse who remained in occupation. The definition must therefore cover a former matrimonial home, as for example in the English Act.[1] The (Irish) Family Home Protection Act 1976[2] gives the following definition:-

> "In this Act, "family home" means, primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving."

The expression would cover caravans and we deal with the special problems of these in Part IX.

2.90 Where there are two or more matrimonial homes in which a married couple usually reside, personal occupancy rights might be available in both. But, on the precedent of the Matrimonial Homes Act 1967, section 3, our proposals in Part VI for allowing enforceability against third parties by registration should apply only to one home. To sum up we suggest that (1) the legislation conferring occupancy rights should apply to a dwelling in which a married couple ordinarily resided 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. (Proposition 18).

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[1] Matrimonial Homes Act 1967, s.1(8).

[2] Section 2(1).

(2) Contracting out and other agreements as to occupancy

2.91 The questions arise of whether or how far it should be possible for the spouses to enter into legally binding agreements on occupancy of the matrimonial home, or for one spouse to waive the statutory occupancy rights which we have proposed. Should such an agreement or waiver supersede the rights conferred by statute? Should it oust the jurisdiction of the court to make orders regulating occupancy or excluding a spouse so that an application for such an order is rendered incompetent? Should it supersede an order which has already been made? We have considered whether some analogy may be drawn from the law on renunciation of alimentary rights. In general, a wife cannot renounce or discharge her entitlement to claim future aliment.[1] The justification for this rule seems to be first that her right to aliment is a matter of public concern not to be bartered away lest the burden of her support falls on the State; and, second, that an agreement as to aliment invariably depends on a separation agreement, which is always revocable by a spouse willing to adhere because the policy of the law favours the reconciliation of spouses. In our Memorandum No.22,[2] we did not advance proposals that the rule prohibiting renunciation of aliment should be changed. While occupancy rights in the matrimonial home, however, may seem to be a form of aliment, the analogy is not exact since the right to be alimented is not a right to be alimented in any particular residence. A man can aliment his wife by providing a home for her in a separate dwelling.

2.92 The appropriate solution is not self evident. On the one hand, it can be argued that the law should encourage the resolution of marital disputes by agreement. Further, it can hardly be suggested that a wife must retain occupancy rights lest she be compelled to apply to the local authority for the provision of a council house. Moreover, some waivers of occupancy rights will be necessary. For example, it seems clear that

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[1] Clive and Wilson, op.cit., pp.414-418; p.424. Different rules apply to the renunciation of financial provision on divorce which is generally competent: see e.g. Dunbar v. Dunbar 1977 S.L.T. (Notes) 55.

[2] Memorandum on Aliment and Financial Provision, paras. 2.157-2.162.

a consent to disposal of the home should amount to an implied waiver of occupancy rights. But other types of waiver seem more problematic, in particular (a) a waiver of current occupancy rights in the matrimonial home given by a spouse who is resident there and has no intention of departing from it; and (b) a spouse's waiver of occupancy rights in all matrimonial homes present and future which may be owned by the other spouse during the marriage. Thus a wealthy father settling property on his daughter may make a waiver by the daughter's husband a condition of the gift, or the owner of the mansionhouse of a landed estate may be advised to insert such a clause in a marriage settlement. On the other hand, the waiver of rights in a more modest dwelling by a wife without independent financial resources, made without separate legal advice, might defeat the policy of the legislation. Orders as to the home, especially exclusion orders, are designed to give protection from inter alia the violence of a spouse and these are obvious risks in ousting the court's jurisdiction. Occupancy rights might be regarded as a minimal protection which cannot be renounced except in relation to a particular home.

2.93 We think that this difficult question should not be left unregulated. One solution would be to provide that agreements waiving or regulating occupancy rights should not be legally enforceable unless they are in writing (like other agreements relating to heritage). We deal below with the form of a spouse's consent to disposal of the home and these formalities might provide a model for agreements waiving or regulating occupancy rights. To elicit views, we suggest that (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 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 those rights have accrued. (Proposition 19). The effect would be that agreements would not usually be binding unless made on the advice of legal (or para-legal) advisers, whether or not there was a requirement that separate advice must be obtained.

(3) Duration, variation and recall of orders

2.94 We have suggested above the introduction in Scots law of 'interim' and 'final' orders regulating occupancy rights or rights of management in the matrimonial home, exclusion orders suspending a spouse's rights in the matrimonial home, and various ancillary orders. These orders must necessarily have continuing effect. Whether they become a once-and-for-all settlement of the parties' rights of occupancy until termination of the marriage by death, divorce or annulment will depend on the circumstances. It will, however, often happen that an order is rendered inappropriate and out-of-date by a material change in circumstances and where this occurs, either party should be entitled to apply to the court to obtain a subsequent order providing for the variation or recall of the original order. Thus if the parties become reconciled and resume cohabitation happily after an exclusion order, the order should cease to have effect. One technical question is whether the events terminating the operation of the orders should be specified in the enabling statute or whether they should be specified in the orders themselves.

2.95 To elicit views on these problems we propose that (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) 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. (Proposition 20).

(4) Personal rights to recover expenditure on matrimonial home from other spouse

2.96 At paras. 2.17 to 2.20 above we discussed whether a spouse with occupancy rights should have a right to order necessary repairs

and maintenance works. There remains inter alia the question of which spouse should be liable for repairs and maintenance in a dispute as between the spouses. If the owner-husband or occupier wife pays the tradesmen's bills, should he or she be entitled to be reimbursed in whole or part by the other spouse, and, if so, in what circumstances? Apart from repairs and maintenance costs, it frequently happens that a spouse who has no proprietary stake in the matrimonial home spends money on improvements, or himself effects improvements. Again, in the owner-occupier sector, a spouse may contribute towards the initial payment or the subsequent loan instalments without acquiring a right of ownership. In a future memorandum, we shall discuss the question whether in these circumstances the contributing spouse should have a proprietary claim or a share in the value. Here we are concerned with the question whether the spouse who made the payments or effected the improvements should have a personal right, enforceable against the other spouse or his (or her) executors, to recover the expenditure.

2.97 We set out the existing law in some detail in Appendix A. In discussing its effects, it is convenient to distinguish cases where the home is vested in one spouse (single ownership) from cases where it is vested in both spouses as common property or joint property.

(a) Single property (home owned by one spouse)

2.98 Where the title to the home is vested in one spouse and the other spouse effects physical improvements, or makes financial contributions to the initial purchase price or to the subsequent secured loan instalments, the latter may claim against the former either under the common law principles of unjust enrichment or, in the case of contributions to the secured loan, by taking an assignation of the building society's rights and remedies. It seems that in the Anglo-American Common Law jurisdictions, there has been little discussion of the possibility of a remedy based on unjust enrichment. As Lord Justice Gibson explained, - "Unjust enrichment, though it is potentially very versatile, has always been regarded by the judges with some mistrust as the product of an alien system and has never found full acceptance, ..."[1] In these jurisdictions, the law enables the

[1] "A Wife's Rights in the Matrimonial Home" (1976) 27 Northern Ireland Legal Quarterly 333 at p.341; see also the remarks of Lord Reid in Pettit v. Pettit [1970] A.C. 777 at p.795 to effect that the doctrine of unjust enrichment had not been applied in any English case "where one spouse has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved."

courts to look behind the title more easily than in Scotland so that a spouse making financial contributions or improvements to the home generally claims a right of beneficial ownership, rather than repayment or recompense. Since, with us, financial contributions or capital improvements by a spouse do not give him or her a proprietary stake, it might be thought that the doctrine of unjust enrichment, which is deeply rooted in Scots law, has a potentially useful role to play.[1]

2.99 As appears from Appendix A, however, the broad effect of the existing law is that a spouse will rarely, if ever, be able to claim from the owner-spouse recompense for improvements to the home or for secured loan instalment payments, or repayment of financial contributions to the purchase price or secured loan instalments. The effect may often be to leave the contributing spouse without any remedy since loan can only be proved by writ or oath, and negotiorum gestio requires that the expenditure must have been made in an emergency.

2.100 On one view, ideas of unjust enrichment lie behind the demand for equal sharing of the value or ownership of the matrimonial home. For it may be argued that a husband is unjustly enriched at his wife's expense when she gives up her career prospects to manage the home, while he takes the whole advantage of its inflating value. Circumstances can vary widely, but it seems safe to say that it will often be unjust to deny a spouse the right to recover expenditure on the home or financial contributions to the secured loan. Further, it seems unrealistic, and may often be unjust, to require that the spouse's claim to recover should depend on the same principles of unjust enrichment as apply between strangers. The payments will rarely be made on the erroneous assumption that they were due and to make error an important test of the claim's validity is to focus on an irrelevant circumstance. Again, it may be sensible and fair for the law to presume that a temporary possessor (such as a liferenter) effects improvements for his own benefit and cannot claim recompense from the owner. But if that presumption is applied to disputes between spouses, then the claimant will almost always fail. While a marriage is happy, financial contributions are made or improvements effected because normally it does not matter which

[1] See Clive and Wilson, op.cit., pp.308-310.

spouse pays what bills. Even after a marriage breaks down, a wife for example may pay her husband's secured loan liabilities in order to protect her occupancy from enforcement or calling-up proceedings.

2.101 It is not easy to select the appropriate solution and the matter may require to be investigated again in the wider context of family property law reform. One approach would be to say that the spouse who effected the expenditure or made capital improvements should normally be entitled to recover the cost from the spouse who is owner, at least if the expenditure or improvements were made with his consent or acquiescence. This proviso seems desirable since arguably the owner should not be compelled to pay for unwanted alterations even if the value of his property is inflated thereby. Depending on the pattern of the spouses' general expenditure, for example, there may be cases where a spouse should not be entitled to recover. In such cases the court should have a discretion to refuse the claim.

2.102 The alternative approach is simply to confer a wide discretion on the court to apportion liability for outgoings as between the spouses. This approach is adopted by the Matrimonial Homes Act 1967, section 1(3)(b) and (c), in relation to future liabilities.

2.103 In the light of these remarks we advance the following propositions for comment. (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 owner or 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) Views are invited on the appropriate solution. It is suggested that either (a) the court should be given a general discretionary power to allocate or 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? (Proposition 21).

(b) Title vested in both spouses: common or joint property

2.104 In Appendix A, we show that where both spouses are common or joint proprietors of the matrimonial home, and one of the spouses makes financial contributions in excess of his liability or effects improvements to the home, he or she is more likely to be able to recover the expenditure from the other spouse. We have, therefore, concluded that the law in this respect is satisfactory and that no legislation is required.

PART III: PUBLIC SECTOR TENANCIES OF THE MATRIMONIAL HOME

(1) Introductory: scope of Part III

3.1 About 54% of families in Scotland live in public sector rented accommodation, that is to say, dwellings provided, owned and managed under the Housing (Scotland) Acts 1966 to 1977 by local authorities (islands area and district councils), the Scottish Special Housing Association (S.S.H.A.) and New Town Development Corporations.

3.2 Public sector tenancies merit separate consideration partly because of their numerical importance and partly because the special positions of the landlord and tenant create special problems. The tenant has no security of tenure: the landlord authority can terminate the tenancy at will, and re-let it to the tenant's spouse or a third party. It may also give or offer alternative accommodation to the tenant's spouse or the tenant himself, and will often be the main source of accommodation in the area. In short, the authority is master of the situation.

3.3 Public sector landlords may become involved in matrimonial disputes in one of two ways.

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

It seems that the increase in overt marital breakdown has caused a significant increase in applications to housing authorities for transfers and new allocations.[1] (Applications for new allocations fall outside the scope of this Memorandum since it is clear that the court could not deal with them.)

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[1] This appears from an illuminating report by a Working Party of the Scottish Special Housing Association which, with the Association's kind permission, we annexe at Appendix B, (page 159).

3.4 Two legal questions which can affect spouses involved in marital breakdown may be noted. The first has now possibly been resolved by the Housing (Homeless Persons) Act 1977 which gives responsibility for the homeless to the district council's housing department, rather than the regional council's social work department.[1] The second is whether local authority tenants should be conceded the same or a similar measure of security of tenure as is conceded to protected tenants by the Rent (Scotland) Act 1971.[2] These problems fall outwith family law and cannot be resolved in the present context. Our discussion and proposals in this Part relate only to public sector unfurnished tenancies of the matrimonial home. Under section 85(1) of the Rent (Scotland) Act 1971, where the tenancy is a furnished tenancy, or where the local authority provide certain services[3] for which rent is paid, then the security of tenure and fair rent provisions of Part VII of the Rent (Scotland) Act 1971 apply.[4] It is thought that these tenancies form a very small proportion of the total public sector housing stock[5] and can be ignored for present purposes.

3.5 The main problems raised in this Part are whether decisions on transfer of the 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. Subsidiary problems also arise: should the decision to transfer the tenancy of the matrimonial home between spouses be discretionary? If so, should the discretion be exercised by a court or by an administrative body? Or can fixed legal or administrative rules be laid down?

3.6 We have spoken of "transfers" of tenancies but the phrase is technically inaccurate. Strictly the landlord authority terminates the tenancy by

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[1] The Act will come into operation in Scotland on 1 April 1978.

[2] See the Morris Report on Housing and Social Work (1975) para.8.38; Finer Report, (1974) Cmnd.5629 paras.6.87-6.90; Scottish Consumer Council, Tenancy Agreements in Scotland (1977) Chapter 4. See also the Government consultative paper Scottish Housing (1977) Cmnd.6852, para.9.21.

[3] Section 100(1) defines "services" to include "attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a dwelling-house".

[4] 1971 Act s.85(1).

[5] But see Mitchell, "The Rent Acts and Council Tenants" (1977) Scottish Legal Action Group Bulletin 18.

notice to quit and then re-lets to the tenant's spouse. 'New allocation' (or 'decanting') is the phrase commonly used for the allocation of a different dwelling to the tenant or the tenant's spouse. In Appendix C below, we give a short account of the legal framework within which Scottish housing authorities allocate and transfer tenancies. In this Part, we discuss problems connected with the protection of occupancy rights and transfers of tenancies on marital breakdown before the stage of a divorce action has been reached and where one spouse alone is tenant; we then briefly consider the position on termination of the marriage by divorce or death; and finally we deal with joint tenancies.

(2) Should the court have power to assign public sector tenancies on marital breakdown?

3.7 Several recent official reports have considered the factors to which local authorities should have regard in making decisions on transfers of the matrimonial home.[1] Both the Finer Report[2] and the Morris Report[3] encourage local authorities to anticipate a judicial decision on the matrimonial or custody issue in certain circumstances. Subsequently in our Memorandum No. 22 on Aliment and Financial Provision,[4] we drew attention to the fact that the transfer of the tenancy is entwined with the problem of the custody of the children. In a divorce action, at the stage of an application for an interim order awarding custody of the children, the award of custody pending disposal of the action may often follow the tenancy of the matrimonial home. At the stage of proof in the divorce action, the final custody order may follow the award of interim custody, and thereafter the local authority's decision as to the tenancy of the matrimonial home may follow the award of custody. To break the circle, we suggested that the court should have power to order the transfer of public sector tenancies with the landlord's consent. We envisaged that the power would

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[1] For ease of reference, relevant extracts from these Reports are set out in Appendix D. (page 167).

[2] Cmnd 5629 (1974), para. 6.81 et seq: see Appendix D.

[3] Report on Housing and Social Work: a joint approach (1975) HMSO para. 8.40(b); see Appendix D.

[4] Memorandum No.22, paras. 3.25 to 3.27; and 3.34 and 3.35.

be exercisable both pending disposal of the action and at final decree. The English courts already have powers to transfer tenancies in divorce proceedings, including public sector tenancies.[1]

3.8 In the debates on the Bill which became the Divorce (Scotland) Act 1976, it was suggested that (on one view) the local authority or (on another view) the court, should transfer the tenancy of the matrimonial home at an earlier stage than divorce proceedings.[2] It is not, however, every case in which a judicial transfer would be appropriate and we turn now to consider the situations in which the court might have a useful role to play.

3.9 Applications by a tenant's wife for transfer of the tenancy may be made in four situations. First, where both the husband-tenant and his wife have agreed to live apart and wish to transfer the tenancy of the matrimonial home, the principle adopted by S.S.H.A. is that in normal circumstances the transfer should be made.[3] In the absence of any dispute, judicial intervention seems unnecessary and, on grounds of expense, undesirable.

3.10 Second, where the husband-tenant formally renounces the tenancy by notice to the landlord-authority, the S.S.H.A. solution is to transfer the tenancy to the wife if she wishes such a transfer.[4] Presumably, other housing authorities adopt a similar course. Again, in our view, judicial intervention seems unnecessary and inappropriate. We deal at para.3.28 below with the right of a tenant's spouse to veto renunciation of a tenancy.

3.11 Third, there is a stronger case for allowing the court to order a transfer or assignation of the tenancy where the tenant-husband excludes his wife and the children of the marriage from the matrimonial home. In this type of situation, public authority landlords frequently find them-

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[1] See Thompson v. Thompson [1975] 2 All E.R. 208 (C.A.); Hutchings v. Hutchings (1975) 237 Estates Gazette 571 (C.A.); Regan v. Regan [1977] 1 All E.R. 428; Rodewald v. Rodewald [1977] 2 W.L.R. 191 (C.A.); see also Law Commission Working Paper No. 42 on Family Property Law (1971) para.1.20; Finer Report, op.cit., para.6.88; J Gareth Miller, "The transfer of council tenancies on divorce" (1977) Local Government Chronicle 617.

[2] See Parl.Deb., O.R., Second Scottish Standing Committee, 31 March 1976, cols.156-161.

[3] See Appendix B below, (p.159).

[4] Ibid. (p.159).

selves forced to take one side or the other in matrimonial disputes. The S.S.H.A. practice is that, if the husband at first refuses to transfer the tenancy, then attempts are made to persuade him to do so.[1] If these attempts are unsuccessful, the S.S.H.A. will normally terminate the husband's tenancy and re-let to the wife. At the same time, consideration is given to the provision of adequate alternative accommodation (if at all possible) for the husband. The S.S.H.A. Working Party considered "that to await a legal separation, usually a lengthy process and not frequently sought by the parties concerned, can cause undue suffering and distress."

3.12 If there are no children involved, however, S.S.H.A. recommend that "the judicial decision should be awaited and the tenancy given to the innocent party".[2] The position of the children is thus regarded as a crucial factor and, where there are no children, the finding of matrimonial fault governs.

3.13 To a large extent, the situation where one spouse excludes the other is covered by our proposals in Part II above. The tenant husband would not have the right to exclude his wife except by order of the court.[3] Further, the court would have power, on application by either spouse, to make an order adjusting the occupancy rights of the spouses.[4] It seems but a logical extension of these powers to enable the court to make an order transferring the tenancy since a husband excluded from the home is unlikely to keep up payments of rent. There would of course require to be safeguards for the landlord's right to receive intimation of the application, and to enter the process and be heard.

3.14 Fourth, difficult problems can arise where the tenant husband leaves his wife and children in the matrimonial home. If the husband's whereabouts are unknown, the S.S.H.A. practice is to transfer the tenancy to the wife after the lapse of a period of three months during which reliable confirmation is sought that the husband's absence is permanent.[5]

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[1] Ibid. (page 160).

[2] Idem.

[3] Propositions 1 (para.2.13) and 9 (para.2.49).

[4] Proposition 2 (para.2.20).

[5] See Appendix B below, pp.159-160.

In the meantime, the wife is presumably allowed to remain in the house and may be asked to keep up the payments of rent. In situations of this type, it cannot be assumed that the tenant-husband is in desertion. The spouses may be living apart by agreement; or it may be the wife who is in desertion, as where the husband has moved to a new dwelling and requested his wife to follow him there. If the accommodation selected by the husband as the new matrimonial home is reasonably suitable, and the wife refuses to follow him there, then she is in desertion.[1]

3.15 Where the tenant has left the home, there may be a case for allowing either spouse to apply to the court for a transfer of the tenancy subject to safeguards for the landlord. Already, public authorities take into account the matrimonial obligations of the spouses and the question of who has custody of the children. Arguably, these factors are more appropriately considered by the court.

Our proposals

3.16 In our view, it is impractical to lay down fixed rules governing transfers between spouses of public sector tenancies which would always achieve justice in the various kinds of situation which may arise. The most which the law can achieve is to give the courts a discretionary power to make a transfer order, if such a course appears to the court to be just and reasonable in the circumstances, having regard to all relevant factors.

3.17 In our Memorandum No.22 on Aliment and Financial Provision we suggested[2] that the court should be given power to make an order assigning a public sector tenancy only if the public authority landlord consents. Subsequently, we obtained the views of interested bodies on a proposal that the court's power should be exercisable if the landlord, after receiving intimation of the proceedings, does not object. These proposals were motivated partly by the general principle that property transfers between spouses should not infringe third party rights, such as a landlord's right to veto assignations of tenancies; partly by the desire to avoid

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[1] Clive and Wilson, Husband and Wife (1974) pp.174-6.

[2] Proposition 67(c) at para.3.27.

unseemly contests between the court and the local authority; partly by the fact that for so long as local authority tenants have no security of tenure, the landlord remains master of the situation; and partly by the fact that arguably the local authority can take a broader view of the availability of housing in the area and balance the needs of the spouses against those of other persons in their area. On further reflection, however, we take the provisional view that the court should be able to assign the tenancy after the public authority landlord has been given an opportunity to be heard.

3.18 We have not overlooked the fact that in England and Wales, where the problem of council house tenancies is frequently before registrars in matrimonial proceedings, the courts have not entirely welcomed the power to transfer council house tenancies. In Regan v. Regan[1] (where the Family Division of the English High Court refused to make a property transfer order in respect of a council house tenancy which the local authority would have been unlikely to implement), Sir George Baker, P. said:[2]

> "Housing is a matter for the local authority. It has always been so, and my own view is that it is unfortunate in many ways that the courts, and particularly registrars and circuit judges, may have to make orders, or maybe are being persuaded to make orders or think they ought to make orders, which put pressure on councils, or which may be rejected by councils. This has been referred to in all the decided cases as undesireable, and this case indicates as clearly as any the undesirability of making such an order".

3.19 While it may be conceded that housing is a matter for the local authority, it is equally true that family law and the adjustment of the economic relations of spouses is a matter for the courts. It can be argued that the solution we have suggested is both reasonable and fair to public authority landlords. The judicial order would only assign the unexpired portion of a very short term tenancy; it would not deprive the public authority landlord of the power to reverse the effect of the court's

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[1] [1977] 1 All E.R. 428.
[2] At p.431.

decision; it would ensure that the authority had the benefit of the court's views; and it would avoid the undesirable situation that the court's jurisdiction could be ousted by the local authority even if the court felt it necessary or expedient to adjudicate on the matter.

3.20 We think that the court's discretion should be controlled by statutory guidelines laid down by Parliament. The considerations relating to suspension of occupancy rights apply more forcibly to transfers of tenancies.

3.21 We therefore invite views on the following proposals: (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 shall 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. (Proposition 22).

(3) Judicial power to adjust liability for rent arrears

3.22 The common law rule on liability for rent arrears is that following assignation of a tenancy, the assignee becomes liable, jointly and severally with the assignor, for arrears of rent due for the period of possession of the assignor.[1] What rule should apply to the transfer of public sector tenancies? Following an English precedent,[2] we advanced in our Memorandum No 22 on Aliment and Financial Provision a proposal that

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[1] McGregor v. Hunter (1850) 13 D.90; Dundas v. Morison (1857) 20D.225; Paton and Cameron, Landlord and Tenant (1967) p.163.

[2] Matrimonial Homes Act 1967, s.7(4) (applicable to Rent Act tenancies); and see Finer Report, Cmnd. 5629, para.6.88 which proposes extension of the principle to public sector tenancies.

"On ordering the transfer of a tenancy on divorce, the court should have power to make an order rendering the transferee-spouse liable, jointly and severally with the transferor-spouse, for the whole or part of any rent arrears accrued at the time of the divorce".[1]

While reaction to this proposal was divided, the weight of opinion favoured a power on these lines and our present intention is to recommend in our final Report the introduction of the proposed power in divorce actions.

3.23 Meanwhile, the matter requires consideration in the present context. Broadly speaking, the choice lies between a judicial discretionary power such as that proposed in Memorandum No.22 or a fixed rule. If a fixed rule is preferred, a subsidiary choice arises mutatis mutandis as between the alternatives set out at paragraph 3.27 below for regulating the power of a local authority to make a charge for arrears on terminating a tenancy and re-letting to the tenant's spouse. The main advantage of a fixed rule is that it avoids unnecessary litigation, but this consideration is out of place in the present context because ex hypothesi there is an application before the court. A judicial discretionary power would allow the court to take account of the means, needs and interests of the parties and of any dependent children. Accordingly, we invite views on the proposition that 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. (Proposition 23).

(4) Power of public authority landlord to charge for previous tenant's rent arrears

3.24 Where a local authority terminates a tenancy and "transfers" it to the wife (or husband) of the tenant, the authority will sometimes request the wife to pay the arrears of rent due by the tenant at the time of the transfer. Indeed the local authority may require the wife to pay the

[1] Proposition 67(e), para.3.33.

arrears as a condition of the transfer. From time to time this practice has been criticised as of dubious legality. We agree with these criticisms and think that the local authority's powers should be clarified.

3.25 The local authority's powers over the years have sometimes been "to make charges" and sometimes to obtain "rent" for the tenancy or occupation of houses provided by them; this legislation is and has always been silent as to the persons who should pay the rent.[1] From one point of view, it can be argued that, in the absence of a contrary enactment, the local authority has a discretion in the matter. The levying of arrears of rent cannot, on this view, be regarded as an abuse of the discretion. The local authority are providing a dwelling for the tenant's family as a whole and the lease is simply a way of binding one member of the family to pay the rent. On this view, the charge should only be made if the wife had been living in the dwelling during the period when the arrears accumulated. Further, by transferring the tenancy to the outgoing tenant's wife, the authority may well be giving her a preference over other persons in the waiting list for tenancies. Therefore (so the argument runs), the charges cannot be regarded as inequitable.

3.26 From another standpoint, it can be argued that if the authority has entered into a lease, the rights and obligations of the authority, the tenant and the tenant's family must be considered as regulated by the lease. If the lease creates a joint tenancy in which both spouses are liable jointly and severally, then the wife of the outgoing tenant will be bound to pay arrears but not otherwise. On this view, each lease and tenancy must be looked at separately. Where a single (ie not a joint) tenancy is terminated and the local authority require payment of arrears by the tenant's wife as a precondition of a re-letting to her, they are not entitled to charge a premium at the commencement of the new lease fixed by reference to another lease to someone else under a contract to which the wife was not a party. To say this is not to argue that the authority cannot lawfully charge premiums, but a premium based on someone else's liability is (on this argument) an arbitrary and therefore unlawful exercise of power. It is particularly objectionable if the wife was not resident when the arrears accumulated.

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[1] See Appendix C, para.3.

3.27 In our provisional view, the doubts in the law should be removed by statute. The legislation would, however, require to state a positive rule. The choice lies between three alternatives:-

(a) a rule under which only the husband[1] is liable for rent arrears accrued up to the date of termination of his tenancy, and only the wife is liable for rent for the period after the re-let in her favour; or

(b) a rule whereby both the husband and the wife become jointly and severally liable for the rent due up to the date of termination of his tenancy; but only the wife is liable for the rent accruing after the re-let in her favour; or

(c) a rule that after the re-let, the husband will cease to be liable for the arrears accrued up to the date of termination of his tenancy and the wife alone will be liable for the arrears accrued up to that date.

