Scottish Law Commission

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FAMILY LAW

REPORT ON MATRIMONIAL PROPERTY

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SCOTTISH LAW COMMISSION

Item 14 of the Second Programme

FAMILY LAW

MATRIMONIAL PROPERTY

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on Matrimonial Property.

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
29th March 1984

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PART I INTRODUCTION

Scope of Report

1.1 In this Report[1] we review the law of Scotland on the property of married couples. We conclude that the principles of the present law—that each spouse continues to own his or her own property after marriage, subject to special rules[2] for the protection of the other spouse during the marriage and for the division of property on the dissolution of the marriage by death or divorce—are sound and that only minor reforms are required. We recommend such minor reforms and append a draft Bill to give effect to our recommendations.[3] We are not directly concerned in this Report with the distribution of property on divorce or death. We have already made recommendations for reform of the law on financial provision on divorce (including the redistribution of property on divorce) in an earlier Report.[4] The law of succession forms a separate item in our law reform programme[5] and we hope to be able to examine it later when resources are available.

Consultation and research

1.2 We published in March 1983 a consultative memorandum on Matrimonial Property.[6] This was a substantial document in which we reviewed the present law, considered the laws of other countries, and set out options for reform. These options included schemes, worked out in considerable detail, for statutory co-ownership of the matrimonial home and household goods. Along with the consultative memorandum, which was of necessity a fairly daunting technical document, we published a short pamphlet which explained the issues as simply as possible and which contained a short questionnaire for completion and return. The pamphlet was distributed to members of the public by making it available in public libraries, citizens' advice bureaux and property centres as well as by direct issue to enquirers. We are grateful to all those who submitted comments on the memorandum or pamphlet.[7] Their response has been of great assistance to us.

1.3 We have also been greatly assisted by research carried out for us by the Social Survey Division of the Office of Population Censuses and Surveys into, among other things, the actual ownership of property by married couples in Scotland.[8]

Historical development of the law[9]

1.4 Until the second half of the 19th century the general rule of Scottish matrimonial property law was that all the moveable property (broadly, all

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[1]The Report is presented as part of our programme of family law reform. See our Second Programme of Law Reform (Scot. Law Com. No. 8, 1968) Item 14.

[2]See paras. 2.2 to 2.5 below.

[3]See Part V (summary of recommendations) and Appendix A (draft Married Persons' Property (Scotland) Bill).

[4]Scottish Law Commission, Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981).

[5]See our Second Programme of Law Reform (Scot. Law Com. No. 8, 1968) Item 7.

[6]Consultative Memorandum No. 57—referred to in this Report as the "consultative memorandum".

[7]A list of those who submitted written comments is contained in Appendix B.

[8]A. J. Manners and I. Rauta, *Family Property in Scotland* (H.M.S.O. 1981) (cited in this Report as "the family property survey"). See also paras. 2.6 to 2.9 below.

[9]For a fuller account, with supporting references, see the consultative memorandum, paras. 1.3 to 1.15.

property other than lands and buildings) of a married woman passed automatically to her husband and became his property.[1] The husband's right to his wife's moveable property was known as his *jus mariti*. The wife's land and buildings remained her own, but she had to obtain her husband's consent before she could sell them or let them out. He had the right to administer such of his wife's property as did not pass to him entirely. This right of administration was known as his *jus administrationis*. The system was based on the idea of the husband's legal supremacy. Not surprisingly, many couples opted out of it by marriage contract. It was gradually reformed by Acts of Parliament. One of the most obvious injustices of the old law was that a husband who had deserted his wife, or who had been judicially separated from her because of his cruelty or adultery, could still claim any moveable property acquired by her after the desertion or separation. This was remedied by an Act of 1861.[2] Another obvious injustice of the old law was that a wife's earnings passed to her husband, who could spend them as he pleased. This was remedied by an Act of 1877.[3] Finally, the old law was replaced entirely by the present system, in which husband and wife are treated as equals and marriage does not bring about any transfer of the wife's property to the husband or give him any control over it.[4]

PART II PRESENT LAW

General rule of separate property

2.1 The present Scottish system of matrimonial property law can be described as a separate property system. The general rule is that each spouse's property remains his or her separate property: it is not merged in any sort of "community property" as happens in some legal systems; it is not affected by the marriage. This general rule is subject to three major qualifications and a number of minor qualifications. The major qualifications are that:

(*a*) there is provision for the surviving spouse when the marriage is dissolved by death;

(*b*) the court has power to award financial provision on divorce; and

(*c*) the law gives a spouse occupancy rights in the matrimonial home, even if it is in the sole name of the other spouse.

Provision for the surviving spouse on death

2.2 Scots law has always made special provision for the widow or widower when a marriage ends by death. He or she has "legal rights", which cannot be taken away by the deceased spouse's will. These legal rights are to a fixed share of the deceased spouse's moveable property—a third if there are children

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[1]There were some exceptions to this general rule. The wife's clothes and ornaments, for example, remained her own.

[2]Conjugal Rights (Scotland) Amendment Act 1861, ss. 1 to 6.

[3]Married Women's Property (Scotland) Act 1877. The Married Women's Policies of Assurance (Scotland) Act 1880 also excluded the husband's rights in relation to certain life assurance policies taken out by a wife.

[4]Married Women's Property (Scotland) Acts 1881 and 1920.

or remoter issue of the deceased spouse, a half if there are not. If there is no will, the widow or widower also has "prior rights" to the house, the furniture and a financial sum.[1] There are financial limits on these prior rights[2] but, in practice, their effect is that the widow or widower often receives all or most of the property of the other spouse.

Financial provision on divorce

2.3 On divorce, the court can order either spouse to pay the other a capital sum or a periodical allowance or both, the amount awarded, if any, being at the court's discretion.[3] The court has also power, on divorce, to transfer a tenancy of the matrimonial home from one spouse to the other.[4] The court has no power under the present law to order the transfer of property other than money (say, the matrimonial home itself) from one spouse to the other.[5]

Occupancy rights in the matrimonial home

2.4 During the marriage a spouse's right to occupy the matrimonial home is protected by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Even if the house belongs to the husband alone he cannot simply put his wife out. The 1981 Act also allows a spouse to apply to a court for the right to use furniture and domestic equipment belonging to the other spouse in the matrimonial home. So if a court orders a husband to leave the home because of violence to his wife it can ensure that the wife can not only exercise her statutory rights to occupy the home but also continue to use the furniture and domestic equipment in the home even if it belongs to the husband. One important side-effect of the 1981 Act is that it is now in practice almost impossible for one spouse to sell the matrimonial home, even if it is in his or her sole name, unless the other spouse has renounced occupancy rights or consented to the sale.

Other special rules

2.5 There are other, less important, qualifications to the general rule that marriage has no effect on property. Marriage has certain effects on the law of bankruptcy.[6] There are still special rules on certain policies of life assurance taken out by married people.[7] There are some special rules applying to property transferred under ante-nuptial marriage contracts.[8] We have con-

[1]Succession (Scotland) Act 1964, ss. 8 and 9.

[2]The current limits are that if the value of the house exceeds £50,000, the widow(er) receives £50,000 instead of the house. If the furniture exceeds £10,000 in value the widow(er) receives furniture only up to that value. The right to a financial sum, in addition to house and furniture, is to £15,000 if the deceased spouse is survived by issue and £25,000 if not.

[3]Divorce (Scotland) Act 1976, s. 5.

[4]Matrimonial Homes (Family Protection) (Scotland) Act 1981, s. 13(2).

[5]In our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) para. 3.113 we have recommended that the court should have such power.

[6]See our Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No. 68, 1982) paras. 11.14 to 11.16, 12.22.

[7]See our Report on *The Married Women's Policies of Assurance (Scotland) Act 1880* (Scot. Law Com. No. 52, 1978)—implemented by the Married Women's Policies of Assurance (Scotland) (Amendment) Act 1980.

[8]See our Report on *Outdated Rules in the Law of Husband and Wife* (Scot. Law Com. No. 76, 1983), paras. 7.1 to 7.7.

sidered all of these in previous reports[1] and do not discuss them further here. In addition there is a special rule on savings from a wife's housekeeping allowance. We discuss this in more detail later.[2]

How the present law works in practice

2.6 In practice there is a great deal of voluntary sharing of property by married couples. It is very common for married couples to take the title to their home in joint names. The family property survey carried out for us and published in 1981 showed that 57% of all owner-occupied matrimonial homes were in joint names.[3] Among homes purchased after 1977 the proportion was 78%.[4] We are informed that one effect of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 has been to increase still further the proportion of couples who take the title to their home in joint names. If the title is in joint names, the home will belong to both spouses in equal shares unless the title provides otherwise.

2.7 Most married couples regard household furniture and domestic equipment (such as refrigerators, cookers and washing machines) as belonging to both of them.[5] The legal position, however, is likely to be more complicated. Legally, the starting point will often be that an item (say, a chair) is the property of a shopkeeper. The property passes under a contract of sale to the person who buys it. This may be either spouse, and may depend on quite arbitrary factors such as which spouse is able to attend to the actual purchase. The position is further complicated by the fact that one spouse may be acting as agent for the other. There is no presumption in the present law that household goods belong to both spouses equally. The result is that the legal position in relation to such goods will often be uncertain (particularly after many years of marriage when the exact circumstances of an acquisition may have been forgotten) and very often out of line with the expectations of both spouses.

