

Scottish Law Commission

(SCOT. LAW COM. No. 60)

REPORT ON OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME AND DOMESTIC VIOLENCE

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by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965*

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SCOTTISH LAW COMMISSION

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

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, we submitted on 14th May 1968 our Second Programme for the examination of several branches of the law of Scotland with a view to reform. Item No. 14 of that programme requires us to proceed with an examination of family law. In 1976 the then Secretary of State for Scotland and the then Lord Advocate requested us to examine and report, first, on possible changes in the law to give additional protection to a spouse threatened with violence by the other spouse, and, second, on whether a statutory right of occupation of the matrimonial home should be introduced in Scotland.

In pursuance of Item No. 14 and the above request we have examined the law relating to occupancy rights in the matrimonial home and domestic violence. We have the honour to submit our proposals for the reform of this branch of the law.

J. O. M. HUNTER
Chairman of the Scottish Law Commission

6th May 1980

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REPORT ON OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME AND DOMESTIC VIOLENCE

PART I INTRODUCTION

1.1 Our Second Programme of Law Reform envisages in Item 14¹ the reform of family law. In pursuance of work on this Item we issued first a Memorandum² on Aliment and Financial Provision and some time thereafter a Memorandum on Occupancy Rights in the Matrimonial Home and Domestic Violence.³ We propose to issue a third consultative Memorandum on family property law in due course. In 1976 the then Secretary of State for Scotland and the then Lord Advocate requested us,⁴ partly in response to the Report of the Select Committee on Violence in Marriage,⁵ to give early consideration in our review of family law and to report on, first, possible changes in the law to give additional protection to a spouse threatened with violence by the other spouse, and, second, the question whether a statutory right of occupation in the matrimonial home should be introduced in Scotland. The present report is issued in pursuance of our Programme Item and the Government's request.

1.2 The two subjects with which this report deals, namely occupancy rights and civil remedies against domestic violence, interact upon each other in one important respect. A legal system which denies, as Scots law presently denies, any right of occupancy to a spouse as such, may indirectly encourage toleration by one spouse of violence by the other spouse. A wife who may only occupy the family home while her husband permits it may tolerate violent conduct by that husband as the necessary price of maintaining that occupancy for herself and her children. Moreover, if the home is occupied under a public sector tenancy, she may prefer to retain that precarious occupancy rather than leave and await rehousing by a local authority. We believe that our proposals for the conferring of a statutory occupancy right on such a wife (to which we add proposals for actual exclusion of a violent husband from the home) may help to resolve the disquieting problem of toleration of domestic violence, and we have therefore welcomed the opportunity to deal with occupancy rights and domestic violence together.

1.3 In Part II of this report we make our basic recommendation as to occupancy rights: namely that a statutory right to occupy the matrimonial home should be conferred upon a spouse by virtue of his or her status as a spouse. We explain that we seek to confer such an occupancy right as an automatic incident of marriage and do not envisage it merely as a right which may be conferred in circumstances where marital breakdown makes its absence particularly critical. We also consider in Part II those subsidiary rights which are required so as to ensure that the basic right of occupancy can be effectively

¹(1968) Scot. Law Com. No. 8.

²Memorandum No. 22, (1976).

³Memorandum No. 41, (1978).

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

⁵H.C. 553 (Session 1974-75), paras. 55-57.

enjoyed. This leads us to distinguish between those subsidiary rights which can, like the basic right, be implied by law and those whose exercise should require to be authorised by the court, and to consider the various court orders which may be required in connection with the basic right and with the rights which are subsidiary to it. It also leads us to complement our proposals as to occupancy rights in the home with a scheme for the court to make orders granting use and possession of furniture and furnishings in a matrimonial home. We also consider whether a procedure should be available to enable expenditure relating to a matrimonial home (whether that expenditure results from the exercise of rights proposed by us or otherwise) to be apportioned between spouses.

1.4 We are aware that where, as is increasingly the case, there is co-ownership of a matrimonial home, the co-owners will not require the statutory occupancy rights which we propose to confer. We think, however, that some of the proposals which we make for the regulation of occupancy rights of spouses who are not co-owners may helpfully be extended to spouses who are co-owners and we make recommendations to that effect.

1.5 Although our proposals relate to occupancy rights and not to property rights in the matrimonial home, we believe that in the case of tenanted matrimonial homes it would be logical and practical to empower the court to order the transfer of the tenancy from one spouse to the other. We deal with this matter in Part V of this report and we take the opportunity there to recommend that the power to order such judicial transfers of tenancies should be available to the Court of Session in divorce proceedings. This latter proposal was originally suggested in our Memorandum on Aliment and Financial Provision⁶ and if implemented it would fill a generally acknowledged gap in the powers of the Court of Session on divorce.

1.6 In Part III of this report we consider whether the rights of occupancy which we propose should affect the validity of dealings between the owner spouse and a third party. We believe that the occupancy right, to be effective, must be a right which can be enforced against such a third party no less than against the other spouse, but we recognise that such an extension of occupancy rights can only be justified if satisfactory procedures are devised to notify third parties of the existence of the occupancy right, and to enable the court to sanction dealings overriding occupancy rights in appropriate circumstances. The devising of appropriate procedures has caused us considerable difficulty not least because those procedures will require to harmonise both with existing conveyancing practice and with the new scheme of registration of title.

1.7 We deal with our recommendations as to the improvement of civil remedies for domestic violence in Part IV of this report. The major recommendation which we make is that the court should be empowered, in certain circumstances, to make an exclusion order suspending a violent spouse's own right of occupancy in the matrimonial home. However, we also make recommendations as to the scope and enforcement of the traditional remedy of interdict. Our main concern in relation to interdicts has been to ensure that the police can be

⁶Proposition 67(c) at para. 3.27 and proposition 68 at para. 3.52.

involved in the enforcement of matrimonial interdicts, and this leads us to recommend that the civil court which pronounces an interdict against domestic violence should be able to attach a power of arrest without warrant in the event of a breach of that interdict. We also discuss in Part IV the difficult question of whether the rules as to corroboration of evidence should be relaxed where a perpetual matrimonial interdict is sought or in the case of proof of breach of a matrimonial interdict (whether interim or perpetual).

1.8 We have thought it appropriate to consider whether the benefit of our proposals as to occupancy rights and civil remedies against domestic violence should extend to unmarried cohabiting partners whose relationship has characteristics similar to the relationship of spouses. We deal with this question in Part VI of this report where we recommend that the court should be empowered to grant occupancy rights and exclusion orders of limited duration in the case of such unmarried partners.

1.9 In preparing our Memorandum and this report we have profited from the experience gained in England and Wales in operating the system of statutory occupation rights introduced by the Matrimonial Homes Act 1967; an Act which implemented, albeit with substantial modifications, recommendations in the Morton Report⁷ which were intended to apply to Scotland⁸ also. In framing our recommendations relating to domestic violence we have studied the Domestic Violence and Matrimonial Proceedings Act 1976 which amended the 1967 Act and introduced new remedies against domestic violence; the Domestic Proceedings and Magistrates' Courts Act 1978 which strengthened the powers of magistrates' courts in England and Wales to deal with domestic violence; and the Family Violence (Scotland) Bill.⁹ We have also had regard to the proposals of the Finer Report¹⁰ in the housing problems of one parent families; and to the proposals¹¹ and recommendations¹² of the Law Commission for England and Wales for amending the law on occupancy rights and giving possessory rights in the furniture and furnishings of the matrimonial home.

1.10 The common law of Scotland as to occupancy rights in the matrimonial home contrasts sharply with the provisions of other legal systems of the Commonwealth and Europe. In the Commonwealth a spouse generally has at common law a personal right of occupancy enforceable against the owner spouse, and in some Commonwealth countries legislation protects a spouse's occupancy against third parties also. Many Commonwealth legal systems have either enacted or are officially examining legislation designed to achieve a more equitable division of the matrimonial home and its contents, and as an incident of such legislation (or proposed legislation) provision is made (or is to be made) for the statutory protection of occupancy rights in the home. The majority of

⁷*Report of the Royal Commission on Marriage and Divorce* (1956) Cmd. 9678, Recommendations 78-81.

⁸*Ibid.*, Recommendations 59-62 (Scottish).

⁹A private members Bill introduced by Mr George Reid, M.P. in March 1979.

¹⁰*Report of the Committee on One-Parent Families* (1974) Cmnd. 5629, Part 6 Housing.

¹¹Working Paper No. 42 on *Family Property Law* (1971) paras. 1.3 to 1.26.

¹²*Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*, (1978) Law Com. No. 86.

West European countries have legislative provisions of various kinds limiting the power of one spouse to dispose of property intended for the joint use of those spouses without the consent of the other spouse.¹³ At the Council of Europe conference on family law held in Vienna in 1977 it was decided to propose¹⁴ that the Council should “take the necessary steps to reach a harmonisation or at least bring about a more common approach in the European laws concerning the powers of spouses over property for their common use, in particular with regard to the family home and the household contents; and the consideration of prohibiting either spouse from unilaterally disposing of this property and the provision of effective sanctions.” Our recommendations in this report are in consonance with this recommendation and with trends in other legal systems.

1.11 This report only deals with the question of occupancy rights in the matrimonial home and the right to use and possess furniture and plenishings contained in it. We intend to consider the possible sharing of title to such assets by spouses in a future review of family property law. While it might have been preferable to have dealt with both occupancy and title together, we considered that to do so would be likely to delay unduly essential and urgently needed reforms in the field of occupancy. Moreover, sharing of title is only of general importance in the case of owner-occupied homes (which represent just under a third of the total housing stock in Scotland), and the need for occupancy rights may arise in respect of a matrimonial home which is not in fact owned by either of the spouses.

1.12 In framing our recommendations we have had regard to the comments which we received upon the proposals in our Memorandum. That Memorandum elicited many useful comments and criticisms and we are grateful to all those who submitted them.¹⁵ There was general approval of our tentative proposals although several of those consulted disagreed sharply with our proposed method of achieving the agreed results. While we have in the main adhered to our original proposals, some changes in substance and several modifications in detail have been made in response to the comments received.

1.13 In order to avoid phrases such as “the entitled spouse” for the spouse who has the legal right or permission to occupy a matrimonial home and the converse “the non-titled spouse”, for purposes of presentation we shall assume (since this will most often be the case) that where one spouse has the legal right or permission that spouse is the husband. This assumption also eliminates the need for phrases such as “he or she”, “him or her” and “his or hers”. We would emphasise, however, that our discussion and recommendations are equally applicable if the situation is reversed and the wife is the spouse legally entitled or permitted to occupy the home.

¹³Unpublished Council of Europe report on *Powers of spouses over property for the common use and property rights of the surviving spouse* (Rapporteur: Professor A Rieg, Strasbourg) being paper CJ-DF (77)3 prepared for the European Conference on Family Law held at Vienna on 19-22 September 1977.

¹⁴Report of Commission III of the Conference.

¹⁵A list of those who submitted comments is contained in Appendix II.

PART II OCCUPANCY RIGHTS IN THE MATRIMONIAL HOME

Preliminary

2.1 One of our basic recommendations in this report is that a spouse should have a right in that capacity to occupancy of the matrimonial home notwithstanding that he or she has no legal title, as owner or tenant or otherwise, to occupy that home. In this Part of our report we consider the nature of this occupancy right and the consequences which flow from conferring such a right on a spouse.

Occupancy of the matrimonial home

2.2 Where only one of the spouses has the legal title or liberty to occupy the matrimonial home Scots law¹ confers no right on the other spouse to occupy that home, and the other spouse is in law no more than a precarious occupier, whose ability to occupy the matrimonial home may be withdrawn at will by the owner spouse.² Indeed, where the permission of the owner spouse is withdrawn, the law permits the spouse without any occupancy right to be turned out of the matrimonial home³ or ejected summarily by officers of court after a decree of ejection has been obtained.⁴

2.3 We think that the present law cannot be justified and that it has undesirable consequences. We say this for three main reasons. First, the law fails to have proper regard to the matrimonial relation between the spouses. The law, by making the right to occupy the matrimonial home conditional upon the property title to that home, effectively treats spouses not as spouses but as if they were strangers. It equates a wife who has no property title to a precarious occupier and so denies to such a wife the ability to regard the family home as a place in which she will be able to live and bring up a family secure from the possibility of sudden dispossession by her husband. Secondly, a law which may make a wife dependent upon her husband as regards the right to occupy the family home may thereby effectively oblige such a wife to endure intolerable conduct at the hands of her husband as the price of herself and her children remaining in occupation. In this way the law relating to occupancy of a matrimonial home may contribute to the widespread toleration by wives of that domestic violence against which we seek to provide a civil remedy in Part IV of this report. Thirdly, the inequities in the present law are unequal in their effects as between men and women; for husbands as a class are much more likely to be owners of a matrimonial home than wives.

2.4 In our Memorandum,⁵ we proposed that a spouse who has no legal right or liberty to occupy the matrimonial home should be accorded a personal right of occupancy in the home, and that this right should arise by operation of law. We intend that a personal occupancy right should be available to whichever spouse does not have a legal right or liberty to occupy the matrimonial home,

¹Clive and Wilson, *Husband and Wife* (1974) Chapter 10.

²*Maclure v. Maclure* 1911 S.C. 200. In *Millar v. Millar* 1940 S.C. 56, a wife ejected her husband from a home owned by her.

³*Sutherland v. Sutherland* (1897) 13 Sh. Ct. Rep. 209.

⁴*Macpherson v. Macpherson* (1950) 66 Sh. Ct. Rep. 125.

⁵Para. 2.13.

but for the reasons explained above⁶ we assume below that the husband will have that legal right and that the wife will require the occupancy right.

2.5 It was represented by some of those whom we consulted that the problems created by the present law could be resolved without making an occupancy right a necessary incident of marriage, and thereby requiring the legal incidents of such occupancy rights to be defined in detail. They apprehended that the need for occupancy rights was likely to arise only in circumstances where a breakdown of the marriage itself had either occurred or was likely to occur, and argued that it would be sufficient if the court could be empowered to grant a temporary occupancy right in such circumstances of marital crisis, pending the making of permanent arrangements for the matrimonial home on the termination of the marriage.

2.6 We adhere, however, to the view expressed in our Memorandum. While we recognise that the need for a personal occupancy right may arise in particularly acute form where the spouses are estranged or are in dispute, we believe it to be fundamentally important that occupancy rights should not arise in circumstances of marital crisis only, but should form part of the normal incidents and expectations of a marriage. We think there are two particular reasons why occupancy rights should not in principle depend upon a court application. First, we do not think that a wife who seeks an occupancy right should be obliged to take the step, which may be seen by her husband as hostile or at least unfriendly, of going to court. Secondly, and more importantly, we do not regard a right to apply to a court for a discretionary grant of a right of occupancy as being an acceptable alternative to an occupancy right arising by operation of law. We think that a wife should be entitled to know with certainty what legal rights of occupancy are conferred upon her and should not merely have the possibility of obtaining such rights from a court on an *ad hoc* basis.

2.7 We also believe that there are compelling practical arguments against making the grant of occupancy rights dependent upon a successful application to the court by a wife. A right granted by the court might be granted too late in the day to provide an effective remedy to the wife. A husband, particularly in cases where marital relations were deteriorating, might in anticipation of such a court application exercise his rights as owner to sell the home or take other steps in relation to the home, by virtue of which any future grant of occupancy rights to the wife would be effectively defeated or prejudiced.

2.8 The creation of a right of occupancy which will arise as an automatic incident of marriage does of course require the formulation of detailed rules to regulate the scope and operation of that right. We have tried to keep in mind in formulating those rules the need to avoid the creation of any unduly complex and elaborate statutory scheme.

2.9 We do not envisage that a husband should require to have the legal title of an owner or tenant of the matrimonial home before a derivative right of occupancy can be conferred on his wife. We think that so long as the husband is

⁶Para. 1.13.

legally able in any capacity to occupy a matrimonial home the wife should have a derivative right of occupancy of the same character. Thus, where a husband has a life interest in a matrimonial home which is trust property, or has a proper life interest in a matrimonial home,⁷ the wife should have an equivalent right of occupancy. Similarly, where the husband's occupancy derives not from any right but from a mere permission to occupy granted by a third party, the wife should herself be entitled to occupancy of the matrimonial home while that permission endures. Thus a wife would be entitled to occupy a matrimonial home notwithstanding that it had vested in a trustee in bankruptcy on the husband's insolvency if that trustee permitted the husband to continue to occupy on an informal basis; and a wife would be entitled to occupy a matrimonial home which was trust property but which the husband was able to occupy by virtue of a discretionary permission from the trustees.

2.10 We must emphasise, however, that the right of occupancy or the permission to occupy, which we propose to confer upon a wife, will in no circumstances be a higher right or a more extensive permission than the right or permission in the husband from which it derives. Thus, where the husband was permitted to continue in occupation by the trustee in bankruptcy, the wife's derivative right would automatically cease when that permission was withdrawn on an eventual sale by the trustee. The principle that the wife's occupancy right should be co-extensive with her husband's has a general application to the proposals in this section of our report.

2.11 A case may arise in which the spouse who has a legal title or liberty to occupy a matrimonial home may have that title or liberty jointly with a third party other than his spouse: for example, a dwellinghouse may be jointly owned or life interest held by a husband and another member of his family, although it is used and occupied as a matrimonial home by the husband and his wife. In such a case the conferring of an occupancy right on the wife would affect not only her husband but also the other member of the husband's family. We think that in such cases the wife should not have an occupancy right unless the relevant third party has waived his right of occupation thus permitting the husband to enjoy, with his wife and children, the exclusive occupancy of the dwelling.

2.12 Social and fiscal reasons now make it increasingly common for matrimonial homes to be jointly owned. Where such joint ownership exists, either in owner-occupied or tenanted property, each spouse will have a full occupancy right by virtue of that joint ownership, and the need for the statutory occupancy right which we propose will accordingly not arise. However, we suggest below⁸ that some of the other proposals which we make in relation to the occupancy rights of spouses should be applied to spouses who are co-proprietors.

2.13 We recommend that where one spouse only is entitled or permitted to occupy a matrimonial home exclusively the other spouse should by virtue of marriage have a statutory right of occupancy.
(Recommendation 2.1)

⁷Gloag and Henderson, *Introduction to the Law of Scotland*, (7th ed.) p. 558.

⁸Para. 2.109.

Definition of a matrimonial home

2.14 Since occupancy rights will only arise in respect of dwellings which are matrimonial homes it is important to establish satisfactorily the distinguishing characteristics of a matrimonial home. We have found that the definition of those characteristics has required much thought. In our Memorandum⁹ we suggested that the essential characteristic of a matrimonial home should be that it was a home in which both spouses either were ordinarily resident, or had at some previous time been ordinarily resident; and it was suggested by some on consultation that a matrimonial home should further require to be a home in which a spouse was currently residing at the date the occupancy right was sought to be exercised. We have come to the view, however, that any definition based upon actual residence may result in excluding certain homes from the scope of occupancy rights notwithstanding that they would properly be described as family residences. For example, if a home could not qualify as a matrimonial home unless both spouses had at one time resided in it, then a house which was purchased by, say, an absent serviceman or merchant seaman as a residence for his wife and family, but in which he never had an opportunity to take up residence himself, would never qualify as a matrimonial home. If it were to be a necessary requirement that the claimant spouse was resident in the dwelling at the time that the occupancy right was sought, this might prevent a wife from claiming an occupancy right in a holiday home or in a house which, while vacant at the relevant time, had previously been the family residence and was expected to become the family residence again. We think that it would be wrong to define a matrimonial home in such a way as to exclude family residences of the kind referred to above. We have, therefore, come to the view that the concept of a matrimonial home should be defined in terms of a dwellinghouse which has been provided as a family residence or has become such a residence. We consider that such a definition will be a practicable one to apply, although we accept that a definition in terms of provision as a family residence may require consideration to be given to matters of intention.

2.15 We think that the occupancy right should not be restricted to the dwellinghouse alone, but should extend to any garden, garage or other ground or buildings ancillary to the dwellinghouse. In most cases the dwellinghouse and its pertinents will be the whole property belonging to the husband. Problems may arise, however, where the home is part of a larger unit, as for example a farmhouse on a farm or the resident owner's rooms in an hotel. We do not think that in such circumstances the wife's right of occupancy should extend to property of the husband other than the part which consists of the home and its pertinents. We recommend therefore that occupancy rights should be expressed to relate to the dwellinghouse and any garden or other ground or buildings used together with or reasonably required for the amenity of the dwellinghouse.¹⁰

2.16 The definition of matrimonial home which we propose in paragraph 2.14 is such that it will be possible for a couple to have more than one such matrimonial home at the same time. A main family residence and a holiday cottage

⁹Para. 2.90.

¹⁰S.8(6)(a) of the Succession (Scotland) Act 1964 defines the extent of a surviving spouse's prior right to a home similarly.

might each qualify as a matrimonial home. So too would two main residences in those cases where a couple kept up more than one house. In our Memorandum¹¹ we asked for views as to whether a wife should be entitled to an occupancy right in more than one matrimonial home at a time. Those consulted who expressed an opinion on this point were almost equally divided. We think, however, that if occupancy rights are to be an incident of marriage it is quite appropriate that they should exist in relation to each and every matrimonial home a couple may possess.

2.17 We recommend that a matrimonial home should be any dwellinghouse provided by one or both of the spouses as a family residence or which is or was used as a family residence and should include any garden, other ground or buildings used along with or reasonably required for the amenity of the dwellinghouse.
(Recommendation 2.2)

Rights subsidiary to occupancy rights

2.18 We recognised in our Memorandum that a wife would not obtain by virtue of a grant of a legal right of occupancy any right beyond the bare right to remain in occupancy of the matrimonial home and to re-enter it if ejected. We stated in our Memorandum¹² that a right of such a limited character would inevitably require to be supplemented by subsidiary rights to take further action in relation to the matrimonial home, and we recognised that questions would then arise both as to the proper extent of any such subsidiary rights, and as to whether they should be implied by law or should be required to be sought from the court.

2.19 In our Memorandum¹³ we referred to the possibility that the wife who had a basic occupancy right might be granted the right to take all action in relation to the home which a co-proprietor could take. We also referred by contrast to the possibility that a wife with a basic occupancy right might be required to apply to the court if she wished to exercise any right in relation to the matrimonial home beyond the basic right to occupy and re-enter. We do not think either of these possibilities is a practical one. It would go beyond the bounds of matrimonial occupancy rights to confer the rights of a co-proprietor on a wife. Conversely, the proper enjoyment of the basic occupancy right would be quite unduly impeded if it were necessary to apply to the court for permission to exercise any subsidiary rights related to the basic occupancy right. What we think is necessary is to ensure that action, without which the basic right of occupancy cannot truly be effectively enjoyed, should be capable of being taken by a wife without need for application to the court; and that a satisfactory procedure should be devised to enable a wife to obtain court authorisation to take action which is not in that category but which is nevertheless closely related to the beneficial enjoyment of the basic right of occupancy.

2.20 In considering the action which a wife may seek to take beyond the exercise of her basic occupancy right, we think it is useful to distinguish between action which directly affects the matrimonial home in the sense that it involves the carry-

¹¹Para. 2.90.

¹²Para. 2.14.

¹³Para. 2.20.

ing out of works on that home, and action which relates to the occupancy of the matrimonial home but does not involve the carrying out of such works. So far as direct action involving the matrimonial home is concerned, we think it is right that a wife should be entitled without any need to make a prior application to the court to effect essential repairs to the matrimonial home. The basic occupancy right would be an empty right if it were not accompanied by a corresponding right to keep the home habitable. The subsidiary right to effect essential repairs on the matrimonial home must, however, be limited to the effecting of those repairs which the husband could himself have legally carried out. Circumstances may arise in which a husband cannot carry out essential repairs on a matrimonial home, as, for example, where the husband's own permission to occupy the home is of such a temporary and limited kind as to disentitle him from carrying out any works on the home during its subsistence.

2.21 We do not think that it would be appropriate for a wife to have an automatic right to carry out works on the matrimonial home which fall into the category of non-essential repairs, alterations or improvements. We think that a wife who wishes to effect such works on property to which she does not have a legal title should not be entitled to do so unless she has obtained prior authorisation from the court. The Court of Session judges on consultation suggested that it might be prudent to limit the circumstances in which the court could be asked to give prior authorisation to such works lest the court find itself resorted to on a general basis to resolve any kind of matrimonial dispute relating to home alterations. We agree with this suggestion and propose that the authorisation of non-essential repairs, alterations or improvements should be subject to the condition that the court considers the works in question to be appropriate for the reasonable enjoyment of the basic occupancy right. The ability of the wife to obtain court authorisation for the carrying out of non-essential repairs, alterations and improvements would be subject to the further condition that her husband could himself have carried out the works in question and that the carrying out of the works would not breach any restrictions binding upon the husband.

2.22 We think that a wife should have a right implied by law to take action for the protection of her basic occupancy right where the action could have been taken by her husband and does not involve the carrying out of works on the matrimonial home. We envisage that this general right would extend to include the payment of periodic outgoings on the matrimonial home such as rent, rates or secured loan instalments; the performance of obligations undertaken by the husband to his landlord in the case of a tenanted matrimonial home; the corresponding enforcement of obligations owed to the husband by that landlord; the defence of proceedings brought by a creditor of the husband and the payment of the husband's debts so as to prevent such proceedings being taken. We stress, however, that this general subsidiary right would require to be exercised for the purpose of protecting the basic occupancy right. For example, while we envisage that the subsidiary right would entitle a wife to defend a proceeding such as an action of removing at the instance of the husband's landlord, we do not envisage that it should extend to entitling the wife to initiate proceedings before a rent tribunal in relation to the rent. The former action would properly be related to the protection of the basic occupancy right whereas the latter would not.

2.23 We propose below¹⁴ that a spouse who has no legal title to furniture and plenishings in a matrimonial home should, nevertheless, be able to obtain from the court an order giving him or her the ability to use such furniture and plenishings in the matrimonial home. We think, therefore, that it would be appropriate that a spouse should have an automatic entitlement to take any action available to the other spouse for the purpose of ensuring the continued use of such furniture and plenishings. Such action would include the payment of hire-purchase payments or similar outgoings (e.g. interest charges), the exercise of an option to purchase under a hire-purchase agreement or the carrying out of essential repairs to the furniture and plenishings. We think that this power could appropriately be exercised by a spouse in the absence of an actual use and possession order, since one object of conferring the power is to protect the furniture and plenishings in anticipation of an application for a court order.

2.24 If a wife is to have a general right to take action in relation to the protection of occupancy of the matrimonial home or the protection of the use and possession of furniture and plenishings that action may affect third parties, such as landlords or creditors, with whom the husband has contracted. We deal separately below¹⁵ with the particular problems which may arise in respect of the involvement of such third parties.

2.25 We recommend that, in the absence of any order of the court relating to the occupancy rights of the spouses, the spouse with statutory occupancy rights in a matrimonial home should have the right to enter the home, the right not to be ejected from the home, and the same right as the other spouse to carry out essential repairs to the home. The court should have power, on application by a spouse with statutory occupancy rights, to authorise non-essential repairs, maintenance or improvements to a matrimonial home, but this power should be limited to such works as the other spouse is entitled to carry out and which the court considers appropriate for the reasonable enjoyment of the applicant spouse's right of occupancy.

(Recommendation 2.3)

2.26 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to take any steps in relation to it necessary to maintain occupancy which the other spouse can take; and that the spouse of an owner or hirer of furniture and plenishings should be entitled to take any steps (including the carrying out of essential repairs) necessary to secure their use and possession in a matrimonial home which the owner or hirer can take.

(Recommendation 2.4)

2.27 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to pay any sums due by the other spouse in relation to the home which are necessary to maintain occupancy; and that the spouse of an owner or hirer of furniture and plenishings should be entitled to pay any sums due by the owner or hirer necessary to secure their use and possession in a matrimonial home.

(Recommendation 2.5)

¹⁴Para. 2.36.

¹⁵Para. 2.52.

2.28 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to perform any obligation incumbent on the other spouse in relation to the home necessary to maintain occupancy.
(Recommendation 2.6)

2.29 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to enforce any obligation in relation to the home which a third party has undertaken to the other spouse to the same extent that the other spouse can enforce the obligation.
(Recommendation 2.7)

Court orders relating to occupancy

2.30 We have dealt above with court orders in the context of the exercise of the subsidiary occupancy rights which we propose. We think, however, that it will be necessary to provide for certain court orders to resolve disputes as to the basic occupancy right notwithstanding that the latter right arises by operation of law. We envisage that such court orders may be sought in two different contexts. First, it is possible that a wife may require to obtain a court order declaring the existence of her basic right of occupancy or an interdict against her husband who seeks to breach her basic rights. Secondly, the concurrent exercise by spouses of the basic occupancy rights which each will have, may well give rise to conflict which will require to be regulated by the court. Indeed, circumstances may arise in which it will be appropriate for the court to restrict the basic occupancy rights of the spouses. A married couple who are awaiting divorce may, for instance, continue by choice or necessity to occupy the same matrimonial home, and it may be appropriate for the court to restrict their respective occupancy rights to separate parts of that home. We deal below¹⁶ with the separate question of the interim orders which may be required pending a declaration or an enforcement of a spouse's basic occupancy rights.

2.31 We recommend that the court should have power on application by either spouse to make orders declaring, enforcing, regulating, restricting or protecting the rights of occupancy (whether statutory or otherwise) of the spouses in a matrimonial home.
(Recommendation 2.8)

Guidelines for the courts

2.32 In our Memorandum¹⁷ we set out a list of those factors (modelled upon those contained for England and Wales in the Matrimonial Homes Act 1967¹⁸) to which the court should have regard in making an order dealing with the occupancy rights of either spouse. These factors were:

- (a) the needs and resources of the spouses;
- (b) the conduct of the spouses in relation to each other and the state of their matrimonial relationship;
- (c) the needs and interests of any dependent children living with either spouse; and
- (d) the extent (if any) to which the dwelling is used for the purpose of a business, trade or profession.

¹⁶Para. 2.45.

¹⁷Para. 2.22.

¹⁸S.1(3).

Our purpose in doing this was to give some guidance to the courts and to promote uniformity in the exercise of the powers we recommend in the preceding paragraph. We thought it important that the courts should exercise their discretion in granting the novel orders which we proposed in as uniform a way as possible, and we believed that the provision of guidelines to the courts would help to this end.

2.33 The guidelines suggested above would be applicable where the court was deciding whether to grant orders enforcing, regulating, restricting or protecting rights of occupancy, but not where the court was asked to declare the existence of a wife's right of occupancy. Such a right arises under our recommendations by operation of law as an incident of marriage, and is not a right granted by a court in the exercise of discretionary powers.

2.34 For reasons which we explain more fully below¹⁹ we now think that the children whose needs may be taken into account by the court should not be limited to children actually living with either spouse. For this purpose the needs of children who might normally be expected to live with either spouse in the home, but who are not in fact so living should be included. We also think that children should not be subject to an upper age limit. It is possible, for example, that a grown-up child may be living at home because of disability. The court should be able to have regard to the needs and interests of such a child.

2.35 We recommend that in considering an application for any order enforcing, protecting, regulating or restricting a spouse's right of occupancy the court should make such order as appears just and reasonable in all the circumstances having regard to:

- (a) **the conduct of the spouses;**
- (b) **the needs and resources of the spouses;**
- (c) **the needs and interests of any children living with, or who could normally be expected to live with, either spouse; and**
- (d) **the extent (if any) to which the matrimonial home is used by either spouse in connection with a business, trade or profession.**

(Recommendation 2.9)

Furniture and plenishings in the matrimonial home

2.36 The problem which we identify above, namely that a wife has as such no right to occupy the matrimonial home is duplicated in relation to the use of furniture and plenishings in the matrimonial home. The spouse who is the legal owner or hirer of furniture and plenishings has under Scots law unfettered rights in regard to them, and the other spouse cannot prevent the spouse with such legal title from removing such furniture and plenishings from the matrimonial home and disposing of them. We noted in our Memorandum²⁰ that the exercise by one spouse of such rights to displenish the matrimonial home might effectively render the matrimonial home uninhabitable, and so defeat the object of granting occupancy rights, and we concluded that it would be necessary to

¹⁹Para. 4.5.

²⁰Para. 7.9.

formulate proposals in relation to furniture and plenishings which could complement our proposals in relation to the matrimonial home itself.²¹

2.37 We suggested in our Memorandum²² two possible schemes by which a spouse might be accorded the use and possession of furniture and plenishings. The first scheme would have required the spouse who desired such use and possession to make an application to the court for a use and possession order. The second scheme proceeded on the basis that each spouse should have an automatic right implied by law to use specified items of furniture and plenishings, and that the spouse who had legal title to any such items should not be entitled to exercise his rights as owner or hirer so as to deprive the other spouse of his or her right of use and possession.

2.38 In our Memorandum²³ we indicated a tentative preference for the second scheme, and the introduction of such a scheme was in fact generally supported on consultation. On reconsideration, however, we have come to the view that difficulties would arise if items such as furniture and plenishings were to be subject to an automatic legal right of possession by each spouse. A scheme which was based on such a joint right of possession would entail that a disposal of furniture or plenishings could be challenged if it were made without the consent of both spouses and that purchasers of such items might therefore require to make enquiries as to whether such consent had been obtained. Also, any scheme which conferred automatic rights in respect of furniture and plenishings would require to define with some exactitude the precise items of furniture and plenishings which were subject to the rights. Moreover it seems to us that although the second scheme would not require an initial application to be made to the court to obtain the right of possession, resort would have to be made to the courts in practice in order to enforce the automatic right of use or in order to recover items disposed of in breach of that right. Practical considerations therefore now incline us to believe that a spouse's right to use and possess furniture and plenishings in the matrimonial home should require to be conferred by the court on the basis of individual applications.

2.39 We refer above to the problem which may arise in defining those items of furniture and plenishings which should be subject to possible joint use and possession. This problem is mitigated under the scheme which we propose by virtue of the fact that the court will make orders for use and possession to suit the circumstances of each individual case, but nevertheless some limitation must be placed upon the scope of the items for which use and possession orders may be sought. We think that use and possession orders should be obtainable only in respect of those items where use and possession is required in order to enable the home in question to be used as a family residence.

