Scottish Law Commission

(SCOT. LAW COM. No. 25)

FAMILY LAW
REPORT ON JURISDICTION IN CONSISTORIAL CAUSES AFFECTING MATRIMONIAL STATUS

Laid before Parliament
by the Secretary of State for Scotland
and the Lord Advocate
pursuant to section 3(2)
of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

To The Right Honourable Gordon Campbell, M.C., M.P.,
Her Majesty's Secretary of State for Scotland, and

The Right Honourable Norman Wylie, V.R.D., Q.C., M.P.,
Her Majesty's Advocate.

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, we submitted on 14 May 1968 our Second Programme for the examination of several branches of the law of Scotland with a view to reform. Item No. 14 of that Programme, which was published on 19 July 1968, requires us to proceed with a preliminary examination of Family Law for the purpose, among other things, of making specific recommendations for changes in the law.

In pursuance of Item No. 14 we have examined the law relating to jurisdiction in consistorial causes affecting matrimonial status and connected matters. We have the honour to submit our proposals for the reform of this branch of the law.

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

28 July 1972

JURISDICTION IN CONSISTORIAL CAUSES AFFECTING MATRIMONIAL STATUS

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SCOTTISH LAW COMMISSION

FAMILY LAW

JURISDICTION IN CONSISTORIAL CAUSES AFFECTING MATRIMONIAL STATUS

PART I: INTRODUCTORY

The scope of the Report

1. This Report, made in pursuance of Item No. 14 of our Second Programme of Law Reform[1], the reform of Family Law, is concerned principally with the jurisdiction of the Scottish courts in judicial proceedings affecting matrimonial status, namely actions of divorce (by far the most common remedy[2]), actions of separation, actions of declarator of nullity of marriage, actions of declarator of marriage, actions of declarator of freedom and putting to silence, and petitions for dissolution of a marriage on the ground of presumed death, all of which we will describe as consistorial proceedings or causes.[3] The term 'consistorial' connotes actions formerly competent in the consistorial or commissary courts,[4] including the actions mentioned above, but does not clearly include petitions for dissolution of marriage on presumed death. These petitions, being a more recent creation of statute[5], are not statutorily defined as consistorial, but have analogous characteristics. Indeed the canon of consistorial causes is capable of extension by analogy and so has been held to include actions of reduction of consistorial decrees which we shall consider separately.[6] We have excluded from the Report consistorial actions relating to 'birth-status'[7] and also, for reasons given below[8], the other consistorial actions affecting or arising out of matrimonial status.

Co-operation with the Law Commission

2. Following *Indyka* v. *Indyka*[9], where the existing rules of jurisdiction in matrimonial causes were recently called into question by the House of Lords,

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[1](1968) Scot. Law Com. No. 8.

[2]In 1970, of 4,839 consistorial actions disposed of in the Court of Session, 4,809 were actions for divorce; only 1 was for separation; and 29 were for other consistorial remedies relating to marriage. There were 5 petitions for dissolution of marriage on presumed death. *Civil Judicial Statistics, Scotland,* for 1970 (Cmnd. 4704), Tables 3, 5 and 7. There are no statistics showing separately the number of separation actions in the sheriff court where such actions are usually brought.

[3]These proceedings are considered in Parts II to VII of the Report.

[4]Statutory enumerations of consistorial actions are to be found in the Court of Session Act 1830 (c. 69), s. 33; Court of Session Act 1850 (c. 36), s. 16; and Conjugal Rights (Scotland) Amendment Act 1861 (c. 86), s. 19: but these are not necessarily exhaustive.

[5]Divorce (Scotland) Act 1938 (c. 50), s. 5.

[6]See Part VIII, paras. 94–99 below.

[7]E.g. actions of declarator of legitimacy or of bastardy.

[8]See Part XIII, paras. 162–170.

[9][1969] 1 A.C. 33; though the House of Lords was sitting as an English court, their decision would be followed in Scotland; see *Galbraith* v. *Galbraith* 1971 S.L.T. 139; *Bain* v. *Bain* 1971 S.L.T. 141.

the Law Commission embarked upon a comprehensive study of these rules. We associated ourselves with this study, partly because it seemed desirable that in a realm where similar rules have for long been applied, the Scottish and English systems should not diverge but, more importantly, because a dissimilarity between the rules of jurisdiction in consistorial proceedings in the two countries would increase the risk of parties seeking inappropriate courts for the resolution of their matrimonial disputes and the danger of undesirable conflicts of jurisdiction arising between the courts of the two countries.

The relevance of choice of law

3. Although we are primarily concerned with questions of jurisdiction rather than with the question what rules of law should be applied by a court which possesses jurisdiction, we have not rigidly excluded consideration of the latter question. The two questions cannot be entirely dissociated. It is important that, where possible, the matrimonial affairs of the spouses should be adjusted by the rules of the system with which the spouses are most closely connected. In the past this result was thought to have been secured by requiring the parties to resort to the courts of the domicile of the husband, and requiring those courts to apply their own law. But the introduction of wider grounds of jurisdiction, such as the residence of a wife-pursuer[10] or wider rules such as those recommended in this Report, makes it all the more necessary to consider whether it is always appropriate for the court to apply its own law in actions of divorce and, indeed, in actions of separation and actions to annul a voidable marriage. This question we consider in Part IV (paragraphs 24-30) of the Report.

Consultation

4. The Law Commission's Working Paper No. 28[11] and our own Memorandum No. 13[12], both dealing with jurisdiction in proceedings for divorce, separation (excluding the sheriff court) and dissolution of marriage on presumed death and both reaching the same conclusions, were given a wide circulation. Our tentative conclusions as to nullity actions were similar to those of the Law Commission and, to elicit comments on these conclusions, we circulated to professional bodies in Scotland the Law Commission's Working Paper No. 38 on *Jurisdiction in suits for nullity of marriage*[13]. We are grateful to those who submitted comments. We have thought it right to extend our recommendations to actions of declarator of marriage[14] and actions of declarator of freedom and putting to silence[15] because of their close relationship with certain nullity actions for jurisdictional purposes. To avoid undue delay, we have had to rest content with informal consultations with representatives of the Faculty of Advocates and the Law Society of Scotland on two topics: first, the sheriff

[10]See Law Reform (Miscellaneous Provisions) Act 1949 (c. 100), s. 2, discussed at paras. 8, 10 and 12 below.

[11]Issued in April 1970.

[12]Issued in August 1970. Copies of this Memorandum can be obtained on application to the Secretary of the Scottish Law Commission.

[13]Issued in July 1971.

[14]Dealt with in Parts II to VI of the Report.

[15]Paras. 166–168 below.

court's jurisdiction in separation, and, second, ancillary jurisdiction affecting children and financial obligations. Because of the limited range of our consultations on these two topics, we deal with them at some length in our Report[16]. We have not felt it necessary to consult anyone on our proposal to reverse the notorious rule whereby in certain circumstances the Court of Session cannot reduce Scottish decrees vitiated by fraud or other fundamental defects[17]: we are reasonably confident that this proposal will be welcomed as removing a long-standing grievance. The balance of the comments received in our main consultations supported our provisional conclusions and for the most part we have followed these conclusions in this Report. In particular, consultation on both sides of the border has disclosed widespread support for:

(*a*) the introduction of a residential ground of jurisdiction as an alternative to domicile;

(*b*) abandonment of the rule of the dependent domicile of wives;

(*c*) the introduction of a rule allowing either party to a marriage to found jurisdiction on the domicile or habitual residence of either spouse; and

(*d*) the enactment of conflict rules.

Disagreement has centred largely round the minimum qualifying period of residence[18].

The meaning of 'jurisdiction' in this Report

5. We would stress, in view of comments which we received on our Memorandum No. 13, that this Report is concerned only with jurisdiction in the international sense, that is to say, whether the courts may entertain an action which presents elements unconnected with Scotland[19]. It does not consider how, assuming jurisdiction in this sense, consistorial actions should be allocated as between the Court of Session and the sheriff courts. Nor is the Report concerned with 'jurisdiction' in the sense of the competence of courts to grant particular remedies. Here defects arguably exist such as the requirement that a crave for separation in the sheriff court must be accompanied by a crave for aliment[20], and there are also obscurities in connection with the Court of Session's power to grant decrees of separation[21]. Reform of all these matters falls outwith the scope of the present Report.

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[16]Parts IX and XI of the Report.

[17]Part VIII of the Report.

[18]Discussed at paras. 76–81 below.

[19]It has however proved necessary to deal with the internal, as well as the international, aspects of the sheriff court's jurisdiction in separation proceedings: see Part IX, especially paras. 113–4 below.

[20]See p. 38, n. 1 below.

[21]The Sheriff Courts (Scotland) Act 1907 (c. 51), s. 52 and Sch. 2 repealed the reference to actions of separation *a mensa et thoro* in section 33 of the Court of Session Act 1830 apparently on the assumption that section 33 merely made jurisdiction privative to the Court of Session. In fact, the section is an enabling power: the Court of Session had no common law jurisdiction at first instance. This Report, conform to the practice of the Court of Session since 1907, assumes that the Court's power to entertain such actions still subsists despite any obscurity as to the basis of that power.

Acknowledgements

6. In the preparation of this Report we have had the benefit of consultation with past and present members of the Law Commission and of its staff: we are particularly indebted to Dr L. C. B. Gower, LL.D., F.B.A., formerly of the Law Commission. We have also had the advantage of the advice of Lord Dunpark who, while a member of the Scottish Law Commission, was intimately concerned with our examination of this subject.

PART II: THE EXISTING BASES OF JURISDICTION IN CONSISTORIAL CAUSES AFFECTING MATRIMONIAL STATUS

7. The point of departure for any discussion of the reform of the law must be a statement of its present form. So far as relating to the five types of proceedings with which we are principally concerned, namely actions of divorce, separation, nullity, declarator of marriage, and petitions for dissolution of marriage on presumed death, it may be stated briefly as follows[1]:

(*a*) *Domicile of the husband at the commencement of proceedings*

8. The domicile of the husband is the basic ground of jurisdiction in actions of divorce[2], separation[3], nullity[4] and declarator of marriage[5], and in petitions for dissolution of a marriage on the ground of presumed death[6]. Since 1895, indeed, there has been a tendency on the part of the courts, particularly marked in actions of divorce, to hold that, under the common law at least, the domicile of the husband at the date of the commencement of proceedings is the only proper ground of jurisdiction[7].

(*b*) *Domicile of the husband at the date of the matrimonial offence*

9. The rigour of this rule was mitigated to some extent by the practice of the Court of Session, first in actions of divorce[8] and later in actions of separation[9], to exercise jurisdiction in actions by the wife when the husband, though not domiciled in Scotland at the commencement of the action, had been domiciled in Scotland at the time the matrimonial offence was committed. The basis of the rule has been explained by Lord Skerrington: 'In actions of divorce it has

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[1]For a summary classified by the type of proceedings, see Appendix I.

[2]*Le Mesurier* v. *Le Mesurier* [1895] A.C. 517 (P.C.).

[3]*Hood* v. *Hood* (1897) 24 R. 973; *Linder* v. *Linder* (1904) 11 S.L.T. 777.

[4]As to voidable marriages, see Anton, *Private International Law* (1967) p. 295; as to void marriages, see *Aldridge* v. *Aldridge* 1954 S.C. 58; *Balshaw* v. *Balshaw* 1967 S.C. 63.

[5]See Anton, *op.cit.* p. 308.

[6]Law Reform (Miscellaneous Provisions) Act 1949 (c. 100), s. 2(3).

[7]*Le Mesurier* v. *Le Mesurier;* see n. 2 above.

[8]*Mason* v. *Mason* (1877) 14 S.L.R. 592; *Pabst* v. *Pabst* (1898) 6 S.L.T. 117; *Mayberry* v *Mayberry* (1908) 15 S.L.T. 1016; *Robertson* v. *Robertson* 1915, 2 S.L.T. 96; 1916, 2 S.L.T. 95; *Lack* v. *Lack* 1926 S.L.T. 656 (all desertion). It was at one time doubted whether the rule applied to matrimonial offences other than desertion: but see *Stewart* v. *Stewart* (1906) 13 S.L.T. 668; *Crabtree* v. *Crabtree* 1929 S.L.T. 675; *Clark* v. *Clark* 1967 S.C. 296.

[9]*Ramsay* v. *Ramsay* 1925 S.C. 216.

been thought absurd that a wrongdoer should be able to avoid, in whole or in part, the consequences of his transgressions by retiring to a foreign country and there taking up his residence *animo remanendi*. The absurdity would be just the same if the action was one for judicial separation'[10]. From its nature, this ground of jurisdiction is not available in actions of divorce for insanity, in actions for nullity or declarator of marriage or in petitions for dissolution of a marriage on the ground of presumed death.

(*c*) *Domicile of the wife*

10. Under the common law of Scotland a wife acquires her husband's domicile on marriage and thereafter her domicile follows his during its subsistence. This domicile is imputed to the wife notwithstanding the factual or even the judicial separation of the spouses. It follows that jurisdiction in divorce or separation cannot be founded upon what would be the wife's domicile but for the marriage. The basic rule, however, supposes the existence of a valid marriage and, if the marriage is void, the 'wife' does not acquire her 'husband's' domicile as a domicile of dependence although, in appropriate circumstances, she may be held to have acquired a domicile of choice there[11]. In actions, then, to declare a marriage to be void from its beginning, it is thought that either the 'husband' or the 'wife' may be found upon the independently ascertained domicile of the latter[12]. Where the action, on the other hand, is one to have a voidable marriage annulled, the theory is that a marriage was contracted and the wife would have no independent domicile for jurisdictional purposes. Moreover, by the Law Reform (Miscellaneous Provisions) Act 1949 s.2(3), the domicile in Scotland of the wife may be a ground of jurisdiction in a petition for the dissolution of the marriage on the ground of the presumed death of her husband since, for the purpose of determining jurisdiction under the Act, the husband is to be treated as having died immediately after the last occasion on which the wife knew or had reason to believe him to be alive.