In stating these alternatives we have distinguished between the date of termination of the tenancy of the husband as outgoing tenant and the date of the re-let to the wife as incoming tenant, although often the termination and the re-let will take effect on the same date. We think that alternative (c) would be unfair to the wife and landlord, and would give the outgoing tenant an undeserved advantage. We therefore reject it. Alternative (b) is the same as the common law rule noted at para.3.22 above that, on assignation of a tenancy, the incoming tenant (the assignee) is liable for the arrears of the outgoing tenant (the assignor). Its justification is that the assignor should not be able to evade his liability and that the landlord should continue to be able, as before the assignation, to proceed against a sitting tenant for arrears of rent. The landlord should not be placed in a worse position by the assignation. On the other hand, a local authority 'transfer' is not an assignation but the termination of one tenancy and a re-letting to the tenant's spouse. Many people might

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[1]For brevity, we assume that the husband is the outgoing tenant and the wife is the incoming tenant; but the converse situation could arise.

regard it as unfair to insist that the wife should be liable for arrears which the husband had incurred during his tenancy especially if she was not resident when the arrears accrued. On this view alternative (a) would be preferred. We should be grateful for guidance on this matter. We therefore advance for consideration the following two proposals (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:

(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.

(Proposition 24).

(5) Right of tenant's spouse in occupation to withhold consent to disposal of tenancy

3.28 In Part VI below we argue that in the case of owner-occupied property a spouse having occupancy rights in the matrimonial home should have the right to veto any deed disposing of or burdening the property. We also suggest in Part IV that the spouse of a private sector tenant should have the right to veto any disposal by way of assignation or renunciation of the tenancy. The question arises whether the spouse of a tenant of a public sector dwelling should have a similar right to give or withhold consent to a disposal.

3.29 Against such a measure, it may be argued that it is unnecessary because a spouse is unlikely to be prejudiced by a disposal. Public

sector tenancies are not assignable except with the landlord's consent.[1] Further, while the tenant may renounce the tenancy in favour of the public authority landlord, it will usually be the case that the public authority will thereupon re-let to the tenant's wife if she wishes to continue in occupation. (We have already referred to the fact that this is common S.S.H.A. practice.) In any event the public authority is master of the situation.

3.30 While there is little point in introducing a right of veto specifically for the benefit of spouses of public sector tenants, nevertheless we think such a right should be conceded if, as we propose, it is introduced in the context of private sector tenancies and owner-occupied dwellings. Such a right cannot bind the public authority for long since it can always terminate the tenancy and re-let to a third party rather than the tenant's wife if it so desires. We think that the rules of matrimonial property law should be as general as possible and for this reason we suggest that, 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. (Proposition 25).

(6) Right of public sector tenant's spouse to pay rent

3.31 We discuss below the proposal that a spouse with occupancy rights should be entitled to make payment of rent and other outgoings on the matrimonial home to protect her (or his) occupancy. It is unlikely that a public authority landlord would refuse to accept rent from a tenant's spouse if it was tendered. Unlike private sector landlords, the public authority would derive no advantage from non-payment of rent because it usually has no interest in recovering possession and can do so in any event without founding on a breach of the tenancy agreement or lease. We think, however, that 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

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

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. (Proposition 26).

(7) Restraints on actions by public authority landlords for removing or ejection

3.32 At paragraph 4.14 below, we suggest that the spouse of a protected or statutory tenant under the Rent (Scotland) Act 1971 should have the right to intervene in an action by the landlord for removing or ejection and to be allowed time to pay arrears or to remedy the default in obligations under the lease. It is not however possible to give the spouse of a public sector tenant any protection against proceedings by the public authority landlord since the tenant has no security of tenure. To give the tenant's wife the same rights as the tenant would be to give her nothing; to give her better rights than the tenant would be unjustifiable and contrary to principle.

3.33 We understand that in some sheriff courts the sheriff will sometimes continue (ie adjourn) proceedings by the public authority, or supersede (ie postpone) extract of the decree, or otherwise delay proceedings for ejection to allow the tenant time to pay. But there is no express power vested in the sheriff for this purpose and the assumption of such powers is of doubtful vires.

3.34 There has been much discussion on both sides of the border of the question whether public sector tenants should be conceded a measure of security of tenure against the landlord on the model of Part II of the Rent (Scotland) Act 1971 with or without modifications.[1] It would not be appropriate for us to enter into this debate in this Memorandum, first, because the question involves dwellings which are not occupied as matrimonial homes; second, because the debate raises questions of housing management on which we have no direct expertise; and third, because the Government already have this matter under review.[2]

[1] See para. 3.4 and publications cited there.

[2] In Cmnd. 6852 (1977) at para. 9.21, it is stated that "The Government see no basic justification for any appreciable difference between the rights of private and public tenants, but recognise that the application of the principle of security of tenure to the public sector will need careful working out and this they intend to do in consultation with local authorities and other housing organisations."

3.35 In these circumstances, we simply advance the negative proposition that 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. (Proposition 27).

(8) Divorce, nullity and judicial separation

3.36 As indicated above, we have elsewhere suggested that the court entertaining an action of divorce, declarator of nullity of marriage or separation should have power to order transfers of property[1] and that these powers should extend to public sector tenancies but only if the landlord authority consents[2] or does not object.[3] This differs from the proposals outlined above that the court during the marriage could assign the unexpired portion of such a tenancy even though the landlord authority objects (or withholds consent). We shall deal with the matter in our final Report on financial provision on divorce.

(c) Death of tenant spouse

3.37 Perhaps because of a legislative oversight, public sector tenancies are not expressly excluded from the surviving spouse's 'prior rights' under section 8 of the Succession (Scotland) Act 1964 (though Rent Act tenancies are expressly excluded). It would however be difficult in practice to apply the provisions of section 8 to a public sector tenancy. The operation of these provisions depends on the appointment of an executor and normally the tenancy will have expired before an executor is appointed.[4] In any event, in many cases, an executor is not appointed on the death of a public sector tenant. We suggest, therefore, that in practice the provisions of section 8 are ignored as inoperable or inapt in the case of public sector tenancies, and it might have been simpler to exclude public sector tenancies from section 8 expressly.

[1] Memorandum No.22 on Aliment and Financial Provision (1976) para.3.20; Proposition 67(a).

[2] Ibid., para.3.27; Proposition 67(c).

[3] Informal consultation with legal professional bodies and public authority landlords.

[4] It may be noted that the prohibition of assignations inserted in public sector leases would not prevent the executor from assigning the tenancy to the surviving spouse since section 16 of the 1964 Act makes it clear that such a prohibition does not bind the executor.

3.38 It seems likely that if the tenant's surviving spouse resided in the dwelling at the time of the tenant's death, the public authority landlord will normally either re-let the dwelling to the surviving spouse or else allocate to him or her the tenancy of another dwelling. We doubt whether any difficulties arise in practice and, to elicit views, we merely advance the negative proposal that 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. (Proposition 28).

(4) Where both spouses are tenants (joint or common tenancies)

3.39 It is possible, and not infrequent, for a public housing authority to grant tenancies in the joint names of the husband and wife. One legal effect already noted in Part II is that each spouse has an equal right to occupy and manage the dwelling while their joint tenancy continues: accordingly one spouse cannot eject the other. The term 'joint tenancy' is normally used. But it is ambiguous. Scots law draws a distinction between a joint title and a common title[1] and public sector tenancies are held as common rights. In other words, each of the spouses has a separate share in the tenancy which he or she can renounce in favour of the landlord by his or her separate act or (if the landlord consents) assign to a third party. A public sector tenancy is of short duration and kept alive by tacit relocation (ie tacit re-letting by acquiescence of the parties), but one of the spouses can prevent tacit relocation and terminate the tenancy by giving notice of removal since tacit relocation requires the acquiescence of all of the parties to the lease. If one tenant spouse renounces his or her half share pro indiviso in the tenancy, or terminates the tenancy, we would expect that most public authority landlords would re-let the dwelling to the other co-tenant who remains in occupation. We understand that public sector joint tenancies rarely have survivorship clauses devolving the predecessor's share on the surviving spouse and following the death of one spouse, the public authority will normally re-let to the survivor as sole tenant. Since neither of the spouses can compel a sale of the whole tenant's interest under a public sector let, the only way to resolve

[1] We deal with this distinction more fully in Part VI.

irreconcilable disagreements is for one of them to leave or to obtain a transfer of the other's share. Our proposals in Part II to allow judicial regulation or termination of occupation and management rights will add a new method of resolving disputes. In addition to joint rights of management and occupation, joint (or common) tenancies impose on the co-tenants a joint and several liability to pay the rent and perform the other obligations due from a tenant. This can be a disadvantage to a deserted wife who may require to meet arrears of rent.

3.40 There has been some debate whether joint (or common) tenancies are preferable to the grant of a tenancy to one only of the spouses. The Morris Committee discussed the matter very briefly.[1] They pointed out that where a husband deserts his family, the public authority may be unwilling to transfer the tenancy to the wife until she has obtained a divorce or legal separation. The Committee considered that no problem arises in the case of a joint tenancy and that "local authorities should make wider use of this arrangement". Thus, the Committee emphasised the advantage to the wife that a joint tenancy carries with it a right to remain in occupation in the interval between breakdown of the marriage and judicial decree of divorce, separation or the like.

3.41 On the other hand, the Finer Committee, which looked at the matter from the standpoint of English law, found that the arguments for and against joint tenancies are somewhat evenly balanced.[2]

3.42 The arguments adduced in favour of joint tenancies, (as summarised by the Finer Report) were threefold. (1) Since in England and Wales public opinion is "moving in princple towards a law of partnership, irrespective of direct financial contribution, in the ownership of the matrimonial home, so equally must the partnership concept hold good when the home is held only upon a tenancy". (2) It would simplify the law by side-stepping the complex

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[1] Report of the Committee on links between housing and social work (1974): para. 8.40(a); see Appendix D below.

[2] Cmnd. 5629 (1974), para.6.46.

machinery provided in the (English) Matrimonial Homes Act 1967.[1]
(3) "Chiefly, perhaps, it is argued that there would be a highly beneficial psychological effect as the knowledge grew that under the normal form of tenure wives had equal entitlement with their husbands in the tenancy of the home ...." Joint tenancies "would, it is said, give women a greater sense of security, and lessen the chances that in the breakdown situation they could be pressured or frightened into leaving the home".

3.43 As against these arguments, the Committee set out countervailing arguments. (a) They denied that a useful parallel can be drawn between joint ownership and joint tenancy. Joint ownership is designed to give equal shares in a very valuable marketable asset whereas "the proteciton which the wife and children may require when the family live in rented accommodation is protection in occupancy, which may be achieved irrespective of rights of ownership". By the last phrase is presumably meant "irrespective of title".[2] (b) Even in the case of a joint tenancy, it will in most cases be necessary for a wife after matrimonial breakdown to exclude the husband from occupation and sooner or later to get a sole tenancy for herself.[3] (c) Legislation providing for joint tenancies "would introduce as many complexities as might be eliminated"[4] (d) The Committee pointed out that a joint tenancy would not "do anything to ease the financial problems affecting a deserted or divorced wife left in occupation of privately rented accommodation pressure for arrears of rent will probably be applied to her in any case, and it can only worsen her position to be legally liable for them as joint tenant".[5] The same argument seems to apply in public sector tenancies.

3.44 We see no reason to dissent from these views of the Finer Committee. In Scotland, there is not yet any widespread demand for co-ownership by spouses of homes in the owner-occupier sector[6] and as we note in Volume 1 this question will be discussed in a future Memorandum on family property law. Further, the concession of occupancy rights to non-tenant wives coupled with the right to apply to the court for exclusion of the tenant-

[1] Idem.
[2] Ibid., para. 6.47.
[3] Ibid., para. 6.48.
[4] Ibid., para. 6.49.
[5] Idem.
[6] By "co-ownership" we mean a legal regime of common property imposed by law except in cases where the spouses contract out. Voluntary common owner- of the matrimonial home is, however, increasing

husband and for transfer of the tenancy to the wife's name, would give the wives of public sector tenants much stronger legal weapons to withstand the pressures imposed by the tenants in a breakdown situation. These rights, if properly publicised, should also give the wives of tenants a greater sense of security and lessen the risk that they might be compelled to leave the matrimonial home. We think that the case for joint tenancies would be stronger if co-ownership were to be introduced in Scots law although we agree with the Finer Report that the considerations are different as between public sector tenancies and owner-occupied property. For these reasons, we merely state the proposition that 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. (Proposition 29).

3.45 The only other proposals as to joint or common public sector tenancies which we think should be considered are mainly contingent on proposals made elsewhere in this Memorandum and designed to achieve uniformity of application of the law on the matrimonial home so far as possible as between different types of tenure. The arguments for (or against) these do not require elaboration and, accordingly, we suggest that where a public sector tenancy is vested in both spouses as co-tenants, it is for consideration whether our provisional proposals in Proposition 35 (at para.4.19) below should apply, to preserve consistency with private sector tenancies, that is to say -

(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 share in the tenancy in him or her (subject to the conditions in Proposition 22).

(Proposition 30).

PART IV: PROTECTED AND STATUTORY TENANCIES UNDER RENT (SCOTLAND) ACT 1971 AND OTHER TENANCIES OF URBAN DWELLINGS

Introductory

4.1 About 13% of the housing stock in Scotland consists of dwellings leased from private landlords, and such tenancies are thus far less numerous than public sector tenancies. A very high proportion consist of protected or statutory tenancies under Part II of the Rent (Scotland) Act 1971.

4.2 In Scotland, no special provision is made to protect the occupancy of a spouse of the tenant except on the tenant's death.[1] As we saw in Part II, a spouse of the tenant does not have a personal right of occupancy enforceable against the tenant, and therefore she (or he) has no right for the law to protect. We have proposed above[2] the concession of such a right, and in this Part we suggest that in the case of Rent Act tenancies provision should be made to protect that right in a dispute with the landlord.

4.3 It may be observed, as general background, that Part II of the Rent (Scotland) Act 1971 applies to unfurnished tenancies of premises or furnished tenancies with non-resident landlords where the rateable value did not exceed £200 on 23 March 1965.[3] A landlord can only get decree of removal on a number of statutory grounds of which the most important are the existence of "suitable alternative accommodation"; non-payment of rent; neglect by the tenant of the property; the fact that the landlord previously lived in the dwelling and wishes to resume possession; and nuisance by the tenant to adjoining occupiers.[4] Even though one or more of these grounds are made out, the sheriff must in addition be satisfied that it would be reasonable to pronounce decree for the tenant's removal.[5] The sheriff has wide powers to facilitate the settlement of the dispute otherwise than by removal of the tenant.

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[1] See para. 4.21 below.

[2] Proposition 1 (para. 2.13).

[3] Or, in the case of houses appearing at a later date on the valuation roll, £200 as at that date: see Rent (Scotland) Act 1971, ss. 1(1) and 6(3).

[4] Rent (Scotland) Act 1971, s.10; Sch. 3, Pt.I.

[5] 1971 Act, s.10.

4.4 In considering the specific problems presented by private sector tenancies of the matrimonial home, it is convenient to distinguish those arising:

(a) during the marriage;

(b) on divorce, declarator of nullity of marriage or judicial separation; and

(c) on the death of the spouse with the title.

We now examine these topics in that sequence.

(a) During the marriage

4.5 Under the Rent (Scotland) Act 1971, the tenant of a protected tenancy continues as tenant on the termination of the lease only "so long as he retains possession of the dwelling-house without being entitled to do so under a contractual tenancy".[1] Thus, after the termination of the lease, he becomes a "statutory tenant" whose security of tenure depends not on the lease but on his retention of possession.

4.6 The Scottish and English courts have generally adopted a similar approach in the interpretation of the Rent Acts which at one time were Great Britain measures.[2] What use by the tenant of the dwelling-house amounts to "possession" for the purpose of the Rent Acts is a question of fact[3] but certain rules have been established in both legal systems. Since the policy of the legislation is the protection of the home,[4] the statutory tenant must occupy the dwelling-house as his residence. The

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[1] Section 3(1)(a).

[2] Much of the case law relates to the Increase of Rent and Mortgage Interest Restrictions Act 1920, section 15(1), a Great Britain measure in which the requirement of occupation as a residence did not appear but was engrafted by judicial interpretation. The section was consolidated in the Rent (Scotland) Act 1971, s.3(1)(a) [which uses the expression, "so long as he retains possession of the dwelling-house"] and in the (English) Rent Act 1968, s.3(1)(a) [which uses the phrase "if and so long as he occupies the dwelling-house as his residence"]. Section 3(2) of the English Act provides that the quoted expression is to be construed in the light of the prior case law: there is no equivalent provision in the Scottish Act but applying ordinary canons of statutory interpretation, we think that the Scottish Act must also be construed in the light of the case-law encrusting the consolidated enactments.

[3] Menzies v. Mackay 1938 S.C. 74; Temple v. Mitchell 1956 S.C. 267; following Skinner v. Geary [1931] 2 K.B. 546.

[4] Menzies v. Mackay, supra at p.76; Stewart v. Mackay 1947 S.C. 287 at p.293.

tenant must as a general rule be in personal occupation. A statutory tenant, however, retains possession if he leaves his wife in the home temporarily: "the best instance of (temporary absence) is a sea-captain who may be away for months but who intends to return, and whose wife and family occupy the house during his absence."[1] Obviously, if the parties are divorced, occupation by the ex-wife will not be construed as possession by the husband.[2]

4.7 These principles are common to Scotland and England. But the laws of the two countries diverge where the statutory tenant is in desertion having left his wife in occupation of the matrimonial home. In England, the courts have had regard to the fact that under English matrimonial law the wife has a personal right to remain in the matrimonial home and cannot be ejected by the husband while the marriage subsists. On this foundation the English courts created the fiction that her possession is his possession for Rent Act purposes and this fiction has now been enshrined in statute.[3] The result is that the wife obtains the protection from eviction which the husband would have enjoyed if he had continued in occupation as tenant. Moreover, in England, the husband cannot surrender the tenancy to the landlord over his wife's protests or behind her back[4] because that would be equivalent to eviction from the matrimonial home which, as we have seen, is not allowed.

4.8 By contrast, in Scotland, the statutory tenancy of a deserting husband is not continued by the wife's possession. In the leading case

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[1] Skinner v. Geary, supra, per Scrutton L.J. at p.569; Kelton v. Carmichael 1947 S.L.T. (Sh.Ct.) 60, 62.

[2] Macalister v. Black 1956 S.L.T. (Sh.Ct.)74; Robson v. Headland (1948) 64 T.L.R. 596 (C.A.).

[3] See section 1(5) of the Matrimonial Homes Act 1967 as amended which inter alia provides that "... a spouse's occupation by virtue of this section shall for purposes of the Rent Act 1968 (other that Part VI thereof) be treated as possession by the other spouse". This section seems to have abrogated the English common law rule whereby on committing adultery, a wife lost her right of occupancy and therefore her security of tenure against the landlord. There is no equivalent doctrine in Scots law where adultery is not a bar to a claim for aliment.

[4] Middleton v. Baldock [1950] 1 K.B. 657.

of Temple v. Mitchell,[1] the court felt bound to hold that where a statutory tenant leaves the matrimonial home permanently and intends never to return, he cannot be said to "retain possession" within the meaning of the Act. It matters not that his wife is left in possession. The English doctrine of the deserting husband's constructive possession was not followed because (a) it depends on the English common law rule that a husband cannot eject his wife from the matrimonial home, and (b) that rule is not part of Scots law. Effect must therefore be given to the literal meaning of the Act. The Court reached its decision with regret and it was observed that Parliament alone can change the rule.[2] We think that the time has come to afford a measure of security of tenure to the spouses of protected tenants and statutory tenants who leave them in the home.

4.9 From the standpoint of the spouse (say, for brevity, the wife) of a private sector tenant, there are really three main problems. The first is to ensure that, in the case of a statutory or protected tenancy or indeed any private sector urban tenancy, the tenant does not dispose of the tenancy to a third party as by assigning it to a new tenant, or renouncing it in favour of the landlord. The second is to ensure that, in the case of a statutory tenancy, the tenancy is continued for the benefit of the wife despite the tenant's abandonment of the home. The third problem (which arises particularly in the case of a protected or statutory tenancy but also other private sector urban tenancies,) is whether the wife of the tenant should be given the legal right and practical opportunity to make payment or performance of the tenant's obligations under the lease, and to purge any default on the part of the tenant, so that the tenancy is not lost by the tenant's acts or omissions.

4.10 A survey of other legal systems suggests that there are a number of solutions to these problems including:-

(a) legislation on the model of the English Matrimonial Homes Act 1967, and of the Family home Protection Act 1976 of the Republic of Ireland, enabling the wife to continue the tenancy by her possession,

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[1] 1956 S.C. 267.

[2] Ibid., per L.J.C. Thomson at p.275.

to stand in the tenant's shoes and perform his obligations under the lease, and to defend enforcement proceedings brought by the landlord;

(b) judicial powers to transfer the tenancy on the application of the wife. This solution is adopted in New Zealand legislation and in divorce proceedings, in England and Wales under the Matrimonial Homes Act 1967, section 7.

(c) automatic joint (ie common) tenancies, a solution adopted in French law, together with a requirement of joint consent to a disposal of the tenancy.

In the absence of a system of registration of joint tenancies and in view of the complexity of the legislation which might be required, we do not think that automatic joint tenancies would be an appropriate solution. The advantage of solution (a) from the standpoint of the tenant's wife (or husband) abandoned in the home is that she is in less danger of being irretrievably prejudiced by failure to act in time. If the protection of the wife depends on her first obtaining a court order transferring the tenancy, then it may be that she will often be too late in obtaining the order. The advantage of a judicial order vesting the husband's tenancy in the wife is that it places the rights and obligations of the parties on a regular footing and is clear-cut. On the whole, we incline to the view that the first and second solutions are complementary rather than alternatives and that both should be adopted.

4.11 Our first proposal therefore is that the law should prohibit an assignation, renunciation or notice of removal by the tenant unless made with the consent of the tenant's spouse. Most urban leases have clauses prohibiting assignations, but assignations are possible with the landlord's consent and renunciations or notices of removal are a real danger to the occupancy rights of the tenant's spouse. In addition, the tenant's spouse should be entitled to protect occupancy by paying rent and other outgoings. We revert at para.4.14 below to the question of how to make the spouse's veto on adverse dealings effective against the landlord, persons deriving title from him, and assignees of the tenant. We suggest for comment the proposal that <u>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</u> -

(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. (Proposition 31).

4.12 The wife's veto which we propose would not protect her occupancy in the case of a statutory tenancy where the tenant husband simply abandons her in the home. Accordingly, it seems necessary to reverse the decision in Temple v. Mitchell[1] whose rationale cannot survive the concession of occupancy rights to a spouse abandoned by the tenant. We therefore provisionally propose that 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. (Proposition 32).

4.13 The next question is how far the spouse's occupancy rights and veto on disposal should be effective against third parties, and in particular (1) the landlord; (2) persons deriving title from the landlord; and (3) assignees of the tenant. As regards (1), it may often happen that a tenant defaults in payment of rent over a period so that, unknown to the tenant's spouse, arrears accumulate. If the tenant then abandons his wife in the home and does not defend proceedings by the landlord for recovery of possession, the rights which would be conferred under our proposals in Proposition 31 may be useless. In the Republic of Ireland, the Family Home Protection Act 1976, section 7, enables the tenant's spouse to defend proceedings by the landlord for recovery of possession. If it appears to the court that the tenant's spouse is capable of paying the arrears within a reasonable time as well as future payments of rent, the court may adjourn the proceedings for such a period and on such terms as appears just and equitable. The court must have regard to whether the spouse of the tenant has been informed of the non-payment of rent. No similar right exists in England and Wales, but the Law Commission have provisionally proposed that

[1] 1956 S.C. 267

a spouse of the tenant should have the same right as the tenant to defend enforcement proceedings.[1] We have seen that the court may delay enforcement proceedings against a protected or statutory tenant and has wide powers to facilitate a settlement. We think that the spouse of such a tenant should also be entitled to invoke these powers. There is, however, one additional provision which might be made. We suggest below that the court should have power to make a vesting order assigning a tenancy to the tenant's spouse and we think that, if this suggestion is accepted, the court should be able at the same time to make such an order on application by a spouse who is defending enforcement proceedings by the landlord.

4.14 A second threat to a spouse's occupancy would arise where the landlord conveys the dwelling to a third party. The tenant may have renounced the tenancy, or given notice of removal, without his wife's consent and in breach of her rights. The landlord, in ignorance of these rights, may convey or agree to convey the dwelling with vacant possession, or he may grant a new lease, relying in either case on the renunciation or notice. The tenant's spouse cannot give notice of her rights by registration since there is no register appropriate to tenancies. Our tentative solution is **that the wife's right to veto a disposal to the** landlord should be effective against persons deriving right from the landlord only if the landlord had received intimation of the spouse's right of veto before conveying (or agreeing to convey) that right. The disadvantage of this solution, of course, is that it requires a positive act on the part of the wife but considerations of fairness to third parties maybe thought to outweigh this disadvantage.

4.15 A third threat to occupancy would arise from an assignation by the tenant to a stranger. Again, we think that the spouse's veto should be effective against the stranger only if the landlord had received intimation of the spouse's right of veto before intimation of the assignation.

4.16 To sum up, we invite proposals on the following proposals:
(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

[1] Law Commission Working Paper No.42 (1971) paras. 1.10 and 1.11; cf. Penn v. Dunn [1970] 1 Q.B. 686 (C.A.).

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 agreement to convey or 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 intimated to the landlord before the intimation to him of the assignation. (Proposition 33).

4.17 To complement the foregoing proposals we think that the court should have a power while the marriage subsists to make an order vesting a protected or statutory tenancy in the tenant's spouse if he or she has a right of occupancy. There is a precedent in section 7 of the Matrimonial Homes Act 1967. Where a court in England or Wales pronounces a decree nisi of divorce or nullity of marriage, it may by order transfer a protected or statutory tenancy as from the date when the decree becomes absolute.[1] An order relating to a protected tenancy operates as an assignation of the tenancy.[2] The assignee takes the tenancy with all its privileges and subject to its encumbrances, and the liability of the assignor ceases, except as to arrears and past obligations. Under an order transferring a statutory tenancy, the transferee spouse becomes statutory tenant in lieu of the transferor spouse.[3] The rules governing transmission on the death of a statutory tenant (under which there can be two transmissions on death but no more) may operate on the death of the transferee spouse but the question whether they operate is "determined according as (the rules)

[1] Section 7(1).
[2] Section 7(2).
[3] Section 7(3).

have or have not already had effect in relation to the statutory tenancy".[1] The court may make an order adjusting liability for arrears of rent accrued up to the date of transfer.[2] Under the New Zealand legislation,[3] in which vesting orders transferring tenancies can be made in matrimonial proceedings or in separate applications to the court, the spouse who has lost a tenancy because of a vesting order may apply subsequently for an order revesting the tenancy in him if the court is satisfied that the circumstances have so changed since the vesting order that this should be done. The transferee spouse has all the powers of a tenant and may defeat by anticipation the application for revesting by surrendering (renouncing) the tenancy to the landlord. The dispossessed spouse may apply to be revested in the tenancy on the death of the transferee spouse provided that the death has not terminated the tenancy, as it would do under our law if there had already been two transmissions on death.

4.18 We think that provisions on these lines might be useful and accordingly we advance for consideration the following provisional proposals as to judicial assignation of tenancies: (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 10 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

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[1] Ibid.

