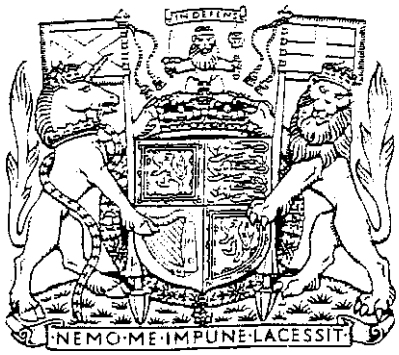

SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO : 57

MATRIMONIAL PROPERTY
Vol 2: Parts VI – VII & Appendices

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PART VI

OPTIONS FOR MINOR REFORMS

Introduction

6.1. In the previous Part of the Memorandum we considered various possible reforms, all of which would have involved the introduction of some form of community property or statutory co-ownership into Scots law. In this Part we consider various possible reforms which would retain the basic principle of separate property, but modify it so as to remove certain defects and meet certain criticisms.

A presumption of co-ownership of household goods

6.2. The presumption. One criticism of the present separate property law is that it is difficult to apply in relation to household goods. It is often impossible, particularly after the lapse of time, to tell who owns what. The scheme for statutory co-ownership of household goods, which we have discussed above, would be one way of responding to this criticism, but it might go further than is necessary and might well cause more difficulties than it would resolve. An alternative response would be to introduce a presumption of co-ownership of household goods. The type of presumption which we have in mind is one which would apply if any question arose as to the respective rights of a husband and wife to the ownership of any item which formed or had formed part of the household goods of their matrimonial home. The definition of household goods would include all normal furniture and plenishings but exclude, for the avoidance of doubt, cars and other vehicles, goods used for business purposes, money and securities, and personal clothing and jewellery. The definition of matrimonial home would be confined to a home which was being, or had been, used by both spouses as their family residence. If this main presumption stood on its own it could be rebutted by proof, by any competent means, that an item did not belong to both spouses equally. It could be rebutted, for example, if one spouse proved that he had owned

the item before the marriage, or had acquired it by gift or inheritance during the marriage, or had made it himself, or had bought it. The presumption would be purely evidential. It would deal with cases where proof of ownership is lacking (for example, because there is no reliable evidence on the question of who bought an item) but would not alter the substantive law. It would have only a limited effect but would nonetheless be useful in various situations - not least, perhaps, in cases where the ownership of household goods has to be determined after the death of one or both of the spouses.[1]

6.3. A secondary rule? The main presumption discussed above would not meet a second criticism which can be levelled at the present law as it applies to household goods, namely that it can produce unrealistic results which are out of line with the expectations of most married couples. Which spouse actually buys an item of household furniture is very often a matter of mere chance. Both may, for example, have looked at kitchen tables in various stores on a Saturday. After discussion, on returning home, they may have made a decision to buy a particular table on the Monday. Whether the husband or wife actually effects the purchase may depend simply on which one finds it more convenient to call into the store. It would be highly artificial to make ownership of the table depend on factors of this nature. It would also be highly artificial to make ownership of the table depend on whether there was any agreement that the spouse making the purchase would do so, as to one-half, on behalf of the other spouse. Married couples are not likely to go into legal niceties of this nature. We have therefore considered whether it would be possible to meet this criticism by means of a secondary

[1] One situation which can cause particular difficulty is where the surviving spouse has been left a liferent of the contents of the home so far as belonging to the other spouse. It can be impossible to ascertain, on the death of the surviving spouse, who owned what.

rule, to the effect that the presumption could not be rebutted by proving that the article had been bought and paid for by one spouse during the marriage, unless it was also proved that it had been bought primarily for his own purposes or benefit. The precise formulation of this secondary rule would require careful consideration, but the intention would be to allow the presumption to be rebutted by proof that the article had been bought as an investment, or as a personal possession, or as a gift for a personal friend, but not by proof that it had been bought for general household purposes or for the benefit of both spouses. The criterion would be the intention of the purchaser at the time of purchase, but in real life subsequent events would often cast a light backwards. It would usually be difficult, for example, for a husband to convince a court that he had bought a living-room carpet, or a kitchen table, primarily for his own purposes or benefit. There would, of course, still be the possibility of difficulties even with a secondary rule of this nature. It might not be easy, for example, to decide whether a painting had been bought primarily for the joint enjoyment and benefit of the spouses or primarily for the purchaser's own purposes or benefit. It is perhaps desirable, however, that there should be some room for manoeuvre at this level of dispute and some room to take into account the facts and circumstances of particular cases. The main presumption and the secondary rule taken together should greatly reduce the area of difficulty, and would concentrate the dispute on questions which would probably be regarded by most couples as more relevant than the simple question of who actually entered into the contract of sale. Against the secondary rule, however, it could be argued that it would go further than was necessary to enable disputes to be resolved by applying the present law. It would alter the substantive law, in effect if not in form.

6.4. We have formed no concluded view on whether or not a presumption of co-ownership of household goods should be fortified by a secondary rule of the type mentioned above. Our provisional view is, however, that a presumption of co-ownership of household goods (with or without a secondary rule) would help to meet the criticism that under the present law it can be impossible to determine who owns what household goods. It would do so in a way which would square with the expectations of married couples. It would leave the way open, however, for a spouse to retain sole ownership of goods in certain cases. A solution of this type would avoid many of the problems which we have referred to above in relation to statutory co-ownership of the household goods. There would not be the same difficulty in deciding what should be excluded from the scheme because various items would be self-excluding. If, for example, a piece of furniture were proved or admitted to have been acquired by one spouse before the marriage, the presumption would automatically be rebutted. The same result would follow if it were proved or admitted that an item had been given by one spouse to the other. The difficulties liable to be caused by opting out rules would be avoided. Choice of law difficulties would also be avoided. The presumption would apply to any proceedings in a Scottish court, no matter what the domicile of the spouses or the situation of the goods.[1] This would avoid some very difficult private international law problems and would also avoid arguments about where a spouse was domiciled. A solution based on a presumption of co-ownership would also avoid the problems caused by temporary resumptions of cohabitation after the parties had separated. If a separated wife, say, proved that she had bought furniture and plenishings for her own use and benefit after the separation, any presumption arising from a subsequent resumption of cohabitation by the husband would be rebutted.

[1] In practice it would be unusual for proceedings to be brought in a Scottish court if the household goods were situated abroad.

6.5. A rule for the protection of third parties? It is for consideration whether, if there were to be a presumption of the type discussed above, there should be a corresponding rule to the effect that a third party buying co-owned household goods in good faith from a spouse should be entitled to assume, unless notified to the contrary, that that spouse had authority to sell on behalf of both. A rule of this kind is found in several community property systems which grant the spouses equal powers of management.[1] In favour of such a rule it can be said that third parties would often have no way of knowing whether household goods in a spouse's possession were co-owned and that they should not be placed at risk if they bought in good faith. The rule could also work to the advantage of spouses. A deserted wife, for example, might not know her husband's whereabouts and yet might wish for very good reasons to sell an item of co-owned furniture.[2] Against such a rule it can be said that even under the present law purchasers of household goods have no way of knowing to which spouse they belong and that this does not seem to give rise to undue difficulty. The suggested rule may, therefore, be unnecessary. It may also be undesirable, in that it would remove the protection which co-ownership affords against a sale of household goods by one spouse without the consent of the other or judicial authority. We have come to no concluded view on this question, but would welcome views on it.

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[1] See paras. 3.6 and 3.12 above.

[2] An alternative solution would be to require her to apply to a court (either for a division and sale or for some special ad hoc remedy). Court proceedings would not, however, appeal to a wife in this situation, particularly if the value of the item in question was low.

6.6. Accretion on survivorship? Very often the surviving spouse takes all the household goods, either under the will of the deceased spouse or by virtue of the prior rights to furniture and plenishings under section 8 of the Succession (Scotland) Act 1964. A presumption of co-ownership would not greatly affect this situation. Instead of taking all of certain goods on survivorship, the surviving spouse would already own half of them and would acquire the other half on survivorship. There may, however, be a few cases where this would not happen, either because the deceased spouse had left his share of the goods to a third party or because the goods did not come under the provisions on prior rights.[1] We have considered, therefore, whether the increase in the number of co-owned household goods which might result from a presumption of co-ownership would necessitate the simultaneous introduction of any special rule, to the effect that the deceased spouse's half-share in co-owned household goods should pass automatically in all cases to the surviving spouse. We have concluded that this is not a matter which need be dealt with at the present time. If there is any need to review the rights of the surviving spouse in household goods or furniture and plenishings this would be best considered in the context of a review of the law of succession.

6.7. Apportioning expenditure on co-owned household goods. The Matrimonial Homes (Family Protection)(Scotland) Act 1981 gives the courts power to apportion expenditure incurred or to be incurred by either spouse, with or without the consent of the other, on anything relating to a co-owned matrimonial home.[2] There is no corresponding provision for co-owned

[1] They may not fall within the definition of furniture and plenishings in the Succession (Scotland) Act 1964, or they may be in a house in which the surviving spouse was not ordinarily resident at the date of the other spouse's death.

[2] S.2(4)(b).

furniture and plenishings, although there is provision for apportioning certain expenditure by one spouse on furniture and plenishings owned by the other spouse.[1] If a presumption of co-ownership of household goods were introduced, there might have to be a minor amendment to the 1981 Act so as to extend to co-owned goods the court's existing powers to apportion expenditure on solely owned furniture and plenishings.

6.8. Division and sale of co-owned household goods. If the number of co-owned household goods were to be increased as a result of a presumption of co-ownership, it might be for consideration whether the court should be given a similar discretion to refuse to grant a decree of division and sale as it has under the 1981 Act in relation to the matrimonial home.[2] Actions for division and sale of household goods are, however, most uncommon and we question whether this matter is sufficiently serious in practice to warrant legislation.

6.9. Questions for consideration

(a) Do you agree with our provisional view that there should be a presumption that household goods in a matrimonial home are owned by both spouses in equal shares?

(b) We invite views on whether this presumption should be reinforced by a secondary rule, to the effect that the presumption could not be rebutted by proving that an article had been bought and paid for by one spouse during the marriage, unless it was also proved that it had been bought primarily for his or her own purposes or benefit.

(c) We invite views on whether there should be a rule to the effect that a third party buying co-owned household goods in good faith from

[1] S.2(5)(b).

[2] Matrimonial Homes (Family Protection)(Scotland) Act 1981, s.19.

a spouse should be entitled to assume, unless notified to the contrary, that that spouse has authority to sell on behalf of both spouses. (Proposition 7)

A presumption of co-ownership of funds in joint names

6.10. Under the present law the fact that funds are placed in a bank account or similar account in the joint names of a husband and wife does not raise any presumption that they are owned in equal shares. There is a presumption against donation in Scots law, and this presumption applies as between spouses.[1] The fact that one spouse has placed his money in an account in joint names does not therefore deprive him of his money or raise any presumption that a half share has been donated to the other spouse. The account may be in joint names purely for administrative convenience. It is probably safe to say, however, that where both spouses contribute to an account in joint names it will rarely be their intention that it should be picked meticulously apart to decide who owns what share. We believe that in practice, whatever may be the position in strict legal theory, such accounts are generally treated in questions between the spouses as belonging to them both equally. It seems to us that, where funds are placed in bank accounts and similar accounts by spouses, a presumption of donation of whatever is necessary to give the spouses equal shares would square with normal expectations better than the present law. It may be that the argument for such a presumption is less strong in the case of a current account, which may have been taken in joint names for administrative convenience, than in the case of an investment account. This, however, is a factor which could be taken into account in deciding whether the presumption was rebutted.

[1] Beveridge v. Beveridge 1925 S.L.T. 234 at 236; Newton v. Newton 1923 S.C. 15 at 26; Johnstone v. Johnstone (1943) 59 Sh. Ct. Rep. 188.

As with the presumption relating to household goods this presumption should, we suggest, apply in Scottish proceedings, no matter what the domicile of the spouses or the place of the account. The presumption should, we think, apply in questions with third parties, such as arresting creditors. In practice, questions between the spouses and the bank or other financial institution would continue to be governed by the terms of the agreement regulating the account. We invite responses, therefore, to the following question. Do you agree with our provisional view that there should be a presumption that funds in bank accounts, and similar accounts, in the joint names of a husband and wife are owned by them both in equal shares? (Proposition 8) This would be merely a presumption and could be rebutted by evidence, for example, that the account had been taken in joint names purely for administrative convenience.

Facilitating voluntary co-ownership of the matrimonial home

6.11. From the survey on family property in Scotland it seems that many couples whose home is in the name of one spouse alone nevertheless regard the home as their joint property.[1] There is, of course, no insuperable obstacle to their rectifying this situation. All that would be required would be for the owner to dispone the house to himself and his spouse, with or without a survivorship clause. There may, however, be practical obstacles such as unwillingness to incur stamp duty liability. Our provisional view is that a conveyance by one spouse to the other of a share in

[1] Manners and Rauta, p.5.

the matrimonial home should be exempt from stamp duty. We invite views on whether any other steps can usefully be taken to facilitate voluntary co-ownership of the matrimonial home. (Proposition 9)

Restricting spouse's power to dispose of certain assets without other spouse's consent

6.12. Matrimonial home. As we have seen in Part III some legal systems restrict a spouse's power to dispose of the matrimonial home without the other spouse's consent. We have considered whether such a rule should be introduced in Scots law if there were to be no statutory co-ownership of the matrimonial home. The effect of the Matrimonial Homes (Family Protection)(Scotland) Act 1981 is, for practical purposes, to introduce a requirement of consent in almost all cases where a spouse has not expressly renounced occupancy rights. Our provisional conclusion is that in view of the protections afforded by the Matrimonial Homes (Family Protection)(Scotland) Act 1981 it is unnecessary to introduce any new restrictions on the power of one spouse to dispose of the matrimonial home without the consent of the other. (Proposition 10)

6.13. Household goods. We have also considered whether there should be a consent requirement in relation to household goods. The 1981 Act, as we have seen, enables a spouse with occupancy rights to apply for an order for the use or possession of furniture and plenishings. Although this does not directly prevent the owner spouse disposing of the furniture and plenishings in question, it is probably unlikely that the owner spouse would attempt to sell the furniture in the face of a court order granting the other spouse use or possession of it. Moreover, the Act provides for an award of compensation if the owner spouse deliberately brings about any loss or impairment of the other spouse's rights.[1] In addition to the

[1] S.3(3) and (7).

protection afforded by the 1981 Act, the non-owner spouse could also obtain some protection by resort to the powers of the court to set aside transactions calculated to defeat a claim for financial provision on divorce. Under the present law these powers are confined to reducing written settlements or dispositions[1] and would not apply to ordinary transfers of household goods. We have, however, recommended that the powers should be extended so as to cover any transfer of, or transaction involving, property made within five years before a claim for aliment or financial provision.[2] A third form of protection would also be available if a presumption of co-ownership of household goods were introduced, as we have suggested above.[3] Indeed, if such a presumption were introduced, it would be difficult to see why, as a matter of principle, there should be a consent requirement in relation to goods not falling under it. If one spouse owns an item of furniture (say, an antique desk inherited from a grandparent) it is not easy to see why he or she should be subject to the veto of the other spouse in disposing of it.

6.14. Our provisional conclusion is that in view of the protections afforded by the Matrimonial Homes (Family Protection)(Scotland) Act 1981, of the proposed powers of the courts to set aside transactions calculated to defeat claims for financial provision on divorce, and of Proposition 7 above, it is unnecessary to introduce any restrictions on the power of one spouse to dispose of household goods without the consent of the other. (Proposition 11)

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[1] Divorce (Scotland) Act 1976, s.6; Maclean v. Maclean 1976 S.L.T. 86.

[2] Scot. Law Com. No. 67, paras. 3.147 to 3.151.

[3] Para. 6.9. This protection would be less valuable if bona fide third parties were entitled to assume, unless notified to the contrary, that a spouse selling co-owned household goods had the authority of the other to do so. See para. 6.5 above.

Allowances for expenses of matrimonial home etc.

6.15. Section 1 of the Married Women's Property Act 1964 provides that -

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

This provision is open to the criticism that it does not apply to an allowance made by a wife.[1] We suggest that the provisions in the Married Women's Property Act 1964 on allowances for the expenses of the matrimonial home or for similar purposes should apply to husbands and wives equally. (Proposition 12)

Modernising statute law on matrimonial property

6.16. The Married Women's Property (Scotland) Acts of 1877, 1881 and 1920 were passed primarily to remedy the old law with its emphasis on the husband's pre-eminence in property matters. They are, therefore, framed in terms of concepts (the jus mariti and jus administrationis) which are now obsolete. A review of matrimonial property law would provide an opportunity to modernise the statute law on this topic and, probably, to repeal much of the old legislation.[2]

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

[2] See also paras. 6.29 to 6.32 below.

Applications for distribution of property otherwise than on divorce.

6.17. Introduction. Many foreign systems allow a spouse to apply to a court, otherwise than in a divorce action, for a winding-up of a community property regime or for a "deferred" sharing of acquests. We have considered whether such a remedy would be useful in Scotland. Should, for example, a separated spouse be able to apply to a court for a sharing of matrimonial property, or an award of a capital sum in recognition of past contributions, on the principles recommended in our Report on Aliment and Financial Provision,[1] even though he or she was not raising a divorce action? Such a rule would have obvious advantages. It would provide an immediate remedy for a spouse who might otherwise have to wait two years or more before being able to raise a divorce action. It would also provide a property remedy for those who might have religious or other objections to raising divorce proceedings. If a remedy of this kind were to be introduced it would be necessary to regulate such questions as the grounds for an application, the orders which could be applied for, the principles which would govern awards, the effect of subsequent events such as divorce or a resumption of cohabitation, and jurisdiction and choice of law. We deal with these matters in turn.