(*d*) *Residence of the husband*

11. The residence of a defending husband is a ground of jurisdiction only in actions of separation and aliment at the instance of the wife in the sheriff court. Section 6 of the Sheriff Courts (Scotland) Act 1907[13], which is the basis of this jurisdiction, presents certain problems which are discussed below[14].

(*e*) *Residence of the wife*

12. By the Law Reform (Miscellaneous Provisions) Act 1949, the Court of Session has jurisdiction in proceedings by a wife for divorce or nullity of marriage—

'notwithstanding that the husband is not domiciled in Scotland, if—

(*a*) the wife is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and

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[10]*Ibid.* at p. 220.
[11]*Administrator of Austrian Property* v. *Von Lorang* 1927 S.C. (H.L.) 80.
[12]See discussion in *Balshaw* v. *Balshaw* 1967 S.C. 63.
[13](c.51) as amended by the Sheriff Courts (Scotland) Act 1913 (c.28) Sch. 1.
[14]Paras. 100–104.

(*b*) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man'[15].

In proceedings by a wife for dissolution of the marriage on the ground of the presumed death of her husband, the court has jurisdiction if the wife is resident in Scotland and has been ordinarily resident there for the above-mentioned period of three years[16]. No provision is made for a residential ground of jurisdiction in actions of declarator of marriage. The Court of Session does not possess jurisdiction in an action of separation at the instance of the wife on the basis of her residence in Scotland except in the special case of jurisdiction *ex necessitate* which we consider below[17]. The sheriff court, however, under the Maintenance Orders Act 1950 s.6, possesses jurisdiction in actions of separation and aliment at the instance of the wife on the basis of her residence if two further conditions are fulfilled, namely that the husband resides in England or Northern Ireland and that the parties last ordinarily resided together as man and wife in Scotland. In actions of separation and aliment in the sheriff court, the residence of a defending wife within the sheriffdom is a basis of jurisdiction under section 6(a) of the Sheriff Courts (Scotland) Act 1907[18].

(*f*) *Place of celebration of the marriage*

13. The marriage of the parties in Scotland does not by itself enable the Court of Session to assume jurisdiction in actions of divorce or of separation. There are decisions based on the principle that the fact of the celebration of the marriage in Scotland, when coupled with personal service of the summons on the defender there or with his consent, may found jurisdiction in actions of declarator of marriage and in actions of declarator of nullity relating to void marriages. However, as we explain below[19], it is doubtful whether that principle is sound and whether these decisions can be relied on.

(*g*) *Jurisdiction* ex necessitate

14. In actions of separation, the Court of Session, as the court of the residence, may assume jurisdiction *ex necessitate* though the parties to the marriage are not domiciled in Scotland[20]. The elements of this rule have yet to be developed by the courts. The rule may be invoked for the physical protection of a spouse[21] and possibly where the need is for the aliment of a spouse[22]. The requirement of residence must no doubt be tested at the commencement of the action but a subsequent change of residence may deprive the court of jurisdiction[23]. It is an open question whether the requirement of 'residence' attracts the common law minimum period of 40 days or whether mere presence is enough: or whether both parties must be resident in the relevant sense, or only one of them, and

[15]See s. 2(1). In England it has been held that under analogous legislation the three year period may begin before the marriage; *Navas* v. *Navas* [1970] P. 159.

[16]See s. 2(3).

[17]See para. 14.

[18]See paras. 101–103 below.

[19]See paras. 41–42.

[20]*Le Mesurier* v. *Le Mesurier* (see n. 2) *per* Lord Watson at pp. 526-7; *Jelfs* v. *Jelfs* 1939 S.L.T. 286 *per* Lord Keith at p. 290; *Luke* v. *Luke* 1950 S.L.T. (Notes) 6.

[21]See authorities in n. 20 above.

[22]See *Jelfs* v. *Jelfs* (n. 20 above) at p. 291.

[23]*Ibid.*

if so, which one. The rule has the appearance of a reserve power analogous to the *nobile officium* and appropriate only to the Court of Session, yet may be relevant to the jurisdiction of the sheriff court[24].

(h) Jurisdiction where one or both of the spouses dead

15. For completeness we may mention that there appears to be no reported authority on the question whether a deceased 'husband's' domicile immediately before his death will found jurisdiction in such consistorial actions in respect of his matrimonial status as are competent after his death, namely actions of declarator of marriage and actions of declarator of nullity relating to void marriages. This question raises incidental problems of when such actions are competent and of title to sue. An action of declarator of marriage may be brought after the death of a person by his or her alleged surviving spouse[25] and there is some authority supporting the view that such an action is competent at the instance of a third party after the death of both spouses[26]. An action of declarator of nullity of a marriage alleged to be void is competent at the instance of a third party[27] and would seem to be competent after the death of one or both of the 'spouses'.

No other bases of jurisdiction

16. It is believed that the grounds of jurisdiction specified above are exhaustive of those available in Scottish courts in consistorial causes. In particular jurisdiction may not be founded upon the nationality of the parties[28], nor upon their matrimonial domicile[29], nor upon prorogation[30] or reconvention[31].

PART III: GENERAL CRITICISM OF THE EXISTING BASES OF JURISDICTION

Objectives of jurisdiction in consistorial causes

17. In our Memorandum No. 13 we suggested that a humane system of divorce jurisdiction should seek to achieve certain ends, namely:

(1) That persons with real and substantial ties with a country should be able to have their matrimonial affairs adjusted there.

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[24]See *Jelfs* v. *Jelfs* (n. 20 above) at p. 290; discussed at para. 103 below.

[25]E.g. *Petrie* v. *Petrie* 1911 S.C. 360; *Hendry* v. *Lord Advocate* 1930 S.C. 1027.

[26]In recent times the Court has allowed at least two actions of declarator of marriage to be brought after the death of *both* spouses; *Chapman* v. *Lord Advocate* (unreported) 26 January 1951; *McMeechan* v. *McMeechan* (unreported) 18 July 1963; cf. Fraser *Husband and Wife* (2nd ed.; 1878) p. 1242.

[27]*Blair* v. *Blair* (1748) Mor. 6293; Fraser, *op.cit.* (n. 26 above) p. 1244; *Report of the Royal Commission on Marriage and Divorce* (1956) Cmd. 9678 p. 233, n. 31.

[28]*Le Mesurier* v. *Le Mesurier* (n. 2 above); Morton Report (n. 27 above) para. 795.

[29]*Le Mesurier* v. *Le Mesurier* (n. 2 above).

[30]*Ringer* v. *Churchill* (1840) 2 D. 307; *Mackie* v. *Mackie* 1917 S.C. 276; *Acutt* v. *Acutt* 1936 S.C. 386; Anton, *op.cit.* (n. 4 above) p. 128.

[31]*Acutt* v. *Acutt* (n. 30 above); *McCord* v. *McCord* 1946 S.C. 198; Anton *op.cit.* p. 137.

(2) That divorce should not be granted to persons without such ties and whose status, therefore, is not a matter of direct concern to it. In particular, the rules for the assumption of jurisdiction should not be so wide as to tempt persons who have no substantial connections with a country to invoke the jurisdiction of its courts because of advantages its substantive law may seem to present to them. In other words, the rules should not be so wide as to encourage 'forum-shopping'.

(3) That, as a matter of preference though not of necessity, rules of jurisdiction should be adopted tending to ensure that decrees pronounced in the exercise of that jurisdiction will be recognised in other countries and, particularly, in other countries with which the parties, or either of them, have ties. In other words, the rules should avoid, as far as possible, the creation of 'limping marriages'.

(4) That the criteria selected should be easily ascertainable and readily applied in practice.

(5) That the criteria should be chosen with a view to avoiding the creation of anomalies and hardship.

These objectives met with the approval of those who commented upon our Memorandum. We consider that, although formulated in the context of jurisdiction in divorce, they may be applied also to actions of declarator of marriage and of nullity and to petitions for dissolution of marriage on presumed death. The common element in these proceedings is that they affect in important ways, whether by alteration or confirmation, the status of the parties to the marriage or alleged marriage. While in relation to separation the effect on status is less clear and the desirability of avoiding 'forum-shopping' must yield in certain circumstances to other considerations, we argue below that an analogy with divorce is valid[1].

The present law in the light of these objectives

18. We recognise that this statement of objectives over-simplifies a number of issues. While all would agree that the courts of a country should exercise jurisdiction only where the spouses have real and substantial ties with that country, it would be too much to expect unanimity on what constitutes such ties. The statement, however, of these objectives, even in very general terms, does facilitate the evaluation of the merits and demerits of the existing law. How does it measure up to these objectives?

First objective: real connections with Scotland

19. We stated, as a first objective, that persons with a real and substantial connection with a country should be able to have their matrimonial affairs adjusted there. It is arguable that our present rules fail to meet this objective:

(*a*) *Inefficacy of long residence.* They fail to meet it, in the first place, because, except in special cases, the law does not admit that a person may invoke jurisdiction on the ground of his own long residence in Scotland. He may found upon his own domicile in Scotland; but the present rules relating to the attribution of a domicile of choice stress

[1]See paras. 105–108.

the element of intention to reside in a place for an unlimited period[2]. Where such intention is absent, residence, for whatever period, does not lead to the attribution of a domicile of choice. Yet for the reasons given in paragraphs 65 to 82 below, we think that settled residence for a period in a place satisfies any reasonable test of real and substantial connection.

(*b*) *Dependent domicile of women.* The present rules fail to meet our first objective in yet another way. If it is conceded—and we give reasons in paragraph 51 below for suggesting that it should be conceded—that a man's domicile in a country is *generally* a connection sufficiently real and substantial as to warrant the assumption of jurisdiction in consistorial actions, then a woman in the same external circumstances apart from her marriage should be able to invoke this jurisdiction. At present this right is conceded to her only in special circumstances. We develop in paragraphs 53 to 57 below arguments for its generalisation.

(*c*) *The place of celebration of the marriage.* In actions of declarator of marriage and nullity actions relating to void marriages, where the courts have in the past assumed jurisdiction on the basis that the marriage was celebrated in Scotland and the defender has been personally cited there, the parties may have lost all connections with Scotland. We develop in paragraphs 41-43 below arguments for the rejection of this ground of jurisdiction.

Second objective: avoidance of 'forum-shopping'

20. The second objective which, we suggest, should inform the rules of jurisdiction in consistorial causes is that persons with no substantial connections with Scotland should not be able to invoke the jurisdiction of its courts. The narrowness of our present rules of jurisdiction must make the cases rare in which neither party has a substantial connection with Scotland. One possible situation is where the only connection which either party has with Scotland is that the husband has retained a Scottish domicile merely because he has not acquired another. Another possible situation is where the jurisdiction of the Scottish courts is founded merely on the fact that, at the time he committed a matrimonial offence, the husband was domiciled in Scotland, though at the commencement of the proceedings he has acquired a domicile and his wife a residence in another country. In actions of divorce, separation, and nullity relating to voidable marriages, the main objection to the present rules is not that they are inherently too wide, but that they are too narrow. On the other hand, the relevance of the place of celebration of the marriage in actions of declarator of marriage and nullity actions relating to void marriages makes the grounds of jurisdiction in such actions too wide.

Third objective: avoidance of 'limping marriages'

21. The third objective of rules of jurisdiction in consistorial causes should be to secure that the criteria adopted gain acceptance in other countries. However, most countries outside the orbit of the Anglo-American common law differ from Scots law in that they use the concept of nationality both as the

[2]See in particular *Ramsay* v. *Liverpool Royal Infirmary* 1930 S.C. (H.L.) 83.

basis of jurisdiction in consistorial actions and as the criterion by which a foreign assumption of jurisdiction will be recognised. This fact causes less difficulty in practice than might be supposed, since a person's domicile and nationality normally coincide. There is a danger, nevertheless, that certain countries will not recognise Scottish decrees where the connection with Scotland is, in their view, insubstantial—as, for example, where, in a divorce action by a husband-pursuer with no current personal connection with Scotland, jurisdiction is assumed on the basis of the domicile of origin.

Fourth objective: avoidance of expense and uncertainty

22. We stated as a fourth objective that the criteria for jurisdiction in consistorial causes should be easily ascertainable and readily applied in practice. Unfortunately, the domicile of a person—central to our present rules of jurisdiction—is not always easily ascertainable because of the weight attached to the intention of the person concerned and, in consequence, of the diversity of the factors relevant to the ascertainment of a person's domicile. Proof of a person's intentions is not always easy[3]. 'Declarations as to intention', in the words of Lord Buckmaster, 'are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared intention'[4]. Where there is no evidence of expressed intention, proof of any fact in a man's life may be relevant as throwing light on his intention[5]. Proof of domicile, therefore, may be expensive and fraught with uncertainty.

Fifth objective: avoidance of anomalies and hardship

23. As a fifth objective of the rules relating to jurisdiction in consistorial causes, we suggested that they should be chosen with a view to avoiding the creation of anomalies and hardship. The principal anomalies of the present law include two discriminatory rules: the common law rule which in some contexts allows the husband to found on his own independently ascertained domicile but not a wife on hers[6] and the statutory rule which, in certain cases, allows a wife but not her husband to found on the wife's residence in Scotland[7].

PART IV: APPLICATION OF THE PERSONAL LAW OF THE SPOUSES

24. Before considering the nature of the defects in the present law and the ways of remedying them, a preliminary question requires discussion. In actions of divorce, separation or declarator of nullity relating to a voidable marriage,

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[3]See for example *Bell* v. *Kennedy* (1868) 6 M. (H.L.) 69 *per* Lord Colonsay at p. 79—". . there is perhaps no chapter of law that has, from such extensive discussion, received less of satisfactory settlement"; *Winans* v. *Attorney-General* [1904] A.C. 287; *Ramsay* v. *Liverpool Royal Infirmary* 1930 S.C. (H.L.) 83.

[4]*Ross* v. *Ross* 1930 S.C. (H.L.) 1 at p. 6.

[5]*Drevon* v. *Drevon* (1864) 34 L.J. (Ch.) 129 *per* Kindersley V.-C. at p. 133.

[6]See para. 10 above.

