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October 17, 1973

RIGHTS OF OCCUPATION
OF A NON-OWNING SPOUSE IN THE MATRIMONIAL HOME

I
INTRODUCTION

The purpose of this memorandum is to consider the nature of "right" of occupation in a matrimonial home which accrues to the non-owning spouse. In this regard, a brief overview will be made of the evolution in the common law of what has come to be regarded as the "deserted wife's equity". This equity has been the rationale behind much of the development through both case law and legislation of provisions of granting to a wife who has no proprietary interest in the matrimonial home, an occupational right as against her husband who has either deserted her, or is living apart from her as a result of his misconduct.

An analysis of the nature and extent of the right of the non-owning spouse to occupy the matrimonial home will involve a brief survey of the development of the law in England through judicial decisions emanating from a consideration of the Married Women's Property Act 1882,¹ and subsequent legislative enactments.

A similar tracing will be made of legislation in Ontario,² and cases based thereupon in order to see the developments in one Canadian jurisdiction of the "deserted wife's equity".

¹45 & 46 Vict., c. 75.

²R.S.O. 1970, c. 262, s. 13(1).

Following the foregoing, a survey will be made of the present legal situation in Alberta with regard being given to the effect of restraining or non-molestation orders under the powers of the Divorce Act,³ and Judicature Act⁴ together with the effects of the Dower Act⁵ upon rights of occupation and disposition of the matrimonial home.

The tracing of developments as outlined above will attempt to raise the issue, which is an integral part of this memorandum, namely; whether occupational "rights" in the matrimonial home are an incident of matrimonial property law, or whether such rights fall more squarely into the areas of family law dealing with maintenance and support obligations.

The statements of the existing legal situation in Alberta will be followed by a return to the recent statutory developments in England and New Zealand with a view to seeing how these jurisdictions have attempted to deal with the issue of occupational rights in the matrimonial home while retaining the general matrimonial regime of separateness of property.

The concluding portions of the memorandum will involve an analysis of how legislative changes such as those recently introduced in England and New Zealand might be applied to the present Alberta situation of separateness of property

³R.S.C. 1970, c. D-8.

⁴R.S.A. 1970, c. 193.

⁵R.S.A. 1970, c. 114.

in order to harmonize the issue of rights of occupation in the matrimonial home with the present day realities of marital life. Also, regard will be had to the effect on the rights of occupation in the matrimonial home which might result from a number of possible changes in the existing matrimonial property regime; such changes including a legislative enactment creating a deemed co-ownership in the matrimonial home, or a new matrimonial property regime of a deferred participation of acquisitions.

II

EVOLUTION AND DEVELOPMENT OF THE DESERTED WIFE'S EQUITY

1. The Nature of the "Equity"

Although minor reference will be made in this memorandum to cases dealing with joint ownership, the main portions of the memorandum will consider the nature and scope of the deserted wife's equity from the standpoint of title being vested in the husband alone. Such a situation implies that the wife depends upon her husband for the roof over her head and does not have any proprietary interest in the matrimonial home. However, the wife has always had a right to protection in relation to the matrimonial home and it is in this context that her "equity" in it has arisen.

The "deserted wife's equity" or right of occupation, derives from her common law right to pledge her husband's credit for necessities which in turn stems from the irrebuttable presumption of law that it is a husband's duty to protect and support his wife. The result is that

the right of occupation, such as it exists, is personal to the wife and cannot be assigned. There is, on the other hand, no corresponding right in the husband, and any rights he may have stemming from the principles relating to consortium will not serve to support a claim by him to possession. In regard to the foregoing, it has been said that;

By virtue of marriage, a wife acquired the right to two things; the right of cohabitation with her husband and the right to support according to her husband's state and condition. She could obtain against him, from the ecclesiastical courts, an order for restitution of conjugal rights which, in its usual form, ordered him to take her home and receive her as his wife and render her conjugal rights--an order which could be enforced by a husband for non-obedience. What the wife gained by the order was the provision for a suitable dwelling house and maintenance coupled with the obligation of the husband to live with her: *Weldon v. Weldon*, (1883) 9 T.D. 52 at page 56, per Sir James Hannen, T. The essential point is that the wife had no right to be provided with, or kept in, any particular home; her rights were not rights *in rem*, nor were they related to any particular property; they were purely person rights against her husband enforceable by proceedings against his person, which he could satisfy by rendering her conjugal rights, i.e., by living with her and supporting her in a suitable home. The jurisdiction of the ecclesiastical courts has long since given way to that of the High Court, there have been changes of jurisdiction, of remedy and of nomenclature but nothing in the various reforms which have taken place has altered the fundamental character of the wife's rights. They remain the right to cohabitation and support, and no more now than before . . . has she by virtue of her married status, any specific right to be provided with or maintained in any particular property.⁶

⁶ *National Provincial Bank Ltd. v. Ainsworth* [1965] 2 All E.R. 472, Per, Lord Wilberforce at p. 492.

Having looked at the general *precepts* to the right of occupation in the matrimonial home, one must consider when this right arises and in what circumstances and upon what conditions it may be terminated.

At common law the right of occupation in the wife stems from her gaining upon being deserted by her husband the irrevocable right to pledge his credit for necessities. This irrevocable right or authority arose in either of two ways: When the spouses separated due to marital misconduct on the part of the husband, or when the husband deserted the wife. From the foregoing, it would seem that the right of occupation arises upon or depends upon desertion. This would appear to be logical in view of the reciprocal duties upon husband and wife to cohabit which arises from them being legally married and the implied authority in each spouse as a consequence of marriage to enter and reside in matrimonial home. Some writers,⁷ however, have contended that although the right of occupation is made irrevocable upon the desertion, the right is based upon marital status, and comes into existence as a consequence of the marriage ceremony. This issue does not seem to have been clarified by cases dealing with the rights of occupation in the matrimonial home.⁸

⁷See Bora Laskin, "The Deserted Wife's Equity in the Matrimonial Home: A Dissent", (1961-62) 14 Univ. of Tor. L.J. 67; and F. R. Crame, "After the Deserted Wife's Licence; Part I: The Present Law", (1965) 29 Conveyancer 254.

⁸e.g., see *Lloyds Bank Ltd. v. Oliver's Trustee and Another* [1953] 2 All E.R. 1443.

2. Emergence of the Deserted Wife's Equity in England

Having looked briefly at the underlying rationale for the rights of a deserted wife to occupation of the matrimonial home, an analysis of the development of the law on this subject in England will now be undertaken.

The effects of the utilitarian school of ideas propounded in part by John Stewart Mill coupled with the effects of the Industrial Revolution served to give women in England a large degree of economic emancipation in the latter half of the nineteenth century. As a result of such emancipation, the need emerged for legislation which would secure to married women some measure of independence from the husbands and the effects of the common law which vested virtually complete control of the economic aspects of married life in the husband.

The Married Women's Property Act, 1882,⁹ was a legislative attempt to protect "against the effects of the common law those married women who were gainfully employed or enjoying some inherited wealth".¹⁰ Section 17 of this statute is of relevance to the issue of occupational rights in the matrimonial home and in an abbreviated fashion it provides that;

In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way . . . and the judge may make such order with respect

⁹ 45 & 46 Vict., c. 75.

¹⁰ O. Kahn-Freund, "Recent Legislation on Matrimonial Property", (1970) 33 Mod. Law Rev. 601.

to the property in dispute . . . as
he shall think fit. . . .

It is apparent that section 17 serves to create a summary procedure for the adjudication by a court upon conflicting claims of husband and wife relating to the matrimonial home and other matrimonial property. The court is vested with a wide discretionary power which is to be exercised by the court in order to prevent the exercise of proprietary rights by the property-owning spouse in such a manner as to avoid or run contrary to his or her matrimonial duties.

Taken by itself, the section does not serve to create a right of occupation in the matrimonial home. Such a right must be and generally is deemed to flow from the husband's duty to support the wife and the "equity" or occupational right will arise upon the wife being deserted.

The wide discretionary powers conferred upon a court by section 17 served to create a series of cases in England spanning the first half of the 20th century and culminating in the decision of the House of Lords in *National Provincial Bank Ltd. v. Ainsworth*,¹¹ in which the limits of judicial discretion under section 17 as well as the nature of the right of a deserted spouse to occupy the matrimonial home were given a restricted meaning, a matter to be discussed more fully after the development of the law in England through application of section 17 of the Married Women's Property Act has been summarized.

¹¹[1965] 2 All E.R. 472 (H. of L.).

3. Section 17 Cases Prior to 1952 and Rent Act Cases

It is to be presumed from the outset and throughout this summary that the wife neither owns the matrimonial home nor has contributed in a materially financial way to its acquisition.¹² In such a case, she is dependent upon the husband to provide her with shelter and has never had, by virtue of her status as wife, any property in the matrimonial home (i.e., no proprietary right in respect of the property). However, the earlier discussion of the interspousal duties attaching as a consequence of marriage has served to give the non-owning wife protection in relation to the matrimonial home; such protection being established by two main series of cases: those dealing with section 17 of the Married Women's Property Act, 1882, and those dealing with situations of statutory tendencies under English Rent Act legislation.

As noted earlier, the wide scope of section 17 and the wide discretionary power given to a judge to make such order "as he thinks fit" has served to see the invocation of the section and its procedures by a non-owning wife who wishes to prevent her husband from evicting her from the matrimonial home. This section was employed in the case of *Hill v. Hill*¹³ wherein an injunction was granted against

¹²This assumption avoids the necessity of considering the effect of such decisions as *Pettitt v. Pettitt* [1969] 2 All E.R. 385 and *Gissing v. Gissing* [1970] 2 All E.R. 782 in England and *Trueman v. Trueman* [1971] 2 W.W.R. 688 (Alta. C.A.) and the recent decision of the Supreme Court of Canada in *Murdoch v. Murdoch* wherein the issue of whether contribution by the non-owning spouse to the acquisition of matrimonial property or its improvement will entitle that spouse to a beneficial or equitable share in the property.

¹³[1916] W.N. 59.

a wife ordering her to leave the matrimonial home on the basis that she was taking the first steps to prevent its sale. The judge, however, suspended the operation of the injunction until suitable alternative accommodation was provided by the husband for his wife and children.

The case of *Hutchinson v. Hutchinson*¹⁴ is a further illustration of the position created by section 17 of the Married Women's Property Act, namely, the inability of the husband to force his wife to leave the matrimonial home. In this case, a judicial separation order was in force between the parties at the time of the application under the Act and the husband wanted to obtain possession of the matrimonial home. The husband applied under section 17 for an order for possession and based part of his argument on the ground that a decree of judicial separation, being in force, prevented the judge exercising his discretion otherwise than in the husband's favour. In exercising his discretion in the wife's favour the judge disagreed with this argument and held that since the relationship of marriage still subsisted, his discretion was unfettered.

In the case of *Lee v. Lee*,¹⁵ an order was issued under section 17 restraining a husband from selling the matrimonial home until he provided suitable alternative accommodation for his wife and their three children.

The Court of Appeal in the case of *Stewart v. Stewart*¹⁶ considered an order which had been granted under section 17

¹⁴ [1947] 2 All E.R. 792.

¹⁵ [1952] 1 All E.R. 1299.

¹⁶ [1947] 2 All E. R. 813.

whereby a husband was granted possession of premises that belonged to him where he had been cohabiting with his wife. Divorce proceedings were pending based on allegations of the wife's adultery and the judge at first instance had made an order for possession which the Court of Appeal refused to interfere with on the basis of his exercise of discretion. However, the Court of Appeal made it clear that in their opinion the jurisdiction for the granting of the order under section 17 was discretionary. In this regard Tucker, L.J. stated

There is jurisdiction in the County Court judge under this section to make an order for possession at the instance of husband or wife against the other spouse, but the cases show that, whether in that or some other form of proceeding, the court will be very slow to make any order dealing with the legal rights of the parties which may have the effect of depriving either the wife or the husband of her or his right to occupy the matrimonial home. The cases show that, whether it is an injunction that is being granted or some other form of relief, great care must be taken in a normal case where there is a subsisting marriage between husband and wife, the parties hitherto living together, and no order having been made by the Divorce Court or by justices giving the one the right to live apart from the other, to see that the rights of the husband or wife should be safeguarded in the form of the order made.¹⁷

Since 1944,¹⁸ there has been a series of English cases dealing with rights of occupation under rent restriction

¹⁷*Ibid* at p. 814.

¹⁸*Brown v. Draper*, [1944] 1 All E.R. 246.

legislation where the husband as a statutory tenant has attempted to get his wife out of possession of the matrimonial home by virtue of surrendering or otherwise determining his tenancy. In taking steps to protect deserted wives in possession of these premises under rent restriction, courts have resorted to the device of holding that the husband-tenant cannot put an end to tenancy, even by such acts as delivering the keys to the landlord, so long as his wife remains on the premises. It has been held that the husband remains there by her and so long as he so remains, whatever else he does or says, the tenancy will remain. An example of this kind of case is *Middleton v. Baldock*,¹⁹ in which the Court of Appeal considered whether a wife could be turned out of rented premises on the ground that the real statutory tenant (her husband) no longer had an interest in the premises. In the case, the husband, a statutory tenant, had admitted the landlord's title to the property in an attempt to get his wife out of the premises. It was held in the Court of Appeal that this attempt by the husband to get the wife out of possession did not defeat the wife's right to stay in the premises if she assumed all the responsibilities of the statutory tenant. The court held that the wife's right to remain in possession could only be terminated by an order under section 17 of the Married Women's Property Act, 1882, or her voluntary removal from the premises. The case of *Old Gate Estates v. Alexander*²⁰ is illustrative of the fact that in rent restrictions

¹⁹ [1950] 1 All E.R. 708.

²⁰ [1949] 2 All E.R. 822, see also *Wabe v. Taylor* [1952] 2 All E.R. 420.

circumstances the wife can take over as statutory tenant. Here, the husband, who was the statutory tenant, deserted his wife and told his landlord that he had given up possession and ceased to pay rent. At a later date the husband returned to his wife and the landlord brought an action against him on the ground that he had forfeited the protection of the Rent Restrictions Act by his earlier actions in respect of the property. The husband's defense was that his wife had paid the rent and acted in all respects as a statutory tenant and that in such circumstances he had not lost the protection of the Rent Restriction Acts. This contention was upheld at the Court of Appeal which observed that since the wife was lawfully in possession of the premises, she could pay the rent and perform the tenancy obligations on behalf of her husband.

It should be noted that the rent restriction cases are limited in their scope and application to the deserted wife's equity, and although the intent of the courts was to work out an empirical solution to prevent injustice being done and to take steps to protect deserted wives in possession of such premises, it is also true that the technique used by the courts is the opposite of that which is an issue in applications under section 17 of the Married Women's Property Act, 1882, namely, where a wife is deserted and left in possession of the matrimonial home her application or defense to an application by her husband under the section will be based upon her assertion of a right to possession that is distinct and separate from that of her husband.

The preceding brief analysis of the cases under section 17 of the Married Women's Property Act, 1882, as well as the

rent restriction cases would indicate that courts in England have recognized some sort of right to possession in the matrimonial home accruing to a deserted spouse. The issue which arises from this as well as the consideration of the common law duties of consortium and access to the matrimonial home which accrued to man and wife as a consequence of marriage is the nature and extent of the right of occupation in the matrimonial home which vests in the non-owning spouse. In this regard it has been said;

The fact that a wife can bring proceedings against her husband in relation to the matrimonial home, or defend herself in any such proceedings that he may bring must mean that she is in possession of some kind of right as against her husband. If she is deserted by her husband, any proceedings under section 17 will invariably be decided in her favour and she will be able to stay in her home at least until other favourable accommodation is provided. It follows that she has a right to stay, even if that right must be established in a court; she cannot be turned out. This much is well established. But problems have arisen over the *extent* of her right. Is it a personal right between husband and wife, that is, a right which avails a wife as against her husband but only against him? Or does it avail her against other people, e.g., perspective successors in title of her husband? In view of cases arising on these points it became necessary to determine what right, if any, a wife has in a matrimonial home if the husband deserts her.²¹

²¹Margaret Buckley "Equity Deserts the Wife", (1967) 20 Current Legal Problems 144 at pp. 146-147.

In the light of the foregoing quotation and the issues raised therein, it is now relevant to consider the evolution of the license theory or equity theory which came out from the number of cases heard by the Court of Appeal in England, particularly the judgment of Denning L.J. in the case of *Bendall v. McWhirter*.²² In that case, the husband had deserted his wife, but left her in possession of the matrimonial home and gave her possession of the furniture in return for his being liable for only a nominal amount of maintenance. The wife subsequently obtained such maintenance order on the ground of his desertion. A year later, however, the husband was adjudged bankrupt with the result that the matrimonial home became vested in his trustee in bankruptcy. The wife refused to give up possession of the property, whereupon the trustee brought an action against her for possession of the property and of the furniture. It was held by the County Court Judge that an order for possession in the trustee should issue on the ground that the wife's license to remain in the home was determined when the property vested in the trustee. The Court of Appeal however came to the opposite conclusion. The majority of the court, Romer and Somervell L.JJ. held in favour of the wife on the basis that the bankrupt's proprietary rights were "subject to a clog or fetter, that the house had an occupant whom he could not of his own volition eject."²³ Since the trustee took no better title to the property than the bankrupt husband possessed, he took subject to the clog or fetter

²²[1952] 1 All E.R. 1307.

²³*Ibid* at p. 1316.

of an irrevocable license by which he was bound.

Whereas the judgment of the majority of the court depended upon the position of the husband's trustee in bankruptcy, Denning L.J. considered that the deserted wife had a right to occupy the matrimonial home which resembled her right to pledge her husband's credit for necessities, and which flowed from the status of marriage coupled with the fact of separation and her husband's misconduct. He considered that the wife's right was an equity and as the trustee in bankruptcy took subject to all equities and liabilities, he took subject to the right of occupation in the wife and was no more able to revoke it than was the husband. In this regard he stated;

. . . the position of the wife is such that she is a licensee with special right under which her husband cannot turn her out except by an order of the court.²⁴

Denning L.J. associated the wife's position with that of a contractual licensee and came to the conclusion that the license of the wife was binding on any devisee of the licensor, being the husband, except a purchaser for value without notice. Such a license is irrevocable by the husband during the subsistence of the marriage, and likewise by his trustee in bankruptcy, although it might be terminated at the discretion of the court under section 17 of the Married Women's Property Act.

The license theory enunciated by Lord Denning was the basis for a number of cases in England which either put glosses

²⁴*Ibid.* at p. 1311.

on it or followed it and created a much stronger position for a deserted wife in terms of her rights of occupation in the matrimonial home then had been accorded to her prior to 1952.

In *Ferris v. Weaven*,²⁵ a husband deserted his wife but allowed her to stay on in the matrimonial home. Many years later he wished to obtain possession of the matrimonial home in order to sell it and consequently he made a nominal sham sale to his brother-in-law who knew of the separation agreement entered into between the husband and his wife and of the wife being in possession of the matrimonial home. The sham sale was clearly an attempt to defeat the wife's rights by placing the brother-in-law in a position to claim possession of the property. It was held that the purchaser, being the brother-in-law, had actual notice of the wife's interest and, therefore, took subject to her interest. The court then exercised its discretion under section 17 of the Married Women's Property Act, 1882, and favoured the wife on the basis that the purchaser knew of and fully appreciated her position.

The position of a purchaser with notice of a deserted wife being in possession was again considered in the case of *Jess B. Woodcock & Sons Ltd. v. Hobbs*.²⁶ This case differed from *Ferris v. Weaven* (*supra*) in that the question arose as to whether he bona fide purchaser with notice of the wife's occupation of the matrimonial home was entitled

²⁵ [1952] 2 All E.R. 233.