6.18. Grounds. The most obvious solution to the question of grounds would be to provide that a spouse could apply for a redistribution of property in an action for judicial separation. There are, however, several objections to this. First, the grounds for judicial separation are essentially the same as the grounds for divorce.[2] So this solution would not provide a remedy for a spouse who did not yet have grounds for divorce. In certain circumstances a spouse might still have to wait for five years before being able to apply for a

[1] Scot. Law Com. No. 67, 1981.

[2] Divorce (Scotland) Act 1976, s.4.

sharing of matrimonial property. Secondly, the action for judicial separation is not one into which we would wish to breathe new life. It is clearly right that those who cannot, or who do not wish to, seek a divorce should have alternative remedies to enable them to resolve disputes about aliment, about custody of children, about matrimonial property and about protection from violence. It is not at all clear, however, that these remedies need to be, or should be, linked to an order for judicial separation which allows one party to live apart from the other and ordains the other to live apart. As the parties are usually separated in any event when judicial separation is applied for, and as a spouse seeking the exclusion of the other spouse from the home, or protection from him, would nowadays seek an exclusion order or an interdict or both, the order is pointless. It has, in practice, become a mere appendage to a claim for aliment. Rather than graft a new remedy for the distribution of property on to this somewhat anachronistic type of order, we would rather work towards a system in which separated spouses have a range of remedies (for aliment, custody, protection, distribution of property) which could be used independently or in such combinations as might be appropriate to a particular case.

6.19. An alternative approach would be to allow a spouse to apply for a distribution of property if the spouses were separated in such circumstances that the separation was likely to be permanent. A test of this nature is used for income tax purposes.[1] Similar tests are used in several recent Canadian statutes on matrimonial property. Thus in Alberta a spouse can apply for a matrimonial property order if inter

[1] Income and Corporation Taxes Act 1970, s.42(1). A married woman is not treated for income tax purposes as living with her husband if, inter alia, "they are in fact separated and the separation is likely to be permanent". Whether or not a husband and wife are living together has very important effects for various tax purposes - including personal reliefs, aggregation of incomes, and capital gains tax.

alia "the Court is satisfied that the spouses have been living separate and apart (i) for a continuous period of at least one year immediately prior to the commencement of an application, or (ii) for a period of less than one year immediately prior to the commencement of the application if, in the opinion of the Court, there is no possibility of the reconciliation of the spouses."[1]. In Ontario a spouse is entitled to have family assets divided if, inter alia, "the spouses are separated and there is no reasonable prospect of the resumption of cohabitation".[2] In Manitoba a spouse has the right to a division of assets if, inter alia, "the spouses have been living separate and apart from each other for a continuous period of at least 6 months ...".[3] In New Brunswick a spouse can apply for an equal division of marital property if, inter alia, "the spouses are living separate and apart and there is no reasonable prospect of the resumption of cohabitation" or "a marriage has broken down and there is no reasonable prospect of reconciliation, whether or not the spouses are living separate and apart".[4]

6.20. In some countries a spouse can apply for a sharing of matrimonial property if the other spouse is dissipating it. Two Canadian provinces have adopted versions of a dissipation of property ground for applying for a division of matrimonial property. In Alberta, a spouse can apply for a matrimonial property order if, inter alia, the court is satisfied "that the parties are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.".[5]

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[1]Matrimonial Property Act 1978, s.5(1)(c).

[2]Family Law Reform Act 1978, s.4(1). This formula is also used in Newfoundland, Nova Scotia and Prince Edward Island.

[3]Marital Property Act 1978, s.12(c).

[4]Marital Property Act 1980, s.3(1).

[5]Matrimonial Property Act 1978, s.5(1)(e).

In Manitoba a spouse has the right to have the assets divided if the other spouse has been guilty of dissipation (defined as "the jeopardising of the financial security of a household by the gross and irresponsible squandering of an asset") even if the spouses are still living together.[1]

6.21. The ground adopted will reflect the philosophy underlying the extension of distribution of property to circumstances short of divorce. If the philosophy is that there is an inchoate right to a share of the property then an application for a distribution of property in the event of dissipation will seem reasonable. This view reflects, perhaps, a notion of community of property with separate powers of management and disposal. If, on the other hand, the underlying philosophy is separate property during marriage with provision for redistribution on breakdown, then the search will be for an adequate way of identifying breakdown. On this view dissipation of assets during a functioning marriage will not be an appropriate ground for an application for sharing, although once an application for sharing is made there may be provisions to counteract attempts at avoidance (including past attempts) by the alienation of assets. Our tentative preference is for the second approach and our tentative suggestion is that a spouse should be permitted to apply for a distribution of property order only if the spouses are separated and there is no reasonable prospect of the resumption of cohabitation.[2]

6.22. Orders which could be applied for. In the situation with which we are here concerned, the parties are ex hypothesi still married. There is an obligation of aliment between them and either could apply for an award of aliment. We are not

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[1] Marital Property Act 1978, ss.1(c) and 12(e).

[2] This, of course, would be without prejudice to any rights to apply for financial provision in an action for divorce or (if our recommendations in Scot. Law Com. No. 67 and Scot. Law Com. No. 72 are implemented) in an action for nullity of marriage or in an application for financial provision after a foreign divorce.

concerned with conferring any new powers to award periodical allowance. The orders which could be applied for in order to effect a distribution of property on the breakdown of the marriage should, therefore, be limited to orders for the payment of a capital sum or the transfer of property, and any necessary incidental orders.[1]

6.23. Principles to be applied. The main purpose of the new remedy would be to enable a separated spouse to obtain a redistribution of property without having to raise an action of divorce. The principles to be applied should, we think, be the same, so far as appropriate, as those applying in a divorce action. There could be no justification in principle and grave inconveniences in practice in applying entirely different rules to these two situations. We therefore suggest that the principles to be applied in an application by a separated spouse for a distribution of property order should be the principles of fair sharing of matrimonial property and of fair recognition of contributions and disadvantages recommended in our Report on Aliment and Financial Provision.[2] The other principles which, we recommended, should govern an award of financial provision on divorce (i.e. fair sharing of the economic burden of child care, fair provision for adjustment to independence after divorce, and relief of grave financial hardship resulting from the divorce) would be reflected in an award of aliment for a separated spouse and would not be appropriate for the non-divorce situation.

6.24. Effect of order in subsequent divorce proceedings. The effect of an award of a capital sum or property in pre-divorce proceedings by a separated spouse should be, we

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[1] Cf. cl. 8(1)(a) and (c) of the draft Bill annexed to Scot. Law Com. No. 67 (1981).

[2] Scot. Law Com. No. 67, 1981, recommendations 32 and 33. These two principles are described at paras. 4.12 to 4.15.

suggest, to bar any subsequent application for such an award under either of the two principles referred to above - that is, the principles of fair sharing of matrimonial property and of fair recognition of contributions and disadvantages. In other words the redistribution of property on the basis of these two principles would be effected in advance of the divorce and could not be re-opened in the divorce proceedings. It would still be possible, however, for a spouse to apply for an award of financial provision in the divorce action if that were justified by the principles of fair sharing of the burden of child care after divorce, or fair provision for adjustment to independence after divorce, or relief of grave financial hardship resulting from the divorce.

6.25. Effect of resumption of cohabitation. Even if the new remedy were to be available only where the parties were separated and there was no reasonable prospect of a resumption of cohabitation, it could still happen that there was a resumption of cohabitation. If this continued for some time - say, four years - before the marriage broke down again, it would be unreasonable to rule out the possibility of a redistribution of property acquired during the period of resumed cohabitation. We suggest, therefore, that an order under the new provisions should not prevent a subsequent application for an order in so far as the application relates to property acquired or events occurring during a period of resumed cohabitation.

6.26. Jurisdiction and choice of law. The choice of law problem is the easier to resolve. It is implicit in what we have said so far that the Scottish court would apply Scots law, just as it does in relation to financial provision on divorce. This makes it essential to have satisfactory grounds of jurisdiction. The European Convention on Jurisdiction and Judgments would not apply, because the remedy would fall squarely within the excepted category of "rights in

property arising out of a matrimonial relationship.".[1] It would clearly, however, still be necessary to ensure that the rules were fair to defenders as well as pursuers. We had to consider a related question recently in relation to applications for financial provision after a foreign divorce. We recommended that the court should have jurisdiction to entertain an application if:-

> "(a) the pursuer is domiciled or habitually resident in Scotland on the date when the action is begun; and
>
> (b) the defender (i) is domiciled or habitually resident in Scotland on the date when the action is begun; or (ii) was domiciled or habitually resident in Scotland when the parties last lived together as husband and wife; or (iii) is an owner, tenant or has any other beneficial interest in property in Scotland which was at any time the matrimonial home of the parties.
>
> In an action in which jurisdiction is based only on paragraph (b)(iii) above, the court should have power to make only an order relating to the former matrimonial home or its furniture and plenishings or an order for payment of a capital sum not greater than the value of the defender's interest in the former matrimonial home and its furniture and plenishings."[2]

We think that similar rules could be used for an application for a property distribution order by a separated spouse.

6.27. Proposition for consideration. We think that provisions on the above lines would go far to meet the criticism that provisions on the redistribution of property on divorce do not provide a remedy for those who do not yet have grounds for divorce, or who do not wish to seek a divorce, and who yet have a legitimate claim to a share of property standing in the name of the other spouse. We have, however, formed no concluded view on this question and merely invite views on the following questions.

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[1] 1968 Convention, art. 1.

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

(a) Should a spouse be able to apply to a court for a distribution of property order in circumstances other than divorce?

(b) If so, is the approach to such a remedy suggested in paragraphs 6.18 to 6.26 above acceptable? (Proposition 13)

Private international law

6.28. We have already noted that, if a wide-ranging community property regime were introduced into Scots law, it would be necessary to give careful attention to the very difficult question of when the Scottish regime should apply, and what the effect of changes in the domicile of one or both of the spouses should be.[1] Similar problems would arise if statutory co-ownership of the household goods were introduced.[2] The minor reforms considered in this Part of the Memorandum would not, however, give rise to private international law problems of anything like the same complexity. Most of them would relate to matters of proof or to the powers of courts to grant particular remedies, and would be governed by Scots law as the law of the forum. The question which we must advert to here is not what rules would be required if sweeping reforms were to be introduced, but whether any change in the existing private international law rules would be necessary if the basic structure of Scottish matrimonial property law were to remain unchanged.

6.29. The present choice of law rules on matrimonial property are uncertain in some respects and unsatisfactory in others.[3] Nevertheless we do not think that this Memorandum is the place to review the whole question of which law should

[1] For the difficulties in this area, see generally Verwilghen, op. cit.

[2] In relation to co-ownership of the matrimonial home the most obvious solution would be to apply Scots law to homes situated in Scotland.

[3] See Anton, pp.446 to 468; Clive, pp.334 to 339.

govern the property relations of spouses. This is a large and difficult issue in theory, but one which in practice seems to give rise to comparatively little trouble in this country.[1] It would be best considered, if at all, in a United Kingdom context. There are, however, two limited statutory rules which seem inappropriate, which are peculiar to Scotland and which could with advantage be repealed or replaced by new provisions expressed in a different way.

6.30. The first of these rules is contained in section 1(1) of the Married Women's Property Act 1881, which abolishes the jus mariti if the husband is domiciled in Scotland at the time of the marriage. The subsection provides as follows:-

> "Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the jus mariti." (Emphasis added.)

This is not a true choice of law rule, because it does not say what law applies if the husband is not domiciled in Scotland at the time of the marriage. It is a strictly limited rule. It seems an inappropriate rule because, now that spouses are on a footing of equality with regard to domicile,[2] there is no reason to have regard to the husband's domicile rather than the wife's. It could with advantage be repealed or replaced by a new general rule to the effect that by the law of Scotland the property of a married person remains his or her separate estate, subject to any rule of law or statutory provision to the contrary. This would open the way to argument that some other country's matrimonial property law

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[1] It is different on the continent of Europe, where choice of law problems relating to matrimonial property regimes are regarded as very troublesome. See Verwilghen, p.24.

[2] Domicile and Matrimonial Proceedings Act 1973.

applied if, for example, the husband happened to be domiciled in Scotland at the time of the marriage but there were stronger connections with the other country. This would be no bad thing. The other country might, for example, be the country where both spouses were habitually resident and where they established their matrimonial home. The law of such a country might well be regarded, in the absence of the rule in the 1881 Act, as the appropriate law to govern the spouses' matrimonial property regime.[1] We have already suggested that a review of matrimonial property law would present an opportunity for modernising the statute law on this topic. In any such modernisation the rule referring to the husband's domicile could well be dispensed with.

6.31. The other inappropriate rule is in section 7 of the Married Women's Property (Scotland) Act 1920.[2] This applies the provisions of the Act "where the husband is domiciled in Scotland", and also applies the provisions on the abolition of the husband's right of administration (jus administrationis) and on donations between husband and wife to heritable property in Scotland. The reference in the Act to the husband's right of administration could now be repealed as unnecessary.[3] The only special feature of donations between husband and wife is that they are revocable by creditors of the donor if he is sequestrated within a year and a day after the donation.[4] We have recommended in our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation that this special feature should be repealed.[5] Other provisions of the Act are also

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[1] Cf. Warrender v. Warrender (1835) 2 Sh. & Macl. 154 at 204; Corbet v. Waddell (1879) 7 R. 200 at 208; Walton, p.350; Anton, pp.457 and 458.

[2] An inappropriate choice of law rule in the 1920 Act on the contractual capacity of married women is being dealt with in our forthcoming Report on certain obsolete and discriminatory rules in the law of husband and wife.

[3] This would not revive the old law. Interpretation Act 1978, s.16(1)(a).

[4] 1920 Act, s.5.

[5] Scot. Law Com. No. 68, 1982, para. 12.22.

liable to be repealed.[1] It is probable that, if these various repeals took place, there would be nothing of substance left in the Act, and that it could be repealed altogether or replaced by a simple provision on the effect (or, more accurately, lack of effect) of marriage on legal capacity under Scots law.

6.32. We have drawn attention to the two special statutory rules mentioned above because they seem out of tune with the idea of the legal equality of husband and wife. As they will probably disappear in any event as a result of the replacement or repeal of the sections in which they appear or to which they refer, we do not think it necessary to make any provisional proposal for their abolition.

Other improvements

6.33. We invite suggestions for other improvements to the law on matrimonial property. (Proposition 14)

[1] Section 4 (married woman to be liable for maintenance of indigent husband) would be repealed and replaced if the draft Bill attached to our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) were enacted. We intend to recommend the repeal of section 2 (husband to be curator of wife during her minority) in the Report to follow our Memorandum on Some Obsolete and Discriminatory Rules in the Law of Husband and Wife (Consultative Memorandum No. 54, 1982)

PART VII

SUMMARY OF PROVISIONAL CONCLUSIONS AND QUESTIONS FOR CONSIDERATION

		Para.
1.	To what extent is the law of Scotland on the property of married persons open to serious criticism when due account is taken of the protections introduced by the Matrimonial Homes (Family Protection)(Scotland) Act 1981, of the legal and other rights conferred on the surviving spouse on the dissolution of the marriage by death, of the present powers of the court to award financial provision on divorce, and of the recommendations on financial provision and sharing of matrimonial property on divorce in our recent Report on Aliment and Financial Provision?	4.19
2.	Do you agree with the provisional conclusion that, having regard to the considerations referred to in paragraphs 5.3 and 5.4 above, a full community property system (whereby virtually all the property of both spouses, no matter when and how acquired, would be subject to special rules which would supersede the present laws on the property of married persons both during marriage and on death and divorce) would be inappropriate for Scotland?	5.5
3.	Do you agree with the provisional conclusion that, having regard to the considerations referred to in paragraphs 5.8 to 5.10 above, a community of acquests system (whereby property acquired during the marriage, otherwise than by gift or inheritance, would be subject to special rules which would supersede	5.11

		Para.
	the present laws on the property of married persons both during the marriage and on death and divorce) would be inappropriate for Scotland?	
4.	Do you agree with the provisional conclusion that a system which confers fixed rights (whether rights in specific items of property or a right to a monetary claim) on divorce or marriage breakdown, without any provision for modifying these rights to take account of special circumstances, would be inappropriate for Scotland?	5.17
5.	(a) We invite views on whether, having regard to the arguments for and against such a solution in paragraphs 5.20 to 5.31 above, there should be a scheme of statutory co-ownership of the matrimonial home.	5.32
	(b) If such a scheme were to be introduced:-	
	(i) Should the scheme apply not only where the home is initially owned by one spouse but also where it is initially owned by both spouses but in unequal shares?	
	(ii) Should co-ownership come about only at the option of the non-owner spouse (e.g. on registration of a notice) or automatically by operation of law? If the latter, is there any practicable way of conferring a real right on the acquiring spouse while sufficiently protecting third parties?	
	(iii) Should the scheme apply to a home which is co-owned with a third party?	

Para.

(iv) Should the scheme apply to any matrimonial home (including a second home or holiday home) or only to the principal family residence?

(v) Should the scheme apply to a home in Scotland even if the spouses are domiciled and habitually resident abroad?

(vi) Should the scheme apply to a home already owned by one spouse at the time when the implementing legislation comes into force? (See also (xii) below).

(vii) Should the scheme apply to a home already owned by one spouse at the time of the marriage? (See also (xiii) below).

(viii) Should the scheme apply to a home acquired by one spouse by gift or succession from a third party during the marriage? (See also (xiv) below).