[7]See para. 12 above.

should the Scottish courts apply Scots law or the personal law of the spouses? This choice of law question is material to the central problems of jurisdiction discussed in our Report because it is arguable that, if the application of the appropriate law is secured by choice of law rules, the rules of jurisdiction in these three types of action need not be selected with such careful regard to the strength and duration of the spouses' connections with Scotland.

(1) Existing choice of law rules

25. In actions of declarator of marriage and in actions of declarator of nullity of marriages alleged to be void from their beginning, the Scottish courts already apply foreign law in certain cases. The central question which arises in each action is whether a marriage was validly constituted[1]. The answer depends *inter alia* on whether the forms of the marriage were in accordance with the law of the place of its celebration (which may not have been Scotland) and whether the parties had capacity to marry under their personal, *viz.* domiciliary, law (which may not have been Scots law). To the extent that the marriage or pretended marriage was governed by foreign law, the relevance of foreign law is beyond dispute[2].

26. On the other hand, in divorce actions, in actions for declarator of nullity of marriage on the ground of impotence and in separation actions, the decree sought dissolves, annuls, or alters the incidents of, a marriage which *ex hypothesi* was validly constituted and, accordingly, the same reasons for the application of foreign law do not obtain. The courts have hitherto applied Scots law exclusively in such actions probably on the view that, since under the common law jurisdiction is assumed on the basis of the husband's domicile, from which the wife's domicile is ascertained, Scots law is appropriately applied both as the law of the forum and the personal law of both spouses. But with the introduction, by section 2 of the Law Reform (Miscellaneous Provisions) Act 1949, of a residential ground of jurisdiction in proceedings by a wife for divorce or nullity of marriage, the law of the forum and the personal law of the parties no longer always coincide. The Act nevertheless provides that in proceedings under section 2 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in Scotland at the time of the proceedings'[3]. This provision has been the subject of some criticism[4].

(2) The Morton Commission's recommendations

27. The Royal Commission on Marriage and Divorce (the Morton Commission) examined this question in their Report, and thought that the criticism

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[1]In an action of declarator of marriage the remedy sought is a declarator that a marriage was validly constituted by a specified mode and that the parties in question are (or, if death has intervened, were) accordingly married. Conversely, in an action of declarator of nullity of marriage, when the marriage is alleged to be void, the remedy sought is a declarator that the pretended marriage is null by reason of a defect existing at the time of the marriage.

[2]This is not to imply that some of the choice of law rules do not require reconsideration e.g. in relation to 'runaway marriages': see *Report of the Departmental Committee on The Marriage Law of Scotland* (1969) Cmnd. 4011 paras. 73 to 78; Anton and Francescakis, 'Modern Scots Runaway Marriages, 1958 Jur. Rev. 253.

[3]S.2(4).

[4]*Report of the Royal Commission on Marriage and Divorce* (1956) Cmd. 9678, paras. 790(iv) and 802.

was justified. They said that if no regard is paid to the personal law of the spouses:

> 'it is very unlikely that a decree given under English or Scots law will be recognised in the country to which the parties belong by domicile or nationality, and it will there be regarded as a usurpation of the divorce jurisdiction of the courts of that country. Under the European doctrine of cumulation, for a divorce to be recognised as valid, it must have conformed both with the personal law and with the law of the country in which the proceedings have taken place'[5].

Another argument for the application of the personal laws of spouses was alluded to briefly by the Morton Commission[6]. It may be developed as follows: if there is no necessary coincidence between the law applied by the forum and the personal law of the spouses, there is a risk that, when they diverge, the pursuer in a consistorial action will raise his action in the court which best suits his interests irrespective of its appropriateness in the circumstances of the case. Such 'forum-shopping' is undesirable and might well be reduced if the courts of every country, irrespective of their grounds of jurisdiction in consistorial actions, applied the personal law of the spouses. In its Recommendations, therefore, the Morton Commission proposed that, except where jurisdiction was based on the domicile of the pursuer or petitioner, regard should be paid to the personal law or laws of the spouses in proceedings for divorce[7] and for nullity[8], though not in proceedings for presumption of death and dissolution of the marriage[9].

(3) Criticism of the Morton Commission's recommendations

28. While we agree with the last of these Recommendations and also concede that the application of foreign law may be appropriate in actions of declarator of marriage, and actions of declarator of nullity of a marriage alleged to be void from its beginning, we do not agree with these Recommendations in relation either to actions of divorce or to actions for the annulment of a voidable marriage. In the first place, we are not convinced by the first of the two arguments set out above. The argument that regard must be paid to foreign law for the purposes of securing the recognition of Scottish decrees abroad is academic where the parties do not intend to return to the country of their domicile or nationality and in relation to divorce would become unsubstantial if, as seems likely, the Hague Convention of 1968 on the Recognition of Divorces and Legal Separations were to attract general acceptance[10]. Article 6 of the Convention provides that subject to certain exceptions[11] the recognition of a divorce, or of a separation, thereunder shall not be refused *inter alia* because a law was applied other than that applicable under the rules of private inter-

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[5] *Ibid.*, para. 828.
[6] *Ibid.*, para. 883.
[7] *Ibid.*, para. 831.
[8] *Ibid.*, paras. 891 and 899.
[9] *Ibid.*, para. 847.
[10] The text of this Convention is set out in a Report of the two Law Commissions in which it is considered; (1970) Cmnd. 4542, Scot. Law Com. No. 16, Law Com. No. 34. The Recognition of Divorces and Legal Separations Act 1971 (c.53) gives effect in Great Britain to the principles of the Convention although the Convention has not yet taken effect.
[11] Notably in Articles 7, 19 and 20.

national law of the State in which recognition is sought. In the second place, we concede that, if the existing grounds of jurisdiction in consistorial actions were widened, there would probably be an increase in 'forum-shopping'. But the risk of this should not be exaggerated since, if the chosen grounds of jurisdiction were to demand a close connection of either spouse with Scotland, in practice few would have the time and money to move to another country to establish plausible *ad hoc* connections for the purpose of matrimonial jurisdiction.

29. Moreover, even if a failure to apply the personal law of the spouses may enhance to some extent the danger of 'forum-shopping', this drawback must be weighed against two important practical disadvantages associated with its application. In the first place, its application would require proof of foreign law whenever either of the spouses was domiciled in or was a national of a foreign state. Application of foreign law is less complicated and expensive in European systems where judicial notice may be taken of it than in our system where it must be proved by the evidence of witnesses as if it were fact. Such proof would be particularly difficult in Scotland where there are few persons qualified to give expert advice as to foreign law. Such proof, moreover, would prolong proceedings in undefended actions and substantially increase expense. In the second place, the ascertainment of the personal law of the spouses is not an easy matter. Even where the spouses share the same personal law, the conflict between the domicile and nationality principles or even between different concepts of domicile may render necessary the examination of the private international law of the spouses' domicile. The position becomes still more complex where the spouses do not share the same personal law, and there the Morton Commission proposed that, in proceedings for divorce, regard should be paid to the personal laws of both spouses[12]. This would, we think, unduly complicate the task of the courts.

RECOMMENDATION 1

30. We **recommend** that no change should be made in the present rules whereby (*a*) the internal law of Scotland is applied in determining the substantive issues in actions of divorce and separation and in actions to have a voidable marriage declared null, and (*b*) foreign law may be applied in actions of declarator of marriage, and in actions of declarator of nullity relating to a marriage alleged to be void from its beginning.

PART V: POSSIBLE BASES OF JURISDICTION OTHER THAN DOMICILE AND RESIDENCE

31. In considering how the defects in the present law may be removed, it seems appropriate not merely to examine the existing bases of jurisdiction in consistorial actions but to inquire both whether there are other jurisdictional criteria, or variants of existing criteria, which might be adopted and whether the range of application of existing criteria should be extended or narrowed.

[12]See n. 4 above, para. 835.

In this Part of our Report we consider four criteria which, we think, should not, or should no longer, find a place in the law. These are the criteria of nationality, matrimonial domicile, the place of celebration of the marriage and the pursuer's presence within Scotland. In Part VI[1], we consider the criteria of domicile and residence which, we think, should continue to find a place in the law.

(1) Nationality as a general basis

32. Nationality is widely adopted in foreign legal systems as the appropriate test of personal law and, in consequence, many states exercise jurisdiction in divorce over their own nationals on the basis of their nationality alone. Many of them are prepared to assume jurisdiction in consistorial proceedings involving the citizens of other states, but usually either apply directly the personal law of the parties or allow a remedy only when the ground of action is admitted both in their own legal system and in that of the state of the nationality. The principle of nationality is advocated on the grounds that most people do have real ties with the state of their nationality, that a person's nationality is easily ascertained because a change of nationality involves a public act, and that the application of the principle of nationality will ensure that decrees based upon that principle are widely recognised[2].

33. The Morton Commission did not recommend that nationality should normally form the basis of jurisdiction in divorce but did recommend that the court should have jurisdiction to entertain proceedings for divorce if the petitioner is a citizen of the United Kingdom and Colonies, and is domiciled in a country 'the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and does not permit divorce to be granted on the basis of the petitioner's domicile or residence'[3].

34. We agree with the Morton Commission that nationality should not be adopted as a general test of jurisdiction in divorce or, indeed, in other consistorial actions. We give special weight to two objections:

(*a*) The principal objection to nationality as a ground of jurisdiction is that this test would not associate the individual with any particular part of the United Kingdom. We think it desirable to adopt criteria of jurisdiction which may be applied in inter-United Kingdom conflicts of law as well as in conflicts involving other legal systems.

(*b*) Citizenship of the United Kingdom and Colonies is, in our opinion, so broad a basis of consistorial jurisdiction that it might sometimes operate in a manner inconsistent with what we consider to be an

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[1]See paras. 47–84 below.

[2]It is instructive, however, to notice that the Hague Convention on the Recognition of Divorces and Legal Separations, while requiring the recognition of divorces based on the nationality of both spouses (Article 2(3)), does not require the recognition of divorces based on the nationality of the defender alone and does not require the recognition of divorces based on the nationality of the pursuer unless he also fulfils other conditions which point to a real connection with the forum (Article 2(4) and (5)).

[3](1956) Cmd. 9678, paras. 811 and 840–844 and Appendix IV, paras. 1 and 2.

important objective of jurisdictional rules, namely, that a decree in a matter affecting status should not be granted to persons who do not have real and substantial ties with the country where the action is raised. Under the British Nationality Act 1948[4] every person who is born within, or whose father is a citizen of, the United Kingdom and Colonies is himself a citizen of the United Kingdom and Colonies. Such persons may have had no substantial connection with the United Kingdom for years. Indeed, they may never have had any personal connection with it, since an enormous number of the indigenous inhabitants of present or former parts of H.M. Dominions possess citizenship of the United Kingdom and Colonies. They may have dual nationality but, unless they have formally renounced their citizenship of the United Kingdom and Colonies[5], they would be entitled to resort to our courts for the purpose of obtaining a divorce denied to them by the country of their domicile or habitual residence.

35. There was no dissent from the tentative view which we advanced in our Memorandum that nationality should not be introduced as a general ground of jurisdiction in consistorial actions. We would not advocate its introduction as a ground of jurisdiction, even in the restricted circumstances proposed by the Morton Commission[6], until our own nationality laws have been revised, even if we thought that proposal right in principle. We do not in any event think the proposal to be right in principle. If both parties intend to remain in the country of their domicile, they should be governed by its law. If, however, the parties have separated and one of them has returned to Scotland, under the proposals which we advance in Part VI, either party (the domicile of the parties being ascertained independently) may invoke the jurisdiction of the Scottish courts either upon the ground of his own or the other party's domicile there or upon that of his own or the other party's habitual residence there for a year. These rules, it is thought, meet the cases where it is right that the Scottish courts should assume jurisdiction, that is to say where at least one of the parties has a real and substantial connection with Scotland. We reject, therefore, the proposal of the Morton Commission and analogous proposals designed to introduce a limited ground of jurisdiction on the basis of nationality.

RECOMMENDATIONS 2 AND 3

36. We **recommend** that nationality should not be introduced as a general ground of jurisdiction in consistorial actions between spouses. We also **recommend** that nationality should not be introduced as a ground of jurisdiction in divorce in cases where British nationals are domiciled in a country which makes no provision for divorce on the basis of domicile but recognises divorce on the basis of nationality.

(2) Matrimonial domicile as a general basis

37. In the middle of the nineteenth century the Court of Session adopted the concept of matrimonial domicile (or domicile of the marriage) as the basis of divorce jurisdiction.

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[4](c.56), s.1(1).
[5]1948 Act, s.19.
[6]See n. 3 above, paras. 811, 840–844.

> 'The true inquiry is, where is the home or seat of the marriage for the time,—where are the spouses actually resident if they be together,—or if from any cause they are separate, what is the place in which they are under obligation to come together, and renew, or commence, their cohabitation as man and wife?'[7]

This doctrine was rejected by the Privy Council in *Le Mesurier* v. *Le Mesurier*[8] and, about the same time, was considered to be no longer a part of the law of Scotland[9]. In *Indyka* v. *Indyka*[10], however, Lord Reid saw advantages in the doctrine of matrimonial domicile and remarked that 'with all respect to the court in *Le Mesurier*, I do not think that there would often be any real difficulty in determining where the spouses' matrimonial home was or with what community they were most closely associated'.

38. There are attractions in this approach. The matrimonial domicile, as Lord Justice-Clerk Inglis understood it, was 'the place of residence of the married pair for the time'[11], and the courts of that place will normally be the most convenient courts for the purpose of settling their matrimonial differences. The main objection to it is that the spouses may have lived apart for a number of years and settled in different countries. To apply the matrimonial domicile principle might require the court to assume jurisdiction in the cases where there is no current connection between the parties and the forum. This seems to run contrary to the general principles accepted in this country for the assumption of jurisdiction and to the principles accepted in our own and other countries for the recognition of foreign decrees. The principle of matrimonial domicile would not be satisfactory as a unique ground of jurisdiction and would have to be coupled with other grounds. The principle, moreover, would become almost superfluous if residence grounds were introduced into the law. For these reasons, we do not advocate the introduction into our law of the matrimonial domicile principle.