²⁶ [1955] 1 All E.R. 445.

to an order for possession as against her. However the court found that mere proof of notice of the wife's right, whether actual or constructive, did not end the matter. Denning L.J. indicated that the court still had a discretionary power and stated that;

The deserted wife has no right to stay indefinitely in the house. Her right is only to stay until such time as the court in its discretion orders her to leave. That is the only right she has against her husband, and it is the only right she has against his successor. The court always has a discretion in the matter.²⁷

It is now necessary to consider a number of cases which have created a loss on the license theory of Denning L.J. The cases referred to previously have dealt with the situation where the husband deserted the wife and subsequent thereto attempted to dispose of his property. The cases now to be considered involve the claim of a person or persons against a wife where the husband had taken certain actions in order to give those persons a beneficial or equitable interest in the property prior to deserting his wife. In *Lloyds Bank Ltd. v. Oliver's Trustee*,²⁸ the husband executed a legal mortgage on the matrimonial home in which he was living with his wife. A number of years later, he deserted his wife who remained in possession of the matrimonial home. Subsequently, the husband became bankrupt, and the mortgagee claimed possession of the premises from

²⁷*Ibid* at p. 449.

²⁸[1953] 1 W.L.R. 1460.

the wife. It was held by Upjohn J. that the bank's claim must succeed because the wife's right to remain in the home does not arise until she is deserted. Therefore, so far as third parties are concerned, the priorities will be determined from the moment of desertion. The wife's right to remain on the premises must be subject to any rights existing at the time of the desertion, and since the legal mortgage in this situation was executed prior to her being deserted, the mortgagee's right to possession took priority over that of the wife.

A similar result was arrived at in the case of *Barclays Bank Ltd v. Bird*,²⁹ where the facts were almost identical to *Lloyds Bank Ltd. v. Oliver's Trustee*, (*supra*), except that the husband had executed an equitable mortgage. In following the decision in the *Lloyds Bank* case, the court awarded possession to the mortgagee as holding a prior equitable interest to that of the wife at the time of the wife being deserted.

In *Westminster Bank Ltd. v. Lee*³⁰ the husband had deserted his wife in September of 1948 and in November he created a mortgage of the matrimonial home in favour of the bank in order to secure his overdraft. The bank was unaware, at the time the mortgage was created, that the husband had deserted his wife, and it was three years later when the bank attempted to enforce the mortgage against the husband, which involved dispossessing the wife from her occupation of the matrimonial home. It was

²⁹ [1954] 1 All E.R. 449.

³⁰ [1955] 2 All E.R. 883.

held by Upjohn J. that the bank was to be given possession. His decision is important for two reasons; namely, if the wife's right is enforceable against the purchaser with notice, such right is not an equitable estate or interest but a mere equity over which subsequent equitable interest or a subsequent legal interest will take priority unless the purchaser has notice of such equity. Secondly, the rules regarding constructive notice in reference to land dealings have no application to the deserted wife's right to remain in occupation of the matrimonial home.

From the foregoing analysis it would appear that the result of cases such as *Bendall v. McWhirter*³¹ and *Jess B. Woodcock and Sons Ltd. v. Hobbs*³² was to give to the deserted wife a real equitable estate in the matrimonial home which was determinable only at the discretion of the court. It also appeared that the wife's right would be enforceable against everyone except a bona fide purchaser for value of a legal or equitable estate or interest in the matrimonial home without actual or constructive notice of her right to possession.

It is to be noted that when the deserted wife's right to occupation of the matrimonial home was first recognized, it was based on procedural grounds. The husband could not sue his wife in tort nor in trespass. He could only apply for possession under section 17 of the Married Women's Property Act, 1882, and under such section

³¹*Supra*, note 22.

³²*Supra*, note 26.

the court had a discretion of whether or not to order the wife out. However, in England by the Law Reform (Husband and Wife) Act, 1962, the interspousal tort immunity was removed. It was on this basis that Denning L.J. had to consider the nature of the deserted wife's equity in 1964.³³ The facts in the case of *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.*³⁴ were that the husband deserted his wife and left her and their four children in the matrimonial home. The wife subsequently obtained a decree of judicial separation and alimony on the basis that she could stay in the matrimonial home free of rent. The husband then went to live with his mother, and incorporated his business into a company and conveyed both its premises and the matrimonial home to the company. The company later charged both premises to the bank who did not know of the husband's desertion. Some time later, the bank called in the money secured by the charge, saying that in the event of non-payment they would exercise their power to sell the matrimonial home. It is to be noted that the property was registered land, and the bank's charge on it had been entered in the charges register when it was made. The bank brought a summons for possession against the wife when her husband failed to satisfy their claim, as the first step towards selling the property. The wife claimed the protection of section 70 of the Land Registration Act, 1925, which provides that registered land is subject to certain "over-riding interests", one of which, by subsection (1), paragraph (g)

³³*National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1964] Ch. 665..

³⁴*Ibid.*

is "the rights of every person in actual possession of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."

It was held at trial that the wife's right to possession of the matrimonial home was not an overriding interest within the meaning of section 70(1)(g) of the Land Registration Act, 1925. The wife then appealed to the Court of Appeal on the basis that the trial judge's decision had been wrong. The Court of Appeal, consisting of Lord Denning M.R., and Russell and Donovan L.JJ., rendered a majority judgment in favour of the wife. Lord Denning took the opportunity once again to expound the theory that the wife was a licensee, and in this particular case he also added that the wife's license was coupled with an equity. He stated that the right of the deserted wife

. . . must now be based, not on procedural grounds, but on the true ground that the husband is presumed to have given authority to his wife to remain in the matrimonial home--and this is a conclusive presumption which he is not at liberty of his own head to revoke. The right is now so well established that it is not open to question.³⁵

Lord Denning went on to add that;

The wife has no tenancy. She has no legal estate or equitable interest in the land. All that she has is a license. But not a bare license. She has a license coupled

³⁵ *Ibid.* p. 684.

with an equity. It is an equity which the courts will enforce against any successor except a purchaser for value without notice.³⁶

The powerful dissenting judgment of Russell L.J. was an introduction to the reception that the case was later to receive in the House of Lords. He commented that the wife's rights in the matrimonial home are enforceable only against her husband and that the best way to see the nature of her rights in such a case is to look at such rights in relation to unregistered land. In this regard, he felt that certain cases showed that even contractual licensees do not bind successors in title of the licensor where there is a mere personal obligation between the licensor and the licensee, as opposed to an interest in land.

The case was then appealed to the House of Lords and came under the new title of *National Provincial Bank Ltd. v. Ainsworth*.³⁷ The House of Lords was faced with the problem of determining whether the "deserted wife's equity" and the license theory of Lord Denning which was employed in the Court of Appeal to give effect to the "equity" could be mounted upon existing principles of sound matrimonial and property law. The conclusion of the court was that it was not; the rights of a deserted wife were personal rights against her husband which could not operate as a clog or fetter on the title to the property so as to affect its transferability.

³⁶*Ibid* p. 686.

³⁷[1965] 2 All E.R. 472.

In regarding the evolution of the right of a wife to occupy the matrimonial home, Lord Hodson stated;

The matrimonial law did not, however, at any time give the wife any property in the house in which she lived with her husband unless she could rely on a settlement. His duty is to live with his wife and to support her, but she has no proprietary rights in the house by virtue of her status as a wife. She is lawfully there not by reason of any contract or license but simply because she is a wife. If her husband leaves her, the right which she had to be left undisturbed is a personal right and does not attach itself to any specific piece of property which may at a given time be the home in which the spouses lived together. The husband may return or provide accommodation for the wife elsewhere, or the relationship of the spouses may change by the wife losing her right to her husband's consortium and to be maintained by him. So long as she has not forfeited her rights, the courts have often intervened to protect the wife's right to live in the house which she and her husband have occupied together. Proceedings are available under section 17 of the Married Women's Property Act, 1882, which enables questions between husband and wife to be decided in a summary way. The court has intervened by injunction to restrain a husband from entering into a contract for the sale of the house while his wife and children are living there until the husband provided alternative accommodations; see *Lee v. Lee* [1952] 1 All E.R. 1299, where the Court of Appeal confirmed an order of a County Court judge to this effect. Even after a separation has been judicially pronounced and the spouses are released from their obligation to live together, the court has exercised its discretion to make an order in relation to property, since the subsistence of the marriage tie is sufficient to confer jurisdiction:

Hutchinson v. Hutchinson, [1947] 2 All E.R. 792. Questions have arisen in considering the extent of the discretion of the court under section 17 of the Act of 1882, but, broadly speaking, the view is accepted that the court has a discretion to be exercised in the interest of the parties to restrain or postpone the enforcement of legal rights but not to vary agreed or established rights to property in an endeavour to achieve a kind of palm tree justice.³⁸

Lord Hodson went on to consider the equity theory referred to by Lord Denning in the Court of Appeal decision in *Bendall v. McWhirter*³⁹ and commented;

It being conceded that the "equity" is not an equitable interest in the land, I find difficulty in seeing how it can operate so as to affect third parties. The court can protect itself against sham sales (cf. *Ferris v. Weaven* [1952] 2 All E.R. 233, a decision which can be supported on that ground) . . . when there is a genuine transfer there is no reason why the wife's personal rights against her husband which are derived from her status, should enter the field of real property law so as to clog the title of an owner.⁴⁰

Lord Upjohn basically concurred in the findings of Lord Hodson and made some additional comments relating to the position of a wife before and after desertion. In this regard he stated;

³⁸ *Ibid* at p. 477.

³⁹ *Supra*, note 22.

⁴⁰ *Supra*, note 37 at p. 479.

. . . before desertion she has no special rights in the particular house where the spouses are living, and I cannot see why, on principle, any better rights should arise on desertion. Her rights as a wife continue on as before, they are not increased by breach of duty on the part of the husband, but, being in breach himself, he may find it difficult to turn her out of the house where she is lawfully awaiting his return, and the court may prevent the husband by injunction from dealing with his property to the prejudice of the wife without safeguarding her position Then many things may happen; he may offer alternative accommodation to the wife; he may offer her substantial maintenance to go and live elsewhere. . . . Provided the wife's marital rights are adequately safeguarded in some such way, the court would not normally refuse to evict a wife if the husband wants to deal with his property. Or he may return and presume cohabitation when the domestic forum resumes exclusive jurisdiction. Or the wife may change her position. She may commit a matrimonial offence which may lead the court to refuse her the right to continue under her husband's roof; she may obtain . . . a degree of judicial separation which at all events brings the husband's desertion to an end. . . . Such a decree must necessarily be an important, though not conclusive, factor if the husband is seeking to turn his wife out of occupation. Finally, any right on the part of the deserted wife to remain in occupation terminates when the marriage terminates.⁴¹

Based on the preceding statement, Lord Upjohn then continued to consider the nature of the deserted wife's

⁴¹*Ibid* at p. 485.

rights of occupation in the following terms;

The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definitions; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies and the right to remain may change over night by the act or behaviour of either spouse. So, as a matter of broad principle, I am of opinion that the rights of a husband and wife must be regarded as purely personal *inter se* and that these rights as a matter of law do not affect third parties.⁴²

Lord Upjohn went on to agree with the basic decision that the discretionary power conferred upon the court with regard to property disputes and applications concerning them brought under section 17 of the Married Women's Property Act, 1882, were the same as in any other proceeding where the ownership or possession of property is in question. In this regard he accepted the statement of Romer L.J. in the case of *Cobb v. Cobb*, [1955] 2 All E.R. 696 at p. 700 where the Lord Justice stated;

. . . I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under section 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair.

⁴²*Ibid.*

Lord Wilberforce also considered the nature of the deserted wife's right to occupation of the matrimonial home and came to a different conclusion to that reached by Lord Denning in the Court of Appeal. With regard to ascertaining the nature of the wife's rights he stated;

The wife has no specific right against her husband to be provided with any particular house, nor to remain in any particular house. She has a right to cohabitation and support; but, in considering whether the husband should be given possession of property of his, the court will have regard to the duty of the spouses to each other, and the decision it reaches will be based on a consideration of what may be called the matrimonial circumstances. These include such matters as whether the husband can provide alternative accommodation and, if so, whether such accommodation is suitable having regard to the estate and condition of the spouses; whether the husband's conduct amounts to desertion, whether the conduct of the wife has been such as to deprive her of any of her rights against the husband. The order to be made must be fashioned accordingly; it may be that the wife should leave immediately or after a certain period; it may be subject to revision on a change of circumstances.

The conclusion emerges to my mind very clearly from this that the wife's rights as regards to the occupation of her husband's property are essentially of a personal kind; personal in the sense that a decision can only be reached on the basis of considerations essentially dependent on the mutual claims of husband and wife as spouses and as the result of a broad weighing of circumstances and merit. Moreover these rights are at no time definitive, they are provisional and subject to review at any time according as changes take place in the material circumstances and conduct of the parties. On any division, then, which is to be made between property rights on the one

hand and personal rights on the other hand, however broad or penumbral the separating band between these two kinds of rights may be, there can be little doubt where the wife's rights fall. Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities; it is characterized by the reverse of them.

The necessary results of these statements was that the House of Lords decision served to overrule *Bendall v. McWhirter*,⁴⁴ *Street v. Denham*,⁴⁵ *Jess B. Woodcock and Sons Ltd. v. Hobbs*⁴⁶ and *Churcher v. Street*.⁴⁷ The deserted wife's right to occupation of the matrimonial home and to be supported by her husband has been removed from a new sort of proprietary right and placed back to being a right *in personam*. However, the effect of this ruling was that the then existing law was in a very unsatisfactory state particularly with regard to the position of the deserted wife and third parties. Attention to this state of affairs was drawn by Lord Cowan and Lord Upjohn in the *Ainsworth* case by their references to the Report of the Royal Commission on Divorce.⁴⁸

⁴³*Ibid* at p. 494.

⁴⁴*Supra*, note 22.

⁴⁵[1954] 1 All E.R. 532.

⁴⁶*Supra*, note 26.

⁴⁷[1959] 1 All E.R. 23.

⁴⁸Cmnd. 9678 (1956), paras. 664, 685.

There can be little doubt that the doctrine of the "deserted wife's equity" was evolved in England to mitigate the effects of the house shortage which plagued Great Britain in the years following the second World War. However, to describe the rights of the deserted wife as a "clog or fetter" like a "license", and "equity" or a "status of irremovability" merely served to create further problems, particularly in regard to transactions in real property. The new doctrine of the deserted wife's equity prior to its overthrow by the House of Lords left many questions unanswered. These comprise such questions as whether occupation of the matrimonial home would serve, by itself, as notice of the occupier's right. If so, would every intending purchaser or mortgagee finding a house occupied by a woman living without a man be put on inquiry? Also, does the right of occupation arise on marriage, or does it arise when the wife is wrongfully deserted? If the former is the case, then notice of the marriage would be notice of the right; whereas if it is the latter case, a purchaser or mortgagee with notice of the marriage in addition to having to investigate the title to the property, might also be bound to investigate the state of the marriage, including whether it is the wife who is guilty of constructive desertion. Further, the issue of when the wife's right arises would be of importance in determining priorities as to interests in the property. For example, if a mortgage was executed prior to the marriage, the wife would be unprotected even if she is deserted. However, if priorities are to be determined from the date of desertion, this would require an investigation into the marital state of the mortgagor. In this regard Lord Upjohn stated in *Westminster Bank Ltd. v. Lee*,⁴⁹ that

⁴⁹[1955] 2 All E.R. 883.

In my judgment the law does not require an intending purchaser or mortgagee, who has no reason to believe that a wife is deserted to make an inquiry on the footing that it is conceivably possible that she might be; that is not a reasonable inquiry. If the law were otherwise it would mean that every intending purchaser or lender must inquire into the relationship of husband and wife and inquire into matters which are no concern of his and would bring thousands of business transactions into the area of domestic life and ties. This could not be right.⁵⁰

The issue of when the right of occupation in the matrimonial home arises and when it terminates is also of importance. If it is considered that the right arises on desertion rather than from the state of marriage, does such a consideration imply that the right will cease when desertion ends? If such is the case than if a husband returned to the matrimonial home, his trustee in bankruptcy under a *Bendall v. McWhirter* situation could evict both the husband and the wife, although according to that case, he could not do so so long as the wife was deserted. However if the right were to continue after the desertion ceases, a husband might conceivably shelter behind his wife's matrimonial right of occupation. Further, if the right of occupation does not arise until desertion, a trustee could not evict a wife who was deserted by her husband but he could evict a happily married couple. It is interesting to see the bazaar results that could arise from the foregoing type of reasoning. Also it should be noted that no corresponding rights were recorded to the deserted husband in the

⁵⁰ *Ibid* at p. 889.

evolution of the "deserted wife's equity".

From the foregoing, it may be seen that the evolution of the deserted wife's right to remain in the matrimonial home produced a controversy and a conflict between protection for a deserted wife and freedom to alienate property and create security rights. The effect of the decision of the House of Lords in the *Ainsworth* case points to the fact that this kind of controversy

. . . cannot be solved by the trial and error method of judicial legislation [It] requires the intervention of Parliament, that is an open and deliberate decision on policy.⁵¹

It may be seen from the confusion of the law created by the divergent judicial opinions, that if any protection is to be given to the deserted wife, or conversely to a husband should the wife be the owner of the property, such protection should be provided by either the introduction of a new matrimonial property regime, a matter to be considered at a later stage than this memorandum, or a statutory amendment to existing principles of matrimonial property law based on separateness as to property with the object of "operating on the recognized rights of property, rather than what is in effect the judicial invention of a proprietary right."⁵²

Prior to considering some of the more recent legislative attempts in England which have been made to remedy

⁵¹O. Kahn-Freund, "Once Again - The Matrimonial Home", (1958) 18 M.L.R. 412 at p. 413.

⁵²Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home", (1952), 68 L.Q.R. 379 at p. 389.

the situation created by the decision in *National Provincial Bank Ltd. v. Ainsworth* (*supra*) the "deserted wife's equity" as it exists in Canada, notably in Ontario, will be very briefly looked at, together with an analysis of the present state of the law in the Province of Alberta.

4. The Deserted Wife's Equity in Canada

Whereas the deserted wife's right to remain in the matrimonial home under English law has changed from "equity coupled with an irrevocable license"⁵³ to a mere "personal right against the husband",⁵⁴ the Canadian situation has not seen either the litigation or the attempts at palm tree justice which "can only be ascribed to judicial chivalry".⁵⁵

In Canada, the litigation that has arisen involving the issue of the nature of the "deserted wife's equity" has, for the most part, occurred in the province of Ontario which has legislation⁵⁶ to the previously considered English Married

⁵³*Bendall v. McWhirter, supra.*

⁵⁴*National Provincial Bank Ltd. v. Ainsworth (supra).*

⁵⁵Bora Laskin "The Deserted Wife's Equity in the Matrimonial Home: A Dissent", (1961-62) 14 U. of T.L.J. 67 at p. 74.

⁵⁶The Married Women's Property Act, R.S.O. 1970, c. 267, s. 12(1). Legislation similar to that in Ontario and section 17 of the Married Women's Property Act, 1882, in England is to be found under the same title in the following provinces: British Columbia, R.S.B.C. 1960, c. 233, s. 29; Saskatchewan, R.S.S. 1965, c. 340, s. 22; Manitoba, R.S.M. 1970, c. M-70, s. 8; New Brunswick, R.S.N.B. 1952, c. 140, s. 7; Nova Scotia, R.S.N.S. 1967, c. 176, s. 36; Prince Edward Island, R.S.P.E.I. 1951, c. 92, s. 13; Newfoundland, R.S. Nfld. 1952, c. 143, s. 19.

Women's Property Act, 1882. Whereas the Ontario cases dealing with section 12(1) of the Ontario Married Women's Property Act have raised issues similar to those raised in England,⁵⁷ there have not been any decisions, to the writer's knowledge, dealing with rights of third parties as against a claim to possession of the matrimonial home by a non-owning spouse, such as occurred in England in *Lloyds Bank Ltd. v. Oliver's Trustee*, or *Westminster Bank Ltd. v. Lee*.⁵⁹ Therefore, this section on the Canadian situation will be very brief, and will merely attempt to indicate, where possible, any divergences from previously noted developments in England.