2.8 The family property survey showed that most couples had some small savings (e.g. with a bank, a building society or the Post Office)[6] while just over half had one or more current accounts.[7] The pattern of holding savings or current accounts varied. Sometimes they were in the name of one spouse only, the other spouse having no accounts.[8] Sometimes both spouses had separate accounts[9] or the spouses had one or more accounts in joint names (with or without separate accounts in addition).[10] Legally, the true beneficial

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[1]See the reports cited in the three preceding footnotes.

[2]Para. 4.16 below.

[3]Family Property Survey, Table 2.4.

[4]*Ibid.* It must be borne in mind, however, that in Scotland only 37% of all matrimonial homes are owner occupied. *Ibid,* Table 2.1.

[5]*Ibid,* Table 2.9. The proportions of informants regarding such items as belonging to both spouses were: furniture (95%), refrigerator (93%), television (92%), cooker (91%), vacuum cleaner (90%), washing machine (85%), record player (84%).

[6]Table 2.11. 88% of couples had small savings of this type.

[7]Table 2.12. 51% had one or more current accounts.

[8]Tables 2.11 and 2.12. This was the case for 15% of couples in relation to savings accounts and 14% in relation to current accounts.

[9]Tables 2.11 and 2.12. This was the case for 20% of couples in relation to savings accounts and 7% in relation to current accounts.

[10]Tables 2.11 and 2.12. 53% of couples had savings accounts in joint names and 30% had current accounts in joint names (with or without separate accounts in addition).

ownership of the funds in an account is not necessarily determined by the name, or names, in which the account is held. The person who contributed the funds will, in the absence of proof of donation, continue to own them.[1] If, however, it is impossible to determine who contributed what to an account in joint names, the court is likely to conclude that the funds belong to both account holders equally.[2]

2.9 Other types of property owned by couples in the family property survey included cars;[3] insurance policies;[4] units in unit trusts, stocks, shares and other financial investment;[5] businesses;[6] and land or buildings other than the family home.[7]

PART III OPTIONS FOR MAJOR REFORMS

3.1 In the consultative memorandum we invited views on various options for major reforms of matrimonial property law, all of which would have involved a shift towards a system in which all or part of the property of a married couple would become "community property" or at least property subject to a special statutory regime of co-ownership. In order to make the available options as clear as possible we discussed at some length various types of community property systems found in other countries as well as possible schemes for statutory co-ownership of the matrimonial home and household goods. In the event there was very little support for these options for major reform and we do not recommend that any of them should be introduced. We shall therefore deal with them much more briefly than we did in the consultative memorandum.

A "full community property" system

3.2 In a "full community property" system practically all the property of a married couple, including property owned by one of them before the marriage

[1]See e.g. *Johnstone* v. *Johnstone* (1943) 59 Sh. Ct. Rep. 188. This does not affect the bank's obligation to pay in terms of the mandate or agreement governing the account. If it is, in the case of a joint account, bound to pay to "either or survivor", then it must pay to either or survivor and will not be concerned with the true ownership of the funds as between the two account holders. See *Anderson* v. *North of Scotland Bank Ltd.* (1901) 4 F. 49.

[2]See *Bank of Scotland* v. *Robertson* (1870) 8 M. 391; *Trotter* v. *Spence* (1885) 22 S.L.R. 353; *Miller's Exrx.* v. *Miller's Trs.* 1922 S.C. 150.

[3]52% of married couples owned one car and 9% owned two or more cars. Among one car couples 74% regarded the car as jointly owned, 22%regarded it as the husband's, 3% regarded it as the wife's and 1% gave other answers. Table 2.9 and p. 7.

[4]89% of married couples in the family property survey had at least one life insurance policy. In 64% of all couples both spouses had a policy; in 21% only the husband had a policy; in 4% only the wife had a policy. Table 2.13. The survey did not include information on the beneficiary or beneficiaries under the policies. In many cases the wife would doubtless be the sole or main beneficiary under a policy taken out by the husband on his life and vice versa.

[5]12% of married couples in the family property survey had such financial investments. 8% of husbands and 5% of wives owned assets of this kind in their sole names and 2% of couples owned them jointly. P. 7.

[6]8% of married couples in the family property survey had at least one business. 5% of husbands owned a business, either alone or with people other than their wives; 1% of wives owned a business, either alone or with people other than their husbands; 2% of couples owned a business jointly. P. 7.

[7]4% of married couples in the family property survey owned such property. 1% of husbands and 1% of wives owned it alone; 1% of couples owned it jointly; 1% owned it in the names of one or both spouses and other persons. P. 7.

or inherited during it, would be automatically subject to a special form of joint ownership. It would not belong to one spouse or the other but would become "community property". Special rules would be necessary to regulate the management of the community property. The device traditionally used in community property systems of giving full powers of management to the husband and none to the wife would not be acceptable today and more complicated rules providing for greater equality would be necessary. Among the usual consequences of a full community system are these:

(*a*) The community property is liable for the debts of both spouses. So one spouse may lose all the property he or she brings into the marriage if the other is a spendthrift or becomes bankrupt.

(*b*) The community property is divided equally on divorce. So one spouse may lose half of the property he or she brings into the marriage, even after a very short marriage.

(*c*) The community property is divided equally on the death of *either* spouse. So if one spouse dies after, say, a year of marriage, the surviving spouse may have to pay half of the property he or she brought into the marriage to the heirs of the other, perhaps a brother or a charity to which the deceased spouse has left property by will.[1]

A law introducing a full community system would be extremely complex.[2] In countries with such systems many couples contract out of them. In our view the effect of introducing such a system as the legal matrimonial regime in Scotland would be that many couples would be put to the expense and inconvenience of opting out of it by marriage contract. The provisional conclusion which we reached in the consultative memorandum was that a full community system would be inappropriate for Scotland. This was supported by virtually all of those who commented. We do not therefore recommend the introduction of a full community property system in Scots law.

A "community of acquests" system

3.3 Under most "community of acquests" systems the only property which becomes community property is that which is acquired by the spouses during the marriage otherwise than by gift or inheritance. There will usually be an equal division of such property on the dissolution of the marriage by death or divorce and joint liability for at least some debts. The advantage of such systems is that they give expression to the idea of marriage as an equal partnership. The disadvantages are complexity and regidity.

3.4 Although the great majority of those who commented on our proposals were opposed to the introduction of a community of acquests system in Scotland, a few were attracted by the underlying principle of this type of system and by the protection it appears to afford to the non-earning spouse. In our view the important question is whether a community of acquests system would have significant advantages in practice, on the dissolution of a marriage or during its subsistence, over a rule of separate property during marriage with rules for a division of property on dissolution of the marriage by death or divorce. We do not believe that it would. So far as the position on death

[1]This would not always be the case but could happen if the deceased spouse brought no property into the marriage.

[2]We described some of the complexities in para. 5.4 of the consultative memorandum.

or divorce is concerned, there is no reason why a rule of separate property during marriage should not co-exist with satisfactory rules for the division of property on death or divorce. It may be that the present rules of Scots law on these points are not entirely satisfactory, but that could be remedied. We intend to deal in a future consultative memorandum with defects in the rules for division of property on the dissolution of marriage by death. We have already made recommendations designed to bring about a more satisfactory approach to the division of property on divorce.[1] So far as the position during marriage is concerned, we do not believe that a community of acquests system would bring about significant benefits for many people. We know from the family property survey that there already is a great deal of voluntary sharing of property by married couples under our system. A community of acquests system would not make very much, if any, practical difference in cases where there already is considerable voluntary sharing and it would be unlikely to make very much practical difference, during the marriage, in those cases where there is little or no sharing. The crucial problem here is the day to day management of the community funds. The traditional solution of community property systems, which gave the husband alone full powers of management, would be neither just nor acceptable. It would be equally unjust and unacceptable to give the wife alone full powers of management. To require the consent of *both* spouses to any dealing with community assets would be unwieldy. That leaves two solutions—to allow either spouse to deal with any part of the community property, or to allow each spouse to deal with the property he or she brought into the community. The first solution leaves both spouses at risk, while neither protects the non-earning spouse. Of course, the general rules on the management of the spouses' property could be qualified by special rules for the protection of the non-earning spouse, but that is also the case in separate property systems.[2] The aspect of a community of acquests system which appealed to the minority of commentators supporting this type of system was the governing principle itself. In our view, any advantage of adopting this governing principle would, during the marriage, be symbolic rather than real and would be outweighed by the disadvantages of introducing a community of acquests system.

3.5 One of these disadvantages would be excessive legal complexity. If a community of acquests system were introduced there would have to be rules enabling spouses to opt out by marriage contract. There would also have to be choice of law rules to determine when the Scottish community property law applied and to determine whether the parties could, by changing their domicile or habitual residence, bring themselves under the matrimonial property law of some other jurisdiction.[3] These rules would be particularly important, and probably particularly troublesome in practice, if Scotland had a community property system while the other parts of the United Kingdom had separate property systems. As some marriages would be governed by the community property rules and others (where the spouses had opted out of

[1]See our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981).