[2] Section 7(5).

[3] Matrimonial Property Act 1976, s.28.

(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. (Proposition 34).

4.19 Where the matrimonial home is held by the spouse under a joint (or common) tenancy, then, in the absence of any contractual provision to the contrary, one spouse can prevent tacit relocation by giving notice unilaterally to the landlord terminating the tenancy if it has not expired[1] but it seems that one spouse cannot renounce the tenancy in favour of the landlord before its termination without the other's consent.[2] A statutory tenancy is not, however, a true tenancy but a special statutory right to retain possession in a question with the landlord. Under section 12(3) of the Rent (Scotland) Act 1971, a statutory tenant is entitled to give up possession "if, and only if, he gives such notice as would have been required under the provisions of the original contract of tenancy, or if no notice would have been required under the provisions of the original contract of tenancy, on giving not less than three months notice". In any case the period of notice must not be less than 28 days (section 131 as read with section 12(3) of the 1971 Act). Each spouse can assign his or her own share if allowed by the lease (which is probably rare) but neither spouse can assign over the whole tenancy to a third party without the consent of the other spouse. To promote the policy of protecting occupancy rights, we suggest that where both spouses are co-tenants of the matrimonial home -

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[1] Smith v. Grayton Estates Ltd. 1960 S.C. 349; Paton and Cameron, op.cit.; pp.226, 242.

[2] Graham v. Stirling 1922 S.C. 90 per Lord Skerrington (obiter) at p.107.

(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.

(Proposition 35).

(b) On divorce, nullity or judicial separation

4.20 Under the existing law, the court cannot order the transfer of a Rent Act tenancy in an action of divorce, declarator of nullity of marriage or judicial separation. In our Memorandum No. 22, however, we provisionally proposed that the courts should have power to order the transfer of statutory tenancies even though the landlord has not given his consent to the transfer.[1] We also proposed that this power would be exercisable by interim order pending the disposal of the action.[2] We are presently considering comments on these proposals. Accordingly we do not deal in this Memorandum with the problems which are more appropriately dealt with in the context of financial provision.

(c) On death of the tenant spouse

4.21 Protected and statutory tenancies are excluded from the provisions of the Succession (Scotland) Act 1964 relating to the surviving spouse's prior rights to the tenancy of a dwelling house.[3] There is no express exclusion of such tenancies from the rules on intestate succession laid down by the 1964 Act, but these rules can be taken as impliedly excluded by the special rules on transmission of a tenancy which was a protected tenancy or a statutory tenancy immediately before the tenant's death. The

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[1] Memorandum on Aliment and Financial Provision, Proposition 67(f) at para. 3.35; cf. the (English) Matrimonial Homes Act 1967, section 7, discussed above.

[2] Ibid., Proposition 68 at para. 3.52.

[3] For this exclusion see Succession (Scotland) Act 1964, s.8(6)(d) as read with the Rent (Scotland) Act 1971, Sch. 19, para.5.

general object of the transmission rules, which are now set out in Schedule 1 to the Rent (Scotland) Act 1971, is that there may be two transmissions on death but no more. The first and second transmissions are regulated in the same way.

(a) The tenancy transmits to the widow (but not the widower) of the deceased tenant if, and only if, she "was residing with him at his death"; and

(b) if the widow does not succeed, a member of the deceased tenant's family may succeed if he was residing with the tenant for 6 months prior to the death. "Family" includes a husband.

The widow (or member of the family), becomes the statutory tenant "so long as she retains possession of the dwelling house without being entitled to do so under a contractual tenancy."

4.22 Thus, the succession of a statutory tenant's widow depends, first, on the tenant's retention of possession (otherwise he ceases to be a statutory tenant) and, second, on her residence with him at his death. We have considered above the test applied by the courts in determining whether a tenant retains possession. Similar principles are applied by the courts to determine whether the widow was living with the tenant at his death.[1] If the husband dies when away from home temporarily having left his wife to manage the household, or if she is away temporarily, he will be treated as retaining possession and she will be treated as continuing to live with him there. Accordingly the tenancy will transmit to her. But a deserted wife of a protected tenant who has left her in the family home will not succeed; she was not "living with him at his death" as the Act requires.

4.23 In England and Wales, the Law Commission suggested[2] that a wife who has remained in occupation after her husband's departure should receive the benefit of the transmission provisions in the analogous English

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[1] E.g. Brand v. Ross 1946 S.L.T. (Sh.Ct.) 38; Cheyne v. Will 1947 S.L.T. (Sh.Ct.) 21; Kelton v. Carmichael 1947 S.L.T. (Sh.Ct.) 60; Strachan v. Porteous 1956 S.L.T. (Sh.Ct.) 99.

[2] Working Paper No. 42 on Family Property Law, para. 1.25

legislation - Schedule 1 to the Rent Act 1968. This view was endorsed by the Finer Committee[1] which did not, however, deal with the Scottish Rent Act. The same problem arises under that Act and accordingly we propose that 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. (Proposition 36).

4.24 The Law Commission for England and Wales pointed out that the rules in the English Act concerning transmission of statutory tenancies apply in favour of a widow, not a widower.[2] A widower's right to succeed to the tenancy is no better than that of other members of the family equally qualified. The Commission therefore proposed that this element of discrimination against husbands should be removed. We suggest therefore that 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. (Proposition 37).

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[1] Report on One Parent Families (1974) Cmnd. 5629, para. 6.44(8).

[2] Working Paper No.42, para. 1.26; this view was endorsed by the Finer Committee at para. 6.44(8).

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

Introductory

5.1 Special considerations arise in the case of service tenancies and occupancies, and in the case of farmhouses, homes on crofts or small holdings, and of homes which are used, are closely connected with property which is used, by the owner or tenant for the purpose of a profession, trade or business. In this Part, we briefly consider the more important of these problems.

Residence clauses

5.2 We envisage that our proposals in Part II above would enable the court to regulate occupancy. But problems would arise if the court were to make an order excluding a spouse from a home which is subject to a service tenancy, or a service occupancy agreement, requiring him or her to reside there, or which was subject to an agricultural lease containing the usual condition that the tenant must reside in the farmhouse. By making compliance with the residence conditions impossible, the order would lead to loss of the tenancy or contractual occupancy so that the spouse of the tenant or contractual occupant would also lose possession.

5.3 There are two possible solutions to this difficulty. One approach would be to make residence clauses an absolute bar to the making of an exclusion order. The other approach would be to leave the matter to the good sense of the parties and the court. If a tenants' spouse applied for an exclusion order in ignorance of a residence clause, the tenant would be entitled to rely on the clause as a defence to the application. It seems unlikely in such a case that the applicant spouse would continue to insist in the application, or that the court would grant the application, having regard to the consequences of any order. To elicit comments, we invite views on the following question: 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). (Proposition 38).

Matrimonial home on agricultural holding

5.4 The next question is whether the court should have power to transfer the tenancy of the matrimonial home when it is the farmhouse of an agricultural holding. Before dealing with this question it is desirable to state the existing law briefly.

5.5 The existing law: Usually the tenancy of an agricultural holding is not assignable partly because rural or agricultural leases of ordinary duration are deemed at common law to involve personal choice (delectus personae) by the landlord[1] and partly because the lease itself normally prohibits assignation by the tenant. On divorce or annulment of marriage, the court has no power to make orders assigning the tenancy, but in our Memorandum No 22, we suggested that the court might be given such a power exercisable if the landlord consents.[2]

5.6 As regards transmission of the tenancy on the tenant's death, a tenant has a statutory power to bequeath a lease[3] but the power cannot be exercised in the face of an express exclusion in the lease prohibiting assignation.[4] Since such exclusions are practically universal, wills do not operate on agricultural tenancies in practice. Therefore, the farm will usually be comprised in the tenant's intestate estate, in which event the surviving spouse will become entitled to the prior housing right under section 8 of the Succession (Scotland) Act 1964. But section 8 (1) and (2) implicitly recognises that the farm house should not be split from the farm because where the dwelling house forms part of the subjects used for a trade, profession or occupation, the executor can give the surviving spouse a sum in lieu of the actual dwelling house. There are also safeguards enabling the landlord to object to a successor. Thus, where the tenant of an agricultural holding dies intestate and his successor as tenant is "a near relative" (defined by statute to include among others his or her surviving spouse[5]) the landlord may serve a notice

[1] Cameron and Paton, Landlord and Tenant (1967) pp.150–151.

[2] Proposition 67(d); para. 3.32.

[3] Agricultural Holdings (Scotland) Act 1949, s.20.

[4] Kennedy v. Johnston 1956 S.C. 39.

[5] Agriculture (Miscellaneous Provisions) Act 1968, section 18(7): "'near relative' .... means a surviving spouse, son or daughter, or adopted son or daughter".

to quit on one or more of a number of prescribed grounds, one of which is:

> "... that the near relative has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable him to farm the holding ... with reasonable efficiency ..."[1]

Where the surviving spouse (or other near relative) serves a counter-notice, the Scottish Land Court must be satisfied as to the matter and give its consent if the notice to quit is to be effective.[2] Under the 1968 Act, Part III (which regulates termination of agricultural tenancies acquired by succession), the successor as tenant does not merely inherit the unexpired portion of the lease; he has security of tenure.

5.7 Our proposals: In considering whether the courts should have power to transfer the tenancy of a matrimonial home which is part of an agricultural holding, a balance must be struck between the competing interests of the tenant, the tenant's spouse and the landlord. The public interest in good farming is also relevant. As regards the landlord's interest in an agricultural holding, the analogy of the existing law points different ways since the tenancy of a farm is not assignable inter vivos but is transmissible on death subject to the landlord's right to object on limited grounds. A compulsory transfer of the farmhouse would however be unfair to the landlord because he would have two tenancies under the lease instead of one. But even if the landlord consented, we do not think that the court should have power to transfer a farmhouse on an agricultural holding because it would seem unfair to the tenant who might thereby lose his livelihood, and also, incidentally, his ability to pay aliment. It might make the farm unworkable since the farmhouse and farm may form a single unit. It is clear that there are strong economic reasons against splitting farmhouses from farms.[3] Moreover the housing "prior right" provisions of the Succession (Scotland) Act 1964 show that the policy of the law is against inter alia splitting farmhouses from farms and it would be anomalous to have a different rule on marital breakdown. We have therefore concluded that the matrimonial home should not be assignable by court order where it is part of an agricultural holding. Usually the tenant

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[1] 1968 Act, section 18(2)(c).

[2] Idem.

[3] Cf. the arguments advanced by the Mackintosh Report on Succession (1950) Cmd. 8144, para. 8 against the sub-division of farms between co-heirs.

farmer will be prohibited from assigning the farm but even if he were to obtain the landlord's consent, we do not think his spouse should be able to veto the assignation to preserve her occupancy of the farmhouse. Accordingly, we advance for comment the proposition that 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 her (or his) occupancy by withholding consent to its disposal. (Proposition 39).

Crofts and landholders tenure

5.8 Existing law: Under crofting tenure, the crofter pays a rent for the land only since the building on the land and other permanent improvements will have been provided by him or (more likely) his predecessors. He is entitled to compensation for these at the waygo. A crofter may assign his croft to "a member of his family" (which expression includes a spouse among others) if he obtains the landlord's consent, which failing, the consent of the Crofters Commission.[1] A crofter may bequeath his croft by will[2] and, if he dies intestate, the normal rules of intestate succession apply[3] so that a surviving spouse or other member of the crofter's family may succeed to the croft on his death. The crofter may acquire compulsorily the ownership of his croft house from the landlord[4] and this is an absolute right. He also has a right to apply to the Land Court for an order authorising him to acquire the croft land.

5.9 We have not reached any tentative conclusions on whether or how far crofts, and the similar category of small holdings, should be included in the legislation on protection of occupancy rights, with or without modifications. We shall be seeking the views of those having an interest or specialised knowledge and experience. Clearly, if a crofter were to acquire his croft house, it would become an owner-occupied dwelling to which our

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[1] Crofters (Scotland) Act 1955, s.8 as amended by the Crofting Reform (Scotland) Act 1976, Sch. 2 , para. 6; 1976 Act, s.15(2).

[2] 1955 Act, s.10.

[3] 1955 Act, s.11 set out as amended in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, Schedule 2.

[4] 1976 Act, s.1(2).

proposals in Part VI below would apply. Thus, his wife would be able to veto a disposal and, after registration, enforce the veto against third parties. The compulsory assignation of the croft house by vesting order may well be unfair to the crofter since the result might be to make the croft unworkable if the croft house and land form an integral unit. In other cases, there might be little hardship. Prima facie there would seem to be stronger arguments for allowing the crofter's spouse a right to veto adverse dealings such as a renunciation in favour of the landlord or an assignation to a third party. These matters require further investigation and meantime we merely note that 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 dealing in favour of third parties. Similar problems arise in the case of landholder's tenure. (Proposition 40). We invite views.

Home used in connection with profession, trade or occupation

5.10 Apart from rural leases, there are cases in which the matrimonial home is used, or closely connected with property which is used, for the purpose of a profession, trade or business. We have already suggested that in regulating occupancy or making exclusion orders the court should have regard to this circumstance.[1] We do not think that any further provision is required. If a spouse seeks to withhold consent to disposal of the premises under Proposition 42 (para.6.33) below, the court may dispense with the consent and will have regard to its use for professional or business purposes.

[1] Propositions 4 and 10.

PART VI: OWNER-OCCUPIED HOMES

Section A: General

6.1 In this Part, we are concerned with owner-occupied dwellings[1] (which comprise about one-third of the total Scottish housing stock). In particular, we deal with the problem of how the occupancy rights of the owner's spouse (proposed in Part II) should be protected against the owner's adverse dealings in favour of third parties, or against proceedings by third parties (such as the calling-up or enforcement of a security) by which the spouse's occupancy may be lost.

6.2 In informal preliminary consultations, it was represented to us that our proposed changes in the law were unnecessary and undesirable in relation to the owner-occupier sector. The argument proceeded in stages on the following lines. First, laws regulating property rights and tenancy rights have traditionally been separately debated and separately enacted so that today they form separate statutory codes. The need for any change in the law in the owner-occupier sector should thus be argued separately from changes in relation to tenancies. Second, it was doubted whether, in the owner-occupier sector, exclusion from the home or domestic violence presented problems in a significant number of cases. It was said that, because of the middle-class values of owner-occupiers, or middle-class social pressures on them, their marital disputes tended not to be settled (or accompanied) by forcible exclusion from the home or domestic violence, but were settled by agreement. Third, it was argued that, since the introduction of capital transfer tax by the Finance Act 1975, spouses in the owner-occupier sector have increasingly been putting the title to the matrimonial home in joint names because of the fiscal advantages to be gained thereby. The policy of the Matrimonial Homes Act 1967 was therefore out-of-date in relation to the owner-occupier sector since the problems would be solved in time by the trend towards ownership in common. Thus the disruption or complication of conveyancing transactions which would result from our proposals would not (it was said) be balanced by significant advantages.

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[1] Unless the contrary intention appears, in this term we include not only the proprietor's interest in feudal property (the *dominium utile*) and in allodial property but also the tenant's interest under long leases recorded in the Register of Sasines in pursuance of the Registration of Leases (Scotland) Act 1857.

6.3 In our view, these arguments are unconvincing. First, in considering whether personal occupancy rights and exclusion orders should be introduced, the tenure by which the home is held is altogether irrelevant. It is a question, not of property law, but of family law and, accordingly, the same rules should apply to all married couples irrespective of tenure or social class.

6.4 Second, we do not concede that cases of domestic violence or exclusion from the home are not a significant problem in the owner-occupier sector but, even if we are wrong in this, adverse dealings in favour of third parties are frequently a threat to a spouse's occupancy in that sector. It is this problem with which we are now concerned. Further, even if marital disputes as to occupancy of the home are normally settled by agreement, the negotiating position of the spouse whose occupancy is unprotected is very weak indeed, and would be strengthened by our proposals in a way which seems to us just and reasonable.

6.5 Third, we regard occupancy rights in the matrimonial home as minimum rights which ought to be available whenever (broadly speaking) the home is not held by both spouses in common property. We do not therefore regard the increase in common ownership of matrimonial homes as material.

6.6 We leave aside the special problems which arise on the divorce[1] or death of a spouse. While a surviving spouse may succeed to the matrimonial home under his or her statutory "prior rights",[2] there is nothing to prevent the owner spouse from bequeathing the home to a third party thereby defeating the surviving spouse's prior rights. Arguably, therefore, there is a gap in the provision made by the law for the surviving spouse and we have carefully considered whether this gap should be filled by extending occupancy rights beyond death, in other words, by converting them into a type of life interest. We think, however, that such a solution has to be

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[1] We have dealt elsewhere with the problems arising on divorce, annulment or judicial separation: see our Memorandum No. 22 on Aliment and Financial Provision, Part III.

[2] Succession (Scotland) Act 1964, section 8.

compared with other possible solutions in the context of family property law when alternative modes of distributing a deceased's estate can be reviewed.

6.7 We are mainly concerned in this Part with cases where the matrimonial home is vested in one only of the spouses. (See paras. 6.8–6.55 below). Rather different problems arise where the home is vested in both spouses as common or joint proprietors and we examine these later. (See paras. 6.56–6.62).

(2) Where matrimonial home owned by one spouse

6.8 The mere concession of an occupancy right to the matrimonial home by statute would leave it unclear whether that right could be enforced against third parties. The general rule is that a purchaser or lender on security is entitled to rely on the title as it stands in the Register of Sasines and is not bound by any prior unrecorded right though binding on the seller.[1] Further a right of occupancy as such (created for example by an agreement[2]) is not a separate tenement registrable in the Sasines Register. It is clear therefore that supplementary legislation would be needed to secure that the occupancy rights are enforceable against third parties.

6.9 At paras. 1.12 to 1.22 in Volume 1, we contrasted two approaches to the protection of occupancy rights against third party purchasers and secured creditors. One approach based on the Morton Report would make protection of occupancy depend on court orders. We gave our reasons for rejecting that solution but to focus views on whether, in the context of owner-occupied property, this decision is correct, we would mention again that 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

[1] Gloag, Contract (1929) p.178. It is true that in some cases a purchaser will be bound by a prior personal right if he knows, or ought to have known, of it. But these cases all concern personal rights, such as a right to demand a conveyance, which are capable of being converted into real rights: see Rodger (Builders) Ltd v. Fawdry 1950 S.C. 483; cf. Wallace v. Simmers 1961 S.L.T. 34; G L F Henry, "Personal Rights" (1961) 1 Conveyancing Review 193.

[2] Wallace v. Simmers 1961 S.L.T. 34, per L.P. Clyde at p.37.

protection pending the application for the order by registration in the personal registers. It is provisionally concluded that this solution should not be adopted. (Proposition 41).

6.10 The alternative approach is a scheme whereby the non-owning spouse's occupancy rights would be protected from adverse dealings by the registration of a prescribed notice in the property registers which would, from the time of registration, bind singular successors of the owner and subsequent secured creditors. 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.

6.11 If it is accepted that protection of occupancy rights should not depend on a court order, then technically there are two ways in which protection can be afforded and notice of occupancy rights given to third parties:-

(a) the occupancy rights might be made "a charge" on the owner's proprietary interest, which charge would be registrable in the property registers; and

(b) the owner-spouse might be prohibited from alienating or granting securities over the matrimonial home except with the consent of the non-owning spouse, and the latter would be entitled to register his or her right of veto in the property registers to make it enforceable against third parties.

The former solution is that adopted in the Matrimonial Homes Act 1967 in England and Wales. We describe this briefly at para. 6.12. The alternative solution is followed in a number of other countries to which we refer at paras. 6.13-6.14. At paras. 6.15-6.21 we compare the two approaches and give our reasons for preferring the second.

6.12 Comparative survey: In England and Wales, the Matrimonial Homes Act 1967[1]

[1] See generally Hayton, "Overriding Rights of Occupiers of Matrimonial Homes" (1969) 33 The Conveyancer and Property Lawyer 254; Palley, "Wives, Creditors and the Matrimonial Home", (1969) 20 N.I.L.Q. 132; Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 M.L.R. 601; Miller, "Expenses of the Matrimonial Home" (1971) 35 The Conveyancer and Property Lawyer 332; Cretney, "Cave Uxorem" (1973) 117 Sol. Jo. 475; Barnsley, "Conveying the Matrimonial Home" (1974) 27 Current Legal Problems 76; Hayton, "The Femme Fatale in Conveyancing Practice" (1974) 38 The Conveyancing and Property Lawyer 110; Miller, Creditors and the Matrimonial Home" (1975) 119 Sol.Jo. 582; Bromley, Family Law (5th ed. 1976) pp.486-7.

attempts to balance the interests of the non-owning wife (or husband) and third party purchaser or mortgagee by providing that her right of occupation of the matrimonial home is to be "a charge" on the owner's estate or interest in the property as from (a) the date when he acquires that interest; (b) the date of the marriage; or (c) the commencement of the Act, whichever last occurs.[1] Thus, departing from the Morton Report's proposals, the occupation rights of the non-owning spouse become a charge without the need for a court order. Notwithstanding that the occupation rights are a charge, they are brought to an end by the death of either spouse or divorce or annulment unless in the event of matrimonial dispute or estrangement the court sees fit to direct otherwise.[2] The charge is not, however, enforceable against third parties unless it has been registered as a Class F Land Charge under the Land Charges Act 1972 or, in the case of land registered under the Land Registration Act 1925, a notice or caution has been registered.[3] In this way, a personal right otherwise enforceable only as between the spouses is transformed into a quasi-proprietary right. But although it transmits against the owner-spouse's singular successors in title, it is not assignable by the non-owning spouse. The charge is also void against the husband's trustee in bankruptcy or against a trustee for creditors under a deed of arrangement.[4] The charge is purely a creature of statute and it has been observed that it does not fit into any category of right known to English conveyancers before 1967.[5] Only one charge may be registered at any one time under the Act and if a second registration is effected on a second home, the first registration must be cancelled.[6] The non-owning spouse may release her rights of occupation and may agree that another charge or interest should have priority.[7]

6.13 Many other legal systems impose restrictions on the unilateral disposal of the family home as such.[8] In France, the spouses cannot, the one acting without the other, dispose of whatever rights assure the lodging of the family, nor of the household effects with which it is furnished.[8A] The law is to a similar effect in the Netherlands[9] and Belgium.[10] Similar restraints exist in Denmark, Sweden and Norway.[11] In the Federal Republic of Germany, there is no restriction on disposal of the family home as such, but there is a restriction on disposal of the entire assets.[12] If the home is a spouse's only asset, the prohibition will apply. Similar restrictions are imposed by the homestead legislation

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[1] Section 2(1).

[2] Section 2(2).

[3] Land Charges Act 1972, section 2(7); MHA 1967, s.2(7).

[4] MHA 1967, s.2(5).

[5] Barnsley, op.cit. at p.77.

[6] MHA 1967, s.3.

[7] Ibid., ss.4 and 6.

[8] See Law Commission Working Paper No. 42, paras. 1.60 and 1.61.

[8A] Code Civil Art. 215, al.3; Amos and Walton, Introduction to French Law (3rd ed.; 1967 pp.382-3.)

[9] Netherlands Civil Code, Article 164-a.

[10] Belgian Civil Code, Article 215 (inserted 14 July 1976).

[11] See e.g. Pedersen, "Matrimonial Property Law in Denmark" (1965)28MLR 137 at pp.140-1.

[12] BGB Art.1365: there is a restriction on disposal of goods in the conjugal house-hold under BGB Article 1369 discussed in Part VII below.

which originated in the United States of America[1] and was adopted with variations in the western provinces of Canada[2] (including Alberta, British Columbia, Manitoba and Saskatchewan); and in New Zealand,[3] (but not in Australia[4]). The most recent example appears to be the Family Home Protection Act 1976 of the Republic of Ireland.[5] Homestead legislation may be designed to protect occupancy rights of the non-owning spouse as mentioned above; or to give the family immunity from creditors; or to secure for the surviving spouse a life interest in the home enduring after the death of the owning spouse.

6.14 The Irish Act of 1976 might be suitable for adaptation to Scotland. It provides that where a spouse purports to convey any interest in the family home to a third party without the prior consent in writing of the other spouse, the purported conveyance is void.[6] The prohibition does not strike at a conveyance implementing a contract made before the marriage, nor a conveyance to a purchaser or the singular successors of a purchaser transacting in good faith and for full value.[7] In these excepted cases, the burden of proving validity lies on the person alleging it.[8] There are a number of supplementary provisions enabling or requiring the court to make orders dispensing with the consent in a case of incapacity or if the consent is unreasonably withheld.[9] The court may make orders preventing conduct leading to loss of the family home;[10] orders adjourning proceedings by a mortgagee (or landlord) for possession or sale of the home;[11] and orders modifying the terms of a mortgage (or lease) as to payment or a capital sum.[12] Either spouse is entitled to make payment of outgoings on the family home.[13]

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[1] See Milner, "A Homestead Act for England?" (1959) 22 M.L.R. 458.

[2] See M.C. Cullity, "Property Rights During the Subsistence of Marriage," chap. 5 of Studies in Canadian Family Law, ed. D. Mendes da Costa, (Toronto, 1972) vol.1., p.179 at pp.224-229.

[3] Matrimonial Property Act 1963 as amended.

[4] See Finlay and Bisset-Johnson, Family Law in Australia (1972) pp.569-571.

[5] For a commentary on this Act, see Shatter, Family Law in the Republic of Ireland (1977) pp.283-297.

[6] Section 3(1).

[7] Sections 3(2), (3) and (6).

[8] Section 3(4).

[9] Section 4.

[10] Section 5.

[11] Section 7.

[12] Section 8.

[13] Section 6.

6.15 The options compared: Both of the solutions described above would undoubtedly make it possible in many circumstances for the spouse without title to continue in occupation of the matrimonial home during the marriage free from the fear of ejection by third party purchasers. We think, however, that of the two solutions a restriction on unilateral disposal is on balance preferable to a registrable charge for the following reasons.

6.16 First, in England and Wales, it is possible to apply the device of a charge to leasehold as well as freehold property. In Scotland, however, only assignations of long leases, of which there are very few, can be recorded in the Register of Sasines[1] and there are no other public records in which transfers of tenancies are registered and which are searched by conveyancers. Such transfers are very infrequent in any event, but it is an advantage of the restraint or veto on unilateral disposal that it can be easily applied, if need be, to the assignation or renunciation of the tenant's interest under a lease. So far as possible, the legal rules on the matrimonial home should be so framed as to apply to all dwellings whatever the type of tenure.

6.17 Second, the notion of occupation rights forming a charge which, on recording in the Register of Sasines, binds third parties, is perhaps less easily understood by members of the public than the notion that one spouse cannot dispose of the property without the other's consent. If this is right, then the idea of a veto is more easily disseminated among the public and therefore more likely to be effective.

6.18 Third, the 1967 Act does not compel a spouse who wishes to sell or mortgage his home to notify the other spouse of his or her intentions. It appears to be an advantage of the veto approach, that the owner has to obtain the formal consent of the other spouse to the disposition or security deed.