(ix) Should the scheme apply to homes used partly for business purposes or forming part of other property and, if so, how?

(x) Should a statutory co-owner's share of the matrimonial home pass automatically, on his or her death, to the surviving spouse, or should it simply form part of his or her estate to be dealt with by the general law on testate or intestate succession?

(xi) If statutory co-ownership comes into operation in relation to a home, should both spouses become equally liable for any loan secured over the home? If so, should heritable creditors of the owner spouse be under a statutory duty to supply the acquiring spouse, on request, with information about the amount of indebtedness outstanding?

(xii) Should a spouse be able to renounce his or her rights under the scheme in relation to a specified home?

(xiii) If the scheme applies to a home owned by one spouse before the implementing legislation comes into force or before the marriage, should the owner spouse be able to opt out of the scheme unilaterally in relation to any such home?

(xiv) If the scheme applies to a home acquired by gift or succession from a third party, should a donor or testator be able to exclude the scheme in relation to a home given or bequeathed to one spouse?

(xv) If the scheme applies to a house co-owned with a third party, should it be excluded where the acquiring spouse had previously transferred to a third party a half share (or some other share) in the house? (The object of this exclusion would be to prevent a spouse acquiring a half share of the other's house,

transferring that half share to a third party, and then repeating the process so as to acquire a further quarter share, and so on.)

(xvi) Should there be any other provisions for opting out of, or excluding, the scheme?

(xvii) Should the scheme apply to a home acquired by a spouse after the spouses have separated? If not, is there any satisfactory way of dealing with the problem of temporary resumptions of cohabitation?

(xviii) If the scheme is based on registration of a matrimonial home notice, should it be possible to register such a notice after the dissolution of the marriage by the death of either spouse?

(xix) If the scheme is based on the registration of a matrimonial home notice, should registration be possible after the house has vested in a trustee in sequestration or an adjudging creditor? Should a registration shortly before the owner spouse's bankruptcy be challengeable by his creditors?

(xx) If the scheme is based on registration of a matrimonial home notice, would it be acceptable to resolve conflicting claims by an acquiring spouse and third parties (i.e. third parties who had acquired a house or an interest in it from the owner spouse) by simple priority of registration?

Para.

(xxi) If the scheme is based on registration of a matrimonial home notice, should there be any provision to enable the non-owner spouse to reduce a gratuitous alienation of the home, or an interest in it, by the owner spouse made without the consent of the non-owner spouse?

(xxii) Is there a need for any special protection for the acquiring spouse against the owner spouse diminishing the value of the property by obtaining further advances under a heritable security over the property? If so, what form should this protection take?

(xxiii) Should there be a special statutory provision enabling a spouse to apply to the court for a forced contribution by the other spouse, out of the proceeds of a co-owned home, towards the purchase price of a replacement home? If so, are there any other circumstances where one spouse should be entitled to exact a contribution from the other towards the cost of a matrimonial home?

(xxiv) Should there be a special statutory provision enabling an acquiring spouse to apply to the court to have the other spouse ordained to complete title to the matrimonial home?

Para.

(xxv) Should it be provided that a minor spouse would be deemed to be of full age for the purpose of opting out of the scheme, renouncing rights under it, and registering a matrimonial home notice?

(xxvi) Where the owner spouse is a minor, or is mentally incapable, should the statutory transfer effected on registration of a matrimonial home notice be deemed to take place as if he or she were of full age and mental capacity?

(xxvii) Is any special provision necessary in relation to the insurance of a home which becomes subject to statutory co-ownership?

(xxviii) Should the scheme apply to unmarried cohabiting couples?

6. Do you agree with the provisional conclusion that the disadvantages of a scheme whereby the household goods in a matrimonial home are automatically co-owned by operation of law would outweigh the advantages? 5.35

7. (a) Do you agree with our provisional view that there should be a presumption that household goods in a matrimonial home are owned by both spouses in equal shares? 6.9

(b) We invite views on whether this presumption should be reinforced by a secondary rule, to the effect that the presumption could not be rebutted by proving that an article had been

bought and paid for by one spouse during the marriage, unless it was also proved that it had been bought primarily for his or her own purposes or benefit.

(c) We invite views on whether there should be a rule to the effect that a third party buying co-owned household goods in good faith from a spouse should be entitled to assume, unless notified to the contrary, that that spouse has authority to sell on behalf of both spouses.

8. Do you agree with our provisional view that there should be a presumption that funds in bank accounts, and similar accounts, in the joint names of a husband and wife are owned by them both in equal shares? 6.10

9. Our provisional view is that a conveyance by one spouse to the other of a share in the matrimonial home should be exempt from stamp duty. We invite views on whether any other steps can usefully be taken to facilitate voluntary co-ownership of the matrimonial home. 6.11

10. In view of the protections afforded by the Matrimonial Homes (Family Protection)(Scotland) Act 1981 it is unnecessary to introduce any new restrictions on the power of one spouse to dispose of the matrimonial home without the consent of the other. 6.12

11. In view of the protections afforded by the Matrimonial Homes (Family Protection)(Scotland) Act 1981, of the proposed powers of the courts to set aside transactions calculated to defeat 6.14

claims for financial provision on divorce, and of Proposition 7 above, it is unnecessary to introduce any restrictions on the power of one spouse to dispose of household goods without the consent of the other.

12. The provisions in the Married Women's Property Act 1964 on allowances for the expenses of the matrimonial home or for similar purposes should apply to husbands and wives equally. 6.15

13. (a) Should a spouse be able to apply to a court for a distribution of property order in circumstances other than divorce? 6.27

(b) If so, is the approach to such a remedy suggested in paragraphs 6.18 to 6.26 above acceptable?

14. We invite suggestions for other improvements to the law on matrimonial property. 6.33

APPENDIX

GENERAL INTRODUCTION

1. In this Appendix we outline possible schemes for statutory co-ownership of the matrimonial home (Chapter 1) and of household goods (Chapter 2). We gratefully acknowledge the assistance of Mr K.G.C. Reid of the Faculty of Law, Edinburgh University in the preparation of these schemes. We wish to emphasise, however, that the schemes as presented do not in all respects represent the views of Mr Reid. Nor do they represent the considered views of the Scottish Law Commission. They are put forward merely as possible models, in an attempt to make it easier for readers to express an informed view on whether or not statutory schemes should be introduced and, if so, on the form which they might take. In dealing with the many policy points which arise we have tended, for present purposes, to opt for the simpler solution whenever possible.

2. Rather than leave everything open-ended and vague, we have tried to give some shape to the model schemes by making certain interim assumptions and stating certain provisional conclusions. These are not, of course, intended to pre-empt the discussion of the merits of statutory co-ownership in the body of the Memorandum or to commit us in any way. We also, for the sake of precision, suggest definitions of certain key terms. Again, these are not intended to commit either ourselves or the parliamentary draftsman.

CHAPTER 1

CO-OWNERSHIP OF THE MATRIMONIAL HOME: A POSSIBLE SCHEME

Preliminary questions

1. Should the scheme apply to homes already co-owned but in unequal shares? It might be argued that if the spouses have taken their home in joint names but in unequal shares they have impliedly contracted out of equal co-ownership. To exclude such homes from the scheme would, however, open up the risk of evasion. A husband could buy a house and take the title as to .9999 parts in his own name and as to .0001 parts in his wife's name. We shall proceed therefore on the assumption that the scheme will apply to homes co-owned by the spouses but in unequal shares. In the following discussion, accordingly, "owner spouse" means the spouse who, in relation to the property in question, owns a greater share than the other spouse. The spouse who owns the lesser share - or often no share at all - is the "acquiring spouse". In the typical case discussed in this Chapter the owner spouse will be sole owner of the matrimonial home. For the sake of convenience we have sometimes assumed the owner spouse to be the husband and the acquiring spouse the wife. We must emphasise, however, that the scheme applies equally where the position is reversed and the owner spouse is the wife.

2. Should the scheme be based on direct ownership or "indirect ownership"? A preliminary choice must be made between two different methods of bringing about co-ownership of the matrimonial home. By one method the owner spouse continues as sole owner of the home but his ownership is that of a trustee, holding for behoof of himself and the acquiring spouse. The acquiring spouse thus has a *jus crediti*, the personal right of a trust beneficiary, to a half share of the home. This method - which may be named, rather inaccurately, "indirect ownership" - forms the basis of the recommendations

of the Law Commission in England and Wales.[1] By the other method, "direct ownership", the acquiring spouse becomes owner of a half share in the home. The result is identical to that produced by the voluntary co-ownership now favoured by most spouses.

3. Indirect ownership has two main disadvantages which direct ownership avoids. Firstly, any scheme based on indirect ownership would necessarily be very complex. To take just one example, because the statutory trust would be latent, it would be necessary to devise a set of rules which balanced the need to protect the acquiring spouse against the need to protect third parties dealing with the property. If co-ownership can only be achieved at the cost of great complexity, this is a strong argument against the introduction of co-ownership at all. Secondly, indirect ownership requires an artificial use of trust law. English law has a well-developed doctrine of trust ownership centred on the trust for sale. There is no such doctrine in Scotland. Co-ownership in Scots law means direct ownership. We shall, therefore, proceed on the assumption that it would be undesirable to put forward proposals based on an unfamiliar and very technical concept which would place statutory co-owners in a quite different position from their neighbours who are voluntary co-owners. For these reasons the scheme which follows is based on direct ownership.

4. Should co-ownership come about automatically or only on registration of a notice? This is a key question. In favour

[1] Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods. (Law Com. No. 86, 1978). The term "indirect ownership" is inaccurate in Scots law because the trust beneficiary is not an owner. Strictly speaking a scheme based on the idea of the owner spouse holding the property in trust for both would not bring about "co-ownership" in Scots law.

of automatic co-ownership it can be argued that this would confer immediate benefits on non-owner spouses. A non-owner spouse would not have to consult a lawyer, or register any notice, or take any step which might be perceived as a hostile act. If some step, such as registration of a notice, were required, there would probably be many cases where a non-owner spouse would not get round to taking the step in time. Against automatic co-ownership it can be argued that it would be a much more complicated solution, which would be contrary to the general principle of Scots law that ownership of land can be ascertained from a public register. If statutory co-ownership came about automatically (on the date of commencement of the Act, or on marriage, or on the acquisition of a matrimonial home by a married person) a very large measure of uncertainty would be injected into a system which, so far as real rights in land are concerned, has always prided itself on its simplicity and certainty. Third parties would be placed at risk unless elaborate measures were enacted for their protection. If these measures went far enough to protect third parties completely (e.g. by providing that a co-ownership interest could not be asserted against a third party unless it had been registered) they would destroy or diminish the protection supposedly conferred on the non-owner spouse by automatic co-ownership. The nature of an unregistered right of property which was good against the other spouse but not against third parties would also require careful consideration. Would this be a real right or only a personal right? Is it an essential characteristic of a real right that it is good against all the world? If the right was properly regarded as only a personal right, would it be misleading to talk of statutory co-ownership by operation of law? Could the acquiring spouse raise an action for division and sale? What would happen on the bankruptcy of the acquiring spouse? Would the unregistered half share be available to his or her creditors? Should it make any difference if he or she is bankrupt at the time when the home

is acquired by the owner spouse or becomes bankrupt a week later? If so, why?[1] Careful consideration would also have to be given to the consequences of any invasion or threatened invasion of the unregistered right by the owner spouse. Presumably the owner spouse could be interdicted from selling the house or burdening it with debt to the prejudice of the acquiring spouse's right even if it was unregistered. Presumably the owner spouse would be liable in damages to the acquiring spouse if he or she invaded the acquiring spouse's right in any way - for example, by selling it or burdening it with debt. This would, however, give rise to a further problem in the case where the owner spouse burdened the house with debt. It would be regarded as unfair (presumably) to require him or her to pay damages to the acquiring spouse for diminishing the value of the unregistered share in the house and to repay the whole debt. The acquiring spouse would then receive a windfall profit when the debt was repaid. Presumably therefore an owner spouse who had paid damages would need to be given a right to be reimbursed by the non-owner spouse as and when the debt was repaid. A further question arises. If the owner spouse is liable to damages for diminishing the value of the acquiring spouse's right, should he be entitled to recompense for enhancing it - for example, by paying off a loan secured on the home? If not, the results would sometimes seem somewhat one-sided - especially if, having paid off a loan, the owner found he needed to take out a new one a few months later. If so,

[1] The Law Commission have recommended that co-ownership should not come into effect if the acquiring spouse is bankrupt when the other spouse acquires the home, because this would force co-ownership upon an unwilling couple. Law Com. No. 86 para. 1.169. Presumably, however, the spouses would also be unwilling to be subject to co-ownership if the acquiring spouse was on the verge of bankruptcy. They could contract out by mutual agreement, but that might be challenged as a gratuitous alienation and they would doubtless prefer not to be subject to co-ownership at all.

complications and uncertainty would ensue and the purpose of the scheme would often be frustrated. Similar problems could arise in the case of a sale of the home. Suppose the owner spouse (say, the husband) sells without the consent of the acquiring spouse. The latter's interest is not registered. So the sale is valid and the purchaser is protected. The wife has, however, a right to damages from the husband. She recovers, let us suppose, damages amounting to half the value of the home. Now suppose the husband buys a new home, just as valuable as the old. Is the wife to obtain damages for the sale of the old and a half-share in the new? Is the husband on buying the new home to be entitled to recover the damages paid for selling the first without his wife's consent?[1]

5. The Law Commission have recommended, for England and Wales, a scheme based on automatic co-ownership, using, however, the English technique of the trust for sale rather than the technique of direct co-ownership.[2] This basic policy is, however, qualified by rules which would protect third parties acquiring an interest in the home unless the co-ownership right was protected by registration.[3] The precise scheme worked out for England and Wales could not be applied in Scotland if the Scottish scheme were based on direct co-ownership. The question for us is whether a scheme based on automatic direct co-ownership would be practicable or acceptable. We doubt whether it would be. If unregistered co-ownership rights were good against third parties the scheme would be unacceptable.[4]

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[1] See also paras. 64 and 65 below.

[2] Law Com. No. 86 (1978).

[3] Ibid., paras. 1.310 to 1.364. See also Law Com. No. 115 (1982) paras. 73 to 84.

[4] This was also the strongly expressed view of the Law Commission who concluded that it would be "totally unacceptable" to require purchasers "to satisfy themselves by prolonged and perhaps impertinent enquiries (involving the vendor's marital status and the uses to which the property had been put), that statutory co-ownership had not arisen.". They emphasised that it would be a "practical impossibility" to project "the acquiring spouse, automatically and effectively, into the legal ownership of the property." Law Com. No. 86 (1978) paras. 1.57 to 1.59.

If they were not good against third parties, we would become involved in all the complications and unexplored contradictions of property rights (or so-called property rights) good against some people but not against others. There is no doubt that a system whereby co-ownership arose only on registration of a notice would fit in better with Scottish conveyancing principles and would be much simpler to introduce and to operate. For present purposes, therefore, we shall assume that the scheme would be of this type. We would, however, welcome views on the general question whether a scheme based on automatic co-ownership could be made to operate fairly without undue difficulty or complexity.

The scheme in outline

6. The scheme put forward in this Chapter as a possible model can be summarised as follows. Where the owner spouse has a relevant interest in a matrimonial home, the acquiring spouse would by statute have the option (known as the matrimonial home option) of acquiring a share therein by registering a notice in a prescribed form (called a matrimonial home notice) in the Register of Sasines or Land Register. The phrases underlined require further definition and explanation.

7. "Relevant interest". The most important example of relevant interest is owner occupation. Homes that are rented rather than owned would, subject to paragraph 8, be excluded from the scheme. One reason for this is that domestic leases usually have little capital value. Another reason is that leases cannot usually be registered in the Register of Sasines or Land Register and so could not in any case be brought within the scheme without complex modification. For the same reasons "relevant interest" would not include liferents and any purely personal right to occupy a home, such as a licence or permission given to a trust beneficiary. In all these excluded cases the most important right of all, the occupancy right, is of course already protected under the Matrimonial

Homes (Family Protection)(Scotland) Act 1981 (referred to in the rest of this Appendix as "the 1981 Act").

8. Long leases - that is, leases of more than twenty years falling under the Registration of Leases (Scotland) Act 1857 - would not, however, be excluded from the definition of relevant interest. It has been impossible to create long leases of dwellinghouses since 1974[1] and only a small number of homes are now held on such a lease. A long lease is, however, often valuable and, depending on the unexpired term, indistinguishable for practical purposes from outright ownership. As long leases are registrable there is no difficulty in bringing them within the scheme.

9. The scheme could have no application to property in which the owner spouse does not have full beneficial interest. Accordingly, property which he holds as a trustee or as an heir of entail would be excluded.

10. If statutory co-ownership is to operate on the acquiring spouse registering a matrimonial home notice, it follows that the owner spouse must himself first have a registered title and, subject to the exception noted in the following paragraph, a registration requirement is incorporated in the definition of relevant interest. In an important minority of cases the owner spouse will not have a registered title, a difficulty considered later.[2]

11. The exception referred to in the preceding paragraph is the reversionary interest of a debtor under a heritable security constituted by ex facie absolute disposition. Here it is the creditor who appears on the face of the

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[1] Land Tenure Reform (Scotland) Act 1974, s.8.