Ontario courts faced a problem in the mid-1960s due to reliance which had been placed by such courts upon the reasoning of Denning L.J. in *Bendall v. McWhirter*.⁶⁰ The

⁵⁷Laskin (*supra*, note 53) stated in this regard: "What is significant about section 12 of the Married Women's Property Act is that it is unlimited in its application, applying as well to non-deserted wives as to deserted ones, and similarly as to husbands so long as there is a 'question between husband and wife as to the title to or possession of property.' The nice question that arises here in respect both of the deserted wife's 'equity' and the 'family assets' doctrine is whether section 12 assumes a pre-existing right of property or whether the 'right', whatever it may be, arises through the exercise or non-exercise of the court's discretion and hence is dependent for its recognition as well as for its continuance on the way in which the judicial discretion is operated." (The idea that the "equity" or right of occupation arose upon desertion found support in *Lloyds Bank Ltd. v. Oliver's Trustee*, (*supra*) and in the *Ainsworth* case (*supra*).).

⁵⁸[1953] 2 All E.R. 1443.

⁵⁹[1955] 2 All E.R. 883.

⁶⁰[1952] 1 All E.R. 1307; Ontario cases which had relied upon the license theory of Denning L.J. include
[Continued on next page.]

result of such reliance was a number of decisions⁶¹ which created a dilemma for Ontario courts; namely, whether to follow earlier precedents of such courts which relied upon the reasoning which had been overruled by the House of Lords in the *Ainsworth* case, or to give effect to the reasoning in *Ainsworth*. Prior to the House of Lord's decision in the *Ainsworth* case, the Supreme Court of Canada in *Thompson v. Thompson*,⁶² considered the scope of the court's discretion in applications under section 12(1) of the Ontario Married Women's Property Act. Although the case was not dealing with the issue of occupational rights in the matrimonial home, but, rather, with whether a contribution by a non-owning spouse to the acquisition of property would entitle such spouse to an equitable or beneficial interest in the property; the statement of Judson J. regarding the scope of judicial discretion in applications under section 12 is noteworthy.

The judicial use of the discretionary power under section 12 . . . in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. . . .

If a presumption of joint assets is to be built up in these matrimonial cases, it

[Continued from page 33.]

Carnochan v. Carnochan [1955] 4 D.L.R. 81; *Jollow v. Jollow* [1954] O.R. 895; *Rush v. Rush* (1960) 24 D.L.R. (2d) 248; *Re Cates and Cates* [1968] 2 O.R. 447 (C.A.); and *Audras v. Audras* (1970) 2 O.R. 46.

⁶¹On the other hand, the following cases relied on *National Provincial Bank Ltd. v. Ainsworth* [1965] 2 All E.R. 472; *Richardson v. Richardson* [1966] O.R. 624; *Re Smyth and Smyth* [1969] 3 D.L.R. (3d) 409; and *Stephens v. Brown* [1969] 2 D.L.R. (3d) 687.

⁶²[1961] S.C.R. 3.

seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion under section 12 of the Married Women's Property Act.⁶³

By analogy of the foregoing statement of Judson J., it might well be said that if it is considered proper that the deserted wife should have a claim to occupation of the matrimonial home that is to be binding, not only against her husband, but also as against third parties making claims to the property through the husband; such a claim, whether couched in terms of being a proprietary right or some sort of contractual license, must be the result of a legislative change to existing principles of matrimonial and real property law.

Prior to considering the present state of law in the province of Alberta, it is perhaps appropriate to revert back for a moment to consider the effect of some cases in England and in Canada which would place some extensions on the basic holdings of the *Ainsworth* case (namely; that whatever rights a wife may have in relation to the matrimonial home owned by her husband, such rights are personal as against the husband and are not enforceable against a third party, whether he is a purchaser or encumbrancer, even with notice of the wife's occupancy). A number of cases have considered the nature of the right of the deserted wife and have concluded that the right is personal as between the husband and wife arising out of the husband's duty to support and maintain his wife. They have

⁶³*Ibid* at p. 14.

gone on to consider what principles should apply in the event that the husband wants to put his deserted wife out of the matrimonial home.

In the case of *Lee v. Lee*,⁶⁴ it was held that a deserted wife could obtain an injunction to prevent her husband from dealing with the matrimonial home until suitable alternative accommodation was provided for her.

A similar holding was reached in the English Court of Appeal in the cases of *Halden v. Halden*,⁶⁵ and *Bedson v. Bedson*.⁶⁶ Both cases followed the principle in *Lee v. Lee (supra)* to hold as against the husband, that the deserted wife has a right to remain secure in the matrimonial home provided the right is not forfeited by her through the commission of some matrimonial offence such as adultery and that the principle in *Lee v. Lee (supra)* had survived the ruling of the House of Lords in the *Ainsworth* case such that a husband could not bring an application under the Married Women's Property Act in order to get his deserted wife out of possession of the matrimonial home without providing her with suitable alternative accommodation.

In Canada the issue of the wife's right to remain in occupation of the matrimonial home as against her husband wishing to obtain vacant possession in order to deal with the property was considered in the case of *Beauchamp v. Beauchamp*.⁶⁷

⁶⁴ [1952] 1 All E.R. 1299.

⁶⁵ [1966] 3 All E.R. 412 (C.A.).

⁶⁶ [1965] 3 All E.R. 307 (C.A.).

⁶⁷ (1972) 6 R.F.L. 43.

In that case Wright J. considered the matter of suitable alternative accommodation and stated, *inter alia*:

1. The deserted wife has against her husband the personal right to stay on in the matrimonial home until:
 - (a) reasonable suitable alternative accommodation is provided for her; or
 - (b) an alimentary payment has been assured or awarded to her, *Richardson v. Richardson* [1966] O.R. 624; or
 - (c) she has been found guilty of adultery, for a husband has no obligation to support a wife who has committed adultery, *Wright and Webb v. Annandale* [1930] 2 K.B. 8; or
 - (d) the marriage has been dissolved by divorce or death of the husband; or
 - (e) a court order has been made against her under section 12.

. . .
4. The right to stay on will not prevail against a bona fide purchaser for value with or without notice. . . , but the court will protect the right by injunction before sale: *Hill v. Hill* [1916] W.N. 59; *Leev. Lee, supra.*⁶⁸

Wright J. stated further that in his view;

⁶⁸*Ibid* at pp. 49-50.

. . . the court only needs to be concerned with the physical adequacy of the house for the family and its capital and rental value. These are the kinds of things relevant to the amount of alimony or maintenance. The court need not become embroiled in a consideration of the comparative amenities and drawbacks of the houses in question.⁶⁹

An interesting Australian decision, *Plowman v. Plowman*,⁷⁰ which was reported in the Reports of Family Law also involves considerations to be undertaken by a court in regard to inter-spousal disputes as to possession of the matrimonial home. It was held that:

In order that a court restrain a husband from returning to a matrimonial home or to order him to vacate such a home there must be found some legal right as a basis for the existence of the court's jurisdiction. Such a right need not be founded only in a statute. Such a power may be exercised to maintain an existing situation until the court can decide what should be done upon the substantive application for maintenance, even though its exercise involves third parties, and the rights of any such party or parties in relation to one or both of the parties to the matrimonial cause, or in relation to the property of one or both of those parties.⁷¹

Carmicheal J. who heard the case, also put forth the following considerations for a judge, in the exercise of his discretion, in determining occupational rights of disputing spouses;

⁶⁹ *Ibid.*

⁷⁰ (1973) 9 R.F.L. 160.

⁷¹ *Ibid* at p. 160 (headnote).

- (1) A wife by virtue of her status has a right to support unless by her conduct she has lost that right. (By losing the right I do not wish it to be thought that this can only be done by way of some matrimonial offence or fault, because I have also in mind the possibility of a wife losing that right by having acquired independent means or taken up a course of conduct from which she derives an adequate income for her own support.)
- (2) In some cases a wife may be able to show that as an incident of her support she needs, by objective standards, either for financial reasons or otherwise, to be housed in the matrimonial home.
- (3) In that class of case she may also be able to show that her husband has lost his right to cohabitation, i.e., that she would be able to resist restitution of conjugal rights.
- (4) Where a wife can establish (2) and (3) in her favour then the court has a discretion to order the husband from the matrimonial home and grant the wife exclusive occupation thereof.
- (5) Amongst factors which will determine how the discretion is to be exercised are:
 - (a) Can the wife be adequately housed elsewhere?
 - (b) Is money available either from the wife's own resources and/or her husband's to provide that housing?
 - (c) For whom, husband or wife, is it less inconvenient to have to live away from the matrimonial home?
 - (d) What are the interests of any children of the parties and what order would be in their paramount interest?

- (e) What are the relevant proprietary rights of the spouses?
- (f) Would a non-molestation order be an appropriate alternative to an order for expulsion?
- (g) Is there possible use of improper methods either by way of intimidation or fraudulent condonation to prevent the wife from pursuing her rights, if the spouses continue to reside in one home?
- (h) The possible injustice of forcing a husband to establish for himself another home, or otherwise accept inferior accommodation without just cause.⁷²

It is to be noted from the foregoing passage in the judgement of Carmicheal J., that considerations in addition to those put forth by Wright J. in *Beauchamp v. Beauchamp*⁷³ were enunciated. Of particular note is the linking of occupational rights to concepts of support and also to the welfare of children, which matters will be further considered in the concluding portions of this memorandum.

5. The Deserted Wife's Equity in Alberta

From the foregoing brief outline of the nature and scope of the "deserted wife's equity" as it emerged through

⁷²*Ibid* at p. 172.

⁷³*Supra*, note 67.

judicial interpretations of section 17 of the Married Women's Property Act, 1882,⁷⁴ in England and section 12(1) of the similar Ontario statute,⁷⁵ it can be seen that if such equity can exist in Canada it must stand on the basis of the ruling in *National Provincial Bank Ltd. v. Ainsworth*.⁷⁶ The importance of the earlier decisions, notably the English cases where Denning L.J. developed the "license theory" and courts attempted to develop a concept of palm tree justice wherein they would attempt to resolve inter-spousal disputes on principles of fairness in all the circumstances, should not be underestimated when thought is being given to law reform. The "palm tree justice" cases where attempts by the court in reliance on its discretionary powers to administer justice between conflicting interests without making a strict categorization of the nature of the claims of the disputing spouses. Usually, the application of concepts of "palm tree justice" and the desire on the part of the courts to reach a just and fair determination of an inter-spousal dispute operated to assist the married woman who was most often in the position of having no proprietary interest in the matrimonial home.

Whereas Ontario and many other provinces in Canada have legislation similar to that contained in section 17 of the English Married Women's Property Act, 1882,⁷⁷ the situation

⁷⁴45 & 46 Vict., c. 75.

⁷⁵R.S.O. 1970, c. 262.

⁷⁶[1965] 2 All E.R. 472 (H.L.)

⁷⁷See note 56, *supra*.

for the deserted wife in Alberta is a problem of even greater magnitude due to the lack of any summary procedure for the determination of conflicting inter-spousal claims in respect of matrimonial property.

In order to provide for occupation in the matrimonial home for a deserted wife, Alberta courts have made rather frequent use of interim non-molestation orders (such orders to be discussed more fully shortly), but the purpose of which does not consider occupation in the matrimonial home as of right. The husband in Alberta is in a similar disadvantageous position where he wishes to obtain occupation of the matrimonial home to the exclusion of his wife,⁷⁸ and since the case of *Minaker v. Minaker*,⁷⁹ is still good law in Canada, neither spouse is capable of bringing an action for an order of eviction against the other as, at common law, such an action is like the action for ejectment which, sounding in tort, is subject to the inter-spousal tort immunity.⁸⁰

It is open to doubt that the "deserted wife's equity" is applicable in Alberta at all, since it arose, as has been set forth previously,⁸¹ upon judicial interpretation of the

⁷⁸See; Jean McBean-Worton's research paper, "Family Law--Matrimonial Property"--Book II at p. 217.

⁷⁹[1949] S.C.R. 397.

⁸⁰For the statutory enunciation of the inter-spousal tort immunity in Alberta, see: The Married Women's Act, R.S.A. 1970, c. 227, s. 3(2).

⁸¹See previous sections of this memorandum dealing with the "deserted wife's equity" in England.

basically procedural section 17 of the Married Women's Property Act, 1882, a mechanism for determining disputes as to property between husband and wife which has not found its way into the statutory law of Alberta. In this regard it has been said that;

. . . the deserted wife's equity, . . . must be adjudicated under a summary procedure and can only apply to disputes between a husband and wife with respect to occupation. However, it may in practice affect third party rights temporarily since the court has judicial discretion to postpone rights. The judicial equity thus developed, does not extend to husbands nor to mistresses.⁸²

There are a number of other factors which may be briefly set out which would tend to indicate that the "deserted wife's equity" is inapplicable in Alberta.

The "deserted wife's equity" arose in England where dower, whether by statute or as an inchoate right is not in existence. Dower legislation in Alberta,⁸³ the effect of which upon the matrimonial home will be discussed more fully shortly, serves to create a contingent right in either spouse to occupy the matrimonial home by vesting the non-owning spouse with a life estate in the homestead property.⁸⁴ Also provided, is an action for damages,⁸⁵

⁸²Jean McBean-Worton, *supra*, note 78 at p. 218; and see also *Pinckney v. Pinckney* [1966] 1 All E.R. 121.

⁸³The Dower Act, R.S.A. 1970, c. 114.

⁸⁴*Ibid*, s. 19.

⁸⁵*Ibid*, s. 12.

should the homestead property be sold without first obtaining the consent of the non-owning spouse as required by the Act.⁸⁶ Although the Act is directed at restricting the transferability of land registered in the name of a married person (and which falls within the meaning of homestead property under the terms of the Dower Act), and contains certain curative provisions, it is not legislation which directly deals with rights to possession or occupation of matrimonial property. It may be argued, however, that the provisions of the Dower Act serve, if indirectly, to remove the element of necessity which is required for a wife to assert a claim to possession of the matrimonial home based upon her agency of necessity which accrues to a wife when she is deserted by her husband and fails to receive maintenance from him. In this regard the case of *Richardson v. Richardson* (1970) 12 D.L.R. (3d) 233 is noteworthy. At page 238 of the judgment, Donnelly J. stated:

The right of the deserted wife [to occupation of the matrimonial home] arises from necessity. If this necessity is removed, the right is extinguished. If alimony adequate to support the wife according to the station which she previously enjoyed, is paid, the right to remain in the matrimonial home should be revoked.

It should be noted, however, that neither in Alberta nor in state jurisdictions in the United States of America containing homestead or Dower legislation,⁸⁷ is there express

⁸⁶ *Ibid*, ss. 5 and 6; Form A.

⁸⁷ See for example: *Brooks v. Hotchkiss* 4 Ill. A.C. Rep. (Bradwell Ill.) S.C. 1879; *Moore v. Dunning* 29 Ill. (Peck.) 130, S.C. (1862); and *Montgomery v. Dane* 98 S.W. Rep. 715 (Ark. S.C.A. 1906).

legislative provision for a right of occupation in a matrimonial home. Rather, these statutes serve to create restrictions on transferability with curative provisions.⁸⁸

A further problem attaching to the applicability of the "deserted wife's equity" in Alberta, is the existence in this jurisdiction of the Torrens Land System where a third party interested in acquiring or taking as security, matrimonial property, would have no notice from a certificate of title of an equitable claim to occupation based upon desertion which was terminable by certain conduct of the deserted wife. Such an equity, under the present state of the law could not be registered, and hence would not affect dealings with the property by third parties even where such third parties had knowledge of the marital circumstances.⁸⁹

Under the present Torrens Land System in Alberta, it is possible for a caveat to be filed by "any person claiming to be interested . . . howsoever in any land" ⁹⁰ Thus, it may be said that the subject matter of a caveat must be an interest in land. Although it has been held that a legal or equitable interest will qualify as the subject matter of a caveat,⁹¹ Laskin has pointed out that;

⁸⁸See: *Clark v. Clark* (1965) 54 W.W.R. 744 (Alta. C.A.); and *Heiden v. Huck* [1971] 5 W.W.R. 446.

⁸⁹Land Titles Act, R.S.A. 1970, c. 198, s. 203.

⁹⁰*Ibid*, s. 136.

⁹¹See *Williams v. Papworth* [1900] A.C. 563.

It is, however, difficult to see how this could be true of the deserted wife's equity which, under the most liberal view of the favouring English cases, has not been called to the dignity of an interest in land (although having that effect, under those cases, for third party purposes where there is notice).⁹²

Laskin goes on, in comparing an assignable and irrevocable license with that of a deserted wife which is unassignable and irrevocable to suggest that;

. . . the possible complications of title, both for Land Titles and Registry Act purposes and extending possibly to requisitions under a contract for sale of the matrimonial home, should make the courts wary of thus adversely affecting the marketability of land.⁹³

From the standpoint of the historical and economic background in England of the emergence of the "deserted wife's equity",⁹⁴ the applicability of such an equity in

⁹²Laskin, *supra*, note 55 at p. 74; Also in this regard consider the finding of Pennell J. in *Re Smyth and Smyth* (1969) 3 D.L.R. (3d) 408 that the right of a deserted wife to occupy the matrimonial home was "not an interest of any part in the property that would entitle her to a *lis pendens*. . . ."

⁹³*Ibid* at pp. 75-76.

⁹⁴*Vis*: Lord Wilberforce in *National Provincial Bank Ltd. v. Ainsworth* [1965] 2 All E.R. 472 who stated at p. 490 ". . . the doctrine of the 'deserted wife's equity' has been evolved by the courts during the past thirteen years [since 1952 and the decision in *Bendall v. McWhirter*] in an

Alberta would also be suspect, and this might even seem the more so in view of the contingent interest in the matrimonial property created by the Dower Act. In this regard Laskin has stated;

In England where there is no longer any dower, and which knows neither homestead legislation nor a regime of community property, the support of the wife's equity can only be ascribed to judicial chivalry. In those parts of the United States and in Canada where there is homestead legislation and community property, the notion of a deserted wife's equity is both superfluous and impossible to mount on existing precepts.⁹⁵

For purposes of continuity, the provisions of the Dower Act and the potential of this statute in Alberta for the protection of a non-owning spouse who wishes to remain in possession of the matrimonial home will now be considered. Whereas dower may be seen more readily as applying to situations of joint ownership where partition orders threaten the inchoate rights of a spouse,⁹⁶ the effect of the discretionary powers under the Act may be regarded as offering protection for the practical recognition of equitable right of a wife to remain in occupation of the matrimonial home and prevent the disposition of this property by the husband in favour of a third party.

[Continued from page 46.]

attempt to mitigate some of the effects of the housing shortage which has persisted since the 1939-45 war. To a woman, whose husband has left her, especially if she has children, it is of little use to receive periodical payments for her maintenance (even if these are in fact punctually made), if she is left without a home. Once possession of a home has been lost the process of acquiring another place to live may be painful and prolonged."

⁹⁵Laskin, *supra*, note 55 at p. 74.

⁹⁶Jean McBean-Worton, *supra*, note 78 at p. 225.

In this context it has been said that the restrictions upon transferability of homestead property created by dower legislation will give a wife who has been deserted by her husband and left in possession of the matrimonial home, a right of possession against the husband so long as he is in desertion. In the case of *Keller v. Schultz*,⁹⁷ it was held that the intent of homestead legislation was not only to "prevent a husband from selling or otherwise parting with his home without his wife's consent",⁹⁸ but also

. . . so long as it is the homestead of the . . . husband, the [wife] and her family have the right to reside thereon, and . . . that right can only be interfered with when [her] husband has acquired a domicile different from the land in question, with the right to compel the [wife] to reside with him. The land would then cease to be the homestead.⁹⁹

Notwithstanding the foregoing, the right to possession is independent of the Dower Act, and proceeds from the common law duty of a husband to maintain his wife. In this respect, there exists no corresponding duty on a deserting wife to maintain her husband, and when a wife is the owner of homestead property she is free to bring proceedings against her husband to recover possession.¹⁰⁰

⁹⁷ [1920] 3 W.W.R. 188 (Sask. C.A.).

⁹⁸ *Ibid* at p. 189, per Newlands J.A.

⁹⁹ *Ibid* at p. 190 per Ellwood J.A.

¹⁰⁰ In this regard see *Purdy v. Colton* 7 W.L.R. 820; and *Baker v. Gillum* 9 W.L.R. 436.