[2]In Scotland, for example, special protection against disposal of the matrimonial home is, in practice, provided by the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

[3]In theory, this difficulty could also arise under the present law. In practice, choice of law problems seem to be very rare under a separate property system, perhaps because the question whether a *special* set of rules applies, and if so which, simply does not often present itself for decision.

community property, or had married before the new law came into force, or were governed by the law of some other country) would not, there would have to be at least two sets of rules on such matters as liability for debts, financial provision on divorce and legal rights on death. There would clearly have to be complicated rules, and possibly a special register[1], for the protection of third parties whose rights might depend on whether or not a couple came under the community property rules. There would probably have to be rules excluding certain property acquired during the marriage (even if not acquired by gift or inheritance) from the community. What about damages for personal injuries, and social security payments? Should they be excluded from community property in all cases, or only in certain cases (e.g. where they do not represent a substitute for lost earnings)? It would not always be easy to decide what should or should not be excluded, and framing suitably precise rules would add considerably to the complexity of any scheme. As there would, in many marriages, be three separate lots of property—the husband's, the wife's and the community property—there would have to be rules on the allocation of property to each category (including, probably, rules for "tracing" property if, for example, an asset is acquired during the marriage with funds owned by one spouse before the marriage) and rules on the reimbursement of one fund by the other where, for example, the first has borne an expense which should properly have been borne by the other. We think that the legal complexity involved in introducing a community of acquests system should not be underestimated.

3.6 The other main disadvantage of a community of acquests system is its rigidity. It is easier for couples to opt into voluntary sharing under a separate property system than it is for them to opt out of a community property system. The former involves no more, in relation to many types of assets, than taking a title in joint names:[2] the latter involves employing a lawyer to draw up a marriage contract. Moreover, in so far as a community of acquests system involves a fixed rule of equal sharing of certain property on the dissolution of a marriage by divorce, it imposes too rigid a solution to suit the circumstances of all cases. Even those commentators who favoured the introduction of a community of acquests system generally favoured the conferring of some discretion to depart from equal sharing on divorce. Yet if such a discretion is conferred, the system offers no advantages, on divorce, over a separate property system with the kind of rules for the financial consequences of divorce recommended by us in our Report on *Aliment and Financial Provision.*[3]

3.7 In the memorandum we expressed the provisional conclusion that a community of acquests system would be inappropriate for Scotland. This view was supported by a large majority of those who commented, including those representing the legal profession and certain women's organisations. It is our

[1]The purpose of a register of this type would be to let third parties know whether a couple were or were not married under the community property system. Registers of this type are regarded as essential in many countries with community property laws.

[2]This is not the case, of course, in relation to corporeal moveables such as household goods, but we know that most couples regard household goods as jointly owned in any event (see para. 2.7 above) and we make recommendations later for a legal presumption of co-ownership of household goods (see para. 4.8 below).

[3]Scot. Law Com. No. 67 (1981).

impression that there is no strong demand for the introduction of any community property system into Scots law. Having weighed the arguments again, and having carefully considered the views of the minority of commentators, we remain of the view that a community of acquests system should not be introduced in Scotland.

Fixed property rights on divorce

3.8 There was no support whatsoever on consultation for a system in which the spouses own their property as separate individuals during the marriage but share it, or some of it, in *fixed* proportions on divorce. This is not to say that all commentators were satisfied with the present law, which leaves the financial consequences of divorce to the discretion of the judge. A number of commentators criticised this system and expressed support for the kind of system recommended by us in our Report on *Aliment and Financial Provision*[1] in which there would be a *norm* of equal sharing of property acquired during the marriage, otherwise than by gift or inheritance, with power to the court to depart from that norm in special circumstances (which might include, for example, the fact that property had been acquired with funds owned before the marriage by one of the spouses or donated by a relative of one of the spouses). The consultation on matrimonial property therefore confirms us in our view that a system based on fixed rights on divorce, without any provision for modifying those rights to take account of special circumstances, would be too inflexible.

Statutory co-ownership of the matrimonial home

3.9 The Law Commission have recommended for England and Wales a scheme of statutory co-ownership of the matrimonial home.[2] The recommendation has attracted both support and criticism.[3] In our consultative memorandum we set out, at length and in detail, a possible scheme for co-ownership of the matrimonial home as it might operate in Scotland. We set out arguments for and against such a scheme and, without expressing any provisional conclusion, invited views. There was, in the event, hardly any support for a scheme of statutory co-ownership of the matrimonial home. We ourselves think that the arguments against the scheme outweigh the argument for it and we do not recommend its introduction in Scotland. In these circumstances we need not discuss the details of the scheme put forward for consideration in the consultative memorandum or the replies to the many questions we asked

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[1] *Ibid.*

[2] Law Commission, *First Report on Family Property: A New Approach* (Law Com. No. 52, 1973); *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods* (Law Com. No. 86, 1978). See also the Law Commission's Report on *Property Law: The Implications of Williams & Glyn's Bank Ltd.* v. *Boland* (Law Com. No. 115, 1982).

[3] See *Hansard* (H.L.) 18 July 1979, Vol. 401, col. 1432 and 1455; 12 Feb. 1980, vol. 405, col. 112; 15 Dec. 1982, vol. 437, col. 640; Cretney, *Principles of Family Law* (3rd edn. 1979) pp. 417 to 422; Deech, "A Tide in the Affairs of Women" (1972) 122 N.L.J. 742; Nevitt and Levin "Social Policy and the Matrimonial Home" (1973) 36 M.L.R. 345; Baxter (1974) 37 M.L.R. 175; Zuckerman, "Ownership of the Matrimonial Home—Common Sense and Reformist Nonsense" (1978) 94 L.Q.R. 26; Stone (1979) 42 M.L.R. 192; Deech, "Williams and Glyn's and Family Law" (1980) 130 N.L.J. 896; Murphy and Rawlings, "The Matrimonial Homes (Co-ownership) Bill: The Right Way Forward?" (1980) 10 Family Law 136; Temkin, "Property Relations during Marriage in England and Ontario" (1981) 30 I.C.L.Q. 190.

about the options available within its framework. We shall confine ourselves to the arguments for and against the principle of such a scheme. Before setting these out, however, we make two important preliminary points. First, what we are concerned with here is not voluntary co-ownership but whether there should be a form of legal co-ownership which could be forced on an unwilling husband or wife against his or her will.[1] Secondly, the considerations relating to the introduction of statutory co-ownership of the matrimonial home are not identical in England and Scotland. In England there may be technical reasons for introducing this kind of scheme which do not apply in Scotland. In Scotland you can tell who owns a house by looking at the title. In England you cannot: people not on the title may have proprietory interests in the house and these interests may prevail over the rights of purchasers and lenders. The uncertainty in English law in this area may provide a reason, not applicable to Scotland, for introducing statutory co-ownership.[2]

3.10 There appear to be four arguments for a scheme of statutory co-ownership of the matrimonial home:

(i) It would give expression to the idea of marriage as an equal partnership.

(ii) It would reward the contributions in unpaid work by a non-earning spouse, particularly a housewife.

(iii) It would bring the law more into line with the views of most married people.

(iv) It would give effect to the view that the matrimonial home should be owned in common because it is used in common.

These arguments can, however, be met by the following arguments:

(i) Statutory co-ownership of the matrimonial home would not be a good way of giving expression to the idea of marriage as an equal partnership. In some cases it would go too far, particularly if it applied to a home owned before marriage, or acquired by gift or inheritance during the marriage. These are not the results of the spouses' joint efforts. In other cases it would not go far enough and could produce results which were unfair as between one spouse and another. If the wife, say, owned the home and the husband owned other property, he could acquire a half share in the home without having to share any of his property. A spouse with investments worth thousands of pounds could allow the other to buy a home and then claim half of it without contributing a penny. The scheme would also work very unevenly as between different couples. If Mr A had invested all his money in the matrimonial home while his next-door neighbour Mr B had mortgaged his home[3] to its full value in order to finance his business, the law would operate very unevenly for the benefit of Mrs A and Mrs B. It would, in short, be a hit or miss way of giving effect to the partnership ideal.

(ii) Statutory co-ownership of the matrimonial home would not be a good way of recognising contributions in unpaid work by a non-earning

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[1]It would be possible for *both* spouses to opt out by mutual agreement, but that would still enable co-ownership to be imposed on one of them against his or her will.

[2]See the Law Commission's Report on *Property Law: The Implications of Williams and Glyn's Bank Ltd.* v. *Boland* (Law Com. No. 115, 1982) para. 112.

[3]Since the Matrimonial Homes (Family Protection) (Scotland) Act 1981 this would normally need the wife's consent.

spouse. It would benefit the undeserving as well as the deserving. Extreme cases can be imagined. A man might marry a wealthy widow, encourage her to buy an expensive house, claim half of her house and leave her. Even in less extreme cases statutory co-ownership would be a poor way of rewarding unpaid work. Most housewives would get nothing from the new law because its effects would be confined to owner-occupiers. Only about 37% of married couples in Scotland live in owner-occupied accommodation. Even where the new law did apply, its effects would be totally arbitrary. Not only would the net value of the home vary enormously from case to case, and from time to time, but so too would the respective values of the spouses' contributions.

(iii) Statutory co-ownership of the matrimonial home would not necessarily bring the law into line with the views of most married people. We know that most married owner-occupiers in Scotland favour voluntary co-ownership of the matrimonial home.[1] We do not know that most married people in Scotland would favour forcing co-ownership on an unwilling owner regardless of the circumstances of the particular case.

(iv) It is not self-evident that property which is used in common should be owned in common. Even if this proposition were accepted, it would lead further than co-ownership between spouses. It would lead to co-ownership between the members of a household, including for example, children and parents.