39. A different concept of 'matrimonial domicile' was adumbrated in our consultations on Memorandum No. 13. It was suggested that the court should have jurisdiction 'solely on the simple ground that either party has his or her matrimonial domicile within the territory of the court'. For this purpose matrimonial domicile was to mean 'that there exists between the person and the territory concerned some real and substantial relationship'. This concept bears some resemblance to that of 'juriscentre' discussed in the Law Commission's Working Paper No. 28[12]. At an earlier stage of our consideration of jurisdiction in consistorial actions we closely examined this and similar proposals but considered, and still consider, that tests of 'closest connection' or 'real and substantial relationship' are so lacking in precision as to be inadequate as a guide for practitioners. Such concepts lend themselves, moreover, as the

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[7] *Jack* v. *Jack* (1862) 24 D. 467 *per* L. J. C. Inglis at p. 484.
[8] [1895] A.C. 517. (P.C.).
[9] *Dombrowitzki* v. *Dombrowitzki* (1895) 22 R. 906 at p. 911; *Manderson* v. *Sutherland* (1899) 1 F. 621.
[10] [1969] 1 A.C. 33 at p. 67.
[11] See *Jack* v. *Jack* (n. 7 above) at p. 483.
[12] Paras. 22–26.

cases following *Indyka* v. *Indyka* demonstrate[13], to constant pressure for their extension. We therefore reject this proposal.

RECOMMENDATION 4

40. We **recommend** that jurisdiction in consistorial actions should not be based on the criterion of 'matrimonial domicile', or related criteria such as 'real and substantial relationship' with a country or territory.

(3) *Celebration of the marriage in Scotland as a basis in declaratory actions*

41. The fact that a marriage was celebrated in Scotland does not confer jurisdiction upon the Court of Session in actions either of divorce or of separation. In actions of declarator of marriage the celebration of the marriage in Scotland does not of itself found jurisdiction[14], but apparently does so when coupled with personal service within Scotland[15]. There are decisions in the same sense in actions of declarator of nullity of void marriages[16]. In some cases[17] the assent of the defender has been regarded as a sufficient substitute for personal service. There seem to be no reported Scottish decisions concerned with actions of declarator of nullity of voidable marriages. In English law, it is clear that the fact that the marriage was celebrated in England does not found jurisdiction in actions to annul a voidable marriage[18]. In *Ross Smith* v. *Ross Smith*[19] the House of Lords was divided on the question whether the place of celebration sufficed in actions to annul a void marriage, but the majority of those who answered it in the affirmative based their conclusions on the undesirability of overruling a long-established precedent.

42. Although it might be argued in the light of *Ross Smith* v. *Ross Smith* that the Scottish decisions admitting the place of celebration as a ground of jurisdiction are incorrect, we are concerned less with the merits of this argument than with discussing what the law ought to be. The assumption of jurisdiction by the Scottish court in actions of nullity and of declarator of marriage on the ground that the marriage was celebrated in Scotland might be justified on the view that the place where the bond between the parties was forged is the most suitable place to assess its legal strength[20]. It has also been said that the legal

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[13] *Angelo* v. *Angelo* [1968] 1 W.L.R. 401; *Peters* v. *Peters* [1968] P.275; *Brown* v. *Brown* [1968] P.518; *Mather* v. *Mahoney* [1968] 1 W.L.R. 1773; *Blair* v. *Blair* [1969] 1 W.L.R. 221; *Mayfield* v. *Mayfield* [1969] P.119; *Alexander* v. *Alexander* (1969) 113 Sol.J.344; *Davidson* v. *Davidson* (1969) 113 Sol.J.813; *Bromley* v. *Bromley* (1969) 113 Sol.J.836; *Welsby* v. *Welsby* [1970] 1 W.L.R. 877; *Munt* v. *Munt* [1970] 2 All E.R. 516; *Hornett* v. *Hornett* [1971] 2 W.L.R. 181; *Messina* v. *Messina* [1971] 3 W.L.R. 118; and see *Bain* v. *Bain* 1971 S.L.T. 141 *per* Lord Robertson at p. 144.

[14] *A.B.* v. *C.D.* (1888) 15 S.L.R. 736; *Murison* v. *Murison* 1923 S.C. 624.

[15] *Wylie* v. *Laye* (1834) 12 S. 927.

[16] *Miller* v. *Deakin* 1912, 1 S.L.T. 253; *Lendrum* v. *Chakravarti* 1929 S.L.T. 96; *Macdougall* v. *Chitnavis* 1937 S.C. 390; *Prawdzic-Lazarska* v. *Prawdzic-Lazarski* 1954 S.C. 98.

[17] *Tallarico* v. *Lord Advocate* 1923 S.L.T. 272; *A.B.* v. *C.D.* 1957 S.C. 415 reported also as *Woodward* v. *Woodward* 1958 S.L.T. 213.

[18] *Ross Smith* v. *Ross Smith* [1963] A.C. 280; *Padolecchia* v. *Padolecchia* [1968] P. 314.

[19] See n. 18 above.

[20] *Addison* v. *Addison* [1955] N.I. 1.

system of the place has an interest to see that its marriage registers are accurate[21]. These reasons, whether singly or together, are slender justification for a departure from the general principle that matters of status are appropriately governed by a legal system which has a serious interest in determining the status of at least one of the parties to the marriage[22]. The cases which based jurisdiction on the celebration of the marriage within Scotland were decided for the most part at a time when the principle was applied in its full vigour that the domicile of the husband only and not that of the wife was relevant as a ground of jurisdiction in actions of status and, therefore, at a time when there was a pressure to discover grounds of jurisdiction more favourable to the wife. If, as we later propose in this Report, this principle is discarded, this pressure should be reduced and the law enabled to discard the rule that jurisdiction in actions of nullity of marriage and of declarator of marriage may be founded upon the celebration of the marriage within Scotland, whether or not coupled with personal service within the territory.

RECOMMENDATION 5

43. We **recommend** that jurisdiction in actions of declarator of marriage and of declarator of nullity of marriage should not be based on the place of celebration of the marriage whether or not coupled with personal service. Any doubt in the existing law as to this rule should be removed.

(4) *Pursuer's presence within Scotland as a basis in nullity actions*

44. The Morton Commission recommended that, in actions of declarator of nullity on the grounds that a marriage is void, the mere presence of the pursuer in Scotland at the commencement of the action should be a basis for jurisdiction, as an alternative to domicile[23]. This recommendation had a double rationale. First, the court has power to decide questions of nullity incidentally in other actions, *e.g.* construing a gift to 'the wife of X' in a deed, and there are no jurisdictional limitations on this power[24]. Second, there was no risk of 'forum-shopping' since they proposed that 'the court should look to the personal law of the parties for determination of the issues, except those relating to an alleged lack of formalities. There would be no point in coming to . . . Scotland if the remedy could be obtained from the applicant's own country'[25].

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[21]*Prawdzic-Lazarska* v. *Prawdzic-Lazarski* 1954 S.C. 98 *per* L.P. Cooper at p. 103. The Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c. 49), s. 48 makes provision for decrees altering status (in practice held to include declaratory decrees) to be notified to the Registrar-General and entered in the Register of Corrections, etc., kept under that Act. The Marriage (Scotland) Act 1939 (c. 34), s. 6 makes similar provision for registration of decrees of declarator establishing irregular marriages.

[22]See Anton, *Private International Law* (1967) p. 298.

[23](1956) Cmd. 9678 paras. 882–885: cf. actions of nullity relating to voidable marriages, paras. 892–4.

[24]*Ibid.* para. 882.

[25]*Ibid.* para. 883: cf. *Aldridge* v. *Aldridge* 1954 S.C. 58 *per* L.J.C. Thomson at p. 60—'There can be little objection to increasing the grounds of jurisdiction for entertaining an action of nullity, provided the Court which accepts the jurisdiction is careful to see that the proper law is applied'.

45. As regards the second of these points, we agree with the Morton Commission that the application of the personal law of the spouses should tend to reduce the attractions of 'forum-shopping' since, in theory, the same law is applied wherever the matter is litigated. So long, however, as different legal systems choose the personal law of the parties in different ways, 'forum-shopping' may occasionally present real attractions. We stress this point, however, less than the fact that there is a material distinction between a finding of nullity given incidentally in the course of another action and a finding of nullity in a nominate action of declarator of nullity. The first finding binds only the parties to the action while the second is designed to operate with universal effect. A decree of nullity will be conceded such effect only if foreign courts regard the court which pronounced the decree as having a legitimate interest in the subject matter of the action. The analogy with actions of declarator of marriage is close, yet there the Morton Commission made no recommendation to admit of the presence of the pursuer as a ground of jurisdiction.

RECOMMENDATION 6

46. We **recommend** that the pursuer's presence in Scotland should not be introduced as a ground of jurisdiction in actions of declarator of nullity of void marriages.

PART VI: RECOMMENDED BASES OF JURISDICTION IN ACTIONS OF DIVORCE, SEPARATION (IN THE COURT OF SESSION), NULLITY AND DECLARATOR OF MARRIAGE

47. In this Part of the Report we consider the criteria of domicile and residence in relation to actions in the Court of Session for divorce, separation, declarator of nullity of marriage and declarator of marriage. Similar principles apply in actions of declarator of freedom and putting to silence which, however, because of their rarity and unfamiliarity, are discussed separately[1]. Special considerations arise in relation to petitions for dissolution of a marriage on the ground of presumed death, actions of reduction of consistorial decrees and actions of separation and aliment in the sheriff court and these are likewise separately considered[2].

A. DOMICILE AS A TEST

(1) Domicile in general

48. Tests based on the domicile principle will often fulfil the basic objectives of rules of jurisdiction in consistorial actions, namely those of including persons with substantial ties with Scotland and of excluding persons without those ties. They do so because the concept of domicile was developed to point to the place with which a person has the most permanent ties, ties of family, home and sentiment. It seems right that the law of the country with which a person has such ties should continue to apply to him in his family relationships even when he temporarily leaves that country to live elsewhere. We think, therefore,

[1]See paras. 166–168 below.
[2]See Parts VII, VIII and IX below.

that the concept of domicile is rightly basic to our rules of jurisdiction in divorce and other consistorial actions.

49. Nevertheless, as the concept of domicile has been developed by case law in the United Kingdom, it has become overloaded with technicalities which make it, in some respects at least, unsatisfactory as a basis of jurisdiction in consistorial actions and certainly unsuitable as the exclusive basis of such jurisdiction. The chief respects in which it is unsatisfactory are these:

(*a*) The concept of domicile, at least with the current emphasis upon intention, introduces an undesirable element of uncertainty into the law. We discussed this in paragraph 22.

(*b*) As the law has been developed during the last century, proof of domicile demands evidence of a permanency of connection which of the nature of things cannot always be adduced[3]. The Morton Report pointed out:

> 'The intention of the resident must be examined in the greatest detail, and if the evidence shows that he contemplates some event, however uncertain or problematical it may be, on the occurrence of which he will leave the country in which he has long resided, then he will be held to have lacked the intention necessary for acquiring a domicil of choice in that country. In the result, a person who has perhaps spent most of his married life in England may be unable to obtain matrimonial relief unless he is prepared to undergo the trouble and inconvenience of taking proceedings in the country in which English law regards him as being still domiciled'[4].

(*c*) The domicile of a person who has abandoned a domicile of choice without acquiring another domicile of choice is deemed to be his domicile of origin. This domicile of origin a person acquires from his father, or (if illegitimate) his mother, at birth so that a person may be domiciled in a country which he has never visited and with which he has no real social connections. The cases must be rare where jurisdiction in consistorial actions has been assumed on the mere basis of a domicile of origin. The artificiality of this rule, however, has attracted criticism[5], and it is an impediment to the recognition of United Kingdom decrees abroad.

(*d*) The rule that a married woman's domicile is necessarily that of her husband may have some justification in other branches of the law, but it is extremely artificial in the context of jurisdiction in consistorial actions. The rule springs from the old conception of the legal unity of husband and wife in which the wife's legal personality was 'sunk' in that of her husband. It is when a marriage has broken down and proceedings to declare it null or to have it dissolved have been instituted, that the artificiality of the conception emerges in

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[3]See p. 10, n. 3 above.
[4](1956) Cmd. 9678, para. 793.
[5]*First Report of the Private International Law Committee,* (1954) Cmd. 9068, paras. 8 and 14.

clearest relief. We discuss the rule of unity of domicile in paragraphs 53 to 57.

50. The result of these rather technical rules is that a person, in some circumstances, may be regarded as being domiciled in a country with which his social connections are tenuous or even non-existent. The artificiality of these rules has led to various attempts to reform the law of domicile, either generally or in its application to jurisdiction in divorce. We would consider it inappropriate, in any case, to suggest here general reforms but, apart from this, the failure of previous attempts in recent years to secure such general reforms is daunting[6]. For these reasons we make no suggestions for amending the law of domicile to alter the emphasis on intention and on permanence of intention or to alter the rules relating to revival of a domicile of origin[7]. We consider in any event that the difficulties associated with proof of intention could be met by introducing the habitual residence of either spouse as an alternative ground of jurisdiction, as we suggest in paragraphs 65 to 84 below.

51. Nevertheless we do not think that the introduction of a residence test would render superfluous the retention of tests based on the criterion of domicile. We take this view partly because a person may not possess a habitual residence anywhere and partly because, once it is accepted that nationality is an inappropriate criterion, domicile is the only jurisdictional criterion available to Scottish expatriates. It is traditional and common for Scotsmen to pursue careers in other parts of the United Kingdom and in foreign countries with the fixed intention, nevertheless, of returning to Scotland at a later stage of their lives. In many cases, their children are being educated in Scotland and they retain strong social connections there. In these circumstances, it would seem wrong to deny them resort to the Scottish court to determine their matrimonial status, particularly since they may be resident in countries which regard nationality as the appropriate criterion for jurisdiction in consistorial actions and whose courts might expect them to have their matrimonial affairs dealt with by the courts of the state of their nationality.