Whether or not a wife has a legal or beneficial interest in the matrimonial home, she may, in judicial separation or divorce proceedings, indirectly acquire, in terms of possession, the benefits of ownership of the matrimonial home if she is given alimony or maintenance by a court. The court may direct that she be allowed to live in the home in lieu of an increased amount of maintenance,¹⁰¹ or award her a lump sum secured upon the home with a proviso that the husband may perform the obligation by transferring his interest to her.

In addition to the foregoing, consideration may be directed to section 11 of the Dower Act which provides for circumstances in which dower consent may be dispensed with. The judicial discretion under the section to refuse applications for dispensing with dower consent may serve, in an indirect sense, to recognize or give effect to a right of occupation in the matrimonial home. Section 11 provides, *inter alia*;

11. (1) A married person who wishes to make disposition of his homestead, and who cannot obtain the consent of his spouse

(a) where the married person and his spouse are living apart, . . . may apply by notice of motion to a judge for an order dispensing with the consent of the spouse to the proposed disposition.

.

¹⁰¹ See in this regard *Huff v. Huff and Kemp* (1972) 4 R.F.L. 258.

(4) On any such application a judge may hear any evidence and consider any matters as in his opinion relate to the application without restricting the generality of the foregoing, he may consider

(a) in the case of a husband and wife who are living apart, the circumstances of the separation and the financial resources of the parties and their mode of life, . . .

.

(5) A judge by order may dispense with the consent of the spouse if in the opinion of the judge it appears fair and reasonable under the circumstances to do so.¹⁰²

Notwithstanding the holding in *Essery v. Essery*, *Tactko v. Leiske (Tactko Estates) (No. 2)*,¹⁰³ wherein it was held that the dower interest of a spouse in a homestead is merely contingent while the couple are alive and married and that the Dower Act does not confer a vested right to possession in any circumstances, the effect of section 11 and the subsections quoted above may serve to prevent the disposition of the homestead in circumstances similar to the previously analyzed cases dealing with the "deserted wife's equity". The wide discretion conferred by section 11(4) would appear to confer sufficient discretionary scope to examine the issue of desertion as a basis for refusing judicial consent for the disposition of a homestead. Although no decision has been rendered in Alberta on this point, in Manitoba, exercise of the discretion under a similar section

¹⁰²R.S.A. 1970, c.

¹⁰³[1947] 2 W.W.R. 1044.

was held to be operant without regard to the matrimonial offense or fault which lead to the breakdown in marital relations; the reason being that a number of years may have elapsed since the separation of the parties and in such circumstances fault for the separation often exists on both sides.¹⁰⁴ However where faults can primarily be ascribed to one spouse, courts appear to have power to protect the "innocent" party. The discretionary power may thus conceivably cover the situation under which a "deserted wife's equity" is said to arise, and by the denial of a dispensing order, the discretionary power in the court under section 11 may protect either spouse in occupation of the matrimonial home.

Notwithstanding the potential for the protection of a right of occupation in the non-owning spouse in the matrimonial home conferred by section 11 of the Dower Act, there are some potential defects in the use of this section for such protection. Firstly, the aforementioned section is not only indirect and not expressly intended for the purpose of protecting a right of occupation, but it also fails to supply a court with any guidelines for the exercise of the discretionary powers it confers and also fails to give any guidelines as to the legislative intent of the Act with regard to the issue of a right of occupation in the matrimonial home.

A further note is the fact that the application for an order dispensing with dower consent under section 11 may not provide a proper proceedings for the examination

¹⁰⁴*Re Dower Act: Re Rodick and Rodick (1958) 24 W.W.R. 38.*

and disclosure of factors which are relevant to the equities of occupation,¹⁰⁵ but which relate more directly to dealings with real property. Also, the effecton will not have any application to a situation of a constructively deserted spouse being outside of the matrimonial home in relation to providing a right of occupation or a right of re-entry and occupation.

The Dower Act in providing for protections against disposition of homestead property does not serve to create clear guidelines as to the respective rights of a non-owning spouse to occupation of the matrimonial home vis-a-vis the interests of third parties which may arise upon a disposition or other action taken by the property-owning spouse in respect of the matrimonial home. The intention of the existing legislation is to balance the claim to a homestead of a bona fide purchaser who is protected by the registration of a transfer by sale; and the interest of the unregistered spouse by giving that spouse a personal right of action for damages against the spouse registered as owner of the property for one-half of the property transferred under sale and registered without dower consent. Also of note is the discrepancy between the effect of a transfer of the homestead property to a bona fide purchaser wherein the bona fide purchaser will get title to the property and the effect of transactions by an owning spouse with third parties which do not amount to the issuance of

¹⁰⁵ E.g. see *Beauchamp v. Beauchamp* (1972) 6 R.F.L. 43, *Plowman v. Plowman* (1973) 9 R.F.L. 160 for the importance of such matters as the availability of alternative accommodation, whether maintenance is being received or not; whether children would be adversely affected, etc.

a new certificate of title.¹⁰⁶

Discrepancies such as the one noted in the preceding paragraph give rise to the need for legislation which will clearly set out the spheres of third party interests relating to the tenor of the Dower Act and the adjustment of those interest to any legislative change which is made regarding the creation of an interest or right of possession in the matrimonial home being given to a non-owning spouse.

6. Occupation of the Matrimonial Home under Restraining or Non-molestation Orders

The jurisdiction of the court to grant interim non-molestation orders is derived from the Divorce Act,¹⁰⁷ and the Judicature Act.¹⁰⁸ Under the Divorce Act section 10 and 12 provide as follows:

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make some interim orders as it thinks fit and just

¹⁰⁶ See *B.A. Oil Co. Ltd. v. Kos & Kos* [1964] S.C.R. 167 where the Supreme Court of Canada held that a transaction which does not result in a new certificate of title, such as an agreement for sale, lease, mortgage, encumbrance or other disposition which does not finally dispose of the interest of a married person in the homestead, can be set aside by the wife where her consent was not obtained and she did not acknowledge her husband's signature in accordance with the statutory requirements.

¹⁰⁷ R.S.C. 1970, c. D-8.

¹⁰⁸ R.S.A. 1970, c. 193, s. 34(9) and (10).

- (c) for relieving either spouse of any subsisting obligation to cohabit with the other.
- 12. Where a court makes an order pursuant to section 10 . . . , it may . . .
 - (d) impose such terms, conditions or restrictions that the court thinks fit and just.

It is to be noted from the just quoted sections of the Divorce Act that the jurisdiction of the court to grant non-molestation orders will only come into existence upon the issuance of a petition for divorce or the commencement of proceedings for judicial separation. In regard to the latter, the powers exercised by the court appear to emanate from the exercise of discretion to grant injunctions conferred by section 34(9) and (10) of the Judicature Act (*supra*). Section 34(9) provides that an injunction may be granted in circumstances where "it appears to the court or judge to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court or judge thinks just."

In addition to these statutory powers which may be employed by a court to affect the rights of occupation in the matrimonial home, it has been held that there exists in the court, an inherent power

. . . to ensure that a party may exercise the right to come to it for relief free from threats or pressures or intimidation by a respondent or defendant or anyone else who seeks to have the action abandoned or modified. The court will interfere by injunction to ensure that a party is not prevented from obtaining justice . . .

this power to grant an injunction against molestation has to be exercised reasonably and sensibly. It must not become a weapon of domestic warfare Except where property is involved (such as the use of the matrimonial home), the order should not interfere with the rights of the husband. It only protects the rights of the wife.¹⁰⁹

It would appear that in Alberta, the statutory and inherent powers of the court referred to above have been exercised to grant restraining orders upon the rationale of furthering or aiding the continuance of matrimonial proceedings without fear of intimidation of one spouse against the other. Notwithstanding the fact that criticisms have been raised against this judicial exercise of authority to restrain one spouse from entering or occupying the matrimonial home on the ground of protecting the other spouse against intimidation or fear of bodily harm and of aiding the proper continuation of matrimonial proceedings,¹¹⁰ there have emerged from some of the cases dealing with this issue, some observations in relation to the right of a non-owning spouse to occupy the matrimonial home.

¹⁰⁹*Hastings v. Hastings* (1971) 21 D.L.R. (2d) 244 per MacPherson J. at 244-245 referring to Ormrod J. in *Montgomery v. Montgomery* [1965] P. 46 at p. 51.

¹¹⁰See D. P. McGuire "The Ex Parte Injunction in Matrimonial Cases" (1970) 8 Alta. L.R. 151 where the writer suggests that the use of restraining or non-molestation orders are improper attempts to enjoin inter-spousal assaults which are within the purview of s. 717 of the Criminal Code and the issuance of peace bonds.

In circumstances where the wife is the owner of the matrimonial home, she may obtain an injunction to exclude her husband from the matrimonial home in circumstances where the husband is guilty of such conduct that he forfeits his right to consortium.¹¹¹ However, even in such circumstances the courts will proceed cautiously and will not hastily make an order excluding the husband so as to separate the parties to a subsisting marriage.¹¹² There is no entitlement in either spouse to have the other excluded from the matrimonial home as of right.

It was held in *Silverstone v. Silverstone*,¹¹³ that pending the hearing of a petition for judicial separation, the court has power to restrain a husband from entering the matrimonial home even where he is the owner of it, on the ground that the wife

. . . has a right to be in the matrimonial home while a petition is pending before [the] court and this court is entitled to protect that right and insure that pressure is not put on the wife to abandon her petition by evicting her from the home.¹¹⁴

However, in *Montgomery v. Montgomery*,¹¹⁵ where the inherent jurisdiction of the court to grant an injunction

¹¹¹*Shipman v. Shipman* (1924) 2 Ch. 140.

¹¹²*Gorulnick v. Gorulnick* (1958) P. 47.

¹¹³(1953) P. 174.

¹¹⁴*Ibid* at p. 177 per Pearce J.

¹¹⁵[1964] 2 All E.R. 22.

was considered, the result of the *Silverstone* case was agreed with, but only in the context of pending proceedings and a subsisting marriage. It was further observed by Ormrod J., that the case of *Robinson v. Robinson* [1963] 3 All E.R. 818

. . . is authority for the proposition that [the] court can restrain one party from molesting the other after a decree of judicial separation . . ., but it is not . . . authority for the further proposition that the court can . . . order the [husband] to leave the matrimonial home.

He added further

I do not . . . doubt that in a proper case this court can order a party to leave the matrimonial home notwithstanding his or her proprietary rights in it, so long as proceedings are pending, but different considerations arise after final decree. . . . It is . . . a fundamental rule that the court will grant an injunction only to support a legal right.¹¹⁶

From the foregoing it may be suggested that if the wife has no legal right of occupation in the matrimonial home, which is the situation under the present state of the law, she will only be able to obtain an injunction to exclude her husband from the matrimonial home prior to a decree of judicial separation or divorce. After either decree is granted, only a non-molestation order will go against a husband as there is no legal right of occupation in the wife for the court to protect by injunction.

¹¹⁶*Ibid* at p. 23.

There is no general rule in matrimonial law to the effect that either spouse has an absolute right to remain in the matrimonial home. This applies irrespective of proprietary rights of possession such that each case must be decided on its particular facts. However, a court will only interfere with an owner's proprietary rights by way of injunction where it concludes, as noted in the preceding paragraph, that such an order is the only sure means of preventing the wife from being molested.¹¹⁷

From the foregoing English authorities it would appear that in order for a wife to obtain an order which excludes her husband from entering or occupying the matrimonial home, the circumstances must be such that there is a definite threat to the wife or the wife and the children should the husband enter the home, and the situation in the home, if the husband were allowed to return, must be impossible or intolerable.¹¹⁸ In this regard Lord Denning was of the opinion that

. . . [an] order to exclude one spouse or the other from the matrimonial home is a drastic order. It ought not to be made unless it is proved to be impossible for them to live together in the same house . . . unpleasantness and inconvenience was not a sufficient ground for ordering one spouse out . . . such an order ought not to be made unless the situation is impossible.¹¹⁹

The situation in Canada appears to be that in order to exclude a husband from the matrimonial home in which he

¹¹⁷*Cook v. Cook* [1961] 2 All E.R. 791.

¹¹⁸*Hall v. Hall* [1971] 1 W.L.R. 904 (C.A.).

¹¹⁹*Ibid* at p. 406.

has either sole title or joint title with his wife, the circumstances of the case would require that not only would the husband have to be guilty of a matrimonial offence such as adultery or cruelty, but he would also have to have deserted the wife and seek to return.¹²⁰

In summary, it would appear that any court will be very wary of making any order which would exclude one spouse from occupational rights in the matrimonial home on the ground that such an order being granted would serve to give judicial endorsement to a marital breakdown. From the cases that have just been considered, it would appear that the conditions required for an order to be granted excluding an owner spouse from the matrimonial home are much stricter than for those required to establish the "deserted wife's equity" which was based in part on an interpretation of the broad discretionary power conferred upon the court under the Married Women's Property Act. It is to be noted that the discretionary power conferred upon the court under the Married Women's Property Act and under the Divorce Act and the relevant section of the Judicature Act are of similar scope. However, it can only be attributed to the desire of the court to prevent giving judicial recognition to marital breakdowns through exclusion orders, that the stringent criteria for the granting of such orders has arisen. In this regard the following propositions may be considered:

- (1) If the wife is the owner of the property, it must be made clear to the court that the husband has lost his right to matrimonial consortium before an order restraining him from entering the matrimonial home will be granted.

¹²⁰ *Duggan v. Duggan* (1965) 51 D.L.R. 92d) 576.

- (2) If the husband is the owner of the property, then the wife should commence divorce proceedings or proceedings for judicial separation and she must be able to show that the situation in the matrimonial home is "impossible" or "intolerable" due to the husband's illtreatment and also that the husband has deserted her and is seeking to return.
- (3) If the property is jointly owned by the spouses then it is the wife's obligation to show that the husband's conduct is "so outrageous" that it is virtually impossible for them to live together under the same roof.¹²¹

From the foregoing it may be seen that the powers of the court under the Divorce Act and the Judicature Act to exclude a spouse from a right of occupation in the matrimonial home can raise the equities of occupation in the matrimonial home for consideration by the court. However, the circumstances under which such an order will be granted, as referred to above, severely limit the procedure as a method of protection of the claim to occupation in the matrimonial home of the non-owning spouse.

¹²¹R. L. Denyer, "Excluding the Husband from the Matrimonial Home" (1973) 123 New Law Journal 655 at p. 656.

III

RECENT LEGISLATIVE ATTEMPTS TO REFORM
THE LAW RELATING TO OCCUPATIONAL
RIGHTS IN THE MATRIMONIAL HOME

1. The Matrimonial Homes Act, 1967 (England)

Although the development of the law in Alberta relating to occupational rights of a non-owning spouse in the matrimonial home is different than that which occurs in England since the passage of the Married Women's Property Act, 1882, the Matrimonial Homes Act, 1967, provides a useful condensation and illustrative example of an attempt to reform the law relating to occupational rights in the matrimonial home, while, at the same time, retaining the basic construct of separateness of property.

The Matrimonial Homes Act, 1967, c. 75* is a legislative attempt to answer the decision in *National Provincial Bank v. Ainsworth*,¹²² which had drawn a sharp line between the external and internal relations of the spouses. These had been blurred through the invention of such notions as the "equity" of the deserted wife or the "irrevocable license" which enabled a wife to assert a right to occupy the matrimonial home even against outsiders such as purchasers, landlords, mortgagees and other creditors of her husband, the person holding the legal title to the property.

The mutual rights of the spouses *inter se* were not affected by the *Ainsworth* decision, but it was established

*See Appendix A

¹²²[1965] 2 All E.R. 472.

that the right which, by virtue of marriage, a spouse has to occupy the matrimonial home is *a jus in personam*, and no more.

It is to be noted that third parties dealing in some way with property owned by a spouse or spouses jointly are concerned with the legal title which is vested in a spouse or in both spouses jointly; they are not concerned with the rights of enjoyment by occupation which the spouses enjoyed between themselves in their capacity as spouses.

The *Ainsworth* decision illustrated the problem of the common law; namely, that it could not protect the inter-spousal relationship which related to rights of occupation in contrast to rights of third parties where title to an interest in property were concerned. This problem, however, was not new to practitioners of the law in England. The problems of the conflict between property rights and marital rights had given rise to proposals as early as 1956 when the Royal Commission on Marriage and Divorce¹²³ suggested that with regard to the rights of spouses *inter se*, a mechanism should be employed which would give publicity to the rights of occupation in the matrimonial home by registration under the Land Charges Act and the Land Registration Act in order to transpose the spouse's right of occupation into the external sphere. It was recognized, however, that such a remedy would require legislation and could not arise through any sort of judicial law making.¹²⁴

¹²³ (Cmd. 9678, 1956), para. 671, Rec. 78(b).

¹²⁴ O. Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 Mod. L. Rev. 601 at 610.

The provisions of the Matrimonial Homes Act deal primarily with the situation where one spouse is the legal owner and serve to confer rights on the non-owner spouse which are regarded throughout the Act as "rights of occupation". These rights which accrue either a husband or a wife, are as follows:

Where one spouse is entitled,¹²⁵ to occupy a dwelling house¹²⁶ and the other is not, the spouse not so entitled, if in occupation has the right not to be evicted or excluded from the house or any part of it except with leave of the court,¹²⁷ given by an order of the court.¹²⁸

¹²⁵i.e., by virtue of any estate or interest or contract or enactment.

¹²⁶The dwelling house must have been the matrimonial home of the spouses at some time (see s. 1(7), (8)).

¹²⁷Either the High Court or County Court notwithstanding the value of the property.

¹²⁸Matrimonial Homes Act, 1967, s. 1(1)(a). Also, by an amendment to the Matrimonial Proceedings and Property Act 1970, s. 38, whereby a new section 1(9) was added to the Matrimonial Homes Act

- (9) It is hereby declared that a spouse who has an equitable interest in a dwelling house or in the proceeds of sale thereof, not being a spouse in whom is vested (whether solely or as a joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling house, is to be treated for the purpose only of determining whether he or she has rights of occupation under this section as not being entitled to occupy the dwelling house by virtue of that interest.

If not in occupation, the spouse has a right to enter and occupy the house with leave of the court so given.¹²⁹

Either spouse, pursuant to section 1(2) of the Act, may apply for an order "declaring, enforcing, restricting or terminating those rights for regulating the exercise by either spouse of the right to occupy the dwelling house."

By section 1(5) of the Act, provision is made for self help by a spouse who has been left in occupation of the matrimonial home, to the effect that such spouse may make any payment or tender or other thing to be done by the owning spouse towards satisfaction of the latter spouse's liability in respect of rents, rates, mortgage payments or other outgoing; and such a payment by the non-owning spouse is deemed to be as good as is made or done by the owner spouse. Also the subsection does not take away the rights of one spouse against the other for payments so made notwithstanding that the payments fulfilled an obligation of the owner spouse to some third party.

¹²⁹ *Ibid.* It is to be noted that this section only protects a spouse who has no proprietary, contractual, or statutory right to occupy (see *Gurasz v. Gurasz* [1970] P. 11 (C.A.)). Also it has been held in *Tarr v. Tarr* [1972] 2 All E.R. 295 (H.L.) that the terms of section 1(2) do not empower a court to make an order prohibiting a spouse altogether from exercising rights of occupation in the matrimonial home.

With regard to the rights of the spouses *inter se*, the court has a very wide discretion under section 1(3) of the Act and may make any order that it thinks fit and which is just as reasonable having regard to the conduct of the spouses, their needs and resources, the needs of any children and to any other circumstances.¹³⁰ Further, the court may except part of the dwelling house from the spouse's rights of occupation,¹³¹ may order a spouse to make periodical payments in respect of the occupation¹³² and may impose obligations as to the repair and maintenance of the house on either spouse.¹³³ These orders may be limited or unlimited in time.¹³⁴

In order that the rights of occupation in the matrimonial home may be brought into the external sphere, the Act provides machinery whereby a non-owning spouse may register his or her right of occupation in

¹³⁰See *Baynham v. Baynham* [1969] 1 All E.R. 305 (C.A.) where it was held that the terms of section 1(3) enable a court to make interim orders.