(v) A scheme for statutory co-ownership of the matrimonial home would be very complex. The scheme we outlined in our consultative memorandum was as simple as we could make it, but even so it raised many difficult questions. Should, for example, co-ownership come about automatically by operation of law (in which case how would third parties, such as people who have bought the house in good faith, be protected) or should it come about only, say, on registration of a notice by the non-owner spouse (in which case would non-owner spouses bother to register before it was too late)? Should co-ownership apply to a house owned by one spouse before the marriage? Should it apply to a home which is part of commercial or agricultural property? Should it apply to a home bought by one spouse after the couple have separated? If not, should it make any difference if the spouses resume cohabitation for a short period? Should the spouses become jointly liable for any debts secured on the home? When should it be possible for one spouse, or both, to opt out of co-ownership and how should this be done? Should a spouse be able to claim half of the sale proceeds of one home, refuse to contribute to the purchase price of a new home, and then claim half of that one too? If not, how can this be remedied without forcing one spouse to invest in a home he or she does not want to invest in? These are just some of the less technical questions which would have to be answered. Other difficulties, some of them of a very technical nature, were discussed in the consultative memorandum. All that need be said here is that although statutory co-ownership of the matrimonial home seems attractively simple in general terms, it turns out to be surprisingly

[1]Family Property Survey, pp. 4 to 6.

complicated when embodied in a detailed scheme.[1] One side-effect of the inevitable legal complexity of a co-ownership scheme would be that there would be various situations in which it would pay a spouse to have good legal advice. There would be a risk that the law would favour the well-advised and penalise the unwary. This would not seem to be a desirable element to introduce into the affairs of married couples. If a scheme of statutory co-ownership would lead, on balance, to much greater justice, complexity of this order would be a small price to pay, but it is arguable that a co-ownership scheme would in fact have very little effect on the balance of fairness and unfairness.

(vi) Statutory co-ownership of the matrimonial home would not benefit many people. Only about 37% of married couples in Scotland are owner-occupiers. The majority of these owner-occupier couples already have their home in joint names. Of those owner-occupiers who have their home in the sole name of one spouse, a number will have a good reason for this and would presumably opt out of a statutory scheme. In many cases a co-ownership scheme would confer no long-term benefit on the non-owner spouse because he or she would succeed to the house on the death of the other in any event, or would receive as much by way of financial provision on divorce as he or she would have received if the scheme had applied.

(vii) A scheme for statutory co-ownership of the matrimonial home would have to co-exist with the law on financial provision on divorce. It would make little sense, it might be said, to introduce a complicated scheme for fixed co-ownership rights in the home during the marriage if the whole financial circumstances of the spouses were to be thrown into the melting-pot on divorce. The supposed benefit of fixed rights would be illusory. It would be most useless when most needed.

(viii) Finally, a scheme for forced co-ownership could exacerbate matrimonial disputes. If co-ownership came about only when the non-owner spouse registered a notice, the act of registration might well be seen as a deliberate raising of the level of a domestic dispute. An intimation by one spouse that he or she was opting out of co-ownership would also be unlikely to promote good domestic relations.

3.11 We have already noted that there was hardly any support on consultation for the introduction, in Scotland, of a scheme of statutory co-ownership of the matrimonial home. Some commentators, indeed, expressed strong opposition. In these circumstances we do not recommend the introduction, in Scotland, of a scheme of statutory co-ownership of the matrimonial home.

Statutory co-ownership of household goods

3.12 In the consultative memorandum we put forward for consideration two responses to the criticism that the present separate property rule is artificial and difficult to apply in relation to household goods in a matrimonial home. The first was a scheme of statutory co-ownership of such goods. The second

[1] In this respect it is not unlike the conferring of occupancy rights in the home on the spouse who is not the owner or tenant. The basic idea is simple but the legislation required to give effect to it is far from simple. See the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

was a presumption of co-ownership of such goods. Our provisional preference was for a presumption of co-ownership. We considered that the arguments against a *rule* of co-ownership, which are similar to the arguments against statutory co-ownership of the matrimonial home, outweighed the arguments for it and that, in particular, the difficulties involved in such a rule would be out of all proportion to the benefits. To enable informed comments to be made, however, we appended to the consultative memorandum a fully worked out draft scheme for statutory co-ownership of household goods. The results of consultation on this issue were decisive. All of those who commented on it agreed with our provisional conclusion that the disadvantages of a scheme for statutory co-ownership of household goods in the matrimonial home outweighed the advantages. We do not, therefore, recommend the introduction of any such scheme. We deal later with our preferred alternative approach based on a presumption of co-ownership.[1]

Conclusion

3.13 Our conclusion, like that of most of those who commented on the consultative memorandum or pamphlet, is that the present law of Scotland on the property of married couples during their marriage is not open to serious criticism and is not in need of major reform. Lest this should appear unduly complacent we should add that we do think that there is room for a more principled approach to the division of matrimonial property on divorce. We have already made recommendations in another report on this question.[2] We also accept that the law on the legal position of the surviving spouse when a marriage is dissolved by death is in need of review and we intend to publish a consultative memorandum on that subject. In the following parts of this report we make recommendations for minor reforms of the law on the property of married couples during the marriage. The end result of our reports in this area,[3] if implemented, would be a system in which the basic rules were separate property during marriage (with maximum scope for voluntary co-ownership and with special rules on the occupancy of the matrimonial home and on some other matters, such as household goods) and division of matrimonial property, in accordance with improved rules, on the dissolution of the marriage. The rules for division on divorce and death would not necessarily be the same. This is the kind of system we would like to see. It would not be *fundamentally* different from the present law of Scotland. Nor would it be *fundamentally* different from the kind of "deferred community" systems which have been introduced in a number of jurisdictions in recent years.[4]

3.14 Our **recommendations** on the topics dealt with in this part of the Report can be summed up as follows:

1. The law of Scotland on the property of married couples should continue to be based on the principle of separate property during marriage (subject to some special rules). This should be supplemented by improved

[1]See paras. 4.2 to 4.8 below.

[2]See Scot. Law Com. No. 67 (1981).

[3]Including our Report on *Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot. Law Com. No. 60, 1980)—implemented, with certain changes, by the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

[4]We described a number of these systems in the consultative memorandum paras. 3.13 to 3.19.

rules for the division of property on the dissolution of a marriage by death or divorce (topics with which we are not concerned in this Report). There should be no introduction of statutory co-ownership of the matrimonial home, household goods or other property.
(Paragraphs 3.2 to 3.13; Clause 1.)

PART IV OPTIONS FOR MINOR REFORMS

4.1 In this part of the Report we assume that the basic principle of separate property during marriage will continue to apply and we consider various minor reforms which would remedy certain defects in the law and meet certain criticisms.

A presumption of co-ownership of household goods

4.2 One criticism of the present separate property law is, as we have seen,[1] that it is difficult to apply in relation to household goods. It is often impossible, particularly after the lapse of time, to tell who own what. In the consultative memorandum we invited comments on our provisional view that there should be a presumption that household goods in a matrimonial home are owned by both spouses in equal shares. The presumption would apply if any question arose, whether during or after the marriage, as to the respective rights of a husband and wife to the ownership of any item which formed, or had formed, part of the household goods in their matrimonial home, while they were living together.[2] There was almost unanimous support on consultation for this proposal.

4.3 The presumption would be a rule of evidence, not of substantive law. It would therefore apply if the question of ownership arose in Scotland, no matter what the domicile or habitual residence of the parties or the situation of the goods.[3]

4.4 By "household goods" we mean goods kept or used for the joint domestic purposes of the spouses. The term, if defined in this way, would automatically exclude items kept or used in the home for business purposes, or for the personal purposes of one of the spouses (e.g. in connection with a hobby or pastime), or for the purposes of a third party other than a dependent child of the family (e.g. the parent of one of the spouses). Subject to that, it would include the normal furniture and plenishings of a household—tables, chairs, cupboards, carpets, curtains, clocks, lamps, television sets, radios, record and cassette players, pictures and ornaments, beds and bedclothes, wardrobes, cookers, heaters, refrigerators, washing machines, cooking vessels, storage vessels, china and crockery, cutlery, linen, cleaning and mending equipment and materials, consumable stores, garden tools and effects, and so on. We think it better, however, that the definition in the statute should be in general terms and should not contain a list of specific

[1]Para. 2.7 above.

[2]We discuss the definitions of "household goods" and "matrimonial home" and the circumstances in which the presumption should be rebuttable in paras. 4.4 to 4.7 below.

[3]This is not to say that rules of any applicable foreign law would necessarily be irrelevant. The presumption might, for example, be rebutted by proof that under an applicable foreign law an item belonged to one spouse alone.

items, which would almost inevitably be incomplete and which could rapidly become out of date. The definition should, however, for the avoidance of doubt, exclude money and securities. It should also exclude cars, caravans and other road vehicles, even in cases where they might be said to be kept or used substantially for the joint domestic purposes of the spouses. Cars, caravans and other road vehicles would not normally be regarded as "household goods". At least in the case of cars, they are less likely than ordinary household goods to be regarded as jointly owned,[1] and it is less likely (given their value, the fact that they are changed fairly frequently and the fact that there is a registration book) that there will be insuperable difficulty in applying the ordinary law to determine ownership. We also recommend, for the avoidance of doubt, that domestic animals should be expressly excluded from the definition, even in cases (such as guard dogs) where they might be said to be kept for the spouses' joint domestic purposes. Again, animals would not normally be regarded as "household goods" and, we suspect,[2] would often be regarded by the spouses as belonging fairly definitely to one or the other of them.

4.5 So far as the definition of "matrimonial home" is concerned we recommend the use of a slightly modified version of the definition in section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The modifications would be designed to remove the reference to the home being provided or made available by one or both of the spouses (which in the present context would be inappropriate as there is no reason why the presumption should not apply to household goods in a home provided for, or made available to, the spouses by someone else) and to make it clear that the definition covers only a home used as the joint residence of *both* the husband and the wife (and not, for example, a home bought by a separated wife for herself and her children after the breakdown of her marriage). The definition in the 1981 Act would, with these modifications, be as follows:

> "'matrimonial home' means any house, caravan, houseboat or other structure used at any time as the joint residence of the husband and the wife, and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure".