52. If this is accepted, a number of questions still remain to be resolved. The first is whether, as at present, the domicile of the husband alone should found jurisdiction. If this is answered in the negative and it is agreed that the independently ascertained domicile of the wife should also found jurisdiction, should each spouse be entitled to initiate proceedings only in the court of his

[6]General reforms were recommended by the Lord Chancellor's Standing Committee on Private International Law in their First Report (see n. 5 above). The recommendations were endorsed by the Morton Report (see n. 4 above), paras. 816–818. Attempts to legislate on the basis of the Committee's Report proved abortive largely because foreign businessmen had apprehensions about possible effects on liability for income tax and estate duty. The Private International Law Committee were asked to re-examine the matter and did so in their Seventh Report, (1963) Cmnd. 1955, but no legislation was introduced following that Report.

[7]In January 1972, the Committee of Ministers of the Council of Europe adopted a resolution recommending to governments of member states Rules submitted by the European Committee on Legal Co-operation (C.C.J.) for the standardisation of the legal concepts of domicile and residence. The United Kingdom Representative, in welcoming the Rules, did not accept any binding commitment but gave an assurance that the Rules would be taken fully into account in revising United Kingdom law.

or her own domicile, only in the court of the other's domicile, or in both sets of courts? Finally, if the pursuer's domicile is admitted as founding jurisdiction, should it be a sufficient condition of jurisdiction or sufficient only if combined with another element, such as the fact that it has continued for a specified period or that the spouses last habitually resided together there?

(2) *The domicile of a married woman*

53. The rule that the domicile of a married woman is necessarily that of her husband ('the unity rule')[8], when combined with the rule in *Le Mesurier* v. *Le Mesurier*[9] that 'the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage'[10] creates the principle that the husband's domicile is the unique forum in actions affecting matrimonial status. This principle leads to obvious inconvenience and to frequent hardship. The effects of the unity rule have been criticised as discriminatory and co-trary to the principle of the equality of the sexes[11].

54. The limits of that principle and its component rules may be noticed. The rule of unity of domicile assumes that there was a marriage, and so cannot apply in a situation where one of the parties claims that there is no marriage. In this situation, for purposes of jurisdiction, either party may found upon what, leaving aside the ceremony of marriage, would be the domicile of the woman[12]. Nor does the *Le Mesurier* rule apply, at any rate without exceptions, to lesser remedies, such as separation, which are not designed to put an end to the marriage[13].

55. Moreover, recognising the difficulties resulting from the rigorous application of the *Le Mesurier* rule, the law as we have seen[14], admits of two exceptions to it. First, in actions of divorce and separation the common law applies the rule that, once a matrimonial offence has been committed, the defender cannot, by changing his domicile, deprive the pursuer of a remedy otherwise available to her: in those circumstances, jurisdiction may be based upon the domicile of the husband at the date of his desertion or adultery[15]. Second, statute law has intervened to allow a wife to found jurisdiction in actions of divorce and nullity of marriage upon her own residence for three years in Scotland, at least when her husband is not domiciled in another part of the British Islands[16].

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[8]*Mackinnon's Trustees* v. *Inland Revenue* 1920 S.C. (H.L.) 171. Cf. *Attorney-General for Alberta* v. *Cook* [1926] A.C. 444; *Mackenzie* v. *Mackenzie* 1931 S.L.T. 262.

[9][1895] A.C. 517 (P.C.).

[10]*Ibid. per* Lord Watson at p. 526.

[11]E.g. *Seventh Report of the Private International Law Committee* (see n. 6 above) para. 34 (7); cf. Hague Convention on the Recognition of Divorces and Legal Separations, Article 3. The C.C.J. Rules referred to at n. 7 above involve abandonment of the rule of unity. And see also the Domicile and Matrimonial Proceedings Bill (1972), clause 1, introduced in the House of Commons by a private member. A working party has been set up to advise the Government on the effects of abolishing the rule of unity of domicile in English and Scots law.

[12]*Administrator of Austrian Property* v. *Von Lorang* 1927 S.C. (H.L.) 80; *Balshaw* v. *Balshaw* 1967 S.C. 63.

[13]*Le Mesurier* v. *Le Mesurier* (see n. 9 above) at p. 576.

[14]See paras. 9 and 12 above.

[15]See para. 9 above (p. 4, ns. 8 and 9).

[16]See para. 12 above.

56. These two exceptions to the rule in *Le Mesurier* and the rule of unity appear to us to lessen their disadvantages without removing them altogether. The matrimonial offence rule, as it is usually formulated, would apply when the wife herself no longer resides in Scotland, that is to say, in circumstances where neither of the parties retains ties with Scotland. In this form, the rule is inconsistent with the general principles of jurisdiction in actions relating to status, and, for this reason, decrees of divorce proceeding upon it may not always attract recognition abroad. The rule, moreover, would be inappropriate if the Scots law of divorce were changed by discarding the principle that the basis of divorce is the commission of a matrimonial offence[17]. The statutory criterion of the wife's residence for three years within Scotland is also unsatisfactory. It may require a wife to seek matrimonial relief in a distant court when her husband is domiciled in another part of the United Kingdom. Where a Scottish wife has made her home with a husband domiciled abroad, it may require a young wife to wait for three years and, in practice, often considerably longer before she can establish that the marriage was voidable on the ground of her husband's impotence or dissoluble on the ground of his adultery. In this period, not only may she lose opportunities for remarriage but the evidence she requires for the purpose of her proceedings against her husband may also be lost. It is arguable that in these circumstances it should suffice for her to have returned to Scotland and to have re-established her pre-marital ties with this country.

57. The above exceptions mitigate the most serious hardships occasioned by the rule in *Le Mesurier*, but do not establish the law on a rational and satisfactory basis. The inconveniences and anomalies remaining are such as to throw doubt on the basis of the principle under which a wife acquires and retains her husband's domicile throughout her married life. But, since that principle has effects outwith the field of jurisdiction in consistorial actions and is presently under review[18], we merely propose, on the general lines of a recommendation made by the Morton Report[19], that a wife's domicile should be ascertained independently of that of her husband for the purposes of jurisdiction in the four consistorial actions with which this Part of our Report is concerned. The general justification for the principle that a wife's domicile should follow that of her husband—namely that a wife normally is domiciled, and normally would wish to be domiciled, with her husband—is clearly inapplicable in situations where the question is whether a marriage was ever entered into between the parties, but arguably is also inapplicable in situations where one of the parties insists upon living separate and apart from the other[20] and the question is whether a subsisting marriage should be annulled or dissolved. Our proposal differs from that of the Morton Commission in two important respects: it does not apply only to actions of divorce, and it is formulated so that the husband, and not simply the wife, would be entitled to found jurisdiction on the latter's independent domicile. We make this proposal because we think that it would be wrong for the court to have jurisdiction in an action at the

[17]As proposed in the Divorce (Scotland) Bill (1970) clause 1; see also our report, *Divorce, The Grounds Considered* (1967) Cmnd. 3256; cf. in England, Divorce Reform Act 1969 (c. 55).

[18]See n. 11 above.

[19](1956) Cmd. 9678, para. 825.

[20]See also *ibid.*, para. 824.

instance of the wife based on her domicile, but no jurisdiction in a cross-action at the instance of the husband. We revert to this point in paragraph 116. The rules which we advocate would have the incidental advantage of making it unnecessary to retain the matrimonial offence rule and we suggest that it should be abrogated.

RECOMMENDATIONS 7–9

58. We **recommend** that for the purposes of jurisdiction in actions of divorce, separation in the Court of Session, nullity of marriage and declarator of marriage, the domicile of a married woman should be determined without reference to the rule that her domicile necessarily follows that of her husband. We also **recommend** that the wife's domicile at the date of the commencement of proceedings should found jurisdiction in actions at the instance of either spouse. We further **recommend** that the rule should be abrogated whereby the domicile of a husband who has committed a matrimonial offence is to be determined for purposes of jurisdiction in divorce and separation at the time when the offence was committed.

(3) *The domicile of a married man*

59. The present law of Scotland is that, in the actions to which this part of our Report relates, either spouse may found jurisdiction upon the domicile of the husband. Where a husband founds jurisdiction in an action for divorce or separation upon his own domicile in Scotland, the decree of divorce or of separation will not necessarily be recognised under the Hague Convention on the Recognition of Divorces and Legal Separations unless certain further conditions are fulfilled, such as the fact that his domicile in Scotland continued for not less than one year immediately prior to the institution of the proceedings or unless the jurisdiction of the Scottish court falls to be recognised upon another ground, such as the fact that the spouses were both nationals of the United Kingdom and Colonies[21]. We have considered whether the husband's domicile alone should continue to be sufficient to found jurisdiction in actions at his instance. The qualifications to the rule appearing in the Hague Convention were introduced primarily in the context of the concept of habitual residence, and were there introduced to avoid the danger, in the words of the Rapporteurs, 'of facilitating a choice by the petitioner of the competent country and thereby of the law applicable'[22]. It is less easy for a man, however, to change his domicile than to change his habitual residence, and we consider that the qualifications introduced by the Convention are inappropriate in relation to the concept of domicile. The Convention, moreover, does not prevent the application of rules of law more favourable to the recognition of foreign divorces[23], and we believe that divorces based on the domicile of the pursuer ought to, and usually will, receive recognition abroad, even in the absence of conventional bases of recognition. The Convention recognises divorces based jurisdictionally upon the simple domicile of a defending husband.

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[21]Article 2.

[22]Actes et documents de la onzième session, Conférence de La Haye de droit international privé, tome II, *Divorce,* (Hague, 1970) p. 214.

[23]Article 17.

RECOMMENDATION 10

60. We **recommend** that in actions of divorce, separation in the Court of Session, nullity of marriage and declarator of marriage, the domicile of the husband should continue to found jurisdiction whether or not the action is at his instance.

(4) *Time at which domicile to be ascertained*

61. A minor question concerns the point of time at which the domicile of a party to the marriage is to be ascertained for purposes of jurisdiction. In Scotland and, we understand, in England, the generally accepted rule is that the relevant date for ascertaining the existence of jurisdiction is the commencement of the proceedings, a rule exemplified in relation to residence in section 2 (1) and (3) of the Law Reform (Miscellaneous Provisions) Act 1949. In Scotland, an action is held to commence for this purpose when the summons is first served on the defender[24] but in England when the petition is presented in court.

62. Clearly special considerations arise in actions of declarator of marriage and in actions of declarator of nullity relating to a marriage alleged to be void from its beginning which are brought after the death of one or both of the spouses. Where one spouse is dead we propose that jurisdiction should be based not only on the surviving spouse's domicile at the commencement of proceedings but on the deceased spouse's domicile at his or her death. Where such an action is brought after the death of both spouses[25], the court should possess jurisdiction if the husband at his death, or the wife at hers, was domiciled in Scotland.

RECOMMENDATION 11

63. We **recommend** that the time at which domicile is to be ascertained in actions of divorce, separation in the Court of Session, declarator of marriage and declarator of nullity of marriage should be the date of commencement of the proceedings. Where an action of declarator of marriage or of nullity of a void marriage is brought after the death of one or both of the spouses, the domicile of that spouse, or of either spouse as the case may be, at his or her death should also found jurisdiction.

(5) *Recommended domicile test (summary)*

64. We may summarise this section of our Report by saying that the Court of Session should have jurisdiction to entertain actions for divorce, separation,

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[24]McLaren *Court of Session Practice* (1916) pp. 317, 330, 350; *McNeill* v. *McNeill* 1960 S.C. 30 which decided that the defender's residence after the date of service on him of the summons in a separation action could not create a jurisdiction which did not exist at that date. Most cases on the point relate to the statutory provisions limiting the period of time within which a damages action may be commenced: e.g. *Alston* v. *Macdougall* (1887) 15 R. 78; *McNiven* v. *Glasgow Corporation* 1920 S.C. 584 *per* L.P. Clyde at p. 587; *Miller* v. *N.C.B.* 1960 S.C. 376.

[25]See para. 15 above.

declarator of marriage and declarator of nullity of marriage if either party to the marriage is domiciled in Scotland at the date of commencement of the proceedings. In actions of declarator of marriage, or of nullity of a marriage alleged to be void *ab initio* brought after the death of a spouse, the domicile of that spouse at his or her death should also found jurisdiction. For these purposes the domicile of a married woman should be ascertained independently of that of her husband. We have also recommended that the fact that the husband was domiciled in Scotland at the date of commission of an alleged matrimonial offence should no longer entitle the court to assume jurisdiction in actions for divorce or separation. Our specific recommendations are set out in greater detail at paragraphs 58, 60 and 63 above.

B. RESIDENCE AS A TEST

(*1*) *The need for a residential basis of jurisdiction*

65. While we consider that domicile is generally an appropriate basis for jurisdiction in consistorial actions, the present rules for ascertaining domicile, with their emphasis upon permanence of intention, can operate hardship[26]. Domicile meets the needs of spouses intending to make their permanent home in a country, but does not meet those of persons whose future intentions are uncertain, whether or not because of the breakdown of the marriage. Yet it is the country where a person has his home for the time being, though not necessarily his permanent home, which is most closely concerned with the fact of this breakdown and its consequences. The authorities of that country will often have to deal in practice with such matters as the maintenance of the wife and children, with the custody of the children, and with the property rights of the parties. Their matrimonial differences are likely to have taken place in that country and its courts are likely to be those which witnesses can most conveniently attend. On grounds both of principle and expediency there is much to be said for treating residence as a main ground of jurisdiction in consistorial actions.

(*2*) *Appraisal of the existing residential basis of jurisdiction*

66. As we have seen[27], the statutory residential ground of jurisdiction in divorce is subject to qualifications:

(*a*) It is applicable only in actions by wives.

(*b*) The husband must not be domiciled in another part of the United Kingdom, or in the Channel Islands or the Isle of Man.

(*c*) The nature of the residence is 'ordinary' residence for three years within the territory.