¹³¹*Matrimonial Homes Act, 1967, s. 1(3)(a).*

¹³²*Ibid* s. 1(3)(b).

¹³³*Ibid* s. 1(3)(c).

¹³⁴*Ibid* s. 1(4).

the matrimonial home as Class F. Land Charge.¹³⁵ This land charge will rank in priority as if it were an equitable interest created at the date when the spouse (a) acquires the interest or estate, (b) at the date of marriage, or (c) on the first day of January, 1968, whichever is the latest.¹³⁶

By virtue of section 1(8) of the Act, the right of occupation is to continue only during the subsistence of the marriage and during the time in which the owner spouse remains entitled to deal with the property. However, by section 2(2) of the Act, the right of occupation will terminate upon the death of the owner spouse or upon the termination of the marriage otherwise than by death (i.e., by a decree of divorce or nullity), unless the court has, during the subsistence of the marriage, made an order directing otherwise.¹³⁷ Thus, the court will be able to protect a right to occupation in the non-owning spouse on death or divorce, but not in bankruptcy for the non-owning spouse can bring himself or herself within the

¹³⁵The charge should be registered under the Land Charges Act, 1925, s. 10(1), Class F. Where the land in question is already registered, the charge is registrable by means of a notice or caution (see s. 2(7)).

¹³⁶Matrimonial Homes Act 1967, s. 2(1).

¹³⁷Where an order is made under s. 2(2) that the rights of occupation are to continue after termination of the marriage, s. 5(2) prevents the registrar from cancelling the registration of the right of occupation. This prohibition, however, only applies where the order under s. 2(2) is made prior to an application for renewal of a charge or its registration.

doctrine of *Rimmer v. Rimmer*.¹³⁸

In the same vein, the right of succession to tenancy will also apply to members of the family of a deceased statutory tenant, where the family of such a person are deemed under such an order to be a statutory tenant.¹³⁹

Having looked at the provisions of the Matrimonial Homes Act, 1967, which are set out fully in Appendix A to this memorandum, the effects of the statute on the rights of husband and wife *inter se* and upon the rights of a married couple with third parties may now be considered.

In an imperfect manner, the Act attempts to codify the right to occupy the matrimonial home. With regard to the rights of the spouses *inter se*, the regulatory powers of the court have a very wide discretion.

As noted previously, the Act also serves to make the right of occupation a charge upon the estate or interest of the owner spouse, and makes the charge registrable under the Land Charges Act or the Land Registration Act.¹⁴⁰

¹³⁸ [1953] 1 Q.B. 63. In Canada the similar situation would be found in cases such as *Trueman v. Trueman* [1971] 2 W.W.R. 688 and *Wiley v. Wiley* (1972) 6 R.F.L. 36. However, in this regard one must consider the doubts arising out of the decision of the Supreme Court of Canada in *Murdock v. Murdock*.

¹³⁹ Matrimonial Homes Act, 1967, s. 7(2); whereas this is a legislative embodiment of the Rent Act cases typified by such as *Old Gate Estates v. Alexander* [1950] 1 K.B. 311, there is still no protection in the ordinary landlord and tenant situation which is not covered by rent restriction legislation.

¹⁴⁰ *Ibid* s. 2(1), (6) and (7).

According to Professor Kahn-Freund, the Act

. . . uses the machinery of publicity in order to transform the internal right of enjoyment into a modification of title.¹⁴¹

The same results and interpretation may be made as regards rented property subject to the Rent Act, whereby the court may under section 7(2) transfer the tenancy with the right of occupation by virtue of a statutory tenant to the tenant spouse.

As with the situation where the matrimonial home is owned by one of the spouses, a provision of the Act regarding statutory tenancies is

. . . a modification of title, projecting the after-effect of the former household community into this situation after the final breakup of the marriage, but since it operates in both the external and internal spheres it requires an order of the court.¹⁴²

Notwithstanding the creation under the Act of a registrable charge of the right of a non-owning spouse to occupy the matrimonial home, there is no attempt in the statute itself to deal with occupational rights as an offshoot of the duties of maintenance and support and such corollary matters as matrimonial offences. This is unfortunate in light of the recent legislative changes

¹⁴¹O. Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 Mod. L. Rev. 601 at p. 610.

¹⁴²*Ibid*, p. 611.

in England and Canada whereby the concept of the matrimonial offence has been largely removed as a cross or cloud upon the real substantive issue which becomes apparent to a man and wife whose marriage has broken down, namely,

. . . must he continue to pay money to her (or much more rarely, she to him), and (far more complex because the choices are so open), how much and over what period.¹⁴³

Whereas the preceding analysis has indicated that the Matrimonial Homes Act, 1967, has attempted to codify the right of occupation in the matrimonial home, it falls far short of the legislative restatement of important matters of matrimonial law. In this regard, Stone has stated that the Act;

. . . is not the correlation and amendment of our present rules about family property and maintenance which are so urgently needed now and which the dissipation of the smoke screen of "matrimonial offences" will render even more necessary. This is not property legislation; it is not even an amendment of our provisions about financial relief in matrimonial proceedings, but it makes some provisions, short of title, about *de facto* possession and uses of the most important single piece of property owned by most families and needed by all human beings; namely, a place of residence. This is effected within the traditional mold of "rights" for every woman with a living husband . . . the Matrimonial Homes Act has made no breach in the traditional mold

¹⁴³O. M. Stone, "The Matrimonial Homes Act 1967" (1968) 31 Mod. L. Rev. 305.

that, in matters of family property law, one spouse should be awarded rights against the other spouse or other people generally, but that children of the family do not enter this framework of "rights" The Act is in fact a legislative restatement of the common law duty of consortium. At common law, this amounts broadly to rights of the husband and duties for the wife, because the husband had all the power of property of which the common law stripped every woman on marriage. Twentieth century legislation now transforms this into the right to remain in a particular home for a spouse who makes no claims as owner.¹⁴⁴

It is also interesting to note that the statute gives the non-owning spouse a right, if not in occupation of the matrimonial home, to apply for leave of the court to enter and occupy the home. This provision exceeds the authority of even *Bendall v. McWhirter*, which upon its most liberal interpretation did not encompass a right of re-entry in a non-owning spouse who had vacated the matrimonial home. However, the Act does not go so far as *Bendall v. McWhirter* in respect of creditors or other persons claiming through the owner spouse, such as a trustee in bankruptcy. Although this statute makes the right of occupation a registrable charge which will apply to persons deriving title from the spouse having to leave an estate in the property, the right is, in accordance with the finding in the *Ainsworth* case, void "as against a trustee in bankruptcy or other person representing the estate if the person with the estate or interest becomes bankrupt or insolvent."¹⁴⁵

¹⁴⁴*Ibid* at pp. 305-306.

¹⁴⁵*Ibid* at p. 307 (see s. 2(5)).

It is submitted that if the foregoing effect of the Matrimonial Homes Act, 1967, were to be transposed to a jurisdiction such as Alberta, it would constitute a rejection of principles of Dower and Exemption Acts legislation such as exists in Alberta. Also, the Matrimonial Homes Act, 1967, does not serve to make the right of occupation superior or rank in all respects in priority to the rights of creditors of the owner spouse.

The occupational right simply ranks as a charge on the title to the property which has the same priority as an equitable interest in the property. It is also to be noted that such an interest is a minor interest so that it must be registered if it is to take effect as against a bona fide purchaser for value.

From the foregoing, it is obvious that when property is acquired by one of the spouses prior to the marriage, the most appropriate time for the filing of the Class F Land Charge would be at the date of marriage. If property is acquired to be used as the matrimonial home after the marriage, the most appropriate time for registration of the right of occupation in the matrimonial home would be upon the acquisition of the property or so soon thereafter as is possible.

What is to be noted from the foregoing is the fact that notwithstanding the availability of registration of the right of occupation in the matrimonial home under the provisions of the Matrimonial Homes Act, 1967; the onus to register the right of occupation under the Act is cast upon the non-owning spouse.

Whereas the attempt to codify occupational rights in the matrimonial home has created some new rights for a non-owning spouse,¹⁴⁶ and has placed the machinery of the statute in the hands of either a husband or a wife,¹⁴⁷ there are still some defects in the law which have become apparent since the Act was proclaimed in force.¹⁴⁸ Some of these defects have been referred to in the preceding paragraph devoted to setting out the provisions of the statute but they are not exhaustive. The Act and its provisions for occupational rights will only apply to a spouse who is not entitled to occupy the matrimonial home "by virtue of any estate or interest or contract or by virtue of any enactment".¹⁴⁹ Although there is nothing in the Act designed to detract from the common law occupational rights accruing under such things as joint tenancies or tenancies in common, its specialized procedures may not be used by spouses who both enjoy proprietary rights in respect of the matrimonial home, but may only be used by someone whose "right of occupation" is a creation of the statute itself.

¹⁴⁶Such as the right, upon obtaining the leave of the court, to re-enter and occupy the matrimonial home.

¹⁴⁷This is something, which the development of the law through judicial decisions had left in doubt.

¹⁴⁸Proclaimed in force early in 1968 under the Matrimonial Homes Act, 1967 (Commencement) Order 1967, S.I. 1790.

¹⁴⁹See s. 2(1) and also see the necessary amendment which occurred by the addition in 1970 of a new section 1(9) which brought an equitable interest in land under the protection of the Act.

It may be seen that internally, between the spouses, the exercise of proprietary rights is overlaid by matrimonial considerations.¹⁵⁰ In this regard, Kahn-Freund has stated:

. . . the supplementary or fragmentary nature of the codification has already lead to serious inconveniences: . . . the special procedure provided so as to enable a spouse to enforce his right of occupation is only available where his right of occupation is based on the statute and not on the applicant's own proprietary rights. Moreover, where both spouses have a proprietary interest and the marriage collapses, it may be difficult to delay a sale insisted upon by one of them.¹⁵¹

From the foregoing, a transposition of a statute such as the Matrimonial Homes Act, 1967, to Alberta, without changes, might see the resort to restraining orders as a necessary practice where the statute precludes a co-tenant or co-owner from claiming the substantive and procedural benefits conferred by such legislation.¹⁵²

The question of the applicability of a statute such as the Matrimonial Homes Act, 1967, raises a number of questions, notably in relation to the approach of the statute to protecting rights of occupation against third parties. Firstly, there is already in existence a protection

¹⁵⁰ See *Gorulnick v. Gorulnick* [1958] 1 All E.R. 146.

¹⁵¹ O. Kahn-Freund; *supra*, note 141 at p. 613; also see note in (1968) 31 M.L.R. by J. M. Evans and S. Roberts "More Convulsions in Family Property Law", at pp. 566-567 (and note 25).

¹⁵² Jean McBean-Worton, Research Paper on Matrimonial Property, at p. 244.

for either spouse against a disposition of the matrimonial property without his or her consent, with the exception of an executed and registered transfer resulting in the issuance of a new certificate of title (cf. the Dower Act). Thus, the only additional protection from a statute such as the Matrimonial Homes Act would be a statutory mechanism to postpone possession of the matrimonial property vesting in a purchaser.

Further, the English statute does not serve to raise the right of occupation to the level of being an incident of title to property whereby a non-owner spouse could claim some title to the matrimonial home. Thus, a registration in the Land Titles Office of a *lis pendens* which, in Alberta, gives notice of pending litigation in the nature of a dispute as to title, would be inappropriate as a means of enforcing or protecting a "right of occupation".¹⁵³

2. Matrimonial Homes Act, 1963 - New Zealand

The preceding summary of the English Matrimonial Homes Act, 1967, was set out as a part of this memorandum to indicate how one jurisdiction operating under the aegis of a separateness of property perspective as between partners of a marriage, has attempted to provide some protection for a non-owning spouse in relation to occupational rights in the matrimonial home.

New Zealand has also embarked upon a similar attempt to protect the rights of occupation in the matrimonial home

¹⁵³*Ibid* at p. 245; and see also *Re Smyth and Smyth* [1969] 3 D.L.R. (3d) 409.

while retaining a basic separateness of property regime, and it is to this jurisdiction that the focus of this memorandum is now directed.

New Zealand is probably the pioneer common law jurisdiction in this area of matrimonial law in its attempt to provide a settled basis on which a deserted wife may claim an interest in the matrimonial home. The decision in *National Provincial Bank Ltd. v. Ainsworth*,¹⁵⁴ coupled with the effect of the Matrimonial Property Act (No. 72), 1963,¹⁵⁵ would appear, at first sight, to give a considerable amount of certainty to the position of a deserted wife who remains in occupation of the matrimonial home.

The Act gives to the deserted wife (and to the husband if he is the non-owning spouse) the means of protecting, by court order, any rights of occupation in the matrimonial home which she (or he), may have.

The Act provides that "in any question between husband and wife as to the title to or possession or disposition of property (including any question as to investment by one party of money of the other without consent) the husband or the wife or any person on whom conflicting claims are made by the husband and wife, may apply to any judge of the Supreme Court.¹⁵⁶ On any such application the judge or magistrate may make such order as he thinks

¹⁵⁴ [1965] 2 All E.R. 472.

¹⁵⁵ The Act is reprinted in its entirety in Appendix B.

¹⁵⁶ *Ibid* s. 5(1).

fit with respect to the property in dispute, including any order for--(a) the sale of the property and the division or settlement of the proceeds; or (b) the partition or division of the property; or (c) the vesting of property owned by one spouse and both spouses in common in such shares as he thinks fit; or (d) the conversion of joint ownership into ownership in common in such shares as he thinks fit.¹⁵⁷

Pursuant to section 5(3) of the Act, a judge may make such order, whether affecting the title of the property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined or notwithstanding that the spouse in whose favour an order is made has no legal or equitable interest in the property. However, this apparently unfettered discretion may not be exercised so as to defeat a common intention expressed by the husband and wife in respect of the property.¹⁵⁸

Provision is made under section 7(4) of the Act for the registration of an order granting other spouse a right of occupation in the matrimonial home against the land transfer title in the same manner as an order made under section 57 of the Matrimonial Proceedings Act, 1963,¹⁵⁹

¹⁵⁷ ¹⁵⁷*Ibid* s. 52.

¹⁵⁸*Ibid* s. 6(2)

¹⁵⁹Part VIII of the statute is set out in Appendix C. Section 57 empowers a court to make an order for the occupation of the matrimonial home on the granting of a decree of divorce or at any subsequent time instead of or in addition to making an order maintenance under Part IV of the Act. Further, by s. 65, the provisions of section 57 are made to apply, "so far as they are applicable and with any necessary modifications, to a petition for and a decree of nullity or separation or dissolution of a voidable marriage. It is also of note that by s. 57(4), the order for possession will apply against the personal [Continued on next page.]

When an order for possession of the matrimonial home is granted to a spouse pursuant to section 5 of the Matrimonial Property Act and is registered with the district land registrar pursuant to the provisions of section 57 of the Matrimonial Proceedings Act, 1963, (*supra*) the normal rules as to registration under the Land Transfer Act, 1952, would apply, whereby:

The wife, if she has obtained an order granting her the right to occupy the home, will have an indefeasible right to such occupation, and the husband will be unable to sell or mortgage the property over her head.¹⁶⁰

Section 8 of the Matrimonial Property Act, 1963, provides that the right of mortgagees or other persons holding securities, charges or encumbrances affecting the property or rights of a person respecting the property or rising under an instrument executed before an order is granted under section 5 of the Act will not be affected by such an order. However, it has been suggested that

. . . the discretion given to the court by section 5 of the Act is virtually unlimited, and it could make any further order as to the method of repayment of such a mortgage or charge as it thought fit.¹⁶¹

From the foregoing analysis, it would appear that the "deserted wife's equity" is not only capable of recognition

[Continued from page 76.]

of the spouse adverse to the spouse obtaining possession "unless the court otherwise directs".

¹⁶⁰J. L. R. Davies "The Deserted Wife and the Matrimonial Home" (1966-67) 2 N.Z.U.L. Rev. 77 at p. 78.

¹⁶¹*Ibid.*

under the Matrimonial Property Act, 1963, but is also capable of registration under the Matrimonial Proceedings Act, 1963.

It is to be noted, however, that the far-reaching discretionary that are vested in the court by the Married Women's Property Act, 1963, are made applicable in "any question between husband and wife as to the title to or possession or disposition of property".¹⁶² This means that the right of occupation in the matrimonial home is protected under the statute only in relation to the internal relations of the spouses. There is no expressed provision in the Act which elevates the right of occupation in the matrimonial home to a matter of title which by itself will serve to bind or otherwise effect third parties.

The decision in the *Ainsworth* case made it clear that a non-owning spouse has no rights in the matrimonial home as against third parties, and the only effect of the New Zealand Matrimonial Property Act, 1963, which affects the *Ainsworth* decision, is when an order is granted conferring a right of occupation in the matrimonial home to a non-owning spouse pursuant to section 5, and is registered pursuant to the provisions in the Land Transfer Act, 1952.

Because the large powers vested in a court under section 5 of the Matrimonial Property Act, 1963, are discretionary, a spouse will not know the quantum of his or her entitlement to either a share of the proceeds of

¹⁶² Matrimonial Property Act, 1963, s. 5(1).

the matrimonial property or a right of occupation in the matrimonial home until the power is exercised, and until such time, therefore, "he or she does not have any definable interest by virtue of the Act, but at best a right to claim such interest as the courts think fit to grant."¹⁶³ From the foregoing, it may be seen that the right to claim an interest under the Act, is far too uncertain to be of much use for many purposes, notably, the uncertainty of definition of the rights of a non-owning spouse vis-a-vis third parties prior to an order being made under the Act.¹⁶⁴ Such a situation will hardly satisfy the problems raised by Professor Kahn-Freund,¹⁶⁵ that upon marital disharmony, a spouse, usually the wife, will be concerned not only with a particular aspect such as the matrimonial home, but with the whole aggregate of property items, and that her concern will be for a clear answer to the question of "What belongs to whom."

¹⁶³J. F. Burrows, "Matrimonial Property and the Land Transfer Act," (1973) N.Z.U.L. Rev. 284 at p. 285.

¹⁶⁴*Ibid* Burrows further cites the unreported 1968 decision of *Loos v. Loos* wherein it was held that the *right to claim an interest* in the matrimonial home will not, in itself support a caveat which can be registered against the title to the property and further, that a wife who fails to obtain an order for possession of the matrimonial home will be unable to claim that she has been defrauded of an "unregistered interest" for the purposes of the Land Transfer Act where the home is sold prior to her applying to register such interest (see; *Efstration and others v. Glantschnig* [1972] N.Z.L.R. 545).

¹⁶⁵O. Kahn-Freund "Matrimonial Property--Where do We Go From Here?", Joseph Ungar Memorial Lectures, January, 1971, (University of Birmingham).

Whereas the English Matrimonial Homes Act, 1967, made an explicit exception to the right of occupation in the matrimonial home in a non-owning spouse to the claim of a trustee in bankruptcy pursuant to the holding in the *Ainsworth* case, this matter was not clarified in the Matrimonial Property Act, 1963, in New Zealand with the result that this very issue came to be decided by the courts in the case of *Donnelly v. Official Assignee*.¹⁶⁶

In this case, the husband deserted the wife but left her in possession of the matrimonial home and paid all the outgoings on the home as well as 10 pounds per week to his wife for her own support and the support of two children who were residing in the matrimonial home with her. No formal agreement as to possession of the property was made between the husband and wife although negotiations to this effect were undertaken some two years after the husband had deserted her. However, just prior to a separation agreement being executed between the parties, the husband was adjudged bankrupt on his own petition. On discovering this, the wife consulted solicitors and filed an application for an order under section 5 of the Matrimonial Property Act, 1963, granting her title to the house property and the chattels in it or in the alternative giving her possession of the house property. It was held that an official assignee in bankruptcy was not a "personal representative" of the husband within the meaning of section 5(7) of the Matrimonial Property Act, 1963, and that a question between the wife and the official assignee as to the title to or possession of a matrimonial home which has vested in the official assignee under section 53 of the Bankruptcy Act, 1908, is not a "question between husband and wife" for

¹⁶⁶ [1967] N.Z.L.R. 83.

the purposes of section 5(1) of the Matrimonial Property Act, 1963.¹⁶⁷

It is evident from the foregoing analysis of the Matrimonial Property Act, 1963, that the provisions of that Act are directed towards a balancing of claims of disputing spouses and do not readily make themselves applicable to the external sphere of the rights of a spouse in relation to claims of third parties against property held by the other spouse. Certainly, it may be safely said that the Act does not go so far as to create a right of property with respect to the right of occupation in the matrimonial home which is held by a non-owning spouse. Thus it may be said that, in the sphere of matrimonial property in New Zealand, two systems co-exist: a new discretionary system providing for a large measure of discretion to determine rights of the spouses *inter se*, which is superimposed upon an old system which had many problems regarding the rights of a non-owning spouse vis-a-vis third parties.