4.6 The presumption would, subject to a qualification mentioned later, be rebuttable by proof that an item does not belong to both spouses equally. It could be rebutted, for example, if one spouse proved that he or she had owned the item before the marriage, or had acquired it from a third party by gift or inheritance, or had made it. It would also be rebutted if it was proved that the article had been given by one spouse to the other. We drew attention in the consultative memorandum, however, to a difficulty which would arise if the presumption could be rebutted merely by proof that an article had been bought by one spouse during the marriage. Which spouse buys a piece of houshold furniture or domestic equipment may be a matter of mere chance. Both spouses may, for example, have looked at kitchen

[1]Family Property Survey, Table 2.9. Whereas over 90% of married informants considered furniture, refrigerators, televisions, cookers and vacuum cleaners to be jointly owned, 74% (in families where there was only one car) considered the car to be jointly owned.

[2]The Family Property Survey contains no information on this point.

tables in various stores on a Saturday. After discussion over the week-end they may have decided to buy a particular table on the Monday. Whether the husband or wife actually effects the purchase may depend simply on which one finds it more convenient to call into the store. Under the present law, ownership of the table will often depend on factors of this nature. The starting point is that the table belongs to the shopkeeper. Ownership passes under the contract of sale to the person who happens to be the purchaser. It does not matter who supplies the money or pays the bill (although that may give rise to separate questions of agency, loan or gift). In the absence of any proof that the purchaser was acting as agent for the other spouse or subsequently transferred ownership, in whole or in part, to the other spouse, he or she will be the sole owner of the purchased item. It would, in our view, be undesirable to perpetuate this situation in relation to the proposed presumption. We therefore recommend—and a proposal to this effect was strongly supported on consultation[1]—that the presumption of co-ownership should not be rebuttable merely by proof that the goods were purchased from a third party,[2] while the spouses were married and living together,[3] by one spouse alone or by both spouses in unequal shares.[4] The main effect of this special rule will be that household goods falling within the definition of that term (which means, among other things, that they must be, or have been, kept or used for the spouses' joint domestic purposes) will not be removed from the operation of the presumption of co-ownership merely by proof that one spouse rather than the other happened to be the one who bought them.

4.7 In the consultative memorandum we invited views on whether, if a co-ownership presumption were introduced, there should be any special rule for the protection of third parties buying household goods from a married person. On the one hand it could be said that third parties would often have no way of knowing whether household goods were or were not co-owned and should not be placed at risk if buying in good faith. On the other hand it could be said that under the present law purchasers of household goods often have no way of knowing whether they belong to one spouse or the other or to both and that this does not seem to give rise to difficulty. There was a mixed response to this question on consultation. Most commentators favoured a special rule for the protection of third parties. Some disagreed or expressed serious reservations, pointing out that such a rule would make it too easy for one spouse to dispose of goods which would be regarded in law as co-owned. We reached no provisional view on this question in the consultative mem-

[1]See the consultative memorandum para. 6.3. The proposal in the memorandum would have allowed the presumption to be rebutted by proof of individual purchase during the marriage if the item was purchased primarily for the purchaser's own purposes or benefit (e.g. as an investment or in connection with a hobby). This qualification is unnecessary now, given our proposed definition of household goods. Articles kept or used for personal purposes, rather than for joint domestic purposes, would be excluded from the scope of the presumption altogether.

[2]It is our intention that the presumption *should* be rebuttable by proof that an item had been sold by one spouse to the other. There is nothing arbitrary about such a deliberate transaction and no reason why it should not receive full effect.

[3]It is our intention that the presumption *should* be rebuttable by proof that an item was purchased by one of the spouses before the marriage, or during a period of separation.

[4]The purpose of the last words is to preclude arguments that because the funds for the purchase of, say, a carpet were contributed in certain unequal proportions the purchase was effected by the spouse (or spouses) on behalf of both spouses in such a way that property passes to them in those proportions.

orandum. On reconsidering the matter we have come to the conclusion that a special rule for the protection of third parties would be unnecessary and, on balance, undesirable. We therefore make no recommendation on this point.

4.8 Our **recommendations** on a presumption of co-ownership of the household goods in a matrimonial home are, therefore, as follows:

2. (*a*) If any question arises, whether during or after the marriage, as to the respective rights of a husband and wife to the ownership of any item which forms, or formed, part of the household goods in their matrimonial home while they are or were living together, there should be a presumption that the item is owned by both of them in equal shares.

(*b*) The presumption should, subject to the qualification in the following paragraph, be rebuttable by proof that the item does not belong to both spouses in equal shares.

(*c*) The presumption should not, however, be rebuttable merely by proof that the goods were purchased from a third party, while the spouses were married and living together, by one spouse alone or by both spouses in unequal shares.

(*d*) "Household goods" should be defined as goods kept or used for the joint domestic purposes of the spouses. The definition should, however, expressly exclude (i) money or securities, (ii) cars, caravans and other road vehicles (even if they could be said to be kept or used for the spouses' joint domestic purposes) and (iii) domestic animals.

(*e*) "Matrimonial home" should be defined as in section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 with minor modifications to remove the reference to the home being provided or made available by one or both of the spouses and to make it clear that it covers only a home which is, or has been, the joint residence of *both* of the spouses.
(Paragraphs 4.2 to 4.7; Clause 2.)

Accounts in joint names

4.9 In the consultative memorandum we provisionally suggested that there should be a statutory presumption that funds in bank accounts, and similar accounts, in the joint names of a husband and wife are owned by them both in equal shares. Although this suggestion was supported by most of those who commented on it, it was opposed by the Committee of Scottish Clearing Bankers who favoured retention of the status quo. We have given a great deal of thought to the question of the form which a presumption of joint ownership might take and we have concluded, with regret, that any presumption which went far enough beyond the existing law to be worth introducing would be open to serious objections. The simplest form of presumption would be one to the effect that funds in a joint account in the names of a husband and wife would be presumed to have been contributed equally unless the contrary was proved. This, however, would add little or nothing to the present law[1] and

[1]See *Bank of Scotland* v. *Robertson* (1870) 8 M. 391; *Trotter* v. *Spence* (1885) 22 S.L.R. 353; *Miller's Exrx.* v. *Miller's Trs.* 1922 S.C. 150.

would, in our view, not be worth introducing. A stronger presumption would be one to the effect that where an account was held in the joint names of a husband and wife each should be presumed to have donated to the other, or received as a donation from the other, whatever amount was necessary to give them an equal share in the funds standing at credit of the account. The presumption would be rebuttable by proof that the person contributing the greater amount had no intention of donation. A difficulty with this solution would, however, be in deciding when the donation should be presumed to have taken place. It would, presumably, have to be at the moment before any question arose as to the ownership of the funds. Any other solution would involve the type of calculation and the type of investigation of an account's history which it would be the purpose of the presumption to avoid. Yet a presumption of this kind could lead to strange results if one spouse had withdrawn a large amount just before the account was notionally frozen for the purpose of ascertaining ownership. It would provide a prima facie answer as to the ownership of the funds in the account, but no answer as to the ownership of funds withdrawn from the account. Moreover it would still be necessary to decide, in order to see whether the presumption had been rebutted, which spouse had contributed the greater amount and that could give rise to difficulties. There would also be something unrealistic in asking whether there was or was not an intention of donation at a moment when, in all probability, the spouse in question did not give a thought to the account. Our conclusion was that a presumption of this nature would probably give rise to more difficulties than it would solve. Another solution might be to have a presumption that funds in joint accounts in the names of husband and wife were owned by them both equally, unless they had agreed to the contrary. This, however, would probably be too strong a presumption. It would be unusual for people to seek legal advice when opening a joint bank account and a spouse might find himself or herself "caught" by such a presumption even in circumstances where it could be clearly established that there was no intention of donation. In an effort to find a way round these difficulties we considered drawing a distinction between current accounts and savings accounts, but concluded that any such distinction would be unsatisfactory, given the various types of accounts which are subject to frequent credits and debits. In the end we concluded that the safest course was to recommend no change in the existing law on joint accounts. A factor which weighed with us in reaching this conclusion was the difficulty of justifying a special rule for accounts in the names of husband and wife when there would be no such special rule in the case of other joint accounts. One commentator suggested that there should be a rule that the funds in a joint account passed to the survivor on the death of one of the joint holders. We can see attractions in this suggestion, but it goes beyond what we consulted on and would be better considered, in our view, in our future work on succession law.

Facilitating transfer of home into joint names

4.10 The family property survey showed that most married couples whose home was in the name of one of them alone nevertheless regarded it as belonging to both of them.[1] The spouse who was the legal owner was as likely

[1]Table 2.6.

to take this view as the other spouse.[1] In these circumstances it may be asked why the spouses did not take the title to the house in joint names in the first place. The family property survey suggests that the reasons are various. The house may have been bought many years ago when it was less usual to take the title in joint names:[2] the couple may not have received advice on the option of taking the title to the house in joint names:[3] or, while regarding the house as belonging to both, the couple may have had special reasons for taking the title in the name of one of them alone.[4] Interestingly, two-thirds of couples whose house was in the name of one of them alone saw no disadvantages in having the house in joint names.[5] In these circumstances it seems to us to be important that the law should not place unnecessary obstacles in the way of a voluntary transfer of the matrimonial home into joint names.