²¹Proposals for the regulation of the use and possession of furniture and plenishings were included in the Morton Report in 1956 (Cmd. 9678) in Recommendations 59–62. Proposals have also been made by the Law Commission of England and Wales in their *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*, Law Com. No. 86, para. 3.31.

²²Para. 7.32.

²³Para. 7.32.

2.40 We think that the factors which we suggest above,²⁴ as appropriate for the court to take into account in exercising a discretion to grant orders regulating occupancy rights in a matrimonial home, would also be appropriate in the case of use and possession orders. Those factors would enable the court to have regard to the extent to which any relevant items were used for the purposes of the husband's trade or profession.

2.41 In our Memorandum²⁵ we proceeded on the basis that a spouse should not be able to obtain a use and possession order in respect of furniture and plenishings which were subject to hiring or hire-purchase arrangements²⁶ entered into by the other spouse. We did so on the view that complications would arise if a spouse could obtain use and possession of items which were not in fact owned by the other spouse. We have, however, come to the view that no such complications need in fact arise. The hiring or hire-purchase arrangements between the spouse and the relevant creditor would be unaffected by the grant of use and possession to the other spouse. Nor would the creditor's right of re-possession be affected by the use and possession order. It would clearly be of great practical advantage to a spouse to be able to have the use and possession of items such as domestic goods subject to hire or hire-purchase contracts, and accordingly we now propose that it should be competent for a spouse to apply for a use and possession order in respect of such goods. We previously recommend²⁷ that a wife should have the subsidiary right to pay hire-purchase instalments or other outgoings or indeed to exercise a purchase option in place of her husband in relation to furniture and plenishings in the matrimonial home.

2.42 In our Memorandum²⁸ we considered the question of use and possession of the family car separately from the use and possession of furniture and plenishings of the matrimonial home, and we proposed that the court should have power to grant orders regulating the use and possession of such a car. Although the majority of those consulted agreed with our proposal, other criticisms have persuaded us to reconsider our original proposal. We think that severe practical difficulties would arise if it were necessary to regulate the use of a car which both spouses reasonably required, and that such difficulties would be increased if one spouse required to use the car for business purposes, particularly where the car had itself been provided by an employer. In any event we do not think that the use of a car can be regarded as incidental to the enjoyment of the right of occupancy of the matrimonial home in the same way as the use of furniture and plenishings is incidental to such occupancy.

2.43 The court should, we think, only be empowered to grant an order giving a wife use and possession *in the matrimonial home* of her husband's furniture and plenishings. The wife must, therefore, have at the time of the granting of the order a right to occupy the home in which the furniture and plenishings are situated; otherwise the court's order would be without substance.

²⁴Para. 2.35.

²⁵Para. 7.38.

²⁶We use the term hire-purchase to include both hire-purchase and conditional sale.

²⁷Para. 2.23.

²⁸Para. 7.33.

2.44 We recommend that where one spouse owns, hires or is acquiring under a hire-purchase or conditional sale agreement furniture and plenishings in a matrimonial home, the court should have power to grant the other spouse (if he or she has occupancy rights in that home) use and possession there of such of those items (excluding any vehicle) as are reasonably necessary to enable the home to be used as a family residence. In making an order the court should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9. (Recommendation 2.10)

Interim orders

2.45 We suggested in our Memorandum²⁹ that express provision should be made to ensure that interim orders and interim interdicts could be obtained by a wife pending determination of any application to declare or enforce her basic occupancy right. We anticipate that in certain circumstances the availability of such orders may be very necessary. For example, a wife may require to obtain an interim interdict against being ejected by her husband in breach of her occupancy right; and where a wife has in fact been so ejected, she may require an interim order to enable her to recover personal effects belonging to her or her children from the home. The suggestion that interim orders and interdicts should be made available was generally approved on consultation and we adhere to it now.

2.46 We think that it is similarly necessary to ensure that interim orders can be made in relation to the use and possession of furniture and plenishings. It is true that no right to use and possess furniture and plenishings will arise under our proposals unless and until the court has made an order, but we think it is necessary to ensure that while an application to the court is pending the applicant spouse can be protected on an interim basis against the removal or disposal of the furniture and plenishings by the other spouse.³⁰

2.47 Our proposals met with general approval on consultation. It was further suggested on consultation that either spouse should be entitled to apply for an interim order. We agree with this suggestion.

2.48 **We recommend that where an application has been made to the court for an order relating to the occupancy of a matrimonial home or for an order granting use and possession of the furniture and plenishings, the court should have power on the application of either spouse to make such interim orders as it considers necessary or expedient in relation to the matrimonial home, its furniture and plenishings or the personal effects of either spouse and any children.**
(Recommendation 2.11)

Delivery orders

2.49 We envisage that orders relating to disputes over occupancy rights may require to include orders for the delivery of personal effects left in a matrimonial home. In our Memorandum³¹ we drew attention to the fact that it was doubtful whether it was competent for the court to grant a warrant to sheriff officers to

²⁹Para. 2.2.4

³⁰Such a displenishing occurred in *Davis v. Johnson* [1978] 1 All E.R. 1132.

³¹Para. 2.23.

search for articles concurrently with the grant of an order for their delivery.³² We proposed that such a grant should be competent and this proposal was accepted by those consulted.

2.50 Where a delivery order is granted it is possible that a charge to deliver may require to be given to a defender, and that a period may require to elapse before the search warrant can be executed by officers of court.³³ Since time will be of the essence in the case of the delivery orders which we anticipate, we propose that the court should be empowered to fix the requisite period for expiry of the charge when it grants the actual delivery order. We think that the period should be as short as possible (say two days) where delivery of personal effects is being sought.

2.51 We recommend that where the court following on the recommendations in this report orders the delivery of any article it should have the power at the same time to grant warrant to messengers-at-arms or sheriff officers to search for and deliver the article if no delivery is made after a charge to do so has expired. The order for delivery should specify the period of the charge.

(Recommendation 2.12)

Effect on third parties of rights subsidiary to occupancy rights

2.52 We recommend above³⁴ that a wife should be able, without the need for prior court authorisation, to take steps for the protection of her occupancy right where her husband would himself have been entitled to take such steps but fails to do so. Such steps may involve positive action, such as the payment of the husband's debts or the performance of his obligations, or they may involve defensive action, such as the contesting of proceedings relating to the matrimonial home by landlords or creditors of the husband or persons who have hired furniture to the husband. They will, however, involve the wife with third parties such as landlords or creditors who themselves contracted with the husband and not with the wife. We now turn, therefore, to consider this consequence of the general right which we propose to confer upon the wife.

2.53 A wife may not become aware of proceedings by a third party in time for her to exercise her rights effectively if she is living apart or estranged from her husband. We have considered anxiously whether there should be imposed on third parties a general duty to send copies of all notices or summonses to a wife who has notified them of her existence and whereabouts.³⁵ We have come to the conclusion that the complexity of the legislation which might be required to give effect to this would be out of proportion to the benefits that would accrue, since

³²In *United Dominions Trust (Commercial) Limited v. Hayes* 1966 S.L.T. (Sh. Ct.) 101; *Napier v. Reed* (1943) 59 Sh. Ct. Rep. 117; it was held that, having regard to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s.1 a search warrant could not be granted at the same time as a delivery order. For the contrary view see *George Hopkinson Ltd v. Carr* 1955 S.L.T. (Sh. Ct.) 80; *North Central Wagon & Finance Co. Ltd. v. McGiffen* 1958 S.L.T. (Sh. Ct.) 62.

³³Summary Cause Rules, Rule 71 and Form U.10 provide that a charge of 14 days must be given where the decree for delivery is obtained in a Summary Cause action.

³⁴Para. 2.18.

³⁵This was proposed in our Memorandum (para. 6.45) in relation to the enforcement of a heritable security over a matrimonial home.

it may be anticipated that wives will rarely be unaware of impending proceedings. In any event a wife who apprehends that proceedings may be instituted could informally request a landlord or other third party to inform her.

2.54 Our proposals envisage that a wife may wish to make payments in place of her husband to third parties such as rental payments on the home or hire-purchase instalments on its contents. Under the present law, a landlord or creditor would not be obliged to accept such a payment from a wife, unless she made payments on her husband's behalf as his agent with his authority. While most landlords would no doubt be willing to accept a payment of rent from wives of tenants, it is not impossible that he might decline to do so, if by so doing he could establish a default by the husband, and so have grounds for recovering possession. In our Memorandum we proposed that a wife should be entitled to pay the rent and other sums due under the lease in both public³⁶ and private³⁷ sector tenancies, and that such payments should be treated as if made under an irrevocable mandate by her husband. These proposals were unanimously accepted on consultation. We think that similar provision should be made in relation to payments to creditors in respect of hire or hire-purchase contracts.

2.55 Where the matrimonial home is owner-occupied a wife may wish to pay outgoings such as instalments due to a heritable creditor, feu duty or rates in place of her husband. We proposed in our Memorandum³⁸ that a wife should be entitled to pay these sums, and that her payments should be treated as if made under an irrevocable mandate by her husband. This was accepted on consultation.

2.56 A wife may seek to protect her continued use and possession of furniture and plenishings by making payment of hire-purchase instalments or other payments in relation to such items. Under our proposals the use and possession by the wife of furniture and plenishings may depend upon the wife having first obtained a court order for such use and possession. We think, however, that the wife should be entitled to make payments to third parties such as hire-purchase creditors in respect of furniture and plenishings, whether or not she has obtained an order for their use and possession.

2.57 Apart from wishing to pay periodical payments in place of her husband, a wife may wish to pay other debts due by her husband in order to prevent the possibility of action by the husband's creditors directed against the matrimonial home or its contents. Again we think it is necessary to oblige creditors to accept such payments from the wife as if they had been tendered by the husband himself.

2.58 We recommend that any payment made by a spouse by virtue of Recommendation 2.5 should be treated as if made under an irrevocable mandate by the other spouse.

(Recommendation 2.13)

³⁶Para. 3.31.

³⁷Para. 4.11.

³⁸Para. 6.38.

2.59 Where a wife seeks to protect her occupancy right by fulfilling a non-monetary obligation relating to the matrimonial home (such as an obligation under a lease or a feu charter) which her husband fails to perform, we think that the wife's performance should be deemed to be equivalent to performance by her husband, and that the creditor in the obligation should not be entitled to claim that performance must be made by the husband as actual obligant.

2.60 The converse situation will arise where the wife seeks, in place of her husband, to enforce performance of an obligation due by a third party to her husband, (such as the obligation of a landlord under a lease) which is relevant to the protection of her occupancy right. We think that it should be provided that such performance by a third party to the wife is equivalent to performance to the husband as creditor in the obligation.

2.61 We recommend that performance by a spouse of an obligation by virtue of Recommendation 2.6 should be treated as performance by the other spouse.
(Recommendation 2.14)

2.62 We recommend that performance by a third party in terms of Recommendation 2.7 to a spouse with statutory occupancy rights should be regarded as performance to the other spouse.
(Recommendation 2.15)

2.63 In our Memorandum we proposed³⁹ that a wife who notified the existence of her right of occupancy of the matrimonial home⁴⁰ should have a preferential right to purchase it at a fair value from a heritable creditor enforcing his security. This proposal was rejected by the majority of those consulted. It was pointed out that difficulties would arise in arriving at the fair value and that the proposal might run counter to a building society's statutory duty⁴¹ to achieve the best price which could reasonably be attained on a sale of property. Section 25 of the Conveyancing and Feudal Reform (Scotland) Act 1970 also obliges a creditor in a standard security to advertise any sale and to take all possible steps to ensure that the price paid is the best that can reasonably be obtained. In the light of these points we think that a preferential purchase right should not be conferred upon a wife. A wife who wished to purchase the matrimonial home from a heritable creditor would of course be free to enter into negotiations to that end with the heritable creditor and her husband.

Apportionment of expenditure on the matrimonial home and its contents

2.64 Our recommendation above⁴² that a wife with a basic occupancy right should have a subsidiary right to take certain actions to supplement the basic occupancy right makes it necessary to consider whether consequential provision should be made to enable a wife to seek an apportionment as between herself and her husband of any expenditure incurred by her in the exercise of such subsidiary rights. If consequential provision is not made and such expenditure cannot be

³⁹Para. 6.45.

⁴⁰See Part III of our report, paras. 3.27 ff.

⁴¹S.36(1), Building Societies Act 1962.

⁴²Para. 2.18.

apportioned between the spouses, the right to exercise such subsidiary rights will be an empty right unless the wife is in a position to meet the expenditure herself. However, in considering a basis for the apportionment of such expenditure, we have identified defects which we think should be remedied in the law relating to apportionment of expenditure on the matrimonial home generally between spouses. Accordingly, the proposals which we advance in the following paragraphs are intended to relate to any expenditure by spouses on the matrimonial home, and do not relate merely to expenditure incurred by a wife in the exercise of the particular subsidiary rights which we propose above.

2.65 In our view the law relating to apportionment of expenditure on a matrimonial home is deficient in the same general way that the law relating to occupancy rights is deficient; namely, that it is based on outmoded assumptions as to the nature of the matrimonial relationship. As the law stands at present a spouse who does not have a legal title to the matrimonial home is unlikely to be able to make a successful claim for recompense against the other spouse in respect of expenditure incurred on the matrimonial home. The law presumes such expenditure to have been made for the personal benefit of the spouse incurring it and accordingly denies a claim in recompense to that spouse notwithstanding that the other spouse may have been enriched by the expenditure.⁴³ We think that this legal presumption is quite unrealistic. Expenditure incurred on a matrimonial home during the subsistence of a marriage may be made by one spouse or the other purely as a matter of convenience; and such expenditure is made not for the benefit of one spouse, but for the benefit of both. We think therefore, that where a spouse makes payments in relation to a matrimonial home that spouse should not be denied the power to seek to have all or part of that expenditure apportioned to the other spouse.

2.66 Our Memorandum⁴⁴ proposed that the court should have a discretionary power to apportion liability for expenditure on the matrimonial home between the spouses, or alternatively that the wife should be entitled to be reimbursed for all expenditure (or at least for expenditure on an owner-occupied home) provided the expenditure had been consented to or acquiesced in by the other spouse. The latter alternative found little favour on consultation. We think that the circumstances in which payments are made by spouses are likely to be so various that only by conferring discretionary powers on the court could justice be done in all cases, and that the grant of an unqualified right to reimbursement of expenditure could, even where that expenditure had been incurred with the consent of the other spouse, lead to no less injustice than the present denial of recompense. We conclude that the appropriate solution is to enable the court to make an apportionment of expenditure on a matrimonial home where in its discretion the court thinks it proper to do so.

2.67 We think that a distinction must be drawn in the case of expenditure which the court can be asked to apportion between expenditure which is effected with the consent of both spouses and that which is incurred by one spouse without the

⁴³*Readie v. Yeaman* (1875) 12 S.L. Rep. 625. Any attempt by a spouse to claim repayment of money expended on the basis that the money was a loan would only succeed where there was a writ (or the oath of the debtor) available.

⁴⁴Para. 2.102.

consent of the other. Expenditure incurred by a spouse in the exercise of the subsidiary occupancy rights which we propose above,⁴⁵ would, of course, be incurred by one spouse without the consent of the other, unless that consent was actually obtained.

2.68 We think that where expenditure is incurred with the consent of both spouses the court should have a general power to apportion such expenditure between the spouses upon the application of either spouse. We think, however, that where expenditure has been incurred without such mutual consent the ability of one spouse to apply for an apportionment of his or her expenditure should depend upon the nature of the expenditure.

2.69 Where expenditure incurred by one spouse without the consent of the other spouse relates to basic outgoings on the matrimonial home such as rent, rates, secured loan instalments or the like, of whose existence the other spouse can be taken to know, then we think it is appropriate to allow the spouse who pays such outgoings to seek an apportionment of the expenditure from the court. We also think that a spouse should have a similar right to apply to the court for an apportionment of expenditure incurred in carrying out essential repairs to the matrimonial home and to the furniture and furnishings since such expenditure ensures that the home remains habitable.

2.70 We do not think, however, that a spouse who has incurred expenditure without the consent of the other spouse on matters other than basic outgoings and essential repairs should have a right to apply to the court for apportionment of such expenditure. We think that a wife, for example, who incurs expenditure on carrying out non-essential repairs or making improvements to the matrimonial home, or who incurs legal costs in taking or defending proceedings relating to the occupancy of the home, should incur such expenditure or costs at her own risk, if she does so without obtaining the consent of her husband.

2.71 We think that the court's power to apportion expenditure between the spouses should extend to an apportionment of future expenditure on the matrimonial home or on its furniture and furnishings. We envisage that the court's powers to apportion future expenditure would be most likely to be exercised in relation to anticipated basic outgoings (such as rent, rates, secured loan or hire-purchase instalments) but they could also, for example, apply to anticipated essential repairs. As a result a wife who had no resources of her own could obtain an order apportioning liability for the cost of such repairs to her husband before she herself entered into a contract with the tradesmen.

2.72 We appreciate that our proposals, involving as they do the possibility that a husband or a wife may be required to contribute towards the cost of upkeep of the matrimonial home, even when both spouses are living in it, represent a radical departure from the present law. We think, however, that our proposals achieve an equitable result and that they are likely to reflect the realities of the situation and the expectations of the spouses.

⁴⁵Para. 2.18.

2.73 In our Memorandum⁴⁶ we asked for views as to whether a claim for an apportionment of expenditure should require to be made within 5 years of the date on which the expenditure was incurred.⁴⁷ Some of those consulted were against the imposition of such a short period on the view that such claims might not be advanced until a much later date and possibly not until a divorce or a sale of the property intervened. The majority, however, thought that a 5 year period should be imposed to prevent stale claims being made. We agree with the latter view.

2.74 We think that it should be made clear that the court should be given express power, in cases where past expenditure has been apportioned, to grant decree for payment by one spouse to the other of the amount apportioned to the former spouse. If such an express power is not given, it might be thought that a further action was necessary in order to obtain a decree for payment.

2.75 We recommend that the court should have power, on application by either spouse, to apportion between the spouses, in such proportion as it thinks just and equitable, any expenditure, whether past or future, relating to a matrimonial home or to its furniture and plenishings:

- (a) which has been consented to by the non-paying spouse or;
- (b) which is a basic outgoing, or is the cost of an essential repair.

The court should have power to grant decree for payment by one spouse to the other of the amount due in terms of the apportionment order. Any application for apportionment should be made within 5 years of the date on which the expenditure was incurred.

(Recommendation 2.16)

Termination of occupancy rights

2.76 We now turn to deal with the termination of occupancy rights either by voluntary renunciation, or by operation of law on the occurrence of certain events.

(a) Voluntary renunciation

2.77 We have considered anxiously whether a spouse with occupancy rights should be permitted to renounce them. The need arises to balance the advantage of permitting a couple to make their own agreements in relation to their matrimonial affairs against the possibility that the economically weaker spouse may be influenced or cajoled into surrendering valuable rights. In our Memorandum⁴⁸ we sought to achieve this balance by permitting occupancy rights to be renounced in relation to a particular existing matrimonial home only. The proposal met with general favour on consultation, but we have on reconsideration come to the view that it is too narrow in its scope, and that prospective renunciations of occupancy rights in future matrimonial homes should be permissible. Circumstances may arise in which the availability of a matrimonial home may be dependent upon the possibility of such a general prior renunciation.

⁴⁶Para. 2.103.

⁴⁷This period is the short negative prescriptive period introduced by s.6 of the Prescription and Limitation (Scotland) Act 1973.

⁴⁸Para. 2.93.

For example, money may be provided by a wife's family for the purchase of a matrimonial home but on condition that the husband prospectively renounces his occupancy rights on a general basis. We think that in such circumstances a general renunciation should be obtainable. We believe that the requirement that any renunciation be made in writing will prevent any wholesale contracting-out of occupancy rights.

2.78 We did not discuss in our Memorandum the question whether a spouse could renounce his or her right to apply for an order granting use and possession of furniture and plenishings. In the normal case, where the husband has title both to the home and to its contents, a renunciation of occupancy rights by the wife would imply a renunciation of the right to seek a use and possession order, in as much as the latter order relates to use and possession of items in a matrimonial home, and assumes that the beneficiary of the order has the right to occupy the home. It is possible, however, that a wife may have title to the home, whereas her husband has the ownership of some or all of the furniture and plenishings. In such a case the wife could make a separate renunciation in relation to use and possession orders only. We think that it should be competent for a spouse to make a renunciation of future rights to apply for such orders in the same way as it should be competent for a spouse to make a prospective renunciation of occupancy rights.

2.79 In our Memorandum⁴⁹ we suggested that a renunciation of occupancy rights should be in writing, that the renouncing spouse should have received independent legal advice, and that the spouse's signature should be witnessed by a lawyer who certified that he had explained the effect of the renunciation. There was general support on consultation for the requirement that any renunciation should be in writing but most of those consulted were against the requirement of independent legal advice. On reconsideration we agree. The law already provides sufficient remedies where a renunciation has been improperly obtained and special formalities of the kind we envisaged should not be required.

2.80 We recommend that a spouse should be allowed to renounce in writing a statutory right of occupancy in any existing or future matrimonial home and a right to apply to the court for an order granting use and possession of the furniture and plenishings in any existing or future matrimonial home.
(Recommendation 2.17)

(b) Termination implied by law

2.81 Earlier in this report⁵⁰ we state our view that the occupancy rights which we recommend should be an incident of marriage. It follows that a wife's occupancy rights must terminate when her marriage ends whether upon death or upon the grant of a decree of divorce or nullity.

2.82 The occupancy right which we recommend should be conferred on a wife should also terminate when her husband ceases to have a right or liberty to occupy the home: if it did not then the wife would acquire a greater right than her husband had. This means, however, that if the husband sells the home or if a

⁴⁹Para. 2.93.

⁵⁰Para. 2.6.

heritable creditor of the husband sells the home on enforcing his security, such a sale will also have the consequential effect of terminating the occupancy right of the wife. The general problems which may arise by virtue of the effect of a sale by the husband on the wife's occupancy rights are discussed in Part III of this report. Certain particular problems which may arise in respect of the consequences of enforcement by creditors of a husband are discussed in paragraphs 2.90 to 2.99 below.

2.83 A wife should, we think, cease to be entitled to apply to the court for an order granting use and possession of her husband's furniture and plenishings when her right to occupy the matrimonial home in which they are situated terminates⁵¹ or when her husband himself ceases to be entitled to possess them. Thus, when a husband disposes of the furniture and plenishings or when his creditors acquire a right to them, his wife should no longer be entitled to apply to the court for an order. We discuss later⁵² the effect of events such as those described above on an existing court order granting use and possession of furniture and plenishings.

2.84 We think that where events occur which terminate the wife's rights, either in relation to the occupancy of the matrimonial home or in relation to the furniture and plenishings, such termination should be implied by law without any need for a court order for termination.

2.85 We recommend that the statutory right of a spouse to occupy a matrimonial home should terminate by operation of law on the termination of the marriage by death, presumed death, divorce or annulment, or on the other spouse ceasing to be permitted to occupy the matrimonial home; and that a spouse should cease to be entitled to apply to the court for an order granting use and possession of furniture and plenishings in a matrimonial home when that spouse ceases to be entitled or permitted to occupy that matrimonial home or when the other spouse ceases to be entitled to possess the furniture and plenishings.
(Recommendation 2.18)

Variation, recall and lapsing of orders

2.86 Most of the orders which we recommend a court should have power to make in connection with the occupancy of the matrimonial home, or with the use and possession of its furniture and plenishings have continuing effect. It is therefore necessary to provide for the variation or recall of these orders when circumstances change. In our Memorandum⁵³ we proposed that either spouse should be entitled to apply to the court for an order varying or recalling an existing order, and this proposal was accepted by those consulted.

2.87 In our Memorandum⁵³ we proposed that an existing court order should lapse without being recalled if the spouses subsequently agree to different arrangements. Although this proposal did not give rise to any controversy on consultation, we have come to the view that it is not desirable to allow orders to

⁵¹This point is discussed in para. 2.43.

⁵²Para. 2.86.

⁵³Para. 2.95.

lapse simply by agreement between the spouses, because of the uncertainty created especially where third parties are involved. Where different arrangements are subsequently agreed, or where occupancy rights are subsequently renounced, a variation or recall of the existing court order should be sought.

2.88 We think that orders relating to occupancy rights in the matrimonial home and use and possession orders in respect of furniture and plenishings in the matrimonial home should cease to be effective, without need for any application to be made for their recall, when the marriage ceases to subsist or the husband's own ability to occupy the matrimonial home or retain possession of the furniture and plenishings ceases to subsist. Thus, for example, the sale of a matrimonial home by a husband's trustee in bankruptcy or the repossession of items of furniture by a creditor of a husband would result in an automatic lapsing of the relevant order.

2.89 We recommend that the court on application of either spouse should have power to make a further order varying or recalling any order relating to the occupancy of a matrimonial home or to the use and possession of any furniture and plenishings. Any order should in any event cease to have effect when:

- (a) the marriage terminates by death, presumed death, divorce, or annulment;
or
- (b) the spouse entitled or permitted to occupy the matrimonial home ceases to be either entitled or permitted:

and where the order grants use and possession of the furniture and plenishings it should also cease to have effect when they cease to be permitted to be retained in the matrimonial home.

(Recommendation 2.19)

Counteracting contrived sequestrations and diligence

2.90 We refer above⁵⁴ to the fact that enforcement of his rights by a creditor of the husband may, by terminating the husband's occupancy right, also terminate the wife's derivative right. In our Memorandum⁵⁵ we suggested that it might be necessary to ensure that a husband could not effectively defeat his wife's rights by contriving a circumstance in which one of his creditors was able to enforce creditors' rights against the matrimonial home or its contents. This suggestion was very firmly supported by those whom we consulted, and accordingly we think that provisions must be devised for the purpose of counteracting any prejudice to a wife's rights as a result of a contrived sequestration, pouncing or adjudication. Sequestration, pouncing and adjudication are not an exhaustive list of the actions by a creditor which may prejudice a wife's rights. Such prejudice may also result from enforcement by a landlord of his rights as a landlord or from the enforcement of a standard security or from the grant of a voluntary trust deed for creditors. A wife will, however, have the opportunity to defend or prevent action by a landlord by virtue of our recommendation⁵⁶ that she be able to defend proceedings or to perform her husband's obligations under the tenancy; and the grant of a standard security over a matrimonial home or any

⁵⁴Para. 2.82.

⁵⁵Para. 6.48.

⁵⁶Paras. 2.26 and 2.28.

conveyance of a home to a trustee for creditors will constitute an adverse dealing and will be subject to the proposals in Part III of this report.

2.91 We think that section 6 of the Divorce (Scotland) Act 1976, which provides for the counteracting of transactions entered into by one spouse with the object of defeating the other spouse's claims for aliment or financial provision on divorce, provides a model for the kind of anti-avoidance legislation which we envisage may be required to counteract the defeating of a spouse's occupancy rights by virtue of contrived arrangements for sequestration or diligence. Section 6 of the Divorce (Scotland) Act 1976 refers to transactions

“made . . . wholly or partly for the purpose of defeating in whole or in part”

the claim of the other spouse. We think that the *bona fides* of a sequestration or diligence might similarly be tested in relation to the wife's occupancy rights by allowing the court to enquire whether it had arisen wholly or mainly for the purpose of defeating such occupancy rights.

2.92 Where the court is satisfied that a sequestration or a diligence has arisen in circumstances which amount to a scheme designed wholly or mainly to defeat the wife's occupancy rights, the question will arise as to what remedy can properly be conferred upon the wife. We think that this requires careful consideration. It is essential that the remedy should be an effective one from the wife's point of view. If the wife is required to rely on a claim for compensation in respect of her lost occupancy rights, then such a claim may not provide an effective remedy if the husband has insufficient assets or has made his assets unavailable. At the same time, however, it may be inappropriate to require a legal process such as a sequestration or diligence to be recalled in all circumstances where there has been a scheme to defeat a wife's occupancy rights. We think that the problem is best resolved by allowing the court a discretion to make such an order as it thinks appropriate in the circumstances. This would enable the court to recall a sequestration or diligence where recall was appropriate, or to allow the sequestration or diligence to proceed subject to arrangements being made for the protection of the wife's interest. For example, a trustee or an adjudger might be prevented from disposing of the matrimonial home unless such arrangements had been made to the satisfaction of the court.

2.93 If processes such as sequestration and diligence can in special circumstances be subject to challenge, then it is clearly important to select an appropriate period after which a wife will cease to have a right to make such a challenge. Two conflicting requirements arise and have to be balanced. A short period would enable a trustee or creditor to know without undue delay that the sequestration or diligence would be unchallengeable. On the other hand, any period has to give the wife sufficient time to ascertain the occurrence of the sequestration or diligence, to decide whether to apply to the court and to obtain any evidence in support of her application. We think that a period of 40 days (which is the period within which a petition for recall of an award of sequestration must be presented under the existing law⁵⁷) would be appropriate.

2.94 It is necessary to consider the date from which the 40 day period should run. We think that any starting date should relate to some act preferably of a

⁵⁷§,30, Bankruptcy (Scotland) Act 1913.

public nature, that it should be readily ascertainable, and that it should occur before steps have already been taken in the sequestration or diligence which cannot be easily reversed. We think that the date of execution of the poinding and the date of registering (or recording) the decree of adjudication in the property registers would be the appropriate dates in the case of those diligences. In the case of sequestration we think the date of the act and warrant confirming the appointment of the trustee is more appropriate than the date of the sequestration.⁵⁸ Trustees are normally appointed some two or three weeks after the date of the sequestration, so that if the latter date were to be chosen a wife might be left with very little time in which to apply to the court before the 40 day period had elapsed.

2.95 A transaction contrived in order to defeat a wife's occupancy rights may well be conducted in a secret or covert manner, and this may prevent the wife from becoming aware, as she would normally do, of an impending sequestration or diligence. We do not think that the statutory notification of an award of sequestration required to be made by the Bankruptcy (Scotland) Act 1913 in the Registers⁵⁹ and in the Gazette⁶⁰ can be assumed to be an effective notice in practice to a wife, and we think that other methods will have to be devised to alert a wife to the fact that her husband has been sequestered. We think the only effective method would be to require intimation by the trustee to the bankrupt's wife of the fact of her husband's sequestration. If trustees are to have such a duty to intimate they will require to ask the bankrupt for information as to his marital status and the whereabouts of his wife. A bankrupt is, however, under the 1913 Act⁶¹ obliged to give all such information to his trustee as the latter may require for the carrying out of his duties.

2.96 We do not think that a duty can properly be laid on a poinding or adjudging creditor to intimate his diligence to the wife (if any) of the debtor, since such a creditor should not be obliged to investigate his debtor's domestic circumstances. It appears to us that in the case of a poinding of the furniture and plenishings in the matrimonial home, a wife with a use and possession order would, in fact, almost certainly get to know of the diligence in time to apply to the court.

2.97 **We recommend that where a matrimonial home forms part of a bankrupt's estate the trustee should within 7 days of the date of the act and warrant confirming his appointment intimate the sequestration to the bankrupt's spouse (if any) having statutory occupancy rights where he is aware of his or her whereabouts. The bankrupt's spouse should be entitled to apply to the Court of Session within 40 days of the date of the act and warrant for recall of the sequestration. On the Court of Session being satisfied that the purpose of the application for sequestration was wholly or mainly to defeat the spouse's occupancy rights in the matrimonial home it should have power to recall the sequestration or make such other order as it considers appropriate.**

(Recommendation 2.20)

⁵⁸S.41 of the Bankruptcy (Scotland) Act 1913 provides that the date of the first deliverance on the petition for sequestration is the date of the sequestration.

⁵⁹Ss.44 and 156 provide for recording details of a sequestration in the Register of Inhibitions and Adjudications and the Register of Sequestrations respectively.

⁶⁰S.44.

⁶¹S.77.

2.98 We recommend that where a matrimonial home is adjudged the debtor's spouse having statutory occupancy rights should be entitled to apply to the court within 40 days of the date of registration of the decree of adjudication in the Land Register (or recording an extract of the decree in the Register of Sasines). On the court being satisfied that the purpose of the diligence was wholly or mainly to defeat the spouse's occupancy rights, it should have power to reduce the decree of adjudication or make such other order as it considers appropriate.
(Recommendation 2.21)

2.99 We recommend that where a poinding has been executed of furniture and plenishings in a matrimonial home of which the debtor's spouse has been granted use and possession, the spouse should be entitled to apply to the sheriff court having jurisdiction over the poinding within 40 days of the date of the execution of the poinding. On the court being satisfied that the purpose of the diligence was wholly or mainly to defeat the spouse's rights of use and possession, it should have power to declare the poinding null or to make such other order as it considers appropriate.
(Recommendation 2.22)

Compensation for loss of occupancy rights or rights of use and possession

2.100 In our Memorandum we proposed that the court should have power to award compensation to a spouse deprived of occupancy⁶² of the matrimonial home or use and possession of furniture and plenishings.⁶³ Those consulted agreed in principle with our proposal. Although some questioned the need to make express provision for compensation, we think that where legislation introduces new rights, such as the statutory right of occupancy of the matrimonial home which we recommend conferring upon a wife, it should also make it clear whether compensation is payable for their loss.

2.101 In our view a husband should be liable to compensate his wife for any act or omission which results in loss of her rights, provided always that the act or omission was deliberately intended to lead to such loss. A husband should not be liable, for example, to pay compensation for failure to pay rent due in respect of the home, when the reason for his failure was lack of money.

2.102 We do not think that compensation should be payable only in cases where the wife has been ejected, or the home has become completely uninhabitable. A wife should also be entitled to claim where her occupancy has become restricted to part of the home (e.g. as a result of a leaking roof), or where the quality of her occupancy has been impaired (e.g. as a result of the electricity supply being deliberately disconnected by her husband).

2.103 So far we have discussed compensation in relation to the wife's right of occupancy of the matrimonial home. Where the court has granted the wife use and possession of the furniture and plenishings, she should be entitled to claim if she suffers loss or impairment of her right to use and possess. Although in terms of our recommendations the court would have power to interdict sale or removal of the furniture and plenishings from the home, the husband may breach

⁶²Para. 2.25.