In regard to the foregoing a New Zealand writer suggested:

If our Legislature is to concern itself with the reform of our matrimonial property legislation, which is not beyond reasonable expectation, one hopes that it will be able

¹⁶⁷The wife attempted to obtain a right of occupation on a further ground in *Re D. (A Debtor)* [1967] N.Z.L.R. 828 to the effect that she was a contractual licensee. It was held not only that she was not a contractual licensee, but even if she was, it would not be binding upon the Official Assignee in Bankruptcy.

to eliminate this confusing duality. Surely one means of determining the respective rights of a husband and wife should be sufficient for all purposes.¹⁶⁸

3. Some Observations

The preceding analysis of the state of the law regarding occupational rights in the matrimonial home in England and in New Zealand leads to a consideration of the applicability of some of the provisions therein contained to the situation which is presently existing in Alberta. The section of this memorandum dealing with the state of the law in Alberta has indicated the lack of a legal right to protection in the occupation of the matrimonial home for either spouse irrespective of legal or beneficial interests.

In order to bring the Alberta situation more in line with the present realities of marriage being a partnership between the spouses and more in line with recent legislation in England and New Zealand which have dealt with rights of occupation of the matrimonial home within a context of separateness of property, it would seem appropriate to at least confer a substantive right to occupation of the matrimonial home which is binding on both spouses and which is to be interpreted by a court for the general welfare and benefit of the family as a whole. This latter point is important, in as much as problems relating to rights of occupation in the matrimonial home are not merely problems arising out of disputes between husband and wife but are problems in which the rights of children and the parental obligations

¹⁶⁸J. F. Burrows, *supra* note 163 at pp. 285-286.

towards children are inextricably intertwined. It is submitted that irrespective of the manner in which the legal and beneficial estates of the property are held, there should be a legislative provision whereby a right of occupation in the matrimonial home is conferred on both spouses as a matter of substantive law. This right would accrue to the spouses by virtue of their entering into a state of matrimony and would not depend for its operation upon desertion or acquisition of property, but would apply to any piece of property which the spouses occupied either as tenants or as owners for purposes of its being used as the matrimonial home. The right so conferred, should include a right to apply by a summary procedure such as by way of notice of motion under the Supreme Court Rules to the court to protect against the disposition of the matrimonial home and of the personal property contained in the home. The court, in such a situation, would be concerned with the issue of what is for the maximum benefit of the family unit as a whole regarding the proper use and enjoyment of the matrimonial home and its contents. This would mean that the duties of the parents towards the children and the rights of the children in relation to the matrimonial home would gain far more consideration than has previously been granted.

It is submitted that a summary procedure should be provided for the adjudication of disputes regarding possessory rights in the matrimonial home and its contents. Similar considerations to those outlined in the preceding paragraph regarding rights of children and parental obligations towards the children should apply and, prior to extinguishing the rights of either spouse to occupation in the matrimonial home, the court should have regard to the paramount interest of the family unit as a whole.

In a manner similar to that provided for under the English Matrimonial Homes Act, 1967, or the New Zealand Matrimonial Property Act, 1963, there should be a summary procedure under the Rules of Court or a specific statute providing for the adjudication of disputes between spouses in respect of conflicting claims which they may have to occupation of the matrimonial home and its contents. In this writer's view, the wide discretionary powers contained in the New Zealand legislation are commendable with the exception that the Matrimonial Property Act, 1963, does not set out the right of occupation in the matrimonial home as a substantive right but leaves this matter to be determined by a court; necessitating application to the court to determine whether a right of occupation will exist. The making of rights of occupation in the matrimonial home in either spouse a substantive rule of law would seem to overcome this problem to a large extent.

In relation to conflicting claims of spouses to a right of possession and occupation of the matrimonial home, a large curative power should be vested in the court to alter the rights of occupation between the spouses upon the operant principle of what is in the best general interest of the family unit as a whole.

As a matter of substantive law, the right of occupation should be binding upon the spouses *inter se*, and penalties should be provided whereby any disposition of the matrimonial property by a spouse holding the legal interest without the consent of the other would make such spouse subject to penal sanctions and would give rise to an action for damages in the spouse whose right of occupation in the

matrimonial home was terminated by a wrongful disposition of the property to a third party. Protection against such an event happening could be provided for by requiring a specific consent or release form of the occupational right to be executed by the non-owning spouse whenever a disposition or encumbrance of the matrimonial home is to be made. Further, there should be provision for the automatic registration of a marriage certificate and a statutory declaration regarding any property to be used as the matrimonial home in the appropriate Land Titles Office which would become a notification on the title to the property as a warning to any third persons intending to deal with the property that it is subject to the substantive legal right of occupation in both spouses.

Provision should be made whereby any disposition or attempted disposition or encumbrance of the matrimonial home without the foregoing consent or releases being first obtained, shall be null and void unless the transaction results in the registration of title to the property vesting in a third party.

However, as with the New Zealand statute, any power granted to a court to alter or vary rights of occupation in the matrimonial home arising out of a dispute between spouses should be qualified by a provision to the effect that the court may not make an order which is contrary to an expressed intention of the spouses.

It is submitted that the matters outlined in the preceding paragraph indicate in a general way the type of reform that ought to be made in Alberta to protect and enforce rights of occupation in the matrimonial home. In

this regard it may be specifically advocated that a procedural section similar in nature to that found in section 17 of the Married Women's Property Act, 1882, in the United Kingdom could be of considerable benefit in Alberta for the adjudication of disputes between spouses in respect of possession to the matrimonial home. Further, in relation to the rights of occupation in a spouse as against third parties claiming an interest in the property to the property owning spouse, there would appear to be a need to alter provisions of the Dower Act so as to recognize the substantive right of occupation in the matrimonial home and make this right caveatable or registrable upon marriage or upon acquisition of the property to be used as the matrimonial home, whichever is the latest.

Further, in relation to the increasing situation of married couples renting the matrimonial home rather than purchasing it, provision should be made such as contained in the Matrimonial Homes Act, 1967, in England,¹⁶⁹ or the New Zealand Matrimonial Proceedings Act, 1963,¹⁷⁰ whereby the non-lessee spouse may convert the leasehold of the property in circumstances of separation. A similar summary procedure to that suggested for determining the right of occupation in the matrimonial home would be envisioned in this circumstance.

Further, although consideration has not been directed in this memorandum to situations of joint tenancies and

¹⁶⁹ See s. 7.

¹⁷⁰ See sections 60 and 61.

applications for a partition of property held by spouses jointly or to the situation of one spouse entering into a conditional sales contract in respect of purchase of property to be used in the matrimonial context, the recommendations set forth at page 248 of Mrs. McBean-Worton's Working Paper are of note and ought to be considered as adjunct to the proposals outlined above in relation to the matrimonial home.¹⁷¹

IV CONCLUDING REMARKS

The preceding sections of this memorandum constitute an analysis which is brief in some respects and fairly detailed in others, to illustrate the attempts which have been made in England and New Zealand to modify the hardships of the separation of property regimes existing in those jurisdictions. These attempts at modification of the separateness of property regime are illustrative of what could possibly be done in Alberta in relation to rights of occupation in the matrimonial home. It is noteworthy, however, that the addition of certain equalizing or discretionary measures to this area of the law will not overcome the objections of those persons who feel that;

. . . the basic complexity and practice (in contradistinction from its apparent simplicity on paper), the inequity, and the uncertainty of the separation of property regime can be remedied only by an overall change in our

¹⁷¹Jean McBean-Worton, "Family Law - Matrimonial Property - Book II at p. 248 (viz., recommendations (c), (d), (f) and (h)).

matrimonial property law. At the present the law treats married persons as strangers--what is needed is a recognition that marriage in fact does produce fundamental charges in the property relationship of a man and a woman. . . .¹⁷²

Merely adding a discretionary section such as section 17 of the English Married Women's Property Act, 1882, while serving to give a court discretion to allocate rights with respect to the matrimonial home and other property which is in dispute between spouses, would not serve to remove the present state of uncertainty in the law and it has been said in relation to a wife who has no legal interest in the matrimonial home, that;

. . . [she] wants to know what her rights are; she does not want to be told that she must be patient until a judge in his discretionary wisdom has given a ruling. She wants to know here and now. Is it an illegitimate desire? This does not mean that the courts will not have a vital role to play in adjusting the principle to the varying needs of a thousand different married couples. But the courts cannot establish the principle. Discretion is the rule of no principle.¹⁷³

Placed in its best light, the situation existing in Alberta would be that there is a common law duty upon a husband to support his wife he has deserted, and from this duty of support, the wife may assert a claim to a right of occupation in the matrimonial home. The preceding sections of this memorandum have attempted to show the

¹⁷²*Ibid* at p. 249.

¹⁷³O. Kahn-Freund, *supra* note 165 at p. 19.

limitations which accrue to the establishment of such a right in the non-owning spouse to occupy the matrimonial home; the most noteworthy of which, as was mentioned earlier, is the failure to deal squarely with the problems that the matrimonial home raises which are mixed issues as to property law and the law relating to support and maintenance.¹⁷⁴ Further, there has not been, to date, in any of the common law jurisdictions considered, a clear statement recognizing that different considerations must attach to problems arising under a state of matrimony from those applying to problems arising between strangers in relation to dealings with real property.

Regard must be had to the welfare of the family unit as a whole when considering the right of a spouse to occupy the matrimonial home. It appears that there has been an effort to regard the matrimonial home as simply part of "matrimonial property" rather than "family property". The fact that these two terms are not synonymous is pointed out by Professor Kahn-Freund in reference to the question --"Separation or Community of Property between Husband and Wife?"--posed by the Law Commission in England in its Working Paper on Family Property Law.¹⁷⁵ After thus setting out the question, Professor Kahn-Freund stated;

¹⁷⁴See in this regard; *Huff v. Huff and Kemp* (1972) 4 R.F.L. 258 (Man. C.A.); *Matty v. Matty* (1968) 62 W.W.R. 62 (B.C.S.Ct.); and *Richardson v. Richardson* (1971) 3 R.F.L. 260 at p. 265 where Donnelly J. stated, "The right of a deserted wife [to remain in the matrimonial home] arises from necessity. If this necessity is removed, the right is extinguished. If alimony, adequate to support the wife according to the station which she previously enjoyed, is paid, the right to remain in the matrimonial home should be revoked.

¹⁷⁵Law Commission Published Working Paper No. 42: Family Property Law 1971.

This way of putting the problem ignores the elementary points that family property is not the same as matrimonial property, i.e., that the property rights of the children are inextricably linked with those of their parents. It also ignores the mutual impact of matrimonial property *inter vivos* and the right of the surviving spouse in the estate and against the estate of the predeceasing spouse. But even if one disregarded all this, and concentrated ones attention entirely on the property relations between the spouses, the question as put above would still be misleading because the choice open to the law maker is not capable of being defined in terms of a simple antithesis of two possibilities.¹⁷⁶

The problems set out in the foregoing quotation is part of the problem which attaches to matrimonial law under a separateness of property regime where the effect of marriage on property of the spouses often is quite different as regards the right of enjoyment of property and rights of title to property. In this regard Professor Kahn-Freund has stated;

Much of the confusion surround the subject . . . has been caused by a failure to distinguish the domestic or "internal" relationship between the spouses, and the obligations they owe one another with regard to both the use of and the income

¹⁷⁶O. Kahn-Freund, Report of Committee: Law Commission Published Working Paper No. 42; Family Property Law" (1972) 35 Mod. Law Rev. 403.

derived from property and to the distribution of the substance or value, from the "external" relationship, that is the allocation of the power of the disposal which the spouses or either spouse have as against outsiders, and the position of outsiders towards the property. The distinction between the internal relationship (both as regards use and as regards capital) and the external relationship ("title") is vital If one considers how much of the existing property and conveyancing legislation in this country consists of an attempt to translate the distinction between internal and external relations into rules applicable in practice, it is surprising that it has so often been blurred in the discussion of matrimonial problems.¹⁷⁷

As with the problem of the blurring between the "internal" and "external" relations of the spouses, as outlined above, there is a further problem under a separation of property regime whereby the law of maintenance is applied to attempt to give some sort of aid to a non-owning spouse, usually the wife, where the maintenance awarded to her is in some way related to the matrimonial home. In this regard it has been said that;

. . . the problem of sharing between the spouses and of the protection of the non-earning housewife (which is part of it) can no longer be solved through the law of maintenance. It must comprise her share in what has been called "household property" or "family assets". Much the most important of these is the family home, whether it be freehold or rented property. This is the

¹⁷⁷ O. Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 Mod. Law Rev. 601 at p. 608.

consider themselves to be in a life partnership for their own mutual and individual benefit. In this regard the recommendations contained in this memorandum together with those found in Mrs. McBean-Worton's paper on matrimonial property are hereby recommended to the Board.

reason why today the matrimonial home dominates the discussion.¹⁷⁸

The foregoing statements serve, in the writer's opinion, to point out the need, particularly in the Province of Alberta, for legislative reform of the law relating to the right to occupy the matrimonial home.

Whereas one of the possibilities for reform within the separation of property framework has been discussed in the preceding section of this memorandum,¹⁷⁹ the proposals for reform of the law contained in the research paper of Mrs. McBean-Worton relating to the implementation of a regime involving a kind of partnership of acquests or deferred community¹⁸⁰ together with her recommendations for partial reform of the law under a separation of property regime,¹⁸¹ are worthy of consideration by the Board.

It is submitted that the issue before the Board in relation to the occupation in the matrimonial home is not one of whether the problem falls within the context of property or whether it falls within the context of maintenance but whether the law is in accord with the present matrimonial situation in Alberta wherein the parties to a marriage

¹⁷⁸ *Ibid*, at pp. 606-607.

¹⁷⁹ *Ante* pp. 82-87 : this proposal is merely comprised of certain additions to the law relating to rights of occupation in the matrimonial home.

¹⁸⁰ Jean McBean-Worton, *supra*, note 171 at pp. 254ff.

¹⁸¹ *Ibid*, Appendix E which is attached hereto for ease of reference from the present memorandum.

APPENDIX A

Matrimonial Homes Act 1967

(1967 c. 75)

An Act to amend the law of England and Wales as to the rights of a husband or wife to occupy a dwelling house which has been the matrimonial home; and for connected purposes.

[27th July 1967]

Protection against eviction, etc., from matrimonial home of spouse not entitled by virtue of estate, etc., to occupy it

1.—(1) Where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, then, subject to the provisions of this Act, the spouse not so entitled shall have the following rights (in this Act referred to as “rights of occupation”):—

- (a) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section;
- (b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house.

(2) So long as one spouse has rights of occupation, either of the spouses may apply to the court for an order declaring, enforcing, restricting or terminating those rights or regulating the exercise by either spouse of the right to occupy the dwelling house.

(3) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,—

- (a) may except part of the dwelling house from a spouse's rights of occupation (and in particular a part used wholly or mainly for or in connection with the trade, business or profession of the other spouse);
- (b) may order a spouse occupying the dwelling house or any part thereof by virtue of this section to make periodical payments to the other in respect of the occupation;
- (c) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house.

(4) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order.

(5) Where a spouse is entitled under this section to occupy a dwelling house or any part thereof, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house shall, whether or not it is made or done in pursuance of an order under this section, be as good as if made or done by the other spouse; and a spouse's occupation by virtue of this section shall for purposes of [the Rent Act 1968 (other than Part VI

thereof]]¹ be treated as possession by the other spouse.

Where a spouse entitled under this section to occupy a dwelling house or any part thereof makes any payment in or towards satisfaction of any liability of the other spouse in respect of mortgage payments affecting the dwelling house, the person to whom the payment is made may treat it as having been made by that other spouse, but the fact that that person has treated any such payment as having been so made shall not affect any claim of the first-mentioned spouse against the other to an interest in the dwelling house by virtue of the payment.

(6) The jurisdiction conferred on the court by this section shall be exercisable by the High Court or by a county court, and shall be exercisable by a county court notwithstanding that by reason of the amount of the net annual value for rating of the dwelling house or otherwise the jurisdiction would not but for this subsection be exercisable by a county court.

(7) In this Act "dwelling house" includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling house and occupied therewith.

(8) This Act shall not apply to a dwelling house which has at no time been a matrimonial home of the spouses in question; and a spouse's rights of occupation shall continue only so long as the marriage subsists and the other spouse is entitled as mentioned in subsection (1) above to occupy the dwelling house, except where provision is made by section 2 of this Act for those rights to be a charge on an estate or interest in the dwelling house.^{1a}

¹ Substituted by the Rent Act 1968 (c. 23), Sched. 15.

^{1a} Subsection (9) added by Matrimonial Proceedings and Property Act 1970 (c. 45), s. 38, *post*.

Effect of statutory rights of occupation as charge on dwelling house

2.—(1) Where, at any time during the subsistence of a marriage, one spouse is entitled to occupy a dwelling house by virtue of an estate or interest, then the other spouse's rights of occupation shall be a charge on that estate or interest, having the like priority as if it were an equitable interest created at whichever is the latest of the following dates, that is to say,—

- (a) the date when the spouse so entitled acquires the estate or interest;
- (b) the date of the marriage; and
- (c) the commencement of this Act.

(2) Notwithstanding that a spouse's rights of occupation are a charge on an estate or interest in the dwelling house, those rights shall be brought to an end by—

- (a) the death of the other spouse, or
- (b) the termination (otherwise than by death) of the marriage, unless in the event of a matrimonial dispute or estrangement the court sees fit to direct otherwise by an order made under section 1 above during the subsistence of the marriage.

(3) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse—

- (a) any order under section 1 above against the other spouse shall, except in so far as the contrary intention appears, have the like effect against persons deriving title under the other spouse and affected by the charge; and
- (b) subsections (2) to (5) of section 1 above shall apply in relation to any person deriving title under the other spouse and affected by the charge as they apply in relation to the other spouse.

(4) Where a spouse's rights of occupation are a charge on an estate or interest in the dwelling house, and that estate or interest is surrendered so as to merge in some other estate or interest expectant thereon in such circumstances that, but for the merger, the person taking the estate or

interest of the other spouse would be bound by the charge, then the surrender shall have effect subject to the charge and the persons thereafter entitled to the other estate or interest shall, for so long as the estate or interest surrendered would have endured if not so surrendered be treated for all purposes of this Act as deriving title to the other estate or interest under the other spouse by virtue of the surrender.

(5) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse, and the other spouse—

- (a) is adjudged bankrupt or makes a conveyance or assignment of his or her property (including that estate or interest) to trustees for the benefit of his or her creditors generally; or
- (b) dies and his or her estate is insolvent;

then, notwithstanding that it is registered in accordance with the following provisions of this section, the charge shall be void against the trustee in bankruptcy, the trustees under the conveyance or assignment or the personal representatives of the deceased spouse, as the case may be.

(6) At the end of section 10 (1) of the Land Charges Act 1925 (which lists the classes of charges on, or obligations affecting, land which may be registered as land charges) there shall be added the following paragraph:—

“Class F: A charge affecting any land by virtue of the Matrimonial Homes Act 1967”;

and in the enactments mentioned in the Schedule to this Act there shall be made the consequential amendments provided for by that Schedule.

(7) Where the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling house is registered under the Land Registration Act 1925 or any enactment replaced by that Act, registration of a land charge affecting the dwelling house by virtue of this Act shall be effected by registering a notice or caution under that Act, and a spouse's rights of occupation shall not be an overriding interest within the meaning of that Act affecting the dwelling house notwithstanding that the spouse is in actual occupation of the dwelling house.