6.19 Fourth, the requirement of consent appears a more direct way of protecting occupancy rights than the creation of a charge. The concept of a registered charge would be appropriate if it was thought that in practice the husband should be able to convey his interest in the matrimonial home to a third party subject to the charge. In theory,

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[1] Registration of Leases (Scotland) Act 1857.

under the English Act of 1967, the husband can introduce a stranger into the matrimonial home if he can find a purchaser willing to take the property subject to the wife's rights of occupation. The concession of a veto to the non-owner spouse would avoid the very possibility of this absurdity. In practice, of course, a prospective third party purchaser or lender seeking security over the home would wish the non-owning spouse to release her or his rights of occupancy because such a purchaser or lender will want vacant possession in order to occupy the dwelling himself or, as the case may be, to realise his security. Since the discharge of occupancy rights is likely to be required anyway, there is advantage in making it a clear requirement in every case.

6.20 Fifth, both solutions would complicate conveyancing transactions, and the legislation would be somewhat complex since it would require to balance the interests of the owner and non-owner spouse and third party purchasers and heritable creditors. But a requirement of consent would probably be less complicated and would fit better into the existing law of Scotland than the concept of a charge. In Scotland, the concept of a charge is purely the creature of specific statutes and in those statutes it seems always to have denoted a security for monetary debts.[1] There is no Scottish legislation on 'land charges' as such.

6.21 For these reasons, a requirement of consent seems preferable to a charge and we invite views on the following proposal: 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. (Proposition 42). We turn now to consider what consequential provisions would be necessary if the foregoing rule were to be adopted in Scotland.

[1] As to charging orders made by local authorities securing debts, see eg Housing (Scotland) Act 1969, s.24(4) and Schedule 26; Water (Scotland) Act 1946, s. 55; Sewerage (Scotland) Act 1968, s.47. As to floating charges see Companies (Floating Charges and Receivers)(Scotland) Act 1972. The concept of a "charge" as used in estate duty legislation was explained in Lord Advocate v. Earl of Moray's Trustees (1905) 7 F.(H.L.) 116.

(3) Scheme for restriction on unilateral disposal

6.22 If the rule mentioned in Proposition 42 above were to be introduced into Scots law, a number of incidental and consequential statutory provisions would have to be enacted. We deal with these and related matters under the following heads;

(a) Form of spouse's consent;
(b) Judicial orders allowing disposal;
(c) The requirement of registration;
(d) Payment of outgoings on the matrimonial home;
(e) Protection of occupancy on enforcement or calling up of heritable security;
(f) Effect of sequestration or diligence against owner on a spouse's occupancy rights;
(g) Civil liability of owner for dealings without consent;
(h) Solicitor's letter of obligation on sale etc of matrimonial home; and
(i) Matrimonial home vested in trustees.

In making these proposals we have derived great assistance inter alia from the experience in England and Wales in operating the Matrimonial Homes Act 1967 and from legislation elsewhere including the homestead Acts in Canada and the Republic of Ireland. Certain other relevant matters, such as the definition of the matrimonial home, are dealt with elsewhere in this Memorandum.

(a) Form of spouse's consent

6.23 The legislation would require to prescribe or make clear the form and manner in which consent is to be given. This varies in different legal systems. Writing is generally required. Since the consent must not be vitiated by fraud, force or fear, or facility and circumvention, it has been observed that "there is a need for some statutory form which will give adequate protection to a wife".[1] In some legal systems, consent must be given before a judge, solicitor, notary public, justice of the peace or other authorised person.[2] A recent New Zealand statute (which provided

[1] Alan Milner, "A Homestead Act for England?" (1959) 22 M.L.R. 458 at p.467.

[2] In Scots law, at one time, when a married woman granted a deed with her husband's consent, a 'judicial ratification' was required. The wife appeared before the magistrate (in her husband's absence) ratified the deed and swore or declared that she had not been compelled or induced to grant it but had done so of her own free will. (The Act on which this practice was based - A.P.S. 1418, c.14 (record ed.) was repealed by the Statute Law Revision (Scotland) Act 1964).

a regime for sharing family assets) allows agreements for contracting out of the regime but subject to certain safeguards.[1] The agreement must be in writing and signed by each party.[2] Each party must have independent legal advice before signing the agreement.[3] The signature of each party must be witnessed by a solicitor (or other authorised person furth of New Zealand) who must add a certificate that he had explained the effect and implication of the agreement.[4] Failure to observe these requirements invalidates the agreements and the court may also invalidate an unjust agreement.[5] Similar safeguards could be introduced in Scotland. Arguably a disposition to a bona fide third party should be invalidated only where ex facie of the deed, or instrument consenting to a deed, the formalities had not been complied with. As a matter of conveyancing, the reason for the spouse's consent would be explained by a reference to the relevant legislation in the narrative clause of the disposition or standard security and the consenting spouse would sign the disposition or standard security as consenter in the normal way. As a precaution, it may be necessary or desirable for the spouse who is owner to obtain a deed of consent to the disposal of the matrimonial home before missives are signed. The case of Wroth v. Tyler[6] shows the difficulties which can arise if consent is not obtained.

6.24 We think that it should not be possible for the non-owning spouse to validate ex post facto a disposition by a subsequent deed consenting to the disposition. A new disposition should be granted. One can envisage cases in which it might be beneficial to third party purchasers to have their title retroactively validated by the later consent in much the same way as completion of title in the person of the grantor of a disposition will validate, by accretion, unperfected rights conveyed by the deed to singular successors. But nothing should be done to relax the formal requirements of a prior consent or a judicial order in lieu of consent. In the light of

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[1] Matrimonial Property Act 1976, section 21.

[2] Ibid., subsection (4).

[3] Ibid., subsection (5).

[4] Ibid., subsection (6).

[5] Ibid., subsection (8).

[6] [1974] Ch.30; [1973] 1 All E.R. 897.

these remarks, we suggest that (1) there should be a requirement that consent to a disposition of the matrimonial home or the granting of 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 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. (Proposition 43).

6.25 Problems may arise when the consenting wife is a minor.[1] If her husband is adult and of full capacity, he will be her curator[2] though he cannot consent to her deeds if he has (as here) a patrimonial interest.[3] If the husband is a minor, then his minor wife's curator may be her father.[4] There is a need here for a simple rule and we think that a minor wife 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. (Proposition 44). **Since a minor husband acquires full capacity on his marriage, corresponding provision is not needed in his case.**

(b) Judicial orders allowing disposal

6.26 There are circumstances in which limits must be placed on the right of the non-owning spouse to refuse consent. Joint consent may sometimes be impossible to obtain and may at other times be an unfair requirement. The non-owning spouse may not be in need of accommodation because she may have another home, or she may simply not want to move from that particular home although her husband is willing to provide her with an equally suitable alternative.[5] Or she may be in desertion having left the former matrimonial home permanently without reasonable cause intending never to return. Or she may be incapable of giving consent because of mental or physical disability or she may have gone missing without trace.

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[1] See generally Clive and Wilson, Husband and Wife (1974) pp.247-250.

[2] Married Women's Property (Scotland) Act 1920, s.2.

[3] In that case, her consent would be reducible for "enorm lesion" within four years after majority.

[4] 1920 Act, s.2.

[5] E.g. Wroth v. Tyler, supra.

In these circumstances the owner spouse who requires urgently to sell the home or to use it as a fund of credit will find it "frozen" by the impossibility of obtaining the consent of the other spouse. In this situation, the court must intervene. The Court of Session and the sheriff court already have power under section 5 of the Married Women's Property (Scotland) Act 1881 to make an order dispensing with the husband's consent to any deed relating to the wife's estate where the wife has been deserted by her husband or is living apart from him with his consent. The Act dates from the period when the husband had curatorial powers over his wife and, at that period, section 5 was frequently used.[1] But the husband's powers were abolished by the Married Women's Property (Scotland) Act 1920 except in cases where the husband is an adult and the wife a minor. Section 5 of the Act is thus now of very limited significance and we shall be discussing in a later Memorandum whether it should be repealed along with the abolition of the curatory of husbands over minor wives. Obviously, the Act is inadequate for present purposes inter alia because it applies in favour of wives but not husbands, and because it applies only when the spouses are living apart. Moreover, it does not specify the principles upon which the court will dispense with consent.

6.27 Comparative survey: Commonwealth homestead legislation makes provision conferring a power or imposing a duty on the court to dispense with the non-owning spouse's consent in a variety of circumstances which include the following:-

(a) where the spouse whose consent is required withholds consent unreasonably;[2]

(b) where the spouse whose consent is required is incapable of giving consent because of mental or other disability;[3]

(c) if the whereabouts of the consenting spouse is unknown;[4]

(d) if the parties have lived separate and apart,[5] as to which a a minimum period may be prescribed;[6]

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[1] See e.g. Niven (1883) 20 S.L.R. 587; Gibson (1893) 1 S.L.T. 323; McLennan v. McLennan 1908 S.C. 164; Dunnachie 1910 S.C. 115; Sillars v. Sillars 1911 S.C. 1207; Steel 1916 S.L.T. 125; Dewar v. Dewar (1902) 18 Sh.Ct.Rep. 354; J.B. v. A.B. (1910) 26 Sh.Ct.Rep. 50; Jamieson v. Jamieson (1910) 26 Sh. Ct.Rep. 297.

[2] British Columbia, The Wife's Protection Act, RSBC 1960, Section 9(1); Republic of Ireland, Family Home Protection Act 1976, section 4(2).

[3] Alberta, The Dower Act RSA 1970, Section 11; Manitoba, The Dower Act, RSM 1970, Section 13(1)(b); Saskatchewan, The Homesteads Act, RSS 1965 section 3(2); Republic of Ireland, Act 1976, Section 4(4).

[4] Alberta, Act, 1970 Act, section 11; Republic of Ireland, Act 1976, section 4(4).

[5] Alberta, 1970 Act, s.11(1)(a); British Columbia, Wife's Protection Act 1960, s.9(1).

[6] Manitoba, 1970 Act, s.13(1)(a).

(e) if the spouse whose consent is required has been guilty of marital misconduct, such as adultery or desertion;[1]

(f) if the spouse whose consent is required has released her rights for valuable consideration;[2] and

(g) if the owner has two or more homesteads.[3]

The object of the Canadian legislation cited is not to give the wife a right of occupancy during life but to prevent alienation so that it is available for her (or him) on the death of the owner spouse. Sometimes the court's power is fenced with guidelines. For example, the Irish Act of 1976 provides:[4]

> "(2) The court shall not dispense with the consent of a spouse unless the court considers that it is unreasonable for the spouse to withhold a consent, taking into account all the circumstances including -
>
> (a) the respective needs and resources of the spouses and of the dependent children (if any) of the family; and
>
> (b) in a case where the spouse whose consent is required is offered alternative accommodation, the suitability of that accommodation having regard to the respective degrees of security of tenure in the family home and in the alternative accommodation."

This provision enables the court to have regard to the whole circumstances while the specified factors seem to indicate that the object of the dispensing power is to supplement the law on maintenance obligations towards the wife (or husband) and children. In addition to this discretion, the court is under a duty to dispense with consent in cases of desertion, constructive desertion (conduct by the spouse whose consent is required justifying non-adherence by the owner),[5] incapacity or absence.[6]

6.28 In France, neither spouse can dispose of the family home without the consent of the other.[7] One spouse, however, may be authorised by the court to dispose of the home if the other spouse is incapable of giving his consent, or he or she refuses consent and the refusal is not justifiable having regard to the interests of the family.[8] In the Federal Republic of Germany, a spouse may enter into an obligation to dispose of his or her whole assets only with the other spouse's consent.[9] The BGB further provides:

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[1] Saskatchewan, 1965 Act, s.3(2); Republic of Ireland, 1976 Act, s.4(3).

[2] Alberta, 1970 Act, s.11(1).

[3] Idem.

[4] Family Home Protection Act 1976, section 4(2).

[5] Ibid., s.4(3).

[6] Ibid., s.4(4).

[7] Code Civil, Art. 215.

[8] Art. 217, cf. Art. 219.

[9] Art. 1365(1).

"If such a transaction conforms to the principles of regular management, the Guardianship Court may, upon application by one spouse, substitute the consent of the other spouse where the latter unreasonably refuses to give it, or by reason of sickness or absence is prevented from making a declaration, and delay entails jeopardy."[1]

6.29 Our proposals: If the right to give or withhold consent is regarded purely as a right to protect occupancy, then a court order terminating occupancy rights might also terminate the non-owning spouse's right of veto. In other cases, as where the owner wishes to grant a standard security, the court must have power not to terminate occupancy rights but to dispense with the need for consent, eg to cover the case where a non-owning wife in occupation is not at risk of losing a roof over her head but nevertheless unreasonably refuses consent.[2] We further suggest that (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:

(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. (Proposition 46).

6.30 We envisage that title to apply to the court for a dispensation order would be restricted to the owner or, if he is incapacitated, a curator bonis managing his affairs. Title to apply should not be extended

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[1] Art. 1365(2); translation taken from Forrester, Goren and Ilgen, The German Civil Code (Amsterdam and Oxford; 1975).

[2] Cf. Wroth v. Tyler [1974] Ch.30.

to third party purchasers or creditors. 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 invoked by a wife as an alternative to the special procedure suggested in the Proposition. (Proposition 47).

(c) The requirement of registration

6.31 In affording protection to the non-owning spouse and family, the law must also safeguard the position of third party purchasers and secured creditors, such as building societies, transacting on the faith of the records. As we pointed out in volume 1, if occupancy rights are to be enforceable against third parties on registration of a matrimonial home notice in the property registers, and if priority of registration determines priority of title, then conveyancing transactions relating to dwelling houses will be made more complicated. For a potential purchaser or lender in security will be placed on his enquiry lest a matrimonial home notice is registered between the date of the contract and the date of the registration of the delivered disposition or security deed in his favour. These complications are the price of effective protection of the spouse's occupancy rights.

6.32 Considerations of fairness to third parties, however, and the need for certainty in property rights require that occupancy rights should only be enforceable against third parties if the rights have been registered. (We note that in England and Wales, the Matrimonial Homes Act 1967 gives no protection to the spouse's occupation rights against third parties until the rights are registered as a charge on the dwelling.) This means that we reject the alternative safeguard that the occupancy rights should be enforceable even without registration unless the third party purchaser or his successor transacted in good faith and for value.[1]

[1] There is a precedent for this approach in section 6(2) of the Divorce (Scotland) Act 1976, re-enacting with amendments Succession (Scotland) Act 1964 section 27(2). A similar approach is adopted by the Irish Family Home Protection Act 1976, sections 3 and 12: see Shatter, op.cit. p.285. In the Canadian provinces of Alberta, Manitoba and Saskatchewan, the wife's power of veto of a disposition of the homestead is not conditional on registration but it is conditional in British Columbia.

We also reject the type of safeguard suggested by the Law Commission to protect co-ownership rights. This was:-

> "to require every vendor, lessor or mortgagor of property which included a dwelling house to make a declaration to the effect that:
>
> > 'no person other than a party to /the conveyance/ has any interest arising under a matrimonial home trust in the property /conveyed/'.
>
> A conveyance without the declaration would be void, and a false declaration would give rise to penal sanctions. The declaration would be conclusive; the purchaser would not be affected by actual or constructive notice of a spouse's interest."[1]

We think that this safeguard would be too cumbersome: the declaration would require to be made whenever any dwelling of whatever sort was conveyed. It would probably be unnecessary. In practice a solicitor acting for a seller would be bound to give a letter of obligation and would therefore make his own inquiries lest a notice was registered between missives and recording of a delivered disposition. In any event it might often prove ineffective. A husband wanting to defeat his wife's rights would not only sell the property but get rid of the proceeds of sale as well.

6.3 We think, however, that 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, as a matter of standard or routine conveyancing practice, state his or her intention of using the home for this purpose. The formula could be inserted in the narrative or dispositive clause of a conveyance. This would be an optional statutory facility rather than a mandatory requirement.

6.34 To sum up, we suggest the following scheme on which we invite comments. (1) Registration in the property registers of a prescribed notice of a spouse's entitlement to give or withhold consent (which

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[1] Working Paper No. 42 on Family Property Law; paras. 1.111-1.112. This was not intended to be exclusive of other possible safeguards such as registration: see para.1.113 of the Working Paper.

may be called a matrimonial home notice) would have the effect of rendering invalid a disposition or security deed made without that consent if the disposition or security 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. 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. (Proposition 48). 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 the registration of a matrimonial home notice. (Proposition 49).

(d) Payment of outgoings on the matrimonial home

6.35 The Morton Report (at paras. 676–677) observed:

> "676 Under the present law the protection afforded to the wife in her occupation of the matrimonial home /in England and Wales/ may be defeated if there is a mortgage on the house, for instance if the husband is purchasing it by means of a loan from a building society, since third parties who have acquired an interest in the home before the wife was left in it are not affected by her right of occupation. After leaving his wife, the husband may stop making the payments due on the loan, and the building society will then be able to take over the house. The society may, of course, be willing to accept an offer from the wife to keep up the payments, but otherwise she will lose her home.
>
> 677 In order to protect the wife if the husband stops repayment of a loan on the matrimonial home, we propose that the building society or other mortgagee should be bound to accept payment of the instalments if the wife tenders them and is prepared to observe the conditions of the original agreement. The husband, if he can be traced, should be given adequate notice by the building society or other mortgagee that it proposes to accept payment by the wife unless, within a specified period, he pays the arrears and makes it clear that he intends to keep up the payments."

The Report envisaged that "the obligation on the mortgagee to accept payments tendered should not be affected by a decree of divorce or nullity of marriage"[1] but that it would be affected by an order made under other powers which the Commission proposed[2] should be conceded to the court to enable it to alter the spouses' proprietary interests in the home.

6.36 The Matrimonial Homes Act 1967[3] enacted for England and Wales a wider provision enabling any spouse (not merely an abandoned wife) of an owner to stand in the owner's shoes and to discharge his or her liabilities to third parties in relation to the matrimonial home, including not only mortgage payments but also rates, maintenance costs and other outgoings on the home. This is the same principle (and enactment) as applies to payment of rent. We have already provisionally suggested in Part IV above that it should apply in relation to rented homes and we note that it has been copied almost verbatim in the recent Irish legislation.[4]

6.37 Arguably it should apply also to owner-occupied dwellings in Scotland. There is, however, a disincentive to a non-owning spouse taking over building society payments in Scotland. With us, the separate property principle applies in such a way that ownership generally follows the title. If the spouse without title makes financial contributions towards payment of a building society secured loan, the paying spouse would not acquire a proprietary stake in the home. Moreover, if the contributions are recoverable, it will merely be on principles of recompense[5] and in a period of inflation like the present when dwellings keep their value but money does not, recompense may be a poor reward.[6] It is also true that the non-owning wife may obtain an order for a capital sum on divorce[7] which may compensate her or, if our recent provisional proposals on financial provision on divorce are implemented,

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[1] Para. 677.

[2] See paras. 679 and 679(i).

[3] Section 1(6).

[4] Family Home Protection Act 1976, s.6.

[5] See Clive and Wilson, Husband and Wife (1974) pp.308-309; also para. 2.96 et seq. in Part II above.

[6] It appears from Reedie v. Yeaman (1875) 12 S.L.R. 625 that in determining the amount by which the owner is enriched, no account is taken of the increase in value of the house attributable to inflation.

[7] Divorce (Scotland) Act 1976, s.6.

the matrimonial home may be vested in her by or under a court order on divorce.[1] But such orders are necessarily discretionary and therefore uncertain, and accordingly, the non-owning wife may not wish to rely on the mere chance of being compensated in this way.

6.38 Nevertheless, while by itself a right to keep up payments may not be much used, there may be cases where the wife wishes to do so, and if property transfer orders on divorce are introduced in Scotland (as suggested in our Memorandum No. 22 on Aliment and Financial Provision), such cases may increase. We therefore propose that, consistently with our proposals on rented homes (see Proposition 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, 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. (Proposition 50).

(e) Protection of occupancy on enforcement or calling-up of heritable security

6.39 The main danger to the non-owning wife's occupancy is likely to arise from enforcement proceedings or a calling-up notice by a secured creditor rather than from a clandestine sale.[2] A sale would be struck at by the wife's veto and the wife may often discover the husband's intentions of selling from visits by prospective purchasers. On the other hand, if the husband does not keep up building society payments, it may be long before the wife discovers the default. In the meantime, unpaid instalments which she could have paid may accumulate into arrears which she cannot meet. In these circumstances her right to discharge the owner's liabilities would be an empty right.

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[1] Memorandum No.22 on Aliment and Financial Provision 1976 Part III.

[2] Normally the owner of a house will grant a standard security in favour of the building society at the time of purchase, and before taking entry to and possession of the house, and thus before it becomes the matrimonial home and a right to withhold consent can be registered. Accordingly, when for example the matrimonial home is to be taken in the husband's name, there would normally be no question of a wife in occupation exercising her right of veto against the standard security because it will already have been made and registered.

6.40 We have examined the provisions of English law and Irish law restraining enforcement proceedings by mortgagees. Thus, in English law, in proceedings to enforce a mortgage, if the court considers that the mortgagor is likely to be able to pay within a reasonable period what is due to the mortgagee or to remedy any other default, the court may, by order subject to conditions, delay enforcement proceedings for a period which the court thinks reasonable.[1] Recently there have been proposals designed to give the mortgagor's spouse the same right as the mortgagor to apply for restraint on enforcement proceedings.[2] Similarly in the Republic of Ireland, where the mortgagee of a family home brings proceedings because of arrears of payments due by a spouse, the other spouse may in effect be given the opportunity to clear the arrears and to take over the responsibility for future payments.[3] In England and Wales and in the Irish Republic, the court may relax a requirement of the mortgage that on default, the whole outstanding balance may become due.[4]

6.41 In Scotland, there are special difficulties in giving the owner's spouse protection against proceedings to enforce a heritable security. It would be unacceptable to give the spouse of an owner a better right than the owner himself to contest proceedings by a heritable creditor to enforce a security on default, or to contest a calling-up notice. The statutory provisions on enforcement of a standard security are not free from ambiguity[5] and their ramifications cannot be explained here. Generally speaking, however, the owner's rights to contest enforcement proceedings or a calling-up notice by the creditor are much more limited than under English or Irish law. Usually the loan agreement will stipulate that on default the whole unpaid balance of the principal sum, together with interest accrued, will become immediately payable. The creditor can proceed to sell on the expiry of a default notice without judicial warrant. He will wish to sell with vacant possession and although a warrant allowing entry and ejection of the borrower-owner and his family is needed for this purpose, this possessory remedy is granted as of right for the court has

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[1] Administration of Justice Act 1970, s.36(1). This provision stemmed from the Payne Report (1969 Cmnd. 3909) para. 1389 et seq. The court's power can only be exercised "if it appears to the court that in the event of its exercising its power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage."

[2] See the Law Commission's Working Paper No. 42, paras. 1.12-1.14; Finer Report (1974) Cmnd. 5629, para.6.12.0.

[3] Family Home Protection Act 1976, s.7.

[4] Administration of Justice Act 1973, s.8 (England and Wales); Family Home Protection Act 1976 s.7 (Republic of Ireland).

[5] See generally Halliday, The Conveyancing and Feudal Reform (Scotland) Act 1970 (2nd ed.) Chapter 10.

no discretionary powers to restrain enforcement proceedings.[1] Moreover, ejection proceedings can be commenced by the creditor immediately on default[2] so that the creditor need not await the expiry of the one month period allowed to the borrower to purge the default before the dwelling is sold.

6.42 Further, even if it were possible to contest default proceedings, this would often not assist the borrower or his spouse. Many (though not all) standard securities have non-default calling-up clauses which provide that calling-up is competent even if there has not been any default on the part of the borrower. If a heritable creditor called up a security in the absence of default, the only remedy available to the borrower might be an application to the sheriff court under sections 137-140 of the Consumer Credit Act 1974 which enables the court to re-open extortionate credit bargains and set aside or alter provisions of the credit agreement.[3] We do not know of any case in which this remedy has been invoked. We understand that, generally speaking, building societies which insert non-default calling-up clauses in their standard securities do not in practice call-up securities if there has been no default and it is difficult to envisage circumstances in which they would. Moreover, there may be good reasons for the retention of such clauses and an examination of the heritable creditors' remedies would fall outwith the scope of this Memorandum. This being so, non-default calling-up clauses present an obstacle to the introduction of restraints on enforcement for, where such clauses exist, default is not the legal basis of enforcement, and so, logically, giving time to either spouse to purge the default cannot be allowed to prevent or delay enforcement.

6.43 It would however be possible to give some rights to the owner's spouse within the framework of the existing law of enforcement of heritable securities. One possibility is to require default or calling-up notices to be served on the owner's spouse if her or his occupancy rights have

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[1] See United Dominions Trust Ltd. v. Site Preparations Ltd (No. 1) 1978 S.L.T. (Sh Ct.) 14. This contrasts with proceedings by a landlord to recover possession of a protected or statutory tenancy under the Rent (Scotland) Act 1971 described at para. 4.3 above.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, s.24.

[3] A credit bargain is extortionate within the meaning of the Act inter alia if it "grossly contravenes ordinary principles of fair dealing".

been recorded in the Register of Sasines at the time of service of the notice. Further, the borrower should not be entitled to dispense with or shorten the period for complying with a calling-up or default notice without the consent of the spouse having occupancy rights. This would give legislative approval to the informal practice adopted by many building societies of accepting instalments from the borrower's spouse, and it might also give time to the spouse to obtain funds, for example, from the Supplementary Benefits Commission.[1]

6.44 It might also be provided that where a heritable creditor acquires power to sell following a default notice or calling-up notice, and the wife's occupancy rights have been registered, the creditor should be under a duty to offer to sell the dwelling to the owner's wife at a fair value fixed by an independent surveyor, in lieu of the usual procedure of advertisement and sale at the best price which can reasonably be obtained. Thus, the building society or other heritable creditor might, if the price was more than the wife could raise from her other resources, give a further loan to enable her to meet the price. And if the wife wished to purchase, she would not be in competition with third party purchasers on the open market.

6.45 To sum up, (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. (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

[1] Under the Supplementary Benefit Act 1976 Sch. 1 para. 11 the Commission can give benefit to meet the interest on heritably secured debts.

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. (Proposition 51).

(f) Effect of owner's sequestration and diligence against the home on a spouse's occupancy rights.

6.46 We think that a spouse's right of occupancy should not prevail over the claims of the owner's creditors if he is sequestrated or grants a trust deed for creditors. As in the analogous field of alimentary rights, a wife should follow her husband's fortunes. This policy is consistent with the view that marriage ought to be regarded as a partnership in which the parties share the gains and losses. The trustee is bound to seek to obtain the best possible price for the bankrupt's home in the interests of the creditors and will therefore wish to sell it with vacant possession. We consider that he should be able to do so, and we note that this view underlies the corresponding legislation in England and Wales.

6.47 Likewise, a creditor's decree of adjudication in security, or a superior's declarator of irritancy of the feu, should prevail over the wife's occupancy rights. Such decrees are very rare nowadays, and we doubt whether there is a case for allowing a spouse with occupancy the same right as the owner to purge the irritancy or, as the case may be, to pay the debt secured by the adjudication.

6.48 We therefore suggest that (1) a spouse's rights of occupancy should not prevail against (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. (Proposition 52).

(g) Civil liability of owner for dealings without consent

6.49 We have suggested (Proposition 5 at para.2.25) that the court should have power, on the application of a spouse, to make an order awarding compensation to a spouse deprived of occupancy which would be payable by the owner, or a third party whose conduct led to the loss.

6.50 If the owner concludes missives for the sale of the matrimonial home and his spouse's occupancy rights are subsequently enforced by the registration of the prescribed notice, then the third party purchaser will normally be able to claim damages from the owner for breach of the usual vacant possession clause in the missives of sale or other prior contract. This result seems just.