⁶³Para. 7.32.

the interdict. A claim for compensation would be the only remedy left to the wife if the furniture and plenishings could not be recovered.

2.104 We recommend that the court should have power to award such compensation as it considers reasonable to a spouse who has suffered loss or impairment of his or her statutory right of occupancy of a matrimonial home, or right of use and possession of the furniture and plenishings, in consequence of any act or default on the part of the other spouse, which was intended to result in such loss or impairment. (Recommendation 2.23)

Caravans and Houseboats

2.105 We now turn to consider to what extent the recommendations in this Part of our report should be applied to matrimonial homes which take the form of caravans and houseboats.⁶⁴ Most caravans are corporeal moveable property but some are fixed to their sites in such a way as to render them heritable. Again a large number of caravans are used as temporary holiday homes, while others are used as permanent homes by those who have no other accommodation.

2.106 In our Memorandum⁶⁵ we suggested that our proposals relating to occupancy rights could be extended to cover the cases in which caravans were heritable property, but invited views as to whether caravans which were mobile homes might be the subject of use and possession orders only. Few of those consulted expressed an opinion on this point, although there was a slight preference for a use and possession regime. The latter has also been recommended for mobile homes in England and Wales.⁶⁶

2.107 On reconsideration we think that it would be wrong to attempt to distinguish between heritable and moveable caravans in the context of occupancy rights.⁶⁷ The relevant question seems to us to be whether the caravan is in fact used as a matrimonial home. If it is so used then we think that a wife should have the same occupancy rights in it as she would have in a dwelling house. We think that the same principle ought to apply to houseboats or other mobile structures if such houseboats or structures are occupied as matrimonial homes.

2.108 We recommend that our recommendations in this report (except Part III) should be extended to caravans, houseboats and other structures which are matrimonial homes. (Recommendation 2.24)

⁶⁴It has been estimated by the Central Research Unit of the Scottish Office that approximately 3,800 households (10,000 people or less than 0.25% of the population) were living in mobile homes on 166 licensed caravan parks in Scotland in 1975. Over half of these households were younger married couples (head of household aged under 40), with or without children, while most of the remainder were older childless married couples and older single adults. In addition an unknown number of households lived in caravans on unlicensed sites.

⁶⁵Para. 9.7.

⁶⁶*Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods* (1978) Law Com. No. 86, para. 3.132.

⁶⁷Heritably fixed caravans can usually be disconnected from the site services and so can become mobile again fairly easily.

Occupancy rights where both spouses are co-proprietors.

2.109 Hitherto we have assumed that one of the spouses alone will have the legal right or liberty to occupy the matrimonial home. We now consider the situation where both spouses jointly have that right or liberty. This will most usually arise as a result of common or joint ownership or tenancy but it could arise by virtue of a joint liferent. Joint permission would also confer on both spouses rights of occupancy. We refer below to spouses who have joint rights as co-proprietors.

2.110 Where both spouses are co-proprietors in relation to a matrimonial home each spouse has a legal right of occupancy in the whole of that home, and accordingly neither will require the statutory occupancy right which we recommend. But as we pointed out in our Memorandum⁶⁸ it would be anomalous and unfortunate if a co-proprietor were deprived of the benefit of those orders regulating the occupancy or management of a matrimonial home which we propose to make available to spouses who are not co-proprietors. We therefore proposed⁶⁸ that a co-proprietor spouse should also be entitled to apply for these orders. There was general agreement on consultation with this proposal, although it was pointed out that it would entail a change from the existing rule of law regarding the maintenance of common property, whereby one co-proprietor may not carry out works other than essential repairs without the consent of the other co-proprietor.⁶⁹ We think, however, that an application to the court to regulate the occupancy or management of common property would, where the property is a matrimonial home, prove a more appropriate way to settle disputes than the present method of bringing an action of division and sale.

2.111 We previously recommend⁷⁰ that a spouse with occupancy rights should be entitled to make any payments, to perform any obligations on behalf of the other spouse, and generally to take any steps in relation to the occupancy of the matrimonial home which the other spouse can take. These recommendations do not need to be extended to co-proprietors because each co-proprietor is under the existing law entitled to make payment, perform obligations and take any other steps to protect his own interests and those of his co-proprietor. A co-proprietor, who makes financial contributions in excess of his liability, or who effects improvements to the property with the consent of the other, is normally entitled to recompense from the other co-proprietor. It was suggested in our Memorandum⁷¹ that the existing common law of recompense provided a satisfactory remedy for co-proprietors, and accordingly we made no proposal for change. On reconsideration, however, we have come to the view that the benefit of the procedures for judicial apportionment of expenditure on a matrimonial home, which we recommend above, should be extended also to spouses who are co-proprietors. We think that those procedures may lead to more appropriate results than reliance upon the common law. In relation to co-proprietors the limits on the court's power to apportion expenditure by reference to the availability of consent by the other spouse or by reference to the nature of the relevant expenditure should not apply. The court's power to apportion should be general.

⁶⁸Para. 2.30.

⁶⁹*Deans v. Woolfson* 1922 S.C. 221; Bell's Principles (10th ed.) 1075.

⁷⁰Para. 2.18.

⁷¹Para. 2.104.

2.112 We recommend that where both spouses are entitled or permitted to occupy a matrimonial home the court should:

- (a) have the same powers to regulate occupancy and to authorise non-essential repairs or improvements, as we recommend it should have in relation to a matrimonial home which only one of the spouses is entitled or permitted to occupy,
- (b) have power to apportion any expenditure incurred or to be incurred by a spouse in relation to that home.

(Recommendation 2.25)

2.113 We noted in our Memorandum that a modern case⁷² suggested that there might be no absolute rule to the effect that one co-proprietor spouse cannot obtain an order for the ejection of the other. We proposed in our Memorandum,⁷³ therefore, that it should be expressly enacted that one co-proprietor spouse should not be able to bring an action to eject the other co-proprietor spouse from a joint matrimonial home, and that an exclusion order should become the sole competent means of effecting such an ejection. Those consulted agreed without comment.

2.114 We recommend that it should be made clear that where both spouses are entitled or permitted to occupy a matrimonial home, an action of ejection by one spouse against the other should be incompetent except in connection with an application for an exclusion order.

(Recommendation 2.26)

2.115 Where the spouses own a matrimonial home in common each has an absolute right, in the absence of any undertaking or agreement to the contrary⁷⁴ to terminate the common ownership of that home by obtaining a judicial decree of division and sale. The court has a discretion whether to order division of the home or to order a sale of the home and division of the sale proceeds, but it has no discretion to refuse decree.⁷⁵ In our Memorandum⁷⁶ we proposed that the court should have a power either to refuse to grant a decree of division and sale in the case of a matrimonial home, or to grant decree subject to conditions, and that in exercising such powers the court should have regard to all the circumstances of the case including the factors which we recommend in relation to other court orders; namely the conduct of the spouses, the respective needs and resources of the spouses, the needs of any child of the family and the extent (if any) to which the home was used in connection with a trade, business or profession of either spouse. No adverse comment was made on consultation and we adhere to this proposal.

2.116 We recommend that where a matrimonial home is the common property of both spouses the court should have power in an action of division and sale of the home to refuse or to delay decree, or to grant decree subject to conditions. In exercising the above powers the court should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9.

(Recommendation 2.27)

⁷²*Price v. Watson* 1951 S.C. 359.

⁷³Para. 2.29.

⁷⁴*Morrison v. Kirk* 1912 S.C. 44 per Lord Salvesen at p. 47.

⁷⁵*Anderson v. Anderson* (1857) 19D 700; *Morrison v. Kirk* 1912 S.C. 44; *Vincent v. Anderson* (1920) 36 Sh. Ct. Rep. 182.

⁷⁶Para. 6.62.

PART III ENFORCEMENT OF OCCUPANCY RIGHTS AGAINST THIRD PARTIES

The need for enforcement against third parties

3.1 Hitherto we have considered occupancy rights and the sanction for their breach as a matter affecting only the spouses themselves. We now come to consider whether, in cases where the breach of the wife's occupancy rights is occasioned by a dealing relating to the matrimonial home between her husband and a third party, (for example, the sale of the home to a stranger) the wife should be entitled to have that dealing annulled or should be entitled only to a personal remedy such as an action of damages against her husband which would not affect the rights of the stranger purchasing the home.

3.2 In our Memorandum we proceeded on the basis that the protection of occupancy rights should include the protection of a wife from the loss of those rights by adverse dealings entered into between her husband and a third party to which the wife had not consented provided that there had been prior notification to the third party of the existence of the rights and provided that a procedure was available whereby the court could dispense with the wife's consent where it was unreasonably withheld.¹

3.3 There was general agreement on consultation that a wife should be entitled to protect her occupancy rights against adverse dealings in favour of third parties, although concern was expressed by some legal bodies lest elaborate arrangements might be required to affect the necessary balancing of interests between protection of the wife on the one hand and freedom of dealings in residential property on the other. We remain, however, firmly of the view that a wife must be able to protect her occupancy rights against adverse dealings between a husband and a third party. It was also suggested to us that if the protection was to be so extended, such protection might conveniently be restricted to dealings in tenanted property. We are, however, of the view that the problems which occupancy rights are designed to alleviate apply in the owner-occupied sector of housing no less than in the rented sector. Indeed, protection against adverse dealings is likely to be of particular value and importance in the case of owner-occupied matrimonial homes since such homes are readily marketable assets.

3.4 Consultation has, however, made us keenly aware of the need, in formulating any recommendations, to minimise so far as possible any consequential difficulties which may arise for those dealing in practice with residential property, whether as parties, solicitors, searchers or officials in the Registers of Scotland. The practical application of our recommendations must now of course be related to two conveyancing systems: the traditional system based upon recording of title deeds in the Sasine Register and the new system introduced by the Land Registration (Scotland) Act 1979, which is based upon registration of title

¹Our detailed proposals for dispensation by the court from the need for a wife's consent are set out in para. 3.63 below. The possibility of such dispensation in the case of unreasonable withholding of consent should be taken into account in considering our general proposals for the annulment of adverse dealings.

rather than title deeds, and which additionally involves the giving or withholding of an indemnity by the Keeper in respect of the registered titles to land.² We hope that our proposals will not be seen as unduly elaborate and will enable all involved to identify clear and practicable canons of good practice to take account of the new rights and remedies which we recommend.

The scope of the right to enforce

3.5 Protection of a wife's occupancy rights against third parties means that a wife should be entitled to annul voluntary dealings between her husband and a third party which prejudice her occupancy rights and to which consent has not been given by her or by the court. We do not seek to empower a wife to obtain annulment of any transaction by a third party which does not involve a dealing with her husband, nor do we think that a wife should have a right to maintain occupancy rights against a third party in circumstances where her husband could not himself have done so. A wife, for example, should not (save in the special circumstances of a contrived bankruptcy as mentioned in paragraph 2.90) be entitled to annul a sale of the matrimonial home by her husband's trustee in bankruptcy. The husband could not claim such a right of occupancy against the trustee and neither should the wife be entitled to do so. Nor, in the case of a tenanted matrimonial home, should an irritancy of the tenancy by a landlord following on a breach by the husband of his obligations as tenant, be subject to annulment by the wife.

3.6 Although protection against the husband's adverse dealings in favour of third parties should not be conceded in circumstances where protection against the husband himself is not also available, we do not think that the two types of protection should be co-extensive. There are several general considerations which apply so as to limit the scope of protection against third parties by comparison with the scope of protection against the husband.

3.7 In the first place, we believe that where protection against third parties is in point the husband's occupancy must derive from an entitlement in the husband and not from mere permission to occupy granted to the husband at the discretion of a third party (for example, trustees granting a discretionary permission to occupy trust property). We think that it is right and practicable to give a wife a personal remedy against her husband where the latter voluntarily gives up such a permission. But we think it would be inappropriate to allow the wife to enforce a right against a third party who can at his discretion terminate the husband's permission to occupy.

3.8 Secondly, we think that there is one case in which the wife should not have a remedy against third parties notwithstanding that her husband may have an actual entitlement to occupy. This is the case where the husband's entitlement to the property is shared jointly with a third party (for example a sister or other relative). Such a shared title should not bar occupancy rights against the husband provided that the third party allows the husband exclusive

²References in this Part of our report to the property registers denote either the Land Register or the Sasine Register or both and references to registration denote either registration in the former or recording in the latter.

occupation of the home.³ But if the wife were to be permitted to annul adverse dealings in the property, that would be an unjustifiable restraint on the freedom of the third party to deal with the property.

3.9 Thirdly, there are instances where the nature of the matrimonial home itself is such as to preclude giving the wife protection against third parties. The scheme which we propose below in respect of adverse dealings, assumes that the matrimonial home is heritable property and that notification of the wife's rights to third parties can be made through the medium of the property registers or through the medium of a landlord. Caravans or houseboats may not be clearly heritable or clearly moveable, and where they are occupied under a tenancy or licence, that tenancy or licence may not properly be comparable to a tenancy of heritable property. For that reason we do not think that our proposals for protection against third parties could be made to apply generally to caravans and houseboats.

3.10 Lastly, we proposed in our Memorandum⁴ that a dealing should not be subject to annulment by a wife as an adverse dealing where it implemented a binding obligation entered into by the husband prior to the marriage. This proposal was accepted on consultation and we adhere to it.

The form of protection

3.11 A proposal that a wife should have protection against adverse dealings raises the further question whether protection should be available to a wife as a matter of law or only where a court has authorised it in a particular case. We think that the arguments on this question are very narrowly balanced and the matter has caused us some anxiety; but in the end considerations both of principle and of practicality have persuaded us to adhere to the proposals in our Memorandum,⁵ that a wife should not be required to seek a court order before she becomes entitled to have dealings in favour of third parties annulled. It seems to us that the need to make a court application might be disadvantageous to a wife if, as might well be the case, the application could not be granted until it was too late to stop the apprehended dealing. More importantly, however, the introduction of court orders would not be in harmony with our general view that occupancy rights should be an incident of marriage, and that their vindication should not require an application to a court.

The nature of the spouse's remedy

3.12 When we refer to a wife having a right to "annul" adverse dealings where she has not consented to the dealing and where the court has not dispensed with her consent, we mean that the wife should have the right to bring an action of reduction of the deed or document implementing the adverse dealing or the right to bring an action of declarator that the adverse dealing constituted otherwise than by deed or other document be set aside. We refer hereafter to annulment proceedings as including both an action of reduction or an action of declarator.

³Para. 2.11.

⁴Para. 6.34.

⁵Para. 6.9.

3.13 We have considered but rejected the possibility that legislation should render adverse dealings automatically null and void. Deeds which give effect to adverse dealings cannot be prevented from being registered, and we think that it would be undesirable if legislation were to render void deeds or titles which had been registered. We also adhere to the view expressed in our Memorandum⁶ that it would not be desirable to attempt to reproduce in Scotland the English concept of the wife's occupancy right as a continuing charge on the interest of the third party. It follows that dealings which adversely affect occupancy rights of a wife without her consent will be valid until annulled by the court, and the occupancy rights will not operate by way of automatic charge or burden on the rights of the husband. Where a dealing takes place without the consent of a wife who has given prior notification of her occupancy rights, the husband and the third party and their professional advisers will require to take into account a potential right in the wife to have the dealing annulled. Where the possibility of annulment can be seen to exist (as it will do if a transaction is implemented in breach of a registered notification of the wife's rights of occupancy in accordance with the notification procedures proposed below⁷) then the transaction will be one in respect of which the Keeper may be expected to exclude indemnity under section 12 of the Land Registration (Scotland) Act 1979 in the case of the new Land Register.

3.14 We think that a decree of reduction should be registrable and that in the case of the new Land Register the court should be empowered to order a consequential rectification so that the position as to title can be restored to that which existed prior to the dealing.

3.15 We recommend that where one spouse is exclusively entitled to occupy a matrimonial home and the other spouse is not so entitled, that other spouse should, as long as timeous notification is given to third parties of the existence of occupancy rights, be entitled to annul any dealing (other than a dealing which implements a binding obligation entered into by the entitled spouse prior to the marriage) between the entitled spouse and a third party in relation to the home which is actually or potentially adverse to that other spouse's occupancy rights, and which has not been authorised by that other spouse's consent or by a court order dispensing with that consent. Where the matrimonial home is a caravan, houseboat or other similar structure (whether affixed to land or not), a spouse's right to occupy that home should not be enforceable against third parties.
(Recommendation 3.1)

3.16 We recommend that a decree annulling an adverse dealing should be capable of being registered in the Land Register or recorded in the Sasine Register or served on the landlord (or trustees) as appropriate, and that consequential rectification of the Land Register should be permitted where such annulment has occurred.
(Recommendation 3.2)

The nature of adverse dealings

3.17 We envisage that the adverse dealings against which protection should be available should comprise any transactions whereby a wife's right of occu-

⁶Paras. 6.15 to 6.21.

⁷Paras. 3.27 ff.

pancy is or may be adversely affected and should extend to any agreements to carry out such transactions. Thus, in the case of owner-occupied property adverse dealings would include not only dispositions and securities by the husband in favour of third parties (to which we referred for illustrative purposes in our Memorandum⁸) but also formal or informal leases or the creation of servitudes burdening the home. The husband's unilateral declaration of a trust affecting a matrimonial home, or a conveyance of it to a trustee under a voluntary trust deed for creditors, would also constitute adverse dealings. So also would missives of sale or missives of let. Unregistered deeds and informal agreements (whether capable of creating real rights or not) would constitute adverse dealings no less than registered deeds and formal agreements.

3.18 In the case of tenanted property an adverse dealing would include any voluntary termination of the tenancy by the husband before its term; any voluntary frustration by the husband of tacit relocation on the stipulated expiry of a lease; any grant by the husband of occupancy rights in the tenanted property whether by way of formal sub-tenancy or otherwise; and any assignation by the husband of the tenancy. Where the husband has a liferent of the matrimonial home (as contrasted with a mere discretionary permission to occupy granted by the trustees) then we think that the wife should have a right to be protected against dealings by the husband in that liferent right which may prejudice her. Accordingly, we think that a surrender or assignation of such a liferent should constitute an adverse dealing.

3.19 The inclusion of securities within the scope of adverse dealings calls for some comment. We appreciate that the grant of a security will usually not operate adversely to occupancy rights in any immediate sense, and that a security will normally be merely an incident in the arrangements for the borrowing of money. We think, however, that the granting of a security, necessarily involving as it does a potential enforcement of rights by a creditor against the matrimonial home, is a transaction of such a kind that either the wife's consent or a court decree dispensing with that consent should be required.

3.20 It should also be noted that it is the grant of the security which will constitute the adverse dealing and not the incurring of the secured obligations. Thus, if a standard security were granted over a matrimonial home to secure "all sums due and to become due" and were consented to by the wife, no further consent would be required if at a future date the borrowings were increased. Consent would, however, be required if a further standard security were granted for new borrowings.

3.21 We recommend that any dealing relating to a matrimonial home entered into between the spouse who is entitled to occupy it and a third party being a dealing which is actually or potentially adverse to the occupancy rights of the other spouse, should be liable to annulment as an adverse dealing. Such adverse dealings should be defined by statute to include the grant of any security over the home or the creation of a trust affecting the home.

(Recommendation 3.3)

⁸Para. 6.21.

Enforcement of securities

3.22 The enforcement of a security over a matrimonial home by a heritable creditor will not constitute an adverse dealing by the husband and accordingly no question of annulment will arise in respect of such enforcement. We proposed, however, in our Memorandum⁹ that where the heritable creditor served a calling-up notice¹⁰ or a notice of default,¹¹ the husband should not be entitled to shorten the period for complying with the notice without his wife's consent in writing. This proposal was accepted by those consulted. The measure of protection proposed would not prejudice the creditor but it would properly complement our earlier recommendation in Part II of this report¹² that a wife should be able to take such steps for the protection of her occupancy rights as her husband is himself entitled to take.

3.23 We recommend that where a heritable creditor has served a calling-up notice or a notice of default in respect of a matrimonial home on the owner spouse, that spouse should not be entitled to dispense with or shorten the period for complying with the notice without the consent in writing of the other spouse having statutory occupancy rights.

(Recommendation 3.4)

Prescription of right to seek annulment

3.24 If dealings in property are to be liable to annulment then it is clearly important to select an appropriate prescriptive period after which the right to take annulment proceedings will cease. We think that the prescriptive period should be a relatively short one, and that a period of six months from the date when the wife has become aware, or can reasonably be taken to have become aware, of the conclusion of the dealing should give the wife adequate time to bring any action, while at the same time giving adequate certainty to the third party. We should say that we do not think that it would be reasonable to impute knowledge of a dealing to a wife by reason only of the registration of the dealing.

3.25 We also consider, however, that a definite date must be specified after which the bringing of an annulment action will cease to be competent, and we recommend therefore that regardless of the wife's awareness, the right to annul should prescribe five years after the date of conclusion of the dealing.

3.26 We recommend that the right of a spouse to have an adverse dealing annulled should prescribe on whichever is the earlier of the date six months after the spouse has become aware or could reasonably have become aware of the dealing having been concluded, or the date five years after the effective date of the dealing.

(Recommendation 3.5)

The requirement for notification

3.27 Our Memorandum proceeded on the basis that it would not be right to permit a wife to annul an adverse dealing in a matrimonial home between her

⁹Para. 6.45.

¹⁰S.19, Conveyancing and Feudal Reform (Scotland) Act 1970.

¹¹S.21, *ibid.*

¹²Para. 2.18.

husband and a third party, unless that wife had given notice to third parties generally of her occupancy rights. Our first task has therefore been to formulate a suitable notification procedure for use in owner-occupied property and in tenanted or liferented property. We emphasise below¹³ that our proposals hinge upon the giving of consent by the wife, and that notification is a procedural matter. We were asked to consider whether the notification procedure might be dispensed with and the passing of good title to a third party made to depend simply on the availability of consent from the wife. We think, however, that it is necessary to add a notification procedure to the substantive requirement of consent for two reasons.

3.28 First, it will provide a degree of certainty for those who deal in residential property in as much as they will know that no action for annulment can be brought by the wife if the notification procedure has not been completed within the time limits which we recommend below.¹⁴

3.29 Secondly, a notification procedure will serve to inform the Keeper of the Registers as to the possibility of reduction of a dealing and, in the case of the Land Register, consequential rectification of the register. If the Keeper were deprived of this information then a serious problem would ensue in respect of indemnity against dealings effected without the consent of a wife. If such dealings were to be subject to reduction, as we recommend, then the Keeper would, in the absence of a notification procedure, wish to exclude indemnity in respect of all dealings in residential property registered in the Land Register save where he had positive evidence both of the existence of a wife and of the availability of her consent. This would not be a practical proposition. If dealings were not to be subject to reduction and consequential rectification of the Land Register then a non-consenting wife would be restricted to a personal remedy against her husband, unless the Keeper were willing to accept a liability to indemnify her. We do not think it is likely that the Keeper would accept any such liability.

Notification in respect of owner-occupied property

3.30 In our Memorandum¹⁵ we proposed that notification in the case of owner-occupied property¹⁶ should be given by registration of appropriate notices which we called "matrimonial home notices". We envisaged that a matrimonial home notice would be a simple notification signed by a wife in a form to be prescribed by subordinate legislation stating the existence of the wife's occupancy right in a given residence.

3.31 The selection of the appropriate register for matrimonial home notices has caused us some difficulty. In our Memorandum¹⁷ we proposed registration of matrimonial home notices in the property registers. We adhere to that proposal and recommend that registration of matrimonial home notices should

¹³Para. 3.52.

¹⁴Para. 3.49.

¹⁵Para. 6.34.

¹⁶References to "owner-occupied" property should be read as including references to registrable long leases of matrimonial homes. The Land Tenure Reform (Scotland) Act 1974 now prevents the creation of such leases in respect of residential property.

¹⁷Para. 6.34.

be made either in the Register of Sasines or in the new Land Register. Matrimonial home notices would be recorded in the Sasine Register as deeds, and would on registration in the Land Register result in an entry being made in the proprietor's section of a land certificate. We must, however, explain our reasons for recommending the property registers: for they derive from practical considerations rather than from any notion that matrimonial home notices are linked by their nature with the property registers.

3.32 Matrimonial home notices, as we conceive them, will not constitute interests in land, nor will registration of such notices in any way alter the nature of the pre-existing occupancy rights to which they relate. The effect of the notice will be to notify third parties of the existence of occupancy rights in a property, and thereby to warn third parties that the wife can have a dealing in the property annulled, if it is effected without her consent or without court dispensation. On this basis it might have been expected that we should recommend either that a new register be created for publication of such notices or, as many suggested on consultation, that they be registered in the personal register (the Register of Inhibitions and Adjudications) and treated as a species of inhibition.

3.33 Creation of a new register for notification of occupancy rights would have had the advantage of enabling notification of occupancy rights in tenanted property as well as in owner-occupied property to be made in one register. But the introduction of such a new register seemed to us to pose two overwhelming practical difficulties. First, its constitution and staffing would necessarily have involved additional public expenditure. Secondly, the establishment of such a register would have imposed upon those involved in property transactions the burden and expense of searching in three registers rather than two, which would run counter to our desire to avoid undue increased burdens for practitioners, and increased expense to members of the public.

3.34 Practical considerations also operated to offset the apparent convenience of using the personal register to publicise notices which are broadly comparable in effect to inhibitions. While the Register of Inhibitions and Adjudications is in theory a register of persons (rather than property) it is more useful to regard it as a register of persons' names. As such it is appropriate for the use of creditors who wish to render litigious the whole heritable property of a debtor, but not for the receipt of notifications in respect of particular matrimonial homes. Entries in the personal register also require quinquennial renewal, and while legislation could make a special exemption for notification of occupancy rights, searches for unprescribed notifications in the personal register would then require to cover the whole possible duration of a marriage. This seemed to us a quite impractical burden, and we were advised that it could not have been alleviated, even with the aid of computerised methods of retrieval of past entries in the personal register. In one further respect inhibitions in the personal register would not have achieved the desired effect for notification of occupancy rights. We recommend below¹⁸ that notification of occupancy rights should be allowed to take effect in relation to prior missives: but inhibitions are effective only as regards voluntary acts and so cannot affect implementation of prior missives.¹⁹

¹⁸Para. 3.50.

¹⁹Graham Stewart, *Diligence*, p. 551.

3.35 We therefore arrived, by a process of elimination, at the property registers as the medium through which matrimonial home notices for owner-occupied property should be published to third parties. Investigation of the administrative procedures affecting the Sasine Register and the new Land Register has, moreover, served to confirm us in this view. We believe that parties seeking to ascertain from the property registers whether a matrimonial home notice has been registered should be able to do so with the minimum of difficulty and delay. The latter point is of particular importance because apprehension was voiced on consultation, by the Law Society of Scotland, that the Sasine Register would not in fact provide information which would enable speedy disclosure to be made of the fact of registration of a matrimonial home notice for inclusion in an interim report on search. The Keeper of the Registers, however, has told us that he anticipates that it should be possible for his department to establish a separate index for matrimonial home notices, which would enable a search of matrimonial home notices to be made in the Sasine Register within a very short time after presentment for recording. We understand that the computerised methods envisaged for the new Land Register should enable matrimonial home notices to be extracted and identified for search purposes almost contemporaneously with their presentment for registration in that register.

3.36 We have also required to satisfy ourselves as to the practicability of imposing upon a wife the burden of registering a matrimonial home notice when she may well not have access to the property titles for the home. We therefore enquired whether a description of the matrimonial home based upon the modicum of information likely to be known or accessible to a wife would enable the Keeper to link the matrimonial home notice with the deeds in the Sasine Register or entries in the Land Register. We are advised that informal discussion between a wife's solicitors and the officials in the Registers of Scotland should normally suffice to overcome any identification problem as long as the postal address of the matrimonial home and the name of the husband is provided.

3.37 We consider therefore that the registration of a matrimonial home notice in the Sasine Register or in the Land Register should achieve the desired end of enabling a spouse or her agents to complete and register a simple prescribed form of notice which, upon presentment to the Keeper, can easily be linked with the entries for the property in the Sasine Register search sheet or with the title sheet in the Land Register and can also be speedily brought to the attention of searchers. We believe that such matrimonial home notices will be capable of registration without legal advice, although we should say that we envisage that registration would normally be undertaken with the assistance of a solicitor.

3.38 **We recommend that where one spouse is the owner of a matrimonial home the other spouse should be entitled to give notice of his or her occupancy rights but only by registering in the Land Register (or recording in the Sasine Register) a notice (called a "matrimonial home notice") in a prescribed form, and that for this purpose an "owner" should include an unfeft proprietor with a personal right, a proper liferenter or a tenant under a registered long lease.**
(Recommendation 3.6)

Notification in respect of tenanted and liferented property

3.39 Our recommendations in the foregoing paragraphs for notification to third parties of occupancy rights in owner-occupied homes or homes held under long lease hinge upon the use of the Sasine Register or the Land Register. No such register exists for tenanted property and, as we explained above, we have not been able to recommend the introduction of a new register for the purpose of publicising notification of occupancy rights in homes of all tenures. Nevertheless, some method has to be found for notifying third parties of a wife's right of occupancy in a tenanted matrimonial home, if adverse dealings in tenanted property (which comprises approximately two thirds of the dwellinghouses in Scotland) are to be made subject to protection against third parties.

3.40 Our task has been to identify a medium through which third parties, whether they deal with a tenant spouse as prospective assignees or sub-tenants or deal with a landlord to whom a tenant spouse may have renounced his tenancy, may ascertain whether their transaction is liable to annulment by the tenant's spouse. We believe that the most appropriate medium through which a tenant's wife can give notice to third parties of the existence of her occupancy rights will be the landlord himself. The landlord will normally be known to the wife and it would be a simple matter for the wife to give a written intimation in a prescribed form to the landlord stating that dealings in the tenancy would be subject to her consent. Equally, we think it is a practical proposition that the third parties who deal with the tenant should make enquiries as to the existence of any such intimation from the landlord. In many instances they will be in contact with the landlord in any event for the purpose of obtaining the landlord's consent or approval to the transaction; and even where they are not, they will or ought to be aware of the landlord's existence. It may be, of course, that a dealing in the tenancy (for example a renunciation of the tenancy) may involve only the tenant spouse and the landlord himself. In that case also the landlord will be an appropriate recipient of an intimation from the wife as to her occupancy rights.

3.41 The procedure suggested above for notification of occupancy rights through the medium of the landlord can, we think, readily be adapted to the case where the matrimonial home is held by trustees and the husband has a liferent interest in it. In that case the wife's intimation (again in a suitable prescribed form) would be given to the trustees and would state that dealings by the husband in the liferent were subject to her consent.

3.42 We recommend that where one spouse is the tenant or liferenter of a matrimonial home, the other spouse should be entitled to give notice of his or her occupancy rights, but only by means of a written intimation (called a "matrimonial home intimation") in a prescribed form given to the landlord or the trustees as appropriate.

(Recommendation 3.7)

A landlord's duty on receiving notification

3.43 We accept that our proposals for the notification of occupancy rights in tenanted or liferented property will impose upon individual landlords and trustees the role which is performed by the Keeper of the Registers in the case of owner-occupied property. That requires provision to be made to enable third

parties dealing with a tenant husband to rely on the accuracy of information received from such individual landlords or trustees. We think therefore that landlords and trustees should be put under a duty to inform enquirers whether any intimation of occupancy rights has been made to them by a wife, and if so, whether they have been subsequently notified that the intimation has been discharged or superseded.

3.44 We are also aware that our proposals will necessarily impose upon landlords and trustees the burden of recording information received by them relating to occupancy rights. Such information will not be restricted to matrimonial home intimations as such, but will extend further to notification of their discharge or termination. We think that landlords and trustees should be suitably recompensed for this administrative burden, and that fees should be payable to landlords or trustees on the submission of the relevant forms to them.

3.45 A landlord may not be aware of the fact of service of an intimation of occupancy rights on his predecessor. In this situation he may unwittingly misinform a third party acquirer, thus permitting that third party to acquire an unchallengeable title to the tenancy, or he himself may rely in good faith on a renunciation of the tenancy by the tenant. We consider that a landlord should be placed under a statutory duty to provide to his successor the information he has kept concerning documents relating to occupancy rights served on him or on his own predecessors. A similar provision is, in our view, unnecessary where the matrimonial home is trust property, since trustees or their agents as a matter of administrative practice hand over to their successors all documents relating to the trust.

3.46 We recommend that landlords (or trustees) should be required to inform any enquirer what documents have been served on them under the recommendations of this Part of our report. A dealing should not be capable of annulment where a third party was informed by the landlord (or trustees) that no intimation of occupancy rights had been made or if made had ceased to be effective. Any document served on a landlord (or trustees) should be accompanied by a prescribed fee. We further recommend that landlords or their representatives should be required to inform their successors what documents have been served on them or their predecessors under the recommendations of this Part of our report.
(Recommendation 3.8)

Informing the spouse with title of a notification

3.47 We think that husbands should be informed speedily of the registration of any matrimonial home notice or the giving of any matrimonial home intimation. It is possible that the notice or intimation may have been given in circumstances where the husband will have a right to seek its reduction, (for example where the wife has previously renounced her occupancy rights), and in any event such a notice or intimation will affect the rights of the husband to deal with the matrimonial home in the future and should be brought to his attention. Where the notice is registered in the property registers, we think that the Keeper can conveniently be charged with the duty of sending to the husband a copy of the notice. This duty would be performed by sending a copy of the notice to the husband at the address specified for the home in the notice itself. Where notification is given by intimation to a landlord or to trustees, we think it would be

appropriate to impose upon the wife a duty of sending her husband a copy of the intimation.