4.11 In the consultative memorandum we suggested that a conveyance by one spouse to the other of a share in the matrimonial home should be exempt from stamp duty.[6] This was approved by virtually all of those who commented. We also invited views on whether any other steps could usefuly be taken to facilitate voluntary co-ownership of the matrimonial home. One suggestion received from several sources was that the recording dues (or, in the case of homes in areas where registration of title has been introduced, the registration fees) in relation to a conveyance by one spouse to the other of a share in the matrimonial home should be at a low fixed rate, rather than being determined by the value of the property transferred. This seems to us to be a useful suggestion and we endorse it. It would remove another possible financial disincentive to a voluntary transfer into joint names.

4.12 Other suggestions related to conveyancing costs. Some commentators suggested that introduction of a simpler conveyancing procedure for the type of transfer under consideration. We do not consider, however, that there is much scope for significant change here. The document effecting the transfer would have to be capable of being recorded in the Register of Sasines and of forming a proper link in the title or (in the case of registered land) of supporting an application for registration. It could not, therefore, be very much, if any, simpler than a simple disposition in ordinary form.

4.13 The Building Societies Association, in their comments, pointed out that most building societies restrict dealings in the reversionary interest in the property secured and referred us to a suggestion that this common restriction might be disapplied in relation to transfers by one spouse into the joint names of both. This would not affect the society's security. This seems to us to be a most helpful suggestion. It is not one which could be appropriately dealt with by legislation but is rather a matter for building societies themselves.

4.14 Our **recommendations** on facilitating voluntary transfers of matrimonial homes into joint names are as follows:

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[1]P. 5.
[2]Table 2.4 and p. 4.
[3]Table 2.7 and p.5.
[4]P. 6—informants mentioned such factors as raising capital and liability for mortgage repayments.
[5]P. 6.
[6]The wider question whether stamp duty should apply at all to voluntary dispositions is under consideration by the government. See Inland Revenue Consultative Document, *The Scope for Reforming Stamp Duties* (March 1983) paras. 6.3 to 6.8.

3. (*a*) A conveyance by one spouse to the other of a share in the matrimonial home should be exempt from stamp duty.

   (*b*) The recording dues or registration fees in relation to such a conveyance should be at a low fixed rate, rather than being determined by the value of the property transferred.
   (Paragraphs 4.11 to 4.13.)

We have not included provisions on these recommendations in the draft Bill appended to this Report as we consider that action on these matters must be regarded as a matter for the departments concerned. Nor have we made any formal recommendation on the possibility of building societies relaxing, in husband and wife cases, their usual restriction on dealings in the reversionary interest. We express the hope, however, that the Building Societies Association will consider whether any action could be taken in this respect to facilitate voluntary transfers of matrimonial homes into joint names.

Restrictions on disposals of certain assets

4.15 In the consultative memorandum we expressed the provisional view that, in view of the protections afforded by the Matrimonial Homes (Family Protection) (Scotland) Act 1981, of the powers of the courts to set aside transactions calculated to defeat claims for financial provision on divorce, and of our proposals on a presumption of joint ownership of household goods, it was unnecessary to introduce any further restrictions on the power of one spouse to dispose of the matrimonial home or household goods without the consent of the other.[1] This was agreed by those who commented on it. We therefore make no recommendations on these points.

Allowances for expenses of matrimonial home, etc.

4.16 Section 1 of the Married Women's Property Act 1964 provides that:

> "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares."

This provision is open to the criticism that it does not apply to an allowance made by a wife.[2] In the consultative memorandum we suggested that it should apply to husbands and wives equally. There was general agreement with this proposal. We therefore **recommend:**

4. The provisions in the Married Women's Property Act 1964 on allowances for the expenses of the matrimonial home[3] or for similar purposes should apply to husbands and wives equally.
   (Clause 3.)

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[1]Consultative Memorandum paras. 6.12 to 6.14.

[2]This was contrary to the recommendation of the Royal Commission on Marriage and Divorce which was that "savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed". Cmd. 9678 (1956) para. 701.

[3]The draft Bill in Appendix A substitutes "their joint household expenses" for "the expenses of the matrimonial home". The reason for this minor change is that "matrimonial home" is given a special definition in clause 2 of the Bill and it would be confusing to use it in a different sense in clause 3.

Modernising statute law on matrimonial property

4.17 The Conjugal Rights (Scotland) Amendment Act 1861 and the Married Women's Property (Scotland) Acts of 1877, 1881 and 1920 were passed (in so far as they deal with matrimonial property and the legal capacity of married women)[1] to reform the old law based on the husband's *jus mariti* and *jus administrationis*. They are, therefore, framed in terms of these concepts. We have already, in previous reports, recommended the repeal of the 1877 Act and of certain provisions of the 1861, 1881 and 1920 Acts.[2] We think that the present opportunity should be taken to modernise and simplify the statute law on this subject still further and, at the same time, to get rid of certain inappropriate choice of law rules in the old legislation. The 1881 Act, for example, applies at present where the husband is domiciled in Scotland at the date of the marriage.[3] This is inappropriate because, now that spouses are on a footing of equality with regard to domicile, there is no reason to have regard to the husband's domicile rather than the wife's. The 1920 Act contains references to the husband's domicile and to heritable property in Scotland.[4] Both seem inappropriately narrow. We have given some thought to the best way of achieving a simplification and modernisation of the statute law on matrimonial property. One technique would be simply to repeal the relevant parts of the old Acts[5] and put nothing in their place, relying on the argument that section 16(1)(*a*) of the Interpretation Act 1978 would prevent revival of the old common law rules on the *jus mariti* and *jus administrationis*.[6] On balance, however, we consider that it would be preferable, if only from the point of view of those seeking a statement of what the present law is, to replace the main provisions of the 1881 and 1920 Acts with a new statutory provision to the effect that marriage does not of itself, subject to the provisions of any enactment and with an express saving for the law of succession, affect the legal capacity of the parties or their respective rights in relation to their property.[7] This would not contain any choice of law rule and would accordingly

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[1]The 1861 Act deals with various other matters, including certain court proceedings. Both it and the 1881 Act contain provisions on legal rights and succession. See para. 4.18 below.

[2]See our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) paras. 2.38 and 2.152 and Appendix A, Sched. 2; Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No. 68, 1982) paras. 11.16 and 12.22 and Appendix 6, Sched. 7; Report on *Outdated Rules in the Law of Husband and Wife* (Scot. Law Com. No. 76, 1983) paras. 5.5, 8.4 and 11.5 and Appendix A, Sched. 2.

[3]S. 1.

[4]S. 7.

[5]i.e., in addition to provisions already recommended for repeal in previous reports, section 6 of the 1861 Act (except in so far as it deals with succession), section 16 of the 1861 Act, the whole of the 1881 Act (except sections 6 and 7 which deal with succession) and the whole of the 1920 Act.

[6]S. 16(1) of the Interpretation Act 1978 provides that "where an Act repeals an enactment, the repeal does not, unless the contrary intention appears—(*a*) revive anything not in force or existing at the time at which the repeal takes effect. . . ."

[7]See draft Bill, Appendix A, clause 1. The saving for enactments would cover, for example, statutory provisions on occupancy rights in the matrimonial home or on savings from housekeeping allowances. It is thought that the rules of the civil and criminal law on bigamy are independent rules and not simply matters of "legal capacity" and that accordingly no saving is necessary to cover them.

leave choice of law questions to turn on the ordinary rules of private international law.[1]

4.18 The 1861 and 1881 Acts contain three short provisions on the law of succession. These provisions (dealing respectively with the effect of judicial separation on succession rights,[2] with the husband's *jus relicti*[3] and with the claim of children to legitim out of their mother's estate[4] cannot be repealed for the present, although we hope that it will eventually be possible to supersede them by new or restated provisions on the law of succession. We therefore **recommend:**

5. (*a*) Sections 6 and 16 of the Conjugal Rights (Scotland) Amendment Act 1861, the whole of the Married Women's Property (Scotland) Act 1881 and the whole of the Married Women's Property (Scotland) Act 1920 should be repealed except in so far as they relate to the law of succession.

   (*b*) The provisions of the 1881 Act and 1920 Act on the *jus mariti* and *jus administrationis* should be replaced by a simple provision, restating the present law, to the effect that marriage does not of itself, subject to any enactment to the contrary and with an express saving for the law of succession, affect the legal capacity of the parties or their respective rights in relation to their property. (Paragraphs 4.17 and 4.18; Clauses 1 and 4 and Schedule.)

Application for distribution of property otherwise than on divorce

4.19 In the consultative memorandum we invited views on the question whether a separated spouse who did not wish, or who did not yet have grounds for, a divorce should be able to apply to the court for a redistribution of the spouses' property as between themselves. We pointed out that in a number of foreign countries an application for a sharing of property could be made in circumstances short of divorce. The scheme on which we invited views in the memorandum was one whereby:

(*a*) a spouse could apply for a redistribution of property if the spouses were separated and there was no reasonable prospect of a resumption of cohabitation;

(*b*) the orders which could be applied for under the scheme would be limited to orders for the payment of a capital sum or the transfer of property;[5]

(*c*) the principles governing the amount of an award, if any, would be the principles of fair sharing of matrimonial property (as defined) and of fair recognition of contributions and disadvantages, (as defined) recommended in our Report on *Aliment and Financial Provision*;[6]

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[1]See Anton, *Private International Law* pp. 455 to 464.

[2]1861 Act s. 6. This section also contains a good deal of spent material excluding certain property of a separated wife from the husband's *jus mariti*. This material falls to be repealed.