(h) Solicitor's letter of obligation

6.51 A further safeguard for a spouse's occupancy rights would result from the rule of Scottish conveyancing practice that a solicitor acting for the seller of heritable property is normally bound at settlement of the transaction (ie when the disposition is delivered in exchange for the price) to deliver to the purchaser's agent a letter of obligation binding him to deliver within a reasonable or specified period searches in the personal and property registers brought down in terms of a memorandum adjusted between the respective solicitors and showing clear records. A similar rule applies where a person borrows on the security of heritable property. If the seller's wife registers a matrimonial home notice before the disposition is recorded, the seller's solicitor will incur personal liability under his letter of obligation. (We would not expect a purchaser's solicitors to accept letters of obligation which except liability for matrimonial home notices since a letter of obligation which makes exceptions is worth very little.) It will therefore be in the interests of a husband's law agent to ensure that no disposition or security deed is granted by the husband without the wife's consent and we would expect solicitors to make the necessary enquiries from their own clients as a matter of routine conveyancing practice. This will undoubtedly throw an extra burden on those solicitors who are unfamiliar with their client's matrimonial and domestic arrangements, but the social policy of protecting occupancy rights makes this burden unavoidable.

(i) Matrimonial home vested in trustees

6.52 Our attention has been drawn by the Law Commission for England and Wales to a problem which will be dealt with by them in their forthcoming Report on the matrimonial home.[1] As we explained at paragraph 2.13 above, we envisage that the spouse of a person who has a liferent or other interest under a trust deed should have a personal right to occupy the home as proposed in Proposition 1 in that paragraph. The question arises as to whether and how that right should be enforceable against the trustees or third parties deriving title from them. A powerful argument favouring enforceability is the need to counteract evasion of occupancy rights by means of a trust.

6.53 We understand that the solution favoured by the Law Commission is that in any case where a spouse (say the wife) has rights of occupation in a matrimonial home, held on a trust under which the husband is a beneficiary, at a time when no one but he (or no one but he and she) has a beneficial interest, her rights should become a charge on the trustees' interest as well as the husband's interest. The charge would be registrable and would have priority from the date on which it arises. Thus the spouses' occupancy rights would not be enforceable against the trustees if there are other beneficiaries, actual or potential (eg unborn children), but the mere fact that trust property can be appointed to others by the exercise of a general power of appointment should not, in the view of the (English) Law Commission, disqualify the spouses from being treated as sole beneficiaries. Furthermore, in English law, under section 1(5) of the Matrimonial Homes Act 1967 a wife with rights of occupation has the right to stand in the husband's shoes and pay outgoings on the home such as mortgage payments. We understand that the Law Commission recommend that where the wife's rights of occupation arise by reason of her husband's interest under a trust, she should have a similar right to stand in the shoes of the trustees and pay outgoings even in cases where the spouses are not the sole beneficiaries. Thus, for example, if the trustees default in mortgage payments, the wife may lose possession of the house because the mortgagee may exercise his power of sale on default. The Commission envisage that she should be entitled to protect her occupancy by making the payments herself.

[1] Third Report on Family Property Law: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978) Law Com. No. 86 (to be published shortly): paras. 2.6 to 2.15.

6.54 We think that similar provision would be required in Scotland. It might be argued that the wife should have no higher right against the trustees than her husband has as a beneficiary under the trust. But usually the trustees would not sell the home against the beneficiary's wishes so that, unlike his wife, the beneficiary would not normally need protection.

6.55 To elicit views on this question, we advance the following proposals: (1) Where (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 trustees' shoes and pay outgoings on the home as if she had an irrevocable mandate given by the trustees. (Proposition 53).

(3) Where matrimonial owned by both spouses (common or joint property)

6.56 When the matrimonial home is held by both spouses in common or joint ownership, neither spouse can convey the dwelling without the consent of the other spouse, but threats to occupancy can arise in a different way.

6.57 The law relating to plural holdings has not been free from difficulties of terminology arising from the different senses in which such terms as "common", "joint" and "pro indiviso" have been employed.[1] The definitions which have been accepted by the most recent commentaries[2] and have received judicial approval[3] draw a distinction between "common

[1] J.R. Scott, "Property Commonly Called Joint" (1957) 1 Conveyancing Review 17.
[2] Gloag and Henderson, Introduction (7th ed.) p.564; Walker, Principles (2nd ed.) p. 1300 ; cf. Smith, Short Commentary pp.479-480.
[3] Magistrates of Banff v. Ruthin Castle Ltd 1944 S.C. 36 per L.J.C. Cooper at p.68.

property" and "joint property" broadly speaking by reference to the powers of alienation, severance and transmission on death vested in the co-owners. Common property, unmodified by contract, gives complete freedom to an individual co-owner to dispose of his share inter vivos or mortis causa or to sever the bond of common property by raising an action of division and sale. Joint property gives the least freedom in these respects, and in between these two extremes of the spectrum, there can be cases where the rights of disposal of the owners are more restricted than in common property and less restricted than in joint property.[1] We revert to joint property below.[2]

6.58 By far the most usual form of concurrent ownership by married couples is common property, under which inter alia -

(a) each spouse has a separate share or estate in every inch of the whole undivided subjects, and he or she may alienate or burden his or her share by his **or her own separate act without the consent of the other spouse; and**

(b) each owner has an absolute right to obtain a judicial decree of division and sale to terminate the regime of common property.

There is a case for restricting these two rights for the benefit of the spouse wishing to retain the dwelling as the matrimonial home.[3]

6.59 Thus, if one of the spouses disposes of his or her share to a third party, the effect would be to introduce a stranger into the matrimonial home. In practice, it may often be difficult for a spouse to find a purchaser for his or her pro indiviso share but the possibility exists. It would be consistent with our other proposals

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[1] See Magistrates of Banff v. Ruthin Castle Ltd., supra, per Lord Mackay at p.55; "I have from the first had considerable difficulty in appreciating that our Scottish law of conveyancing made any such absolute and unpassable cleavage between two classes of common property."

[2] See para. 6.61.

[3] We leave aside restrictions on transmission on death of a co-owner as outwith the scope of the Memorandum.

to impose a restraint on such a disposition except with the consent of the other spouse or if consent is unreasonably withheld, of the court.

6.60 A more likely threat to the co-owning spouse's occupancy is an action of division and sale raised by the other co-owning spouse in pursuance of his (or her) absolute right to compel a sale of the interests of all co-owners in the dwelling. While the court has a discretion to choose between division of the subjects or a sale and division of the proceeds, it has no discretion to refuse decree.[1] It is for consideration whether there should be conceded to the court a discretion to refuse or delay decree of division and sale and to impose such conditions as it thinks fit. The court would be required to have regard to all the circumstances including the factors specified in Proposition 46(2), viz 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. It may be thought that the right of an individual co-owner to compel a sale whenever he wishes may in certain circumstances bear harshly on another co-owner: for example, it may not suit all or both co-owners that the subjects should be sold while the market is depressed. However that may be, there seems to be a case for restricting freedom to insist on a sale where the subjects are used as a matrimonial home since the needs of (say) a spouse having custody of the children may require that the regime of common property should continue until alternative accommodation can be found or until the dependent children are able to support themselves. The disadvantages of this solution are that it will lead to uncertainty at least until the court has made its order, and that it will also involve litigation in cases where (because of the co-owner's absolute right) litigation is usually avoided at present.

6.61 We do not think that this solution should be applied to joint

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[1] Anderson v. Anderson (1857) 19 D. 700; Morrison v. Kirk 1912 S.C. 44; Vincent v. Anderson (1920) 36 Sh.Ct.Rep. 182.

property.[1] This form of concurrent ownership exists only by virtue of an independent legal relationship (that is, a relationship independent of the relationship of joint owners created by the title) and while this usually consists of a partnership, or trust, or unincorporated association, it may also be a "contractual arrangement" between members of a family, eg to keep the family home open to them during their respective lifetimes.[2] If such an arrangement exists, then there would be no need for a veto on disposal of a share or a restriction on severance by division or sale. Similarly the solution would be unnecessary and inappropriate in cases where there is a contractual restriction, either on the right of disposal or on the right of severance by division and sale, not amounting to full joint property.[3]

6.62 In these circumstances we invite views on the following proposal: (1) Where the matrimonial home is vested in both spouses as owners in common (ie in common property not joint property), than (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. (Proposition 54).

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[1] In the case of joint property - (a) the owners have no separate estates or shares but only one estate or share vested in them indivisibly; (b) the right of a joint owner accresces on his death to the other joint owners and does not devolve to his representatives; and (c) none of the owners may raise an action of division and sale except on dissolution of the legal relationship on which it is based.

[2] Munro v. Munro and Anor 1972 S.L.T. (Sh.Ct.) 6.

[3] Restrictions on severance by division and sale are competent: see Walker Principles (2nd ed.) 301; Morrison v. Kirk 1912 S.C. 44 per Lord Salvesen at p.47; Vincent v. Anderson (1920) 36 Sh.Ct.Rep. 182. The proposition that the right of severance is a necessary incident of common property (Gloag and Henderson, 7th.ed., p.565), unless tautologous, is too wide and based on remarks by Lord President Dunedin which were concerned to hold that a purported restriction on severance in a feu charter running with the lands was incompetent. See Grant v. Heriot's Trust (1906) 8 F.647 at p.658.

PART VII: THE FURNITURE, PLENISHINGS AND OTHER HOUSEHOLD MOVEABLES

(1) Introductory

7.1 The furniture and plenishings in the matrimonial home are essential to its use as a home. For this reason, in many other legal systems, the contents of the matrimonial home are specifically regulated to take account of the problems which frequently arise on the breakdown of a marriage. In Scots law, however, with minor exeptions, the separate property principle applies, and no special provision is made for these special problems. Accordingly, possessory rights follow the ownership of individual items and the spouse who happens to own a particular article of the furniture or plenishings may legally remove or dispose of it without let or hindrance. In this Part, we argue that possessory rights should no longer necessarily follow ownership of the furniture and plenishings and we consider how possession of such articles should be regulated.

(2) Existing law on ownership of furniture and plenishings

7.2 Since possessory rights in the essential contents of the matrimonial home are not regulated by law separately from ownership, it is necessary to refer briefly here to the broad outlines of the existing law on ownership.

7.3 It follows from the separate property principle that a spouse who purchases an article from his or her own funds, or receives it by gift or succession, becomes the sole owner.[1] If both spouses have received the article in a gift to both, or if both have purchased the article out of contributions from the separate funds of each, or from a joint fund, the ownership of the article will be shared. If the purchase price is provided from savings made by a wife from a housekeeping allowance, then the ownership of the article is shared under the Married Women's Property Act 1964. If the article is being purchased under a hire purchase or other consumer credit agreement, the spouse specified in the agreement

[1] See Clive and Wilson, Husband and Wife (1974) p.294.

as purchaser has all the rights under the agreement as hirer, or actual or prospective owner, as the case may be. If the other spouse contributes to the purchase by payment of instalments he or she will not become part owner. But he or she may be entitled to reimbursement of the payments in whole or part under principles of recompense, the measure of recovery being the extent of the owner-spouse's enrichment.[1] A spouse effecting or paying for improvements to moveables owned by the other spouse will not thereby acquire a proprietary stake in that article.[2] But the outlays may be recoverable at least in part by way of recompense. A spouse left in possession of furniture belonging to the other spouse in the family home has no implied authority to dispose of it and the owner can recover it from third parties acting in good faith and for value.[3]

7.4 The existing law presents certain difficulties. For example, it may often be unclear whether a gift from a third party is to one spouse or the other or both. If the donor's intention cannot be established, it is not clear what legal presumption applies and different rules of thumb have been invoked.[4] Again, where the spouses are cohabiting there is uncertainty whether one spouse can transfer ownership of a moveable article to the other without any overt change of use or whether delivery is essential.[5] The solution to these problems will be considered either in our third Memorandum on family property law or as part of the law on delivery of corporeal moveables.

7.5 In our Memorandum No 22 we advanced proposals enabling the court in a divorce, nullity or separation action to make orders transferring property rights in inter alia corporeal moveable property as between

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[1] See paras. 2.96 et seq above and Appendix A below.

[2] Cf. the English rule under section 37 of the Matrimonial Proceedings and Property Act 1970.

[3] See Tweddell v. Duncan (1841) 3D.998 (pledge by wife of husband's clothing); Currie v. Howie (1920) 36 Sh.Ct.Rep. 157 (wife's sale of husband's piano); Peggie v. Rex & Co Falkirk Ltd (1946) 62 Sh.Ct.Rep 142 (wife sold husband's furniture). See, however, Clive and Wilson op.cit. p.256 for the view that in some cases a wife's praepositura entitles her to dispose of moveables to third parties.

[4] Clive and Wilson, op.cit. pp.294-295.

[5] Ibid. pp.295-297.

the spouses and orders (including interim orders) regulating use and possession.[1]

7.6 Where a spouse dies intestate, the surviving spouse is entitled to receive the ownership or tenancy of a dwelling house comprised in the intestate estate.[2] This is supplemented by section 8(3) of the Succession (Scotland) Act 1964[3] which provides that the surviving spouse is entitled to receive, in addition to the dwelling-house in which the surviving spouse was ordinarily resident, the furniture and plenishings in the house up to a maximum value of £8,000, or, if the value of the furniture and plenishings exceeds that amount, such part of the furniture and plenishings as the surviving spouse may choose. The furniture and plenishings must be comprised in the intestate estate. If the surviving spouse was ordinarily resident in two or more dwelling houses at the date of the other spouse's death, he or she is entitled to the furniture and plenishings belonging to the deceased in such one of the houses as the surviving spouse selects within six months of the death of the intestate.

7.7 Section 8(6)(b) provides the following definition:

> "'furniture and plenishings' includes garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, articles of household use and consumable stores; but does not include any article or animal used at the date of death of the intestate for business purposes, or money or securities for money, or any heirloom."[4]

(3) The need for regulation of use and possession

7.8 A spouse not in occupation may find it difficult to recover clothing or goods owned by him or her and left in the home. For this reason we have suggested at Proposition 5 (para. 2.25) that the court should be able to authorise entry to the home to recover the property and make

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[1] Memorandum No 22 on Aliment and Financial Provision (1976) Propositions 67(a) at para. 3.20 and 68 at para. 3.52. Our proposals in Proposition 73 at para. 3.60 would enable the court to set aside transfers of corporeal moveables or money designed to evade financial provision and thus close the gap disclosed by MacLean v. MacLean 1976 S.L.T. 86.

[2] Succession (Scotland) Act 1964, section 8(1).

[3] As amended by the Succession (Scotland) Act 1973.

[4] The word 'heirloom' is defined by section 8(6)(c) to mean "any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate."

other orders for that purpose. Here we are concerned with the problems of giving a spouse rights to possess furniture and plenishings belonging to the other spouse irrespective of ownership rights.

7.9 The furniture and plenishings of the matrimonial home are essential to its use as a family residence. We concur with Law Commission's view[1] that:

> "Even if the rules concerning ownership were changed, for example by introducing a presumption of co-ownership, this alone would not necessarily provide adequate protection for a spouse. In contrast to the home itself, which is often a substantial asset, the market value of the household goods is usually far less than the cost of their replacement. It would be of little value to a deserted wife to be awarded half the proceeds of sale or half the value of the household goods if her husband had already sold them or removed them from the home. The amount received would usually be inadequate to cover even partial replacement."

Accordingly, we agree with the Law Commission that so far as the essential contents of the matrimonial home are concerned, what is needed is legislation to establish and protect the right of a spouse having occupancy rights to prevent the removal of these items and to use and enjoy them.

(4) Prior official consideration: the Morton Report

7.10 We are fortified in this approach by the fact that the Morton Report's proposals, which extended to Scotland as well as to England and Wales, to give a deserted wife possessory rights in the matrimonial home extended also to its furniture and plenishings.[2] Briefly the Report recommended that:

> (a) Where one spouse leaves the other in the matrimonial home, he should not be able to take away any of the essential contents without a court order;
> (b) The spouse left in the matrimonial home should be able to apply for a court order restraining (for such period as the

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[1] Working Paper No. 42, para. 2.26

[2] (1956) Cmd. 9678, Recommendations 59-62 (Scottish).

court thinks fit or until further order) the deserting spouse from disposing of the essential contents;

(c) Where the deserting spouse fails to pay instalments under a hire purchase agreement with a third party relating to any of the essential contents, the stay-at-home spouse should be entitled to make payments under the agreement which would bind the third party;

(d) Either spouse should be able to apply to the court for an order as to the disposition of the essential contents of the home;

(e) On divorce, nullity of marriage or judicial separation, the court should have power to make an equitable division of the essential contents of the home including articles subject to hire purchase agreements; and

(f) Pending a divorce, nullity or separation action, the pursuer should have power to restrain the other spouse from disposing of any interest in the contents of the home.

So far as paragraphs (e) and (f) are concerned, the principle of the proposals have been accepted by our proposals in Memorandum No. 22.[1] Otherwise the proposals have not yet been implemented in any part of Great Britain.

(5) Comparative survey

7.11 Before advancing a scheme for reform, it may be convenient to outline the existing law and developments in other legal systems.

7.12 In England and Wales, the existing law is broadly that occupation rights follow ownership and the principle of separate property applies. For the reasons given at paragraph 7.9, the Law Commission have advanced proposals to protect a spouse's use and possession of "the household goods".[2] In their forthcoming Report on this topic the Commission describe their scheme as being:-

> "that at any time during the subsistence of the marriage (except while a decree of judicial separation is in force) the court should have power on application of either spouse to make an order giving him or her the right, as against the other spouse, to use and enjoy the household goods or some of them. The effect of the order will thus be to confer a right of user on the applicant spouse, and that right will be secured by the sanctions which will be available against the spouse who acts in breach of the order."[3]

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[1] Para. 7 above.

[2] Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978) Law Com. No. 86. At the time when our Memorandum was completed, this Report had been submitted to the Lord Chancellor but not yet published. We acknowledge above (para. 0.15 in Volume 1) our indebtedness to the Law Commission for their permission to rely on the Report.

[3] Law Com. No. 86, para. 3.31.

The court would have a wide discretion to make a use and enjoyment order which would not be confined to emergencies (para.3.32) but would be subject to guidelines, in particular "the extent to which the goods in question are needed by the applicant to meet the ordinary requirements of his or her daily life, including any requirements arising from any family responsibilities of the applicant", (para.3.42). The court's powers would not extend to goods in which a third party has a beneficial interest, (paras. 3.58 and 3.59), and would not affect a subsequent acquisition by a third party of proprietary rights, (para.3.61). The court would have powers to make orders as to entitlement to use and possession, and ancillary orders for preventing removal, for delivery and prohibiting disposal but subject to conditions. (paras.3.35 and 3.36). The orders would cease to have effect on termination of the marriage by divorce, annulment or death, or on an event specified in the order, and would be subject to variation and discharge. (paras. 3.47 to 3.52). If an order were disobeyed, the court would have power to order the defaulting spouse and a mala fide third party, to pay a lump sum as compensation and could also treat the disobedience as contempt of court, (paras 3.64 and 3.66). The respondent spouse in an application would be prohibited from disposing of the goods after service of the application on him and pending disposal of the application, (para.3.68). Breach of the prohibition would attract sanctions including the payment of a lump sum by the respondent or a mala fide third party, (para. 3.71).

7.13 In the Republic of Ireland, the Family Home Protection Act 1976 restricts the disposal, burdening or removal from the family home of 'household chattels'. Section 9(1) provides:

> "9-(1) Where it appears to the court, on the application of a spouse, that there are reasonable grounds for believing that the other spouse intends to sell, lease, pledge, charge or otherwise dispose of or to remove such a number or proportion of the household chattels in a family home as would be likely to make it difficult for the applicant spouse or a dependent child of the family to reside in the home without undue hardship, the court may by order prohibit on such terms as it may see fit, the other spouse from making such intended disposition or removal."

Where matrimonial proceedings have been commenced, neither spouse can dispose of the household chattels except with the consent of the other spouse or the permission of the court, which permission may be subject to conditions.[1] Contravention of this prohibition is a criminal offence punishable by a fine up to £100 or up to six months' imprisonment.[2] In the event of a disposition in breach of a court order, or during matrimonial proceedings, or of a disposition which "has made or is likely to make it difficult for the applicant spouse or a dependent child of the family to reside in the family home without undue hardship" then the court may on application order the offending spouse:

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[1] Section 9(2).

[2] Section 9(4).

> "to provide household chattels for the applicant spouse, or a sum of money in lieu thereof, so as to place the applicant spouse or the dependent child of the family as nearly as possible in the position that prevailed before such contravention, disposition or removal."[1]

There is apparently no rule that the aggrieved spouse can obtain restitution or recompense from a third party acquiring in good faith or even bad faith, except where the party receives intimation and is subject to a court order under section 9(6) which provides:

> "Where a third person, before a sale, lease, pledge, charge or other disposition of any household chattel to him by a spouse, is informed in writing by the other spouse that he intends to take proceedings in respect of such disposition or intended disposition, the court in proceedings under this section may make such order, directed to the former spouse or the third person, in respect of such chattel, as appears to it to be proper in the circumstances."

"Household chattels" here includes "furniture, bedding, linen, china, earthenware, glass, books and other chattels of ordinary household use or ornament and also consumable stores, garden effects and domestic animals" but does not include "any chattels used by either spouse for business or professional purposes or money or security for money."[2]

7.14 In New Zealand, the courts have power to make orders regulating occupancy or vesting the tenancy or ownership of the matrimonial home in one (or both) of the spouses, and at the same time, the courts may make orders granting to a spouse the right of exclusive possession of the furniture and other specific items of property, including moveable property.[3] If the property is subject to a hire purchase, conditional sale or hire agreement, the court may nevertheless vest the rights and obligations under the agreement in either spouse, and the order has effect notwithstanding anything in the agreement.[4] Before such an order is made, however, the court will direct notice to be given to the third party concerned who is entitled to enter the process and be heard.[5]

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[1] Section 9(4).

[2] Section 9(7).

[3] Matrimonial Property Act 1976, s.25. (This replaces earlier provisions in the Matrimonial Proceedings Act 1963, s.62 and the Domestic Proceedings Act 1968, ss. 40 and 44.)

[4] Matrimonial Property Act 1976, s.29.

[5] Ibid., s.37.

7.15 In the Common Law provinces of Canada, there appears to be no clear rules of law of general application. The spouse who owns chattels in the matrimonial home has a right to remove them but the courts may restrain the exercise of the right acting in pursuance of the discretionary powers conferred by the Married Women's Property Acts. Summarising the position, Mr M C Cullity observes:

> "On the one hand one can say that the right to reside in the former matrimonial home does not automatically carry with it the right to possess everything contained in it at the time the parties separated. On the other hand, a deserting husband would not be entitled to assume that his spouse's right of occupation was necessarily limited to the bare boards of the house. Apart from these obvious propositions, all that can be said is that everything will depend upon the financial circumstances of the parties and whether the spouse in occupation, or the children of which that spouse has custody, are entitled to support from the other."[1]

7.16 A number of Civil Law legal systems make provision prohibiting disposal of the contents of the matrimonial home with a view to securing their use by both spouses. In France, the Civil Code Article 215 provides that one of the spouses acting without the other's consent cannot dispose of those rights which secure the lodging or shelter of the family "nor of the moveable furniture with which it is plenished."[2] A spouse who has not given consent to the act of disposal can raise an action to annul the act, within a limitation period of a year from the date on which he or she acquires knowledge of the act.[3] It appears that opinions are divided on the question whether a third party acquiring household furniture in good faith, which has been irregularly alienated without consent, is protected by article 2279 of the Code (which provides that in moveable property, possession gives title, but the owner of lost or stolen property may recover it within three years from a third party without prejudice to that party's claims against the person from whom he acquired it).[4] In default of the spouse's consent, the court may authorise disposal.[5] It seems that the article strikes not merely at acts of disposal but also acts of administration if they would prejudice the peaceable enjoyment of the home by the family.[6] It would seem therefore to cover the removal as well as the disposal of furniture. Similar legislation to the French Code has been enacted recently in Belgium.

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[1] Cullity, op.cit. (para. 6.13 note 2 above) pp.257-8.

[2] Alinea 3 (formerly al. 4).

[3] Idem.

[4] Marty and Raynaud Droit Civil; Les Personnes (3rd ed; 1976) p.268,fn.(3).

[5] Code Civil, article 217.

[6] Chartier, (1971) 69 Revue Trimestrielle de Droit Civil 510 at p.569.

7.17 In the Federal Republic of Germany, there is no restriction on disposal of the matrimonial home as such, but Article 1369 of the B G B provides:

> "(1) A spouse may only dispose of items in the conjugal household belonging to him, and may only undertake an obligation for such disposition, if the other spouse consents thereto.
>
> (2) The Guardianship Court may, upon the application of one spouse, substitute the consent of the other spouse if the latter unreasonably refuses it, or by reason of sickness or absence is prevented from making a declaration."[1]

There are supplementary provisions on ratification by the spouse whose consent is required and the rights of third parties. Under Article 1366:

> "(1) A contract concluded by a spouse without the consent of the other spouse is effective if the latter ratifies it.
>
> (2) A third party is entitled to revoke the contract up until ratification. If he knew that the husband or wife was married, he may revoke only if the husband or wife had untruthfully stated that the other spouse had consented; he may not revoke even in such a case, if at the time of concluding the contract it was known to him that the other spouse had not ratified.
>
> (3) If a third party demands that a spouse produce the required ratification of the other spouse only the latter may declare ratification to the third party; if he had already made a declaration to the other spouse prior to the demand, that declaration is ineffective. The ratification may be declared only within two weeks from the receipt of the demand; if it is not given, it is deemed refused. If the Guardianship Court orders a substituted ratification, its decision is valid only if the spouse notifies the third party thereof within the two weeks time-limit; otherwise the ratification is deemed refused.
>
> (4) If ratification is refused, the contract is ineffective."

Article 1367 provides that a "unilateral legal transaction carried out without the requisite consent is ineffective." Article 1368 ensures that rights are enforceable against third parties by providing:

> "If a spouse disposes of his property without the requisite ratification of the other spouse, then the other spouse is also entitled to enforce in court his rights, arising out of the ineffectiveness of the disposition against the third party."

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[1] Translation of this Article and of Articles 1365-1368 is taken from Forrester, Goren and Ilgen, The German Civil Code (Amsterdam and Oxford; 1975).

(6) Our provisional proposals

7.18 The proposed right of a spouse having occupancy rights to use the furniture and plenishings would necessarily consist of a bundle of subsidiary rights, which might include the following:-

(a) a right to prevent the removal of the goods from the matrimonial home;
(b) a right following removal of the goods to recover them from the spouse who had removed them if they were still in his possession or subject to his control, and if no rights in the goods had been conferred on a third party by an alienation or under an onerous obligation;
(c) a right to prohibit or prevent an act of disposal of any of the furniture or plenishings, or an obligation to dispose of them, in favour of a third party; and
(d) a right to recover them following such an act or obligation.

The first and second rights would be personal rights enforceable respectively by interdict and by an order for delivery. The two last-mentioned rights would however require to be enforceable against third parties if they were to be effective.

7.19 Probably the most fundamental question in formulating a legislative scheme is whether the subsidiary rights just described should arise by operation of law (which is the approach adopted in France, and West Germany[1]) or whether they should only be available if the spouse applies for and/or obtains a judicial order (as in the case of the English proposals and the Irish Republic and New Zealand legislation[2]). In other words, there is a choice between what may be called the rule-based approach of the Civil Law systems and the remedy-based approach of the Common Law systems.