3.48 We recommend that where one spouse intimates his or her occupancy rights to the landlord (or the trustees) that spouse should be required to send to the other spouse a copy of the intimation; and that where one spouse registers a matrimonial home notice the Keeper of the Registers should be required to send a copy to the other spouse addressed to that other spouse at the address specified in the notice as the address of the matrimonial home.
(Recommendation 3.9)

Priorities between notifications and adverse dealings

3.49 In our Memorandum²⁰ we referred to the fact that introduction of a system for notification to third parties of occupancy rights would necessitate the enactment of appropriate rules to regulate competition between such notification and the implementation of dealings in the matrimonial home. This means that notification must be given before an appropriate prescribed date if it is to be relied on by the wife in any annulment proceedings. Where owner-occupied property is concerned we think that the reliance placed on the property registers dictates that a matrimonial home notice should be ineffective unless registered before the date of registration of a deed implementing an adverse dealing. In the case of dealings in tenanted property which require to be intimated to a landlord in order to create real rights (e.g. assignations of tenancies) we think that a matrimonial home intimation should not be effective unless served before the date on which the real right has been created by intimation. In the case of dealings which involve termination of a tenancy as between husband and landlord, (e.g. a renunciation) or which prevent tacit relocation of the lease (e.g. a tenant's notice of removal), we think that a matrimonial home intimation should not be effective unless served before the effective date of termination. In the case of those dealings (such as the grant of a lease of an owner-occupied home or the grant of a sub-lease of a tenanted home by the husband) which do not involve registration or intimation, we think that a matrimonial home notice or intimation should not be effective unless registered or served before the date when the third party has actually entered into possession of the matrimonial home. Where adverse dealings arise in respect of liferents, we think that a matrimonial home intimation should not be effective unless served on the trustees before the date on which an intimation is given to the trustees of an assignation of the liferent or before the date on which the liferent right has effectively been terminated.

3.50 We have considered carefully whether a wife should be permitted to give an effective notification after the conclusion of a binding contract between the husband and a third party to effect a dealing in respect of the matrimonial home. Our proposals will enable a wife to register a matrimonial home notice as of right at any time after the home becomes a matrimonial home, and it might seem reasonable to require such a wife to give notification of her occupancy rights not later than the date on which a contract is concluded for a dealing in the home. Such a rule would have convenient practical results in the case of a

²⁰Para. 6.34 and Vol. I, Para. 1.14.

sale of residential property, since absence of a notice at the date of the missives would mean that the sale could proceed, and that a letter of obligation could be given without the possibility of subsequent effective notification being given. This consideration might have persuaded us to require notification prior to the contract had we been satisfied that a wife would always be able to apprise herself of the position before the missives were concluded. We think, however, that although in many cases a wife will, or should be, well aware of imminent dealings, the possibility cannot be discounted that a husband may enter into arrangements for such dealings which are kept secret, either by chance or design, from the wife. For that reason we think it essential to permit a wife to give her notification after the conclusion of missives of sale or similar contracts. Such a notification would then be effective for its purpose so long as it was registered or intimated before the appropriate date proposed in the preceding paragraph.

3.51 We recommend that annulment of a dealing relating to a matrimonial home should be competent only if occupancy rights have been notified by matrimonial home notice or matrimonial home intimation before the date given below:—

- (a) where the dealing is capable of being registered in the Land Register (or recorded in the Sasine Register), the date of registration or recording;**
- (b) where the dealing is an assignation of a tenancy or liferent, the date of intimation of the assignation to the landlord or trustees;**
- (c) where the dealing is the termination of a tenancy on or before the expiry date of the lease, the date on which the tenancy terminates;**
- (d) where the dealing is the termination of a liferent, the date on which the liferent terminates;**
- (e) where the dealing is the creation of a trust, the date on which the trust is created;**
- (f) where the dealing does not fall within any of the categories above, the date on which the third party in pursuance of the dealing, enters or attempts to enter into possession of the matrimonial home.**

(Recommendation 3.10)

Consent to dealings

3.52 Compliance with the notification procedures will be a precondition of the exercise by a wife of her right to annul adverse dealings. We emphasise, however, that notification should be seen as a procedural matter. The matter which lies at the heart of our proposals, and which will also be of central importance in the practical working out of those proposals, is the obtaining of consent from the wife. Circumstances may well arise in which prudence will dictate that such consent be obtained even though at the time no notification of occupancy rights has been given. For example, if missives are concluded for the sale of a matrimonial home, the absence of any matrimonial home notice at the date of the missives will not preclude subsequent registration of a matrimonial home notice; so that, the absence of notification will not avoid the need to obtain the wife's consent at the missives stage or even earlier. Moreover, it should be remembered that lack of consent will affect the husband's personal obligations to his wife quite apart from any prejudice it may occasion to the husband's ability to pass a good title to a third party. The importance of consent and the advisability of its being obtained at the earliest stage in a transaction (especially where the spouses are estranged) is fundamental to an understanding of the practical application of our proposals.

3.53 In the case of residential property which is tenanted or liferented our proposals are not likely to create substantial problems for practitioners. It is true that those who engage in dealings in tenancies or liferent interests will now require to take into account the possibility that consent may be required from a wife, and to make enquiries of landlords or trustees as to the existence of matrimonial home intimations. In many circumstances, however, an approach to the landlord may be required in any event for other reasons.

3.54 Our proposals do, however, conflict with existing practice in the conveyancing of owner-occupied property. Conveyancers rely at present upon the conclusiveness of missives and the giving at settlement of personal obligations to deliver clear searchers; whereas under our proposals, dealings in residential property may be affected by matrimonial home notices registered after missives are concluded. We believe, however, that our proposals will not prevent the prudent conveyancer, who obtains the wife's consent at an appropriately early stage, from transacting with the same degree of certainty as he can at present.

3.55 We believe that where the wife's consent to the dealing has been obtained three results should follow. First, the husband should not require to seek his wife's consent again during the remaining stages of the transaction. Secondly, the husband's solicitors should be able to rely, in giving any letter of obligation, on the fact that the consent will override any matrimonial home notice. Thirdly, the purchaser should be able, where consent has been given, to obtain a title which is not flawed by any matrimonial home notice. We think that these various objectives can be attained without undue cost in time or expense if legislation provides that the wife's consent should be *registrable*. We think that registrability is vital because unless the consent is registered the third party will obtain a title which on the face of the registers is liable to annulment and so will not be readily marketable.

3.56 In transactions involving tenanted (or liferented) property where title is not investigated to the same extent as in the case of owner-occupied property, there may be less need for a wife's consent to be intimated to landlords or trustees.²¹ Nevertheless we think it is important that the consent by a wife to a dealing should be made manifest to landlords or trustees, given that we have imposed on the latter the role of acting as substitutes for a register. For that reason we think that legislation should permit any prescribed form of consent given by a wife in respect of such property to be served upon the landlord or trustees but should not make such service mandatory.

3.57 Taking a proposed sale of residential property as an example, we envisage that our proposals would operate in practice in the following way. In a "normal" case, where the spouses were not in dispute and there was no reason to anticipate any objection to the sale on the part of the wife, the husband would ascertain informally from his wife that she was agreeable to the sale and would obtain registrable evidence of her consent by procuring her signature to the disposition as a consenter. If the husband or his solicitors were not content to await the

²¹Where the adverse dealing in owner-occupied property is itself not registrable (e.g. the grant of a lease) we would expect the prescribed form of consent to be handed over at settlement but not registered.

signing of the disposition before obtaining such written evidence of the wife's consent, they would get the wife to sign a consent (in prescribed form) at the missives stage, or at some earlier stage. In those cases where there was estrangement between the spouses or there was some reason to anticipate that the wife might object to a projected sale, the husband would seek his wife's signature to a consent (in prescribed form) to the projected sale before taking any steps towards that sale. We envisage that the prescribed form for such a prospective consent would limit the consent to a specified type of projected transaction (e.g. a sale in our example) occurring within a specified future period.

3.58 We envisage that prescribed forms of consent will be very simple documents; that they will be registrable; and that they will be irrevocable once signed. A form of consent could be registered by the husband's solicitors upon its delivery or it could be retained and handed over at settlement to the purchaser for registration by the latter. Once a consent has been signed and delivered the parties will know that the possibility of annulment of the sale cannot arise, and obligations to deliver searches clear of effective matrimonial notices can be given in reliance on that knowledge. Under our procedure a husband would require to obtain his wife's consent on only one occasion either by obtaining her signature to a form of consent or to the disposition itself.

3.59 If for any reason a projected sale were to fail to take place the signature by the wife of a prescribed form of consent to that sale in favour of the specified purchaser or his assignees would not prejudice her, even if the form of consent was in fact registered, for any subsisting or subsequent matrimonial home notice by her would remain unaffected in that event, and would remain valid in respect of any subsequent adverse dealing.

3.60 The procedures which we envisage could also provide a means of protection where a seller and purchaser had omitted through inadvertence to obtain a consent in one form or another from a wife, but that consent would have been available if asked for. In such a case the wife would be able to sign a prescribed form of consent *after* settlement of the transaction, and registration of that consent would evidence the fact that the prior disposition had ceased to become subject to annulment.

3.61 Our proposals do, of course, assume that the seller's solicitor will either know whether his client is married or will be correctly informed as to the marital status of his client. If the solicitor is misled so as to believe that a client who is in fact married is single, and as a result does not obtain consent from an undisclosed wife, then a transaction may become subject to annulment if that wife registers a matrimonial home notice before the disposition itself is registered. The whole object of our proposals is to protect such a wife in these circumstances. We think, however, that a seller's solicitor who has made proper enquiry of his client as to the existence of a wife will be seen to have exercised due care in the circumstances.

3.62 We recommend that annulment of an adverse dealing relating to a matrimonial home should not be competent where the spouse who has statutory occu-

pancy rights consents in a prescribed manner to the dealing either before or after the dealing is effected. Such prescribed manner should include:

- (a) signature of a prescribed form indicating consent to a projected adverse dealing;
- (b) signature of a prescribed form indicating consent to a specific adverse dealing; and
- (c) signature as a consentor to the deed implementing a specific adverse dealing.

The prescribed forms of consent should be capable of being registered in the Land Register, or recorded in the Sasine Register, or served on the landlord (or trustee) as appropriate.

(Recommendation 3.11)

Dispensing with consent

3.63 Proposals of the kind we have advanced, which may make a husband's right to deal with his property dependent upon his obtaining the consent of his wife, must make proper allowance for cases where such consent cannot be obtained because of her incapacity or because consent is unreasonably withheld by the wife. It would not, for example, be right to impede a sale of a matrimonial home where arrangements had been made by the husband for the provision of suitable alternative accommodation for his wife and children. Nor would it be appropriate to protect the occupancy rights of a wife who had abandoned the matrimonial home without due cause.

3.64 In our Memorandum²² we proposed that circumstances of the kind outlined above should be remedied by giving the court a discretion to dispense with the consent of a wife, who did not have the capacity to consent, or who had unreasonably withheld consent. This remedy was generally approved on consultation. Further consideration and the benefit of consultation have persuaded us that it would be helpful if legislation were to create a rebuttable presumption of the unreasonable withholding of consent in circumstances where the wife had previously led the husband to believe that she would in fact consent to the dealing, and in circumstances where the wife had failed to acknowledge receipt of more than one written request from the husband for her consent. We think in general that the guidelines which we have provided in Part II of this report²³ for the court in the exercise of its powers to regulate occupancy rights should be equally appropriate as guidance to the court in the exercise of its discretion to dispense with a wife's consent. These guidelines will enable the court to take into account all the circumstances of the case including the conduct of the spouses, their needs and financial resources, the needs of any child of the family and any use of the matrimonial home in connection with a trade, business or profession.

3.65 It will be necessary to ensure that a court decree granting dispensation from consent should be registrable or capable of being served on the relevant landlord or trustees and we recommend that provision be made to that end.

²²Para. 6.29.

²³Para. 2.32.

3.66 In our Memorandum²⁴ we drew attention to the particular problems involved in the giving of valid consents by minor wives to adverse dealings by their husbands. What we had in mind was that the husband would have a conflict of interest as the curator for his wife on the one hand and as an intending party to the dealing on the other. We think, however, that even if this conflict of interest were resolved a further problem relating to minors would remain: namely, that the wife might seek to repudiate within the quadriennium (the four years following the attaining of majority) a sale consented to by her curator. We think that the whole problem of dealings in a matrimonial home by a minor wife can best be resolved by enabling application to be made to the court to dispense with such a wife's consent to the dealing. Indeed we think that the court's powers should extend to minor husbands as well as minor wives in view of the problem of repudiation within the quadriennium which we note above.

3.67 In our Memorandum²⁵ we proposed that only the husband should be entitled to apply to the court for a dispensation from his wife's consent. We think that this proposal would be unduly restrictive in view of the fact that the withholding of consent may prejudice a third party who deals with the husband. We propose, therefore, that any person who has an interest should be entitled to apply to the court to exercise its dispensing power.

3.68 We recommend that the court should have power, on the application of any person having an interest, to dispense with the consent of a spouse with statutory occupancy rights to a dealing or to a proposed dealing relating to a matrimonial home where:

- (a) the consent is unreasonably withheld; or
- (b) the consent cannot be given because of that spouse's physical or mental disability; or
- (c) that spouse cannot be found after reasonable steps have been made to trace him or her; or
- (d) that spouse is a minor.

(Recommendation 3.12)

3.69 We recommend that consent should be rebuttably deemed to have been unreasonably withheld by a spouse if he or she has led the other spouse to believe that consent would be given or if he or she has refused to reply to two written requests for consent; and that the court, in deciding whether to exercise its discretion to dispense with consent, should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9.

(Recommendation 3.13)

3.70 We recommend that the decree of the court dispensing with consent should be capable of being registered in the Land Register or recorded in the Sasine Register or served on the landlord (or trustees) as appropriate.

(Recommendation 3.14)

²⁴Para. 6.25.

²⁵Para. 6.30.

Dispensation and annulment

3.71 It is possible that a husband or another party may apply to the court for an order dispensing with the wife's consent to an adverse dealing at the same time as the wife brings an action to have that dealing annulled. In such circumstances we think that the court should sist the annulment proceedings until it has decided whether it is appropriate that dispensation from consent should be granted.

3.72 We recommend that if an application is made to dispense with consent to a dealing relating to a matrimonial home while an action for annulment of that dealing is pending, the court should sist the annulment proceedings until the conclusion of the proceedings on the application for dispensing with consent.

(Recommendation 3.15)

Petitions under the Married Womens' Property (Scotland) Act 1881

3.73 Section 5 of the Married Womens' Property (Scotland) Act 1881 provides that where a wife is deserted by her husband or is living apart from him with his consent, the court may on petition dispense with his consent to any deed relating to her estate. In our Memorandum²⁶ we proposed that where a wife was herself the owner or tenant of a matrimonial home the procedure under the 1881 Act should cease to be competent, and she should be required to apply to the court under the procedure we recommend above²⁷ for an order dispensing with her husband's consent to any adverse dealing. No adverse comments were made on this proposal by those consulted.

3.74 We recommend that it should be incompetent for a wife to apply to the court under section 5 of the Married Womens' Property (Scotland) Act 1881 for an order dispensing with her husband's consent to a dealing relating to a matrimonial home.

(Recommendation 3.16)

Formalities of consent

3.75 In our Memorandum²⁸ we invited views on whether the signing by a wife of a consent to an adverse dealing should be subject to special formalities, and in particular whether its validity should be conditional upon evidence that the wife had received independent legal advice. Nearly all of those who commented on this point on consultation did not favour the imposition of such special formalities, and we for our part do not think that they are necessary. The general law relating to misrepresentation or duress will, we think, adequately cover circumstances where a wife's consent has been improperly obtained. Accordingly we make no recommendation.

Matrimonial home in joint names

3.76 It might be thought that where the title to an owner-occupied or a tenanted matrimonial home is in joint names of both spouses no need for

²⁶Para. 6.30.

²⁷Paras. 3.63 ff.

²⁸Para. 6.24.

protection against adverse dealings will arise. However this is not so. In our Memorandum we pointed out that circumstances could be figured in which a dealing by one spouse in that spouse's *pro indiviso* share of an owner-occupied²⁹ or tenanted home³⁰ would have the result of introducing a stranger into the matrimonial home; and that in the case of tenanted property unilateral action by one spouse might result in tacit relocation becoming unavailable to either spouse.³¹ We proposed, therefore, that protection should be made available to one co-proprietor spouse against dealings by the other spouse which could effectively prejudice the first spouse's rights of occupancy.

3.77 We recommend that where both spouses are entitled to occupy a matrimonial home the recommendations in this Part of our report should apply to any adverse dealing by one of the spouses relating to the matrimonial home or his or her share of it.

(Recommendation 3.17)

Multiple matrimonial homes

3.78 In our Memorandum³² we envisaged that protection of a wife's right to retain occupancy in a question with her husband might extend to more than one qualifying matrimonial home at a time, but that protection against third parties would require to be limited to one such home only. On reconsideration, however, we have come to the view that such a limitation would probably be impractical. It would not in fact be possible by direct means to prevent the actual giving of a matrimonial home notice or intimation in respect of a second matrimonial home and prevention by indirect means (for example, by deeming all notifications other than the first one to be invalid) might cause hardship in those cases where there was good reason for the wife to seek annulment of an adverse dealing affecting the second home. We think, however, that in cases where there is no good reason for preventing a dealing in respect of a second home, the court may be expected to dispense with the wife's consent. In view of the availability of this remedy, we do not propose to make any special provision excluding the giving of matrimonial home notices or intimations in respect of more than one qualifying home.

Notices of termination of occupancy rights and discharges.

3.79 We think that it will be important to ensure that where matrimonial home notices or matrimonial home intimations have become superseded by events this fact can be made public to third parties. A matrimonial home notice, for example, may be registered during the currency of a marriage in order to protect occupancy rights which are an incident of the marriage. Termination for any reason of the marriage or of the husband's entitlement to occupy the home will automatically terminate the occupancy rights; but means will have to be provided to enable the registered matrimonial home notice to be shown to have become redundant by virtue of such termination or cessation. We think, therefore, that legislation should enable any interested party to

²⁹Para. 6.59.

³⁰Paras. 3.45 and 4.19.

³¹Paras. 3.45 and 4.19.

³²Para. 2.90.

register a notice of termination in a prescribed form, where events have occurred which terminate the occupancy rights protected by a matrimonial home notice or a matrimonial home intimation. We also think that it would be convenient if a wife who wished to discharge a matrimonial home notice or matrimonial home intimation were enabled to effect a registration or intimation of that discharge. A voluntary discharge may be appropriate in some cases rather than a general renunciation of occupancy rights or a consent to a particular proposed dealing.

3.80 We recommend that any person having an interest should be entitled to give notice of the termination of a spouse's statutory occupancy rights in a matrimonial home by registering in the Land Register, or recording in the Sasine Register or serving on the landlord (or trustees) as appropriate, a notice in prescribed form.

(Recommendation 3.18)

3.81 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to discharge a matrimonial home notice or a matrimonial home intimation by registering in the Land Register, or recording in the Sasine Register or serving on the landlord (or trustees) as appropriate, a deed of discharge in prescribed form.

(Recommendation 3.19)

Interim protection pending annulment

3.82 The fact that a wife may bring an action to annul an adverse dealing will not resolve the immediate problem occasioned to her by the intrusion of a third party. In any event, time may elapse before decree in an action of annulment can be obtained. We think, therefore, that the court should have power, where an adverse dealing has occurred, to make interim orders for the protection of the wife's occupancy rights equivalent to those we recommend in Part II of this report.³³

3.83 We recommend that, pending the disposal of an action of annulment of a dealing relating to a matrimonial home, the court should have power to make such interim orders as it considers necessary or expedient in relation to the matrimonial home, its furniture and plenishings or the personal effects of the spouses and any children.

(Recommendation 3.20)

Reduction

3.84 Where a matrimonial home notice (or intimation), a consent to an adverse dealing, a discharge of a matrimonial home notice (or intimation), or a notice of termination of occupancy rights has been registered³⁴ improperly, or where a court order dispensing with consent to an adverse dealing has been granted incompetently, it will be necessary that in addition to a decree of reduction of the document or order being obtained, the property registers or the records of

³³Para. 2.45.

³⁴In this section we use the term "registered" to include served on the landlord or trustees. Registration and registrable also have this extended meaning.

landlords or trustees can be corrected. A person who transacts with the owner of heritable property is in general entitled to rely on the state of the owner's title as evidenced by the property registers, and we recommend³⁵ that a person dealing in tenanted (or liferented) property should also be able to rely on the records of the landlord (or the trustees). A decree of reduction of any of the above documents or orders, therefore, should be registrable but should not, until it is registered, have legal effect against third parties. The legal effect of a registered decree of reduction will depend upon the nature of the document reduced, and we now turn to discuss the various situations.

3.85 Where a matrimonial home notice (or intimation) itself is reduced the decree of reduction should, on registration, have a retrospective effect, so as to ensure that adverse dealings concluded prior to its registration cease to be liable to annulment. Such retrospective effect can only be achieved in the Land Register by rectification of the register, and the limited extent to which such rectification is permitted by section 9 of the Land Registration (Scotland) Act 1979 makes it necessary to enact that the court may order rectification of the Land Register on granting an order reducing a matrimonial home notice (or intimation).

3.86 A registered discharge of a matrimonial home notice (or intimation) or a registered notice of termination of occupancy rights serves to prevent an existing matrimonial home notice (or intimation) being an effective foundation for an annulment of an adverse dealing. Where such a discharge or notice of termination is itself reduced, the registration of the decree of reduction should revive the relevant existing matrimonial home notice (or intimation), but should revive it in respect of subsequent dealings only. We think it is essential that a third party who deals with a husband should be entitled to rely on a discharge or notice of termination, which was in fact registered at the time of his dealing, notwithstanding that such discharge or notice is subsequently reduced. However, where the decree of reduction is registered before the adverse dealing between the husband and the third party is actually concluded, then it is proper to enable that dealing to be annulled. Once public notice has been given of the revival of the matrimonial home notice (or intimation) a third party proceeds at his peril.

3.87 For the reasons stated in the last paragraph a registered decree of reduction of a consent to an adverse dealing or of reduction of a court order dispensing with such consent should only be effective in relation to subsequent dealings. We think, however, that this general rule should not apply in a case where the consent or court order dispensing with consent has been given or made *after* the conclusion of the adverse dealing. In such a case the third party will have dealt in the knowledge that his title may be liable to annulment, and he will not be prejudiced if the decree of reduction, on being registered, restores the possibility of annulment. We think, however, that the title of a *bona fide* acquirer from the third party should be protected if the former's title is completed by registration or otherwise before the registration of the decree of reduction.

³⁵Para. 3.46.

3.88 We recommend that where the court reduces a matrimonial home notice registered in the Land Register it should have power to order rectification of the register.

(Recommendation 3.21)

3.89 We recommend that where the court orders the reduction of a discharge, a consent, an order dispensing with consent, or a notice of termination of occupancy rights, an adverse dealing should not become liable to annulment unless:

- (a) the decree of reduction was registered in the Land Register, recorded in the Sasine Register or served on the landlord (or trustees) as appropriate, before the conclusion of the dealing; or
- (b) the consent or order dispensing with consent under reduction was given or made after the conclusion of the dealing.

(Recommendation 3.22)

PART IV DOMESTIC VIOLENCE

Preliminary

4.1 We deal in this section of our report with the improvement of the civil remedies available to a spouse (who will almost invariably be a wife rather than a husband) who requires protection against violent conduct by the other spouse. This necessarily leads us to make proposals for the improvement of the main existing civil remedy available, namely interdict against molestation. However, as we explained in our Memorandum,¹ even an improved form of interdict may not be sufficient to assure peaceable possession of the matrimonial home to a wife and children who require to share that home with a violent husband. If that peaceable possession is to be assured then it may be necessary in the last resort to order what interdict cannot order:² namely the exclusion of the husband from the matrimonial home. We make proposals below for such a new remedy involving an exclusion order against the husband, and we deal with this new remedy before discussing our proposals for the improvement of the existing remedy of interdict.

4.2 We think that it is important to stress that domestic violence which involves assault by one spouse on another is a criminal offence. While we make no proposals in this report relating to the criminal law as such,³ we have taken into account in formulating certain of the proposals we make in relation to civil remedies the fact that such violence does constitute such an offence.

SECTION A: EXCLUSION OF A SPOUSE FROM A MATRIMONIAL HOME

Exclusion Orders

4.3 We recognised in our Memorandum⁴ that a power of the courts to exclude a husband from a matrimonial home for the purpose of protecting the wife and

¹Para. 2.34.

²Burn-Murdoch, *Interdict* (1933) p. 5; Walker, *Civil Remedies* (1974) pp. 228 and 252.

³See however our recommendation in para. 4.50 in relation to s.30 of the Rent Act 1965.

⁴Para. 2.48.

children would amount to a power to suspend that very occupancy right which we propose should be available to husbands and wives alike. We also recognised that an exclusion order might result in the exclusion from his home of a husband, who not only had an occupancy right in that home, but was the legal owner or tenant of the home. However, nearly all of those whom we consulted⁵ agreed that where the end was the protection of a wife or of a wife and children, this end justified a remedy which deprived a husband of the benefit of occupancy. Accordingly we recommend that the court should have a discretion, where the need for protection of a wife or of a wife and children so dictates, to grant an order suspending the right of a husband to occupy the matrimonial home, and we recommend further below⁶ that such an exclusion order may be accompanied by an interdict prohibiting the husband from entering an area which includes the matrimonial home itself.

4.4 We have referred in the preceding paragraph to protection against violence by a husband as being the object of an exclusion order. We think, however, that the remedy should be available not only as a protection against physical violence as such, but also as a protection against conduct which injures the physical or mental health of the wife or children. We also think that it is important that the protection should be available where there has been a course of conduct, as opposed to an isolated act or series of acts.

4.5 It was suggested to us by the Royal Scottish Society for the Prevention of Cruelty to Children that the children whose protection was in view might extend beyond those children who were actually resident in the matrimonial home. The Society drew attention to the fact that there might be children who had been taken into care, but whose return to the matrimonial home might become possible if a violent husband were excluded from the home. We are glad to adopt this suggestion, and recommend that an exclusion order should be competent if it is made for the protection of a child, who is not in fact resident in the matrimonial home, but who might normally be expected to reside in that home.

4.6 We suggested in our Memorandum⁷ that the factors to be taken into account by the court in granting orders relating to occupancy rights⁸ would be equally appropriate to be taken into account in considering an application for an exclusion order. Those factors enable the court to take into account all the circumstances of a case but in particular the conduct of the spouses, the respective needs and resources of the spouses, the needs and interests of the children and the extent to which the matrimonial home is used for any business purpose. Accordingly, where an application was made for an exclusion order the court would be able to have regard to the fact that the exclusion order might render the husband homeless, and would be able to take into account any special consequences which might arise if the husband was excluded from a matrimonial

⁵It was suggested by some that exclusion orders should not be extended to owner-occupied property on the basis that violence is rare among owner-occupiers, and that the few cases which occur do not justify interference with rights of property. We cannot accept such an argument. The tenure of the matrimonial home should not affect the availability of remedies against domestic violence.

⁶Para. 4.20.

⁷Para. 2.51.

⁸Para. 2.32 of this report.

home in which he also carried on his business or profession. We went on, however, to suggest that in the particular case of an exclusion order the court should also be required to consider the balance of hardship as between the wife and children on the one hand and the excluded husband on the other hand.

4.7 The suggestion that the court should be required to consider the balance of hardship proved controversial on consultation. It was argued by some that the protection of the wife and children should be the paramount factor for the court in deciding to grant an exclusion order, and that the concept of a balance of hardship was inappropriate in cases involving domestic violence. We consider that where the exclusion of the husband is in issue there cannot be any paramount factor. It is possible, for example, that the exclusion of a husband may have serious economic consequences for the whole family unit which would render an exclusion order a quite inappropriate remedy. The exclusion of the husband from the matrimonial home might, if he were a service tenant, lead to a termination of the tenancy to the detriment of the whole family. The court should not, we think, be precluded from having regard to such consequences.

4.8 However, although we reject the notion that protection must be the paramount factor, we have also come to the view that it would be a mistake to impose upon the court the need to evaluate the balance of hardship arising out of the grant of an exclusion order. Such a requirement could well result in argument as to the balance of hardship in every case where an exclusion order was sought, and we think that it might lead to the court refusing to grant exclusion orders in circumstances where we would wish to see an order made. We think that what is needed is to ensure that the court has no unnecessary disincentive to grant an exclusion order, but that the court should at the same time have a residual discretion not to grant an exclusion order in those special cases where the particular consequences of excluding a husband would make the remedy an inappropriate one for the wife and children. We recommend below,⁹ therefore, that the court should be required to make an exclusion order, if it is satisfied that the need for protection arises, unless there are exceptional circumstances which would make the grant of such an order unreasonable.

4.9 We noted in our Memorandum¹⁰ that certain tenancies of matrimonial homes such as service tenancies or agricultural leases may contain a requirement that the husband as tenant maintains his residence in the home, and we asked for views on whether the existence of such a residence requirement should preclude the court from making an exclusion order against the husband. Certain of the bodies who require to grant tenancies to employees, such as the North of Scotland Hydro-Electric Board, expressed concern on consultation in their capacity as employers at the prospect of employees being excluded from their homes in areas where there might be little or no prospect of alternative accommodation. We think that the existence of a residence requirement in a tenancy need not automatically preclude the possibility of an exclusion order. It must be a question of fact in each case whether the exclusion order would in fact result in a loss of the tenancy. The court would be able to take such a fact into account by virtue of the residual discretion which we reserve to it, and would be able to withhold an exclusion order in appropriate cases.

⁹Para. 4.11.

¹⁰Para. 5.3.

4.10 We refer above¹¹ to the fact that the court will be entitled to have regard, in deciding whether to grant an exclusion order, to the availability and suitability of any alternative accommodation for the husband. Many of those consulted pointed out that some excluded husbands might face serious housing difficulties. Although they would be treated as homeless under the Housing (Homeless Persons) Act 1977,¹² they would have no priority, and consequently a local authority would have no duty to house them. We think that it is proper for the court to have regard to the husband's need for accommodation, but we do not think that the court should refuse to grant an exclusion order simply because an injured wife with children will be a priority case¹³ under the 1977 Act and can expect to be rehoused elsewhere.

4.11 We recommend that the court should have power to make an order (called an exclusion order) on the application of a spouse, suspending the other spouse's right to occupy a matrimonial home. The court should be required to grant an exclusion order if it is satisfied that it is necessary for the protection of the applicant or any child who resides or might normally be expected to reside with the applicant, from conduct of the other spouse which is injurious to the physical or mental health of the applicant or child, unless the court is satisfied that the granting of an exclusion order would be unreasonable having regard to all the circumstances of the case including:

- (a) **the matters specified in Recommendation 2.9; and**
- (b) **where the matrimonial home is let or possession given on a service tenancy or service occupancy, or the matrimonial home forms part of an agricultural holding and the lease contains a residence requirement, the likely consequences of the exclusion of the tenant or occupier.**

(Recommendation 4.1)

Interim exclusion orders

4.12 In our Memorandum¹⁴ we proposed that, while it should be competent for the court to grant interim interdict against violence or molestation pending the disposal of an application for an exclusion order, it should not be competent for the court to grant an interim exclusion order. Consultation revealed a division of opinion on this matter. Some argued, as we had ourselves done in our Memorandum, that it would be unwise to allow orders to be made on the strength of unopposed averments by a wife as to the conduct of her husband. Others, however, pointed out that unless orders could be obtained on an interim basis, protection could not be assured to the wife who, having made an application for an exclusion order, might thereafter require to share a matrimonial home with her husband against whom the application had been directed.

4.13 We see the force of the argument that unless interim orders are available a wife's protection may be in peril, and we acknowledge that interdict may not afford satisfactory protection to a wife who has to share a matrimonial home with the husband pending a final determination. We therefore suggest that interim orders should be competent provided that a procedure can be devised to ensure

¹¹Para. 4.6.

¹²S.1(2)(a).

¹³S.2(1)(a).

¹⁴Para. 2.62.

that the application for an interim exclusion order is served on the husband and that he has an opportunity to make representations against it. This procedure would prevent the courts from granting an interim exclusion order on the basis of averments by the wife which the husband had not been given an opportunity to challenge. We do not make any detailed recommendations as to the procedure that should be adopted. A useful model might be the procedure^{15,16} available at present in the case of applications for interim interdict, whereby the court arranges an early hearing to which the parties are cited.

4.14 We recommend that the court should have power to grant an interim exclusion order pending the determination of an application for an exclusion order. Rules of court should be made to provide that the spouse whom it is sought to exclude should have had the application for an interim exclusion order intimated to him or her, and should have been cited to a hearing at which it is considered.
(Recommendation 4.2)

Orders ancillary to exclusion orders

4.15 An exclusion order will merely suspend the excluded spouse's occupancy rights in the matrimonial home. We think that further orders will be required to ensure that an exclusion order is made effective for its purpose. In our Memorandum¹⁷ we proposed that the court should have power, when granting an exclusion order, to grant orders such as the following: a warrant for the husband's summary ejection, an interdict prohibiting his re-entry, and an order giving direction for the preservation of his goods and effects where the exclusion order was granted in his absence. We also proposed that the court should be able to grant any such orders or interdicts subject to appropriate terms and conditions. In general the orders we proposed were approved by those consulted. However, many suggested that it would be prudent to empower the court to make such ancillary orders in relation to an exclusion order as appeared necessary to it. We think this suggestion should be adopted. It was also suggested on consultation that the court should have power to require the husband to find caution for breach of the interdict prohibiting his re-entry to the matrimonial home, from which he had been excluded. We take up this suggestion later¹⁸ when we consider the remedy of interdict.

4.16 We think that the court must have power, where it makes an exclusion order, to make an ancillary order preventing the excluded spouse from removing furniture and plenishings from the matrimonial home without the consent of the other spouse. If such an order were not available, then an excluded husband might exercise his rights as owner to remove the furniture and plenishings, and thereby render the home incapable of being used as a family residence. We think that the wife must be protected against such an eventuality, and that she should be entitled to such protection, notwithstanding that she may not have a use and possession order in respect of the furniture and plenishings at the relevant time. We do not, of course, propose that an excluded husband should be prevented

¹⁵Dobie, *Sheriff Court Practice* (1952) p. 507.

¹⁶Burn-Murdoch, *Interdict* (1933) pp. 134-5.

¹⁷Para. 2.61.

¹⁸Para. 4.36.

from removing his other goods and effects from the matrimonial home should he wish to do so. Indeed, we think that the court should be able to make an order to ensure that such goods and effects are preserved notwithstanding his exclusion.