We consider that, if jurisdiction based upon residence is appropriate, it should be available to husbands as well as to wives. Under the present rule the anomaly arises that, while the wife may raise an action against her husband based upon her own residence, a cross-action by the husband would appear to be incompetent[28]. The present rule, moreover, applies only where the husband is not

[26]See para. 49 above.
[27]See para. 12 above: Law Reform (Miscellaneous Provisions) Act 1949, s. 2(1).
[28]See para. 116 below.

domiciled in another part of the United Kingdom. In favour of this restriction it might be said that, when the husband is domiciled elsewhere in the United Kingdom, it should not be difficult for the wife to initiate proceedings there. This may be so, but the court of the husband's domicile may still be inconvenient for the determination of the issues of fact. We think therefore that this restriction is unnecessary and should be removed. We also consider that the criteria of the quality and duration of the residence imposed by the 1949 Act are inappropriate.

67. In actions of declarator of nullity of marriage, the Court of Session possesses the same limited statutory jurisdiction on the basis of the residence of a wife-pursuer for three years in Scotland as it possesses in divorce actions[29]. It is anomalous that this jurisdiction does not extend to actions of declarator of marriage. We consider, however, that this statutory jurisdiction should be abolished for the reasons which have led us to suggest its abolition in actions of divorce. It is also anomalous that in actions of separation (except as mentioned in paragraph 80 below) the Court of Session does not possess jurisdiction on grounds of residence. (In England the courts may entertain proceedings for judicial separation where both parties[30] are, or the respondent alone[31] is, resident there.) On the view that the courts of a married person's residence do have a special interest and duty to see that his or her matrimonial obligations to the other spouse are fulfilled, we consider that the Court of Session should possess jurisdiction to entertain actions for divorce, separation, declarator of marriage and nullity where either party has resided for a certain time within Scotland.

(3) *The quality of the residence*

68. But residence is a term with a broad spectrum of meaning. We would not suggest that the transient residence of persons in Scotland should permit them to invoke the matrimonial jurisdiction of the Scottish courts. This would open the door to 'forum-shopping'. The residence should be such as to demonstrate a real and substantial connection with Scotland. In some way, therefore, the concept of residence must be qualified.

(i) *Unsuitability of 'home'*

69. We considered, in the first place, whether the expression 'home' should be used in preference to, or in conjunction with, the term 'residence'. The use of the word 'home' was suggested by the Private International Law Committee as part of a new set of rules for the attribution of domicile[32]. We reject the term 'home' because it is an imprecise term which is open to a variety of interpretations according to the context and the disposition of the hearer[33].

[29]Law Reform (Miscellaneous Provisions) Act 1949, s.2(2).

[30]*Graham* v. *Graham* [1923] P. 31.

[31]*Sinclair* v. *Sinclair* [1968] P. 189 at p. 199.

[32]First Report (see p. 20 n. 5 above) para. 13 and Appendix A, Article 2.

[33]See *Re Brace dec'd* [1954] 1 W.L.R. 955 *per* Vaisey J. at p. 958; *Herbert* v. *Byrne* [1964] 1 W.L.R. 519 *per* Salmon L.J. at p. 528.

It connotes, in particular, an element of intention to which different persons might give a different weight. Its adoption would maintain the uncertainty which at present is associated with the use of the concept of domicile.

(ii) Unsuitability of 'last joint residence'

70. The Morton Commission recommended that the Court of Session should have jurisdiction to entertain proceedings for divorce *inter alia* if either:

(*a*) the pursuer was in Scotland at the commencement of the proceedings and the place where the parties to the marriage last resided together was in Scotland, or

(*b*) the parties to the marriage were both resident in Scotland at the commencement of the proceedings[34].

These suggested grounds of jurisdiction were coupled with rules to ensure that the court should not, in the exercise of that jurisdiction, grant a decree of divorce unless the pursuer could in the circumstances of the case have obtained a divorce under the personal law or laws of both parties. We have given reasons for our view that it would be undesirable to require the Court of Session to have regard to the personal law of the spouses in matters of divorce[35]. But we consider that, without regard to the personal law, the first ground suggested by the Morton Commission would be too wide. The place where the parties last happened to reside together might have been fortuitous, and this ground would be inappropriate unless they had resided together in Scotland for a sufficient period of time. The second ground, unless their personal law were to be applied, would lend itself to the collusive selection by foreigners of the Scottish courts in divorce proceedings.

(iii) Unsuitability of 'ordinary residence'

71. The test of residence chosen should, we think, indicate some stability and duration of ties with the place of residence. A qualifying adjective must be used to indicate that it is not enough for a person to make his occasional residence within the territory but that, on the other hand, residence which in substance is stable should not be ignored because the person in question occasionally interrupts it to go elsewhere for purposes of business or recreation. In our legislation it has been a common practice to express this fact by the use of the adverb 'ordinarily'. We would prefer, however, to avoid using the expression 'ordinary residence' in the context of jurisdiction in consistorial actions. This preference is based on the fact that, in construing section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949 and corresponding English legislation, the courts have not always distinguished clearly between the concept of 'residence' and that of 'ordinary residence'. The better view may be that 'ordinary residence' is to be contrasted with 'occasional' or 'casual' residence[36]; but, in *Hopkins* v. *Hopkins*[37], where a wife sought to

[34]Para. 831 (see p. 20, n. 4 above).

[35]See Part IV, paras. 24 to 30 above.

[36]Cf. *Lysaght* v. *I.R.C.* [1927] 2 K.B. 55 *per* Lawrence, L.J. at p. 74; *idem* [1928] A.C. 217 *per* Viscount Sumner at p. 243.

[37][1951] P. 116; see note in (1951) 67 L.Q.R. 32.

found jurisdiction in divorce upon her own residence for three years in England, it was held that there was no ground for applying a different meaning to the words 'resident' and 'ordinarily resident' over a defined period of time. A similar approach was adopted in the Scottish case of *Land* v. *Land*[38] where it was held that the pursuer's residence for two months in Holland during the statutory period of three years prior to the commencement of the proceedings was fatal to her contention that she had been ordinarily resident in Scotland for that period. Having regard to these decisions, we conclude that it would be desirable to find another qualifying adjective to describe that stability of residence which is appropriate to a main criterion of jurisdiction in consistorial actions. This view is fortified by the fact that the expressions 'ordinary residence' and 'ordinarily resident' appear in our revenue law. It is possible that the legislature might wish to use, or the courts to construe, these phrases in a taxing statute in a sense different to that appropriate to an Act relating to consistorial jurisdiction.

(*iv*) *The recommended test: 'habitual residence'*

72. The Hague Convention on the Recognition of Divorces and Legal Separations uses the concept of 'habitual residence'. Since its adoption as a ground of jurisdiction in United Kingdom law would facilitate the recognition of United Kingdom divorces and legal separations in other countries, we strongly advocate its adoption. The concept already finds a place in United Kingdon law in at least four statutes[39].

73. The use of the criterion of habitual residence might be thought sufficient of itself to indicate those ties with a country which suffice to found jurisdiction. But to qualify a residence as habitual suggests that it has endured for a period of time. There might, therefore, be an element of uncertainty in the law unless a minimum period were specified. Since certainty is of particular importance in this context, we conclude that the test should specify the duration of habitual residence required before jurisdiction may be assumed. But the period of time appropriate depends, to some extent at least, upon whether jurisdiction may be founded only upon the residence of both spouses, or upon that of the pursuer or defender or either of them. This question we now consider.

(*4*) *Habitual residence of either spouse*

74. We think that it would be wrong to demand that both spouses should be habitually resident within the territory. Exceptions would be required to meet the case of the spouse, long resident within the jurisdiction, whose partner is neither resident nor domiciled there. The fact, on the other hand, that the defender has resided for a period within the jurisdiction should found jurisdiction in actions against him. It is likely to be the most convenient forum from his point of view and 'forum-shopping' is unlikely without his connivance. The

[38]1962 S.L.T. 316.

[39]Administration of Justice Act 1956 (c.46), s. 4; the Wills Act 1963 (c.44), s. 1; the Adoption Act 1958 (c.53), s. 11; and the Recognition of Divorces and Legal Separations Act 1971 (c.53), s. 3.

habitual residence of the defender is a well-recognised ground of jurisdiction abroad and, under the Hague Convention on the Recognition of Divorces and Legal Separations[40], it suffices that the defender should have had his habitual residence within the State in which the action is raised at the time when it is raised. We think that this ground of jurisdiction should be adopted into our law.

75. We come next to the habitual residence of the pursuer. As a ground of jurisdiction it is open to the objection that the pursuer, by changing his residence, may select a forum of his own choice. The risk of this, however, should not be exaggerated. If the residence must have endured for a sufficiently long period of time, 'forum-shopping' becomes difficult for ordinary men or women who must earn their livelihood.

(*5*) *Duration of habitual residence*

76. We have given much thought to the question what length of time should suffice to found jurisdiction on the basis of habitual residence. In our Memorandum No. 13 we suggested that the period should demonstrate the existence of real ties with the forum; that it should be a duration to discourage all but the most assiduous 'forum-shopper'; that it should be of such duration that a decree pronounced in the exercise of this jurisdiction should attract international recognition; but that it should not be a period such that a spouse whose marriage has broken down should have to wait for a long time before his or her matrimonial status may be regularised. We concluded that a period of one year should suffice both in the case of pursuers and in that of defenders. This proved to be the most controversial of our tentative proposals, as it was in the case of the corresponding proposal of the Law Commission. Although some of those who commented on our Memorandum favoured a one-year period, others, including the Law Society of Scotland, suggested that a two-year period would be preferable.

77. The basic arguments for the longer period are that a one-year period is not long enough to ensure the existence of substantial ties with the country of residence; that it is so short as to allow a person deliberately to choose to reside temporarily in a country with a view to taking advantage of its divorce law; and that, because of the absence of substantial ties, a divorce founded upon such a ground of jurisdiction would be exposed to the risk of being refused recognition abroad, particularly in Commonwealth countries.

78. We concede that the choice between the two periods is not an easy one. No length of residence is by itself a clear guarantee of the durability of a person's ties with a country, and the need to ensure durability of connection must be balanced against the need to ensure that a spouse whose marriage has in fact broken down should not have to wait too long for his matrimonial affairs to be regularised. Nor does any period of time afford a clear guarantee against 'forum-shopping'. But the fact is that few people will be both able and willing to reside in Scotland for more than a year simply to take advantage of our

[40]Article 2(1).

divorce or ancillary provision[41]. Most people have to work to earn a living, and in some cases immigration controls and the need to obtain work-permits would be a barrier. For the few, there are other countries with less strict rules of procedural and substantive law in the realm of divorce. We agree, too, that the period selected should be one likely to attract recognition abroad, but the Hague Convention[42] requires the recognition of foreign decrees of divorce and separation founded jurisdictionally upon the habitual residence either of the pursuer or the defender and only in the case of the former is there a stipulation for its endurance, and that a period of one year only. We concede that some Commonwealth countries may still require a longer period, but the general tendency is to relax the strictness of rules of recognition, and the law of those countries may well be changed to follow the lead given by the Recognition of Divorces and Legal Separations Act 1971.

79. Our firm view, then, is to require a period of one year only. We consider, moreover, that the same period should apply to the defender because, in many actions of divorce, it is a matter of chance which of the parties is the original pursuer and which the original defender.

(6) *Retention of jurisdiction* ex necessitate *in actions of separation*

80. We have already noted[43] that the Court of Session, as the court of the residence, possesses jurisdiction to entertain actions of separation to protect a spouse in circumstances of urgency and necessity. Those whom we consulted did not dissent from our view that this ground of jurisdiction should be retained as an exception to the period of a year's habitual residence. The jurisdiction will be rarely invoked but it would be wrong to deprive the Court of Session of a special jurisdiction in cases which may be important when they do occur.

RECOMMENDATION 12

81. We **recommend** that the existing rule of law whereby the Court of Session exercises jurisdiction *ex necessitate* in actions of separation should be retained.

(7) *Time at which habitual residence to be ascertained*

82. In line with our proposals concerning domicile[44], we consider that the *terminus ad quem* for the period of one year's habitual residence should be the date of the commencement of proceedings. On the same analogy[45], in those few cases where an action of declarator of marriage or of nullity of a void marriage is brought after the death of one or both of the spouses, the court should possess jurisdiction if that spouse, or either spouse as the case may be, was habitually resident in Scotland throughout the year before his or her death.

[41]The remarks of Lord Pearce in *Indyka* v. *Indyka* [1969] A.C. 33 at p. 87, though expressly directed to questions of recognition, are apposite in this context.

[42]Article 2(2) (*a*).

[43]See para. 14 above: as to jurisdiction of the sheriff court in separation, see Part IX, para. 100 *et seq.* below.

[44]See para. 61 above.

[45]See para. 62 above.

(8) Recommended habitual residence test (summary)

83. To sum up, we think that the Court of Session should have jurisdiction to entertain actions of divorce, separation, declarator of marriage, or declarator of nullity of marriage, on the basis of the pursuer's or the defender's habitual residence in Scotland throughout the year preceding the date of commencement of the action. In advocating this test, we adopt an approach which is similar to section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1949 and which avoids the troublesome necessity of enquiring into the future intention of a party. The habitual character of the **past** residence should be determined by the settled nature of that residence over a period of time and the court should not be concerned to ascertain whether or not the party intended or intends to maintain his habitual residence in Scotland in the **future.** This criterion, we suggest, fulfils all the objectives of jurisdiction set out in Part III above. It would render superfluous section 2 (1) and (2) of the 1949 Act. It would not, however, supersede the power of the Court of Session to assume jurisdiction *ex necessitate* in actions of separation.

RECOMMENDATIONS 13 AND 14

84. We **recommend** that the Court of Session should have jurisdiction to entertain actions of divorce, separation, declarator of nullity of marriage, or declarator of marriage (*a*) if either party to the marriage was habitually resident in Scotland throughout the year immediately preceding the date of the commencement of the proceedings or (*b*) in the case of actions of declarator of marriage or nullity brought after the death of one or both of the spouses, if the deceased spouse was habitually resident in Scotland throughout the year immediately preceding the death. As a consequence of this recommendation, we **recommend** that section 2 (1) and (2) of the Law Reform (Miscellaneous Provisions) Act 1949 (which makes the ordinary residence of a wife for three years in Scotland a basis of jurisdiction in divorce and nullity of marriage in certain circumstances) should be repealed.