[2] Paras. 66 to 70 below.

register as owner, and the debtor usually has no registered title to his interest. There is disagreement about the legal effect of the ex facie absolute disposition,[1] but for present purposes the debtor's interest can be regarded as similar to that of the registered owner who has merely granted an impignorative security such as a standard security. Although it has not been possible to secure loans by ex facie absolute disposition since 1970,[2] a significant number of existing loans remain outstanding. These are concentrated among the older age-groups where voluntary co-ownership is less common. It would seem to be right to include the debtor's reversionary interest in the definition of relevant interest. This would not give rise to any special difficulties. Where, for example, the home is sold, the purchaser, who takes title from the creditor with consent of the debtor, will be alerted by the registered matrimonial home notice to the need to obtain the consent of both spouses. Where, on the other hand, the loan is discharged without a sale, either the creditor will reconvey to both spouses or he will execute a section 40[3] discharge which will reinvest the home in both spouses.

12. The 1981 Act excludes from its scheme of occupancy rights matrimonial homes that are co-owned with a third party, except where the third party has waived his right of occupation.[4] The reason is that the third party would be adversely and unfairly affected by the occupancy right.[5] It is not clear that the same exclusion should apply to a co-ownership scheme. There is no reason why statute should not bring about a transfer which the owner spouse is free to bring

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[1] Gretton 24 (1979) J.L.S.S. 462; Halliday 25 (1980) J.L.S.S. 54; Gretton 25 (1980) J.L.S.S. 139.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, s.9(3).

[3] Conveyancing and Feudal Reform (Scotland) Act 1970, s.40.

[4] S.1(2).

[5] Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (1980) (Scot. Law Com. No. 60, 1980) para. 2.11.

about himself. Although statutory co-ownership would turn two co-owners into three co-owners, the third party's ownership of his pro indiviso share would be unaffected.

13. "Relevant interest" might, therefore, be defined as follows. "Relevant interest" is the whole of, or a pro indiviso share in, any of the following interests, namely, (a) the registered interest of a tenant under a long lease; or (b) the registered[2] interest of an owner of the dominium utile; or (c) the registered interest of an absolute allodial owner;[3] or (d) the reversionary interest of a debtor under a heritable security constituted by a registered ex facie absolute conveyance. "Relevant interest" does not, however, include (a) the interest of a trustee; (b) the interest of a creditor under a heritable security constituted by an ex facie absolute conveyance; or (c) the interest of an heir of entail.

14. It will be noted that if "relevant interest" were defined as suggested above it would be easy for a spouse to avoid the operation of the scheme. All he would need to do would be to arrange for the house to be conveyed to a trustee to hold for him, or to a company in which he had a controlling interest. It would be possible to counteract such devices by anti-avoidance provisions. This, however, would make the legislation much more complicated. It would begin to resemble tax legislation. For the moment, therefore, we assume that a simple definition would suffice. We must,

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[1] Report on Occupancy Rights in the Matrimonial Home and Violence (1980) (Scot. Law Com. No. 60, 1980) para. 2.11.

[2] In almost every case registration is, of course, necessary before a real right can be obtained: but this is not true of Kindly Tenants of Lochmaben, who nevertheless hold on feudal tenure: see C.D. Farran, The Principles of Scots and English Land Law pp.63 and 64.

[3] Allodial land is rare in Scotland. For present purposes the main examples are udal land and land which has been compulsorily purchased.

however, place on record our general concern that in several respects a scheme of statutory co-ownership of the matrimonial home would place a premium on the availability of good legal advice at the right time. We are not sure that it would be a good idea to inject this element into the financial affairs of married couples.

15. "Matrimonial home". Section 22 of the 1981 Act defines matrimonial home as:

> "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."

A co-ownership scheme could use this definition, modified in one respect. The scheme would be based on the matrimonial home being heritable property. It would, therefore, be necessary to exclude caravans, houseboats and other moveable structures. In a few cases, of course, a caravan will be so annexed to the ground as to be heritable.[1] In such cases, provided that the owner spouse also owns the ground, the caravan would come within the scheme. The definition of "matrimonial home" would therefore be confined to "any house or other heritable structure".

16. Holiday homes. The 1981 Act definition embraces holiday homes as well as the principal family residence. It would therefore be possible for a spouse to register a matrimonial home notice in respect of both a principal family residence and a holiday home. There is a question of policy here on which we would welcome views. We shall proceed on the assumption that the scheme would apply to second homes.[2]

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[1] Assessor for Renfrewshire v. Mitchell 1965 S.C. 271; Redgates Caravan Parks Ltd. v. Assessor for Ayrshire 1973 S.L.T. 52.

[2] This is the solution recommended by the Law Commission. See Law Com. No. 86, para. 1.100.

17. Successive homes. It could also happen that a spouse would be able to exercise the matrimonial home option in relation to two houses which became successively the principal family residence. For example, a house might begin the marriage as the principal residence but might later be rented out while the family set up home in a second house. Again, there is a question of policy on which we would welcome views. We shall proceed on the assumption that there is no need to exclude the possibility of registering notices in relation to two homes.[1]

18. Homes owned by spouses domiciled abroad. The 1981 definition is on the face of it quite general in geographical scope, but we assume that statutory co-ownership of the matrimonial home would operate only in respect of homes situated in Scotland. We also assume for the present that the scheme would apply to a home in Scotland (e.g. a holiday cottage) even if the spouses were domiciled and habitually resident elsewhere. Whether it is justifiable to apply the scheme to couples whose matrimonial affairs are governed by the law of some other country is, however, a question on which we would welcome views.

19. Homes owned at time when new law comes into force. The 1981 definition is also quite general in its temporal application, but a question does arise whether a scheme of statutory co-ownership should apply to a home owned by one spouse at the date when implementing legislation comes into force. If it did, many people could be deprived of half their property at a stroke, and this would sometimes appear grossly unjust. A man who was separated from his wife, who was on terms of

[1] This is the solution adopted by the Law Commission. See Law Com. No. 86, para. 1.100.

bitter enmity with her, and who had paid her a capital sum in full settlement of any claims against him, might, for example, take it badly if he woke up one morning to find that she owned half of his house. On the other hand, if the scheme did not apply to a home owned by a married person when the legislation came into force, many cases would be excluded from it, and these would probably include those cases where the scheme might be thought, by those in favour of it, to be most useful. The Law Commission recommended a compromise solution to this difficult problem. Existing matrimonial homes would be subject to statutory co-ownership, but there would be a one year's "breathing space" after the passing of the Act in which the owner spouse could opt out of co-ownership by means of a written declaration, signed and witnessed.[1] Experience in other fields suggests, however, that people are very often unaware of changes in the law, however well publicised, and very often fail to take advantage of options or benefits available to them. There would still be a risk, under this compromise solution, of expropriation without compensation. It must also be open to question whether it would be in the interests of harmonious domestic relations if thousands of husbands informed their wives that they were unilaterally opting out of co-ownership or, worse, opted out without informing their wives and were then forced to admit that they had done so. We would welcome views on this very important question. For present purposes, we shall assume that the scheme would apply to existing matrimonial homes.

20. Homes owned at time of marriage. Use of the 1981 definition would have the effect of including a home owned by one spouse before the marriage. There is a very difficult policy question here on which we would welcome views. Should a home owned by one spouse before the marriage be excluded

[1] Law Com. No. 86, paras. 1.212 to 1.215.

from co-ownership? The answer to this question probably depends on the view taken as to the purpose of co-ownership. If the purpose is to reward unpaid contributions and to give expression to the idea of marriage as a partnership, then a home owned before marriage should be excluded. If the purpose is to give expression to the feeling that "if it's used in common it should be owned in common", or the feeling that "co-ownership is a good thing and should apply as widely as possible", then a home owned before marriage should be included. The Law Commission for England and Wales originally took the provisional view that such homes should be excluded.[1] Reactions on consultation were divided on this issue, and in their final report the Commission recommended that such homes should be subject to statutory co-ownership but that the owner spouse should be able to opt out of co-ownership by a written declaration, signed and witnessed, and made before the marriage. The Commission were divided on the question whether the declaration should have to be communicated to the other spouse.[2] The difficulty with this compromise solution is that many people would not know of the need to execute a written declaration before the marriage. The solution would favour the legally aware and penalise others. This is a very difficult and important question on which we would welcome views. For the present, we shall assume that homes owned before marriage would come within the scheme.

21. Homes acquired by gift or inheritance. Similar questions arise in relation to a home acquired by one spouse by gift or inheritance from a third party during the marriage. Again there are arguments both ways. If a wife has, under the new statute, taken a half share in her husband's house, it may seem fair that he should be able to acquire a half

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[1] Working Paper No. 42, paras. 1.98 and 1.99.

[2] Law Com. No. 86, paras. 1.106 to 1.115 and, in particular, note 77 to para. 1.108. If communication were required attestation would be unnecessary.

share in a house inherited by her from her mother, say, and used by the family as a country cottage. On the other hand the second house is not in any way the result of the spouses' joint efforts and may well be regarded by the wife as her separate property. Again there would be a risk that the law would favour the wary and the well-advised and penalise the unwary and the well-intentioned. A wife who knew her rights could, in the above situation, sell the house and keep all the proceeds. A less well-informed wife might not realise that by making the house available as a secondary residence she was running the risk of losing half of it. We shall assume, for the present, that homes acquired by gift or succession from a third party would be included in the scheme, but we would welcome views on whether this is the right solution.

22. Homes used partly for business purposes. Difficult issues, both of policy and of practice, arise where the owner spouse uses the home, or property adjacent to the home, for business purposes.[1] It would go beyond the aims of the scheme if statutory co-ownership were to operate to give the acquiring spouse a share in the other spouse's business premises. On the other hand, there is no obvious reason why incidental use for business should exclude a home from co-ownership. Is it possible to produce a workable solution which takes account of both these considerations?

23. It would seem desirable that, where within the one building there is a part assigned as living quarters and a part as business quarters, and each is reasonably self-contained, only the living quarters will fall within the definition of matrimonial home. So, for example, if a doctor uses one wing of his house as a surgery and the

[1] The definition of "matrimonial home" in the 1981 Act does not deal specifically with this problem, because in regulating occupancy rights the court is directed to have regard inter alia to the extent to which the home is used in connection with a trade, business or profession: s.3(3)(d).

rest as living quarters, the surgery will be excluded from the definition of matrimonial home. If, however, the room used for business is just an ordinary room in the house, with no special physical separation, or if business is not conducted from any particular room, the whole house will be the matrimonial home. What, however, if the building is predominantly of a business character - say, a shop or an office or a hotel - and the spouses live in one small non-severable part of it which is not separately occupied? In this situation, the obvious solution would be to say that the scheme would not apply to any part of the property.[1] Already, therefore, there are difficulties. When is property mainly a home with a small non-severable business part (e.g. an ordinary dwelling-house with a room used as a study) and when is it mainly business property with a small non-severable home part (e.g. a hotel with two rooms used by the proprietor as a home)? The question would not always be easy to resolve and, for the spouses, much might depend on the answer.

24. The difficulties do not become any less if the business part and the home part of the property are severable - if, for example, the home is a farmhouse on the edge of a farm or a self-contained house to which business premises happen to be attached. It may be that the home part and the non-home part of the property could be sold separately for as much as would be realised by a sale of the whole property. There is no problem in this case. It may be, however, that a sale of both parts separately would realise less than a sale of both parts together. The shortfall might be greater or less in amount.

25. The solution recommended by the Law Commission for England and Wales for the case where the home part and the

[1] This was the conclusion of the Law Commission. See Law Com. No. 86, para. 1.47.

non-home part of the property could be sold separately only at a reduced total price is to apply co-ownership to the home if the shortfall would not be substantial, but to exclude co-ownership if the shortfall would be substantial.[1] This, however, could lead to formidable difficulties. A half share in property which might be worth many thousands of pounds would depend on what was meant by a "substantially reduced" - a question on which reasonable men could reasonably differ. Yet what are the alternatives? To apply the co-ownership scheme to the home part in a case where there would be a substantial loss if the two parts had to be sold separately would, as the Law Commission point out, give the acquiring spouse a measure of control over the whole property. The owner spouse would not be able to sell the whole property at its market value without the consent of the other spouse or without raising an action for division and sale, which might not be successful[2] and which might give rise to further difficulties in apportioning the price between the home part and the non-home part even if it was successful. The acquiring spouse could threaten to raise an action for division and sale of the home part at any time, thereby putting pressure on the owner spouse to sell the non-home part as well. On the other hand, to exclude co-ownership of the home merely because there might be a slight shortfall if the two parts were sold separately would seem to be unduly hard on the acquiring spouse. In short, the only way out of a solution which would be hard on one spouse or the other may be to draw a distinction which would be impossible to apply with any precision.

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[1] Ibid., para. 1.46 and cl. 13 of draft Matrimonial Homes (Co-ownership) Bill.

[2] Under s.19 of the 1981 Act the court has a discretion to refuse to grant a decree of division and sale in the case of a matrimonial home.

26. If co-ownership did apply to a home which formed part of a larger property it might be objected that the acquiring spouse's half share could very well be useless unless accompanied by various servitude rights, for example rights of way, over the adjoining land retained by the other spouse. This objection would be met by the general law. Under the scheme registration of a matrimonial home notice would be declared to be the equivalent of registration of a disposition from the owner spouse containing "all usual and necessary clauses".[1] These clauses will include implied servitudes of convenience, for it is well settled that:

> "when two properties are possessed by the same owner and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance."[2]

The converse problem, servitudes for the benefit of the retained land, would not arise because the owner spouse would retain a half share in the adjoining home.

27. The problem of property used partly as a matrimonial home and partly for business purposes is a difficult one. None of the solutions outlined above is entirely satisfactory but it is not easy to think of any other. The difficulty is probably inherent in a scheme which isolates one particular asset for special treatment. If that asset cannot in fact be readily isolated, problems are bound to arise. We would welcome views on what is the least unsatisfactory solution to this problem.

28. "Matrimonial home option". Where the owner spouse had at any time a relevant interest in a matrimonial home, the acquiring spouse would have a matrimonial home option. The

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[1] See para. 34 below.

[2] Cochrane v. Ewart (1861) 4 Macq. 117 per Lord Campbell, LC, at 122.

option could not therefore arise unless three elements coincided: marriage; relevant interest; and matrimonial home. Once it had arisen it would be defeasible if either of the first two elements disappeared - for example, if the couple were divorced, or if the owner spouse sold the house so that he no longer had a relevant interest. It would not be defeasible, however, merely because the matrimonial home was rented out and the parties took up residence in another home. It would be the existence of the option that empowered the acquiring spouse to register a matrimonial home notice. Registration would, therefore, be ineffective unless the acquiring spouse held the option at the time of registration.

29. Registration of the notice would give the acquiring spouse the real right of co-ownership. Until registration he or she would have only an option. The matrimonial home option would not be a "right" in the same sense that the right of a purchaser under missives is a right. The option would not be a right which corresponded to a duty imposed on anyone else, but a power to alter the legal situation which could be exercised or not exercised as the holder wished. There would be no correlative duty imposed on the owner spouse to retain an interest in a house so that the option could be exercised. On the contrary, he would be free to sell or otherwise dispose of the house as he wished. We deal later with the question of balancing the rights of acquiring spouses against the rights of purchasers and lenders who are in good faith.[1]

30. "Matrimonial home notice". We envisage that the matrimonial home notice would be a simple notification signed by the acquiring spouse and witnessed in the usual way.

[1] Paras. 56 to 58 below.

There would be two prescribed forms, one for the Register of Sasines, the other for the Land Register. A conveyancing description of the home would be required and, in the case of a notice for the Land Register, the title sheet number.[1] Although this information is much more likely to be in the hands of the owner spouse than of the acquiring spouse we do not believe that the solicitor acting for the latter would have much difficulty in extracting it from the registers.

Registration of matrimonial home notice

31. Need to exclude indemnity? The Register of Sasines is a register of deeds merely, not of titles. Recording does not guarantee the deed's validity. It would therefore be for third parties dealing with the home to ascertain that the notice was valid and did not go beyond the acquiring spouse's matrimonial home option by, for example, including land which was not properly part of the home. This would create few difficulties in practice in the usual case where the home, rather than the acquiring spouse's one-half share in it, was being sold. Both spouses would sign the conveyance, so that even if the notice was invalid the owner spouse's signature would ensure a good title for the third party. In contrast, the Land Register is a register of titles. Once he has accepted a deed the Keeper completes registration by making the appropriate amendment to the title sheet.[2] In the case of a matrimonial home notice he would enter the acquiring spouse as proprietor to the extent of a one-half share. Two important consequences would result. One is that the acquiring spouse would become co-owner whether the notice was valid or not.[3] The other is that if it turned

[1] This is an existing requirement under the Land Registration (Scotland) Act 1979, s.4(2)(d). The use of a notice should not be a registrable event under s.2 (i. e. it should not be regarded as bringing about a transfer in consideration of marriage). So registration in the Land Register will only occur where a title sheet exists already.

[2] 1979 Act, s.5(1)(a)(ii).

[3] 1979 Act, s.3(1).

out that the notice was not valid, the Keeper would, in certain circumstances, have to indemnify anyone who suffered loss as a result.[1] These results would not give rise to difficulty if the registration was successfully challenged by the owner spouse before any third party had acquired an interest in the property. The Keeper could rectify the register and would not have to indemnify the acquiring spouse, because the loss would have been caused by the acquiring spouse's own "fraudulent or careless act or omission".[2] If the home had been conveyed to a third party by both spouses, the third party would acquire a good title and questions of rectification or indemnification should not arise. Difficulties could arise, however, if the acquiring spouse, immediately after registration, sold his or her one-half share to a third party. If the third party was not yet a "proprietor in possession" the register could be rectified but the Keeper, unless he had excluded indemnity, would have to indemnify the third party for the resulting loss.[3] If the third party had managed to become a proprietor in possession the Keeper would have to refuse to rectify the register but, unless he had excluded indemnity, would have to indemnify the owner spouse for the resulting loss.[4] The Keeper has power to require an application for registration to be accompanied by "such documents and other evidence as he may require",[5] and could reduce the risk of an invalid or fraudulent notice being registered by, for example, requiring a matrimonial home notice to be accompanied by a marriage certificate and an affidavit by the applicant's solicitor to the effect that to the best of his knowledge and belief the

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[1] 1979 Act, s.4(1).