4.17 We think that it should be mandatory, in the event of an exclusion order being granted, for the court to grant a warrant for the summary ejection of the husband together with interdicts prohibiting his re-entry to the matrimonial home and his removal of any furniture and plenishings from it, unless the court is satisfied that such further orders are unnecessary. The court should be entitled, in deciding whether such further orders are not required, to rely on undertakings from the husband as to his future conduct. The court should, however, also bear in mind that if interdicts are not pronounced the power of arrest, which we recommend below¹⁹ should be attached to interdicts, will as a consequence cease to be available.

4.18 It is not presently competent under Scots law to interdict a person from being in a public place²⁰ and it is accordingly not possible, in cases of apprehended domestic violence, to prohibit the violent husband from entering any specified public area near the matrimonial home. In our Memorandum²¹ we proposed that in such cases it should become competent, not only to interdict the husband from entering the matrimonial home, but also to interdict him from entering a specified area surrounding that home. Some of those whom we consulted suggested that area interdicts of this kind might be extended to cover areas unrelated to the matrimonial home such as the wife's place of work or the children's school. Others, however, pointed out that area interdicts might result in the exclusion of the husband from particular places within a larger area from which he could not legitimately be excluded. On reflection, we think that the proper solution is that adopted in England and Wales,²² namely, that the area covered by any matrimonial interdict should require to be an area which actually includes the matrimonial home itself. We think that this formula should protect the legitimate interests both of the husband and of the wife.

4.19 We recommend that on granting an exclusion order (or an interim exclusion order) the court should be required to grant a warrant for the defender's summary ejection from the matrimonial home, an interdict prohibiting his re-entry without the applicant's express permission, and an interdict prohibiting him from removing or disposing of any of the furniture and plenishings in the matrimonial home, unless it is satisfied that such orders are unnecessary.
(Recommendation 4.3)

4.20 We recommend that the court on granting an exclusion order (or an interim exclusion order) may grant:

- (a) an interdict prohibiting the defender from entering or remaining in any specified area in which the matrimonial home is included;**

¹⁹Paras. 4.32 ff.

²⁰*Murdoch v. Murdoch* 1973 S.L.T. (Notes) 13.

²¹Para. 2.80. Although in our Memorandum we discussed area interdicts in the context of interdict generally, we think that such interdicts should properly be seen as ancillary to exclusion orders.

²²S.1(1)(c), Domestic Violence and Matrimonial Proceedings Act 1976.

- (b) **an order giving directions for the preservation of the defender's goods and effects left in the matrimonial home where the exclusion order or interim exclusion order was granted in his absence;**
- (c) **an order making any of the orders subject to such terms and conditions as the court may prescribe; and**
- (d) **such other order as it may consider necessary for the protection of the applicant or any child who resides with, or who could normally be expected to reside with, either spouse.**

(Recommendation 4.4)

Duration, variation and recall of exclusion orders

4.21 Since an exclusion order will have a continuing effect provision will require to be made to empower the court to vary such an order if circumstances change. In our Memorandum²³ we proposed that either spouse should be entitled to apply to the court for a further order varying or recalling an existing exclusion order. This proposal was approved by those consulted.

4.22 Many of those consulted suggested that either a maximum or a minimum period should be specified for the duration of an exclusion order. The Domestic Violence Working Party thought that an exclusion order should last for at least 6 months. Others took the view that such an order should be a short term remedy, available for a period of 3 months at the most, subject to possible extension in appropriate circumstances. We do not think, however, that there is any reason to treat the duration of an exclusion order in a different way from other orders relating to occupancy rights. An exclusion order should in our view subsist until such time as it is recalled or varied by the court on an application by either of the spouses, and it should cease to subsist automatically if the marriage itself terminates, or if the husband ceases (other than by reason of the order itself) to have a right or liberty to occupy the matrimonial home. We also think that the nature of an exclusion order makes it important that recall or variation should be made by the court and should not be permitted to be made by agreement between the spouses.

4.23 **We recommend that the court on application by either spouse should have power to make a further order varying or recalling an exclusion order, interim exclusion order or any order ancillary to the foregoing orders. Any order should in any event cease to have effect when:**

- (a) **the marriage terminates by death, presumed death, divorce or annulment; or**
- (b) **the spouse entitled or permitted to occupy the matrimonial home ceases to be either entitled or permitted.**

(Recommendation 4.5)

SECTION B: MATRIMONIAL INTERDICTS

Preliminary

4.24 We turn now to deal with other recommendations related to the existing civil remedies available to a spouse treated or threatened with violence by the other spouse. The present civil law remedies against domestic violence are

²³Para. 2.95.

interdict, lawburrows and separation. An interdict is an order of the court (either a sheriff court or the Court of Session) prohibiting a person from doing a specified act or acts. A decree of lawburrows is an order by the sheriff requiring a person, on pain of a fine or imprisonment, to find caution or grant a bond for a specified sum that he will not harm the pursuer,²⁴ his or her family or possessions. Lawburrows is an obsolescent remedy nowadays, having been largely replaced over the last century by interdict. We do not deal with it further, because we believe that the basis of lawburrows is not an appropriate foundation on which to construct an effective remedy against matrimonial violence. In the remainder of this Part of this report, therefore, we deal only with interdict.²⁵

4.25 In the following paragraphs we use the term matrimonial interdict to denote an interdict which either restrains or prohibits any conduct or course of conduct by one spouse towards the other or a child or prohibits a spouse from entering or remaining in a matrimonial home or a specified area in which the matrimonial home is included.

Scope of interdicts

4.26 In many cases a wife who wishes to obtain protection from her husband's violence may at the same time wish to continue to live with him in the matrimonial home. There is no direct authority as to whether it is competent for a court to grant an interdict prohibiting the husband from assaulting or molesting his wife in such circumstances. In our Memorandum²⁶ we proposed, for the removal of doubt, that such interdicts should be competent. All those consulted agreed with our proposal, and the evidence we received of differing approaches taken by the courts confirms us in our view that such a proposal was necessary.

4.27 We recommend that proceedings for any matrimonial interdict should not be treated as incompetent or irrelevant by reason only of the fact that the spouses are living together as man and wife.

(Recommendation 4.6)

Corroboration in interdict

4.28 In applications for interdict in matrimonial proceedings, an interim interdict pending disposal of the proceedings may be granted on uncorroborated testimony or statements, but a full proof of the pursuer's averments is required before a defended interdict is made perpetual. In proceedings for breach of interdict corroboration of the breach is also required and the standard of proof is the criminal standard of proof beyond reasonable doubt.²⁷ The Report of the Select Committee on Violence in Marriage recommended²⁸ that the requirement of corroboration should be abolished for criminal proceedings arising out of charges of assault taking place between spouses in the matrimonial home, but they did not deal with civil proceedings.

²⁴Including a spouse, *A v. B* (1853) 26 Scot. Jur. 58.

²⁵A decree of judicial separation is merely a declaration that the wife is entitled to live apart from her husband without being in desertion, and no sanctions are imposed for attempted resumption of cohabitation by him.

²⁶Para. 2.70.

²⁷*Gribben v. Gribben* 1976 S.L.T. 266.

²⁸H.C. 553 (Session 1974-75), Recommendation 23.

4.29 In our Memorandum²⁹ we asked for views as to whether corroboration should continue to be required in civil proceedings for perpetual interdicts against violence or molestation between spouses and for breach of such interdicts. This topic proved controversial but the weight of consulted opinion opposed relaxation of the present requirement of corroboration. Those who sought the relaxation of the corroboration rule pointed out that where, as was normal, domestic violence was carried out behind closed doors it might be difficult or impossible to satisfy a requirement for corroborative evidence of its occurrence. Those who argued against a relaxation of the corroboration rule rested their case on the principle that it was wrong to expose a husband to possible criminal sanctions on the basis of uncorroborated allegations by a wife at a time when emotions were necessarily running high; but they also argued that corroborative evidence might be more readily available than was commonly supposed. They pointed out that corroboration did not require the existence of a second eye witness to the domestic violence in question, and that evidence of surrounding facts and circumstances (such as visible injuries or sounds of scuffling), if they were obtainable from a source other than the wife, could effectively corroborate the evidence of the wife herself.

4.30 We are on balance convinced that it would be unsafe, in the context of matrimonial interdicts, to put a defender at risk on the unsupported evidence of a pursuer. Apprehensions as to the difficulty of obtaining sufficient corroborative evidence of domestic violence may in many cases rest on a misconception of the rule. But we add the rider that it is most important that those concerned with enforcing the law relating to domestic violence should properly understand the nature of the evidence which can constitute corroborative evidence. It has been suggested to us, for example, that there is a widespread belief that evidence cannot be corroborative evidence unless it derives from a second eye witness. It seems to us that it is important to ensure that this notion is dispelled particularly if it is entertained by policemen.

4.31 We recommend that it should continue to be incompetent for the court to grant a perpetual matrimonial interdict or to find a breach of an interim or perpetual matrimonial interdict proved on the uncorroborated evidence of one witness.
(Recommendation 4.7)

Enforcement of matrimonial interdicts

4.32 Any protection afforded by a matrimonial interdict may be illusory unless there is a satisfactory procedure for its enforcement. In our Memorandum³⁰ we drew attention to the problems which arise at present by virtue of the fact that interdicts against conduct such as violence require to be enforced by civil procedures. We provisionally proposed³¹ that these problems be resolved by making breach of a matrimonial interdict a criminal offence for which a husband would fall to be arrested and prosecuted. We took the view that if breach of matrimonial interdict were made a criminal offence, this would enable the police to arrest immediately a spouse who had say, re-entered a matrimonial home in

²⁹Para. 2.74.

³⁰Paras. 2.82–2.84.

³¹Para. 2.85.

breach of an interdict against re-entry, without having to await the occurrence of further violence. We also thought it helpful to make such breaches of interdict subject to the procedures of the criminal law.

4.33 The Domestic Violence Working Party and some other bodies strongly supported the proposal that breach of matrimonial interdict should be made a criminal offence. They argued that since domestic violence was itself a criminal offence its nature should be reflected in the nature of the sanctions for breach of an interdict relating to it. They also emphasised strongly that the involvement of the police in the process of enforcing matrimonial interdicts was necessary in itself. The police were the only agency upon which a wife could call at any time of the day or night, and the prospect of their intervention was calculated to have a deterrent effect.

4.34 However, a strong case was also made for not making matrimonial interdict a criminal offence. It was put to us that there would be grave disadvantage in removing the enforcement of interdict from the control of the civil court which had been involved in the grant of the interdict, and which was apprised of all the facts and circumstances; and it was suggested that it was better to reform the civil enforcement procedures rather than to allow these civil procedures to be superseded by criminal procedures. In this connection our attention was particularly drawn to the possibility of extending the present summary procedure in the Court of Session for breach of interim interdict to breaches of perpetual interdict and to breaches of sheriff court interdicts. It was suggested to us that a husband might be required to find caution for the observance of a matrimonial interdict. It was also urged upon us that if breach of matrimonial interdict were to become a matter for the criminal law this could only add to the present burden on the resources of the police and the procurators fiscal.

4.35 We remain convinced of the vital importance of ensuring that the police become involved in the enforcement of matrimonial interdicts. At the same time we are persuaded by the argument that the civil court should retain control at the enforcement stage. This has led us to seek a means of enforcement which can involve the use of the police without at the same time resulting in the civil court being deprived of its control of the case. The possible reforms in civil procedure which were suggested to us are valuable in themselves, and we refer to them again below, but they do not provide a means for ensuring police involvement. We think, however, that the procedure followed in England and Wales, which we rejected in our Memorandum, suggests a means whereby civil procedure may be successfully linked with criminal sanctions enforced by the police. The courts there have a discretionary power to attach a power of arrest to an injunction granted against a spouse,³² which enables a police constable to arrest without warrant that spouse if he breaches the injunction. Provision is also made for the arrested spouse to be brought before a judge within 24 hours³³ of his arrest. The judge may deal with the matter although no application has been made by the injured wife.³⁴ We think that this procedure has considerable advantages. It involves the police, yet it retains the civil courts' flexible and speedy powers to

³²S.2(1), Domestic Violence and Matrimonial Proceedings Act 1976.

³³S.2(3), Domestic Violence and Matrimonial Proceedings Act 1976.

³⁴Rules of the Supreme Court 1965, Order 90, Rule 17(4) (inserted by S.I. 1977/532).

deal with breaches. It avoids criminal trial yet it provides for the arrest of the offending husband and his detention for a short period. It appears, however, that in England and Wales³⁵ the courts are reluctant to attach a power of arrest to a matrimonial injunction, even in cases where the husband's past conduct would seem to make it highly desirable. We hope that any such tendency might be avoided in Scotland by requiring the court to attach a power of arrest whenever an interdict is granted in connection with an exclusion order. For other matrimonial interdicts we think the husband should have to satisfy the court that attachment of a power of arrest was unnecessary.

4.36 It was suggested to us on consultation that the court should be empowered, in appropriate cases, to order a husband to find caution for his due observance of the terms of a matrimonial interdict. We think this is a valuable suggestion because the certain loss of caution money on proof of any breach would be a considerable inducement to a husband to avoid committing a breach.

4.37 We should perhaps stress that we do not recommend any change in the standard of proof required to prove a breach of any matrimonial interdict. Any breach if denied would still require to be proved beyond reasonable doubt.³⁶

4.38 We recommend that the court should be required to attach a power of arrest to any matrimonial interdict ancillary to an exclusion order. Where the court grants any other matrimonial interdict it should be required to attach a power of arrest unless the interdicted spouse satisfies the court that in all the circumstances a power of arrest is unnecessary. A power of arrest should enable a constable to arrest without warrant the interdicted spouse if he has reasonable cause for suspecting him of being in breach of the interdict. The spouse after arrest should be detained in custody and brought before the court which granted the interdict as soon as possible.

(Recommendation 4.8)

4.39 We recommend that the court in granting any matrimonial interdict should have power to order the interdicted spouse to find caution for his due observance of the terms of the interdict.

(Recommendation 4.9)

4.40 We do not make detailed proposals for the procedure to be adopted by the courts after an arrest has been made. We think that the formulation of such procedures should be left to the appropriate rule making bodies of the Court of Session and the sheriff courts. We also think that rules should be formulated by the appropriate rule making bodies to regulate the civil procedure applicable in cases of breach of interdicts to which no power of arrest has been attached. On consultation it was suggested that the existing procedures for dealing with a breach of any interdict in the sheriff courts, or for dealing with a breach of a perpetual interdict in the Court of Session, might be remodelled along the lines of the present summary Court of Session procedure used for breach of interim interdict. This seems to us to be a helpful suggestion.

³⁵Journal of Family Law, 1978, p. 194; *Lewis v. Lewis* [1978] 1 All E.R. 729.

³⁶*Gribben v. Gribben* 1976 S.L.T. 266.

4.41 We recommend that rules of court should be made to regulate the procedure to be followed in the Court of Session and in the sheriff courts after arrest under a power attached to a matrimonial interdict.
(Recommendation 4.10)

4.42 We recommend that rules of court should be made to enable breaches of interdict, whether perpetual or interim, to be dealt with in the Court of Session or in the sheriff courts along the lines of the existing Court of Session procedure for breach of interim interdict.
(Recommendation 4.11)

Intimation of interdict

4.43 The recommendations which we make in the preceding paragraphs for the more effective enforcement of interdicts make the points we raised in our Memorandum regarding the intimation of interdicts the more important. An interdict granted against a husband in his absence does not bind him unless and until the interdict has been intimated to him or until he receives informal notice of it.³⁷ In our Memorandum³⁸ we discussed the problems that might arise if the husband could not be traced so that service of the interdict on him was impossible. Service is normally made personally by an officer of court (i.e. a messenger-at-arms or a sheriff officer) and we rejected the idea that the police should be involved in serving civil interdicts. Instead we put forward a negative proposal³⁸ that there should be no change in the existing law in this area. Those consulted agreed in general with our proposal. Some thought that service of the interdict on the husband's solicitor should bind the husband. This is arguably the law already, but service on a solicitor would hardly touch the main problem. Most husbands against whom interdict is granted in absence have no known legal representatives. It was suggested to us that service of the interdict at the husband's last known address should suffice. In our opinion this would be a dangerous expedient, especially where the interdict had a power of arrest attached to it.

4.44 We recommend that there should be no change in the law whereby a matrimonial interdict only binds an interdicted spouse if served on him or if he has received informal notice of it.
(Recommendation 4.12)

4.45 We think it important that the police should be informed of any interdict to which a power of arrest has been attached. This information would alert the police to the possibility of violence so that they could keep a watch on the house. If the wife called for assistance the police officer attending would be informed of the terms of the interdict and the existence of the power of arrest. We proposed in our Memorandum³⁹ that the clerk of the court which granted an interdict with a power of arrest attached should send a copy of the interdict to the police station for the area in which the matrimonial home (or the wife's residence) was situated. Some of those consulted pointed out that adoption of this proposal

³⁷*Henderson v. Maclellan* (1874) 1R 920; *Matheson v. Fraser* 1911 2 S.L.T. 493; *Neville v. Neville* (1924) 40 Sh. Ct. Rep. 151.

³⁸Para. 2.86.

³⁹Para. 2.85.

might lead the police to act on an interdict which had not been intimated to the husband and which therefore did not bind him. They suggested therefore that the police should be sent a copy of the interdict together with a certificate by the clerk of the court that service had been effected on the husband.

4.46 It has been stated⁴⁰ that the most likely time for a violent husband to renew his assault is soon after he has been served with a court order. We think it is essential therefore that the police be informed of the interdict as soon as possible after service has been made on the husband. It would not make for speed if the messenger-at-arms or sheriff officer had to report service to the clerk of court and then the clerk had to notify the police. For that reason we think that the messenger or officer effecting service should forthwith deliver to the police a copy of the interdict with his certificate of service endorsed. We have been advised that the most effective way of notifying the police of the existence of an interdict with a power of arrest attached is for a copy to be delivered to the Police Regional Headquarters. Where the matrimonial home and the wife's residence are situated in different regions, we think the police forces in both regions should be notified.

4.47 It is also important that the police should be informed promptly of any variation of the terms of or the recall of an interdict which has previously been notified to them. We think that the procedure for informing the police of the existence of an interdict should also be utilised for informing them of any variation or recall.

4.48 We recommend that where a matrimonial interdict has attached to it a power of arrest, the messenger-at-arms or sheriff officer serving the interdict on the interdicted spouse should forthwith deliver to the chief constable of the region:

- (a) **in which the matrimonial house is situated; and if different**
- (b) **in which the other spouse resides**

a copy of the interdict together with his certificate of service of the interdict. Any order varying or recalling the interdict should be notified similarly to the chief constable(s) above.

(Recommendation 4.13)

SECTION C: CRIMINAL LAW SAFEGUARDS

Harassment or eviction of a spouse

4.49 Section 30(1) of the Rent Act 1965 enacts:

“If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof or attempts to do so he shall be guilty of an offence . . .”

Subsection 5 defines a residential occupier to mean:

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

⁴⁰*Evicting a spouse from the matrimonial home—II*, Mary Hayes, *Journal of Family Law*, 1978, p. 43, footnote 57.

If, as we recommend earlier in this report,⁴¹ a wife is given a statutory right to occupy the matrimonial home she would become a residential occupier. Any person *including her husband* who ejected her from the matrimonial home or who attempted by harassment to make her leave would commit a criminal offence. In our Memorandum⁴² we asked whether such a result would be appropriate. Some of those consulted were of the opinion that civil interdict was a more appropriate remedy, but we think that harassment of a wife in her occupation of the home or eviction of her from the home whether by her husband or by another should properly be a criminal offence.

4.50 We recommend that no amendment should be made to section 30 of the Rent Act 1965.

(Recommendation 4.14)

PART V TENANCIES

Preliminary

5.1 In this Part of our report we make certain recommendations in connection with tenanted matrimonial homes. Our major recommendation is that the court should have power in appropriate circumstances to transfer a tenancy¹ of a matrimonial home from one spouse as tenant to the other spouse. We also make proposals relating to the consequences of the creation of occupancy rights upon succession to statutory tenancies and to the question of liability for any arrears of rent when a tenancy is transferred.

5.2 In this Part of our report we do not distinguish, as we did in our Memorandum, between private sector tenancies and public sector tenancies. We made this distinction in our Memorandum because at the time it was published security of tenure did not apply to public sector tenancies. However, the Tenants' Rights, Etc. (Scotland) Bill currently before Parliament contains provisions for the extension to public sector tenants of security of tenure on broadly similar lines to that conferred by the Rent (Scotland) Act 1971 in the case of private sector tenants. These provisions of that Bill have consequences for our own proposals which it may be convenient to note as a preliminary matter. Local authorities are at present able to effect transfers of tenancies from one spouse to another, where circumstances make it appropriate, as a matter of administrative discretion. Such an administrative discretion to transfer tenancies will cease to be available if security of tenure becomes available in public sector tenancies² and accordingly a judicial transfer procedure will be required in order to effect transfers of public sector tenancies no less than private sector tenancies. If such a judicial transfer is made, however, the transferee in the case of a public sector tenancy will himself have security of tenure and will not, as at present, be liable to have his new tenancy terminated at discretion of the local authority. It follows that any proposal to extend judicial

⁴¹Para. 2.13.

⁴²Para. 2.27.

¹Including a statutory tenancy.

²We understand that the Tenants' Rights, Etc. (Scotland) Bill will permit local authorities to continue to transfer tenancies administratively until the judicial transfer procedure recommended in this report comes into operation.

transfer to public sector tenancies will no longer be open to the objection that any such transfer could effectively be nullified by a subsequent discretionary termination of the tenancy by the relevant local authority.

Judicial transfer of a tenancy

5.3 In our Memorandum³ we proposed that a spouse should be enabled to apply to the court for the transfer to him or her of a tenancy of a matrimonial home which was vested in the other spouse. The possibility of such judicial transfers of tenancies of matrimonial homes was broadly welcomed by those whom we consulted, although it was noted that such transfers would affect the title to the matrimonial home and not merely the right to occupy it. We consider, however, that transfer of the tenancy of a matrimonial home is merely a logical and convenient extension of the rights which we have proposed above⁴ should be made available to the spouse of a tenant. Those rights enable a spouse to pay the rent under the tenancy; to enforce the landlords' obligations to the other spouse; and to perform the other spouse's obligations as tenant generally. We think it is appropriate, therefore, that the spouse who has those rights should be able, where circumstances make it appropriate, to become the actual tenant in place of the original tenant. Such a facility would be particularly helpful, for example, in cases where a wife had been deserted and left in occupation of a tenanted home. A transfer of the tenancy would benefit not only the wife, but also the landlord in that the wife as tenant would have a greater interest in paying the rent and performing the obligations of the tenancy than her absent husband.

5.4 We suggested in our Memorandum⁵ that the court should, in exercising its discretion to effect a transfer of a tenancy of a matrimonial home, take into account the same factors as are applicable in the case of court orders as to occupancy rights generally, but should in addition have regard to the capacity of the transferee spouse to perform the obligations arising under the tenancy. There was general agreement on consultation that the above factors were appropriate ones. We think, however, that in view of the landlords' interest in the transfer the court should be entitled to have regard to the suitability of the transferee to become a tenant as well as to his or her financial capacity to perform the obligations under the tenancy. Moreover, we think that questions of suitability and capacity should require to be taken into account by the court even although representations on those aspects have not been made by the landlord on the application for the transfer.

5.5 We adhere to the proposals in our Memorandum⁶ relating to the role of the landlord in relation to a transfer of tenancy: namely, that he should have a right to be heard by the court, but should not have a right to veto an application for a transfer. We think that the landlord will be enabled thereby to put his views as to the substitution of one tenant for another before the court without depriving the court of the ultimate decision as to whether in the circumstances it is appropriate for the tenancy to be transferred. It is important that the land-

³Paras. 3.21 and 4.18.

⁴Paras. 2.18 ff.

⁵Paras. 3.21 and 4.18.

⁶Paras. 3.21 and 4.18.

lord should receive adequate notice of any application for a transfer of a tenancy and we therefore propose that the applicant spouse should be required to serve a copy of an application for a transfer upon the landlord as well as upon the other spouse.

5.6 We do not now favour the proposal in our Memorandum⁷ that the court should have power to make an interim order transferring a tenancy pending the determination of an application for transfer. We think that such a power is unnecessary in view of our recommendations that interim orders may be made for the regulation of a spouse's occupancy of the matrimonial home⁸ and indeed his exclusion from the home.⁹

5.7 We recommend that the court should have power, on application by the spouse of the tenant, to make an order transferring the tenancy of a matrimonial home to the applicant. A copy of the application must be served on the landlord and he must be given an opportunity to be heard by the court. The court should in deciding whether to make the order consider all the circumstances of the case including the suitability of the applicant to become the tenant, his or her ability to perform the obligations under the lease and the matters specified in Recommendation 2.9.

(Recommendation 5.1)

Judicial transfer of common or joint tenancies

5.8 We proposed in our Memorandum¹⁰ that where spouses were joint tenants it should be competent for one of the spouses to apply to the court for a vesting of the tenancy in himself or herself as sole tenant. We think that circumstances may arise in which it is appropriate for a joint tenancy to be converted into a sole tenancy thereby enabling one spouse to occupy and manage a matrimonial home without the need to refer to the other spouse. We also think that spouses who are co-proprietors should not be deprived of a facility available to spouses who are not co-proprietors.

5.9 We recommend that on application by either spouse the court should have power where a matrimonial home is let to both of the spouses jointly or in common to make an order vesting the tenancy solely in the applicant spouse.

(Recommendation 5.2)

Tenancies to which judicial transfer should be inapplicable

5.10 When we recommend that judicial transfer of a tenancy of a matrimonial home be permitted, we do so on the assumptions that the tenancy does not confer substantial rights on the tenant beyond the right to occupy the home and that the tenancy does not comprise property other than the matrimonial home and its pertinents. Where the tenancy forms part of a larger unit such as an agricultural holding, then we think it becomes inappropriate to make it subject to transfer. It was for this reason that we suggested in our Memorandum¹¹

⁷Para. 3.21.

⁸Para. 2.45 of this report.

⁹Para. 4.3 of this report.

¹⁰Paras. 3.45 and 4.19.

¹¹Paras. 5.7 and 5.9.

that matrimonial homes which were or formed part of agricultural tenancies or crofts should be excluded from the scope of judicial transfers of tenancy. We remain of that view and think that the same exclusion should apply in respect of cottars, landholders, statutory small tenants and tenants-at-will whose position is comparable to crofters.

5.11 We similarly think that the tenant's interest in a matrimonial home held under a long lease should not be subject to judicial transfer, since it may have substantial economic value to the original tenant.

5.12 Service tenancies also have characteristics which may render it appropriate to exclude them from judicial transfer. The right of the tenant under a service tenancy is a right to occupy a dwelling as an incident of employment and the judicial transfer of such a right to the tenant's spouse might well lead to the termination of the tenancy by the employer as a preliminary to a re-letting in favour of another employee. For that reason we recommend that service tenancies should not be subject to judicial transfer.

5.13 **We recommend that the court should not have power to transfer the tenancy (or a share of the tenancy) of a matrimonial home where the home:**

- (a) **forms part of an agricultural holding;**
- (b) **forms part of a croft or the property of a cottar, statutory small tenant, landholder or tenant-at-will;**
- (c) **is let on a long lease;**
- (d) **is let on a service tenancy.**

(Recommendation 5.3)

Compensation payable on judicial transfer

5.14 As a result of a transfer of the tenancy to the other spouse the original tenant may suffer financial loss and be put to inconvenience in finding new accommodation. Some tenancies (e.g. urban tenancies which are outwith the scope of the Rent Acts but are not long leases) may be capable of being assigned for value, so that judicial transfer of the tenant's interest would transfer a possibly valuable right from the original tenant to his or her spouse. In view of these possibilities we consider that the court should have power to make a transfer conditional upon the payment of compensation by the transferee to the original tenant. The amount of such compensation should be calculated having regard to what would be just in the particular circumstances of the spouses and the tenancy.

5.15 **We recommend that the court should have power on making an order transferring the tenancy (or a share of the tenancy) of a matrimonial home to order payment by the transferee spouse to the other spouse of such compensation as seems just in the circumstances.**

(Recommendation 5.4)

Judicial transfer on divorce

5.16 We think that it would be appropriate to enable the Court of Session to make an order for a transfer of a tenancy of a matrimonial home on granting a decree of divorce. This proposal did not appear in our Memorandum but it

was included in our earlier Memorandum on *Aliment and Financial Provision*¹² and was generally accepted by those who commented on the latter Memorandum. The present lack of judicial power to transfer a tenancy on divorce is recognised as a serious gap in the powers of the Court of Session to provide for the needs of the parties on divorce. Moreover, if, as we recommend, the courts are to have power to transfer such tenancies during the subsistence of a marriage, it will be necessary to avoid a situation in which a spouse whose marriage has broken down may require to raise two separate actions, one for the transfer of the tenancy and the other for decree of divorce.

5.17 We recommend that the Court of Session in granting decree of divorce or nullity of marriage should have power on application by a spouse to make an order transferring the tenancy (or a share of the tenancy) of a matrimonial home to the applicant.

(Recommendation 5.5)

Effect of a transfer order

5.18 In our Memorandum¹³ we envisaged that the order of the court transferring the tenancy would operate as a judicial assignation of the tenancy and that the assignee's title would require to be completed by subsequent intimation to the landlord. We now think that it would be more appropriate if the court order were to vest the tenancy in the new tenant, without that new tenant being obliged to take the further procedural step of intimation to the landlord.

5.19 Transfer of a tenancy requires consideration to be given to the respective liabilities of the original tenant and the spouse in respect of any accrued arrears of rent. In our Memorandum¹³ we invited views on the suggestion that the court should have power to apportion the liability for such arrears of rent between the two spouses on a transfer of the tenancy. One organisation whom we consulted argued strongly against this suggestion on the view that wives (who were the more likely transferees) might often not be in a position to meet an obligation to pay their husbands' arrears of rent. We are of the view that it is appropriate for the original tenant to retain sole liability for any arrears of rent which he allowed to accrue during the period of his tenancy, and that to allow the court to impose partial or total liability for such arrears on the transferee spouse might serve to discourage applications for transfers.

5.20 On the death of a spouse, to whom a judicial transfer has been made, members of that spouse's family may become entitled to succeed to a statutory tenancy by virtue of the provisions of Schedule 1 of the Rent (Scotland) Act 1971. We think that a judicial transfer of a tenancy would substitute the applicant spouse for the original tenant but would not otherwise affect the operation of these provisions. Thus, if there had already been two successions to the tenancy (the maximum permitted) before the transfer, then no further succession would be available following upon the death of the transferee tenant and the landlord would be entitled to recover possession.

¹²Memorandum No. 22, Proposition 67(c) at para. 3.27.

¹³Paras. 3.23 and 4.18.

5.21 We recommend that the court order should vest the title to the tenancy in the transferee spouse without the need for intimation to the landlord. The transferee spouse should become liable for all the obligations under the lease except any arrears of rent due for the period before the making of the order which should remain the liability of the former tenant, or the joint and several liability of the former tenants, as the case may be.

(Recommendation 5.6)

Protection of a tenancy on abandonment by tenant

5.22 Under section 3(1)(a) of the Rent (Scotland) Act 1971 the tenant of a protected tenancy is entitled to continue as tenant on the termination of the lease but only;

“so long as he retains possession of the dwellinghouse without being entitled to do so under a contractual tenancy”.

Thus the statutory tenancy which arises upon termination of the lease depends upon retention of possession by the tenant. In *Temple v. Mitchell*¹⁴ it was held that the continued occupancy of a home by the wife of a statutory tenant was not sufficient to keep the statutory tenancy of a matrimonial home in being after the husband had left the home with no intention of returning to it. The English Courts have, in similar cases,¹⁵ ruled that a deserted wife can in such circumstances continue the tenancy in place of the deserting husband. English common law, however, unlike Scots law, confers on a wife a licence to occupy a matrimonial home by virtue of her status as a wife.

5.23 In our Memorandum¹⁶ we expressed the view that a statutory tenancy should be allowed to continue in Scotland for the benefit of a deserted wife in the same way as it can continue in England. This suggestion was supported on consultation and our proposals to fill the gap in the Scots common law by conferring a statutory occupancy right on a wife make it appropriate to put it into effect. We think indeed that the possibility of such continuance of the tenancy should apply not only in relation to statutory tenancies, but also in relation to contractual tenancies (whether or not they are protected tenancies under the Rent Acts) and in relation to public sector tenancies once security of tenure is introduced for such tenancies.

5.24 We recommend that where possession is required in order to continue the tenancy (including a statutory tenancy) of a matrimonial home, possession by the spouse of the tenant should continue the tenancy notwithstanding abandonment by the tenant.

(Recommendation 5.7)

Proposals contained in our Memorandum but not recommended in this report

5.25 We included in our Memorandum proposals for an alteration of the law relating to succession rights to tenancies with the object of enabling widowers

¹⁴1956 S.C. 267.

¹⁵*Bramwell v. Bramwell* [1942] 1 K.B. 370; *Bendall v. McWhirter* [1952] 2 Q.B. 466; *Regina v. Twickenham Rent Tribunal* [1953] 2 Q.B. 425; *S.L. Dando Limited v. Hitchcock* [1954] 2 Q.B. 317.

¹⁶Para. 4.12.

to claim a succession right in a statutory tenancy of the same kind as a widow,¹⁷ and of enabling a deserted spouse of a tenant to succeed to a protected or statutory tenancy following the death of the other spouse.¹⁸ It is now intended to deal with the above points in the Tenants' Rights, Etc. (Scotland) Bill and accordingly we make no recommendations in this report.

5.26 We referred in our Memorandum to the problems which arise where a local authority chooses to apportion liability for rent arrears following an administrative transfer of a public sector tenancy from one spouse to another.¹⁹ We also referred to suggestions which had been made that public sector tenancies of matrimonial homes ought to take the form of joint tenancies.²⁰ In the Government's view the above matters raise questions of housing management policy and accordingly we do not think it appropriate to deal with them in this report.