(8) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse, and that estate or interest is the subject of a mortgage within the meaning of the Law of Property Act 1925, then if, after the date of creation of the mortgage, the charge is registered by virtue of subsection (6) above, the charge shall, for the purposes of section 94 of that Act (which regulates the rights of mortgagees to make further advances ranking in priority to subsequent mortgages), be deemed to be a mortgage subsequent in date to the first-mentioned mortgage.

Restriction on registration where spouse entitled to more than one charge

3. Where one spouse is entitled by virtue of section 2 above to a charge on the estate or interest of the other spouse in each of two or more dwelling houses, only one of the charges to which that spouse is so entitled shall be registered in accordance with subsection (6) or (7) of that section at any one time, and if any of those charges is registered in accordance with the said subsection (6) or (7), the Chief Land Registrar, on being satisfied that any other of them is so registered, shall cancel the registration of the charge first registered.

Contract for sale of house affected by registered charge to include term requiring cancellation of registration before completion

4.—(1) Where one spouse is entitled by virtue of section 2 above to a charge on an estate or interest in a dwelling house and the charge is registered in accordance with subsection (6) or (7) of that section, it shall be a term of any contract for the sale of that estate or interest whereby the vendor agrees to give vacant possession of the dwelling house on completion of the contract that the vendor will before such

completion procure the cancellation of the registration of the charge at his expense:

Provided that the foregoing provision shall not apply to any such contract made by a vendor who is entitled to sell the estate or interest in the dwelling house freed from any such charge.

(2) If, on the completion of such a contract as is referred to in subsection (1) above, there is delivered to the purchaser or his solicitor an application by the spouse entitled to the charge for the cancellation of the registration of that charge, the term of the contract for which subsection (1) above provides shall be deemed to have been performed.

(3) This section applies only if and so far as a contrary intention is not expressed in the contract.

(4) This section shall apply to a contract for exchange as it applies to a contract for sale.

(5) This section shall, with the necessary modifications, apply to a contract for the grant of a lease or underlease of a dwelling house as it applies to a contract for the sale of an estate or interest in a dwelling house.

Cancellation of registration after termination of marriage, etc.

5.—(1) Where a spouse's rights of occupation are a charge on the estate or interest of the other spouse in a dwelling house and the charge is registered in accordance with subsection (6) or (7) of section 2 above, the Chief Land Registrar shall, subject to subsection (2) below, cancel the registration of the charge if he is satisfied—

(a) by the production of a certificate or other sufficient evidence, that either spouse is dead, or

(b) by the production of an official copy of a decree of a court, that the marriage in question has been terminated otherwise than by death, or

(c) by the production of an order of the court, that the spouse's rights of occupation constituting the charge have been terminated by the order.

(2) Where—

(a) the marriage in question has been terminated by the death of the spouse entitled to an estate or interest in the dwelling house or otherwise than by death, and

(b) an order affecting the charge of the spouse not so entitled had been made by virtue of section 2 (2) above,

then if, after the making of the order, registration of the charge was renewed or the charge registered in pursuance of subsection (3) below, the Chief Land Registrar shall not cancel the registration of the charge in accordance with subsection (1) above unless he is also satisfied that the order has ceased to have effect.

(3) Where such an order has been made, then, for the purposes of subsection (2) above, the spouse entitled to the charge affected by the order may—

(a) if before the date of the order the charge was registered in accordance with subsection (6) or (7) of section 2 above, renew the registration of the charge, and

(b) if before the said date the charge was not so registered, register the charge in accordance with the said subsection (6) or (7).

(4) Renewal of the registration of a charge in pursuance of subsection (3) above shall be effected in such manner as may be prescribed, and an application for such renewal or for registration of a charge in pursuance of that subsection shall contain such particulars of any order affecting the charge made by virtue of section 2 (2) above as may be prescribed.

(5) The renewal in pursuance of subsection (3) above of the registration of a charge shall not affect the priority of the charge.

(6) In this section "prescribed" means prescribed by rules made under section 19 of the Land Charges Act 1925 or section 144 of the Land Registration Act 1925, as the circumstances of the case require.

Release of rights of occupation and postponement of priority of charge

6.—(1) A spouse entitled to rights of occupation may by a release in writing release those rights or release them as respects part only of the dwelling house affected by them.

(2) Where a contract is made for the sale of an estate or interest in a dwelling house, or for the grant of a lease or underlease of a dwelling house, being (in either case) a dwelling house affected by a charge registered in accordance with subsection (6) or (7) of section 2 above, then, without prejudice to subsection (1) above, the rights of occupation constituting the charge shall be deemed to have been released on the happening of whichever of the following events first occurs, that is to say, the delivery to the purchaser or lessee, as the case may be, or his solicitor on completion of the contract of an application by the spouse entitled to the charge for the cancellation of the registration of the charge or the lodging of such an application at Her Majesty's Land Registry.

(3) A spouse entitled by virtue of section 2 above to a charge on an estate or interest of the other spouse may agree in writing that any other charge on, or interest in, that estate or interest shall rank in priority to the charge to which that spouse is so entitled.

Provision for case where Rent Acts apply and marriage is terminated by divorce, etc.

7.—(1) Where one spouse is entitled, either in his or her own right or jointly with the other spouse, to occupy a dwelling house by virtue of a [protected tenancy]² or of a statutory tenancy and the marriage is terminated by the grant of a decree of divorce or nullity of marriage, the court by which the decree is granted may make an order under subsection (2) or (3) below according to the circumstances.

(2) Where a spouse is entitled as aforesaid to occupy the dwelling house by virtue of a [protected tenancy],² the court may by order direct that, as from the date on which the decree is made absolute, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, his or her former spouse—

(a) the estate or interest which the spouse so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and

(b) where the said spouse is an assignee of such lease or agreement, the liability of the said spouse under any covenant of indemnity by the assignee expressed or implied in the assignment of the lease or agreement to that spouse;

and where such an order is made, any liability or obligation to which the said spouse is subject under any covenant having reference to the dwelling house in such lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date on which the decree is made absolute, shall not be enforceable against the said spouse.

(3) Where the spouse is entitled as aforesaid to occupy the dwelling house by virtue of a statutory tenancy, the court may by order direct that, as from the date on which the decree is made absolute, that spouse shall cease to be entitled to occupy the dwelling house and that his or

² Substituted by the Rent Act 1968 (c. 23), Sched. 15.

her former spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and the question whether the provisions of the [paragraphs 1 to 3 or, as the case may be, paragraphs 5 to 7 of Schedule 1 to the Rent Act 1968]³ as to the succession by the widow of a deceased tenant or by a member of his family to the right to retain possession are capable of having effect in the event of the death of the person deemed by an order under this subsection to be the tenant or sole tenant under the statutory tenancy shall be determined according as those provisions have or have not already had effect in relation to the statutory tenancy.

(4) Where the court makes an order under this section it may by the order direct that both spouses shall be jointly and severally liable to discharge or perform any or all of the liabilities and obligations in respect of the dwelling house (whether arising under the tenancy or otherwise) which have at the date of the order fallen due to be discharged or performed by one only of the spouses or which, but for the direction, would before the date on which the decree is made absolute fall due to be discharged or performed by one only of them; and where the court gives such a direction it may further direct that either spouse shall be liable to indemnify the other in whole or in part against any payment made or expenses incurred by the other in discharging or performing any such liability or obligation.

(5) An order under this section may be made at any time after a decree nisi has been granted and before the decree is made absolute.

(6) Rules of court shall be made requiring the court before it makes an order under this section to give the landlord of the dwelling house to which the order will relate an opportunity of being heard.

(7) Where a spouse is entitled to occupy a dwelling house by virtue of a tenancy, this section shall not affect the operation of sections 1 and 2 above in relation to the other spouse's rights of occupation, and the court's power to make orders under this section shall be in addition to the powers conferred by those sections.

(8) [In this section the expressions "landlord," "protected tenancy," "statutory tenancy" and "tenancy" have the same meaning as in the Rent Act 1968.]³

Short title, commencement, extent and construction

8.—(1) This Act may be cited as the Matrimonial Homes Act 1967, and shall come into operation on such date as the Lord Chancellor may by order made by statutory instrument appoint.

(2) This Act shall not extend to Scotland or Northern Ireland.

(3) [References in this Act to any enactment are references to that]⁴ enactment as amended, extended or applied by any other enactment, including this Act.

Section 2 (6)

SCHEDULE

CONSEQUENTIAL AMENDMENTS AS TO LAND CHARGES

[Paragraph (1) repealed by Law of Property Act 1969 (c. 59), ss. 16 (2), 17 (1), Sched. 2, Pt. II.]

2. In section 12 (2) of the Land Charges Act 1925 (which relates to the expenses of registering land charges) after the words "Class E" there shall be inserted the words "or Class F."

3. At the end of section 13 of the Land Charges Act 1925 (which protects purchasers against land charges created after certain dates) there shall be added the following subsection:—

³ Substituted by the Rent Act 1968 (c. 23), Sched. 15.

⁴ Substituted by the Rent Act 1968 (c. 23), Sched. 15.

"(3) A land charge of Class F shall be void as against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase."

4. In Schedule 1 to the County Courts Act 1959 (which specifies the cases in which a county court has jurisdiction under certain enactments), at the end of the second column of the entry relating to section 10 (8) of the Land Charges Act 1925, there shall be added the following paragraph:—

"In a case where the land charge is within Class F, if the land affected by the charge is the subject of an order made by the court under section 1 of the Matrimonial Homes Act 1967 or an application for an order under the said section 1 relating to such land has been made to the court."

APPENDIX B

Matrimonial Property

1963, No. 72



ANALYSIS

Title	
1. Short Title and commencement	6. Matters to be considered by Court
2. Interpretation	7. Procedure
3. Criminal proceedings	8. Rights of mortgagee, etc., not affected
4. Proceedings in tort	9. Consequential amendment and repeals
5. Property disputes	

1963, No. 72

An Act to make provision with respect to proceedings as to property or in tort between husband and wife

[23 October 1963]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Matrimonial Property Act 1963.

(2) Sections 5, 6, 7, 8, and subsection (3) of section 9 of this Act shall come into force on the first day of January, nineteen hundred and sixty-five.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Marriage” includes a former marriage; and “party to a marriage” has a corresponding meaning:

“Property” includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

3. Criminal proceedings—(1) No criminal proceedings shall be taken against any party to a marriage by or on the complaint of the other party to the marriage—

- (a) While the parties are living together; or
- (b) While the parties are living apart, with respect to any act done or omitted while they were living together—in respect of any property claimed by the other party to the marriage.

(2) Subject to the provisions of subsection (1) of this section and of section 226 of the Crimes Act 1961, each of the parties to a marriage shall have against every other person (including the other party to the marriage) the same remedies and redress by way of criminal proceedings for the protection and security of his or her property as if he or she were unmarried.

Cf. 1952, No. 53, ss. 9, 18

4. Proceedings in tort—(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were unmarried.

(2) Where one of the parties to a marriage brings an action in tort against the other during the subsistence of the marriage, the Court may at any stage of the proceedings, on application or of its own motion, stay the action if it appears that—

- (a) No substantial benefit, whether material or otherwise, would accrue to either party by the continuation of the proceedings; or
- (b) The proceedings are vexatious in character; or
- (c) The question or questions in issue could more conveniently be disposed of on an application made under section 5 of this Act.

(3) Without limiting the provisions of paragraph (c) of subsection (2) of this section, the Court may in any such action exercise any power which could be exercised on an application under section 5 of this Act or give such directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

(4) In an action to which this section applies, judgment by default shall not be entered except with the leave of the Court. An application for the grant of such leave must be served on the defendant.

(5) This section shall apply only where the cause of action arises after the date of the passing of this Act. In any case where the cause of action arose before that date, the provisions

of sections 3 and 9 of the Married Women's Property Act 1952 shall continue to apply as if this section and section 9 of this Act had not been passed.

Cf. 1936, No. 31, s. 17 (1A) ; 1952, No. 53, ss. 3, 9; 1955, No. 73, s. 3; Law Reform (Husband and Wife) Act 1962, s. 1 (U.K.)

5. Property disputes—(1) In any question between husband and wife as to the title to or possession or disposition of property (including any question as to investment by one party of money of the other without consent) the husband or the wife, or any person on whom conflicting claims are made by the husband and wife, may apply to any Judge of the Supreme Court or, subject to the provisions of subsection (4) of this section, to a Magistrate's Court.

(2) On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute, including any order for—

- (a) The sale of the property or any part thereof and the division or settlement of the proceeds; or
- (b) The partition or division of the property; or
- (c) The vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit; or
- (d) The conversion of joint ownership into ownership in common in such shares as he thinks fit;—

and may make such order as to the costs of and consequent upon the application as he thinks fit, and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit.

(3) Subject to the provisions of subsection (2) of section 6 of this Act, the Judge or Magistrate may make such order under this section, whether affecting the title to property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

(4) A Magistrate's Court may exercise jurisdiction under this section where the value of the property in dispute is within the limits of the jurisdiction of that Court:

Provided that a Magistrate's Court may make an order under this section granting to the husband or wife the right to occupy a matrimonial home irrespective of the value thereof.

(5) An order made under this section shall be subject to appeal in the same way as an order made by the Judge or Court in an action in the Supreme Court or a Magistrate's Court, respectively, would be.

(6) This section shall apply with respect to any matrimonial home, whether or not it is a joint family home within the meaning of the Joint Family Homes Act 1950.

(7) In this section and in sections 6 to 8 of this Act the terms "husband" and "wife" include the legal personal representatives of the husband or wife.

Cf. 1952, No. 53, s. 19; 1961, No. 90, s. 2; Marriage (Property) Act 1962, s. 3 (Victoria)

6. Matters to be considered by Court—(1) In considering any application under section 5 of this Act, the Judge or Magistrate shall, where the application relates to a matrimonial home or to the division of the proceeds of the sale of a matrimonial home, and may in any other case, have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever).

(2) The Judge or Magistrate shall not exercise the powers conferred upon him under subsection (3) of section 5 of this Act so as to defeat any common intention which he is satisfied was expressed by the husband and the wife.

Cf. Marriage (Property) Act 1962, s. 3 (Victoria)

7. Procedure—(1) Before any order is made under section 5 of this Act, such notice as the Court directs shall be given to any person having an interest in the property that would be affected by the order, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(2) Any application or appeal under section 5 of this Act shall be heard in private if the husband or wife so desires.

(3) If any person other than the husband or wife is the applicant under section 5 of this Act, that person shall, for the purposes of costs or otherwise, be treated as a stakeholder only.

(4) Where the Court makes an order under section 5 of this Act granting to the husband or wife the right to occupy a matrimonial home or directing the sale of a matrimonial home and the division of the proceeds between the spouses or for the vesting in both spouses in common of a matrimonial

home owned by one spouse or for the conversion of joint ownership of a matrimonial home into ownership in common, the provisions of section 57 or, as the case may require, section 58 or section 59 of the Matrimonial Proceedings Act 1963, as far as they are applicable and with the necessary modifications, shall apply as if the order were an order under the said section 57 or section 58 or section 59.

(5) The provisions of sections 80 and 81 of the Matrimonial Proceedings Act 1963 (which relate to the restraining and setting aside of dispositions) shall, as far as they are applicable and with the necessary modifications, apply with respect to an application and an order under section 5 of this Act.

(6) Subject to the provisions of Part VIII of the Matrimonial Proceedings Act 1963, where any question which could have been raised for decision in proceedings under section 5 of this Act arises between husband and wife in any other proceedings, the Judge or Court shall decide the question as if it had been raised for decision in proceedings under section 5 of this Act.

(7) Where at the time when an application for a separation order is made under section 17 of the Destitute Persons Act 1910 proceedings under section 5 of this Act are pending in a Magistrate's Court between the parties to the application, or such proceedings are commenced before the separation order is granted, the Court may hear and determine the proceedings under section 5 of this Act in conjunction with the proceedings between the parties under the Destitute Persons Act 1910.

Cf. 1952, No. 53, s. 19 (1), (3); Marriage (Property) Act 1962, s. 3 (Victoria)

8. Rights of mortgagee, etc., not affected—The rights conferred on the husband or wife by any order made under section 5 of this Act shall be subject to the rights of the person entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property in respect of which the order is made if it was registered before the date of the making of the order or if the rights of that person arise under an instrument executed before that date:

Provided that, notwithstanding anything in any enactment or in any instrument, no money payable under any such mortgage, security, charge, or encumbrance shall be called up or become due by reason of the making of any such order, not being an order directing the sale of any property.

9. Consequential amendment and repeals—(1) Section 3 of the Married Women's Property Act 1952 is hereby amended by omitting the words "section nine hereof", and substituting the words "section 4 of the Matrimonial Property Act 1963".

(2) The following enactments are hereby repealed:

(a) Paragraph (c) of subsection (1) of section 39 of the Divorce and Matrimonial Causes Act 1928 (which subsection was substituted by subsection (5) of section 16 of the Law Reform Act 1936):

(b) Subsection (1A) of section 17 of the Law Reform Act 1936 (which subsection was inserted by section 3 of the Law Reform Amendment Act 1955):

(c) Sections 9 and 18 of the Married Women's Property Act 1952:

(d) Section 3 of the Law Reform Amendment Act 1955:

(e) So much of the Third Schedule to the Crimes Act 1961 as relates to the Married Women's Property Act 1952.

(3) The following enactments are hereby repealed:

(a) Section 19 of the Married Women's Property Act 1952:

(b) The Married Women's Property Amendment Act 1961.

This Act is administered in the Department of Justice.

APPENDIX C

Matrimonial Proceedings

1963, No. 71

PART VIII

THE MATRIMONIAL HOME

55. Interpretation—(1) In this Part of this Act, unless the context otherwise requires,—

“Furniture” includes household appliances and effects; and also includes furniture and household appliances and effects that are the subject of a hire-purchase agreement:

“Matrimonial home” means any dwelling (including a flat) being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of divorce is or has been granted, in any case where—

(a) Either or both of the parties or the personal representative of one of them—

(i) Owns the dwelling; or

(ii) Owns a specified share of any estate or interest in the land on which the dwelling is situated and by reason of reciprocal agreements with the owners of the other shares is entitled to the exclusive occupation of the dwelling; or

(iii) Holds shares in a company which owns any estate or interest in the land on which the dwelling is situated, and by reason of holding those shares is entitled to the exclusive occupation of the dwelling; and

(b) Either or both of the parties owned the dwelling or the specified share in land or held the shares, as the case may be, at the date of the decree.

(2) The provisions of this Part of this Act shall apply with respect to a matrimonial home, whether or not it is a joint family home within the meaning of the Joint Family Homes Act 1950.

56. Rights of mortgagee, etc., not affected by order under this Part—The rights conferred on the husband or wife by any order made under this Part of this Act shall be subject to the rights of the person entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property in respect of which the order is made if it was registered before the date of the making of the order or if the rights of that person arise under an instrument executed before that date:

Provided that, notwithstanding anything in any enactment or in any instrument, no money payable under any such mortgage, security, charge, or encumbrance shall be called up or become due by reason of the making of any such order, not being an order under section 58 of this Act directing the sale of a matrimonial home.

57. Court may make order for occupation of matrimonial home—(1) The Court may, if it thinks fit, on making a decree of divorce or at any subsequent time, instead of or in addition to making any order under Part VI of this Act, make an order against the husband or the wife, or his or her personal representative, granting to the wife or husband, as the case may be, for such period and on such terms and subject to such conditions as the Court thinks fit, the right personally to occupy the matrimonial home.

(2) Where an order is made under subsection (1) of this section, the wife or husband, as the case may be, shall be entitled personally to occupy the land on which the matrimonial home is situated or which is appurtenant to the matrimonial home, or such part of that land as is specified in the order.

(3) The Court may make such other orders and give such directions as may be necessary or desirable to give effect to any order made under subsection (1) of this section.

(4) An order made under subsection (1) of this section against the husband or wife shall be enforceable against the personal representative of the person against whom it is made, unless the Court otherwise directs.