PART VII: JURISDICTION IN PETITIONS FOR DISSOLUTION OF MARRIAGE ON PRESUMED DEATH

(1) The existing bases of jurisdiction

85. Until the Divorce (Scotland) Act 1938 took effect, no special provision was made by Scots law for the dissolution of a marriage on the ground of the presumed death of one of the spouses. The common law decree of declarator of death could be obtained by a spouse only if either he or she could establish facts and circumstances pointing clearly to the death of his or her partner or if that partner had reached an age when he or she could no longer be presumed to live[1]. Section 5 of the 1938 Act altered the common law by enabling the court to grant a decree of dissolution of marriage on the ground of the presumed

[1]See our Memorandum No. 11 on *Presumptions of Survivorship and Death*, paras. 3 and 4. Copies of this Memorandum can be obtained on application to the Secretary of the Scottish Law Commission.

death of a spouse where it is satisfied that reasonable grounds exist for supposing that he or she is dead. In these proceedings 'the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead unless the contrary is proved'[2].

86. As we have stated in our Memorandum No. 11 on *Presumptions of Survivorship and Death*[3], the 1938 Act gave no guidance as to the appropriate rules of jurisdiction in such actions. The court, however, having regard to the general rules for jurisdiction in divorce, required that the petitioner should be domiciled in Scotland at the time of the action. Because of the rule that a wife's domicile follows that of her husband, the wife of a man who disappeared was bound to establish her husband's domicile at the date of the commencement of proceedings. This heavy burden was lightened, however, by the rule that a person's domicile, once established, is presumed to subsist in the absence of evidence to the contrary[4]. Even so, a woman could not invoke the jurisdiction of the Court of Session on the ground of her residence in Scotland; she had to aver that her husband was domiciled there at the date of his disappearance.

87. The rigour of the rule of unity of domicile was mitigated by the Law Reform (Miscellaneous Provisions) Act 1949, s. 2 (3) which provides that, in petitions by a wife, the court has jurisdiction 'if she is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings'. The section also preserves the above-mentioned rules of the common law by providing that in such petitions the court shall have jurisdiction where the petitioner is domiciled in Scotland at the commencement of proceedings and that in determining whether for this purpose a woman is domiciled in Scotland, her husband is treated as having died immediately after the last occasion on which she knew, or had reason to believe, him to be alive. Finally, the section makes these rules exhaustive of the grounds of jurisdiction in petitions under section 5 of the 1938 Act.

(2) Criticism of the existing bases of jurisdiction and recommendations

88. Our consultations had regard not only to petitions under section 5 of the 1938 Act but also to a new action of declarator of death or presumption of death whose introduction we suggested in our Memorandum No. 11 and shall recommend in a forthcoming Report. In the present Report, we deal with petitions under section 5 of the 1938 Act leaving jurisdiction in the new action to be discussed in our forthcoming Report. The law in its present state is unsatisfactory. In particular it is open to the following objections:

(*a*) It admits a residential ground of jurisdiction in the case of proceedings by a wife but not in the case of proceedings by a husband.

(*b*) While the rule of unity of domicile does not apply in its full rigour to proceedings by a wife, the rule effectively precludes a petitioning

[2]1938 Act (c.50), s. 5(2).
[3]At para. 16.
[4]*Labacianskas* v. *Labacianskas* 1949 S.C. 280.

husband from founding on his missing wife's last known independently ascertained domicile in Scotland.

(*c*) The remedy alters the status of a missing person by dissolving his or her marriage just as it alters the status of the petitioner. Yet where the last known connections of a missing person are with Scotland, his or her spouse cannot found jurisdiction upon them: a petitioner can only found on his or her own domicile at the commencement of proceedings. This objection is only partially met by the concession allowing a petitioning wife, in establishing her own domicile at the commencement of proceedings, to found on her missing husband's domicile at his disappearance: for the concession does not assist her if her domicile has changed after the disappearance.

The petitioner's domicile and habitual residence

89. Our Memorandum No. 13 suggested tentatively[5] that the petitioner should be able to found jurisdiction on his or her domicile (a wife's domicile being ascertained independently) or one year's habitual residence. Those whom we consulted generally accepted that a rule that the petitioner should be able to found on his or her own domicile or habitial residence for a prescribed period fulfilled the general objective that the Court should assume jurisdiction only where the parties to the marriage had substantial links with Scotland and we propose that the rule should be adopted.

The missing spouse's domicile

90. In the existing law, as we have seen[6], jurisdiction is not based on the missing person's domicile, except to the extent that a petitioning wife may found jurisdiction upon her husband's domicile at the time of his disappearance where her domicile has not changed since that time. In our Memorandum No. 13, we suggested that a petitioner, whether husband or wife, should be able to found jurisdiction on the missing person's domicile at the last time when he or she was known to be alive and that for this purpose a wife's domicile should be ascertained independently. This proposal was generally accepted by those whom we consulted. Such bases of jurisdiction, however, are *prima facie* open to two objections. The first is that the missing person's domicile at that time may not always be easy to ascertain. But this is a familiar difficulty in different branches of the law where a past domicile may require to be ascertained and, in the present case, could be mitigated if, as we propose, the missing person's habitual residence at the date when he was last known to be alive should also be a ground of jurisdiction. The second difficulty arises from the fact that the missing spouse's domicile at the date when he or she was last known to be alive will be invoked only when the petitioner cannot rely on his or her own domicile or habitual residence and when the missing spouse may in fact have severed his or her ties with Scotland. Although in law a person's existing domicile is presumed to continue until he is proved to have acquired another, this presumption may be at variance with the facts. We concede this, but, in the situation envisaged, there is no way of knowing the true facts. If, as the Morton Report suggested, the real purpose of the proceedings 'is to obtain a declaration

[5]At para. 56.
[6]Paras. 87 and 88 above.

that the other spouse is to be presumed to be dead'[7], it seems appropriate to ascertain the connections of the missing person at the time when he was last known to be alive. On the other hand, it is arguable that presumption of death is merely the ground upon which decree is granted (akin, say, to incurable insanity), and that the effect of the decree is divorce and nothing else[8]. If on that view, which we take to be correct, emphasis should be placed on the dissolution of the missing person's marriage, it seems appropriate that the Court of Session should have jurisdiction for that purpose where the missing person was domiciled in Scotland at the time when he (or she) was last known to be alive. For upon the hypothesis that he is missing, it is not known what other court, if any, has or has had jurisdiction over his status at any time since his disappearance. We consider therefore that the Court of Session should have jurisdiction on the basis of the domicile of a missing person (including the independently ascertained domicile of a missing wife) ascertained at the date when he or she was last known to be alive.

The missing spouse's habitual residence

91. Consistently with this proposal and our other recommendations in this Report, we consider that jurisdiction should also be based on the missing person's habitual residence in Scotland for a year preceding the date when he was last known to be alive. This goes beyond our tentative proposals in Memorandum No. 13. In the preceding paragraph, however, we pointed out that it may not always be easy to ascertain a missing person's domicile at the date when he was last known to be alive. It should, nevertheless usually be easier to ascertain, and lead evidence relating to, the last known habitual residence of the missing person. This may well coincide with his domicile. Even if it does not, it points to the existence of social connections with Scotland, at the time when he was last known to be alive, of sufficient strength to justify the intervention of the Scottish courts to presume the missing person to be dead for matrimonial purposes.

92. We select the period of one year for the petitioner's and missing person's habitual residence in order to preserve consistency with the test in the other consistorial causes to which our Report relates. We would add that our proposals are consistent with the recommendations which we shall be making in our Report referred to in paragraph 88 above.

RECOMMENDATIONS 15–17

93. We **recommend** that, in petitions under section 5 of the Divorce (Scotland) Act 1938 for dissolution of marriage on the ground of presumed death, the Court of Session should have jurisdiction:

(*a*) where the petitioner is domiciled in Scotland at the date of the commencement of proceedings, or was habitually resident there throughout the year preceding that date; or

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[7](1956) Cmd. 9678, para. 846.

[8]While a distinction is drawn in the long title of the Divorce (Scotland) Act 1938 between 'divorce' and 'dissolution of marriage', the only difference in the effect of the two remedies is that, unlike a divorce decree, a decree dissolving a marriage on presumption of death cannot make ancillary financial provision or provision as to custody etc. of children.

(*b*) where the missing person was domiciled in Scotland on the date when he was last known to be alive or had been habitually resident there throughout the year preceding that date.

This recommendation is made with the explanation that the period of habitual residence for one year is selected to conform with that recommended for other consistorial proceedings. We also **recommend** that for this purpose the domicile of a married woman should be determined independently of that of her husband. As a consequence of these recommendations, we **recommend** that section 2(3) of the Law Reform (Miscellaneous Provisions) Act 1949 (under which the petitioner's domicile founds jurisdiction in petitions for dissolution of a marriage on the ground of presumed death) should be repealed.

PART VIII: JURISDICTION IN ACTIONS OF REDUCTION OF CONSISTORIAL DECREES

The existing bases of jurisdiction

94. The power to review consistorial decrees has always been vested in the Court of Session. Following the transfer in 1830 of original consistorial jurisdiction from the Commissary Courts[1], the Court of Session had exclusive power to review consistorial decrees, whether its own or (after 1907) those of the sheriff, which it exercised either by action of reduction or, in the case of decrees in absence, by Bill of Suspension. In 1934, the latter remedy became unavailable for the purpose of reviewing divorce decrees[2], and now an action of reduction in the Court of Session is the only method of reviewing a divorce decree, and a proper method of reviewing other consistorial decrees, after the time for appeal or reponing has expired[3].

95. The basis of jurisdiction is not free from doubt. It is usually said, following *Longworth* v. *Yelverton*[4], that jurisdiction in an action of reduction is established if the defender is personally subject to the Court's jurisdiction at the commencement of the action. There are also dicta in *Acutt* v. *Acutt*[5] supporting the view that an action of reduction of a consistorial decree affecting status attracts jurisdictional criteria appropriate to status actions. It is however clear that the mere fact that the Court has granted a consistorial decree which is null from want of jurisdiction, from fraud, or *semble* through any other fundamental defect, does not by itself found jurisdiction in an international sense in an action to reduce the decree. There have been few reported actions of reduction of consistorial decrees and very few involving a foreign element. But the injustice which can occur is illustrated by the leading case of *Acutt* v. *Acutt*[6]:

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[1]Court of Session Act 1830, s. 33.

[2]The relevant Act of Sederunt is now consolidated in Rules of Court of Session 1965, Rule 163(*d*).

[3]For a short account of this historical development in divorce, see Lord Wark's opinion in *Acutt* v. *Acutt* 1935 S.C. 525 at p. 528.

[4](1868) 7 M.70.

[5]1936 S.C. 386 *per* L.P. Normand at p. 393 'It has (been held) that this is a consistorial case affecting status. In considering its jurisdiction the Court must give due effect to that decision'; *per* Lord Morison at p. 396 'It may be that a wife in the pursuer's position here might have obtained her remedy in the Court of the defender's domicile . . . . .'.

[6]See ns. 3 and 5 above.

H divorced W for desertion in an undefended action in the Court of Session. Thereafter while H was resident in England, W brought an action in the same court for reduction of the divorce on the ground of want of jurisdiction and fraud. This action was also undefended though H knew about it. The Court held that as the proceedings affected status, in respect that decree of reduction would reinstate the marriage and render null any second marriage, the action was consistorial within the meaning of the Court of Session Act 1850[7] and proof must be led. It was proved that in the divorce action H had fraudulently claimed a Scottish domicile and misled the Court on the merits. On appeal the First Division, by a majority, reluctantly dismissed the action as incompetent, since the defender was not subject to its jurisdiction.

Criticism of the existing bases of jurisdiction and recommendations

96. The objections to this rule may be gathered from opinions in the reported cases[8]. On general principles, only the courts of the country of the forum granting the decree are recognised as having jurisdiction to reduce it and certainly no English court can reduce a Scottish decree in view of Article XIX of the Treaty of Union 1707[9]. If the Scottish Courts refuse jurisdiction, 'the result is to deny a remedy for what may be a grievous wrong'. It is true that a decree vitiated by a fundamental nullity may be disregarded in other judicial proceedings. But this is clearly an imperfect remedy. Moreover it seems wrong that decrees of the Supreme Court in Scotland should have to be disregarded by inferior courts or even by itself, and that the records of court and the national registers should stand uncorrected[10]. Nor do we see much force in an argument that, in cases where a decree is alleged to be null through excess of jurisdiction, the Court cannot undo an injustice by repeating that excess: we prefer the view that the Court should be able to undo what *ex hypothesi* it should never have done.

97. What form should amending legislation take? While we have not examined the basis of jurisdiction in actions of reduction generally, it seems to us clear that a person wronged by a Scottish consistorial decree which is null through excess of jurisdiction or through any other fundamental defect, should be able to remedy the wrong by action of reduction in the Scottish courts even though the defender is not subject to the jurisdiction of those courts at the date of the commencement of the action. We propose therefore that the law should be amended in that sense.

98. Since the decisions in *Longworth* v. *Yelverton* and *Acutt* v. *Acutt*[11] have implications not merely for decrees affecting matrimonial status, but for all

[7]S.16 which applies *inter alia* the Court of Session Act 1830, s. 36 to all consistorial actions though not specified in those Acts.

[8]Especially the dissenting opinions of Lord Deas in *Longworth* (n. 4 above) at p. 74 and of Lord Moncrieff in *Acutt* 1936 S.C. 386 at p. 396.

[9]See Union with England Act 1707, Recorded., 1706, c.7, 12 mo. ed., 1707, c.7: the Union with Scotland Act 1706, 6 Anne, c.11.

[10]See Registration of Births, Deaths and Marriages (Scotland) Act 1965, s. 48 explained at p. 18, n. 21 above.

[11]See ns. 4 and 5 above.

consistorial decrees such as declarators of legitimacy and bastardy, we think that any reform should apply to actions for the reduction of all consistorial decrees.

RECOMMENDATION 18

99. We **recommend** that the Court of Session should have jurisdiction in actions of reduction of any consistorial decree granted by a Scottish court whether or not at the date of the commencement of the action of reduction the defender was otherwise subject to the jurisdiction of the Scottish courts.