PART VI UNMARRIED COHABITING COUPLES

Preliminary

6.1 We noted in our Memorandum¹ that in England and Wales there had been a growing, if limited, judicial and legislative acceptance that legal remedies applicable to married couples might properly be extended to couples who were not married, but whose cohabitation was such that they performed roles equivalent to the roles performed by spouses. We therefore think it is appropriate to consider in this report whether the benefit of the occupancy rights and the remedies against domestic violence which we propose for spouses, should in principle be extended to such cohabiting couples and if so to what extent.

6.2 We must explain, as a preliminary matter, the characteristics which in our view a cohabiting couple would require to have before the possibility could arise of our proposals being extended to them. We think that a man and a woman should only qualify as a cohabiting couple for this purpose if they are living with each other as if they were man and wife. We do not favour the suggestion in our Memorandum² that a minimum period of at least one year of cohabitation should be required. It seems to us that such a minimum qualification period could result in unjust distinctions between different couples, and that any dispute as to whether the qualification had been satisfied would be difficult to resolve. Some of those whom we consulted suggested that a distinction might be drawn between a cohabiting couple with children and a cohabiting couple without children on the view that the presence of children made it easier to equate an unmarried relationship to a married one. While we accept that the presence of dependent children may support the contention that a couple are living together as if they were man and wife, we do not think that it would be proper to allow the absence of such children to prevent a couple from qualifying for legal rights or remedies.

¹⁷Para. 4.24.

¹⁸Para. 4.23.

¹⁹Para. 3.27.

²⁰Para. 3.44.

¹Para. 8.3.

²Para. 8.13.

6.3 We turn now to deal with the extent to which the previous recommendations in this report should be applied to unmarried cohabiting couples.

Occupancy rights

6.4 We think that where a couple are a cohabiting couple, within the definition proposed above, the law should not regard the couple as mere strangers and so permit the occupancy of the home in which they cohabit to be withdrawn at will from a partner who has no legal right or liberty of occupancy therein by a partner who has such right or liberty. We think, however, that the extent of any occupancy right which can properly be made available to such a non-titled partner and the manner in which that right can be obtained must differ substantially from the corresponding provisions applicable to a spouse who has no title to a matrimonial home.

6.5 So far as the manner of obtaining any occupancy right is concerned it is clear that no right can be conferred by operation of law on a cohabiting partner, and that any available right would require to be conferred following an application to the court in an individual case. An automatic legal occupancy right can be conferred by law as an incident of marriage upon a married couple since marital status is an instantly verifiable status. A cohabiting partner by contrast, who has by choice not acquired that status, will require to satisfy the court on the facts that he or she has been living with the other partner as if they were man and wife.

6.6 We think that the differences between a married couple and a cohabiting couple must also be reflected in the extent of the respective occupancy rights which it is proper to confer upon them. In the case of a married couple there is no necessary limit to the duration of the occupancy right: it subsists for so long as the marriage subsists and reflects the mutual commitment which the choice of marital status involves. No such commitment arises, as a matter of law, in the case of a cohabiting couple and we think it would be quite wrong if the distinction which an unmarried couple choose to make between themselves and a married couple were not reflected in the nature of any occupancy right made available to an unmarried partner. The law should in our view seek to make available an occupancy right which is appropriate to the legitimate expectations of an unmarried partner. This suggests that the occupancy right to be made available to an unmarried partner should be limited, so as to enable the unmarried partner to continue in occupation of a home without risk of ejection by the other partner during such period as he or she may reasonably require to secure alternative accommodation following upon the ending of the cohabitation. In our Memorandum³ we proposed that a fixed occupancy period of three months might suffice for this purpose. On reconsideration we think that such a period might not give sufficient time for an unmarried partner to find suitable alternative accommodation, and we therefore now propose that the period of three months should be capable of being extended by the court for one further period of not more than three months.

³Para. 8.13. By Practice Direction [1978] 2 All E.R. 1056, county courts in England and Wales are recommended to grant injunctions under s.1(1)(c) of the Domestic Violence and Matrimonial Proceedings Act 1976 for a period of 3 months initially.

6.7 We think that an unmarried partner to whom the court has granted such a limited period of occupancy should be entitled to apply for an order granting use and possession of the furniture and furnishings in the home during that period. The interim and ancillary orders which we recommend for the protection of a spouse's occupancy rights should also be available during such a period to protect the rights of an unmarried partner.

6.8 We recommend that the court should have power, on application by a person whom it is satisfied is living with another as if they were man and wife to grant the applicant a right of occupancy in the home, and a right of use and possession of the furniture and furnishings, together with any interim or ancillary orders necessary to protect the rights granted. Any grant of occupancy should last for a period of three months, or as specified in the order, whichever is the shorter, subject to the court's power to grant one extension for a period of up to three months.

(Recommendation 6.1)

Domestic violence

6.9 In our Memorandum⁴ we proposed that the civil remedies of interdicts and exclusion orders in relation to domestic violence proposed for a married couple should also extend to an unmarried cohabiting couple. We adhere to that proposal. We draw attention, however, to the fact that our proposal that the occupancy right of a cohabiting partner should subsist for a limited period only has a consequential effect upon the duration of exclusion orders in relation to such a partner. We think that an exclusion order cannot be allowed to subsist for a longer period than the subsistence of the occupancy right of the partner who has applied for that order. It follows therefore that the duration of any exclusion order which may be granted by the court to an unmarried partner will be for the period of the occupancy right granted to that partner.

6.10 We think that in one case an exclusion order against an unmarried partner may not require to be limited in time, but may instead be permitted to subsist until the court makes a further order. This is the case where the cohabiting couple are co-proprietors of the home in which they cohabit. In such a case the excluded partner will be able to resolve the problem of his exclusion by seeking a decree of division and sale of the dwelling, and accordingly it will not be necessary to limit the duration of the protection afforded to the other co-proprietor.

6.11 We recommend that the recommendations contained in Part IV of this report should extend to unmarried cohabiting couples. Any order excluding the partner with a title to occupy the home should last only while the other partner has a right of occupancy of the home by virtue of an order of the court under Recommendation 6.1, but where both partners have a title to occupy the home an exclusion order should continue to have effect until further order.

(Recommendation 6.2)

⁴Para. 8.13.

Protection of occupancy rights and recovery of expenditure

6.12 In our Memorandum⁵ we proposed that the court should be able to apportion between unmarried partners amounts expended in relation to outgoings on the home during any limited period of occupancy which might be granted by the court. We also proposed,⁶ however, that an unmarried partner without legal title to occupy the home should have a right to be reimbursed for any expenditure incurred by him or her on the home where this had been consented to or acquiesced in by the partner with legal title to the home. Our proposals did not give rise to much comment on consultation, but we now think that they were misconceived. The occupancy of the home and use and possession of its furniture and plenishings which will be available to an unmarried partner will be limited in time, and it is unnecessary in our view to provide for any apportionment of current outgoings during that limited time. We further think that any right to apportionment of past expenditure can appropriately be left in the case of unmarried partners to be resolved by the existing law of recompense, or by any contractual agreement which the couple may make.

6.13 The limited nature of the occupancy right which we propose to make available to an unmarried partner makes it inappropriate in our view to extend to an unmarried partner the various subsidiary rights and consequential remedies which we propose should be conferred on a spouse in respect of a spouse's occupancy right. We do not think, for example, that the implied rights, which we recommend conferring on a spouse to carry out essential repairs or to take action in relation to the protection of the basic occupancy right⁷ should be extended to an unmarried partner. Nor do we think that our proposals in relation to judicial transfer of tenancies,⁸ protection against adverse dealings⁹ and protection against contrived arrangements involving creditors¹⁰ should extend to the home occupied by a cohabiting couple. The proposals referred to confer protections which are appropriate only where there is a marriage.

6.14 We recommend that an unmarried cohabiting partner who has been granted a right of occupancy should not be entitled to carry out essential repairs, to make payments on behalf of the other partner, or to take steps in relation to the home or its furniture and plenishings which the other partner can take; and that the court should have no power to apportion expenditure on the home or on the furniture and plenishings between the partners, to transfer the tenancy (or a share of the tenancy) of the home, or to set aside sequestration or diligence designed to defeat occupancy rights; and that the recommendations contained in Part III of this report should not extend to unmarried partners.

(Recommendation 6.3)

⁵Para. 8.13.

⁶Para. 8.15.

⁷Paras. 2.18 ff of this report.

⁸Part V *ibid.*

⁹Part III *ibid.*

¹⁰Para. 2.90 *ibid.*

PART VII JURISDICTION AND PROCEDURE

Preliminary

7.1 In this Part of our report we deal with certain matters relating to jurisdiction and procedure.

Choice of court

7.2 In our Memorandum¹ we proposed that the recommended new types of proceedings should be competent in the Court of Session or in the sheriff courts. While it is desirable that the sheriff court, which is a local court easily accessible to litigants, should have jurisdiction, consistorial proceedings may be contemplated or pending in the Court of Session, and it would be inappropriate to have different courts dealing with different aspects of the same case. All those consulted agreed without comment. We would in general adhere to our original proposition, but there are three instances where we think one court should have exclusive jurisdiction. First, the power which we recommend² that the court should have to transfer a tenancy on granting a decree of divorce or nullity of marriage should be exercisable only by the Court of Session, because only that court has power to grant such decrees. Secondly, the power to set aside a poinding which we recommend³ should be exercisable by sheriffs only as they control the execution of all poindings. Thirdly, a petition to recall a sequestration which had been contrived to defeat occupancy rights⁴ should be competent only in the Court of Session in conformity with the existing law.⁵

7.3 We recommend that any proceedings following on the recommendations in this report (except applications for the transfer of a tenancy on divorce or nullity of marriage, for the recall of a sequestration or for declaring a poinding null) should be competent both in the Court of Session and in the sheriff courts.
(Recommendation 7.1)

Vexatious proceedings

7.4 Under section 2(2) of the Law Reform (Husband and Wife) Act 1962 in proceedings by one spouse against the other—

“in respect of a wrongful act or omission or for the prevention of a wrongful act”

the court has power to dismiss the proceedings if it appears that no substantial advantage would accrue to either party from the proceedings. The court also has a duty to consider at an early stage of the proceedings whether the action should be dismissed or not. The object of these provisions is to prevent trivial and vexatious litigation between spouses.

7.5 In our Memorandum⁶ we doubted whether the above provisions of the 1962 Act would apply to the new types of proceedings, and we invited views as

¹Para. 9.9.

²Para. 5.16.

³Para. 2.99.

⁴Para. 2.97.

⁵S.30, Bankruptcy (Scotland) Act 1913.

⁶Para. 9.12.

to whether the provisions should be applied. The weight of consulted opinion was against such application. The Court of Session judges pointed out that the powers which would be conferred on the courts were discretionary, so that they would not be bound to grant every trivial application. They expressed the view that it would merely make for complication if the courts were obliged to consider a preliminary issue of whether to dismiss the proceedings. We accept these points and do not recommend applying the provisions of the 1962 Act.

7.6 We recommend that section 2(2) of the Law Reform (Husband and Wife) Act 1962 should not apply to any proceedings following on the recommendations in this report.

(Recommendation 7.2)

Combining sheriff court proceedings

7.7 Normally, applications to the sheriff under special statutes are summary applications, where the sheriff has a discretion in regulating the procedure to be followed. Actions of ejection will normally be raised as summary causes,⁷ but if an interdict against re-entry is also sought the action must be raised as an ordinary cause. Actions for custody cannot be raised as summary causes, and actions of aliment are either summary causes or ordinary causes depending on the amount of aliment claimed. All of these actions may be closely connected with proceedings relating to occupancy rights. The availability of occupancy to a spouse may affect an award of custody or an award of aliment. In our Memorandum⁸ we proposed that it should be competent to combine proceedings in the sheriff court which related to occupancy rights with other related proceedings, such as actions for custody or aliment. All those consulted agreed and we would adhere to our proposal.

7.8 In our Memorandum we did not make any proposals regarding combining actions in the Court of Session on the view that this was a matter which should be left to the Court of Session Rules Council. However we do now suggest that the Court of Session should have power to make orders pending the disposal of an action of divorce or nullity, (a) excluding a spouse from a matrimonial home, (b) regulating or restricting the occupancy rights of either spouse and (c) regulating the use and possession of furniture and plenishings in the home.

7.9 We recommend that it should be competent to combine any proceedings following on the recommendations of this report with other related proceedings competent in the sheriff court.

(Recommendation 7.3)

Appeals

7.10 In our Memorandum⁹ we suggested that in any proceedings in the sheriff courts following on the proposals in the Memorandum an appeal should be competent on points of law from the decision of the sheriff to the sheriff principal and from either to the Court of Session but that no other appeals should be

⁷S.35, Sheriff Courts (Scotland) Act 1971.

⁸Para. 9.13.

⁹Para. 9.14.

competent. Those consulted were against the exclusion of an appeal from the Court of Session to the House of Lords and were also against confining appeals to points of law.¹⁰ On reconsideration we agree with the views expressed on consultation.

7.11 We recommend that in any proceedings brought in the sheriff court under the recommendations of this report there should be a right of appeal from the decision of the sheriff to the sheriff principal and from the decision of either to the Court of Session and thence to the House of Lords.

(Recommendation 7.4)

Local jurisdiction

7.12 We think that the sheriff having jurisdiction in the place where the matrimonial home is situated should have jurisdiction to entertain any of the proceedings relating to occupancy rights which we recommend. Other grounds of jurisdiction such as a defender's place of residence or the place of a threatened wrong, may, however, apply to proceedings related to occupancy rights proceedings. In our Memorandum¹¹ we suggested that such other grounds of jurisdiction should also be available in order to facilitate the combining of proceedings. All those consulted agreed without comment.

7.13 We recommend that the sheriff should have jurisdiction to entertain any proceedings following on the recommendations of this report if he has jurisdiction in the place where the matrimonial home is situated, as well as if he has jurisdiction under the general grounds specified in section 6 of the Sheriff Courts (Scotland) Act 1907.

(Recommendation 7.5)

PART VIII SUMMARY OF RECOMMENDATIONS

Part II: Occupancy rights in the matrimonial home

2.1 We recommend that where one spouse only is entitled or permitted to occupy a matrimonial home exclusively the other spouse should by virtue of marriage have a statutory right of occupancy.

(Paragraph 2.13)

2.2 We recommend that a matrimonial home should be any dwellinghouse provided by one or both of the spouses as a family residence or which is or was used as a family residence and should include any garden, other ground or buildings used along with or reasonably required for the amenity of the dwellinghouse.

(Paragraph 2.17)

2.3 We recommend that, in the absence of any order of the court relating to the occupancy rights of the spouses, the spouse with statutory occupancy rights in a matrimonial home should have the right to enter the home, the right

¹⁰S.40 of the Court of Session (Scotland) Act 1825 confines appeals to the House of Lords to matters of law where the case originated in the sheriff courts. Otherwise the facts and law of the case may be reviewed on appeal.

¹¹Para. 9.15.

not to be ejected from the home and the same right as the other spouse to carry out essential repairs to the home. The court should have power, on application by a spouse with statutory occupancy rights, to authorise non-essential repairs, maintenance or improvements to a matrimonial home, but this power should be limited to such works as the other spouse is entitled to carry out and which the court considers appropriate for the reasonable enjoyment of the applicant spouse's right of occupancy.

(Paragraph 2.25)

2.4 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to take any steps in relation to it necessary to maintain occupancy which the other spouse can take; and that the spouse of an owner or hirer of furniture and plenishings should be entitled to take any steps (including the carrying out of essential repairs) necessary to secure their use and possession in a matrimonial home which the owner or hirer can take.

(Paragraph 2.26)

2.5 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to pay any sums due by the other spouse in relation to the home which are necessary to maintain occupancy; and that the spouse of an owner or hirer of furniture and plenishings should be entitled to pay any sums due by the owner or hirer necessary to secure their use and possession in a matrimonial home.

(Paragraph 2.27)

2.6 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to perform any obligation incumbent on the other spouse in relation to the home necessary to maintain occupancy.

(Paragraph 2.28)

2.7 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to enforce any obligation in relation to the home which a third party has undertaken to the other spouse to the same extent that the other spouse can enforce the obligation.

(Paragraph 2.29)

2.8 We recommend that the court should have power on application by either spouse to make orders declaring, enforcing, regulating, restricting or protecting the rights of occupancy (whether statutory or otherwise) of the spouses in a matrimonial home.

(Paragraph 2.31)

2.9 We recommend that in considering an application for any order enforcing, protecting, regulating or restricting a spouse's right of occupancy the court should make such order as appears just and reasonable in all the circumstances having regard to:

- (a) the conduct of the spouses;
- (b) the needs and resources of the spouses;
- (c) the needs and interests of any children living with, or who could normally be expected to live with, either spouse; and
- (d) the extent (if any) to which the matrimonial home is used by either spouse in connection with a business, trade or profession.

(Paragraph 2.35)

2.10 We recommend that where one spouse owns, hires or is acquiring under a hire-purchase or conditional sale agreement furniture and plenishings in a matrimonial home, the court should have power to grant the other spouse (if he or she has occupancy rights in that home) use and possession there of such of those items (excluding any vehicle) as are reasonably necessary to enable the home to be used as a family residence. In making an order the court should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9.

(Paragraph 2.44)

2.11 We recommend that where an application has been made to the court for an order relating to the occupancy of a matrimonial home or for an order granting use and possession of the furniture and plenishings, the court should have power on the application of either spouse to make such interim orders as it considers necessary or expedient in relation to the matrimonial home, its furniture and plenishings or the personal effects of either spouse and any children.

(Paragraph 2.48)

2.12 We recommend that where the court following on the recommendations in this report orders the delivery of any article it should have power at the same time to grant warrant to messengers-at-arms or sheriff officers to search for and deliver the article if no delivery is made after a charge to do so has expired. The order for delivery should specify the period of the charge.

(Paragraph 2.51)

2.13 We recommend that any payment made by a spouse by virtue of Recommendation 2.5 should be treated as if made under an irrevocable mandate by the other spouse.

(Paragraph 2.58)

2.14 We recommend that performance by a spouse of an obligation by virtue of Recommendation 2.6 should be treated as performance by the other spouse.

(Paragraph 2.61)

2.15 We recommend that performance by a third party in terms of Recommendation 2.7 to a spouse with statutory occupancy rights should be regarded as performance to the other spouse.

(Paragraph 2.62)

2.16 We recommend that the court should have power, on application by either spouse, to apportion between the spouses, in such proportion as it thinks just and equitable, any expenditure, whether past or future, relating to a matrimonial home or to its furniture and plenishings:

- (a) which has been consented to by the non-paying spouse; or
- (b) which is a basic outgoing, or is the cost of an essential repair.

The court should have power to grant decree for payment by one spouse to the other of the amount due in terms of the apportionment order. Any application for apportionment should be made within 5 years of the date on which the expenditure was incurred.

(Paragraph 2.75)

2.17 We recommend that a spouse should be allowed to renounce in writing a statutory right of occupancy in any existing or future matrimonial home and a right to apply to the court for an order granting use and possession of the furniture and plenishings in any existing or future matrimonial home.
(Paragraph 2.80)

2.18 We recommend that the statutory right of a spouse to occupy a matrimonial home should terminate by operation of law on the termination of the marriage by death, presumed death, divorce or annulment, or on the other spouse ceasing to be permitted to occupy the matrimonial home; and that a spouse should cease to be entitled to apply to the court for an order granting use and possession of furniture and plenishings in a matrimonial home when that spouse ceases to be entitled or permitted to occupy that matrimonial home or when the other spouse ceases to be entitled to possess the furniture and plenishings.
(Paragraph 2.85)

2.19 We recommend that the court on application of either spouse should have power to make a further order varying or recalling any order relating to the occupancy of a matrimonial home or to the use and possession of any furniture and plenishings. Any order should in any event cease to have effect when:

- (a) the marriage terminates by death, presumed death, divorce, or annulment;
- or
- (b) the spouse entitled or permitted to occupy the matrimonial home ceases to be either entitled or permitted:

and where the order grants use and possession of the furniture and plenishings it should also cease to have effect when they cease to be permitted to be retained in the matrimonial home.
(Paragraph 2.89)

2.20 We recommend that where a matrimonial home forms part of a bankrupt's estate the trustee should within 7 days of the date of the act and warrant confirming his appointment intimate the sequestration to the bankrupt's spouse (if any) having statutory occupancy rights where he is aware of his or her whereabouts. The bankrupt's spouse should be entitled to apply to the Court of Session within 40 days of the date of the act and warrant for recall of the sequestration. On the Court of Session being satisfied that the purpose of the application for sequestration was wholly or mainly to defeat the spouse's occupancy rights in the matrimonial home, it should have power to recall the sequestration or make such other order as it considers appropriate.
(Paragraph 2.97)

2.21 We recommend that where a matrimonial home is adjudged the debtor's spouse having statutory occupancy rights should be entitled to apply to the court within 40 days of the date of registration of the decree of adjudication in the Land Register (or recording an extract of the decree in the Register of Sasines). On the court being satisfied that the purpose of the diligence was wholly or mainly to defeat the spouse's occupancy rights, it should have power to reduce the decree of adjudication or make such other order as it considers appropriate.
(Paragraph 2.98)

2.22 We recommend that where a poinding has been executed of furniture and plenishings in a matrimonial home of which the debtor's spouse has been granted use and possession, the spouse should be entitled to apply to the sheriff court having jurisdiction over the poinding within 40 days of the date of the execution of the poinding. On the court being satisfied that the purpose of the diligence was wholly or mainly to defeat the spouse's rights of use and possession, it should have power to declare the poinding null or to make such other order as it considers appropriate.

(Paragraph 2.99)

2.23 We recommend that the court should have power to award such compensation as it considers reasonable to a spouse, who has suffered loss or impairment of his or her statutory right of occupancy of a matrimonial home, or right of use and possession of the furniture and plenishings, in consequence of any act or default on the part of the other spouse, which was intended to result in such loss or impairment.

(Paragraph 2.104)

2.24 We recommend that our recommendations in this report (except Part III) should be extended to caravans, houseboats and other structures which are matrimonial homes.

(Paragraph 2.108)

2.25 We recommend that where both spouses are entitled or permitted to occupy a matrimonial home the court should:

(a) have the same powers to regulate occupancy and to authorise non-essential repairs or improvements, as we recommend it should have in relation to a matrimonial home which only one of the spouses is entitled or permitted to occupy.

(b) have power to apportion any expenditure incurred or to be incurred by a spouse in relation to that home.

(Paragraph 2.112)

2.26 We recommend that it should be made clear that where both spouses are entitled or permitted to occupy a matrimonial home, an action of ejection by one spouse against the other should be incompetent except in connection with an application for an exclusion order.

(Paragraph 2.114)

2.27 We recommend that where a matrimonial home is the common property of both spouses the court should have power in an action of division and sale of the home to refuse or to delay decree, or to grant decree subject to conditions. In exercising the above powers the court should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9.

(Paragraph 2.116)

Part III: Enforcement of occupancy rights against third parties

3.1 We recommend that where one spouse is exclusively entitled, to occupy a matrimonial home and the other spouse is not so entitled, that other spouse

should, as long as timeous notification is given to third parties of the existence of occupancy rights, be entitled to annul any dealing (other than a dealing which implements a binding obligation entered into by the entitled spouse prior to the marriage) between the entitled spouse and a third party in relation to the home which is actually or potentially adverse to that other spouse's occupancy rights, and which has not been authorised by that other spouse's consent or by a court order dispensing with that consent. Where the matrimonial home is a caravan, houseboat or other similar structure (whether affixed to land or not), a spouse's right to occupy that home should not be enforceable against third parties.
(Paragraph 3.15)

3.2 We recommend that a decree annulling an adverse dealing should be capable of being registered in the Land Register or recorded in the Sasine Register or served on the landlord (or trustees) as appropriate, and that consequential rectification of the Land Register should be permitted where such annulment has occurred.
(Paragraph 3.16)

3.3 We recommend that any dealing relating to a matrimonial home entered into between the spouse who is entitled to occupy it and a third party being a dealing which is actually or potentially adverse to the occupancy rights of the other spouse, should be liable to annulment as an adverse dealing. Such adverse dealings should be defined by statute to include the grant of any security over the home or the creation of a trust affecting the home.
(Paragraph 3.21)

3.4 We recommend that where a heritable creditor has served a calling-up notice or a notice of default in respect of a matrimonial home on the owner spouse, that spouse should not be entitled to dispense with or shorten the period for complying with the notice without the consent in writing of the other spouse having statutory occupancy rights.
(Paragraph 3.23)

3.5 We recommend that the right of a spouse to have an adverse dealing annulled should prescribe on whichever is the earlier of the date six months after the spouse has become aware or could reasonably have become aware of the dealing having been concluded, or the date five years after the effective date of the dealing.
(Paragraph 3.26)

3.6 We recommend that where one spouse is the owner of a matrimonial home the other spouse should be entitled to give notice of his or her occupancy rights but only by registering in the Land Register (or recording in the Sasine Register) a notice (called a "matrimonial home notice") in a prescribed form, and that for this purpose an "owner" should include an uninfert proprietor with a personal right, a proper liferenter or a tenant under a registered long lease.
(Paragraph 3.38)

3.7 We recommend that where one spouse is the tenant or liferenter of a matrimonial home, the other spouse should be entitled to give notice of his or her

occupancy rights, but only by means of a written intimation (called a “matrimonial home intimation”) in a prescribed form given to the landlord or the trustees as appropriate.

(Paragraph 3.42)

3.8 We recommend that landlords (or trustees) should be required to inform any enquirer what documents have been served on them under the recommendations of this Part of our report. A dealing should not be capable of annulment where a third party was informed by the landlord (or trustees) that no intimation of occupancy rights had been made or if made had ceased to be effective. Any document served on a landlord (or trustees) should be accompanied by a prescribed fee. We further recommend that landlords or their representatives should be required to inform their successors what documents have been served on them or their predecessors under the recommendations of this Part of our report.

(Paragraph 3.46)

3.9 We recommend that where one spouse intimates his or her occupancy rights to the landlord (or the trustees) that spouse should be required to send to the other spouse a copy of the intimation; and that where one spouse registers a matrimonial home notice the Keeper of the Registers should be required to send a copy to the other spouse addressed to that other spouse at the address specified in the notice as the address of the matrimonial home.

(Paragraph 3.48)

3.10 We recommend that annulment of a dealing relating to a matrimonial home should be competent only if occupancy rights have been notified by matrimonial home notice or matrimonial home intimation before the date given below:

- (a) where the dealing is capable of being registered in the Land Register (or recorded in the Sasine Register), the date of registration or recording;
- (b) where the dealing is an assignation of a tenancy or liferent, the date of intimation of the assignation to the landlord or trustees;
- (c) where the dealing is the termination of a tenancy on or before the expiry date of the lease, the date on which the tenancy terminates;
- (d) where the dealing is the termination of a liferent, the date on which the liferent terminates;
- (e) where the dealing is the creation of a trust, the date on which the trust is created;
- (f) where the dealing does not fall within any of the categories above, the date on which the third party in pursuance of the dealing, enters or attempts to enter into possession of the matrimonial home.

(Paragraph 3.51)

3.11 We recommend that annulment of an adverse dealing relating to a matrimonial home should not be competent where the spouse who has statutory

occupancy rights consents in a prescribed manner to the dealing either before or after the dealing is effected. Such prescribed manner should include:

- (a) signature of a prescribed form indicating consent to a projected adverse dealing;
- (b) signature of a prescribed form indicating consent to a specific adverse dealing; and
- (c) signature as a consenter to the deed implementing a specific adverse dealing.

The prescribed forms of consent should be capable of being registered in the Land Register, or recorded in the Sasine Register, or served on the landlord (or trustee) as appropriate.

(Paragraph 3.62)

3.12 We recommend that the court should have power, on the application of any person having an interest, to dispense with the consent of a spouse with statutory rights to a dealing or to a proposed dealing relating to a matrimonial home where:

- (a) the consent is unreasonably withheld; or
- (b) the consent cannot be given because of that spouse's physical or mental disability; or
- (c) that spouse cannot be found after reasonable steps have been made to trace him or her; or
- (d) that spouse is a minor.

(Paragraph 3.68)

3.13 We recommend that consent should be rebuttably deemed to have been unreasonably withheld by a spouse if he or she has led the other spouse to believe that consent would be given or if he or she has refused to reply to two written requests for consent; and that the court, in deciding whether to exercise its discretion to dispense with consent, should have regard to all the circumstances of the case including the matters specified in Recommendation 2.9.

(Paragraph 3.69)

3.14 We recommend that the decree of the court dispensing with consent should be capable of being registered in the Land Register or recorded in the Sasine Register or served on the landlord (or trustees) as appropriate.

(Paragraph 3.70)

3.15 We recommend that if an application is made to dispense with consent to a dealing relating to a matrimonial home while an action for annulment of that dealing is pending, the court should sist the annulment proceedings until the conclusion of the proceedings on the application for dispensing with consent.

(Paragraph 3.72)

3.16 We recommend that it should be incompetent for a wife to apply to the court under section 5 of the Married Womens' Property (Scotland) Act 1881 for an order dispensing with her husband's consent to a dealing relating to a matrimonial home.

(Paragraph 3.74)

3.17 We recommend that where both spouses are entitled to occupy a matrimonial home the recommendations in this Part of our report should apply to any adverse dealing by one of the spouses relating to the matrimonial home or his or her share of it.

(Paragraph 3.77)

3.18 We recommend that any person having an interest should be entitled to give notice of the termination of a spouse's statutory occupancy rights in a matrimonial home by registering in the Land Register, or recording in the Sasine Register or serving on the landlord (or trustees) as appropriate, a notice in prescribed form.

(Paragraph 3.80)

3.19 We recommend that a spouse with statutory occupancy rights in a matrimonial home should be entitled to discharge a matrimonial home notice or a matrimonial home intimation by registering in the Land Register, or recording in the Sasine Register or serving on the landlord (or trustees) as appropriate, a deed of discharge in prescribed form.

(Paragraph 3.81)

3.20 We recommend that, pending the disposal of an action of annulment of a dealing relating to a matrimonial home, the court should have power to make such interim orders as it considers necessary or expedient in relation to the matrimonial home, its furniture and plenishings or the personal effects of the spouses and any children.

(Paragraph 3.83)

3.21 We recommend that where the court reduces a matrimonial home notice registered in the Land Register it should have power to order rectification of the register.

(Paragraph 3.88)

3.22 We recommend that where the court orders the reduction of a discharge, a consent, an order dispensing with consent, or a notice of termination of occupancy rights, an adverse dealing should not become liable to annulment unless:

- (a) the decree of reduction was registered in the Land Register, recorded in the Sasine Register or served on the landlord (or trustees) as appropriate, before the conclusion of the dealing; or
- (b) the consent or order dispensing with consent under reduction was given or made after the conclusion of the dealing.

(Paragraph 3.89)

Part IV: Domestic violence

4.1 We recommend that the court should have power to make an order (called an exclusion order) on the application of a spouse, suspending the other spouse's right to occupy a matrimonial home. The court should be required to grant an exclusion order if it is satisfied that it is necessary for the protection of the applicant or any child who resides or might normally be expected to reside with the applicant, from conduct of the other spouse which is injurious

to the physical or mental health of the applicant or child, unless the court is satisfied that the granting of an exclusion order would be unreasonable having regard to all the circumstances of the case including:

- (a) the matters specified in Recommendation 2.9; and
- (b) where the matrimonial home is let or possession given on a service tenancy or service occupancy, or the matrimonial home forms part of an agricultural holding and the lease contains a residence requirement, the likely consequences of the exclusion of the tenant or occupier.

(Paragraph 4.11)

4.2 We recommend that the court should have power to grant an interim exclusion order pending the determination of an application for an exclusion order. Rules of court should be made to provide that the spouse whom it is sought to exclude should have had the application for an interim exclusion order intimated to him or her, and should have been cited to a hearing at which it is considered.

(Paragraph 4.14)

4.3 We recommend that on granting an exclusion order (or an interim exclusion order) the court should be required to grant a warrant for the defender's summary ejection from the matrimonial home, an interdict prohibiting his re-entry without the applicant's express permission, and an interdict prohibiting him from removing or disposing of any of the furniture and plenishings in the matrimonial home, unless it is satisfied that such orders are unnecessary.

(Paragraph 4.19)

4.4 We recommend that the court on granting an exclusion order (or an interim exclusion order) may grant:

- (a) an interdict prohibiting the defender from entering or remaining in any specified area in which the matrimonial home is included;
- (b) an order giving directions for the preservation of the defender's goods and effects left in the matrimonial home where the exclusion order or interim exclusion order was granted in his absence;
- (c) an order making any of the orders subject to such terms and conditions as the court may prescribe; and
- (d) such other order as it may consider necessary for the protection of the applicant or any child who resides with, or who could normally be expected to reside with, either spouse.

(Paragraph 4.20)

4.5 We recommend that the court on application by either spouse should have power to make a further order varying or recalling an exclusion order, interim exclusion order or any order ancillary to the foregoing orders. Any order should in any event cease to have effect when:

- (a) the marriage terminates by death, presumed death, divorce or annulment;
or
- (b) the spouse entitled or permitted to occupy the matrimonial home ceases to be either entitled or permitted.