(5) Before any order is made under subsection (1) of this section, such notice as the Court directs shall be given to any person having an interest in the matrimonial home, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(6) The Court may at any time, if it thinks fit, cancel any order made under subsection (1) of this section.

(7) The Court may from time to time vary or extend any order made under subsection (1) of this section in such manner as the Court thinks fit, whether as to the period of the order or as to the terms and conditions on which or subject to which it was made.

(8) An application under subsection (6) or subsection (7) of this section to cancel, vary, or extend any order may be made by either of the parties to the marriage, or by the personal representative against whom it was made, or by the

personal representative of the person against whom it was made, or by any person having any interest in the matrimonial home.

(9) Where an order made under this section in respect of any matrimonial home relates to any estate or interest in land, a copy of the order sealed with the seal of the Court shall, upon application by either of the parties or, in the case of an order under subsection (6) or subsection (7) of this section, by the person upon whose application the order was made, and upon payment of the prescribed fee, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be, or by the Mining Registrar in any case where the order relates to land comprised in a licence within the meaning of the Mining Tenures Registration Act 1962 that has not been registered under the Land Transfer Act 1952.

(10) An order made under subsection (1) of this section shall cease to have effect where—

- (a) The order is cancelled by the Court under subsection (6) of this section; or
- (b) The person in whose favour and the person against whom the order is made so agree in writing; or
- (c) The period for which the order was made has expired; or
- (d) The Court so directs in any other case.

(11) Where the District Land Registrar or Registrar of Deeds or Mining Registrar, as the case may be, is satisfied that an order made in respect of a matrimonial home and registered under subsection (9) of this section has ceased to have effect pursuant to subsection (10) of this section, he shall, on application in that behalf, endorse the register accordingly.

58. Court may direct sale of home or direct payment—

(1) The Court, on making a decree of divorce, if it is satisfied that both parties to the marriage have made a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever), may, if it thinks fit, on the application of either party made before the decree of divorce is made, make an order—

- (a) Directing the sale of the home (including the land on which it is situated and such other land appurtenant thereto as the Court directs) and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the Court thinks fit:

Provided that where the home comprises part of a building that is not used exclusively or principally as the home of the parties, or where the land appurtenant to the home is not used exclusively or principally for the purposes of a home, the Court shall not make an order under this paragraph, unless in the special circumstances of the case the Court considers it is fair and equitable; or

(b) Directing that either party pay to the other such sum, either in one sum or in instalments and either forthwith or at a future date and either with or without security, as the Court thinks fair and reasonable in return for the contribution made by that other party.

(2) In any case to which subparagraph (iii) of paragraph (a) of the definition of the term "matrimonial home" in section 55 of this Act applies, an order made under paragraph (a) of subsection (1) of this section shall direct the sale of the shares held in relation to the matrimonial home, and the succeeding provisions of this section shall be modified and construed accordingly.

(3) Where the Court makes an order under subsection (1) of this section, it may make such other orders and may give such directions as may be necessary or desirable to give effect to the order.

(4) Before any order is made under subsection (1) of this section, such notice as the Court directs shall be given to any person having an interest in the property that would be affected by the order, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(5) Where the Court directs the sale of the matrimonial home pursuant to subsection (1) of this section, it may, if it thinks fit, instead of directing division of the proceeds between the parties to the marriage, direct that the whole or any part of the proceeds be paid or applied for the benefit of the children of the marriage or any of them, and may give such other directions as may be necessary or desirable to give effect to that direction.

(6) The amount payable to either party to the marriage under any order made pursuant to paragraph (b) of subsection (1) of this section shall constitute a debt owing to that party by the other and shall be recoverable accordingly, and, in the case of an order made in respect of any estate or interest in land, shall also constitute a charge against that

estate or interest, and may be registered against that estate or interest under the provisions of the Statutory Land Charges Registration Act 1928.

(7) Where an order is made under subsection (1) of this section and a party to the marriage who has an estate or interest in the matrimonial home dies before the order has been complied with, the order shall be binding on and be complied with by the personal representative of that party.

(8) Without limiting the provisions of subsection (3) of this section, where the Court, under subsection (1) of this section, directs the sale of the matrimonial home and the division of the proceeds pursuant to paragraph (a) of the said subsection (1) or the application of the proceeds pursuant to subsection (5) of this section, the Court may appoint a person to sell the matrimonial home and divide or apply the proceeds accordingly.

(9) The execution of any instrument by the person so appointed shall have the same force and validity as if it had been executed by the person in whom the matrimonial home is vested.

(10) The Court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of any such instrument and its execution by the person so appointed.

59. Court may vest matrimonial home in parties in common—(1) Where—

(a) The matrimonial home is owned by the petitioner or the respondent or by both of them as joint owners; and

(b) The Court is satisfied that both parties have made a substantial contribution to the matrimonial home (whether in the form of money payments, or services, or prudent management, or otherwise howsoever),—

the Court, on making a decree of divorce, may, if it thinks fit, on the application of either party made before the decree is made, make an order vesting the home (including the land on which it is situated and such other land appurtenant thereto as the Court directs) in the parties as owners in common in such shares as the Court thinks fit.

(2) In any case to which subparagraph (iii) of paragraph (a) of the definition of the term “matrimonial home” in section 55 of this Act applies, an order made under subsection (1) of this section shall vest the shares held in relation to the

matrimonial home, and the provisions of this section shall be modified and construed accordingly.

(3) Before any order is made under subsection (1) of this section, such notice as the Court directs shall be given to any person having an interest in the matrimonial home, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(4) Where any order made under this section in respect of any matrimonial home relates to any estate or interest in land which is registered in the office of the District Land Registrar or the Registrar of Deeds or to the land comprised in any licence within the meaning of the Mining Tenures Registration Act 1962 that has not been registered under the Land Transfer Act 1952, a copy of the order sealed with the seal of the Court shall, upon application by either of the parties and upon payment of the prescribed fee, be registered by the District Land Registrar or the Registrar of Deeds or the Mining Registrar, as the case may require.

(5) The provisions of this section and of any order thereunder shall have effect notwithstanding any prohibition or restrictions in the articles of association of any company relating to the transfer or ownership of shares.

60. Court may vest tenancy of dwellinghouse in petitioner or respondent—(1) Where the Court makes a decree of divorce, it may at the same or any subsequent time, if it thinks fit, make an order vesting in the petitioner or the respondent (in this section referred to as the applicant) the tenancy of any dwellinghouse, being a dwellinghouse within the meaning of the Tenancy Act 1955,—

- (a) Of which at the time of the making of the decree the applicant's wife or husband (in this section referred to as the other party) is or was either the sole tenant or a tenant holding jointly or in common with the applicant; and
- (b) Of which at the time of the making of the order under this subsection the other party is a tenant as aforesaid; and
- (c) In which the applicant or the other party resides at the time of the order under this subsection.

(2) On the taking effect of an order made under subsection (1) of this section, unless the tenancy is sooner lawfully determined, the applicant shall become the tenant of the dwellinghouse upon and subject to the terms and conditions

of the tenancy in force at the time of the making of the order, and the other party shall cease to be the tenant.

(3) Nothing in this section or in any order made thereunder shall be construed to limit or affect the operation of any enactment or rule of law for the time being applicable to any tenancy to which this section applies or to the dwellinghouse held under the tenancy, or to authorise the Court to vary, except by vesting or revesting the tenancy pursuant to this section, any express or implied term or condition of the tenancy.

(4) On the application of the other party in any case in which an order is made under subsection (1) of this section, the Court may, if the tenant has died and the tenancy has not been determined by reason thereof, or if in the opinion of the Court the circumstances have so changed since the making of the order that the tenancy should be revested in the person or any of the persons in whom it was vested before the making of that order, make an order cancelling the first-mentioned order and revesting the tenancy accordingly.

(5) On the taking effect of any revesting order under subsection (4) of this section, unless the tenancy is sooner lawfully determined, the person in whose favour it is made shall become the tenant of the dwellinghouse upon and subject to the terms and conditions of the tenancy in force at the time of the making of the revesting order.

(6) Any order under this section may be made upon and subject to such terms and conditions, not inconsistent with this Act, as the Court thinks fit.

(7) Every order under this section shall take effect on such date as may be specified in that behalf in the order, but, if an appeal is lodged, the operation of the order shall be suspended until the appeal is determined.

(8) Where any dwellinghouse to which any order made under this section relates is held under any registered lease, the Registrar of the Court in which the order is made shall, on the taking effect of the order, send a copy of the order, sealed with the seal of the Court, to the District Land Registrar or, as the case may require, to the Registrar of Deeds, who shall, upon payment of the prescribed registration fee, register it in the prescribed manner. The said registration fee shall be payable by the person in whose favour the order is made.

(9) For the purposes of this section, the term "tenant", in relation to any dwellinghouse, includes any person whose tenancy has expired or been determined, and who is for the

time being deemed under or by virtue of any enactment or rule of law to continue to be the tenant of the dwellinghouse; and the term "tenancy" has a corresponding meaning.

Cf. 1928, No. 16, s. 41A (1)–(12); 1953, No. 43, s. 14

61. Landlord to have right to appear and be heard— Notice in the prescribed form of any application for an order under section 60 of this Act shall be served in the prescribed manner on the landlord of the dwellinghouse, who shall be entitled to appear and be heard as a party to the application.

Cf. 1928, No. 16, ss. 41B, 41C; 1953, No. 43, s. 14

62. Order in respect of furniture—(1) Where the Court makes an order for occupation of the matrimonial home under section 57 of this Act or an order vesting the tenancy of a dwellinghouse under section 60 of this Act, it may, if it thinks fit, by the same or any subsequent order, grant possession of the furniture or any specified articles of furniture in the matrimonial home or, as the case may be, in the dwellinghouse to the party in whose favour the order is made for such period and on such terms and subject to such conditions as the Court thinks fit.

(2) The Court, on making a decree of divorce and whether or not it makes any other order under this Part of this Act, may make an order vesting the furniture or any specified articles of furniture owned by one or both of the parties to the marriage in the other party, or, as the case may be, in one of the parties, if the Court thinks it reasonable so to do having regard to the contribution made to the home (whether a matrimonial home or not) by the party in whose favour the order is made (whether in the form of money payments, or services, or prudent management, or otherwise howsoever).

(3) Before any order is made under subsection (1) or subsection (2) of this section, such notice as the Court directs shall be given to any person having an interest in the furniture that would be affected by the order, and any such person shall be entitled to appear and be heard in the matter as a party to the application.

(4) In any case where any furniture is in the possession of one or both of the parties to the marriage under a hire-purchase agreement within the meaning of the Hire Purchase Agreements Act 1939, the Court, on making a decree of divorce, may, if it thinks fit, make an order vesting the rights

under the hire-purchase agreement in respect of all or any of the articles that are subject to the agreement in the other party, or, as the case may be, in one of the parties, and any such order shall have effect notwithstanding anything in any such agreement.

(5) The owner of any furniture to which any such hire-purchase agreement relates shall be entitled to appear and be heard as a party to the application for an order under subsection (4) of this section.

(6) The Court may make an order under this section in respect of any specified article of furniture, notwithstanding that the article is by law affixed to the realty:

Provided that where any such order is made under subsection (2) of this section the article shall thereupon cease for all purposes to be part of the realty and shall become personal property owned by the person in whose favour the order is made.

(7) The Court may at any time, if it thinks fit, cancel any order made under subsection (1) of this section.

(8) The Court may from time to time vary or extend any order made under subsection (1) of this section in such manner as the Court thinks fit, whether as to the period of the order or as to the terms and conditions on which or subject to which it was made.

(9) An application under subsection (7) or subsection (8) of this section to cancel, vary, or extend any order may be made by either of the parties to the marriage, or by the personal representative against whom it was made, or by the personal representative of the person against whom it was made, or by any person having any interest in the furniture affected by the order.

63. Exclusion of common law rights—Notwithstanding any rule of law to the contrary, a party to a marriage in respect of which a decree has been made under this Act who has no interest in the matrimonial home as owner or under any deed, written agreement, or instrument shall have no right, licence, or equity to occupy or to be or remain in possession of the matrimonial home otherwise than in accordance with this Part of this Act.

64. Power of Court under Matrimonial Property Act 1963 unaffected—(1) Nothing in this Part of this Act shall affect the powers of the Court under section 5 of the Matrimonial Property Act 1963 (which relates to the settlement of disputes between husband and wife as to property).

(2) Where at the time when a petition for divorce is filed proceedings under section 5 of the Matrimonial Property Act 1963 are pending in the Court between the parties to the petition or such proceedings are commenced before the making of the decree absolute, the Court may hear and determine those proceedings in conjunction with any proceedings between the parties under this Act.

65. Application of this Part to nullity and other proceedings—(1) The provisions of this Part of this Act, as far as they are applicable and with any necessary modifications, shall apply with respect to a petition for and a decree of nullity or separation or dissolution of a voidable marriage as they apply with respect to a petition for and a decree of divorce.

(2) The provisions of this Part of this Act (except sections 58 and 59 and subsection (2) of section 62), as far as they are applicable and with the necessary modifications, shall apply with respect to a petition for and decree of restitution of conjugal rights as they apply with respect to a petition for and a decree of divorce.

APPENDIX D

Appendix E of Mrs. McBean-Worton's research paper

Matrimonial Property Act**Part I. The Matrimonial Home and Contents****Alternate Proposal #1. Co-ownership of the Matrimonial Home**

1. The matrimonial home should be defined in the same way as the homestead is presently defined in the Dower Act.

2. In the absence of express agreement the spouses should share equally in the beneficial interest in the homestead.

3. An agreement contracting out of the co-ownership should meet certain requirements to be valid. These should include the requirement of legal advice.

4. Co-ownership should be protected by a requirement that all transfers contain either a declaration that the property is not the homestead of the vendor, or written consent of both parties to the sale.

5. As under the Dower Act the bonafide purchaser would be protected where the vendor made a fraudulent declaration that the home is not a homestead, as long as the transfer was registered. Provision should be made for a wide curative section to enable the court to declare a disposition valid even though the technical requirements of the Act were not followed.

6. Either spouse may have the certificate of title marked to indicate it is the matrimonial home by sending in a copy of the marriage certificate with an affidavit. This would prevent fraudulent declarations that the property was not the homestead.

7. In the absence of such precautions, the spouse who lost the occupation in the matrimonial home due to the other spouse's fraudulent declaration should have an action against that spouse, or, as under the present Dower Act, a right against the Assurance Fund.

8. Where matrimonial differences arise, either spouse may make a summary application to the court to determine which spouse should have possession of the house to the exclusion of the other. Wide judicial discretion should be given allowing the court to make such order as it thinks just. Consideration should be given to any factors the court deems appropriate, but the overriding consideration is to be the welfare of the family as a whole. Postponement of partition and sale applications would fall within this section.

9. The spouse making the application for exclusive possession of the matrimonial home may also ask the court to exercise its discretion to make such order as it thinks fit with regard to possession of the contents of the matrimonial home.

In the event the court makes an order for possession of personal property in favour of the non-owner spouse, and the owner spouse in contravention of the order disposes of

such property to a third party who is a bona fide purchaser for value without notice of the court order, such a disposition will be valid. The spouse in contravention of the order will be subject to ordinary contempt proceedings as well as an action in personam by the other spouse.

10. Since the co-ownership involved in the Act only results in a tenancy in common, the Act should continue to grant a contingent life interest to the surviving spouse.

Alternate Proposal #2. Presumption of Co-ownership

1. A husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of an express agreement or any special circumstances which appear to the Judge to render it unjust so to do, to hold or have held as joint tenants the homestead (as presently defined in the Dower Act).

NOTE: Alternate Proposal #2B follows and complements this legislation since the non-owner spouse would have no registerable interest in the property to protect his or her occupation rights. The presumption would be useful even if a partnership of acquests scheme is adopted.

Alternate Proposal #2A

It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).

NOTE: This provision would apply under both the present separation of property regime and the partnership of acquests regime. However, if either Alternate Proposals #1 or #2 are enacted the provision is unnecessary.

NOTE: Alternate Proposal #2B would still be necessary to protect the occupation rights of the spouse who did not hold the legal title.

**Alternate Proposal #2B. Protection of Occupational Rights
in the Matrimonial Home**

NOTE: This is an adaptation of the present Dower legislation to directly provide for protection of rights of occupation.

1. The definition of the homestead would continue to be the same.

2. The Act should confer a substantive right binding on both spouses to occupy the matrimonial home, irrespective of the manner in which the legal and beneficial interests are held, providing that no third party shares in the beneficial interest in the home. See section 26(1) of the present Dower Act.

3. The present consent and acknowledgment requirements in the Dower Act should be continued in this new Act. Before a homestead can be validly disposed of, there must be consent by both parties.

4. The new Act should contain a wide curative section giving the court the discretion to declare a transfer as registered notwithstanding any technical non-compliance with the Act.

5. Once a disposition has been registered, the matrimonial home will cease to be a homestead within the meaning of the Act. The remedy of the spouse who has lost his or her occupation rights would be limited to a suit against either the husband or the Assurance Fund as under the present system.

6. In order to protect the occupation rights, and not have to rely upon the right of suit against the spouse or the Assurance Fund, provision should be made allowing the property to be registered as the matrimonial home by completion of an affidavit in standard form declaring the property to be a homestead together with the filing of a copy of the marriage certificate.

7. Where matrimonial differences arise, either spouse may make summary application to the court to determine which spouse should have possession of the house to the exclusion of the other. Wide judicial discretion should be given allowing the courts to make such order as it thinks just. Consideration should be given to any factors the court deems appropriate, but the overriding consideration is to be the welfare of the family as a whole.

8. The definition section in the Act should make clear that a disposition includes a partition and sale under the Partition Act 1868. Under the proposed provision for summary application to determine possession rights, the court should also have the discretion to postpone a partition application, using the same discretion as the court would use in deciding whether or not to grant an order dispensing with consent under the present Act. That is the court may consider any fact that it deems appropriate. Again the section might provide that the overriding consideration is to be the welfare of the family as a whole.

9. The spouse making the application for exclusive possession of the matrimonial home may also ask the court to exercise its discretion to make such order as it thinks fit with regard to the possession of the contents of the matrimonial home. In the event the court makes an order for possession of personal property in favour of the non-owner spouse and the owner spouse in contravention of the order disposes of such property to a third party who is a bona fide purchaser for value without notice of the court order, such a disposition will be valid. The spouse in contravention of the order will be subject to ordinary contempt of proceedings as well as action in personam by the other spouse.

11. The present Dower right, that is the contingent life interest in the matrimonial home which is given to the surviving spouse, should be continued in the new Matrimonial Property Act.

Part 2: Tenancies

1. The court should have a discretion as to who should have possession of rental accommodation as between the spouse who has signed the tenancy agreement and the other spouse.

2. The court should have the right to make an order that the lease should be changed to the other spouse's name. Violation of the court order by the landowner would be contempt of court. The present right of the landlord to give a tenant notice, as specified in the lease, or in the absence of a written lease in the Landlord and Tenant Act would be continued.

3. A spouse who was applying for an order of possession in regard to rental accommodation, may also make application for possession of any furniture or other chattels necessary for the continuance of the matrimonial home.

Part 3: Ownership of Matrimonial Property

1. In any question between a husband and wife as to the title of property, either party may apply to a judge and the judge may make an order with respect to the property in dispute as he thinks fit. Following this general section the legislation would set out the principles of the partnership of acquests matrimonial regime. If it were decided not to implement such a partnership of acquests scheme those recommendations which would alleviate some of the hardship of the present separation of property regime should be implemented. For example, the provision whereby household savings are to be considered beneficially owned by both spouses.

Part 4: Variation of Property Rights

1. In this section the court should be given the power to make transfer of property between husband and wife as it thinks fit having regard to such criteria as inter alia, to the means (including property) and the needs of the party, length of the marriage, contributions made by each party to the welfare of the family, and the loss of any benefits such as a pension as a result of the divorce. The court must exercise its powers to place the parties as far as it is practicable and, having regard to their conduct, just to do so, in the financial position which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to the other. (This section is based on the English Matrimonial Proceedings and Property Act of 1970.)