[2] 1979 Act, s.12(3)(n).

[3] 1979 Act, ss.9 and 12.

[4] Ibid.

[5] 1979 Act, s.4(1).

the property is a matrimonial home. Presumably opting out of the scheme would require registration of an appropriate notice,[1] so that the Keeper would generally know whether the scheme had been excluded. Even so the Keeper could never be sure that a matrimonial home notice was valid. The marriage might be invalid, or secretly terminated, or the property might not in fact be within the definition of a matrimonial home. It would be for consideration, therefore, whether the list of losses in respect of which there is no entitlement to indemnity should include any loss suffered as a result of the registration of a matrimonial home notice. One effect would be that bona fide third parties would be unwilling, without making very careful enquiries, to buy a one-half pro indiviso share in a home, if the share had been acquired by the registration of a matrimonial home notice. If a matrimonial home notice had been registered they would normally require any disposition relating to the property to be signed by both parties. This would be no bad thing. In theory there could be a risk of loss to owners. An unmarried man, who had gone abroad for six months leaving his home unoccupied, might find that an unscrupulous woman had registered a matrimonial home notice and sold her half-share to a conniving third party who had taken possession of the house. In practice this risk would be minimal (a) because the Keeper would presumably require certain evidence (such as a marriage certificate and a solicitor's affidavit) before accepting an application for registration of a matrimonial home notice; (b) because the owner would presumably be notified of the application and would have the opportunity of objecting;[2] and (c) because the one-half share acquired by the fraud would not be readily convertible into money. Against excluding indemnity it has to be said that the whole basis of the land registration

[1] See paras. 40 to 43 below.

[2] See para. 32 below.

system is the existence of a very wide right of indemnity. Only if that can be relied on in all except a handful of readily identified and rarely occurring cases will the system work. To exclude indemnity in relation to a type of event which could affect a large proportion of owner occupied houses would be a very serious step.

32. Notification to other spouse. Because of the risk of registrations of invalid notices and because of the general consideration that it would be unreasonable that the owner spouse should be divested of half his property without his knowledge, it would be for consideration whether the Keeper should be placed under the duty of informing the owner of property of any application for registration of a matrimonial home notice relating to that property.

33. Exemption from stamp duty. Under the present law, if one spouse voluntarily conveys a half share of his house to the other, ad valorem stamp duty is payable on the disposition. We have already proposed that such conveyances should be exempt from stamp duty.[1] The same should apply to a matrimonial home notice. Three considerations seem to be relevant. First, possible liability to stamp duty could create difficulties for the acquiring spouse. At best it would be a disincentive to use a notice; at worst the sum involved might be an absolute barrier. Secondly, stamp duty liability in a case like this where no consideration is paid can only be determined after the home has been valued for the Inland Revenue. In some circumstances - for example, an imminent sale by the owner spouse - this would produce an unacceptable delay. Thirdly, as half only of the home is being transferred, the

[1] See para. 6.11 above.

home would have to be worth £50,000 before any stamp duty, at current rates, was payable. Only a small minority of homes would be caught and therefore the loss of revenue by exemption would be small.

34. Main effect of registration. When, under the present law, one spouse transfers a share in the matrimonial home to the other, this is done by granting a disposition or, in the case of a lease, an asssignation. Registration of a matrimonial home notice could be declared the equivalent of registration of such a conveyance. The conveyance could be deemed to contain a clause excluding warrandice but, subject to that, all usual and necessary clauses.[1] The exclusion of warrandice requires explanation. Unless excluded, simple warrandice is implied by law in all gifts;[2] but simple warrandice only provides protection against subsequent acts of the grantor and would be pointless in the present case where the grant of the deemed conveyance and its registration would be simultaneous. Any higher degree of warrandice would, however, have the extraordinary result of making the owner spouse liable for the earlier grant of, for example, a standard security or servitude. The inclusion of other "usual and necessary clauses" would mean that the owner spouse would, for example, assign the writs and grant the usual obligation of relief.[3]

35. The definition of "acquiring spouse"[4] - as the spouse who owns the lesser share - would not exclude from the scheme the spouse who owns a part of the matrimonial home which is less than one half. If registration were simply declared

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[1] This is modelled on the Conveyancing and Feudal Reform (Scotland) Act 1970, s.40.

[2] Erskine, II.3.25.

[3] See para. 26 above for the importance of this formulation for implied servitudes of convenience.

[4] Para. 1 above.

to transfer half of the owner spouse's share to the acquiring spouse, this would have the unintended effect of giving the acquiring spouse a majority share in the home. To avoid this result it would be necessary to provide that registration would be deemed to transfer whatever share was required to make the spouses equal co-owners of their combined relevant interest.

36. Should there be accretion on survivorship? Many married couples who take the title to their home voluntarily in joint names include a survivorship clause in the title, so that on the death of one his or her half share will pass automatically to the other. Should registration of a matrimonial home notice bring about the same result, or should the spouses simply be owners in common,[1] without any survivorship provision, so that on the death of one, his or her share would pass to his or her own heirs? The Law Commission have recommended that where spouses become statutory co-owners of a matrimonial home in England or Wales they should hold as beneficial joint tenants. The most significant effect of holding in this way is that the share of the predeceasing spouse passes automatically to the survivor.[2] This result cannot be defeated by will, although the joint tenancy can be severed by the unilateral act of either joint tenant before his death.[3] In favour of automatic accretion on survivorship it can be said that most voluntary co-owners probably have a survivorship clause in their title, and that statutory co-ownership should correspond to the normal type of voluntary

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[1] "Common property" is the correct technical expression for this situation. "Joint property", properly so called, is an unusual and in many respects inconvenient form of holding which is in practice confined to trusts and unincorporated associations. See Magistrates of Banff v. Ruthin Castle, 1944 S.C. 36.

[2] Law Com. No. 86, paras. 1.8 to 1.10.

[3] Ibid., para. 1.9. Under the Law of Property Act 1925, s.36(2), it is sufficient for one of the beneficial joint tenants to give notice to the other of his desire to sever the beneficial joint tenancy. For doubts which have arisen about severance of beneficial joint tenancies in matrimonial homes, see Emmet on Title (16th edn. 1974) p.304 and Supplement.

co-ownership.[1] There is also the argument that automatic provision for survivorship is seen by members of the public as one of the main advantages of co-ownership.[2] There are, however, arguments the other way.[3] First, it can be plausibly argued that statutory co-ownership should not necessarily correspond to voluntary co-ownership in all respects. Statutory co-ownership is different precisely because it may be forced on an owner against his will, perhaps in a situation of marital conflict. Secondly, a survivorship provision may be unnecessary. If the spouses make wills they can regulate succession to their half shares as they wish. If they do not, the law on prior rights will normally ensure that the survivor takes the deceased spouse's half share in any dwellinghouse in which the surviving spouse was ordinarily resident on the date of the death.[4] Thirdly, difficulties would arise in relation to evacuation of the survivorship provision. If it could be evacuated by will, there would be a difference between statutory co-ownership and most cases of voluntary co-ownership because in the latter, where both spouses have contributed and where the destination in the title is accordingly regarded as contractual, neither spouse can evacuate the destination by testamentary deed.[5] Perhaps, as noted above, this is not something which should cause concern. There would, however, also be a conveyancing difficulty. A purchaser from the surviving spouse could not be sure that the

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[1] This argument weighed with the Law Commission in recommending that spouses holding under statutory co-ownership should do so as beneficial joint tenants. See Law Com. No. 86, paras. 1.8 to 1.10.

[2] Manners and Rauta, Table 2.8.

[3] For criticisms of survivorship clauses in dispositions see Hay's Tr. v. Hay's Tr. 1951 S.C. 329, per Lord President Cooper at 334; Halliday, 2 J.L.S.S. (1957) 219.

[4] Succession (Scotland) Act 1964, s.8.

[5] Perrett's Trs. v. Perrett 1909 S.C. 522; Shand's Trs. v. Shand's Trs. 1966 S.C. 178. Either spouse can, of course, dispose of his one-half share inter vivos. See Steele v. Caldwell 1979 S.L.T. 228.

other spouse had not evacuated the destination. It might be possible to deal with this difficulty,[1] but to do so only for statutory co-owners of matrimonial homes would be anomalous and do so on a wide scale would be beyond the confines of this subject. If, on the other hand, the survivorship destination could not be evacuated by will, the law of succession would in effect be altered and the change in the law would, arguably, go further than was necessary to recognise the idea of equal partnership in the matrimonial home. This is a difficult question on which we would welcome views. As our main purpose, however, is to devise the simplest workable scheme, we shall assume for the time being that the scheme would provide for simple common property without a survivorship rule.

37. Liability under heritable security. Should registration of a matrimonial home notice affect liability under a heritable security? This question would arise if the home was, at the time of registration, burdened with a heritable security. The security would, of course, be real and would continue to burden the home notwithstanding the statutory transfer. The question is whether the acquiring spouse should become personally liable for any personal obligation secured by the heritable security. It would seem to be essential that personal liability should be transferred. If it was not, it is thought that on sale the acquiring spouse would be able to demand half of the gross proceeds leaving the other spouse to meet the full cost of repaying the loan.[2]

38. It might be thought that a transfer of personal liability would be sufficiently achieved under the existing law by virtue of section 47 of the Conveyancing (Scotland) Act 1874, which provides that the personal obligation under a "heritable security for money duly constituted upon an estate in land" transmits against "any person taking such estate by succession, gift or

[1] Cf. the Law of Property (Joint Tenants) Act 1964, s.1(1).
[2] Similar problems might arise in connection with feudal conditions or real burdens.

bequest". Unfortunately, this would not be so. It is by no means clear that an acquiring spouse would take a half share "by succession, gift or bequest". Rather, he or she would take as a result of a compulsory acquisition under a statutory power. Moreover, section 47 applies only to an "estate in land" which is defined[1] more narrowly than "relevant interest" would be under the co-ownership scheme. It is unclear, too, if section 47 applies where part only of a property is conveyed. Obligations contained in separate personal bonds seem to be excluded by the requirement that the obligation be "contained in" the security deed. It is unclear what the position is where the debt exceeds the value of the property. In one respect, too, the provision goes further than necessary. Where the debtor in the obligation secured is a third party rather than the owner of the security subjects, it appears that liability is nevertheless transmitted.

39. For the above reasons it would seem to be necessary to have a special provision that where the owner spouse is debtor in an obligation secured over his relevant interest, the effect of registration would be to make the acquiring spouse liable with the owner spouse for that obligation. The liability would be joint and several in a question with third parties and equal inter se. It would probably be unnecessary to make special provision for the case where the debt secured exceeds the value of the property. Registration would always be voluntary and it would be up to the acquiring spouse to decide whether it was to his or her benefit. Against this it could be argued that it would not always be possible for the acquiring spouse to find out from the creditor the extent of the other spouse's indebtedness. One remedy for this would be to impose a statutory duty on heritable creditors of the owner spouse to provide this information to the acquiring spouse on request, but it might be thought that

[1] In s.3 of the 1874 Act.

it would be wrong to impose any new duties on third parties in this context and that the acquiring spouse should be left to take the risk of incurring a heavier liability than he or she might have anticipated. We would welcome views.

Opting out and other exclusions

40. Renunciation by acquiring spouse. It is not obvious that any special provision need be made for unilateral opting out by the acquiring spouse. He or she would merely have an option and could opt out of co-ownership by simply not exercising the option. On the other hand, there might conceivably be cases where one spouse would refuse to buy a house if the other spouse were to have an option to acquire half of it. There may therefore be a case for allowing an acquiring spouse to renounce his or her right to register a matrimonial home notice in relation to a specified home. We would welcome views, but shall assume for the time being that the acquiring spouse would be able to renounce the right to register a matrimonial home notice in relation to a specified home.

41. Exclusion by owner spouse. It would not be desirable to give the owner spouse any general power to opt out (i.e. to exclude the other spouse's right to register a notice). Inevitably the acquiring spouse would sometimes wish to register a notice in direct opposition to the owner spouse's wishes. If the owner could defeat this simply by opting out first, the scheme would be seriously weakened. There are, however, two circumstances in which it would be reasonable to allow the owner spouse to opt out.[1] One is where he or she already owned the home at the time of marriage. The other is where he or she already owned the home at the time when implementing legislation came into force. In the first

[1] The Law Commission have recommended similar exclusions. See Law Com. No. 86, paras. 1.106 to 1.115, 1.218 to 1.222.

case the home would not, at least initially, be the produce of the joint efforts of the spouses. Moreover, it would not be desirable to discourage marriage by careful home-owners, or encourage marriage by unscrupulous fortune-hunters, by creating completely rigid property consequences. In the second case it may be that the owner spouse would never have bought (or been given) the home if statutory co-ownership had been foreseen. It must be stressed that opting out would require the active steps set out in paragraph 43, and that it would only be possible in respect of homes falling into these two categories. In particular, it would not apply to a new home bought with the proceeds of sale of a home which had been validly excluded from the scheme.

42. Exclusion by donor. When someone makes a gift of a home, he might wish to exclude the operation of the scheme from that house. If he is unable to do so he might be deterred from making the gift. He would often not wish to ask the other spouse to renounce in advance his or her right to register a matrimonial home notice. Nor could he necessarily achieve the desired result by making it a condition of his gift that the acquiring spouse contract out of the scheme. That would be to place the gift at the mercy of the acquiring spouse. We think that a donor should be able to exclude the scheme by making his intention to do so clear in the deed making the gift.[1] "Donor" would include a testator. As the exclusion would appear in the deed it would be possible to ensure that it would find its way on to the Register of Sasines or Land Register when the donee's title was made up.

43. Procedure for opting out by spouses. To opt out a spouse would have to sign a short notice in a prescribed form. The notice would not take effect until registration in the Register of Sasines or Land Register. Registration would be desirable to notify third parties dealing with the

[1] This is also the conclusion reached by the Law Commission for England and Wales. See Law Com. No. 86, para. 1.116 to 1.126.

home. It would also prevent the Keeper from accepting a subsequent matrimonial home notice for registration in the Land Register. Where the opting out was by the owner spouse, he would be able to change his mind by registering a subsequent notice of revocation. In all cases the notice would have to specify the home in question and could only operate in respect of the specified home. The acquiring spouse could renounce his or her rights at any time. The owner spouse could only opt out either before marriage or after the legislation was passed but before the scheme came into force, a period which should be at least one year. It would be for consideration whether the owner spouse should be obliged to inform the other spouse or intended spouse that he had excluded the home from the scheme. There are difficulties either way.[1] In some circumstances the acquiring spouse might be put under pressure to renounce. For this reason, and for the sake of uniformity, it might be provided that the procedure set out in section 1(5) and (6) of the 1981 Act for the comparable renunciation of occupancy rights would have to be followed. No doubt an acquiring spouse would sometimes want to renounce at the same time rights in relation both to statutory co-ownership and to occupancy.

44. Effect of exclusion of scheme. Exclusion of the scheme by any of the above means would not prevent the spouses from becoming voluntary co-owners at any time if they so wished. The owner spouse would be sole owner and as such could at any time voluntarily convey a half share to the other spouse.

45. Contracting out in relation to future homes. If spouses wished to contract out of the scheme in advance in relation to

[1] The Law Commission were divided on this. The majority thought communication should not be required. One reason was that evidence of communication would be necessary and "the resultant formality would be inappropriate". One member thought that "it would be potentially harmful to good matrimonial relations to allow one spouse by his own secret reservation to spring a surprise, perhaps after years of marriage, on the other spouse as to the ownership of the matrimonial home". Law Com. No. 86, para. 1.108 note 77. See also Stone, (1979) 42 M.L.R. 192.

future homes they could agree (for example, in an antenuptial marriage contract) that neither would register a matrimonial home notice or that either would, on request, register a notice of renunciation in relation to a home owned by the other. Such undertakings would not affect real rights. Breach of them would not render any matrimonial home notice invalid but would give the other spouse a remedy for breach of contract.

46. Remaining half share of owner spouse. An acquiring spouse might register a matrimonial home notice, dispose of his or her half share to a third party, and then repeat the process so as to acquire half of the owner spouse's remaining half share - i.e. another quarter, and so on. We think, therefore, that the right to register a notice would have to be excluded in cases where the acquiring spouse had previously transferred to a third party a half share in the house. The exclusion would also have to apply to cases where the spouses were originally voluntary co-owners and one of them transferred his or her half share to a third party. The exclusion might also have to apply, in a modified form, where one spouse had disposed of less than a one-half share to a third party.

Supervening events

47.. In many, perhaps most, cases the acquiring spouse would not register a matrimonial home notice as soon as he or she had the statutory option to do so. Problems would arise if an event supervened which made subsequent registration difficult or impossible. In this section we consider the main categories of supervening event.