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[1]See paras. 7.25-7.26.

[2]See paras. 7.22-7.24.

7.20 Originally in their consultative Working Paper, the Law Commission provisionally suggested a rule-based solution. A spouse in occupation was to be entitled to the continued use and enjoyment of the household goods until the court ordered otherwise.[1] But in their final Report, the Commission reject this solution in favour of a remedy-based scheme. We have set out in summary, the Law Commission's proposals at para. 7.12 above. The reasons which they give for this change of approach shed much light on the differences between the two approaches, and have helped us greatly in making a comparison between them.

7.21 Broadly speaking, the Law Commission advanced three related objections to a spouse's right of use arising by operation of law.[2]

7.22 First, the legislation conferring such a right could not achieve the twin objectives of precision and flexibility. If a right were to arise automatically by law, it would "be essential that the parties should be able to determine easily and with certainty the goods over which the right exists". The Commission do not think it possible to formulate (in legislation conferring an automatic right of user) a definition of household goods "which would leave little or no dispute over individual items and would at the same time be suitable for the infinitely varying circumstances of every kind of marriage". It is an advantage of basing rights of use on court orders that the enabling legislation "could adopt a wide and general definition of household goods, leaving it to the court, within the terms of that definition, to specify precisely the goods to which the order was to apply."

7.23 Second, the right of use was devised to cater for crisis situations, eg removal or threats of removal of the goods by a deserting or absconding husband, but would apply also to all marriages, including normal happy marriages. A right by operation of law "would be bound to interfere with the free disposal of goods" and it would be difficult to formulate the legislation "so as not to interfere unduly with the many ways in which a husband

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[1] Working Paper No. 42 (1971) para. 2.50)i)-(vii).
[2] Law Com. No. 86, (cited above), paras. 3.23-3.29.

or wife may quite legitimately dispose of some of the household goods in the course of their married life".

7.24 Third, The Commission did not think that much if anything would be lost by requiring a court order. In their view, a right of user by operation of law "would not in itself be effective unless supported by a procedural remedy involving an application to the court. In the emergency situations which such a solution is designed to cover, an application to the court would almost certainly be necessary in any event."

7.25 These are cogent and weighty arguments. Certain contrary arguments must, however, be borne in mind. As we have seen, many Civil Law systems, including systems which have been recently revised, confer rights of use which arise by operation of law and for this purpose formulate general statutory definitions of the protected goods.

7.26 Those whom we consult may wish to consider and comment on an alternative solution which would have advantages as well as disadvantages when compared to the Law Commission's approach. The essential features of the alternative approach would be as follows:-

(1) Where items of household furniture and plenishings[1] in the matrimonial home are owned by a spouse and the other spouse has occupancy rights in the home, then the spouse who is owner of the items should be under a duty not to dispose of any of those items, nor to enter into an obligation for such a disposal nor to remove them from the home, without the consent of the other spouse.

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[1] Defined at para. 7.29 below.

(2) Any disposal or obligation made by a spouse in breach of this duty would be subject to reduction or annulment[1] at the instance of the other spouse but only in restricted circumstances, viz:

> (a) if the third party acquiring right to the item in question transacted in bad faith or gratuitously;
> (b) if the action of reduction or annulment was raised within a short limited period (say) three or six months from the date when the disposal or obligation was discovered;
> (c) if the aggrieved spouse is not personally barred by ratification **or acquiescence.**

(3) The court should have power to dispense with consent if it is unreasonably withheld or cannot be given because of physical or mental disability or absence.

(4) Where a disposal or obligation without consent cannot be annulled because the third party had transacted in good faith and for value, the aggrieved spouse should be entitled to apply to the court for an order requiring the offending spouse to pay him or her a sum equivalent to the replacement cost of the item or items in question. (This seems just though it is likely to be higher than the actual value of the goods.) If the third party had transacted in bad faith, but restitution was no longer possible, he would be liable to be convened as a co-defender in the proceedings and made jointly and severally liable.

(5) The spouse with occupancy rights should be entitled to obtain an interdict against a threatened removal of items of household furniture and plenishings from the home. He or she should also be able to obtain an order for their delivery if the items had been removed without consent and a third party had not acquired rights in good faith and for value.

(6) It is envisaged that a detailed and specific definition of the household furniture and plenishings should be provided by the statute.

(7) It will be for consideration how far the foregoing scheme should affect goods subject to a contract of hire, hire-purchase or conditional sale.[2]

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[1] The technical word "reduction" is sometimes confined to transactions embodied in a deed or other writing which the court "reduces". A disposal of corporeal moveables, however, does not need writing.

[2] See para. 7.34 below.

7.27 The major advantage of a scheme on these lines would be that a spouse with occupancy rights would not require to seek a court order before his or her possession and use of the household moveables were protected. Under the Law Commission's proposals, a spouse's use is protected only if an order is applied for in which case there is interim protection after service of the application and pending its disposal.[1] But by the time an application is made it may be too late.

7.28 It may be argued that the prohibitions on disposal would impede the free movement of goods. Where, however, the marriage is happy a spouse disposing of household goods would have no reason to fear a judicial challenge on the part of the other spouse. And under our proposals a bona fide purchaser for value would not be affected. Even the spouse who is owner would not be liable to challenge after a short prescribed period of a few months. And the most he would have to do would be to replace the item or items which he had disposed of, unless by his disobedience of an interdict or delivery order or by his other conduct he also incurred penalties for contempt of court.

7.29 It is a disadvantage of this approach that, as the Law Commission recognised, there are difficulties in formulating a definition of the household goods which would give precise guidance to the parties concerning the property which might be freely disposed of and yet be suitable for the infinite variety of different marriages. Nevertheless other legal systems operate provisions which describe the protected property in the most general terms. Moreover, the scheme would in practice only be relevant when the parties were estranged and in that event it seems right that the owner of the goods should be anxious to secure that the appropriate consents had been obtained. There are two statutory precedents which might be used to define furniture and plenishings. One relates to the furniture and plenishings devolving on a person's death to the surviving spouse as prior rights;[2] and one relates to exemptions from

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[1] Law Com. No. 86, (cited above) para. 3.86.

[2] The Succession (Scotland) Act 1964 section 8(6)(b) set out in para. 7.10 above.

diligence.[1] An article is exempt from poinding if it is one of the articles specified in the Act; if at the time of the poinding it is in a dwelling house in which the debtor is residing; and if "it is reasonably necessary to enable him and any person living in family with him in that dwelling house to continue to reside there without undue hardship."[2] We consider that the "undue hardship" principle is too restrictive and rigorous for present purposes. We propose instead that the safeguarded articles should be more widely defined and tentatively suggest for comment the following formula:-

> '"furniture and plenishings" means those articles of household use or ornament which are reasonably necessary to enable the spouse with occupancy rights and any dependent children living in family with him or her to retain the comfortable use and enjoyment of the dwelling house as a home and includes, without prejudice to the foregoing generality bedding, garden effects, plate, plated articles, linen, china, glass, books, pictures, prints, and articles providing facilities for cooking, eating, storing food, or heating.'

There would, however, be excluded articles wholly or mainly used by their owner in connection with any trade, profession or business, and also money or security for money. Heirlooms would not be excluded. It is true that circumstances will vary and an article which is essential for one marriage may be surplus to requirements for another marriage. But it may be that the safeguarded articles will normally be apparent and that doubts will be important only in situations of marital breakdown. In such situations, it is important that the owner should be anxious to obtain the other spouse's consent and that the onus should be on him to apply to the court to dispense with consent.

7.30 As noted above, if the safeguards are dependent on a court order, a wider definition of the safeguarded articles is possible. The Law Commission in their forthcoming Report give the following wider definition:-[3]

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[1] In the Law Reform (Diligence)(Scotland) Act 1973 (which exempts from poinding certain household effects and furniture), section 1(2) provides that the exemption is to apply to articles of the following descriptions, namely:- "beds or bedding material; chairs; tables; furniture or plenishings providing facilities for cooking, eating or storing food; furniture or plenishings providing facilities for heating." The list may be varied under section 1(3) by statutory instrument subject to negative resolution.

[2] 1973 Act, section 1(1)

[3] Law Com. No. 86 (cited above) para. 3.104.

"'Household goods', means any goods, which are or were available for use or enjoyment in or in connection with any home which the spouses are occupying or have at any time during their marriage occupied as their matrimonial home."

It would be possible to supplement the rights arising by operation of law with rights dependent on court orders in relation to other goods "available for use or enjoyment in or in connection with any home". We doubt whether this refinement is needed.

7.31 It may also be argued that third party acquirers would be placed on their inquiry whenever they purchased property of a kind specified in the statutory definition. But already parties acquiring property are placed on their inquiry where disposals are made to defeat claims for financial provision on divorce, and under the existing law a person acquiring property which has been lost or stolen may have to restore it to its true owner unless he acquired it in good faith or for value.

7.32 In the light of these considerations, we invite views on the following questions:-

(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 plenishings even where they are 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 proposed by the Law Commission for England and Wales (described 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? (Proposition 55).

On balance we provisionally prefer the scheme outlined in paragraph 7.26 but we invite views and comments.

(7) "The family car"

7.33 There are many obvious differences between the family car and the furniture and plenishings of the home. As the Law Commission commented:[1]

> "... the car is not used in or about the home even though it may be kept there. Further, it often has a substantial resale value, and may be the most substantial asset owned by any member of the family. But it is not always used by both husband and wife, or to the same extent by each, and sometimes the spouse may need it for business purposes, including travel to and from work."

We agree with the Law Commission, therefore, that a right to use the family car should not arise by operation of law. On the other hand, it is clear that the car may be essential to occupancy of the home, especially in rural areas where public transport does not provide an adequate service. Even in other cases, it may be desirable and just that the spouse who is not owner should have a right of use, or of exclusive use, of the car. Accordingly we suggest that 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. (Proposition 56).

(8) Third party rights (diligence, bankruptcy and consumer credit agreements)

7.34 We do not think that a spouse with possessory rights in furniture, plenishings or the family car, can have any higher right than the owner in a question with third parties. Accordingly, his or her rights must be postponed to the rights of a creditor of the owner who poinds the property, or sequestrates it for rent under the landlord's hypothec. Further, if the owner is sequestrated or grants a voluntary trust deed for creditors, the trustee for the creditors must be preferred. Of course, some of the furniture and plenishings will be exempt from a poinding[2] and the owner's

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[1] Working Paper No. 42, para. 2.44.

[2] Law Reform (Diligence)(Scotland) Act 1973; cf. Bankruptcy (Scotland) Act 1913 section 91 (exclusion from sequestration of wearing apparel of bankrupt and his spouse and family).

spouse will continue to have possessory rights over these. We are considering the concession of similar exemptions in sequestrations in the context of reform of bankruptcy law.

7.35 Often the furniture, plenishings and family car will be subject to a hire-purchase or conditional sale agreement or possibly a contract of hire. If the husband fails to keep up hire purchase payments, the wife has no right to keep up the payments or to exercise the option to purchase. There are several approaches to this problem. As indicated above (para. 7.20) the Morton Report proposed that when a spouse failed to pay instalments under a hire purchase agreement, the other spouse should be able to make payments under the agreement which would bind the third party. In New Zealand, as we noted above,[1] a third party owner of furniture subject to a hire purchase agreement has a right to receive intimation and to be heard, in a spouse's application for a possession order. Like the Law Commission, however, we are reluctant to involve third party owners in litigation if possible.

7.36 Consideration of reform in this context is complicated by the movement to reform of consumer credit agreements following the Crowther Report.[2] It will be remembered that the Report proposed that hire purchase and instalment sales should be treated by law as outright sales financed by a collateral loan repayable by instalments. Clauses reserving title would in England and Wales be treated as "chattel mortgages".[3] The Law Commission pointed out that, since ownership would be vested in the spouse who made the purchases, the other spouse would be able to acquire an interest in the goods and to take an assignation of the purchaser's interest.[4] The Law Commission therefore advanced proposals upon the view that these proposals of the Crowther Report would be implemented[5] but, although the Consumer Credit Act 1974 made

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[1] Para. 7.24.

[2] Report of the Departmental Committee on Consumer Credit (1971) Cmnd. 4596.

[3] Ibid., paras. 5.2.1.-5.2.4. "Chattel mortgages" are not recognised in Scots law and there is no equivalent form of security over corporeal moveables. A Working Party on Security over Moveables has, however, been set up by us to formulate proposals for the introduction in Scotland of a new system of security over moveable property and the establishment of a register of security interests over moveables: see our Eleventh Annual Report (1975-76), Scot. Law Com. No. 43, para. 21.

[4] Working Paper No. 42, Family Property Law, (1971) paras.2.20-2.21.

[5] Ibid. paras. 2.45-2.49.

wide-ranging changes in the law, it did not introduce the reforms just mentioned upon which the Commission had relied in advancing its proposals.

7.37 The Law Commission have now concluded that where goods are held by a husband on hire or hire purchase, it would be of little or no practical assistance to the wife to confer on her a right to use and enjoy the goods unless the rights were enforceable not only against the husband but also against the owner of the goods.[1] Further, the wife would require to take over some of the obligations as well as rights under the agreement.[2] The Law Commission conclude therefore that the law relating to contracts of hire and hire purchase should be reviewed with particular reference to the question of conferring rights on the spouse of the hirer and, for this purpose, will consult with the Director General of Fair Trading as to the means of putting such a review in hand.[3]

7.38 We intend to associate ourselves with such consultations and meantime we simply state that 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. (Proposition 57).

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[1] Law Com. No. 86 (cited above) para. 3.141.

[2] Idem.

[3] Ibid., para. 3.142.

PART VIII: UNMARRIED COHABITING COUPLES

(1) Introductory

8.1 The next question to be considered is whether any of our proposals should extend to unmarried cohabiting couples. This question presents difficulties partly because it is likely to elicit strongly held opposing views, and partly because it has implications for legislative policy going beyond the issues raised in this Memorandum.

8.2 Thus, many people probably still subscribe to the traditional view that cohabitation outside marriage is immoral or contrary to public policy and that, if it is not discouraged, then at least it should not be recognised, by the rules of private law. On the other hand, it has been asserted (at least in England) that cohabitation outside marriage has increased greatly in the past two or three decades,[1] and that it has lost much of its previous social stigma,[2] and that the law should recognise quasi-marital unions in the context of property rights and related contexts.[3] It seems likely that in recent years extra-marital cohabitation has increased in Scotland as in many other parts of the world.

8.3 In some legal systems, a comprehensive review of all the rights of de facto spouses has been undertaken.[4] In England and Wales, however, the limited recognition of quasi-marital unions has taken shape as a piece-meal legislative or judicial response to arguments for reform in particular legal contexts.[5] As regards Scotland, we ourselves have argued against

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[1] See Dyson Holdings Ltd v. Fox [1976] 1 Q.B. 503 per Bridge L.J. at pp.512-3.

[2] Idem.

[3] See for example Eekelaar, "The Place of Divorce in Family Law's New Role" (1975) 38 M.L.R. 241 at p.245: "The matrimonial adjustive jurisdiction [of the English courts] should be exercisable whenever parties to a relationship have been fulfilling roles equivalent to the marital roles": also Pidgeon, "De Facto Spouses and Property Disputes - A Case for Reform" in Transactions of the Fifth Commonwealth Law Conference (1977) where it is argued that the posiiton of de facto spouses in "settled long standing stable relationships" should be equated with that of husband and wife insofar as property disputes are concerned.

[4] See e.g. Report of Law Reform Commission of Tasmania on Obligations Arising from De Facto Relationships (1977).

[5] See for example the Inheritance (Provision for Family and Dependants) Act 1976 s.1(1)(e), Domestic Violence and Matrimonial Proceedings Act 1976, ss.1(2) and 2(2); Davis v. Johnson, [1978] 2 W.L.R. 182; Dyson Holdings Ltd v. Fox, supra. For a review of this topic from an English standpoint, see Alec Samuels, "The Mistress and the Law" (1976) Family Law 152.

a piecemeal approach recognising the moral claims of unmarried spouses in some contexts but not in others.[1] We are, however, compelled to recognise that a comprehensive review of the legal position of unmarried cohabiting couples is unlikely to receive priority, and that we are bound to sound public opinion on the proper legislative approach in the present context.

8.4 We do not think that the case has yet been made out for adopting a general legislative policy of extending the special rules on spouses' property rights to unmarried couples. The argument for such an extension appears to be that a party to a de facto relationship often has the same need, and in the relevant sense the same moral claim, to obtain from the other party financial support or rights in the other party's property as if the parties were married. It is said that many de facto relationships closely resemble marriages: they are often stable, no less permanent than many marriages today and provide a home background for the children of the relationship. On this view, the unorthodoxy of the parties' marital status is less important than considerations of humanity and the needs of the economically weaker party. Moreover, it has been argued that an extension of the relevant law to unmarried cohabitees would not diminish the status of marriage because, in the absence of such an extension, men wishing to avoid their just responsibilities will be tempted to form illicit relationships instead of entering into marriage.

8.5 There are, however, two powerful contrary arguments which throw doubt on these views. First, one of the reasons why some unmarried cohabiting couples do not enter into marriage is that they wish to retain the freedom and other advantages associated with single status. They may not want for example, to be subject to the powers of the courts to adjust property rights on divorce. If this assumption is correct, then arguably it is unduly paternalistic and inappropriate for the State to claim that it knows better and to foist the trammels of marital property law on them.

8.6 Second, a more important argument is that to give unmarried cohabitation the same property consequences as marriage itself would sooner or

[1] Report on the Law Relating to Damages for Injuries Causing Death (1973) Scot. Law Com. No. 31, para.82; in the proceedings on the Bill which became the Damages (Scotland) Act 1976, this question was debated: see O.R., H.C., First Scottish Standing Committee, 23 March 1976, cols. 16-26; Hansard, O.R., H.C., 1975-76, vol. 908, cols. 1264-1269.

later mean the end of marriage as an institution. It is scarcely possible to have two types of marital status within one society.[1]

8.7 It is against the background of these conflicting general considerations that we must consider the law on occupancy rights, and protection from domestic violence, as it affects unmarried cohabiting couples.

(2) Occupancy rights

8.8 Since under Scots law marriage has minimal effects on property rights until its termination by divorce or the death of a spouse, it is not surprising that the mere fact of cohabitation has no effects whatsoever on property rights. Each partner continues to own his or her own property. In England and Wales, the Matrimonial Homes Act 1967 does not extend to 'unmarried spouses'.

8.9 There are strong arguments against extending our proposals on occupancy rights to unmarried cohabiting couples. As already indicated, unmarried couples may have chosen cohabitation deliberately in order to avoid property entanglements. If they wish the security given by such arrangements, they may marry and if an existing marriage impedes this, it is open to the spouse in question to obtain a divorce after five years or a shorter period. Moreover, there are practical obstacles which would be difficult to surmount. How does one distinguish between the stable union and the casual liaison? It might be necessary to prescribe a minimum period of cohabitation or joint residence to qualify for occupancy rights.[2] It may at times be difficult enough for conveyancers and third party purchasers or lenders on security to ascertain whether a person is married to a spouse having occupancy

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[1] Marriage by cohabitation with habit and repute is not of course a different marital status but an alternative mode of entering marriage. It differs from cohabitation in that the spouses hold themselves out as, and are reputed to be, husband and wife. Only some half dozen **habit and repute** marriages are constituted every year **by action of declarator.**

[2] For example, in British Columbia, the Family Relations Act 1972, s.15, defines a "spouse" for the purpose of family maintenance as including "a man or woman who, not being married to the other, lived together as husband and wife for a period of not less than two years, when an application ... is made by one of them against the other not more than one year after they ceased living together as husband and wife".

rights; but it is much less easy to ascertain whether someone is cohabiting and if so whether the cohabitation is a passing affair or a stable union recognised by law for this purpose. While these difficulties could be overcome to some extent, the legislation would be likely to create uncertainty in property rights. We provisionally conclude that the law should not concede to an "unmarried spouse" with whom the owner or tenant of a dwelling is cohabiting the same occupancy rights as are proposed for spouses. (Proposition 58).

(3) Protection from domestic violence and limited occupancy rights

8.10 There is no doubt that a man's mistress has a title to sue for a civil interdict to protect herself from his violent conduct. Moreover, where the title to the dwelling in which they reside is in her sole name, she may obtain a decree for his ejection and an interdict against his return. Where, however, the title is in the male partner's name or in joint names the court cannot eject him from his own dwelling in order to protect the female partner. Moreover, to exclude him from the home would be a virtually useless remedy where he was the sole owner or tenant since he could react by excluding the female partner from the home by virtue of his proprietary rights. It would be necessary to give the injured partner a right of occupancy as well as a right to exclude the other partner.

8.11 We note that in England and Wales, the legal position is uncertain as a result of ambiguities in the Domestic Violence and Matrimonial Proceedings Act 1976. At first, the Court of Appeal held in two decisions that the reformed powers of the county court to grant injunctions could not be used to override the property rights of the violent partner in the relationship,[1] (and it seems a similar view was taken of the powers of the High Court). In Davis v. Johnson,[2] however, it was held by a Court of Appeal bench of five judges that the courts could use their powers to exclude the violent partner even if he was sole or joint owner or tenant. It is still open to the House of Lords to construe the Act in a different sense.

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[1] B v. B, [1978] 2 W.L.R. 160 (C.A.) (where violent partner had sole title); followed in Cantliff v. Jenkins [1978] 2 W.L.R. 177 (C.A.) (where violent partner had joint title).

[2] [1978] 2 W.L.R. 182 (C.A.). See articles by Lasok, (1978) 128 New Law Journal 124; Glover (1978) Family Law 39.

8.12 As the English experience and the discussion in Part II show, protective remedies are closely connected with occupancy rights. Thus we are confronted with a dilemma. On the one hand, since the female partner is usually the injured party and very often does not have the sole title to the joint residence, it would be unsatisfactory merely to enable the court to exclude the violent partner in cases where the injured partner had the sole title. If the reform is to be effective, it must be possible to exclude the violent partner, and to allow the aggrieved partner to stay in the home, notwithstanding that the violent partner has the sole title or a common title. On the other hand, such a solution would be in effect to concede occupancy rights to the injured partner by a sidewind and to override the other's possessory rights. A compromise solution might be to give the partner who has no legal possessory rights (i) a right not to be excluded except by an order of the court in an action of ejection and (ii) a right to apply to the court for an order allowing her to remain in the home and to retain its essential contents for a limited period up to a prescribed maximum of say two or three months. The effect would be that the injured party would have a reasonable period in which to secure alternative accommodation. If she (or he) lived in a public authority dwelling, she would be able to apply to the landlord for a transfer of the house to her name. It would be for consideration whether the parties must have cohabited together for a minimum period before these limited rights arise.

8.13 To sum up, we invite views on the following provisional proposal: (1) in cases of domestic violence involving unmarried cohabiting couples or their dependent children (a) the court might be empowered to grant an interdict on the uncorroborated testimony of one witness (see Proposition 14[1]); (b) if the unmarried partner requiring protection has the title to the joint residence as sole owner or tenant, the court should have the same powers to pronounce interdicts prohibiting entry to an area near the home as are proposed at Proposition 15[2]; (c) further the proposals on

[1] At para. 2.74.

[2] Para. 2.80.

criminal breach of interdict mentioned in Proposition 16[1] 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; (ii) to exclude the other spouse from the joint residence for that period and (iii) to apportion liability for outgoings on the dwelling 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. (Proposition 59).

(3) Financial contributions and physical improvements

8.14 In Scotland, as we have seen, property rights in the home are fixed by the title at the time when it is acquired. Even financial contributions as such do not give the contributor a proprietary stake. In England and Wales however, the doctrine of constructive trust has been used, not only in disputes between spouses, but also in the case of unmarried cohabiting couples[2]. The courts can look behind the title to financial and perhaps other contributions or physical improvements and give the owner's mistress a share in the beneficial ownership.

8.15 In Scotland, the unmarried cohabiting partner of the owner has broadly the same claims as a wife to repayment or recompense for financial contributions and these are subject to the same uncertainties.[3] We think that, in addition to the proposed power of the court to apportion liability for outgoings incurred during the residence of a cohabitee in terms of the court's order,[4] the unmarried partner should have

[1] Para.2.86.

[2] Richards v. Dove [1974] 1 All E.R. 888; Cooke v. Head [1972] 1 W.L.R. 518; Eves v. Eves [1975] 1 W.L.R. 1338; Tanner v. Tanner [1975] 1 W.L.R. 1346; see articles by A.J. Oakley [1973] Current Legal Problems 17; A.Bisset-Johnson, (1975) 125 N.L.J. 614; Ellis, (1975) 119 Sol.Jo. 108; I.Brewer, (1976) 120 Sol.Jo. 19; Lowe (1976) 120 Sol.Jo. 143.

[3] See para. 2.96 et seq.

[4] See Proposition 60(2) at para. 8.13.

a clear right to a return of financial contributions, and recompense for physical improvements. Accordingly we propose that where an unmarried couple are cohabiting in a dwelling of which one only is 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. (Proposition 60).

(4) Rent Act tenancies

8.16 So far as the Rent Acts are concerned, a limited recognition has been given to unmarried partners residing with statutory tenants. While a statutory tenant can eject his mistress at any time, he can "retain possession" by leaving her in the home to look after it for him just as he can retain possession by leaving a relative, housekeeper or friend there, provided his absence is temporary.[1] If, however, he intends never to return, he loses his possessory rights: his mistress will then be liable to be ejected by the landlord[1A] but not by him.

8.17 As we have seen, on the death of a statutory tenant, the so-called tenancy may transmit to the surviving spouse or a member of the tenant's family residing with him at this death.[2] In 1950 it had been held by the English Court of Appeal that the word "family" was not apt to include an unmarried cohabiting couple,[3] unless there were children,[4] for at least if the couple were childless, they did not constitute a family within the popular meaning of that term. But in 1975 in Dyson Holdings Ltd v. Fox[5] the Court of Appeal held that a statutory tenancy could transmit to a mistress. The word "family" had changed its meaning owing to "a complete revolution in society's attitude to unmarried partnerships" between 1950 and 1975. It is not clear whether this decision would be followed in Scotland. It seems to infringe the general principle that words in a statute should receive

[1] See para. 4.6 above: Brown v. Brash [1948] 1 All E.R. 922.

[1A] Colin Smith Music Ltd. v. Ridge [1975] 1 All E.R. 290 (C.A.)

[2] Rent (Scotland) Act 1971, Sch.2.

[3] Gammans v. Ekins [1950] 2 K.B. 328.

[4] Hawes v. Evenden [1953] 1 W.L.R. 1169; Perry v. Dembowski [1951] 2 K.B. 420.

[5] [1976] 1 Q.B. 503.

the meaning intended by Parliament when the statute was passed.[1] Moreover, it would be open to the Scots courts to hold that the meaning of the word had not changed in Scotland.[2] We do not, however, intend to advance any proposals on this matter.

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[1] See the case note by Professor W.A. Wilson, (1976) Juridical Review 273.

[2] Ibid., at p.274: "Presumably a meaning could change in England but not in Scotland so that a United Kingdom statute could have a different effect in the two countries."

PART IX: MISCELLANEOUS PROBLEMS

9.1 In this final Part of our Memorandum, we consider the possible application of our proposals to caravans or mobile homes (paras. 9.2 to 9.7 below) and we also examine a number of miscellaneous questions relating to the jurisdiction and procedure of the courts in dealing with the matters mentioned in the Memorandum (paras. 9.8 et seq).