[3]1881 Act, s. 6.

[4]1881 Act, s. 7.

[5]As the marriage would still subsist the spouse would also have a claim for aliment under the general law.

[6]Scot. Law Com. No. 67, 1981, recommendations 32 and 33.

(*d*) there would be rules to deal with the effect of an award under the scheme on subsequent applications for financial provision on divorce (one possibility being that, subject to the rule in the following paragraph, an award under the scheme would bar any subsequent application under the same principles of divorce);

(*e*) there would be rules to deal with the effect of a resumption of cohabitation after an award (one possibility being that an award under the scheme would not prevent a subsequent application for an order relating to property acquired or events occurring during a period of resumed cohabitation); and

(*f*) there would be rules on jurisdiction (one possibility being that the rules would be similar to those recommended in our Report on *Financial Provision after a Foreign Divorce*[1]).

4.20 There was a mixed response to this question on consultation. Most commentators favoured the introduction of a new remedy on the above lines but a significant minority did not. Those who gave reasons for favouring the suggested new remedy argued that the same remedies in relation to property should be available to permanently separated spouses as to divorced spouses and that this would give the disadvantaged spouse a much better bargaining position in negotiations between the spouses and might reduce the risk of assets being dispersed prior to divorce. Some of those who opposed the suggested new remedy argued that it was unnecessary and that, if there was a problem in this area, reform of the grounds for divorce would largely solve it. They pointed out that the legislative provisions required would be quite elaborate, particularly in relation to unexpected resumptions of cohabitation and subsequent divorce. Other opponents of the suggested new remedy doubted whether a judge could reasonably be expected to decide whether a resumption of cohabitation was unlikely, pointing out that in practice an obstinate pursuer would simply have to repeat "I am not going back", with a degree of conviction, to leave the court with little alternative but to hold that the grounds for a redistribution of property were established. They also argued that the proposed new remedy would give a discontented spouse a positive financial incentive to make out that the marriage had broken down and that, given the possibilities of resumptions of cohabitation and subsequent divorce, the proposal might lead to recurrent litigations between the parties and an unsatisfactory over-all result. Finally, they pointed out that, if the separated spouse retained his or her full succession rights in relation to the other, the results of an award on the subsequent death of the defender spouse would be seen as unfair to the defender's heirs.

4.21 We have reconsidered this question in the light of the comments made on consultation. An important question, in view of the difficulties and disadvantages which have been pointed out to us, is the extent of the need for a new remedy of this type. This should not be overestimated. In many cases where spouses are separated in such circumstances that a resumption of cohabitation is unlikely, there will be grounds for immediate divorce.[2] In

[1]Scot. Law Com. No. 72 (1982), recommendation 2.

[2]Adultery, or behaviour such that it would be unreasonable to expect the pursuer to cohabit with the defender or, in cases where the parties have been living apart for some time, desertion followed by two years' non-cohabitation. See Divorce (Scotland) Act 1976, s. 1(2)(*a*), (*b*) and (*c*).

some cases where there is no such ground available a pursuer will be able to obtain a divorce on the ground of two years' separation coupled with the consent of the defender to a divorce.[1] The case where a lengthy delay in obtaining a redistribution of property may be anticipated is where the pursuer has to rely on five years' separation, without the defender's consent.[2] There is much force, however, in the suggestion put to us on consultation that reform of the grounds for divorce would be a better remedy for this situation than introducing a whole new set of provisions for a redistribution of property between the spouses in advance of divorce. The Royal Commission on Legal Services in Scotland has recommended:

> "that Parliament should consider the proposition that there should be only one category of divorce based on separation; that this category should not require consent; and that the period of separation which would establish evidence of irretrievable breakdown of marriage should not be longer than two years. If this proposition were accepted there would be no point in retaining the 'desertion' ground. We would not, however, suggest abolishing the adultery and intolerable conduct grounds, since we think that these should still be available even though there has not been two years' separation".[3]

Reform on these lines would not only meet the criticism that some separated spouses may have to wait for five years before being able to obtain a property distribution but would also meet the criticism that, under the present law, a pursuer may have to accept a smaller financial settlement as the price of the defender's consent to an early divorce. It is also worth noting that the separated spouse is not entirely without remedies under the present law. He or she has, or may have, a claim for aliment. His or her occupancy rights in the matrimonial home may be enforced by the court even if the home belongs to the other spouse, and he or she may be given the right to use the furniture and plenishings in the home, even if they belong to the other spouse.[4] He or she may, after raising an action for aliment, apply to the court for an order setting aside or interdicting disposals of property by the other spouse for the purpose of defeating any claim the applicant might have for financial provision on divorce.[5]

4.22 The conclusion we have reached is that there is no substantial need for an additional remedy relating to property redistribution between spouses in circumstances short of divorce. The fundamental disadvantage of any such remedy would be that it would be a final settlement in a situation where the marriage would not be finally dissolved. This would be particularly clear if, in order to meet the point about succession rights mentioned above, an award were to cut off the successful applicants' succession rights. We believe that it is better that a final re-allocation of property as between the spouses should take place only on the final dissolution of the marriage. We therefore make no recommendation for any additional remedy of this nature for circumstances short of divorce.

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[1]Divorce (Scotland) Act 1976 s. 1(2)(*d*).
[2]Divorce (Scotland) Act 1976, s. 1(2)(*e*).
[3]Report, Vol. 1, para. 10.23, Cmnd. 7846 (1980).
[4]Matrimonial Homes (Family Protection) (Scotland) Act 1981, ss. 1 to 3.
[5]Divorce (Scotland) Act 1976, s. 6.

Unmarried cohabiting couples

4.23 We expressed the provisional view in the consultative memorandum that a scheme of statutory co-ownership of the matrimonial home could not apply to unmarried couples cohabiting as man and wife.[1] Such a scheme would involve fixed property rights and this would be inappropriate for a relationship as varied as cohabitation. It would presumably be unacceptable to allow a half share in a person's house to be acquired by a person of the opposite sex after, say, one week of cohabitation as man and wife. A minimum duration of two or three years would probably have to be required. Even then, however, there would be practical difficulties in deciding whether a couple came within the definition, and in applying any provisions allowing "opting out" before the marriage. Third parties dealing with one of the parties would be placed in an impossible position. Similar objections applied, in our view, to extending a scheme for statutory co-ownership of household goods to unmarried cohabiting couples.[2] They would apply *a fortiori* to any more general community property scheme.

4.24 In relation to the minor reforms which we are recommending, the objections to applying the proposed rules to unmarried cohabiting couples are not so strong. There is, however, a difficulty in knowing where to draw the line. There is, in our view, no justification for any special presumptions in cases where two people simply share a flat as, for example, students often do. In this type of case their financial situations are likely to be very largely independent. At the other extreme there may well be a justification for special presumptions in cases where a couple live together in a way which is indistinguishable from marriage, except that they have never taken on the legal bond of matrimony. We can see no objection in principle to having special presumptions (e.g. on co-ownership of household goods acquired during the cohabitation for the couple's joint domestic purposes) in this type of case but we can see difficulties in defining the circumstances in which they apply. Marriage applies a convenient criterion of long-term commitment to a shared life and, in the absence of consultation on the circumstances in which our proposed rules should extend beyond marriage, we prefer to make no recommendations in this Report on unmarried cohabiting couples.

PART V SUMMARY OF RECOMMENDATIONS

1. The law of Scotland on the property of married couples should continue to be based on the principle of separate property during marriage (subject to some special rules). This should be supplemented by improved rules for the division of property on the dissolution of a marriage by death or divorce (topics with which we are not concerned in this Report). There should be no introduction of statutory co-ownership of the matrimonial home, household goods or other property.
(Paragraph 3.14; Clause 1.)

2. (*a*) If any question arises, whether during or after the marriage, as to the respective rights of a husband and wife to the ownership of any item

[1]Consultative Memorandum, Appendix, Chap. 1, para. 76.
[2]Consultative Memorandum Appendix, Chap. 2, para. 36.

which forms, or formed, part of the household goods in their matrimonial home while they are or were living together, there should be a presumption that the item is owned by both of them in equal shares.

(*b*) The presumption should, subject to the qualification in the following paragraph, be rebuttable by proof that the item does not belong to both spouses in equal shares.

(*c*) The presumption should not, however, be rebuttable merely by proof that the goods were purchased from a third party, while the spouses were married and living together, by one spouse alone or by both spouses in unequal shares.

(*d*) "Household goods" should be defined as goods kept or used for the joint domestic purposes of the spouses. The definition should, however, expressly exclude (i) money or securities, (ii) cars, caravans and other road vehicles (even if they could be said to be kept or used for the spouses' joint domestic purposes) and (iii) domestic animals.

(*e*) "Matrimonial home" should be defined as in section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 with minor modifications to remove the reference to the home being provided or made available by one or both of the spouses and to make it clear that it covers only a home which is, or has been, the joint residence of *both* of the spouses.
(Paragraph 4.8; Clause 2.)

3. (*a*) A conveyance by one spouse to the other of a share in the matrimonial home should be exempt from stamp duty.

(*b*) The recording dues or registration fees in relation to such a conveyance should be at a low fixed rate, rather than being determined by the value of the property transferred.
(Paragraph 4.14; not dealt with in draft Bill.)

4. The provisions in the Married Women's Property Act 1964 on allowances for the expenses of the matrimonial home or for similar purposes should apply to husbands and wives equally.
(Paragraph 4.16; Clause 3.)