48. Separation. A home would not cease to come within the definition of a matrimonial home merely because the parties had separated. A wife could, therefore, register a matrimonial home notice after her husband had left her, or she had left him, or they had separated by mutual consent. This

seems right: it would often be after separation that registration of a notice would be most useful. It is not so clear, however, that one spouse should be able to register a notice in relation to a home acquired by the other after separation. Very often, of course, such a home would not come within the definition of a matrimonial home. There could, however, be cases where a separated husband who was himself anxious for a reconciliation acquired a new house and made it available to his wife, in the sense that he invited her to live with him in it. It might not seem reasonable that she should be able to exploit his willingness to adhere by taking half his house even if she has no intention of resuming cohabitation. On the other hand, if she had neglected to register a notice in relation to the first home until it was too late and it had been sold, it might seem reasonable enough that she should be able to seize any opportunity to register a notice in relation to a replacement home, even if acquired by the other spouse after the separation. At least it might seem reasonable in some circumstances. What, however, if she had not lost anything as a result of the marriage and had assets of her own? What if the marriage had only lasted a year? What if the husband had already given her half the proceeds of the first home?[1] We invite views on these questions, but in the meantime suggest that a spouse should not be able to register a matrimonial home notice in relation to a home acquired by the other spouse after their final separation.

49. It may happen that spouses resume cohabitation after separation. If the resumption is genuine the acquiring spouse should, presumably, be able to register a matrimonial home notice even if the home was acquired by the other spouse during the period of separation. If it is not, then he or she should not be able to register a notice in relation to

[1] Cf. Whitehouse v. Whitehouse 1980 S.L.T. (Notes) 48.

such a home. The difficulty is to distinguish satisfactorily between genuine and other resumptions of cohabitation. A test based on the intentions of the spouses would be too subjective, too difficult to apply, and too open to abuse. Where a half share in a house worth many thousands of pounds is at stake, the temptation to lie about intentions would be strong. A more satisfactory solution might be to provide that, in deciding whether a home was acquired after separation, a short temporary resumption of cohabitation should be ignored, and to define a short temporary resumption of cohabitation as any period when, having ceased to cohabit in circumstances indicating an intention by one or both of the parties to terminate their relationship,[1] for a continuous period of 90 days or more, the parties have resumed cohabitation for a period of 90 days or less. A formula on these lines would introduce a measure of objectivity.[2] It would not, however, be a complete answer. An unscrupulous spouse would simply return for three months or whatever time was required. There would also be no way of knowing, during the running of a resumption of cohabitation, whether it would last for the necessary period. A matrimonial home notice registered after, say, two months might, or might not, turn out to be invalid.

50. We confess that we can see no easy answer to the question of separated spouses and co-ownership. The difficulty is probably a fundamental one. Co-ownership proposals are based on a model of marriage which just does not fit the situation of separated spouses.

51. Divorce. On divorce the parties to the marriage cease to be spouses and it would no longer be possible for either to

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[1] This is designed to cater for the situation of seamen, servicemen and others who in the normal course of their lives have to live apart from their spouses for lengthy periods.

[2] We used a similar formula in our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) para. 3.90.

register a matrimonial home notice in relation to a house owned by the other. Under the present legislation either party can apply in a divorce action for an order for a periodical allowance or a capital sum or both, and the court is directed to make "such order, if any, as it thinks fit having regard to the respective means of the parties to the marriage and to all the circumstances of the case". The court can, therefore, readjust the parties' financial position on divorce. Under the present law the court frequently has to exercise its powers in cases where the parties have voluntarily taken the title to their house in joint names.[1] Statutory co-ownership would merely increase the number of cases of this nature. In our Report on Aliment and Financial Provision[2] we have recommended that the court should have wider powers in relation to the financial and property consequences of divorce, including power to order property to be transferred from one spouse to the other. We have recommended that financial provision and property adjustment on divorce should be governed by a set of statutory principles instead of being left entirely to the discretion of the judge deciding the case. We have already discussed the uneasy general relationship between a statutory co-ownership scheme and the principle of fair sharing of matrimonial property on divorce.[3] So far as the technical relationship is concerned the provisions of the draft Bill appended to our Report on Aliment and Financial Provision are, we think, sufficiently flexible to enable the court to to justice in relation to the matrimonial home - and, in particular, to undo the effects of a matrimonial

[1] See e.g. Russell v. Russell 1977 S.L.T. (Notes) 13; Cowie v. Cowie 1977 S.L.T. (Notes) 47; Henderson v. Henderson 1981 S.L.T. (Notes) 25.

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

[3] See paras. 5.28 and 5.29 above.

home notice where it had been abused by an unscrupulous person who had, say, married for money.[1] If both schemes were introduced, however, the technical relationship between them would have to be watched very carefully.

52. Death. On the death of either spouse, the marriage is at an end and, on present definitions, the scheme would cease to operate. Where it is the owner spouse who dies the other spouse usually inherits the matrimonial home in any case, whether by will or under the rules of intestate succession. In a minority - probably a small minority - of cases, however, this will not happen, either because the owner spouse has left the home by will to someone else, or because the value of the home is greater than the £50,000 currently prescribed for prior rights on intestacy.[2] In such cases there would be a marked distinction between the situation of the spouse who had registered a matrimonial home notice a week before the owner spouse's death and the situation of the spouse who had not. The distinction would be particularly striking where the owner spouse had left the house by will to a third party. If a notice had been registered shortly before the death the acquiring spouse would take a half share in the house. If no notice had been registered before the death the surviving spouse would take nothing. We considered whether the acquiring spouse should be able to register a matrimonial home notice within, say, three months after the death of the other spouse. That would avoid the discrepancy noted above. Although there could be a similar discrepancy between the position of a widow who had registered a notice

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[1] A half share acquired by an unscrupulous spouse who had married for money would, for example, be matrimonial property (cl. 10(3)), and the conduct of the spouse could be taken into account in sharing that property because it would have affected the economic position of the parties (cl. 11(4)). The court could, therefore, order the unscrupulous acquiring spouse to return the property because there would be special circumstances justifying a departure from equal sharing (cl. 10(1)).

[2] Succession (Scotland) Act 1964, s.8; S.I. 1981/806.

just before the three months had expired and a widow who had just failed to do so, this should not be a serious problem in practice as legal advice would almost invariably be available to the surviving spouse. There would, however, be complications in this solution. Registration would have to be deemed to have taken place immediately prior to the death of the owner spouse. This could invalidate retrospectively a title make up by a beneficiary under the deceased spouse's will or acquired under a special destination. It could also mean that property included in the inventory for purposes of confirmation would have to be retrospectively excluded. To allow registration of a matrimonial home notice after the death of the owner spouse would, moreover, alter the law of succession by a side-wind. We invite views on whether a matrimonial home notice should be registrable after the death of the owner spouse. For the time being we shall assume, in the interests of simplicity and logical coherence, that it could not be.

53. A related question is whether, if the acquiring spouse dies first without having exercised a matrimonial home option, his or her executor should be able to exercise the option within, say, three months of the death. Although an argument could be made for this solution (based on the notion that the acquiring spouse has a sort of inchoate right in the matrimonial home) we think that it would be seen as objectionable if an executor, possibly a complete stranger, could deprive the surviving spouse of half of the matrimonial home in order to benefit, perhaps, a legatee of whom he disapproved. There would also be practical difficulties. The surviving spouse would, for example, be free to dispose of the house before the executor registered a notice and the executor could not do this before obtaining confirmation. In some cases the surviving spouse would be an executor, perhaps the sole executor, and special provisions might be needed to deal with this situation. We would welcome views, but we shall assume

for the time being that the executor of the acquiring spouse would not be able to register a matrimonial home notice after the acquiring spouse's death and that, in general, a matrimonial home option would not be exercisable after the death of either spouse.

54. Sequestration and diligence. We have considered various possible solutions to the problem of the effect of sequestration or diligence on the right to exercise a matrimonial home option. The logical solution, given that the acquiring spouse has a mere option, is to say that until the option is exercised the whole house remains available to the owner spouse's creditors. Registration of a matrimonial home notice would not be possible after the house had vested in a trustee in sequestration or an adjudging creditor. An alternative would be to say that the acquiring spouse's potential half share should not be available to the owner spouse's creditors but should be available to the acquiring spouse's creditors. The trustee in sequestration would be able to register a matrimonial home notice. This, however, would mean that statutory co-ownership could be forced on spouses against the will of both of them. We doubt whether this would be desirable or acceptable.[1] Our provisional preference would therefore be for the first solution - namely that until a matrimonial home notice was registered the home would be available to the owner spouse's creditors but not to the acquiring spouse's creditors.

55. A further question must, however, be considered. Should the acquiring spouse be able to register a matrimonial home notice, without the risk of its being reduced, right up to

[1] It was for this reason that the Law Commission recommended that statutory co-ownership should not arise if at the relevant time the acquiring spouse was bankrupt. Law Com. No. 86 para. 1.168.

the moment when the property passes to the trustee in sequestration or an adjudging creditor? If the effect of registration is that the half share is deemed to be transferred as a gift by the owner spouse, and if this analogy is pushed to its logical conclusion, then the transfer could often be challenged by the owner spouse's creditors as a gratuitous alienation[1] or as a donation between spouses.[2] We doubt, however, whether the analogy should be pushed this far. The transfer is not the result of any voluntary act on the part of the owner spouse, but is simply the result of the exercise by the acquiring spouse of an option which he or she is entitled to exercise at any time. The better view, therefore, would seem to be that the statutory transfer should not be subject to reduction as a gratuitous alienation or revocation as a donation between spouses.

56. Dealings and protection of third parties. One of the theoretical advantages of a scheme based on registration of a matrimonial home notice is that it would not create any special problems for third parties dealing with the matrimonial home. Where the acquiring spouse had registered a matrimonial home notice, the third party would not usually have to concern himself with its validity. This is because any conveyance or other deed would be signed by both spouses in any case. If it subsequently transpired that the notice was invalid and that the owner spouse was therefore sole owner, his signature would ensure a good title for the third party. In the converse situation, where the matrimonial home option had not yet been exercised, the owner spouse would remain undivested owner, free to sell or burden the property without adverse consequences either for himself or for the third party.

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[1] At common law or under the Bankruptcy Act 1621.

[2] Under the Married Women's Property (Scotland) Act 1920, s.5. For recommendations on reform of these rules see our Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot. Law Com. No. 68, 1981) paras. 12.15 to 12.29.

57. In theory a system based on registration of a notice would be straightforward. In practice, however, it would be less so. We shall consider, by way of example, the case where the house is in the husband's name, where no matrimonial home notice has been registered and where the husband sells the house to a third party. The difficulty here is that there is a gap between the acquisition by the third party of a contractual right to the house under the missives of sale and the acquisition by him of a title perfected by registration in the Register of Sasines or the Land Register. What is to be the position if the wife registers a matrimonial home notice within that time gap? To provide that the third party would be preferred and that any registration of a notice after the conclusion of missives would be invalid would seriously weaken the position of the acquiring spouse. It would also increase the risk of notices which were invalid without there being any indication of this on the register. An alternative would be to provide that the acquiring spouse would be preferred to the third party if she registered a matrimonial home notice before the third party completed his title by registration. At first sight this would seem to place the third party in an unacceptable position of risk. In practice, however, the risk would usually be limited to cases where the owner spouse had deliberately and successfully lied about his matrimonial status. The purchaser of a matrimonial home will be concerned about the seller's matrimonial status in any event because of the occupancy rights conferred on spouses by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. He already has an interest, therefore, to insert a provision in the missives to the effect that if the seller is married his spouse will sign the disposition as a consenting party. If a co-ownership scheme were introduced he would also have an interest to stipulate that if the seller is married his spouse will sign the disposition, not only as a consenter, but also as the disponer of any right,

title and interest, present or future, she may have in the home. If both spouses then sign the disposition the purchaser will be protected. If the wife refuses to sign, and registers a matrimonial home notice, the purchaser will be entitled to rescind the contract and will have a claim for damages against the owner spouse. To avoid any difficulties of this kind the owner spouse would be well advised to ensure in advance that his wife would consent. Indeed it may be that spouses would be advised to register a matrimonial home notice before selling their home and then to sell it jointly. A serious risk to purchasers would exist in any case in which the seller pretended falsely to be unmarried. To some extent the purchaser would be protected by the usual Search in the Register of Sasines or the Land Register. This would disclose any matrimonial home notice registered before the date up to which the Search is made. In the case of the Register of Sasines, however, a completely up-to-date Search cannot be obtained. There would therefore be a period in which a notice could be registered without the purchaser's knowledge. The risks of late dealings by the seller in the period after the end of the Search are covered in practice by a letter of obligation by the seller's solicitor. This system could be used to cover matrimonial home notices. As the solicitor in practice receives the purchase price, there is a much diminished risk that an unscrupulous seller would make off with the proceeds of sale before the late registration of a matrimonial home notice was discovered.

58. The problem of balancing the conflicting claims of acquiring spouses and third parties dealing with the owner spouse in good faith is not an easy one to resolve. We invite views on whether a system based on simple priority of registration would be workable and acceptable. Although this might appear to place the third party at risk in the period immediately before completion of his title by registration, the risk would not be so great as it might seem at

first sight, and would not be significantly greater than other risks run by third parties dealing with lying and unscrupulous owners. The rule might be that the acquiring spouse would be preferred to a third party dealing with the owner spouse if, but only if, the acquiring spouse registered a matrimonial home notice before the third party completed his title by registration. Implicit in this is that, if the third party did become infeft first, the acquiring spouse would not be able to reduce his title even if he was, or should have been, aware that there was a spouse holding a matrimonial home option. The option would not be the same, for this purpose, as a prior personal right which is capable of being made into a real right and which is brought to the notice of the third party.[1]

59. The discussion so far has proceeded on the assumption that the third party is a purchaser or acquirer of rights for value. If the third party is a donee it might be thought that the acquiring spouse should be able to reduce his title. After all, the very purpose of the gift might have been to defeat the acquiring spouse's right. Again there is a conflict between the simple consistency of a scheme based firmly on an option to register a notice and the desire to protect an acquiring spouse who has not got round to exercising the option. We would welcome comments on this question. In the present Memorandum our concern is to present a scheme which is as simple and coherent as possible. Under such a scheme the donee would be preferred if his title were the first to be completed by registration. He would, of course, normally take the house subject to the spouse's occupancy rights under

[1] Cf. Rodger (Builders) Ltd. v. Fawdry 1950 S.C. 483; Wallace v. Simmers 1960 S.C. 255.

the Matrimonial Homes (Family Protection)(Scotland) Act 1981, and the acquiring spouse in the event of marriage breakdown might be able to have the transaction reduced under the anti-avoidance provisions in the Divorce (Scotland) Act 1976.[1]

60. So far as dealings by the acquiring spouse are concerned, the better view would seem to be that the matrimonial home option should not be assignable. Again we are influenced by the desire for simplicity. The scheme would be more complex if notices could be registered by voluntary assignees. If the acquiring spouse wished to transmit an interest in the home, he or she would only have to exercise the option and thereafter transmit the one-half share acquired by registration.

61. Administration. Once statutory co-ownership had been achieved by registration of a matrimonial home notice, the position would be straightforward. Thereafter the spouses, as equal co-owners of common property, would be in the same position as most voluntary co-owners, and the administration of the home would be controlled by the general law of common property, as recently altered by the 1981 Act. The law may be summarised as follows. Either spouse may carry out ordinary acts of administration but both must concur in extra-ordinary acts. Where the extraordinary act is a non-essential repair or improvement to the home, section 2(4)(a) of the 1981 Act allows the court to dispense with concurrence where the act is appropriate for the reasonable enjoyment of occupancy rights. As a result of this provision one spouse, for example the wife, may find herself carrying out, and therefore paying for, improvements. She may also be paying for outgoings, such as the secured loan, for which both spouses are liable. Where the husband is sole earner and the wife has little money, this is scarcely satisfactory.[2] The position is now remedied

[1] S.6.

[2] At common law the wife has the less satisfactory remedy of recompense: see Consultative Memorandum No. 41 (1978) Vol. 2 App. A.

by section 2(4)(b) of the 1981 Act, which allows the court to apportion expenditure on anything relating to the matrimonial home between the spouses, having regard in particular to the respective financial circumstances of the parties. As far as dealings are concerned, either party may sell or burden his own pro indiviso share, although the consent of the other is required if the third party is to have the right to occupy the home.[1] The home as a whole cannot be sold or burdened without the active participation of both spouses. If one refuses, the other can apply to the court to have the home sold and the proceeds divided, but the court now has discretion to refuse on specified grounds.[2]

62. The rules on common property outlined in the preceding paragraph provide a simple and fair balance between the interests of the two parties, and they seem to operate satisfactorily in practice. Proposals for a more general reform of the law of common property are beyond the scope of the present Memorandum.

63. Subsequent advances under heritable security. One aspect of administration merits special attention. We have already seen[3] that as a price of co-ownership the acquiring spouse would become jointly and severally liable for any obligation heritably secured on the home. If there is a standard security or an ex facie absolute disposition, future as well as existing advances will often be secured. What is the position of the acquiring spouse if the creditor makes a subsequent advance to her husband only, without her knowledge

[1] 1981 Act, s.9.
[2] 1981 Act, s.19.
[3] Paras. 37 to 39.

and consent? This is, of course, a general problem of security law, arising equally where both spouses were the original grantors of the security. Two answers are logically possible. One is that the subsequent advance is secured and the acquiring spouse is jointly and severally liable; the other is that it is unsecured and the acquiring spouse is not liable. Which answer is correct may depend on the wording of the original security deed and personal bond. Where the answer is that the advance is secured, the value of the acquiring spouse's pro indiviso share will fall. It would thus be possible for a determined husband to eliminate the value of the statutory conveyance. The question for consideration is whether some special protection for the wife would be required in this situation. The difficulty is to protect the wife without making the position of the creditor impossible. It is not clear that sufficient protection would be provided by section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970.[1] There are difficulties in interpreting this section[2] but, read literally, it appears to restrict only the creditor's preference in ranking, not his security, in relation to further advances after a conveyance of the whole or part of the debtor's interest in the subjects. There would appear to be a need to enact a special rule if the acquiring spouse were to be clearly and sufficiently protected. Such a rule might be to the effect that the acquiring spouse would not be liable for, and the creditor would have no security for, any advances made after the creditor had received actual notice[3] of the registration of a matrimonial home notice, unless the advances were required to be made under the contract to which the security related or were made with the consent of both spouses. We invite comment.