(Paragraph 4.23)

4.6 We recommend that proceedings for any matrimonial interdict should not be treated as incompetent or irrelevant by reason only of the fact that the spouses are living together as man and wife.
(Paragraph 4.27)

4.7 We recommend that it should continue to be incompetent for the court to grant a perpetual matrimonial interdict or to find a breach of an interim or perpetual matrimonial interdict proved on the uncorroborated evidence of one witness.
(Paragraph 4.31)

4.8 We recommend that the court should be required to attach a power of arrest to any matrimonial interdict ancillary to an exclusion order. Where the court grants any other matrimonial interdict it should be required to attach a power of arrest unless the interdicted spouse satisfies the court that in all the circumstances a power of arrest is unnecessary. A power of arrest should enable a constable to arrest without warrant the interdicted spouse if he has reasonable cause for suspecting him of being in breach of the interdict. The spouse after arrest should be detained in custody and brought before the court which granted the interdict as soon as possible.
(Paragraph 4.38)

4.9 We recommend that the court in granting any matrimonial interdict should have power to order the interdicted spouse to find caution for his due observance of the terms of the interdict.
(Paragraph 4.39)

4.10 We recommend that rules of court should be made to regulate the procedure to be followed in the Court of Session and in the sheriff courts after arrest under a power attached to a matrimonial interdict.
(Paragraph 4.41)

4.11 We recommend that rules of court should be made to enable breaches of interdict, whether perpetual or interim, to be dealt with in the Court of Session or in the sheriff courts along the lines of the existing Court of Session procedure for breach of interim interdict.
(Paragraph 4.42)

4.12 We recommend that there should be no change in the law whereby a matrimonial interdict only binds an interdicted spouse if served on him or if he has received informal notice of it.
(Paragraph 4.44)

4.13 We recommend that where a matrimonial interdict has attached to it a power of arrest, the messenger-at-arms or sheriff officer serving the interdict on the interdicted spouse should forthwith deliver to the chief constable of the region:

- (a) in which the matrimonial house is situated; and if different
- (b) in which the other spouse resides

a copy of the interdict together with his certificate of service of the interdict. Any order varying or recalling the interdict should be notified similarly to the chief constable(s) above.
(Paragraph 4.48)

4.14 We recommend that no amendment should be made to section 30 of the Rent Act 1965.
(Paragraph 4.50)

Part V: Tenancies

5.1 We recommend that the court should have power, on application by the spouse of the tenant, to make an order transferring the tenancy of a matrimonial home to the applicant. A copy of the application must be served on the landlord and he must be given an opportunity to be heard by the court. The court should in deciding whether to make the order consider all the circumstances of the case including the suitability of the applicant to become the tenant, his or her ability to perform the obligations under the lease and the matters specified in Recommendation 2.9.
(Paragraph 5.7)

5.2 We recommend that on application by either spouse the court should have power where a matrimonial home is let to both of the spouses jointly or in common to make an order vesting the tenancy solely in the applicant spouse.
(Paragraph 5.9)

5.3 We recommend that the court should not have power to transfer the tenancy (or a share of the tenancy) of a matrimonial home where the home:

- (a) forms part of an agricultural holding;
- (b) forms part of a croft or the property of a cottar, statutory small tenant, landholder or tenant-at-will;
- (c) is let on a long lease;
- (d) is let on a service tenancy.

(Paragraph 5.13)

5.4 We recommend that the court should have power on making an order transferring the tenancy (or a share of the tenancy) of a matrimonial home to order payment by the transferee spouse to the other spouse of such compensation as seems just in the circumstances.
(Paragraph 5.15)

5.5 We recommend that the Court of Session in granting decree of divorce or nullity of marriage should have power on application by a spouse to make an order transferring the tenancy (or a share of the tenancy) of a matrimonial home to the applicant.
(Paragraph 5.17)

5.6 We recommend that the court order should vest the title to the tenancy in the transferee spouse without the need for intimation to the landlord. The

transferee spouse should become liable for all the obligations under the lease except any arrears of rent due for the period before the making of the order which should remain the liability of the former tenant, or the joint and several liability of the former tenants, as the case may be.
(Paragraph 5.21)

5.7 We recommend that where possession is required in order to continue the tenancy (including a statutory tenancy) of a matrimonial home, possession by the spouse of the tenant should continue the tenancy notwithstanding abandonment by the tenant.
(Paragraph 5.24)

Part VI: Unmarried cohabiting couples

6.1 We recommend that the court should have power, on application by a person whom it is satisfied is living with another as if they were man and wife, to grant the applicant a right of occupancy in the home, and a right of use and possession of the furniture and plenishings, together with any interim or ancillary orders necessary to protect the rights granted. Any grant of occupancy should last for a period of three months, or as specified in the order, whichever is the shorter, subject to the court's power to grant one extension for a period of up to three months.
(Paragraph 6.8)

6.2 We recommend that the recommendations contained in Part IV of this report should extend to unmarried cohabiting couples. Any order excluding the partner with a title to occupy the home should last only while the other partner has a right of occupancy of the home by virtue of an order of the court under Recommendation 6.1, but where both partners have a title to occupy the home an exclusion order should continue to have effect until further order.
(Paragraph 6.11)

6.3 We recommend that an unmarried cohabiting partner who has been granted a right of occupancy should not be entitled to carry out essential repairs, to make payments on behalf of the other partner, or to take any steps in relation to the home or its furniture and plenishings which the other partner can take; and that the court should have no power to apportion expenditure on the home or on the furniture and plenishings between the partners, to transfer the tenancy (or a share of the tenancy) of the home, or to set aside sequestration or diligence designed to defeat occupancy rights; and that the recommendations contained in Part III of this report should not extend to unmarried partners.
(Paragraph 6.14)

Part VII: Jurisdiction and procedure

7.1 We recommend that any proceedings following on the recommendations in this report (except applications for the transfer of a tenancy on divorce or nullity of marriage, for the recall of a sequestration or for declaring a poinding null) should be competent both in the Court of Session and in the sheriff courts.
(Paragraph 7.3)

7.2 We recommend that section 2(2) of the Law Reform (Husband and Wife) Act 1962 should not apply to any proceedings following on the recommendations in this report.

(Paragraph 7.6)

7.3 We recommend that it should be competent to combine any proceedings following on the recommendations of this report with other related proceedings competent in the sheriff court.

(Paragraph 7.9)

7.4 We recommend that in any proceedings brought in the sheriff court under the recommendations of this report there should be a right of appeal from the decision of the sheriff to the sheriff principal and from the decision of either to the Court of Session and thence to the House of Lords.

(Paragraph 7.11)

7.5 We recommend that the sheriff should have jurisdiction to entertain any proceedings following on the recommendations of this report if he has jurisdiction in the place where the matrimonial home is situated, as well as if he has jurisdiction under the general grounds specified in section 6 of the Sheriff Courts (Scotland) Act 1907.

(Paragraph 7.13)

APPENDICES

APPENDIX I

Matrimonial Homes and Domestic Violence (Scotland) Bill

ARRANGEMENT OF CLAUSES

*Protection of occupancy rights of one spouse
against the other*

Clause

1. Right of spouse without title to occupy matrimonial home.
2. Subsidiary and consequential rights.
3. Regulation by court of rights of occupancy of matrimonial home.
4. Exclusion orders.
5. Duration of orders under ss. 3 and 4.

*Annulment by one spouse of adverse dealings
between other spouse and third party*

6. Annulment by non-titled spouse.
7. Notification of occupancy rights of non-titled spouse.
8. Priorities between notification of occupancy rights and adverse dealings.
9. Dispensation by court with spouse's consent to adverse dealing.
10. Notification of termination of occupancy rights.
11. Reduction of notices etc.
12. Provisions relating to documents mentioned in ss. 7 to 11.
13. Provisions where both spouses have title.
14. Application of ss. 6 to 13 where Land Register is not operative.

*Protection of rights of spouse against arrangements
intended to defeat them*

15. Sequestration.
16. Poinding.
17. Adjudication.

*Calling-up of standard securities over
matrimonial homes*

18. Spouse's consent required to dispensing with or shortening of notice.

Transfer of tenancy

Clause

19. Transfer of tenancy.

Matrimonial interdicts

20. Increased protection for injured spouse.
21. Attachment of powers of arrest to matrimonial interdicts.

Cohabiting couples

22. Occupancy rights of cohabiting couples.

General

23. Procedural provision and appeals.
24. Interpretation.
25. Short title, commencement and extent.

SCHEDULES:

Schedule 1—Modifications of ss. 6 to 10 where both spouses have title.

Schedule 2—Modifications of ss. 6 to 12 where Land Register is not operative.

Matrimonial Homes and Domestic Violence (Scotland) Bill

DRAFT

OF A

BILL

TO

Make new provision for Scotland as to the rights of occupancy of spouses in a matrimonial home and of cohabiting couples in the house where they cohabit; to provide for the transfer of the tenancy of a matrimonial home between the spouses in certain circumstances during marriage and on granting decree of divorce or nullity of marriage; to strengthen the law relating to domestic violence; and for connected purposes.

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:—

*Protection of occupancy rights of one spouse
against the other*

Right of spouse
without title
to occupy
matrimonial
home.

1.—(1) Where, apart from the provisions of this Act, one spouse is entitled, or permitted by a third party, to occupy a matrimonial home (a “titled spouse”), and the other spouse is not so entitled or permitted (a “non-titled spouse”), the non-titled spouse shall, subject to the provisions of this Act, have the following rights—

- (a) if in occupation, a right not to be excluded from the matrimonial home or any part of it by the titled spouse;
- (b) if not in occupation, a right to enter into and occupy the matrimonial home.

(2) In subsection (1) above, a “titled spouse” includes a spouse who is entitled, or permitted by a third party, to occupy a matrimonial home along with an individual who is not the other spouse only if that individual has waived his right of occupation in favour of the spouse so entitled or permitted.

EXPLANATORY NOTES

Clause 1

Subsection (1)

This subsection implements Recommendations 2.1, 2.3 and 2.18. It confers the rights of occupancy specified in paragraphs (a) and (b) of the subsection on a spouse who is neither entitled nor permitted by a third party to occupy a matrimonial home as defined in Clause 24(1).

Subsection (2)

This subsection implements the word “exclusively” in Recommendation 2.1. Occupancy rights are not conferred upon a non-titled spouse where the titled spouse shares his entitlement or permission to occupy the matrimonial home with a third party, unless that third party has waived his right to occupy the home.

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(3) If the titled spouse refuses to allow the non-titled spouse to exercise the right conferred by subsection (1)(b) above, the non-titled spouse may exercise that right only with the leave of the court under section 3(3) of this Act.

(4) In this Act, the rights mentioned in paragraphs (a) and (b) of subsection (1) above are referred to as occupancy rights.

(5) A non-titled spouse may renounce in writing his or her occupancy rights, either generally or in a particular matrimonial home.

Subsidiary and consequential rights.

2.—(1) For the purpose of securing the occupancy rights of a non-titled spouse, that spouse shall, in relation to a matrimonial home, be entitled without the consent of the titled spouse—

- (a) to make any payment due by the titled spouse in respect of rent, rates, secured loan instalments, interest or other outgoings (not being outgoings on repairs or improvements);
- (b) to perform any other obligation incumbent on the titled spouse (not being an obligation in respect of repairs or improvements);
- (c) to enforce performance of an obligation by a third party which that third party has undertaken to the titled spouse to the extent that the titled spouse can enforce such performance;
- (d) to carry out such essential repairs as the titled spouse is entitled to carry out;
- (e) to carry out such non-essential repairs or improvements as may be authorised by an order of the court, being such repairs or improvements as the titled spouse is entitled to carry out and which the court considers to be appropriate for the reasonable enjoyment of the occupancy rights;
- (f) to take such other steps, for the purpose of protecting the occupancy rights of the non-titled spouse, as the titled spouse is entitled to take to protect the occupancy rights of the titled spouse.

EXPLANATORY NOTES

Subsection (3)

This subsection is consequential on Recommendation 2.9. A non-titled spouse not in occupation of the matrimonial home must, if denied entry, apply to the court under Clause 3(3) for an order enforcing his or her right to enter the home. The court in deciding whether to grant the order will consider all the circumstances of the case. It is, however, only the exercise of this right of occupancy which depends on the discretion of the court, not its existence.

Subsection (4)

This subsection defines the phrase “occupancy rights” which is used throughout the Bill. Where a spouse is a titled spouse these rights arise by virtue of his or her entitlement or permission to occupy the matrimonial home, and where a spouse is non-titled these rights are conferred by subsection (1) above.

Subsection (5)

This subsection implements Recommendation 2.17.

Clause 2

Subsection (1)

This subsection implements Recommendations 2.3 to 2.7. It entitles a non-titled spouse, for the purpose of defending his or her occupancy rights, to make payments or take action in relation to a matrimonial home, which the titled spouse could make or take, without the consent of that titled spouse.

Paragraph (a) makes it clear that a non-titled spouse can make payments in respect of certain basic outgoings.

Paragraph (b) is intended to cover financial obligations of a non-recurrent nature as well as non-financial obligations.

Paragraph (c) provides for enforcement of obligations due to the titled spouse by third parties.

Paragraph (d) entitles a non-titled spouse to carry out essential repairs to a matrimonial home, without authority from the court.

Paragraph (e) empowers the court, on application by a non-titled spouse, and subject to the court being satisfied as to the matters stated to authorise non-essential repairs or improvements.

Paragraph (f) is framed in general terms in order to include matters not specifically referred to in the preceding paragraphs.

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(2) Any payment made under subsection (1)(a) above or any obligation performed under subsection (1)(b) above shall have effect in relation to the rights of a third party as if the payment were made or the obligation were performed by the titled spouse; and the performance of an obligation which has been enforced under subsection (1)(c) above shall have effect as if it had been enforced by the titled spouse.

(3) Where there is a titled and a non-titled spouse, the court may, on the application of either of them, make an order apportioning expenditure incurred or to be incurred by either spouse—

- (a) without the consent of the other spouse, on any of the items mentioned in paragraphs (a) and (d) of subsection (1) above;
- (b) with the consent of the other spouse, on anything relating to a matrimonial home.

(4) Where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home—

- (a) either spouse shall be entitled, without the consent of the other spouse, to carry out such non-essential repairs or improvements as may be authorised by an order of the court, being such repairs or improvements as the court considers to be appropriate for the reasonable enjoyment of the occupancy rights;
- (b) the court may, on the application of either spouse, make an order apportioning expenditure incurred or to be incurred by either spouse, with or without the consent of the other spouse, on anything relating to the matrimonial home.

EXPLANATORY NOTES

Subsection (2)

This subsection provides, following Recommendations 2.13 to 2.15, that a third party creditor must treat payment or performance by a non-titled spouse as if it had been tendered by the titled spouse. It also provides conversely that obligations owed by a third party creditor to a titled spouse should be treated as duly performed by that creditor if they are performed for the non-titled spouse.

Subsection (3)

This subsection implements Recommendation 2.16 in relation to expenditure on a matrimonial home. Either the non-titled or the titled spouse may apply for apportionment. The phrase "incurred or to be incurred" serves to cover both past and future expenditure. Apportionment between spouses who are co-proprietors is dealt with in subsection 4(b) below.

Subsection (4)

Paragraph (a) implements Recommendation 2.25. It entitles a co-proprietor spouse to carry out, without the consent of the other spouse, such non-essential repairs or improvements as the court authorises. Apart from this a co-proprietor spouse is entitled under the existing law to take any of the steps mentioned in subsection (1) above.

Paragraph (b) implements Recommendation 2.25 in relation to the apportionment of expenditure between co-proprietor spouses.

Matrimonial Homes and Domestic Violence (Scotland) Bill

(5) Where one spouse owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and plenishings in a matrimonial home—

- (a) the other spouse may, without the consent of the first mentioned spouse—
 - (i) make any payment due by the first mentioned spouse which is necessary, or take any other step which the first mentioned spouse is entitled to take, to secure the possession or use of any such furniture and plenishings (and any such payment shall have effect in relation to the rights of a third party as if it were made by the first mentioned spouse); or
 - (ii) carry out such essential repairs to the furniture and plenishings as the first mentioned spouse is entitled to carry out;
- (b) the court may, on the application of either spouse, make an order apportioning expenditure incurred or to be incurred by either spouse—
 - (i) without the consent of the other spouse, in making payments under a hire, hire-purchase or conditional sale agreement or in paying interest charges in respect of the furniture and plenishings, or in carrying out essential repairs to the furniture and plenishings; or
 - (ii) with the consent of the other spouse, on anything relating to the furniture and plenishings.

(6) An order under subsection (3), (4)(b) or (5)(b) above may require one spouse to make a payment to the other spouse in implementation of the apportionment.

(7) Any application under subsection (3), (4)(b) or (5)(b) above shall be made within five years of the date on which any payment in respect of such incurred expenditure was made.

(8) Where—

- (a) the titled spouse is the tenant of a matrimonial home; and
 - (b) possession thereof is necessary in order to continue the tenancy; and
 - (c) the titled spouse abandons such possession,
- the tenancy shall be continued by such possession by the non-titled spouse.

(9) In this section “improvements” includes alterations and enlargement.

EXPLANATORY NOTES

Subsection (5)

Paragraph (a), implementing Recommendations 2.4 and 2.5, extends the principle of subsection (1) to the furniture and plenishings situated in the matrimonial home.

Paragraph (b) implements Recommendation 2.16 in relation to the apportionment of expenditure by a spouse on the furniture and plenishings.

“Furniture and plenishings” which is defined in Clause 24(1) includes items hired or being acquired under a hire-purchase or a conditional sale agreement.

Subsection (6)

This subsection implements Recommendation 2.16. It empowers the court to grant a decree for payment of money following on apportionment of expenditure.

Subsection (7)

This subsection, following Recommendation 2.16, provides for a limitation period of 5 years from the date of payment, within which an application can competently be made for apportionment.

Subsection (8)

This subsection allows possession of the matrimonial home by the spouse of a tenant who has abandoned possession to continue that tenancy, and implements Recommendation 5.7. Tenancy and tenant are defined in Clause 24(1) so as to include a statutory tenancy.

Matrimonial Homes and Domestic Violence (Scotland) Bill

Regulation by
court of rights
of occupancy of
matrimonial
home.

3.—(1) Where there is a titled and a non-titled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order—

- (a) declaring the occupancy rights of the applicant spouse;
- (b) enforcing the occupancy rights of the applicant spouse;
- (c) restricting the occupancy rights of the other spouse;
- (d) regulating the exercise by either spouse of his or her occupancy rights;
- (e) protecting the occupancy rights of one spouse in relation to the other spouse.

(2) Where one spouse owns or hires, or is acquiring under a hire-purchase or conditional sale agreement, furniture and plenishings in a matrimonial home, the other spouse, if he or she has occupancy rights in that home, may apply to the court for an order granting to the applicant the possession or use in the matrimonial home of any such furniture and plenishings.

(3) The court shall grant an application under subsection (1)(a) above if it is satisfied that the application relates to a matrimonial home; and, on an application under any of paragraphs (b) to (e) of subsection (1) or under subsection (2) above, the court may make such order relating to the application as appears to it to be just and reasonable in all the circumstances of the case having regard to—

- (a) the conduct of the spouses in relation to each other and otherwise;
- (b) the respective needs and financial resources of the spouses;
- (c) the needs of any child of the family; and
- (d) the extent (if any) to which the matrimonial home is used in connection with a trade, business or profession of either spouse.

(4) Pending the making of an order under subsection (3) above, the court, on the application of either spouse, may make such interim order as it may consider necessary or expedient in relation to—

- (a) the residence of either spouse in the home to which the application relates;
- (b) the personal effects of either spouse or of any child of the family; or
- (c) the furniture and plenishings.

EXPLANATORY NOTES

Clause 3

Subsection (1)

This subsection implements Recommendation 2.8. It empowers the court to make orders declaring, enforcing, restricting, regulating or protecting the rights of a spouse to occupy a matrimonial home.

Subsection (2)

This subsection, implementing Recommendation 2.10, provides that a court may grant a spouse use and possession in the matrimonial home of furniture and plenishings belonging to the other spouse which are situated there at the time of the application for the order.

“Furniture and plenishings” is defined in clause 24(1) and includes articles hired or being acquired under a hire-purchase or a conditional sale agreement.

Subsection (3)

The court is required to grant an application for a declarator of occupancy rights if it is satisfied as to the existence of such rights. The remainder of this subsection implements Recommendation 2.9. It empowers the court to make such order relating to an application under paragraphs (b) to (e) of subsection (1) or under subsection (2) as appears just and reasonable. The matters set out in paragraphs (a) to (d) are matters to which the court is required to have particular regard when considering all the circumstances of the case. “Such order” includes ancillary orders and interdicts.

“Child of the family” is defined in Clause 24(1).

Subsection (4)

This subsection, implementing Recommendation 2.11, empowers the court to make interim orders in relation to the specified matters.

Matrimonial Homes and Domestic Violence (Scotland) Bill

(5) If the court makes an order under subsection (3) or (4) above which requires the delivery to either spouse of anything which has been left in or removed from the matrimonial home, it may also grant a warrant authorising a messenger-at-arms or sheriff officer to enter the matrimonial home or other premises occupied by the spouse who is not the applicant and to search for and take possession of the thing required to be delivered, if need be by opening shut and lockfast places, and to deliver the thing to the spouse in accordance with the said order:

Provided that a warrant granted under this subsection shall be executed only after expiry of the period of a charge, being such period as the court shall specify in the order for delivery.

(6) Where the court is satisfied—

(a) on the application of a non-titled spouse, that that spouse has suffered a loss of occupancy rights or that the quality of the non-titled spouse's occupation of a matrimonial home has been impaired; or

(b) on the application of a spouse who has been given the possession or use of furniture and plenishings by virtue of an order under subsection (3) above, that the applicant has suffered a loss of such possession or use or that the quality of the applicant's possession or use of the furniture and plenishings has been impaired,

in consequence of any act or default on the part of the other spouse which was intended to result in such loss or impairment, it may order that other spouse to pay such compensation as the court in the circumstances considers reasonable to the applicant in respect of that loss or impairment.

(7) A spouse may renounce in writing the right to apply under subsection (2) above for the possession or use of furniture and plenishings.

Exclusion orders.

4.—(1) Where there is a titled and a non-titled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order (in this Act referred to as “an exclusion order”) suspending the occupancy rights of the other spouse (“the non-applicant spouse”) in a matrimonial home.

EXPLANATORY NOTES

Subsection (5)

This subsection implements Recommendation 2.12 as to delivery orders. The court is empowered to specify the period of charge when granting a delivery order under this Clause

Subsection (6)

This subsection implements Recommendation 2.23. It provides that compensation is payable to a non-titled spouse for loss or impairment of his or her right of occupancy of the matrimonial home intentionally caused by the other spouse. Compensation is also payable for loss or impairment of the right of use and possession of furniture and furnishings.

Subsection (7)

This subsection, implementing Recommendation 2.17, permits a spouse to renounce his or her right to apply to the court for an order granting use and possession of the other spouse's furniture and furnishings.

Clause 4

Subsection (1)

This subsection introduces the concept of an exclusion order which suspends the occupancy rights of a spouse.

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(2) Subject to subsection (3) below, the court shall make an exclusion order if it is satisfied that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or course of conduct of the non-applicant spouse which is injurious to the physical or mental health of the applicant or child.

(3) The court shall not make an exclusion order if it is satisfied that the making of the order would be unjustified or unreasonable—

(a) having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (d) of section 3(3) of this Act; and

(b) where—

(i) the matrimonial home is let to the non-applicant spouse or to both spouses by an employer as an incident of employment or is part of an agricultural holding, and the lease is subject to a requirement that the non-applicant spouse or, as the case may be, both spouses must reside in the matrimonial home; or

(ii) possession of the matrimonial home is given subject to a requirement that it must be occupied as an incident of employment,

having regard to that requirement and the likely consequences of the exclusion of the non-applicant spouse from the matrimonial home.

(4) In making an exclusion order the court shall—

(a) grant a warrant for the summary ejection of the non-applicant spouse from the matrimonial home;

(b) grant an interdict prohibiting the non-applicant spouse from entering the matrimonial home without the express permission of the applicant;

(c) grant an interdict prohibiting the removal by the non-applicant spouse, except with the written consent of the applicant or by a further order of the court, of any furniture and plenishings in the matrimonial home;

unless the non-applicant spouse satisfies the court that it is unnecessary for it to grant such a remedy as is mentioned in paragraph (a), (b) or (c) above.

EXPLANATORY NOTES

Subsections (2) and (3)

These subsections implement Recommendation 4.1. Subsection (2) directs the court to make an exclusion order if it is satisfied that the making of the order is necessary for the protection of the applicant spouse or any child of the family (defined in Clause 24(1)) from specified conduct on the part of the other spouse. Subsection (3), however, permits the court not to make an exclusion order if the making of the order would be unjust or unreasonable having regard to the matters specified in paragraphs (a) and (b).

Subsections (4) and (5)

These subsections, implementing Recommendations 4.3 and 4.4, deal with orders ancillary to an exclusion order. Subsection (4) directs the court in granting an exclusion order to grant certain specified ancillary orders and interdicts, unless it is satisfied they are unnecessary, while subsection (5) provides for discretionary orders.

Matrimonial Homes and Domestic Violence (Scotland) Bill

(5) In making an exclusion order the court may—

- (a) grant an interdict prohibiting the non-applicant spouse from entering or remaining in a specified area in which the matrimonial home is included;
- (b) where the warrant for the summary ejection of the non-applicant spouse has been granted in his or her absence, give directions as to the preservation of the non-applicant spouse's goods and effects which remain in the matrimonial home;
- (c) on the application of either spouse, make the exclusion order or the warrant or interdict mentioned in paragraph (a), (b) or (c) of subsection (4) above or paragraph (a) of this subsection subject to such terms and conditions (including the finding of caution) as the court may prescribe;
- (d) on application as aforesaid, make such other order as it may consider necessary for the protection of the applicant or any child of the family.

(6) Pending the making of an exclusion order, the court may make an interim order suspending the occupancy rights of the non-applicant spouse in the matrimonial home to which the application for the exclusion order relates; and the foregoing provisions of this section shall apply to such interim order as they apply to an exclusion order.

(7) Without prejudice to subsections (1) and (6) above, where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, it shall be incompetent for one spouse to bring an action of ejection from the matrimonial home against the other spouse.

Duration of orders under ss. 3 and 4.

5.—(1) The court may, on the application of either spouse, recall or vary any order made by it under section 3 or 4 of this Act, but, subject to subsection (2) below, any such order shall, unless previously so varied or recalled, cease to have effect—

- (a) on the termination of the marriage; or
- (b) where there is a titled and a non-titled spouse, on the titled spouse ceasing to be a titled spouse; or
- (c) where both spouses are entitled, or permitted by a third party, to occupy the matrimonial home, on both spouses ceasing to be so entitled or permitted.

(2) Without prejudice to the generality of subsection (1) above, an order under section 3(3) of this Act which grants the possession or use of furniture and plenishings shall cease to have effect if the furniture and plenishings cease to be permitted by a third party to be retained in the matrimonial home.

EXPLANATORY NOTES

Subsection (6)

This subsection implements Recommendation 4.2. It empowers the court to grant an interim exclusion order. The other provisions of the Recommendation are to be implemented by rules of court.

Subsection (7)

This subsection implements Recommendation 2.26.

Clause 5

Subsection (1)

This subsection, implementing part of Recommendation 2.19 and Recommendation 4.5, empowers the court on application to vary or recall any order relating to occupancy rights or use and possession of furniture and furnishings. It also details those circumstances in which an order will lapse automatically. A titled spouse does not cease to be a titled spouse merely because an exclusion order has been made suspending his or her occupancy rights.

Subsection (2)

This subsection implements the remainder of Recommendation 2.19. It sets out an additional circumstance in which an order granting use and possession of furniture and furnishings will lapse.

Matrimonial Homes and Domestic Violence (Scotland) Bill

*Annulment by one spouse of adverse dealings
between other spouse and third party*

Annulment by
non-titled
spouse.

6.—(1) Subject to the following provisions of this Act, a non-titled spouse, who has given notification (which has not been discharged under section 7(3) of this Act) of his or her occupancy rights, shall be entitled to bring an action before the court to annul any dealing relating to a matrimonial home between the titled spouse and a third party where the dealing is adverse to the occupancy rights of the non-titled spouse.

(2) In this section and sections 7 to 10 of this Act—

“an action” means—

- (a) where the dealing is effected by means of a deed, an action for the reduction of that deed and a consequential rectification of the register;
- (b) where the dealing is not so effected, an action of declarator to determine that the dealing is of no effect;

“dealing” includes the grant of a heritable security and the creation of a trust;

“matrimonial home” does not include a caravan or houseboat or such other structure as is mentioned in the definition of matrimonial home in section 24(1) of this Act;

“titled spouse” means a spouse who, apart from the provisions of this Act, is entitled to occupy a matrimonial home (other than a spouse who is entitled to occupy it along with a third party, whether or not that third party has waived his right of occupation in favour of that spouse); but a spouse who ceases to be a titled spouse by virtue of a dealing with a third party shall be deemed to remain a titled spouse until the third party obtains a real right to the matrimonial home;

“non-titled spouse” means, in relation to a matrimonial home, a spouse who is not a titled spouse as defined in this subsection, whether or not the other spouse remains a titled spouse as so defined of that matrimonial home.

(3) An action under this section shall be competent only if brought before the earlier of the following dates—

- (a) the date occurring five years after the relevant date as defined in section 8(2) of this Act; or
- (b) the date occurring six months after the date when the non-titled spouse became aware or could reasonably have become aware that the dealing had been concluded.

EXPLANATORY NOTES

Clause 6

Subsection (1)

This subsection, following Recommendation 3.1, confers a right upon a non-titled spouse, whose rights of occupancy of a matrimonial home have been adversely affected by a dealing relating to it, to ask the court to annul that dealing.

Subsection (2)

This subsection defines certain expressions used in Clauses 6 to 10. Clause 24(2) provides that words used in the Land Registration (Scotland) Act 1979 shall have the same meaning as in that Act where used in the Bill. Thus "registered" means registered in the Land Register for Scotland and "Keeper" means the Keeper of the Registers of Scotland.

"An action" Paragraph (a), implementing Recommendation 3.2 makes provision for rectification of the Land Register. This is so as to enable retroactive effect to be given where required to a decree annulling an adverse dealing.

"Dealing" The usual adverse dealings will be sales and leases of owner-occupied matrimonial homes, and renunciations and assignations of leases of tenanted homes. For the avoidance of doubt the grant of a heritable security and the creation of a trust (including a trust for behoof of creditors) are specifically mentioned.

"Matrimonial home" This is defined in such a way as to implement Recommendation 3.1. It therefore does not include a caravan, houseboat etc. whether mobile or affixed to land.

"Titled spouse" This expression is defined so as to exclude a spouse who is entitled to occupy a matrimonial home jointly or in common with a third party, and a spouse who is merely permitted to occupy the home. The last part of the definition is inserted so as to ensure that a non-titled spouse can give notification of his or her occupancy rights at any time up to the date when the third party dealing with the titled spouse obtains a real right.

Subsection (3)

This subsection, implementing Recommendation 3.5, provides for the period within which an action of annulment must be raised

Matrimonial Homes and Domestic Violence (Scotland) Bill

Notification
of occupancy
rights of
non-titled
spouse.

1979 c.33.

7.—(1) A non-titled spouse shall give notification of his or her occupancy rights—

(a) where an interest in the matrimonial home is registered, by registering a notice in the prescribed form (in this Act referred to as “a matrimonial home notice”) indicating the existence of those rights;

(b) where the titled spouse is—

(i) the tenant of the matrimonial home (other than a tenant under a long lease within the meaning of section 28(1) of the Land Registration (Scotland) Act 1979 which is registered), or

(ii) the liferenter of the matrimonial home and it is vested in trustees,

by serving, on the landlord of the matrimonial home or, as the case may be, the trustees, an intimation in the prescribed form (in this Act referred to as “a matrimonial home intimation”), indicating the existence of those rights.

(2) There shall be sent to the titled spouse—

(a) by the Keeper, a copy of any matrimonial home notice which has been registered by him;

(b) by the non-titled spouse, a copy of any matrimonial home intimation,

and the Keeper shall comply with paragraph (a) above by addressing such copy to the titled spouse at the matrimonial home.

(3) A non-titled spouse may discharge a matrimonial home notice or a matrimonial home intimation by registering or, as the case may be, by serving on the landlord or the trustees, a deed of discharge in the prescribed form.

(4) If the interest of a landlord in a matrimonial home is disposed of, the landlord or his representative shall deliver, to the persons acquiring the interest, any matrimonial home intimation or other relevant document relating to the matrimonial home which has been served on the landlord or any predecessor under this Act.

EXPLANATORY NOTES

Clause 7

Subsection (1)

This subsection provides for the notification of occupancy rights which is an essential preliminary to any action for annulment of an adverse dealing.

Paragraph (a) implements Recommendation 3.6 and deals with notification in respect of owner-occupied homes where the titled spouse is the owner (whether infert or not), a proper liferenter or a tenant under a registered long lease.

Paragraph (b) implements Recommendation 3.7 and deals with notification in respect of a home where the titled spouse is a tenant or a liferenter.

“Prescribed” means prescribed by rules made under Clause 12.

Subsection (2)

This subsection implements Recommendation 3.9. It provides for the titled spouse to be sent a copy of any notification given by his or her spouse.

Subsection (3)

This subsection implements Recommendation 3.19 and permits a non-titled spouse to discharge an existing notification by registering or serving a deed of discharge in a prescribed form.

Subsection (4)

This subsection implements the last part of Recommendation 3.8.

Priorities
between
notification of
occupancy
rights and
adverse
dealings.

8.—(1) Subject to subsection (3) below, an action to annul an adverse dealing may be brought where the relevant date occurs after the date of notification of occupancy rights in accordance with section 7 of this Act.

(2) In this section, “the relevant date” means—

- (a) where the dealing is registrable, the date of registration;
- (b) where the titled spouse is the tenant of the matrimonial home and the dealing is the assignation of the tenancy to a third party, the date on which the third party intimates the assignation in writing to the landlord;
- (c) where the titled spouse is the tenant of the matrimonial home and the dealing is the termination of the tenancy by the tenant on or before the expiry date of the lease, the date on which the tenancy terminates;
- (d) where the titled spouse is the liferenter of the matrimonial home and it is vested in trustees and the dealing is the assignation of the liferent to a third party, the date on which the third party intimates the assignation in writing to the trustees;
- (e) where the titled spouse is as mentioned in paragraph (d) above and the dealing is the termination of the liferent, the date on which the liferent terminates;
- (f) where the dealing is the creation of a trust, the date on which the deed creating the trust is executed;
- (g) where the dealing does not fall within any of paragraphs (a) to (f) above, the date on which a third party in pursuance of the dealing enters or attempts to enter into possession of the matrimonial home.

EXPLANATORY NOTES

Clause 8

Subsection (1)

This subsection states the general principle that it is essential that notification of occupancy rights must be effected prior to a relevant date, which will vary according to the nature of the adverse dealing.

Subsection (2)

This subsection, implementing Recommendation 3.10, specifies the various relevant dates for the purpose of subsection (1).

Paragraph (c) refers to an adverse dealing constituted by a renunciation of a lease, or by the giving of a notice of removal which prevents tacit relocation.