5. (*a*) Sections 6 and 16 of the Conjugal Rights (Scotland) Amendment Act 1861, the whole of the Married Women's Property (Scotland) Act 1881 and the whole of the Married Women's Property (Scotland) Act 1920 should be repealed except in so far as they relate to the law of succession.

(*b*) The provisions of the 1881 Act and 1920 Act on the *jus mariti* and *jus administrationis* should be replaced by a simple provision, restating the present law, to the effect that marriage does not of itself, subject to any enactment to the contrary and with an express saving for the law of succession, affect the legal capacity of the parties or their respective rights in relation to their property.
(Paragraphs 4.17 and 4.18; Clauses 1 and 4 and Schedule.)

APPENDIX A

Married Persons' Property (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

SCHEDULE

Enactments repealed.

DRAFT

OF A

BILL

TO

Make provision with respect to property rights and legal capacity of married persons.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Marriage not to affect property rights or legal capacity.

1.—(1) Subject to the provisions of any enactment (including this Act), marriage shall not of itself affect—

(*a*) the respective rights of the parties in relation to their property;

(*b*) their legal capacity.

(2) Nothing in subsection (1) affects the law of succession.

Presumption of joint ownership of household goods.

2.—(1) If any question arises (whether during marriage or after its dissolution) as to the respective rights of ownership of husband and wife in any household goods, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the household goods in question.

(2) The contrary shall not be treated as proved by reason only that when the parties were married and living together the goods in question were purchased from a third party by the husband alone or the wife alone or by both in unequal shares.

(3) In this section—

(*a*) "household goods" means any goods (including decorative or ornamental goods) kept or used at any time in any matrimonial home for the joint domestic purposes of the husband and the wife, other than—

(i) money or securities;

(ii) any motor car, caravan or other road vehicle;

(iii) any domestic animal.

Clause 1

This clause, when read with the Schedule to the Bill, reflects the general policy of recommendation 1 and implements the specific policy of recommendation 5. Its general effect is to restate the law as it has been since the Married Women's Property (Scotland) Acts 1881 and 1920 but in more concise, modern and sexually neutral language.

Subsection (1)

This subsection replaces provisions of the Married Women's Property (Scotland) Acts 1881 and 1920 which are repealed in the Schedule. It restates the general principle of separate property during marriage and independent legal capacity of both parties to the marriage. A saving is made for any special statutory rules, for example, those on household goods and savings from housekeeping allowances (cf. clauses 2 and 3) and on occupancy rights in the matrimonial home. The provision is not intended to affect the rule of law prohibiting, and rendering invalid, a marriage between parties one of whom is already married. This, it is thought, is an independent rule rather than a question of legal capacity and would not be affected by the subsection.

Subsection (2)

Marriage has an effect on the parties' property rights in so far as it gives the surviving spouse rights in the estate of the other. Most of the surviving spouse's rights under the law of succession are now statutory and would be covered by the saving for the effect of enactments. This is not, however, true of all (e.g. the widow's *jus relictae*) and accordingly subsection (2) is necessary. No special saving is necessary for the financial and property consequences of divorce because these are now entirely statutory and are covered by the saving for the effect of enactments. The rules on the effect of marriage on curatory will also be entirely statutory if the Law Reform (Husband and Wife) (Scotland) Bill, presently before Parliament, is enacted.

Clause 2

This clause implements recommendation 2. It introduces a presumption that a married couple's household goods are owned by them both in equal shares.

Subsection (1)

This subsection introduces the presumption. It has to be read along with the definition of "household goods" in subsection 3(*a*) and the definition of "matrimonial home" in subsection 3(*b*) which (because of the references to "joint domestic purposes" and "joint residence") have the effect that the presumption will normally apply only in relation to goods in the matrimonial home while the parties are or were living together. Except in circumstances falling within subsection (2), the presumption will be rebutted by proof of actual ownership of the goods in question.

Subsection (2)

The purpose of this subsection is to prevent the presumption of co-ownership being affected by the mere accident that one spouse rather than the other happens to buy an item forming part of their household goods. It is confined to purchases made while the parties are living together during the marriage. Conversely, the presumption will be rebutted by proof of purchase before marriage or during a period of separation.

Subsection (3)

This subsection defines "household goods" and "matrimonial home". The reference in paragraph (*a*) to decorative or ornamental goods is designed to make it clear that items like pictures and ornaments may be included within the category of household goods. The care and upbringing of their children is likely to be the most important joint domestic purpose of a married couple, so that goods kept or used for this purpose will normally fall within the definition. The definition of "matrimonial home" is based on that in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 22 with minor modifications.

(*b*) "matrimonial home" means any house, caravan, houseboat or other structure used at any time as the joint residence of the husband and the wife, and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure.

Presumption of joint ownership of money and property derived from housekeeping allowance.

3. If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband or the wife for their joint household expenses or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares.

Repeals.

4. The enactments specified in the Schedule to this Act shall be repealed to the extent specified in the third column of that Schedule.

Short title, commencement and extent.

5.—(1) This Act may be cited as the Married Persons' Property (Scotland) Act 1984.

(2) This Act shall come into force at the expiration of a period of three months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

Clause 3

This clause implements recommendation 4. The technique used is to repeal the Married Women's Property Act 1964 so far as it extends to Scotland and to re-enact the provision in this Bill, amended to apply to allowances made by either spouse. The only other change from the drafting of the 1964 Act is in the reference to "joint household expenses" rather than "expenses of the matrimonial home". This is to avoid using the expression "matrimonial home" in two different senses in successive clauses (cf. clause 2(3)(*b*) where "matrimonial home" is defined for the purposes of the presumption of joint ownership of household goods).

SCHEDULE

Section 4

Enactments Repealed

Chapter	*Short Title*	*Extent of Repeal*
24 & 25 Vict. c.86	Conjugal Rights (Scotland) Amendment Act 1861	In section 6, the words from "be held and considered" to "as if she were unmarried, and"; the words "the same shall"; and the words "provided, that if any such wife" to the end of the section. Section 16.
44 & 45 Vict. c.21	Married Women's Property (Scotland) Act 1881	The whole Act, except sections 6 and 7.
10 & 11 Geo. 5. c.64	Married Women's Property (Scotland) Act 1920	The whole Act.
1964 c.19	Married Women's Property Act 1964	The whole Act.

Schedule

Conjugal Rights (Scotland) Amendment Act 1861

These repeals get rid of spent and obsolete provisions. The Commission have already recommended repeal of that part of section 6 dealing with the husband's liability for his separated wife's obligations and necessaries (see draft Family Law (Financial Provision) (Scotland) Bill, Schedule 2, appended to Scot. Law Com. No. 67). The net result of these recommendations in relation to section 6 is to repeal the whole of the section, except for the provision that the estate of a judicially separated wife shall devolve on intestacy as if her husband had predeceased her.

Married Women's Property (Scotland) Act 1881

This repeal gets rid of provisions which, in so far as they are not spent, are replaced by the more concise and general terms of clause 1. The Commission have already recommended the repeal of section 1(4), and its replacement by a more general provision, in an earlier Report (see draft Bankruptcy (Scotland) Bill, clause 48(3)(*b*) and Schedule 7, appended to Scot. Law Com. No. 68) but, if this present Report is implemented before Scot. Law Com. No. 68, section 1(4) should be preserved for the time being. The sections which are to remain deal with legal rights (see paragraph 4.18).

Married Women's Property (Scotland) Act 1920

This repeal gets rid of provisions which, in so far as they are not spent, are replaced by the more concise and general terms of clause 1. Section 2 is being repealed in the Law Reform (Husband and Wife) (Scotland) Bill which is presently before Parliament. The Commission have already recommended the repeal of section 4, and its replacement by a more general provision, (see draft Family Law (Financial Provision) (Scotland) Bill, clauses 1 and 4 and Schedule 2, appended to Scot. Law Com. No. 67) and the repeal, without replacement, of the proviso in section 5 (see draft Bankruptcy (Scotland) Bill, Schedule 7, appended to Scot. Law Com. No. 68). If this present Report is implemented before Scot. Law Com. No. 67, section 4 should be preserved for the time being.

Married Women's Property Act 1964

This Act is replaced, so far as Scotland is concerned, by clause 3. It will remain in force for England and Wales.

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 57

Aberdeen University, Faculty of Law
British Insurance Association
Derek J. Buchanan, Aberdeen
Kenneth Buchanan, Perth
Buckhaven and Methil Citizens' Advice Bureau
Building Societies' Association
Church of Scotland, Women's Guild
Committee of Scottish Clearing Bankers
Convention of Scottish Local Authorities
George C. Cunningham, Edinburgh
Dundee Association of University Women
Elizabeth Dick, Dundee
Edinburgh Central Citizens' Advice Bureau
(with individual comments by:
Marjorie Barbour
Arthur Hales
Mary Hammersley
Brenda James
Helen Kerr
Margaret MacPherson
Marjory H. McFadyen
Betty Smith
Francis Strachan)
Faculty of Advocates
Glasgow Association of University Women
Professor W. M. Gordon, Faculty of Law, Glasgow University
J. M. D. Graham, Solicitor, Glasgow
Dr. George Hammersley, Edinburgh
Law Society of Scotland
James C. MacLeod, Bearsden
Mothers' Union of Scotland
Musselburgh Citizens' Advice Bureau
Katherine O'Donovan, University of Kent
M. R. Phillips, Penicuik
Scottish Association of Citizens' Advice Bureaux
Scottish Convention of Women
Scottish Council for Single Parents
Scottish Women's Rural Institutes
Sheriffs' Association
Society of Writers to Her Majesty's Signet
Margaret Walker, Glasgow

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