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[1] Applied to ex facie absolute dispositions by s.42.

[2] See Halliday The Conveyancing and Feudal Reform (Scotland) Act 1970 (2nd edn.) paras. 5 to 40.

[3] The technique of s.13(2)(b) of the 1970 Act, which makes a conveyance resulting from the operation of the law itself sufficient notice, would not be used.

Miscellaneous difficulties

64. Replacement homes. At present when married co-owners sell one home and buy another, it is probably unusual for both not to contribute their share of the net proceeds of the first home to the purchase of the replacement home. If a scheme of statutory co-ownership were introduced the cases in which one spouse refused to contribute would probably increase. This is because the co-ownership might be statutory rather than voluntary. If they had been unable to agree on voluntary co-ownership in the first place they might also be unable to agree subsequently on the application of the sale proceeds. This would be of increased importance under a co-ownership scheme, because unfair consequences could result from the refusal to contribute. The point can be illustrated by considering the position where the wife, the acquiring spouse of the existing home, refused to contribute to the replacement. By registering a matrimonial home notice during the currency of the existing home she would already have gained one half of the net proceeds. Even if she did not contribute to the replacement home she would still be entitled to register a second notice, which would give her one half of the eventual net proceeds of that sale. If this pattern continued for several successive homes there would be a disproportionate transfer of matrimonial assets from husband and wife.

65. Some of the obvious ways of dealing with this difficulty would not be satisfactory. For example, it would be possible to provide that the matrimonial home option could only be exercised once during the course of the marriage, or that a matrimonial home notice could not be registered with respect to any home to which the acquiring spouse had not contributed. These suggestions could be unfair to the acquiring spouse, and would involve third parties - and the Keeper in the case of the Land Register - in considerable difficulties in evaluating the validity of notices. One possible solution would be on the

lines recommended by the Law Commission for England and Wales, namely that where one spouse (say, the husband) pays for all or part of a replacement matrimonial home, and the other spouse does not contribute any or all of her share of the net proceeds of the previous home, he should be entitled to claim from her the balance of the unpaid share.[1] Where the new home costs less than the net proceeds of the old home, the required contribution would be reduced proportionately. This new provision would apply where the old home was co-owned voluntarily as well as where it was co-owned under the statute. It would therefore have a potentially wide application. In the face of a provision of this sort the spouses would normally manage to reach agreement. However, where one spouse continued to refuse contributions, the other spouse would be able to apply to the court. The court would have a discretion to refuse or limit an award. It might, for example, be unreasonable to require payment where the house had been bought by one spouse contrary to the strongly expressed wishes of the other. A solution on these lines would add complexity to the scheme and would introduce another category of ad hoc application to the court for a discretionary remedy. It could be difficult to apply in cases such as that just figured. Is the court to allow one spouse to force the other to invest in a house which he or she has no desire to invest in, or to allow the other spouse to take a double gain from the co-ownership scheme? Neither result is very attractive. The solution in fact seems to be an attempt to treat a symptom rather than the underlying problem. The underlying problem is that a co-ownership scheme would often allow an undeserving spouse to acquire a half share in the other's property. The particular

[1] See Law Com. No. 86 paras. 1.365 to 1.376 and proposed Matrimonial Homes (Co-ownership) Bill cl. 26.

case of successive homes is merely one example. Why, it may be asked, should a right to exact a forced contribution not be available in other cases, where a spouse who could well afford to contribute prefers to keep his or her money intact while still reserving the right to acquire half of a home purchased by the other spouse? We would be grateful for views on the questions whether there should be any special provision enabling a spouse to exact a contribution, out of the proceeds of a co-owned home, towards the purchase of a replacement home and, if so, whether there are any other circumstances in which one spouse should be able to exact a contribution from the other towards the cost of a matrimonial home.

66. Uninfeft proprietors. The scheme outlined here, and the suggested definition of "relevant interest",[1] presupposes that the title of the owner spouse has been registered in the Register of Sasines or Land Register. In an important minority of cases, however, there will have been no registration. This is partly because registration is not always the only way of obtaining a real right. For long leases possession is, under the Leases Act 1449, equally effective. Similarly registration, while usual,[2] is not necessary for land held on udal tenure in Orkney and Shetland and for Kindly Tenants in Lochmaben. In all three cases this difficulty disappears in the counties designated for registration of title where a real right can only be obtained by registration.[3] Even where, as in the overwhelming majority of cases, registration is required to obtain a real right, a title may remain unregistered. A purchaser may, for example, decide

[1] Para. 7 above.

[2] Registration of Title to Land in Scotland (Henry Report) (1969) Cmnd. 4137 para. 6 note 1.

[3] Land Registration (Scotland) Act 1979, s.3(3).

not to register his disposition, or a beneficiary inheriting his father's house may not take steps to have confirmation taken out and the house transferred to his name. In such cases the spouse does not, of course, actually own the house - he has merely a personal right - but in practice his right is rarely subject to challenge and he may have no incentive to complete title.

67. It seems clear that the failure of a spouse to complete title to the matrimonial home should not be allowed to prevent the operation of a co-ownership scheme. This contingency could be provided for, first by extending the definition of "relevant interest" and allowing deduction of title in matrimonial home notices, and secondly by allowing the acquiring spouse to require the other spouse to make up title. We proceed to discuss these possibilities.

68. The first step in dealing with uninfeft proprietors would be to add two additional categories of interests for the purposes of the definition of "relevant interest", namely, (e) the interest of any person who could bring himself within the preceding categories (a) to (c) merely by expeding and registering a notice of title or by registering under the terms of section 3(6) of the Land Registration (Scotland) Act 1979; and (f) the unregistered interest of an owner under udal tenure or of a kindly tenant. In practice category (e) would mean in most cases the interest of the uninfeft proprietor of the dominium utile. It would also include an uninfeft allodial proprietor other than a udaller, and the assignee of a registered long lease who has not made up title by registration. Category (f) is self-explanatory.

69. Where the owner spouse holds an interest falling within category (f), he is full owner notwithstanding that his title is unregistered. It follows that there would be no need for the acquiring spouse to deduce title in a matrimonial home

notice. Where the interest falls within category (e) the spouse is not owner and deduction of title would be necessary, just as it would be necessary in the conveyance which registration would be deemed to effect. Where the notice was being registered in the Register of Sasines, deduction of title would have to conform to section 3 of the Conveyancing (Scotland) Act 1924.[1] For registration in the Land Register no actual deduction of title would be necessary if sufficient midcouples were produced to the Keeper.[2]

70. Three important circumstances remain in which the acquiring spouse would be unable to register a matrimonial home notice, despite the provisions in the two preceding paragraphs. One is where he or she could not deduce title because the owner spouse had possession of the necessary midcouples. Another is where he or she could not deduce title because the owner spouse had neglected to obtain the necessary midcouple. The most common example would be failure to obtain confirmation. The third circumstance is where the owner spouse was tenant under a long but unregistered lease.[3] In all three cases the appropriate solution would appear to be that the acquiring spouse should have power to require the owner spouse to complete title by registration. This would be enforceable by the court, but presumably this would not be necessary in most cases. It would have to be decided which spouse should be liable for the cost of completing title. Once title had been completed by the

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[1] Applied to registered leases by s.24.

[2] Land Registration (Scotland) Act 1979, s.15(3).

[3] An assignee cannot register an assignation, and therefore the acquiring spouse cannot register a notice, where the the lease is itself unregistered: Registration of Leases (Scotland) Act 1857, s.1.

owner spouse, his interest would be a registered relevant interest and the acquiring spouse would be free to register a matrimonial home notice in the usual way.

71. Incapacity. On marriage a minor husband probably becomes forisfamiliated and thus has full contractual capacity, whereas a minor wife falls under the curatory of her husband if he is of full age.[1] Under a co-ownership scheme on the above lines a minor wife would need the consent of her husband for the following acts: opting out before the scheme comes into force (owner spouse); renouncing the matrimonial home option (acquiring spouse); and registering a matrimonial home notice (acquiring spouse). This creates an unacceptable conflict of interest for the husband, particularly when he is being asked to consent to the registration of a matrimonial home notice. The difficulty here would be solved if our recent proposal[2] that a minor wife be forisfamiliated on marriage is implemented. In the absence of a general measure of this sort, it could be provided that for the purposes of these three acts the wife be treated as of full age. This would tie in neatly with the simplest solution to another difficulty. We have seen[3] that registration of a notice would be the equivalent of registration of a deemed conveyance granted by the owner spouse. Where the owner spouse was in minority and not forisfamiliated she could not by herself grant such a conveyance. It would seem desirable, therefore, to provide that the statutory transfer would have effect as if the owner spouse were of full age.

72. There is one further act that a minor might be called upon to perform under a co-ownership scheme on the above

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

[2] Consultative Memorandum No. 54, para. 6.3.

[3] Para. 34 above.

lines - namely excluding the operation of the scheme before marriage. As the curator in this case would not be the other spouse, and as the person might conceivably be under sixteen, it would seem appropriate to apply the usual rules on minority.

73. Where one spouse was insane the general law could apply with one exception and a curator bonis would, therefore, be able to perform the various acts required under the scheme. The exception would be the statutory transfer effected on registration. It would seem to be necessary to provide that this would have effect as if the owner spouse were of full mental capacity.

74. The above points can be summarised as follows. A spouse in minority would be treated as if of full age in relation to the performance of any of the following acts, namely opting out before the scheme came into force; renouncing the matrimonial home option; and registering a matrimonial home notice. In addition, the statutory transfer effected on registration of a matrimonial home notice would take place as if the owner spouse were of full age and of full mental capacity. We invite comment.

75. Insurance. Registration of a matrimonial home notice would, in the normal case, transfer one half of the owner spouse's relevant interest in the home to the acquiring spouse.[1] At the same moment the owner spouse would lose his right to claim for that half under any policy of fire insurance that he might have. This is because, even if he retained an insurable interest in the whole house - which is open to doubt - the policy could only indemnify him for his loss, which would be confined to the retained half. This right

[1] See para. 35 above.

would not pass to the acquiring spouse with the acquired share. On the contrary, unless and until the acquiring spouse insured the newly obtained share, half of the house would be uninsured. A fire shortly after registration could be disastrous for both spouses. We would welcome views on whether this situation merits statutory intervention. It can plausibly be argued that there would be no difference here between the operation of statutory co-ownership and the situation under the present law where one spouse voluntarily transfers a half share to the other. It would be for the acquiring spouse, who would generally be obtaining legal advice at the time, to insure the acquired property, and for the owner spouse to take steps to obtain a reduction in the premiums under the existing policy. Against this it can be said that in practice the acquiring spouse might not insure, or might not insure in time. If statutory intervention were thought to be required, the easiest method would probably be to give registration the additional secondary effect of an intimated assignation of the appropriate interest in the insurance policy. At common law assignation requires the consent of the insurers[1] and so it would be necessary to remove this requirement. We invite comment.

76. Unmarried cohabiting couples. Certain cohabiting couples are given limited occupancy rights on application to the court by section 18 of the 1981 Act. Beyond this, cohabiting couples have no rights over each other's property, either during cohabitation, or on its termination by separation or death. This may be contrasted with the position in England, where trust concepts may be used to give a cohabiting partner

[1] Macgillivray & Parkington Insurance Law (7th edn.) paras. 1615 to 1618; Walker Principles of Scottish Private Law (2nd edn.) p.872.

a share in the home in much the same way as a spouse,[1] and where on the death of one partner the other partner may be able to claim reasonable financial provision from the estate.[2] It may be thought, however, that the fixed property rights that a co-ownership scheme would provide would be inappropriate for a relationship as varied as cohabitation. It would, we suppose, be unacceptable to allow a half share in a person's house to be acquired by a person of the opposite sex after, say, one week of cohabitation as man and wife. A minimum duration of two or three years would probably have to be required. Even then, however, there would be practical difficulties in deciding whether a couple came within the definition. There would also be difficulties in applying the provision on opting out before the "marriage". Third parties dealing with the owner spouse would be placed in an impossible position. If a half share in a house were acquired by a cohabitant in circumstances where the acquisition seemed to be unjust, there would be no opportunity to adjust the consequences by means of financial provision on divorce. For all these reasons, our provisional view is that a matrimonial home scheme of the type outlined here could not apply to unmarried couples.

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[1] Bernard v. Josephs [1982] 2 W.L.R. 1052.

[2] Inheritance (Provision for Family and Dependants) Act 1975 s.1(1)(e).

CHAPTER 2

CO-OWNERSHIP OF HOUSEHOLD GOODS: A POSSIBLE SCHEME

Introduction

1. In Chapter 1 of this Appendix we explained the meaning of the expression "owner spouse" and "acquiring spouse". In this Chapter these terms refer not just to one object, the matrimonial home, but to household goods, a large and diverse category. It is highly likely that in any one home some of the household goods will be owned by one spouse, some by the other, and some by both. This is another way of saying that each party to the marriage will be the owner spouse with respect to some goods and the acquiring spouse with respect to others.

2. It will be seen from the paragraphs that follow that the goods scheme is simpler than the home scheme. This is partly because the law relating to moveables is inherently less complex than the law relating to land. The main reason, however, is that goods, unlike land, are unregistered. This makes it possible to provide for immediate co-ownership by operation of law, without the need for the acquiring spouse to take action to perfect a statutory option.

3. Questions similar to those considered in relation to the home scheme arise in relation to the application of the goods scheme to goods owned at the time when implementing legislation comes into force, or owned by one spouse at the time of the marriage, or acquired by gift or succession from a third party.[1] The arguments for and against applying co-ownership to such assets are the same as in relation to the home, and we need not repeat them. We shall assume for the present that these assets would be included in the goods scheme.

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[1] See Chapter 1, paras. 19 to 21, of this Appendix.

The scheme in outline

4. The scheme outlined here may be summarised as follows. Upon the satisfaction of the two undernoted conditions, any article of corporeal moveable property would become immediately, by operation of law, the common property of both spouses as equal co-owners. The conditions would be:-

(a) that the article was part of the household goods of a matrimonial home and

(b) that the article would, apart from the scheme, have been owned wholly by one spouse or by both spouses but in unequal shares.

The phrases underlined must now be considered in more detail.

5. "Household goods". This is the key phrase in the model scheme. It should apply to the typical contents of a home, to the furniture and plenishings. Devising a suitable definition would not, however, be an easy matter. There are two existing statutory definitions of furniture and plenishings, but neither would be entirely suitable for a co-ownership scheme. One comes from the Succession (Scotland) Act 1964 where, for the purpose of prior rights on intestate succession, it is provided that:[1]

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

This may be contrasted with the second definition, which comes from section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981:

[1] S.8(6)(b).

> "'furniture and plenishings' means any article situated in a matrimonial home which ... is reasonably necessary to enable the home to be used as a family residence, but does not include any vehicle, caravan or houseboat ...".

6. If co-ownership were to come about by operation of law rather than by the exercise of court discretion, it would be essential for any definition to aim at certainty rather than flexibility. For this reason there might be advantages in listing specific items as in the 1964 Act definition. Clearly, however, it would be impossible to achieve by enumeration alone a definition that would produce equally happy results in every household in the country. One solution would be to adopt a middle course, by providing a detailed list coupled with a general expression to cover like articles not given special mention.

7. A description of types of goods would not in itself be sufficient, however. It would also be necessary to consider the function of the goods within the home. It would clearly be wrong to include within the definition, for example, a chair temporarily in the home because the owner spouse happened to be a furniture dealer or because it was intended as a present for a friend. The 1964 Act definition meets this difficulty negatively by excluding goods used for business purposes but, as the example of a chair bought as a present for a friend shows, this might not be sufficiently wide. By contrast, the equivalent part of the 1981 Act definition, requiring the goods to be "reasonably necessary to enable the home to be used as a family residence", would exclude too many goods for the purposes of a co-ownership scheme. It would be difficult to justify the introduction of such a scheme if it was limited in this way to the essentials of living. The question of what was reasonably necessary to enable the home to be used

as a family residence might also require court interpretation,[1] and a definition based on objective use would seem to be preferable for present purposes. On this view the question should not be, which articles does the acquiring spouse need to use, but which articles are actually available for use. One possible solution to the problem of function would therefore be that the articles should be made available by one or both of the spouses primarily for use or enjoyment in or in connection with the home.[2] The qualifying adverb would be designed to exclude availability which was merely temporary, or which was ancillary to business use.

8. A car would not normally be regarded as a household good. Nor would it normally be available primarily for use or enjoyment in or in connection with the home. Unless special provision were made for cars they would, therefore, not come within the scheme. There are arguments both ways on this question. On the one hand it could be said that 74% of couples with one car apparently regard the car as belonging to both spouses equally;[3] that the car may well be the most valuable single corporeal moveable owned by a married couple; and that in rural areas the use of a car may be almost an essential part of family life. On the other hand it could be said that to include cars could give rise to certain difficulties - for example, conflicting business and domestic use, or resale and replacement - which would not often arise in relation to

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[1] This is not, of course, a criticism of the 1981 Act scheme, which always requires an application to the court to bring it into operation: see s.3(2).

[2] This is close to the Law Commission's solution for England and Wales: see Law Com. No. 86, paras. 3.103 to 3.121, a passage which also contains a useful discussion of the definitional difficulties.

[3] See Manners and Rauta, Table 2.9.

household goods properly so called. Cars are excluded from the two existing definitions[1] and we shall assume, for the present, that they would not come within a co-ownership scheme.