Paragraph (e) refers to an adverse dealing constituted by the voluntary termination of a liferent.

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(3) A non-titled spouse shall not be entitled to bring an action to annul an adverse dealing where—

- (a) the dealing implements a binding obligation entered into by the titled spouse before his or her marriage to the non-titled spouse;
- (b) whether before or after the relevant date—
 - (i) the non-titled spouse has consented to the dealing in a prescribed manner; or
 - (ii) the court has made an order under section 9 of this Act dispensing with the consent of the non-titled spouse to the dealing;
- (c) the titled spouse falls within section 7(1)(b)(i) or (ii) of this Act, and the third party was informed under section 12(3) of this Act immediately before the relevant date that a matrimonial home intimation had not been served on the landlord or a previous landlord or, as the case may be, the trustees in respect of the matrimonial home in question, or that a matrimonial home intimation had been so served but it had ceased to be effective by virtue of a provision of this Act; or
- (d) the relevant date relating to the dealing was after the commencement of this Act but the dealing implemented a binding obligation entered into before that commencement.

(4) Pending the disposal of an action to annul an adverse dealing, the court may make such interim order as it may consider necessary or expedient in relation to—

- (a) the residence of the non-titled spouse in the home to which the action relates;
 - (b) the personal effects of that spouse or of any child of the family; or
 - (c) the furniture and plenishings,
- and subsection (5) of section 3 of this Act shall, subject to any necessary modifications, apply in relation to an order made under this subsection as it applies in relation to an order made under subsection (4) of the said section 3.

(5) The following shall be registrable or, as the case may be, may be served on the landlord or the trustees—

- (a) the decree of the court in an action to annul an adverse dealing;
- (b) an order under section 9 of this Act;
- (c) a consent given under subsection (3)(b)(i) above.

EXPLANATORY NOTES

Subsection (3)

This subsection details the situations in which an action of annulment will not be competent.

Paragraph (a) implements part of Recommendation 3.1.

Paragraph (b) (i) implements Recommendation 3.11 and prevents the non-titled spouse bringing an action for annulment where he or she has consented to the adverse dealing in one of the manners specified in that Recommendation and which are to be prescribed by rules made under Clause 12.

Paragraph (b) (ii) implements Recommendation 3.12 as to court dispensation from a consent to an adverse dealing.

Paragraph (c) implements part of Recommendation 3.8. It protects a third party who proposes to deal with the tenant or liferenter of a matrimonial home by enabling him to rely on information received from the landlord (or the trustees).

Paragraph (d) is a transitional provision and prevents an adverse dealing from being annulled where the obligation to implement the dealing has been constituted before the legislation comes into force.

Subsection (4)

This subsection implements Recommendation 3.20. It empowers the court to grant certain interim orders pending the determination of an action to annul an adverse dealing.

Subsection (5)

This subsection provides for registration or for service on the landlord (or the trustees) of a decree of annulment, an order dispensing with a non-titled spouse's consent, and a consent by a non-titled spouse given in a prescribed manner. It implements respectively Recommendations 3.2, 3.14 and 3.11.

Matrimonial Homes and Domestic Violence (Scotland) Bill

Dispensation
by court with
spouse's
consent to
adverse
dealing.

9.—(1) The court may, on the application of a titled spouse or any other person having an interest, make an order dispensing with the consent of a non-titled spouse to an adverse dealing, or a proposed adverse dealing, if—

- (a) such consent is unreasonably withheld;
- (b) such consent cannot be given by reason of physical or mental disability;
- (c) the non-titled spouse cannot be found after reasonable steps have been taken to trace him or her; or
- (d) the non-titled spouse is a minor.

(2) For the purposes of subsection (1)(a) above, a non-titled spouse shall, unless proved otherwise, be deemed to have unreasonably withheld consent to an adverse dealing, or a proposed adverse dealing, where—

- (a) the non-titled spouse has led the titled spouse to believe that he or she would consent to the dealing; or
- (b) two written requests for consent to the proposed dealing have been sent to the spouse at the spouse's last known address (the second request being sent not earlier than 14 days after the first request) and the receipt of neither request has been acknowledged.

(3) The court, in considering whether to make an order under subsection (1) above, shall have regard to all the circumstances of the case including the matters specified in paragraphs (a) to (d) of section 3(3) of this Act.

(4) If, before or after an action has been raised by a non-titled spouse to annul an adverse dealing, an application is made for an order under this section, the action shall be sisted until the conclusion of the proceedings on the application.

1881 c.21. (5) Where a wife is a titled spouse and her husband is a non-titled spouse, it shall not be competent for her to apply to the court under section 5 of the Married Womens' Property (Scotland) Act 1881 for an order dispensing with her husband's consent to an adverse dealing relating to a matrimonial home; and accordingly the said section 5 shall have effect as if at the beginning there were inserted the words "Subject to section 9(5) of the Matrimonial Homes and Domestic Violence (Scotland) Act 1980".

EXPLANATORY NOTES

Clause 9

Subsections (1) and (2)

These subsections implement Recommendations 3.12 and 3.13. They empower the court to make an order dispensing with the non-titled spouse's consent to an adverse dealing or to a proposed adverse dealing in certain situations.

Subsection (3)

This subsection, implementing Recommendation 3.13, directs the court in deciding whether to grant an order dispensing with consent, to have regard to the factors set out in Clause 3(3).

Subsection (4)

This subsection implements Recommendation 3.15.

Subsection (5)

This subsection implements Recommendation 3.16.

Matrimonial Homes and Domestic Violence (Scotland) Bill

Notification
of termination
of occupancy
rights.

10.—Where a matrimonial home notice has been registered or a matrimonial home intimation has been served under this Act, then—

- (a) on the termination of the marriage; or
- (b) where there is a titled and a non-titled spouse, on the titled spouse ceasing to be a titled spouse; or
- (c) where both spouses are entitled to occupy the matrimonial home, on both spouses ceasing to be so entitled,

any person having an interest shall be entitled to register a notice, or, as the case may be, serve on the landlord or the trustees an intimation, in the prescribed form stating that the occupancy rights of the non-titled spouse or, as the case may be, both spouses have ceased to exist and indicating the reason for such cessation.

Reduction of
notices etc.

11.—(1) The court, on the application of any person having an interest, may order—

- (a) the reduction of a matrimonial home notice together with a consequential rectification of the register;
- (b) the reduction of a matrimonial home intimation;
- (c) the reduction of—
 - (i) a deed of discharge under section 7(3) of this Act,
 - (ii) a consent given under section 8(3)(b)(i) of this Act,
 - (iii) an order of the court under section 9 of this Act,
 - (iv) a notice registered or an intimation served under section 10 of this Act;

and an order under this section shall be registrable or may be served on the landlord or trustees, as the case may be.

(2) Without prejudice to section 8(3)(c) of this Act and subject to subsection (3) below, the making of an order under subsection (1)(c) above shall not enable an action to be brought to annul an adverse dealing, if the relevant date relating to the dealing occurs before the order is registered, or served on the landlord or trustees, as the case may be.

(3) The making of an order under sub-paragraph (ii) or (iii) of subsection (1)(c) above shall enable an action to be brought to annul an adverse dealing between the titled spouse and a third party, if the consent or order reduced by the order under the said sub-paragraph (ii) or (iii) was given or made after the relevant date relating to the dealing.

(4) In this section “the relevant date” has the same meaning as in section 8(2) of this Act.

EXPLANATORY NOTES

Clause 10

This Clause provides for the registers or the records of landlords or trustees to be cleared of notifications which cease to be effective by reason of the occurrence of any of the events specified in paragraphs (a), (b) and (c). It implements Recommendation 3.16. A titled spouse does not cease to be a titled spouse merely because an exclusion order has been made suspending his or her occupancy rights.

Clause 11

This Clause is concerned with the reduction of notifications, discharges and notices of termination of notifications and consents to adverse dealings and the effect of such reduction.

Subsection (1)

This subsection empowers the court to order reduction of any of the documents or orders specified in paragraphs (a) and (b) and provides for the decrees of reduction to be registered or served on landlords or trustees.

Paragraph (a) (i) implements Recommendation 3.21. It provides for retroactive rectification of the Land Register upon reduction of a registered matrimonial home notice.

Subsections (2) and (3)

These subsections implement Recommendation 3.22.

Matrimonial Homes and Domestic Violence (Scotland) Bill

Provisions relating to documents mentioned in ss. 7 to 11.

12.—(1) The Secretary of State may, after consultation with the Lord President of the Court of Session, make rules prescribing—

- (a) fees which shall be payable on the service of any document on the landlord or trustees under any of the foregoing provisions of this Act;
- (b) the form of any document (other than a decree or order of the court) which is registrable, or may be served on the landlord or trustees, under any such provision;
- (c) the manner of consent to any dealing;

and in section 7, 8 and 10 of this Act “prescribed” shall be construed accordingly.

(2) The power to make rules under subsection (1) above shall be exercisable by statutory instrument.

(3) The landlord or, as the case may be, the trustees shall, on the request of any person, inform that person what documents, if any, have been served on the landlord or a previous landlord or trustees under any of the foregoing provisions of this Act.

Provisions where both spouses have title.

13.—(1) Where both spouses are entitled to occupy a matrimonial home, either party may bring an action before the court to annul any dealing relating to the matrimonial home between the other spouse and a third party where the dealing is adverse to the occupancy rights of the applicant spouse.

(2) Sections 6(2) and (3) and sections 7 to 12 of this Act shall apply for the purposes of subsection (1) above as they apply for the purposes of section 6(1) of this Act subject to the modifications set out in Schedule 1 to this Act.

(3) Where a spouse brings an action for the division and sale of a matrimonial home which the spouses own in common, the court, after having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (d) of section 3(3) of this Act, may refuse to grant decree in that action or may postpone the granting of decree for such period as it may consider reasonable in the circumstances or may grant decree subject to such conditions as it may prescribe.

Application of ss. 6 to 13 where Land Register is not operative.

1979 c.33.

14.—Sections 6 to 13 of this Act shall apply, subject to the modifications set out in Schedule 2 to this Act, to a matrimonial home—

- (a) which is not in an operational area and in respect of which no application for registration has been accepted by the Keeper under section 11(1) of the Land Registration (Scotland) Act 1979; or
- (b) which is in an operational area but in respect of which no interest is registered.

EXPLANATORY NOTES

Clause 12

Subsection (1)

This subsection provides for rules to be made prescribing the form in which a non-titled spouse may consent to an adverse dealing, and also the form of any other document to be used in connection with this Bill.

Paragraph (a) implements Recommendation 3.8 and enables fees to be prescribed for payment to landlords and trustees on the service of any document on them. The fees payable on registration or recording any document in the Land Register or the Register of Sasines will be fixed by the Secretary of State, with consent of the Treasury, under the power contained in section 25 of the Land Registers (Scotland) Act 1868 as amended by section 23 of the Land Registration (Scotland) Act 1979.

Subsection (3)

This subsection implements part of Recommendation 3.8.

Clause 13

Subsections (1) and (2)

These subsections together with Schedule 1 implement Recommendation 3.17. They extend the provisions of Clauses 6 to 14 to the case where the spouses are co-proprietors of a matrimonial home. Any dealing by one spouse which adversely affects the occupancy rights of the other spouse is treated as an adverse dealing.

Subsection (3)

This subsection implements Recommendation 2.27. It gives the court discretionary powers in relation to an action of division and sale of a matrimonial home owned in common.

Clause 14

This Clause together with Schedule 2 provides for the consequential modifications to Clauses 6 to 13 where documents are recorded in the Register of Sasines and not registered in the Land Register.

Matrimonial Homes and Domestic Violence (Scotland) Bill

*Protection of rights of spouse against
arrangements intended to defeat them*

Sequestration.
1913 c.20. **15.—(1)** After section 31 of the Bankruptcy (Scotland) Act 1913 there shall be inserted the following section—

“Recall of
sequestration
by non-titled
spouse.

31A. (1) If a debtor’s sequestrated estate includes a matrimonial home of which the debtor immediately before the act and warrant appointing the trustee was a titled spouse and the other spouse is a non-titled spouse, the Court of Session, on the application of the non-titled spouse within 40 days of the date of that act and warrant, may—

- (a) recall the sequestration; or
- (b) make such order as it thinks appropriate to protect the occupancy rights of the non-titled spouse,

if it is satisfied that the purpose of the application for sequestration was wholly or mainly to defeat the occupancy rights of the non-titled spouse.

(2) In section 30 of this Act, the words from “and the Lord Ordinary” to the end shall apply for the purposes of this section subject to the following modifications—

- (a) the words “in these several cases” shall be omitted;
- (b) for the words “the recall” there shall be substituted the words “or make an order to protect the occupancy rights of a non-titled spouse, the recall or order”.

(3) In this section and section 30 of this Act—
“titled spouse” and “non-titled spouse” have the meanings respectively assigned to them by section 6(2) of the Matrimonial Homes and Domestic Violence (Scotland) Act 1980;

“matrimonial home” has the same meaning as in section 24(1) of the said Act of 1980;

and other expressions used in this section and the said section 30 and in that Act have the same meanings in those sections as in that Act.”.

EXPLANATORY NOTES

Clause 15

Subsection (1)

This subsection implements part of Recommendation 2.20 and empowers the Court of Session to recall a sequestration or to make other orders in order to protect a non-titled spouse's occupancy rights, where it is satisfied that the sequestration has been contrived for the purpose of defeating those occupancy rights.

Matrimonial Homes and Domestic Violence (Scotland) Bill

1913 c.20.

(2) After section 76 of the Bankruptcy (Scotland) Act 1913 there shall be inserted the following section—

“Noti-
fication of
sequestration
to non-titled
spouse.

76A. (1) Where—

(a) the bankrupt’s estate includes a matrimonial home of which the bankrupt immediately before the act and warrant appointing the trustee was a titled spouse and the other spouse is a non-titled spouse; and

(b) the trustee is aware that the titled spouse is married to the non-titled spouse and knows where the non-titled spouse is residing,

the trustee shall, within 7 days of the date of the said act and warrant, intimate to the non-titled spouse that sequestration of the titled spouse’s estate has been awarded.

(2) In this section—

“titled spouse” and “non-titled spouse” have the meanings respectively assigned to them by section 6(2) of the Matrimonial Homes and Domestic Violence (Scotland) Act 1980;

“matrimonial home” has the same meaning as in section 24(1) of the said Act of 1980.”

Poiding.

16.—Where a poiding has been executed of furniture and plenishings of which the debtor’s spouse has the possession or use by virtue of an order under section 3(3) of this Act, the sheriff, on the application of that spouse within 40 days of the date of execution of the poiding, may—

(a) declare that the poiding is null; or

(b) make such order as he thinks appropriate to protect such possession or use by that spouse,
if he is satisfied that the purpose of the diligence was wholly or mainly to prevent such possession or use.

EXPLANATORY NOTES

Subsection (2)

This subsection implements the remainder of Recommendation 2.20. It imposes a duty on a trustee in bankruptcy to notify the sequestration to the bankrupt's spouse.

Clause 16

This Clause implements Recommendation 2.22. It empowers the sheriff having jurisdiction over a poinding of furniture and plenishings in a matrimonial home to set the poinding aside or to make other orders in order to protect a spouse's right of use and possession where the diligence has been contrived for the purpose of defeating that right.

Matrimonial Homes and Domestic Violence (Scotland) Bill

Adjudication. 17.—(1) Where a matrimonial home of which there is a titled spouse and a non-titled spouse is adjudged, the court, on the application of the non-titled spouse within 40 days of the date of registration of the decree of adjudication, may—

(a) order the reduction of the decree; or

(b) make such order as it thinks appropriate to protect the occupancy rights of the non-titled spouse, if it is satisfied that the purpose of the diligence was wholly or mainly to defeat the occupancy rights of the non-titled spouse.

(2) Any order under subsection (1) above shall be registrable.

(3) In this section, “titled spouse” and “non-titled spouse” have the same meanings respectively as in section 6(2) of this Act.

(4) If the matrimonial home—

(a) is not in an operational area and no application for registration in respect of the matrimonial home has been accepted by the Keeper under section 11(1) of the Land Registration (Scotland) Act 1979, or

1979 c.33.

(b) is in an operational area but no interest in the matrimonial home is registered,

this section shall have effect as if—

(a) in subsection (1) for the words “registration of the decree of adjudication” there were substituted the words “recording of an extract of the decree of adjudication in the Register of Sasines”;

(b) subsection (2) were omitted.

*Calling-up of standard securities
over matrimonial homes*

Spouse's
consent
required to
dispensing
with or
shortening of
notice.
1970 c.35.

18.—Section 19(10) of the Conveyancing and Feudal Reform (Scotland) Act 1970 shall have effect as if at the end there were added the following proviso—

“Provided that, without prejudice to the foregoing generality, if the standard security is over a matrimonial home as defined in section 24(1) of the Matrimonial Homes and Domestic Violence (Scotland) Act 1980, the spouse on whom the calling-up notice has been served may not dispense with or shorten the said period without the consent in writing of the other spouse.”

EXPLANATORY NOTES

Clause 17

Subsection (1)

This subsection implements Recommendation 2.21 and empowers the court to reduce a decree of adjudication of the matrimonial home or to make other orders in order to protect the non-titled spouse's rights of occupancy where the diligence has been contrived by the titled spouse for the purpose of defeating those rights.

Subsection (4)

This subsection provides for consequential modifications to this Clause where the Register of Sasines and not the Land Register is the relevant register.

Clause 18

This Clause implements Recommendation 3.4. It prohibits a titled spouse from agreeing (without the consent of the non-titled spouse) to shorten or dispense with the statutory periods applicable to a calling-up notice or a notice of default served by a heritable creditor.

Transfer of tenancy

Transfer
of tenancy.

19.—(1) The court may, on the application of a non-titled spouse, make an order transferring the tenancy of a matrimonial home to that spouse and providing for the payment by the non-titled spouse to the titled spouse of such compensation as seems just in the circumstances of the case.

(2) The Court of Session may, in granting decree in an action for divorce or nullity of marriage, make an order granting an application under subsection (1) above.

(3) In determining whether to grant an application under subsection (1) above, the court shall have regard to all the circumstances of the case including the matters specified in paragraphs (a) to (d) of section 3(3) of this Act and the suitability of the applicant to become the tenant and the applicant's capacity to perform the obligations under the lease of the matrimonial home.

(4) The non-titled spouse shall serve a copy of an application under subsection (1) above on the landlord and, before making an order under subsection (1) above, the court shall give the landlord an opportunity of being heard by it.

(5) On the making of an order granting an application under subsection (1) above, the tenancy shall vest in the non-titled spouse without intimation to the landlord, subject to all the liabilities under the lease (other than any arrears of rent for the period before the making of the order, which shall remain the liability of the original titled spouse).

(6) It shall not be competent for a non-titled spouse to apply for an order under subsection (1) above where the matrimonial home—

- (a) is let to the titled spouse by his or her employer as an incident of employment, and the lease is subject to a requirement that the titled spouse must reside therein;
- (b) is or is part of an agricultural holding;
- (c) is on or pertains to a croft or the subject of a cottar or the holding of a landholder or a statutory small tenant;
- (d) is let on a long lease;
- (e) is part of the tenancy land of a tenant-at-will.

EXPLANATORY NOTES

Clause 19

Subsection (1)

This subsection implements the general principle stated in Recommendation 5.1 that a court should have power to order the transfer of the tenancy of a matrimonial home between spouses. The provision for payment of compensation implements Recommendation 5.4. Tenancy is defined in Clause 24(1) so as to include a statutory tenancy and a sub-tenancy.

Subsection (2)

This subsection implements Recommendation 5.5. It empowers the Court of Session to order a transfer of the tenancy of a matrimonial home on granting decree of divorce or nullity of marriage.

Subsection (3)

This subsection implements part of Recommendation 5.1.

Subsection (4)

This subsection implements part of Recommendation 5.1.

Subsection (5)

This subsection implements Recommendation 5.6.

Subsection (6)

This subsection, following Recommendation 5.3, details the situations in which an order for transfer of a tenancy cannot be sought.

Matrimonial Homes and Domestic Violence (Scotland) Bill

(7) In subsection (6) above—

- 1949 c.75. “agricultural holding” has the same meaning as in section 1 of the Agricultural Holdings (Scotland) Act 1949;
- 1955 c.21. “cottar” has the same meaning as in section 28(4) of the Crofters (Scotland) Act 1955;
- “croft” has the same meaning as in the Crofters (Scotland) Act 1955;
- “holding”, in relation to a landholder and a statutory small tenant, “landholder” and “statutory small tenant” have the same meanings respectively as in sections 2(1), 2(2) and 32(1) of the Small Landholders (Scotland) Act 1911;
- 1911 c.49. “long lease” has the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979;
- 1979 c.33. “tenant-at-will” has the same meaning as in section 20(8) of the Land Registration (Scotland) Act 1979.

(8) Where both spouses are joint or common tenants of a matrimonial home, the court may, on the application of one of the spouses, make an order vesting the tenancy in the other spouse solely and providing for the payment by the applicant to the other spouse of such compensation as seems just in the circumstances of the case.

(9) Subsections (2) to (7) above shall apply for the purposes of an order under subsection (8) above as they apply for the purposes of an order under subsection (1) above subject to the following modifications—

- (a) in subsection (3) for the word “tenant” there shall be substituted the words “sole tenant”;
- (b) in subsection (5) for the words “non-titled” and “liability of the original titled spouse” there shall be substituted respectively the words “applicant” and “joint and several liability of both spouses”;
- (c) in subsection (6)—
- (i) for the words “a non-titled” there shall be substituted the words “an applicant”;
- (ii) for paragraph (a) there shall be substituted the following paragraph—
- “(a) is let to both spouses by their employer as an incident of employment, and the lease is subject to a requirement that both spouses must reside there;”;
- (iii) paragraphs (c) and (e) shall be omitted.

EXPLANATORY NOTES

Subsections (8) and (9)

These subsections implement Recommendation 5.6. They extend the provisions of this Clause to spouses who are co-tenants. Paragraph (c) (iii) of subsection (9) is inserted because there cannot be joint or common tenancies in the cases of crofters, statutory small tenants, landholders or tenants-at-will.

Matrimonial interdicts

Increased protection for injured spouse.

20.—(1) It shall not be incompetent for the court to entertain an application by a spouse for a matrimonial interdict by reason only that the spouses are living together as man and wife.

(2) The court, in granting a matrimonial interdict, may order the non-applicant spouse to find caution for the due observance of its terms.

(3) In this section and section 21 of this Act—
“matrimonial interdict” means an interdict which—

- (a) restrains or prohibits any conduct or course of conduct of one spouse towards the other spouse or a child of the family, or
- (b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified area in which a matrimonial home is included;

“non-applicant spouse” means the spouse other than the spouse who has applied for the interdict.

Attachment of powers of arrest to matrimonial interdicts.

21.—(1) The court shall attach a power of arrest—

- (a) to any matrimonial interdict which is ancillary to an exclusion order;
- (b) to any other matrimonial interdict, unless the non-applicant spouse satisfies the court that in all the circumstances of the case such a power is unnecessary.

(2) If, by virtue of subsection (1) above, a power of arrest is attached to an interdict, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of the interdict.

(3) A person arrested under subsection (2) above shall be brought before the court which granted the interdict as soon as possible.

(4) If, by virtue of subsection (1) above, a power of arrest is attached to an interdict, the messenger-at-arms or sheriff officer shall, as soon as possible after his service of the interdict on the non-applicant spouse, deliver—

- (a) to the chief constable of the region in which the matrimonial home is situated; and
 - (b) if the applicant spouse resides in a region other than the aforesaid region, to the chief constable of that other region,
- a copy of the interdict together with a certificate of service of the interdict.

(5) Subsection (4) above shall apply to the variation or recall of an interdict to which a power of arrest is attached as it applies to the interdict itself.

EXPLANATORY NOTES

Clause 20

Subsection (1)

This subsection implements Recommendation 4.6.

Subsection (2)

This subsection implements Recommendation 4.11.

Clause 21

This Clause deals with the attachment of a power of arrest to a matrimonial interdict.

Subsections (1), (2) and (3)

These subsections implement Recommendation 4.8.

Subsection (1) requires the court to attach a power of arrest to an interdict which is ancillary to an exclusion order. The court is also required to attach a power of arrest to any other matrimonial interdict, unless it is satisfied that such a power is unnecessary.

Subsection (2) states the powers of a constable in respect of an interdict to which a power of arrest has been attached. "Constable" means any police officer by virtue of the definition of "constable" contained in Section 51 of the Police (Scotland) Act 1967 as read with Section 5 and Schedule 1 of the Interpretation Act 1978.

Subsection (3) provides for an arrested person to be brought before the civil court which granted the interdict as soon as possible. Rules of court are to be made to regulate subsequent procedure before the civil court.

Subsections (4) and (5)

These subsections implement Recommendation 4.13.

Cohabiting couples

Occupancy
rights of
cohabiting
couples.

22.—(1) If a man and a woman are living with each other as if they were man and wife (“a cohabiting couple”) in a house which, apart from the provisions of this section—

(a) one of them (a “titled partner”) is entitled, or permitted by a third party, to occupy; and

(b) the other (a “non-titled partner”) is not so entitled or permitted to occupy,

the court may, on the application of the non-titled partner, if satisfied that the man and the woman are a cohabiting couple in that house, grant occupancy rights therein to the applicant for such period, not exceeding 3 months, as the court may specify: Provided that the court may extend the said period for one further period not exceeding 3 months.

(2) In subsection (1) above, a “titled partner” includes a partner who is entitled, or permitted by a third party, to occupy the house along with an individual who is not the other partner only if that individual has waived his right of occupation in favour of the partner so entitled or permitted.

(3) If an application under subsection (1) above is granted, or if both partners of a cohabiting couple are entitled, or permitted by a third party, to occupy the house where they are cohabiting, the following provisions of this Act shall apply to the cohabiting couple as they apply to parties to a marriage—

in section 1, the definition of “occupancy rights”;

section 3, except subsection (1)(a);

section 4;

in section 5(1), the words from the beginning to “Act”; and

sections 20 and 21,

and any reference to a matrimonial home shall be construed accordingly.

(4) Any order under section 3 or 4 of this Act as applied to a cohabiting couple by subsection (3) above shall have effect—

(a) if one of them is a non-titled partner, for such a period, not exceeding the period for which occupancy rights have been granted under subsection (1) above, as may be specified in the order;

(b) if they are both entitled, or permitted by a third party, to occupy the house, until a further order of the court.

EXPLANATORY NOTES

Clause 22

Subsection (1)

This subsection implements Recommendation 6.1. It empowers the court to grant a non-titled cohabiting partner a limited right of occupancy in the house in which the partners cohabit.

Subsection (3)

This subsection implements Recommendations 6.2 and 6.3. It specifies which provisions of the Bill are to apply to cohabiting couples.

Subsection (4)

This subsection, implementing Recommendation 6.2, provides that any order relating to occupancy shall last as long as the grant of occupancy to the non-titled partner, unless the court specifies some lesser period. Where the couple are co-proprietors of the house in which they cohabit any order relating to occupancy is to last until it is varied or recalled.

Matrimonial Homes and Domestic Violence (Scotland) Bill

General

Procedural
provision and
appeals.
1962 c.48.

23.—(1) Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (dismissal by court of delictual proceedings between spouses) shall not apply to any proceedings brought before the court in pursuance of any provision of this Act.

(2) If any party to proceedings brought before the sheriff in pursuance of any provision of this Act is dissatisfied with a decision of the sheriff, he may appeal therefrom to either the sheriff principal or the Court of Session, and, if his appeal is to the sheriff principal, he may make a further appeal from the decision of the sheriff principal to the Court of Session.

Interpretation.

24.—(1) In this Act—

“caravan” means a caravan which is mobile or affixed to the land;

“child of the family” means any child who resides with or who could normally be expected to reside with either spouse;

“the court” means the Court of Session or the sheriff;

“furniture and plenishings” means any article situated in a matrimonial home which—

(a) is owned or hired by either spouse or is being acquired by either spouse under a hire-purchase or conditional sale agreement; and

(b) is reasonably necessary to enable the home to be used as a family residence,

but does not include any vehicle, caravan or houseboat, or such other structure as is mentioned in the definition of “matrimonial home”;

“matrimonial home” means, subject to section 6(2) of this Act, any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence 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;

“occupancy rights” has the meaning assigned by section 1(4) of this Act;

“the sheriff” includes the sheriff having jurisdiction in the district where the matrimonial home is situated;

EXPLANATORY NOTES

Clause 23

Subsection (1)

This subsection implements Recommendation 7.2.

Subsection (2)

This subsection implements Recommendation 7.4. Unless excluded by statute any final interlocutor of the Court of Session is appealable to the House of Lords (section 15, Court of Session Act 1808).

Clause 24

This Clause defines expressions used in the Bill.

Subsection (1)

The definition of “the court” implements Recommendation 7.1.

The definition of “furniture and plenishings” implements Recommendation 2.10.

The definition of “matrimonial home” implements Recommendations 2.2 and 2.24.

The definition of “sheriff” implements Recommendation 7.5.

Matrimonial Homes and Domestic Violence (Scotland) Bill

1971 c.28. “tenant” includes sub-tenant and a statutory tenant as defined in section 3 of the Rent (Scotland) Act 1971 and “tenancy” shall be construed accordingly;

“titled spouse” and “non-titled spouse”, subject to sections 6(2) and 17(3) of this Act, have the meanings respectively assigned to them by section 1 of this Act.

1979 c.33. (2) Expressions used in this Act and the Land Registration (Scotland) Act 1979 have the same meanings in this Act as in that Act.

Short title,
commencement
and extent. **25.—**(1) This Act may be cited as the Matrimonial Homes and Domestic Violence (Scotland) Act 1980.

(2) This Act shall come into operation on the expiration of one month beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

SCHEDULES

SCHEDULE 1

Section 13(2)

**MODIFICATIONS OF SECTIONS 6 TO 10 WHERE
BOTH SPOUSES HAVE TITLE**

1. Subject to paragraph 3 below, for any reference to a titled spouse and a non-titled spouse there shall be substituted respectively a reference to a non-applicant spouse and an applicant spouse.

2. In section 6(2) the definitions of “titled spouse” and “non-titled spouse” shall be omitted.

3. In paragraph (b) of section 7(1) for the reference to titled spouse there shall be substituted a reference to both spouses and that paragraph and section 8(3)(c) shall be construed accordingly.

4. For paragraphs (b) to (e) of section 8(2) there shall be substituted the following paragraphs—

“(b) where the spouses are common tenants of the matrimonial home and the dealing is the assignation of the non-applicant spouse’s share in the tenancy to a third party, the date on which the third party intimates the assignation in writing to the landlord;

(c) where the spouses are joint tenants of the matrimonial home and the dealing is the termination of the tenancy by the non-applicant spouse on or before the expiry date of the lease, the date on which the tenancy terminates;

(cc) where the spouses are common tenants of the matrimonial home and the dealing is the termination by the non-applicant spouse of that spouse’s share in the tenancy on or before the expiry date of the lease, the date on which that spouse’s share in the tenancy terminates;

(d) where the spouses are joint liferenters of the matrimonial home and it is vested in trustees and the dealing is the assignation of the non-applicant spouse’s share in the liferent to a third party, the date on which the third party intimates the assignation in writing to the trustees;

(e) where the spouses are as mentioned in paragraph (d) above and the dealing is the renunciation of the non-applicant spouse’s share in the liferent in a case where on renunciation the share does not accrue to the applicant spouse, the date of such renunciation;”.

5. In section 10, paragraph (b) and the words “non-titled spouse or, as the case may be,” shall be omitted.

Matrimonial Homes and Domestic Violence (Scotland) Bill

SCHEDULE 2
MODIFICATIONS OF SECTIONS 6 TO 12 WHERE
LAND REGISTER IS NOT OPERATIVE

Section 14

1. In section 6(2), in paragraph (a) of the definition of “an action” the words “and a consequential rectification of the register” shall be omitted.
2. In section 7—
 - (a) in subsection (1)(a) for the words from “interest” to “registering” there shall be substituted the words “title to the matrimonial home is recorded in the Register of Sasines, by recording therein”;
 - (b) in subsections (1)(b)(i) and (2)(a) for the word “registered” there shall be substituted the words “recorded in the Register of Sasines”;
 - (c) in subsection (3) for the word “registering” there shall be substituted the words “recording in the Register of Sasines”.
3. In section 8—
 - (a) for paragraph (a) of subsection (2) there shall be substituted the following paragraph—

“(a) where the dealing is effected by a deed recorded in the Register of Sasines, the date of such recording;”;
 - (b) in subsection (5) for the word “registrable” there shall be substituted the words “capable of being recorded in the Register of Sasines” and at the beginning of paragraph (a) there shall be inserted the words “an extract of”.
4. In section 10 for the words “registered” and “register” there shall be substituted respectively the words “recorded in the Register of Sasines” and “record in the Register of Sasines”.
5. In section 11—
 - (a) in subsection (1)(a) the words “and a” to the end shall be omitted;
 - (b) for the words “registered” and “registrable” wherever they occur there shall be substituted respectively the words “recorded in the Register of Sasines” and “capable of being recorded in the Register of Sasines”.
6. In section 12(1)(b) for the word “registrable” there shall be substituted the words “capable of being recorded in the Register of Sasines”.

APPENDIX II

List of those who submitted comments on Memorandum No. 41.

Aberdeen University, Faculty of Law
Faculty of Advocates
Building Societies Association
Association of Chief Police Officers
Church of Scotland (Committee on Social Responsibility)
Court of Session judges
Crofters Commission
Domestic Violence Working Party
Society of Friends
Finance Houses Association
Glasgow University, Faculty of Law
Sheriff Gordon, Q.C.
Professor J. M. Halliday
Institute of Housing (Scottish Branch)
Law Society of Scotland
Mr G. Moore, Senior Lecturer in Social Work, Jordanhill College of Education
North of Scotland Hydro-Electric Board
Keeper of the Registers of Scotland
Royal Scottish Society for the Prevention of Cruelty to Children
Scottish Council for Single Parents
Scottish Law Agents Society
Scottish Police Federation
Association of Scottish Police Superintendents
Scottish Special Housing Association
Society of Writers to H.M. Signet.