(1) Caravans used as homes

9.2 Caravans present special problems which require separate consideration and to some extent separate legislative provision.[1] They differ widely in their character and in the use to which they are put. Thus most caravans are corporeal moveable property: but some are affixed to the ground in such a way as to partake of the nature of heritable (immoveable) property. Again, a large number of caravans are used as temporary homes for holidays, while others are used as permanent family homes by people who have no other accommodation. It has been estimated that approximately 3,800 households - 10,000 people or less than 0.25% of the population - were living in mobile homes on 166 licensed caravan sites in Scotland in 1975.[2] Over half of these households were younger married couples (head of household aged under 40) with or without children while most of the remainder were older childless married couples and older single adults.[3] In addition, an unknown number of households live in caravans on unlicensed sites.

9.3 Caravans which are heritable fixtures: Where a caravan, which is or has been occupied as a matrimonial home, is a heritable fixture, we think that the policy of our proposals in Part II should apply to it in the same way as to bricks-and-mortar dwellings. In other words, the spouse

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[1] In considering this problem we have been greatly assisted by consultation with the Law Commission for England and Wales; by the recent Report of the Armstrong Committee entitled Report of the Mobile Homes Review: a study carried out within the Department of the Environment (1977) HMSO London; and also by the study referred to in the next footnote.

[2] Information supplied by the Scottish Development Department based on research (unpublished) undertaken by the Central Research Unit of the Scottish Office.

[3] Idem.

who has no proprietary title should have rights of occupancy; the occupancy rights of both spouses should be subject to regulation by the court; and the civil remedies against violence in the home should be available.[1]

9.4 Where the caravan is a heritable fixture, the occupier will in principle be liable to pay rates. Further, if the land is owned by a third party, the contract on which the occupation depends will presumably be treated in law as a lease if it is onerous. Accordingly the charges payable thereunder will be rent. There may be questions whether the Rent Acts apply. The Armstrong Committee referred briefly to the definition problem of whether mobile homes can be let on protected or statutory tenancies.[2] A fortiori, if the caravan is heritable property, the Rent Acts should in principle apply. We think that where the caravan used as a matrimonial home is heritable property, our proposals in Parts II and IV would on their terms apply and do not require modification.

9.5 Caravans used as mobile homes: Most caravans are mobile homes and thus are moveable property and not heritable fixtures. Where one spouse is owner or hirer, how far should the law concede personal occupancy rights to the other spouse? In principle, it seems wrong that a spouse should be denied occupancy rights merely because the matrimonial home is mobile. There are however difficulties in legislating on enforceability against third parties such as site owners. Already, residents in mobile homes on "protected" sites have a measure of security of tenure and freedom from eviction procedures under Part I of the Caravan Sites Act 1968,[3] and this is supplemented by the Mobile Homes Act 1975 which provides a greater degree of security of tenure by means of written contracts setting out the terms of occupancy of the pitch. These provisions and the general problem of how far the occupier should have security of tenure and other rights against the site owner has recently been reviewed by the Armstrong Committee in England and Wales. It remains to be seen how far these proposals will be accepted by the Government and extended to Scotland.

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[1] We note that in England and Wales, caravans which are part of the realty may be dwelling houses within the meaning of the Matrimonial Homes Act 1967 as amended by the Domestic Violence and Matrimonial Proceedings Act 1976.

[2] Op.cit., para. 2.5.3, quoted at para. 9.6 below.

[3] Extended to Scotland by the Mobile Homes Act 1975.

9.6 The main question to be determined is whether mobile homes should be treated for the purposes of occupancy rights as analogous to the heritable dwellings considered in Parts II to VI or to the moveable property considered in Part VII. We have not thought it necessary to decide that question at this stage. Much depends on the response to consultation on our other proposals. To some extent, the appropriate solution may depend on whether the Rent Acts are extended to mobile homes. As the Armstrong Committee pointed out there are definition problems in determining whether mobile homes can be let on protected or statutory tenancies under the Rent Acts. The Committee commented:[1]

> "Much will depend on the circumstances of each case. Some degree of permanency is clearly required. The matter has not been tested in the High Court but where the home is let for occupation solely on one site and there is no question of its being towed away during the tenancy, it seems likely that the letting would be protected (or subject to a restricted contract [under the Rent Act 1977] depending on the terms of occupation. Until 1974 when furnished tenancies of non-resident landlords were brought within full Rent Act protection, rent tribunals had generally accepted jurisdiction."

On the other hand, a mobile home may be subject to a hire purchase or other consumer credit agreement and the question how far occupancy rights should be enforceable against third parties could not be determined wholly as if the mobile home were heritable.

9.7 At this stage we confine our proposals to the following: (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 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. (Proposition 61). We invite views on these matters.

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[1] Op.cit., para. 2.5.3.

(2) Jurisdictional and procedural problems

9.8 There are a number of incidental and consequential questions concerning jurisdiction and procedure on which practitioners and others may wish to comment.

(a) Choice of court

9.9 We think it essential that jurisdiction to entertain the new statutory applications for orders relating to occupancy rights should be competent in the sheriff court. Already actions of interdict and ejection and for delivery of moveables are usually brought there and it is desirable that a local court which is easily accessible should have jurisdiction especially in cases of domestic violence. We envisage that this jurisdiction would include any special statutory power which may be conceded to set aside transactions defeating occupancy rights or possessory rights in moveables.[1] There may be cases, however, where it would be appropriate to initiate the proceedings in the Court of Session and and it may be appropriate to provide for concurrent jurisdiction.[2] We propose therefore that proceedings for orders relating to occupancy rights and domestic violence should be competent in the Court of Session and the Sheriff Court. (Proposition 62).

(b) Vexatious proceedings

9.10 At common law, the spouse with the title raising an action to eject the other spouse need not explain his reasons to the court: he simply stands on his proprietary rights to exclusive possession. There is, however, a statutory amendment of the common law which presents problems. Under section 2(2) of the Law Reform (Husband and Wife) Act 1962[3] in proceedings by one spouse against the other "in respect of a wrongful act or omission, or for the prevention of a wrongful act", the court has both (i) a power

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[1] Actions of reduction are as a general rule reserved to the Court of Session.

[2] Jurisdiction under the Matrimonial Homes Act 1967 is vested in the High Court and county courts.

[3] The Act is designed to prevent trivial or vexatious actions between spouses: see Ninth Report of the Law Reform Committee for England and Wales (1961) Cmnd. 1268.

to dismiss the proceedings "if it appears that no substantial benefit would accrue to either party from the continuation thereof"; and (ii) "a duty to consider at an early stage of the proceedings whether the power to dismiss the proceedings under this subsection should or should not be exercised". The subsection raises a number of difficulties which cannot be fully considered here, but it does seem to apply to actions of ejection and removing between spouses.[1]

9.11 In England and Wales, the County Court Rules require the registrar after the time for filing a defence has expired, to fix a day for a preliminary hearing on the question whether the court's power to impose a stay should or should not be exercised.[2] There is no corresponding provision in Scottish ordinary or summary cause procedure and we suspect that the duty to consider dismissal is usually overlooked, even in damages actions between spouses.

9.12 In actions by the owner or tenant spouse to eject the other spouse from the matrimonial home, the 1962 Act will not afford the defender any protection for so long as the present law continues that the pursuer has the right to resort to physical force to eject the defender despite the court's dismissal of the action. But if, as we propose, the defender is given a right of occupancy, then the court's functions under section 2(2) of the 1962 Act have some practical objective. It is doubtful whether the 1962 Act would extend to the new types of proceedings such as we have proposed. To reduce the risk that trivial squabbles are brought into court, we invite views on the proposition that 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

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[1] There is some doubt whether section 1 of the Act (which applies to proceedings in tort between spouses in England and Wales) applies to proceedings for recovery of possession, which historically were actions in tort: see Minaker v. Minaker [1949] 1 D.L.R. 1; (Supreme Court of Canada); Bramwell v. Bramwell [1942] 1 K.B. 370; contra National Provincial Bank v. Ainsworth [1965] A.C. 1175 (H.L.) at pp.1235, 1244. This controversy is irrelevant to Scots law where the law developed differently and because section 2 is differently worded from section 1.

[2] County Court Rules 1936, Order 46, Rule 7.

(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. (Proposition 63).

(c) Procedure in sheriff court: combining proceedings

9.13 Normally, applications to the sheriff under special statutes are summary applications. In general, this means that the sheriff has a discretion to make interlocutors regulating the procedure to be followed. Actions for ejection will normally be raised as summary causes,[1] but if the action is combined with a crave for interdict against return to the dwelling, it must be raised by initial writ and brought before the sheriff on his ordinary court roll. Often actions for custody, (which are competent only in the ordinary court and are not summary causes) are in substance closely connected with occupancy rights. For a spouse without accommodation is less likely to be awarded custody. Likewise, the amount of aliment may depend on whether the pursuer is given occupancy of the matrimonial home.[2] We envisage that 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. (Proposition 64). We envisage that this matter would be regulated by Act of Sederunt, but we invite views on any special problems which practitioners and others may envisage since they may require special provision in the enabling statute and have implications for the statutory rules on local jurisdiction.

(d) Appeals

9.14 The Grant Report recommended that where a new function is given to the sheriff, the relevant statute should explicitly regulate the rights of appeal.[3] To elicit comment, we suggest that there should be a right of

[1] Sheriff Courts (Scotland) Act 1971 s. 35.

[2] If the amount of weekly aliment craved is less than £25 for the pursuer and £15 for each child, the action must be brought as a summary cause.

[3] Para. 792.

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. (Proposition 65). Appeals to the Court of Session on law are, we think, essential to resolve inconsistent interpretations in different sheriffdoms.

(e) Local jurisdiction

9.15 Prima facie, the primary rule for the assumption of jurisdiction in the sheriff court should be that the sheriff having jurisdiction in the place where the matrimonial home is situated should have jurisdiction to entertain proceedings as to occupancy rights. This will normally (but not invariably) coincide with other grounds of jurisdiction applicable in related proceedings, eg the defender's residence and, in interdict actions, the place of the threatened wrong.[1] It may be for consideration whether the other general grounds of jurisdiction in actions concerning patrimonial matters should be expressly excluded, or be alternative grounds of jurisdiction. We incline to the latter view since it would facilitate the combining of proceedings which, as already indicated, might often be desirable. In appropriate cases, the sheriff might transfer a case to another sheriff court.[2] We propose therefore that 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. (Proposition 66.)

[1] Sheriff Courts (Scotland) Act 1907, s.6.

[2] Sheriff Court Rules, Rule 20.

APPENDIX A: EXISTING LAW ON PERSONAL RIGHTS TO RECOVER EXPENDITURE ON HOME FROM OTHER SPOUSE

1. As we mentioned in paragraph 2.97, this Appendix sets out the existing law on the personal rights of a spouse to recover expenditure on the matrimonial home from the other spouse. In cases where the home is vested in one spouse (single ownership) the law is different from cases where the home is vested in both spouses as common or joint proprietors. We deal with the former class of case first.

(a) Single ownership (home owned by one spouse)

2. We begin by considering claims for recompense for improvements to the home and thereafter discuss repayment of, or recompense for, contributions to the price or to a loan (eg from a building society) secured over the home.

(i) Recompense for improvements

3. Where one spouse is owner of the matrimonial home and the other spouse has effected improvements on it, there is no certainty that the latter can claim recompense from the owner for the amount by which the owner is enriched. The law rests on two principles. The first is the general principle that a claimant for recompense:

> "must show that he has suffered loss, either by expenditure from which he has not obtained the benefit contemplated, or by the rendering of services which have not been requited. If he has done something for his own benefit, and obtained the full advantage of it, he can found no claim that another party has incidentally profited."[1]

The second is the subsidiary principle that a temporary occupier of heritable property who carries out improvements to it is presumed to have done so for his own benefit. The benefit accruing to the owner is presumed incidental and unless the presumption is rebutted, recompense cannot be claimed. In Reedie v. Yeaman,[2] Lord Young explained the presumption on the ground that:

> "the considerations on which (recompense) is founded are outweighed by the stronger consideration that no one should be compelled to improve his property at the will of another, and that a possessor of property on a temporary title who is minded to lay out money on it shall be deemed, and may without hardhsip be deemed, to have done so for what he regarded as a benefit to himself commensurate in his opinion to the expenditure which he voluntarily incurred."[3]

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[1] Gloag, Contract (2nd ed.) p.322.

[2] (1875) 12 S.L.Rep. 625.

[3] His Lordship continued: "The pursuer, indeed, had no title at all but only a lawful enjoyment of the property in right of his wife during the subsistence of the marriage, ... therefore any expenditure on the property must be deemed to have been made with a view to his own temporary enjoyment."

There are a few cases in which the presumption has been rebutted.

4. Thus, in Reedie v. Yeaman[1] a married couple had executed a mutual settlement in which inter alia the wife had disponed the property to the husband on her death. The husband's reasonable expectations of succession were disappointed by the wife's secret revocation of the disposition. Lord Young held that the revocation created a specialty as a result of which the husband was entiteld to recompense. By contrast, in Rankin v. Wither[2], a husband rebuilt a house belonging to his wife at his own expense. It was her known intention to leave the house to him in her will but she died before executing the will. It was held that the husband had no claim for recompense for improvements against the heir-at-law who succeeded to the property. On the other hand, in Newton v. Newton,[3] a husband bought a house taking the title in his wife's name. His attempt to establish that his wife held the property in trust for him failed because proof was limited to writ or oath,[4] But he was subsequently held entitled to recompense for improvements of the house effected in the bona fide but erroneous belief that it was his won property.[5]

5. The cases cited all involved disputes between spouses but, as in most other patrimonial matters, the spouses are treated as if they were strangers. Thus, a claim between spouses is determined in the same way as a claim by any other person improving property possessed on a limited title, or for a temporary period, such as a claim by a liferenter against the fiar;[6] or a claim at common law by a tenant against the landlord.[7] The presumption may often be at variance with the facts for the spouse claiming recompense may have effected the improvements for the benefit of the family as a whole upon the expectation that the marriage would continue to subsist. Nevertheless he (or she) would normally fail unless he could point to some specialty such as an error as to the title which motivated the improvements.[8]

6. It is important to note that the rules on quantification of a claim for recompense for improvements make the remedy less attractive to the wife than a proprietary claim. For it would appear from Reedie v. Yeaman[9] that in determining the amount by which the owner has been enriched, no account is taken of the increase in value of the house attributable to inflation.

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[1] Supra.

[2] (1886) 13R. 903.

[3] 1923 S.C. 15; sequel 1925 S.C. 715.

[4] 1923 S.C. 15.

[5] 1925 S.C. 715.

[6] Morrison v. Allan (1886) 13 R.1156 (in which the presumption was rebutted); Wallace v. Braid (1900) 2 F.754.

[7] Scott's Exors. v. Buchan Hepburn (1876) 3R.816 (tenants now have statutory claims for recovery of expenditure on improvements).

[8] There is a conflict of judicial authority whether error is an essential ingredient in a claim for recompense: see most recently Varney (Scotland) Ltd. v. Burgh of Lanark 1976 S.L.T. 46 in which the court said that recompense involves a judicial process of weighing all relevant factors and that (per Lord Kissen at p.49) "While error of fact may found a claim, its absence cannot invalidate a claim if the other factors justify it."

[9] (1875) 12 S.L.Rep. 625.

(ii) Improvements as negotiorum gestio.

7. There may be circumstances in which a spouse effecting improvements can recover his or her expenditure from the owner-spouse on principles of negotiorum gestio, (the unauthorised administration of another's affairs). The measure of recovery is the cost of the improvements not the extent of the owner's enrichment. Generally speaking, the claim will be upheld only in circumstances of emergency and not where the owner was perfectly capable of effecting the improvements himself.[1] The claim has been allowed where the owner is absent, or incapable of managing his affairs through extreme youth, extreme old age, or mental disorder,[2] but the cases cited seem to have involved repairs rather than improvements to property. In Paterson v. Greig[3], however, it was held that in an accounting a mother who had spent her own money on improvements to her pupil son's heritable property was entitled to be credited with the cost of the improvements. The ground of the decision seems to have been that the mother was entitled to recover as a pro-tutrix, yet it appears that, but for her special position she would have been regarded as a negotiorum gestrix. There are other features of the doctrine which may bar a claim. Usually, a wife effecting improvements will not be acting altruistically for the benefit of her owner husband with the intention of looking after his affairs in an emergency, but partly for his benefit and partly for her own (before marital breakdown) in which case the presumptions outlined above come into play, or solely for her own benefit (after marital breakdown) in which case she is probably not a gestrix. In most cases, the husband will be legally capable and able to give effective consent to any operation on the property: that will be sufficient to bar a claim.

(iii) Recompense for secured loan instalments

8. Often while a marriage is happy, a spouse having no legal interest in the matrimonial home may nevertheless pay instalments of the building society loan as a contribution to family expenses. If the marriage breaks down, a wife deserted in the home by the owner-husband sometimes takes over payments to the building society to protect her possession without much regard to the legal consequences. In either event it seems doubtful whether the instalments will be recoverable.

9. It seems that recompense could not be invoked: the case of Wallace v. Braid[4] provides authority for the proposition that where a person possessing property on a temporary title pays a debt secured over the property in order to protect his possession from the hondholders and takes a discharge rather than an assignation of the bond, he is not entitled to claim recompense from the owner on the plea that the owner had been

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[1] Gloag, Contract, (2nd ed.) pp.334; Wallace v. Braid (1900) 2 F.754.

[2] Graham v. Ker (1757) Mor.3529; aff'd (1758) 2 Paton.13; Fernie v. Robertson (1871) 9M.437; Dunbar v. Wilson & Dunlop's Tr. (1887) 15R.210. There is a distinction between provision of aliment which is presumed to be given ex pietate, vis by way of donation (see Memorandum No.22 paras.2.78 et seq.) and sums paid for the maintenance of, or improvements to, property.

[3] (1862) 24D.1370.

[4] (1900) 2F.754.

enriched by the amount of the payment.[1] For reasons already given it is thought that a claim under negotiorum gestio would usually fail.

(iv) Assignation to paying spouse of heritable creditor's rights

10. A non-owning wife who pays off the balance of the secured loan has a remedy similar in its effect to recompense insofar as she may be entitled to obtain an assignation of the bond from the creditor, and can thus use the creditor's rights and remedies against the borrower in respect of the outstanding balance. The cases, however, in which this provides a satisfactory solution are infrequent and unclear: first, the assignation is only valid for the balance of the loan due at the time of the assignation.[2] Even if the wife could find the money to pay the balance, she could not enforce the security to recover payments made in the past. Second, there is uncertainty as to the question whether the wife could insist on an assignation instead of a discharge as against the building society or other heritable creditor, or as against the wishes of the husband-borrower.[3]

(v) Repetition of payments to owner-spouse made as contribution to purchase price or repayment of secured loan

11. If a wife (or husband) having no legal interest in the home makes payments to the husband as a contribution towards the purchase price, or towards repayment of the building society loan, she may claim "repetition" (ie repayment) of the contributions. One of two actions for redress of unjust enrichment may be raised. These are derived from Roman law and are called the condictio indebiti and condictio causa data causa non secuta.

12. The condictio indebiti is the action by which the pursuer recovers money paid to another under the erroneous belief that it was legally due and which it would be inequitable for the payee to retain. Generally speaking, for a claim under the condictio indebiti to be successful, (a) there must be a payment of money; (b) at the time of payment there must not be a debt due by the payer to the payee; (c) the payment must have been made (i) under an erroneous belief that the payment was due, the error being of a kind recognised by law as entitling the pursuer to recover; or (ii) under an express reservation of rights of recovery;[4] or (iii) under some form of legal compulsion such as a warrant which is later reduced or recalled;[5] or (iv) subject to an express condition which is then repudiated by the recipient;[6] and (d) the error must be excusable and not for example negligent.[7] A payment made under error of fact can

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[1] In Wallace v. Braid, the principal debtor was, not the owner, but the owner's predecessor in title, and thus the case differs on the facts from a case where a non-owning wife pays instalments of her borrower-husband's secured loan. But this difference does not seem material.

[2] See e.g. Craigie, Conveyancing: Heritable Rights (3rd ed.) p.978.

[3] See Burns, Conveyancing Practice (4th ed.) pp.557-8.

[4] Gloag, Contract (2nd ed.) p.63; cf. British Railways Board v. Glasgow Corporation 1975 S.L.T. 45,49.

[5] British Oxygen Co. Ltd v. S.S.E.B. 1958 S.C. 53; 1959 S.C. (H.L.) 17; British Railways Board v. Glasgow Corporation 1975 S.L.T. 45, 49; Unigate Food Ltd v. Scottish Milk Marketing Board 1975 S.L.T. (Notes) 39.

[6] Glasgow Gaslight Co. v. Glasgow Barony Parochial Board (1886) 6M.406; Semple v. Wilson (1889) 16.R.790; British Railways Board v. Glasgow Corporation 1974 S.L.T. 45.50

[7] Credit Lyonnais v. Stevenson (1901) 9 S.L.T. 93.

be recovered but not if the error is in construing a public general statute;[1] further, it has been observed:[2]

> "Between these two extremes, the Scottish courts have treated the condictio indebiti as an equitable remedy depending on a wide variety of circumstances: whether the error was in construing a private contract affecting no-one but the parties; whether the party called on to pay was the same that had benefited from the payment; whether the recipient was a mere intermediary and had paid the money away; what was the status of the recipient and the knowledge to be imputed to him; which of the parties was responsible for the mistake; whether the error had been induced by the recipient's conduct."

These are of course examples and not an exhaustive list.

13. The requirements outlined above are stringent enough to exclude a claim in the vast majority of cases. We have found no reported decision in which a spouse's claim for recovery from the other spouse of contributions was successful. It has been suggested[3] that the condictio would be appropriate if "the paying spouse erroneously thought that the title to the matrimonial home had been taken in joint names and that he was due to pay half the cost to the other spouse." Other cases could be figured but usually payments are not made under an erroneous belief that they are due or under an error of law, but simply upon the reasonable albeit erroneous expectation that the marriage will continue and that it is a pure matter of convenience which spouse pays what expenses.

14 The condictio causa data causa non secuta would be available if the paying spouse could establish that the payments had been made for a return or consideration which had failed.[4] Thus Professor Clive gives as examples the cases where one spouse contributes on the footing that the title would be taken in joint names and the other spouse had proceeded to take the title in the name of himself alone.[5] In such a case proof of ownership would probably not be limited to writ or oath and ownership might be established.

(b) Common or joint property (home owned by both spouses)

15. Where both spouses are common or joint proprietors, and one of the spouses makes financial contributions in excess of his liability or effects improvements to the home, he or she is more likely to be able to recover his or her expenditure from the other spouse.

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[1] Glasgow Corporation v. Lord Advocate 1959 S.C. 203; Taylor v. Wilson's Trs. 1974 S.L.T. 298.

[2] Unigate Food Ltd. v. Scottish Milk Marketing Board 1972 S.L.T. 137 per Lord Stott at p.139 (the cases cited in the quoted passage are here omitted).

[3] Clive and Wilson op.cit., p.309.

[4] Gloag, Contract, (2nd ed.) pp.37-38.

[5] Clive and Wilson op.cit., p.309.

(i) Recompense from other co-owner spouse for improvements

16. We noted at paras. 3 to 6 above that when one spouse is owner of the home and the other carries out improvements on it, the latter cannot generally obtain recompense unless he can rebut the presumption that they were carried out for his own benefit as a temporary possessor and accordingly he has not suffered loss for which he must be recompensed. When, however, both spouses are common or joint owners of the home, and one of them effects improvements, the presumption that they were carried out for his (or her) own benefit does not apply and he may obtain recompense from the other spouse for half the value of the improvements, being the amount by which the latter has been enriched.[1]

(ii) Rights of relief as between co-owner spouses in respect of secured loan instalments

17. Where the title stands in the name of both spouses as co-owners, usually both will have incurred a joint and several liability to the building society to repay the loan. This means that the building society can sue one, or other, or both of the spouses for the whole of any arrears or for repayment of the principal sum if and when it becomes due. As between themselves, however, each of the spouses is liable only for half of the sums due to the building society or whatever the proportionate share happens to be. Accordingly, if one spouse, say the husband, pays more than his half share of the instalments due, he is entitled to claim reimbursement of the amount paid in excess of his half-share and to enforce it by an action of relief.[2] This is based on an implied term of the contract rather than on recompense or other principle of unjust enrichment.

(iii) Assignation to paying spouse of heritable creditor's rights

18. Where one of the co-owner spouses repays the secured loan, or more than his proportionate share, he is entitled to claim from the creditor an assignation of the creditor's rights, and any ancillary securities or diligences.[3] But the right is dependent on the co-obligant repaying the outstanding balance of the loan in full.[4] The heritable creditor can refuse assignation only if he will be prejudiced thereby which must rarely happen if payment is made in full.[5] The value of the beneficium cedendum actionum lies not in its effect on the co-owner's rights of relief against the other co-owner, which are not enlarged (or diminished) by the assignation, but in giving the paying co-owner the same security rights as the creditor has and the benefit of any diligences which he has executed.[6] It may also simplify the procedure for enforcement.[7]

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[1] Stark's Trs. v. Cooper's Trs. (1900) 2F.1257; Rennie v. McGill (1885) 2 Sh.Ct.Rep. 158; Allan v. Macpherson (1928) 44 Sh.Ct.Rep. 63. In English law, it appears that if one co-owner spends money on improvements to real property, he cannot claim a contribution from his co-owner: Leigh v. Dickson (1884) 14 Q.B.D. 60 but the court will compensate the improving co-owner out of the proceeds of sale or on partition: see Tiley, "The More than Handy Husband" [1969] C.L.J. 81 at p.88.

[2] Gloag, Contract (2nd ed.) p.206.

[3] Ibid., p.210.

[4] Ibid., p.211.

[5] Ibid, pp.211-212.

[6] Gloag, op.cit., p.213.

[7] Idem.

APPENDIX B

Report of a Working Party of the Scottish Special Housing Association on transfer and allocation of tenancies to Single Parent Families dated 27 December 1974 and approved by the Council on January 1975

The Association's Housing Management staff have been concerned for some time about the housing problems of the increasing number of single-parent families in society to-day. Statistics show that there are now over two-thirds of a million single-parent families in Britain, five out of six heads of such families are women and one-tenth of the child population is from one-parent families. Moreover, one in every six marriages in Scotland now ends in breakdown.

The Housing Management Department have felt the pressures of these fundamental social changes in two main ways. The first is the increasing number of requests from wives for transfer of the tenancy of the family home to their own names and the second, the growing number of applications from separated wives for tenancies in their own right.

Current policy with regard to the first case, that of transfer of tenancy, is based on the general principle that the Association prefers not to have to anticipate a judicial decision by taking sides on behalf of either the husband or the wife. It has been normal practice, therefore, to await evidence of divorce or legal separation before deciding on what to do about the tenancy. Increasingly, however, a more flexible attitude has been adopted and each individual case has been decided on the basis of the facts gathered from the widest and most reliable sources.

In the second case, that of applications for housing from separated women current policy is again based on the general policy described above and normally such applicants are asked to provide evidence of divorce or legal separation and of having custody of any children involved. Again, there is a good deal of flexibility shown in dealing with such cases and it is true that many single-parent families are housed without such evidence, particularly in general needs areas of low demand or as incomers in an economic expansion situation.

It has become more and more obvious, however, as the problems intensified that the Area Housing Managers would welcome a re-statement of policy and a small working party was set up within the Department to review the whole position and to recommend any changes it felt might be necessary. This review is now complete and the Chief Housing Manager submits the following recommendations for Council's consideration.