9. The 1964 Act definition expressly excluded money and securities for money. A similar exclusion would seem to be appropriate for the purpose of a co-ownership scheme and would probably give rise to little difficulty.

10. The same cannot be said for the other exclusion in the 1964 Act - namely, heirlooms. First, it is not clear that these should be excluded. Secondly, it is not clear that the use of the word "heirloom" is the best way of achieving any desired exclusion.[2] The purpose would perhaps be to exclude items of outstanding financial or sentimental value whether or not they were technically heirlooms. There are two questions here. Should articles of outstanding financial or sentimental value be excluded from the definition of household goods? If so, is there any satisfactory formula by which this could be done without giving rise to intolerable vagueness and uncertainty? We shall assume for the time being that such items would not be excluded. Later in this Chapter we discuss the question whether the owner spouse should have the option of excluding this type of item by an appropriate declaration.[3]

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[1] The 1981 Act definition excludes cars expressly; the 1964 Act definition excludes them impliedly except, perhaps, in very unusual circumstances. See Meston, The Succession (Scotland) Act 1964 (3rd edn.) p.33.

[2] "Heirloom" is defined in s.8(6) of the 1964 Act as "any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate.". The built-in value judgment ("ought to pass") makes this definition very vague.

[3] See para. 21 below.

11. A further question is whether the definition of household goods should expressly exclude purely personal items, such as personal clothing, toilet articles and items of sporting equipment. We shall assume that it should.

12. In short, a definition of "household goods" might include: all furniture, furnishings, bedding, plate, plated articles, linen, china, glass, books, pictures, prints, ornaments, television sets, radio receivers, gramophones, tape recorders, domestic animals, household tools, garden effects, consumable stores, articles for cleaning, cooking, eating, storing food, lighting or heating, and all other like goods, which are (a) in a matrimonial home,[1] and (b) being made available by one or both of the spouses primarily for use or enjoyment in or in connection with that home. The definition might exclude money, securities for money, vehicles, caravans and houseboats,[2] and also purely personal items, such as personal clothing, jewellery and sporting equipment.

13. "Matrimonial home". Co-ownership would apply, if introduced, to household goods of a matrimonial home. Essentially the same definition of "matrimonial home" could be used as in the home scheme.[3] One alteration needed to that definition would be the removal of the requirement that the home should be heritable. Another would be the removal of the requirement that the home was being made available by one or both of the spouses: there is no reason why a goods scheme should not apply to household goods of the spouses in

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[1] This will include articles in the garden. See the definition of "matrimonial home" in para. 13 below.

[2] But see paras. 37 to 39 below.

[3] See Chapter 1 of this Appendix, para. 15.

a home which was being made available by a third party or which the spouses were simply occupying as squatters. A possible definition might therefore be: any house, caravan, houseboat or other structure which is being used by both of the spouses as their family residence, including 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.

14. One consequence of a definition on these lines would be that the co-ownership scheme would apply to the goods of a second home as well as of the principal family residence.

15. Another consequence is that the co-ownership scheme would apply to goods in a home only if it was used by <u>both</u> spouses as their family residence. The scheme would not apply to goods in a house used by only one spouse - say, a separated wife-although, of course, if the goods had become co-owned before separation they would continue to be co-owned after separation.

16. The above definition is not limited to matrimonial homes in Scotland. There is an important question here. Should the scheme apply to goods situated in a matrimonial home in Scotland, even if the spouses are domiciled and habitually resident abroad? Should it apply, for example, to the furniture of a country cottage in Scotland owned by an English or Irish or Dutch couple? Or should the scheme apply to the household goods of a couple domiciled in Scotland, no matter where the home is situated? Should the scheme apply, for example, to the furniture of a country cottage in England or France or Spain owned by a couple domiciled in Scotland? What should the rule be if the spouses have different domiciles? What if they change their domicile? The simplest solution to these problems would be to apply the scheme only to goods in a

home in Scotland. This would not necessarily be the best solution, however. Why should Scots law govern the rights in moveable property of spouses domiciled abroad? Why should Scots law not govern the rights in moveable property of spouses domiciled in Scotland? The resolution of these simple questions in a satisfactory way might require legislation of disproportionate difficulty and complexity.

17. "Owned wholly by one spouse or by both spouses but in unequal shares". The second condition which would have to be satisfied before co-ownership could operate is that the article should, apart from the scheme, be owned wholly by one spouse or by both spouses but in unequal shares. Clearly co-ownership could not apply unless at least one of the spouses owned the article. Where one of the spouses was hiring an article or buying it under hire-purchase or a conditional sale agreement, the article would not belong to him and there could be no question of co-ownership. The Matrimonial Homes (Family Protection)(Scotland) Act 1981 already provides the other spouse with protection in relation to such goods, first by allowing him or her to pay instalments and recover part or all of the cost,[1] and secondly by enabling him or her to apply to the court for an order allowing possession or use of the article.[2] In the case of hire-purchase and conditional sale agreements, ownership passes to the buyer once all the instalments have been met, and at that time a co-ownership scheme would operate to make both spouses co-owners.

18. We shall assume that the scheme would not apply to articles which one spouse owned only as trustee, or to articles owned by one spouse along with a third party.

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[1] S.2(5).

[2] S.3(2).

Effects of scheme

19. When a scheme on these lines first came into force there would be statutory transfers of the goods in most households throughout the country. Thereafter co-ownership would arise mainly on two occasions. One would be marriage, and the other would be the acquisition of a new household article. On completion of the statutory transfer the spouses would hold as equal proprietors in common. The transfer would be permanent and would be unaffected by subsequent separation or subsequent use of the articles for non-household purposes.

Opting out

20. It would seem to be necessary to provide for opting out by an acquiring spouse. There could be no justification for forcing co-ownership on an acquiring spouse against his or her will. If a co-ownership scheme were to apply to goods owned at the time when implementing legislation came into force, or owned at the time of the marriage, or acquired by gift or succession from a third party during the marriage, it would also seem to be desirable to provide for unilateral opting out by the owner spouse in relation to these goods.

21. If the scheme were not to exclude articles of outstanding financial or sentimental value, the question would arise whether the owner spouse should be allowed to opt out in relation to them. Examples might be a valuable piece of household furniture, or a distinguished painting, or a set of antiquarian books, or a grandfather clock inherited by the owner spouse, or a trophy awarded for athletic prowess. It is arguable that articles falling within these categories are distinct, even if not functionally distinct, from the articles typically comprising household goods, and that the owner spouse should be free to exclude co-ownership. It is also arguable, of course, that a category of goods of "outstanding financial or sentimental value" would be so inherently vague as to be unworkable.

22. A prescribed form would not seem to be necessary for opting out. A simple statement, signed and witnessed, would probably be sufficient. Except in the case of pre-marriage and pre-scheme opting out, where the sheer quantity of goods might make this impractical, the individual article or articles would have to be specified. Two specialities would arise where the opting out was by the owner spouse. One is that the statement would have to be intimated to the other spouse on pain of invalidity.[1] This would be necessary because the other spouse would almost certainly own articles equally available for exclusion and might wish to follow the first spouse's example. The other is that the mechanism of a notice of revocation should be available for a subsequent change of mind.

23. Usually the opting out statement would have to be signed before co-ownership operated. For some kinds of opting out - by the acquiring spouse, and by the owner spouse on the grounds of gift or succession or outstanding value - this might not always be possible. For these two kinds of opting out it should perhaps be possible to exclude the scheme at any time within the first three months of statutory co-ownership. The effect of doing so then would be to reverse the statutory transfer, but not retrospectively. It would follow, of course, that a spouse who was not well-advised or legally aware would often lose through inadvertence the opportunity of opting out. This is probably a defect inherent in any provision for opting out.

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[1] Some method would have to be devised for obtaining evidence of intimation. For example, the other spouse might be required to sign the statement or, if he or she refused, there might have to be intimation in the presence of witnesses. Whether all this would conduce to domestic harmony seems highly doubtful.

24. So far the discussion has been confined to unilateral opting out of the kind proposed for the home scheme. A further question is whether it should be possible for the spouses to exclude the scheme in whole or in part by agreement, without specifying particular articles. It might be argued in support of this that household goods would be too numerous and diverse for piecemeal opting out to be sufficient. It would be unreasonable to require a fresh statement every time a new household article was acquired. Moreover, as it would be highly likely that both spouses would own articles and so be owner spouses, their bargaining strength would be more evenly matched than in the case of the matrimonial home, and the case for strict limits on contracting out would be correspondingly weaker. More fundamentally, it would be difficult to justify a scheme which forced co-ownership on spouses where neither of them wished it, and which did not allow them to exclude it quite generally if they so wished. It is important to note in this context that co-ownership of goods would come about automatically, whereas co-ownership of the home would come about only where the acquiring spouse "opted in" by registering a matrimonial home notice. A co-ownership scheme might, therefore, provide (1) that the spouses should be free to contract out of the scheme at any time (perhaps by means of a simple written agreement, signed and witnessed); (2) that they should be able to do so either in whole or in part, either with reference to existing and future goods or with reference only to future acquisitions; and (3) that they should be able to opt back into the statutory scheme by written agreement at any time. The governing principle of such a solution would be that if the spouses care to regulate the ownership of their household goods by written agreement they should be completely free to do so (subject to the general law on the protection of creditors from gratuitous alienations). The statutory co-ownership scheme would be designed for those couples - doubtless the vast majority - who do not trouble to regulate the ownership of their household goods by written agreement.

25. If goods acquired by gift or inheritance from a third party were not excluded from the scheme altogether, it would be arguable that a donor (including a testator) should be free to exclude co-ownership in relation to the article or articles donated.[1] Exclusion would require to be in writing.

Supervening events

26. General. At the moment when a co-ownership scheme came into force, the household goods of all married couples who had not opted out would, by operation of law, become co-owned. Thereafter, it would be unusual for an article of household goods to be the property of one spouse only for any length of time before becoming co-owned. Where interim ownership of one spouse did arise it would be because, for example, he acquired the articles for use in his office or in a second house and only later moved it to the matrimonial home. During any such period of interim ownership the acquiring spouse would have no rights whatsoever. The owner spouse would be completely free to give away or sell the article. If he died or was sequestrated the articles would form part of his estate and the other spouse would have no claim.

27. The effect of the statutory transfer would be to make the spouses equal owners in common. They would be in the same position as voluntary co-owners of household goods under the present law.[2]

28. Separation. Where a couple decide to separate permanently they usually divide up the household goods. The effect

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[1] See the discussion of this question in relation to the matrimonial home at Chapter 1, para. 42, of this Appendix.

[2] See Part VI, paras. 6.5 to 6.8, for a discussion of possible improvements to the present law. Although the discussion is in the context of a presumption of co-ownership of household goods, similar questions would arise if there were to be a scheme of statutory co-ownership.

of a division of the goods would be to take them out of the co-ownership scheme: in effect each spouse would be giving the other his or her share in some of the goods. Co-ownership would not usually apply to goods acquired after separation. This is because the goods would not be part of the household goods of a home used by both spouses as their principal family residence. Difficulties could arise, however, if there were temporary resumptions of cohabitation after separation. If, for example, the spouses had been separated for two years, should the husband acquire a half share in the furniture of the wife's new home merely because there was an unsuccessful attempt at reconciliation, during which the wife's home was used for, say, three weeks by both spouses as their principal family residence? This could be avoided if the wife made it a condition of resuming cohabitation that the husband renounced in writing his statutory rights to co-ownership of the goods: but she might not be legally advised, and might not be aware of the legal consequences of allowing her house to be used as the matrimonial home. The answer to this problem might be to provide that co-ownership would not arise from use of a home as the spouses' family residence during a short temporary resumption of cohabitation after a period of separation of some length. A short temporary resumption of cohabitation could be defined, for example, as any period when, having ceased to cohabit, in circumstances indicating an intention by one or both of the parties to terminate their relationship, for a continuous period of 90 days or more, the parties have resumed cohabitation for a period of 90 days or less. This formula is similar to the one suggested in the home scheme.[1] As noted there, it would not solve all the problems, but it may be that no formula could.

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[1] Chapter 1, para. 49 of this Appendix.

29. Divorce. On divorce the parties cease to be spouses, and a co-ownership scheme would cease to operate for subsequent acquisitions - even in the unlikely event that the parties continued, or resumed, cohabitation. The court's powers to award financial provision on divorce would operate just as if co-ownership of the household goods had resulted from gifts by one spouse to the other. This would be so both under the present law and under the rules which we have recommended in our Report on Aliment and Financial Provision.[1]

30. Death. Once a co-ownership scheme was in operation, a spouse would die owning a half share in all the household goods which had not been contracted out. Normally this half share would pass to the surviving spouse either under the will of the predeceasing spouse or by virtue of prior rights and legal rights.[2]

31. Sequestration and diligence. On sequestration, a spouse's share in the household goods would vest in his trustee along with the rest of the estate. This is equally the case under the present law. The effect of co-ownership on diligence is a matter which we are examining in the course of our work on that subject. Under the present law co-owned goods are exempt from personal poinding and poinding of the ground.[3]

32. No consideration would be given for the statutory transfer of household goods. To remove any doubt as to whether the transfer could be reduced by the creditors of the owner spouse as a gratuitous alienation at common law or under

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

[2] See para. 6.6 above.

[3] Fleming v. Twaddle (1828) 7 S. 92; Graham Stewart Diligence p.346. See Lucas's Trs. v. Campbell & Scott (1894) 21 R. 1096 (arrestment).

the Bankruptcy Act 1621, or as an inter-spousal donation under section 5 of the Married Women's Property (Scotland) Act 1920, it might be desirable to provide that the statutory transfer should not be subject to reduction on these grounds.

Miscellaneous difficulties

33. Inter-spousal gifts. Under a scheme of the type outlined above, household goods could not easily be the subject of a gift from one spouse to the other so long as the spouses were cohabiting. This is because as soon as the donee spouse made the gift generally available, statutory co-ownership would operate to reinvest the donor spouse with a half share. It would be possible to exclude inter-spousal gifts from a co-ownership scheme. This would, however, detract from the uniformity of the scheme. It could also be argued that no special provision was necessary, because a donor spouse who considered this a matter of overwhelming importance could, as the acquiring spouse, exclude co-ownership by contracting out within three months of the gift.[1] On the other hand it might be argued that this would be a somewhat byzantine solution to a simple problem and that it would be simpler, and more in accordance with the wishes of the spouses, to exclude inter-spousal gifts altogether.

34. Successive purchases. No special provision to enable one spouse to exact a contribution towards the purchase of a replacement item forming part of the household goods would seem to be necessary.[2] It is unusual for household goods to be sold to fund the purchase of a replacement, and even more

[1] See paras. 20 and 23 above.

[2] See the discussion of this problem, in relation to the matrimonial home, in Chapter 1, paras. 64 and 65, of this Appendix.

unusual for the sale price to be high. Where the sale price is high, the article is usually of disproportionately high financial value in relation to its household function, and the owner spouse might be able to contract out in respect of its replacement.[1]

35. Incapacity. The difficulties which might arise where one spouse was in minority or insane have been discussed in relation to the home scheme.[2] Similar solutions could be adopted in a scheme for co-ownership of the household goods. In short, for the purposes of opting out of the co-ownership scheme a minor spouse could be treated as of full age. As the statutory transfer effecting co-ownership would take place automatically by operation of law, there would seem to be no need to provide for it to have effect as if the owner spouse were of full age and of full mental capacity.

36. Unmarried cohabiting couples. It would be possible to adapt the goods scheme so that it would apply to unmarried cohabiting couples. This, however, would give rise to the same difficulties and dangers as have already been considered in relation to the home scheme.[3] For the reasons given there, our provisional view is that the goods scheme could not apply to unmarried cohabiting couples.

Caravans and houseboats

37. Caravans and houseboats rest uneasily on the boundary between the home scheme and the goods scheme, excluded from the former because not heritable[4] and from the latter because

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[1] See para. 21 above.

[2] See paras. 71 to 74 of Chapter 1 of this Appendix.

[3] See Chapter 1, para. 76, of this Appendix.

[4] Chapter 1, para. 15, of this Appendix.

not in the ordinary sense household goods. The household goods within caravans and houseboats used as a principal family residence would, however, be subject to statutory co-ownership if a goods scheme were introduced,[1] and it might seem wrong to exclude the residence itself. On the other hand, caravans and houseboats are usually of much greater financial value than household goods, and the danger of unfairness in certain cases would be more acute.

38. If co-ownership of caravans and houseboats were introduced, it would be necessary to consider how this should be done. Caravans and houseboats are moveable, and it would therefore be easier to base co-ownership on the goods scheme. A possible way of doing this would be as follows. Upon the satisfaction of the undernoted conditions, any caravan or houseboat would become, by operation of law, the common property of both spouses as equal co-owners. The conditions would be:-

(a) that the caravan or houseboat was a matrimonial home; and

(b) that the caravan or houseboat would, apart from the scheme, be owned wholly by one spouse or by both spouses but in unequal shares.

39. In most other respects, too, the goods scheme could be applied to caravans and houseboats. There might, however, have to be special modifications in various respects. Should, for example, any exclusion, or power to opt out, in relation to goods of outstanding financial value apply? What rules of private international law would apply, given that a caravan or houseboat could easily be moved to England or some other country? Would there need to be provision for a forced

[1] Because caravans and houseboats are matrimonial homes. See para. 13 above.

contribution to a successive home, of the type discussed in relation to the home scheme, but tentatively rejected as unnecessary in relation to the goods scheme? Should there be any special provision for accretion on survivorship? We have come to no provisional conclusion on any of these questions.