Transfers of Tenancy:

1. Where both husband and wife so wish tenancy of the family home shall be transferred in normal circumstances to the wife.
2. Where the husband has deserted the home and his whereabouts are unknown transfer of tenancy to the wife shall be effected.

Normally a period of three months should be allowed to elapse during which reliable confirmation of desertion should be sought.

3. Where a husband in desertion formally gives notice of termination of tenancy on his own behalf, the tenancy should be offered automatically to the wife should she so wish.

4. Where the wife and family are driven from the family home and the husband in occupation refuses to consider transferring the tenancy to her, attempts should be made, once confirmation of the situation has been received to persuade him into such a course. If these are unsuccessful then legal action should be taken for the recovery of the tenancy which should then be offered to the wife who would normally have care of the children. Consideration should also be given to the provision of adequate alternative accommodation (if at all possible) for the husband. It is felt that to await a legal separation, usually a lengthy process and frequently not sought by the parties concerned, can cause undue suffering and distress. If there are no children involved, however, the judicial decision should be awaited and the tenancy given to the innocent party.

5. It is general experience that most wives who are successful in their application for a tenancy to be transferred to their own name are willing to clear any rent arrears which have accrued during the period of the husband's tenancy. It is felt that the general policy should continue to be that wives to whom tenancy is transferred and who have been in occupation of the premises throughout should be asked at least to reduce, if not to completely clear, the outstanding debt. However, the financial circumstances of the wife must be taken into account and the clearing of the debt must not necessarily be a pre-condition of the transfer of tenancy.

Applications for Tenancy:

1. Where an application is received from the wife of an Association tenant who is still living in the home, wishes a tenancy of her own because of the breakdown of the marriage, it is suggested that after a "cooling off" period of up to twelve months and on receipt of some reliable confirmation of that breakdown from, for example, a Marriage Guidance Counseller, a Social Worker or a Minister, the application should be accepted and treated in its turn on the waiting list.

2. Where an application is received from the separated wife of an Association tenant who, having left the home, wishes a tenancy of her own it is suggested that after a period of three months and if the husband is not contesting custody of the children, the application should be accepted and treated in its turn on the waiting list.

3. Where an application is received from a separated woman previously unconnected with an Association tenancy, it is suggested again that if there has been a minimum period of three months' separation and if reliable confirmation of the breakdown of the marriage is available, then the application (or nomination) should be accepted and treated in the normal fashion.

4. Where an application from a separated woman for an Economic Expansion tenancy falls into an incoming category, it is suggested that marital status should be disregarded since the geographical movement is sufficient proof of a firm intention to pursue a separate life in a separate household.

5. No applicant in her own right shall be required to clear arrears incurred by her husband as an Association tenant before being offered a separate tenancy.

Summary - The main principles involved are:

1. Housing need should be the primary consideration in dealing with the problems outlined in the report.

2. Neither transfer nor granting of a tenancy to a separated woman (or man) should have to await a judicial decision as to guilt or innocence.

3. Clearing of rent arrears incurred by the husband should not be a pre-condition of the granting of a transferred or new tenancy to a separated or divorced wife.

4. The general policy guide lines should be interpreted in such a way that the principles underlying them are sympathetically and sensibly applied to individual cases.

It should be noted that many of the recommendations made recently by the Finer Committee are in accordance with the principles outlined above.

The Council's instructions are now requested.

15/21 Palmerston Place,
EDINBURGH,
24th December, 1974.

APPENDIX C

THE PUBLIC LAW AND PRIVATE LAW BACKGROUND TO ALLOCATION AND TRANSFER OF PUBLIC SECTOR TENANCIES.

1. The allocation and transfer of public sector tenancies is governed partly by the administrative functions entrusted to housing authorities by the Housing (Scotland) Acts 1966 to 1977 and partly by the rules of Scottish private law regulating the landlord and tenant relationship. The administrative powers of local authorities to allocate and transfer tenancies[1] now rest on section 149(1) of the Housing (Scotland) Act 1966 which provides that -

> "The general management, regulation and control of houses provided by a local authority ... shall be vested in and exercised by the authority."[2]

It has been held that the "management" of local authority houses includes allocations and transfers of the houses.[3] The few statutory guidelines fettering the authority's discretion relate mainly to the housing conditions of prospective tenants but authorities must among other things "secure that in the selection of their tenants a reasonable preference is given to persons ... who have large families ..."[4] Local authority unfurnished tenancies are expressly excluded from the security of tenure provisions of Part II of the Rent (Scotland) Act 1971.[5] Further, the Housing (Scotland) Act 1966, section 182, provides inter alia that:

> "Nothing in the Rent Acts shall be deemed ... to prevent possession being obtained -
>
> (a) of any house possession of which is required for the purpose of enabling a local authority to exercise their powers under any enactment relating to housing;"

Since section 149(1) is "an enactment relating to housing", this section also disapplies the Rent Acts from unfurnished public sector tenancies.[6]

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[1] For an account of the administrative practice of Scottish local authorities see Cramond Allocation of Council Houses (Edinburgh, 1964) University of Glasgow Social and Economic Studies, Occasional Papers No. 1; see also the the Report by a Sub-Committee of the Scottish Housing Advisory Committee on Allocating Council Houses (HMSO, 1967). See further Lewis, "Council Housing Allocation: Problems of Discretion and Control", (1976) Public Administration 147 which looks at UK practice. For an account of the law and practice in England and Wales, see Smith and Hoath, Law and the Underprivileged (1975) Chapter 10; Partington, Landlord and Tenant (1975) Chapter 9.

[2] Quaere as to SSHA and New Town Development Corporations.

[3] Carleton v. Greenock Corporation 1962 S.L.T. 35; and Magistrates of Edinburgh v. McEwan (1949) 65 Sh.Ct.Rep. 34, both following Shelley and Anor. v. London C.C. [1948] 2 All E.R. 898 (H.L.), [1949] A.C. 56 (H.L.).

[4] Housing (Scotland) Act 1966, s.151(2).

[5] Rent (Scotland) Act 1971, s.5.

[6] As mentioned above, we do not deal in this Part with public sector tenancies falling within Part VII of the Rent (Scotland) Act 1971.

2. The tenancy can at any time be terminated by the landlord authority giving the tenant notice to quit, but the period of notice must be not less than four weeks before the date when the notice takes effect.[1] The local authority's power of management also includes by implication an unconditional power to raise an action or removing against a tenant (or rather an ex-tenant) who has not left at the due date. In such an action the local authority does not require to justify its decision to the court[2] or to lead evidence that possession is required for the purposes of an enactment relating to housing. If notice to quit has been served timeously, the court cannot refuse decree in an action of removing except possibly where the tenant can show that, in deciding to terminate the tenancy, the authority had manifestly acted in bad faith or unreasonably and allowed irrelevant factors to influence its decision or not taken relevant factors into consideration. At any rate, there is recent English authority to that effect,[3] although it is not clear whether the Scottish courts would necessarily follow the English decisions.[4] Such a defence by a tenant would be extremely difficult to substantiate and we know of no case in which it has been successful. Thus, in individual cases, the local authority has an almost unfettered discretion to terminate the tenancy and to re-let to the tenant's spouse or to a third party.

3. The Housing Acts have not at any stage expressly restricted the function of providing dwellings to provision by way of the grant of tenancies. The charging power at one time provided that "the authority may make such reasonable charges as they may determine for the tenancy or occupation of such houses".[5] The legislation currently in force provides that "a local authoirty may charge such reasonable rents as they may determine for the tenancy or occupation of houses provided by them".[6] In some

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[1] See the Sheriff Courts (Scotland) Act 1907, section 38 as amended by the Rent (Scotland) Act 1971, Sch. 18; see also the 1971 Act, section 131 which provides: "No notice by a landlord or a tenant to quit any premises let ... as a dwelling-house shall be valid unless it is given not less than four weeks before the date on which it is to take effect".

[2] See for example Stonehaven Town Council v. Masson (1938) 54 Sh.Ct.Rep. 142; Glasgow Corporation v. Bruce 1942 S.L.T. 67; Magistrates of Edinburgh v. McEwan (1949) 65 Sh.Ct.Rep. 34; Carleton v. Greenock Corporation 1962 S.L.T. 35; and see next note.

[3] In Bristol District Council v. Clark [1975] 3 All E.R. 976 (C.A.), it was held that the functions of management, regulation and control conferred on a local authoirty by section 111(1) of the (English) Housing Act 1957, which included power to evict, had to be exercised by the authority in good faith taking into account all relevant considerations and ignoring irrelevant considerations. The unlawful use of power is not presumed from the fact that the tenant is a "good tenant" who has performed all the obligations of the tenancy but must be established by the tenant, the onus being on him or her: Cannock Chase District Council v. Kelly [1978] 2 All E.R. 152 discussed in D.J. Hughes, "Municipal Eviction" (1977) 127 New Law Journal 1067.

[4] There are many Scots cases in which remedies were given against an authority which abused its discretion by ignoring relevant considerations or taking account or irrelevant considerations.

[5] Housing (Scotland) Act 1966, s.149(1).

[6] Housing Rents and Subsidies (Scotland) Act 1975, s.1(2).

contexts the distinction between "rent" and "charges" may be verbal only because, as we note at paragraph 6 , "charges" or "rent" can be recovered by a local authority from an occupier where there is no oral or written lease. The point, however, is also important in the context of a local authority's powers to charge a transferee spouse for arrears of rent incurred by the other spouse when he was tenant. We revert to this at paragraph 3.24.

4. The normal private law rules on the constitution of leases determine whether a tenancy exists. We understand that, normally a public sector tenancy is of very short duration, rarely more than four weeks. Since the period is less than a year, the lease may be constituted by oral agreement or by an "informal" writing (i.e. a writing which does not comply with the statutory solemnities for the authentication of deeds).[1] If it is an oral lease, it may be proved in judicial proceedings by oral evidence,[2] and any variation of its terms may also be made orally and proved by oral evidence.[3] If the lease is in writing, however, proof of variation will be restricted to writ or oath.

5. Scottish public authority landlords may choose different modes of constituting a tenancy. It may be constituted by a formal lease which complies with the authentication statutes; or it may be contained in missives of let which are adopted as holograph; or it may be constituted by an oral agreement or an informal writing. We understand that the usual practice is to grant missives of let. If the lease is granted to one only of the spouses, it it almost always the husband who is tenant though the tenancy can be put in the joint names of both spouses. We do not have statistics of the proportions of dwellings in joint names, or in the name of the husband alone, or of the wife alone, and much depends on the practice of individual public authority landlords.

6. Even where the local authority cannot prove that a lease has been constituted, it can invoke the general rule of Scots private law that a person occupying heritable property without the permission of the owner is liable for a reasonable sum in lieu of rent, unless the occupier discharges the heavy onus of proving that he possessed on some contract entitling him to do so gratuitously.[4] The basis of this rule is not entirely clear. It may be founded on principles of unjust enrichment, the measure of the tenant's liability being the extent to which he has been enriched (quantum lucratus).

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[1] Cameron and Paton, Landlord and Tenant (1967) p.19; Rankine, Leases (3rd ed; 1916) p.116.

[2] Stair Institutions II, 9, 4; Erskine, Institute III, 2,2; Walker and Walker, Evidence (1963) p.88; perhaps the tenancy may also be proved by reference to oath; see Bell's Principles para. 1187; Cameron and Paton, op.cit. p.19 citing Stewart v. Leith (1766) Mor. 15178; but contra Walker and Walker, op.cit. p.88, footnote 41 citing Perdikou v. Pattison 1958 S.L.T. 158.

[3] Cameron and Paton, op.cit. p.19.

[4] Gloag Contract (2nd ed.; 1929) p.40; Glen v. Roy (1882) 10 R.239; followed in Stirlingshire County Council v. Cullen (1943) 59 Sh.Ct. Reps. 83, a case where the local authority obtained a decree for a sum equivalent to rent from a person who had been in occupation of a council house provided under the Housing Acts.

7. There is no duty on the local authority to supply the tenant with a rent book[1] but we understand that, as a matter of housing management, many local authorities do supply such a book.

8. The conditions of let are normally set out in writing, e.g. in the lease or missive of let or in the rent book or a pamphlet handed to the tenant. These will contain a condition "that the tenant shall not assign, sub-let or otherwise part with possession of the premises or any part thereof, except with the consent in writing of the authority."[2] In determining whether to give or withhold its consent the authority must comply with any directives given by the Secretary of State,[3] but no directives on transfers between spouses have been issued. Moreover, the local authority must not give its consent unless it is shown that "no payment other than a payment which is in their opinion a reasonable rent had been, or is to be received by the tenant in consideration of the assignation, sub-letting or other transaction".[4] The arrangements for local authority tenancies have been reviewed recently by the Scottish Consumer Council[5] and in England and Wales by the National Consumer Council.[6]

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[1] In England and Wales, a landlord including a local authority does have such a duty under the Landlord and Tenant Act 1962, section 1, but that Act does not extend to Scotland; see section 7(3). For proposals in England and Wales to widen the use of rent books, see Report of the Law Commission on Obligations of Landlord and Tenants (1975) Law Com. No. 67.

[2] The Housing (Scotland) Act 1966, s.151(6) requires that the local authority shall make such a provision a condition of every let.

[3] Ibid. paragraph (a).

[4] Ibid., paragraph (b).

[5] See their Report on Tenancy Agreements in Scotland (1977).

[6] See their discussion paper on Tenancy Agreements (1976), and editorial article, Council Tenancies; A Modern Approach, (1976) New Law Journal 926.

APPENDIX D

EXTRACTS FROM OFFICIAL REPORTS RELATING TO TRANSFER OF PUBLIC SECTOR TENANCIES ON MARITAL BREAKDOWN OR DEATH

SCOTLAND

(1) "Allocating Council Houses" Report by a Sub-Committee of the Scottish Housing Advisory Committee (Chairman: J.B. Kay Esq.)

H.M.S.O., Edinburgh (1967)

Paras. 70 and 71

"70. The duties carried out by welfare and child care officers and by social workers in voluntary agencies may be broadly described as assisting families to manage their affairs and attempting as far as practicable to ensure the proper welfare of children when normal family life is threatened or disrupted. The first basic requirement of any family is a home and we have no doubt that welfare authorities must find their task immeasurably more difficult when a family under their care is unable to obtain separate accommodation of its own. Social problems arise more acutely when a family is threatened with eviction owing, for example, to having accumulated considerable arrears of rent (this being the most common but not the only reason for such action being taken). Cases are encountered where non-payment of rent is more or less wilful and where, after sufficient opportunity has been given to the tenant to clear his debt, eviction is the only action open to the authority - if only to discourage the spread of the practice. But often, the building up of arrears of rent is only one symptom of some deeper trouble within the family and may bring to light for the first time the fact that the husband or wife is in need of skilled help. Moreover, if eviction does take place and the family is split up their rehabilitation becomes more difficult. Similar considerations of family welfare arise in the case of divorce or of desertion by a husband or wife. Most local authorities are prepared in suitable cases to arrange for the transfer of a tenancy to a wife or for the transfer of a family to another house where this would benefit the children.

71. All the local authorities with whom we discussed this matter fully appreciated the nature of the problems which could result from or be associated with rent arrears, evictions and separations and we were impressed by the arrangements which many of them had, not only for ensuring the proper investigation of cases arising within the housing department but also for co-ordinating the activities of the many and various local government departments and outside bodies likely to be concerned with any aspect of welfare or child care. We commend the principle of such co-ordination to all authorities and, from the housing point of view, we recommend that every council should ensure that its policies in regard to the difficulties we have described take full account of the human problems involved. In particular we recommend that eviction should be regarded as a last resort;

that transfers of tenancies or of families should be favourably considered where justified by the circumstances; and that in appropriate cases (for example, where a family have placed themselves in skilled hands or would be liable to serious disintegration) rehousing should be sympathetically considered."

ENGLAND AND WALES

(2) "Council Housing Purposes, Procedures and Priorities", Ninth Report of the Housing Management Sub-Committee of the Central Housing Advisory Committee (for England and Wales) (Chairman: Professor J. Cullingworth)

H.M.S.O., London (1969)

Paras. 205-209.

"Transfer of tenancy

205 There is one final matter we wish to raise in this chapter, namely the transfer of tenancies on the death of a tenant or in cases of desertion, separation or divorce. Unfortunately this was one of the many issues which time did not allow us to pursue and we can only pinpoint some of the problems.

206 Council tenants do not have the protection of the Rent Acts. Neither does the Matrimonial Homes Act 1967, apply to them.

207 Though we have not investigated the matter at all thoroughly we understand that local authorities differ widely in the extent to which they confer rights on their tenants similar to those enjoyed by private tenants. It has been suggested to us that some problems could be circumvented by the use of joint tenancies for parties who have an equal moral claim to the tenancy, particularly in cases of separation or desertion. One witness strongly argued that husbands had an unfair advantage in that they were almost always the sole tenants of council property and that (in his experience) often retained possession of the property even though the wife and children had become homeless. We do not know how typical this is, but we were assured that many authorities are able to overcome the problem by following a policy of "tenancy follows the children". Local authorities face a difficult situation here and are reluctant to become involved in matrimonial disputes in advance of court action.

208 So far as transfer of tenancies to adult children is concerned, a distinction is usually made between children who have been living in the parental household for a considerable time (which is defined in different ways) and those who have been living separately or have only recently joined the parental household. In the former case transfer of tenancy is common; in the latter less common - though much depends on the nature of the local housing shortage.

209 We think that there is a need for further consideration of these issues. Our preliminary view is that the position of council tenants should be neither more nor less favourable than that of private tenants."

GREAT BRITAIN

(3) Report of the Departmental Committee on One-Parent Families (Chairman: Sir Morris Finer)

(1974) Cmnd. 5629.

(Great Britain terms of reference);

Paras. 6.79 to 6.86.

"Transfer of local authority tenancies

6.79 When a family living in council accommodation separates, and where there are children of school age or below, the housing authority should speedily take action either to enable the parent who is caring for the children to stay in the family home, or, where strained relationships prevent such a course, to provide alternative housing elsewhere. The parent continuing in charge of the family and needing this assistance will usually be the mother, although the case of the mother who deserts her husband and children is by no means infrequent. We received evidence that the practices of some local authorities in these circumstances add to the stress and uncertainty of what is already an extremely disturbed family situation. Our attention was drawn particularly to conditional transfers and rent arrears. We deal with the question of conditional transfers in the following paragraphs but have recorded our view on this particular aspect of rent arrears in Section 7 where we look at the wider influence which rent arrears have on the lives of one-parent families.

Conditional transfers

6.80 We had evidence that it was the general practice of most authorities to refuse to transfer a tenancy to a separated wife before a separation order or divorce had been obtained. The Catholic Housing Aid Society have had a good deal of experience with this problem. In their evidence they included the following letter from a solicitor showing how a local authority may distinguish, for this purpose, between a maintenance order and a non-cohabitation order:

> ... she obtained a Maintenance Order against her husband for the benefit of herself and her children as the result of her husband's cruelty to her being proved. But the Bench did not make a separation order.
>
> Nevertheless, Mrs A has left her husband and has taken the four children with her. She has also applied to the Greater London Council, her husband's landlord, to be allotted the former matrimonial home as tenant of the council in place of her husband. The Council has refused to comply with Mrs A's request on the grounds that (a) no Separation Order was made, and (b) that she now proposes to take divorce proceedings against her husband. It is the policy of the council not to make any change in tenancy in such a case before the matrimonial proceedings have been brought to finality. It seems that such a change did take place some years ago, as a result of which the council was strongly criticised by the court. Representations have been made, we believe by others besides

ourselves on Mrs A's behalf, but the council finds itself unable to change its attitude.

The result is that Mrs A and her four children remain inadequately housed.[1]

The Catholic Housing Aid Society were later informed that the mother and children would be "rehoused after the divorce in about a year's time."[2] The Society also quoted from a letter from the Greater London Council setting out their policy on the transfer of tenancies:

> It is, generally speaking, true to say that in cases where divorce is pending between a tenant and his wife, the council is reluctant to intervene in the matter of the tenancy of a dwelling unless the husband is prepared voluntarily to relinquish his tenancy in favour of his wife. This, we know, is not the case with Mr K, and in view of the unhappy features of this family's affairs over the past years, the council feels unable to take action in advance of the hearing of the divorce action. With regard to your suggestion ... to provide temporary accommodation. In the event of Mrs K winning her divorce case, and getting care, custody and control of the children, the council would undertake to provide her and the children with accommodation suitable for their needs. It is unlikely that (the present flat) would be available.[3]

6.81 Family disputes undoubtedly tend to put housing authorities in a difficult situation. They have a proper reluctance to intervene precipitately or in a way which may appear to prejudge an issue within the jurisdiction of the courts. We consider, however, that the strict application of a rule of thumb which prohibits the transfer of a tenancy until after a separation order or divorce decree has been granted produces delays and injustice which sometimes can be avoided; there are many cases in which a more active policy could produce a prompt and fair result without exposing the authority to the criticism of being interventionist.

6.82 In the first place there are many cases in which the parties would agree that the breakdown is irretrievable and that it is inevitable that the wife and children must remain in the matrimonial home. In such cases, the local authority might well be justified, after making the necessary enquiries, in transferring the husband's tenancy with his consent long before the court has formalised the separation, or even if the court never formalises it.

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[1] Catholic Housing Aid Society: Evidence to the Finer Committee, page 68.

[2] It should be added that there is no need for a divorce to take a year. Most of the delays in the divorce jurisdiction are caused by the parties or their advisers failing to press the suit forward. In particular it should be known that no matter concerned with children, including appeals from magistrates, need be delayed for more than a very short time in the High Court, and will be heard immediately if there are circumstances of special urgency. It is the litigant's not the law's delays which are the cause of obstruction in the Family Division.

[3] Ibid, page 71.

6.83 The chances of an agreement of this kind being reached between the spouses would very often be improved if the local authority in their new comprehensive role saw it as their responsibility to find alternative accommodation for the husband, whenever this was possible. Both sides often recognise that the sensible course is for the wife and children to stay put, and for the husband to go elsewhere; but the difficulty is for the husband to find somewhere else to live, especially if his work, or the proximity of his own friends and relations restrict the area to which it is possible for him to go. Many housing authorities make no provision, or only reluctant provision to help a "single" man in such circumstances. We regret that this should be so. Once it is clear that a real breakdown has occurred, the authority could play a valuable role in helping the man who asks for it to find accommodation elsewhere (not necessarily in the public sector) - thus easing the burden of the breakdown on the family as a whole, giving a measure of tranquility to the wife and children, and promoting the ability and inclination of the husband to maintain them.

6.84 Then again, if, as seems to us to be fundamental, the local authority adopt the general principle that the tenancy should follow the children, there are very many cases in which the principle could be applied before the court makes a final order in the matrimonial dispute. For example, a husband respondent in a divorce suit may be vigorously defending the suit and disputing his liability to maintain his wife without traversing the wife's prayer in her petition for divorce for custody of the children. In many such cases the authority would be justified in transferring the tenancy to the wife without the consent or against the will of the husband, and before the hearing of the suit.

Power for the court to order transfer of local authority tenancies

6.85 As we have previously mentioned[1] The Matrimonial Homes Act 1967, section 7, contains a valuable power for the court to order the transfer from one spouse to another of the benefit of tenancies to which the Rent Acts apply. The power arises at the time when the court is terminating the marriage. The section further provides that when the court so deals with a tenancy it may:

> direct that both spouses shall be jointly and severally liabile to discharge or perform any of all of the liabilities and obligations in respect of the dwelling house ... which have at the date of the order fallen due to be discharged or performed by one only of the spouses.[2]

The section makes provision also for the landlord to be given an opportunity of being heard before the court makes any order.[3]

[1] Section 4 above.

[2] Matrimonial Homes Act 1967, section 7(4). This provision well illustrates how, in the absence of some other rule, there are no legal grounds for seeking to recover from a wife arrears of rent due from her husband. This is discussed in Section 7 below.

[3] The Matrimonial Homes Act does not apply to Scotland and there is no comparable legislation (see footnote to the heading of Section 4).

6.86 Since the Rent Acts do not at present apply to local authority tenancies, it follows that the power of the court to order a transfer under the Act of 1967 does not extend to such tenancies.[1] We can see no good reason why it should not apply to premises of a rateable value that would bring them within the Acts when privately let, if let by the local authority.[2] The result would be that upon divorcing a husband who holds a tenancy from the council of the matrimonial home, the wife could request the court to transfer that tenancy to herself. The court would, as under section 7 of the Act of 1967, have power, in transferring the tenancy, to make an order making the wife liable together with the husband for all or part of any rent arrears whenever the circumstances made that seem proper; and the local authority would be entitled to be heard on the wife's application. If the court transferred the tenancy to the wife, she would, as a council tenant, enjoy no greater decree of future security against the council as landlord than her husband had done previously; but she would, of course, be treated as responsibly as any other tenant of a public authority. We believe that this extension of the power of the court would, by its very existence, as well as its exercise, do much to ensure that in difficult and disputed cases local authority tenancies would indeed follow the children."

SCOTLAND

(4) Report of the Departmental Committee on "Housing and Social Work a joint approach" (Chairman: Mrs J D O Morris)

H.M.S.O., Edinburgh (1975)

"(b) Unsupported Mothers

One of the more common causes of homelessness is marital breakup. Two particular groups can be distinguished:

(i) Deserted, Divorced or Other Unsupported Mothers

The tenant of a local authority house is normally the husband. If he deserts his family the housing authority may be unwilling to transfer the tenancy to the wife, before she has obtained a divorce or a legal separation, on the reasonable ground that such action might prejudice the chances of a reconciliation. No problem arises, of course, in the case of a joint tenancy and we believe that local authorities should make wider use of this arrangement. Where there is no joint tenancy we think that the authority should give careful consideration to the possibility of transferring the tenancy to the wife, as she will normally have care of the children. We appreciate that this is a difficult decision for a housing authority to make and there can be no question of an automatic transfer of the tenancy. We believe however that in some cases greater harm may be done by postponing the decision until a divorce has been obtained.

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[1] The question of the application of the Rent Acts in general to local authority tenancies is discussed in paragraphs 6.87-6.90 below.

[2] This would be an automatic result of carrying out our wider recommendation in paragraph 6.90. But the section 7 power of transfer can and ought to be extended as we have suggested even if the larger recommendation is not implemented.

(ii) Battered Wives

There is increasing recognition of the need for special provision to be made for refuges for battered wives but little has as yet been done in this field by local authorities. The small amount of accommodation of this type which is available is run by voluntary organisations, in some cases in premises provided by the local authority. We believe that close co-operation between housing and social work authorities is required to determine the extent of the need for such provision in their area. The provision and management of the accommodation should be the responsibility of the housing authority although social work support will clearly be required, for instance in the provision of counselling services, if and only if, these are desired by the wives involved. Refuges should be provided in normal housing accommodation, probably on a grouped basis since we are given to understand that, at least initially, battered wives derive support from being part of a group.

(c) Children

We are aware that most social work authorities are reluctant, except as a last resort, to take children into care merely because their families are homeless. We recommend that no child ever be taken into care for this reason alone. The effects of homelessness on children are serious enough without adding the problems of separation from parents. There is the further complication that removal of the children may contribute to the irreversible break-up of the family. We believe, therefore, that arrangements which keep families together must be sought, except, of course, in the situation where the presence of one or both of the parents constitutes a threat to the well-being of the children."