PART IX: JURISDICTION OF THE SHERIFF COURT IN ACTIONS OF SEPARATION AND ALIMENT

The existing bases of jurisdiction

100. In this Part of our Report we consider the basis of jurisdiction in sheriff court actions of separation. While recognising that the use made of this remedy is diminishing, we consider the basis of jurisdiction at some length because proceedings are typically brought in that court rather than in the Court of Session to which our earlier consultations on Memorandum No. 13 were largely confined. Moreover, previous proposals for reform have tended to emphasise the internal aspects of jurisdiction to the exclusion of international aspects. The present bases of jurisdiction in actions of separation[1] are unclear and unsatisfactory. There are two principal causes of doubt. The first, which is common to actions in the Court of Session and the sheriff court, is uncertainty whether separation should be regarded primarily as a consistorial remedy affecting status like divorce, or as a financial remedy akin to a decree for debt, or as a protective remedy similar to an interdict against molestation. As we indicated above[2], the primary basis of jurisdiction in Court of Session actions of separation is the husband's domicile but the court may also assume jurisdiction *ex necessitate* to protect a spouse and possibly also to give a spouse aliment[3].

101. The second cause of doubt stems from what have been judicially described as the 'crude' provisions of the Sheriff Courts (Scotland) Act 1907. Section 5 (2) of that Act extended the sheriff court's powers in actions of interim aliment to:

> 'actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment, or interim aliment . . . . .'

Section 6 of the 1907 Act provides that:

> 'any action competent in the sheriff court may be brought within the jurisdiction of the sheriff:

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[1] In *Docherty* v. *Docherty* 1959 S.L.T. (Sh.Ct.) 29 it was held that an action of separation without a conclusion for aliment is incompetent. This peculiar requirement could presumably be circumvented by a conclusion for nominal aliment and we refer hereafter to actions of separation.

[2] Paras. 8 and 9.

[3] Para. 14.

(*a*) where the defender . . . . resides[4] within the jurisdiction, or having resided there for at least forty days, has ceased to reside there for less than forty days and has no known residence in Scotland.'

There follow other grounds of jurisdiction set out in nine paragraphs. Some paragraphs relate to specific forms of action such as interdict but not to those specified in section 5(2); the remaining paragraphs prescribe the general grounds of jurisdiction other than residence, namely, the defender's place of business, arrestment to found jurisdiction, reconvention and prorogation[5].

102. Two main difficulties of interpretation have arisen. First there are doubts about which of the general grounds of jurisdiction may be invoked in separation actions. While there was little difficulty in holding that the defender's residence founds jurisdiction[6], and that jurisdiction cannot be founded on arrestments[7], it remains unclear whether any of the other general grounds apply[8]. This uncertainty is part of a wider uncertainty whether this and cognate provisions of the 1907 Act are meant to be construed literally.

103. The second difficulty is whether section 6 of the 1907 Act provides a test of jurisdiction in the international sense at all. On one view, in cases with a foreign element, a second test of jurisdiction must also be satisfied, namely, whether the parties are domiciled in Scotland or, in certain cases of jurisdiction *ex necessitate,* whether the parties are resident there. On this view, section 6 relates merely to internal jurisdiction; it allocates cases to the appropriate sheriff courts. This approach was adopted by Lord Keith in *Jelfs* v. *Jelfs*[9]. But in *McNeill* v. *McNeill*[10], the First Division clearly assumed that the sheriff court has jurisdiction under section 6 on the mere basis of the residence of a defending husband domiciled abroad and this seems to be the more widely held view[11].

104. In addition to the 1907 Act, section 6 of the Maintenance Orders Act 1950 provides that the sheriff has jurisdiction in *inter alia* an action of separation and aliment at the instance of a wife if:

'(*a*) the husband resides in England or Northern Ireland; and

(*b*) the parties last ordinarily resided together as man and wife in Scotland; and

(*c*) the pursuer resides within the jurisdiction of the sheriff'.

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[4]In an action of separation and aliment, 'resides' was construed as giving effect to the common law ground of residence for forty days prior to the commencement of the action: see *McNeill* v. *McNeill* 1960 S.C. 30.

[5]Paragraphs (*b*), (*c*), (*h*) and (*j*).

[6]*Wingrave* v. *Wingrave* (1919) 35 Sh.Ct.Rep.97.

[7]*Holt* v. *Holt* (1908) 25 Sh.Ct. Rep. 112.

[8]For critical comments on prorogation, see *McCord* v. *McCord* 1946 S.C. 198 *per* L.J.C. Cooper (*obiter*) at p. 201; and on reconvention, *Kitson* v. *Kitson* 1945 S.C. 434 *per* L.J.C. Cooper (*obiter*) at p. 439; cf. *Docherty* v. *Docherty* 1959 S.L.T. (Sh.Ct.) 29 (*obiter*) at p. 30.

[9]1939 S.L.T. 286 at p. 290; see also *Holt* v. *Holt* (n. 7 above)—'It is not competent to found jurisdiction by arrestment in an action of separation and aliment. Such an action involves a question of status and that can be tried only where the defender has a domicile'.

[10]1960 S.C. 30.

[11]See for example Dobie, *Sheriff Court Practice* (1952) p. 525; Anton, *Private International Law* (1967) p. 341.

The nature of an action of separation

105. The reluctance of the courts to construe section 6 of the 1907 Act literally seems to spring largely from a desire to avoid the strange result of (*a*) conceding to the sheriff court a wider international jurisdiction in separation actions than is assumed by the Court of Session, and (*b*) treating the action as relating to status when brought in the Court of Session but as a financial remedy in the sheriff court. Accordingly a detailed assessment of the nature of the remedy is an essential prerequisite to framing jurisdictional rules.

106. We consider that proceedings for separation in the sheriff court should be treated as akin to divorce for the purposes of jurisdiction as it is in the Court of Session[12]. It is true that since the Married Women's Property (Scotland) Acts 1881 and 1920[13], the effects of a decree of separation on a wife's status are much less substantial than they were during the intermediate stage of the gradual emancipation by statute of wives from the *jus mariti* and *jus administrationis*[14]. The remedy has now only minor effects on status in the sense of capacity to act, to hold property, to incur obligations and to acquire rights[15], for the wife already possesses that capacity. The remedy retains the distinctive role of entitling a spouse to live in separation while the marriage bond subsists. Whether in this role it 'affects status' is a question of categorisation which need not here be resolved. There are however strong practical grounds for regarding separation as akin to divorce for jurisdictional purposes. As the Morton Report stated[16], important reasons for retaining the remedy are to permit a remedy to be provided for those who have religious or conscientious objections to divorce and also for those wishing to keep open a door to reconciliation. We may add that a decree of separation is sufficient proof in a subsequent divorce action of the cruelty or adultery to which the decree relates[17]. We think that today judicial separation should be regarded as the equivalent to divorce for spouses who wish to retain the marriage bond despite the breakdown of marriage and that an action for separation should be brought only where that is the remedy which the pursuer really wants.

107. The financial aspect was probably at one time dominant but this is no longer true. A wife living in separation, whose husband had been guilty of adultery or cruelty, was not entitled to aliment unless she obtained a decree

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[12]See *Administrator of Austrian Property* v. *Von Lorang* 1926 S.C. 598 *per* L.P. Clyde at p. 614; 1927 S.C. (H.L.) 80 *per* Visct. Haldane at p. 87; *Jelfs* v. *Jelfs* 1939 S.L.T. 286 *per* Lord Keith at p. 290.

[13]1881 c.21; 1920 c.64.

[14]That is, the husband's right to his wife's moveable property on marriage and his right to act as curator for his wife over property not assigned to him. For this intermediate stage see the Conjugal Rights (Scotland) Amendment Act 1861, s. 6 which gave a wife holding a decree of separation a capacity to sue and be sued; to hold and to dispose of property which she may acquire; to enter into obligations; to become liable for wrongs and injuries, all as if she were unmarried.

[15]E.g. the husband may be liable only by virtue of the wife's agency of necessity, not her *praepositura;* he may lose rights on her intestacy; and a minor wife is exempt from her husband's curatorial powers.

[16](1955) Cmnd. 9678, para. 303.

[17]Divorce (Scotland) Act 1938 (c.50), s. 4 (2) (cruelty); Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c.70), s. 11 (adultery).

of separation or could state that she was willing to adhere[18]. Now, however, a spouse living in separation with just cause can obtain interim aliment[19]. Further a spouse can now obtain support rights on divorce, and the same judicial ancillary powers and duties as to aliment and custody of children apply in divorce and separation, so that the trend is to assimilate the two remedies.

108. While the protective role of separation actions is important, we consider that the general criteria of jurisdiction should not be framed mainly to secure the protection of the threatened spouse. Where a spouse, fearing molestation from the other spouse, seeks protection urgently from the court, then domicile, habitual residence, and the residence of the defender, or even the pursuer, within a sheriffdom for 40 days may be an inadequate or irrelevant criterion of jurisdiction. For practical reasons it is probable that jurisdictional criteria for protective remedies should be related to the place where the wrong will occur so far as that can be ascertained[20]. This will most often be the country or district of the pursuer's residence. Prior residence even for 40 days may be too long a period in cases of urgency. Accordingly, the aims of the jurisdictional requirements of status actions and those of protective remedies are irreconcilable. Faced with a choice, we consider that judicial separation should be treated as a status action. We are reinforced in this view by the fact that there are other remedies than separation which are available to protect a spouse. It is sometimes overlooked that the remedy of lawburrows is still competent, even between spouses who are cohabiting[21], and the remedy is still used, albeit very occasionally[22]. There seem to be no reported decisions on the question whether a threatened spouse can obtain an interdict against molestation by a spouse entitled to cohabit, except in cases where the remedy was granted as ancillary or consequential to a status action[23], or to enforce an exclusive possessory right to his or her residence[24]. We are informed that interdicts against molestation have been granted in the sheriff court to a spouse in other circumstances[25] and in such a case, unlike lawburrows, an interim order is competent. Where interdict is competent, jurisdiction is founded on the place of the threatened wrong[26].

109. A compromise solution might be to confer on the sheriff court jurisdiction to protect a spouse as an exception to a general rule appropriate to status. We

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[18]*Jack* v. *Jack* 1962 S.C. 24; *Beveridge* v. *Beveridge* 1963 S.C. 572.

[19]Divorce (Scotland) Act 1964 (c.91), s. 6.

[20]See Anton, *op.cit.* (n. 11 above) pp. 121–122.

[21]Fraser, *Husband and Wife* (2nd ed., 1878) p. 910; for the procedure see Dobie, *op.cit.* (n. 11 above) pp. 510–511.

[22]Information kindly supplied by the sheriff clerk's offices at Edinburgh and Glasgow. We are informed that of 17 applications for lawburrows in the sheriff court at Edinburgh between 1966 and 1970 inclusive, 9 involved disputes between spouses.

[23]E.g. *Gunn* v. *Gunn* 1955 S.L.T. (Notes) 69; in recent years, such cases have become relatively frequent.

[24]Interdicts against return to a house following a possessory decree of removing or ejection are competent: *MacLure* v. *MacLure* 1911 S.C. 200; *Angus* v. *Angus* (1905) 21 Sh.Ct.Rep 301; *Barlow* v. *Barlow* (1906) 22 Sh.Ct.Rep. 290; *Donachie* v. *Donachie* (1948) 64 Sh.Ct. Rep. 120; cf. *Lawson* v. *Lawson* (1950) 66 Sh.Ct.Rep. 207.

[25]Information kindly supplied by the sheriff clerk's offices at Edinburgh and Glasgow.

[26]Sheriff Courts (Scotland) Act 1907, s. 6(*e*).

reject this solution because we consider that the vagueness of the criterion and the availability of other protective remedies having more suitable jurisdictional criteria make it inappropriate to the sheriff court.

Criticism of the existing bases of jurisdiction and recommendations

110. If, as we consider, judicial separation may be treated as akin to divorce for jurisdictional purposes, how do the criteria in section 6 of the 1907 Act and section 6 of the 1950 Act measure up to the principles which, we have suggested, should inform this branch of private international law? The general grounds of jurisdiction in section 6 of the 1907 Act are really a restatement of the ordinary criteria of jurisdiction in actions where patrimonial issues arise. Apart from the residence qualification in paragraph (*a*) of the section, these grounds are not appropriate to actions affecting status since the sheriff courts would be involved in settling the matrimonial affairs of persons who are not closely connected with Scotland by decrees which, because of this absence of connection, would not be recognised abroad. We therefore propose that the criteria in paragraphs (*b*) to (*j*) should not apply to actions of separation.

111. In considering the criteria in section 6(*a*) of the 1907 Act and section 6 of the 1950 Act, weight should be given to two points. Any statutory test of jurisdiction ought first to satisfy the general objectives of jurisdiction in consistorial causes, and second to allocate cases satisfactorily to specific sheriff courts.

112. As regards the first of these points, it would seem inappropriate to give the sheriff court jurisdiction in circumstances where it would not be possessed by the Court of Session. We therefore propose that the sheriff court should not possess jurisdiction unless either the pursuer or the defender is domiciled in Scotland at the date of commencement of proceedings or was habitually resident there throughout the year ending with that date. We recognise that this would be a barrier to the assumption of jurisdiction by the sheriff court in those few cases where neither the wife nor the husband has subsisting ties of an enduring nature with Scotland and separation is sought *ex necessitate*. But pursuers in those cases could bring an action in the Court of Session, which can give a remedy at very short notice.

113. In addition, a further test must be adopted which will satisfactorily allocate cases to a particular sheriff court within Scotland. We think that it should suffice that either party, and not as at present only the defender, has been resident in the sheriffdom for the periods specified in section 6(*a*) of the 1907 Act as it has been construed by the courts: in other words, (*a*) one of the parties must be resident within the sheriffdom at the date of the commencement of the action and have been resident there for a period of at least 40 days before that date; or (*b*) one of the parties must have resided there for a period of at least 40 days ending not more than 40 days before the date of the commencement of the action and have no known residence in Scotland at that date. This would not necessarily prevent actions being raised concurrently in more than one sheriff court but the sheriff has power to remit any cause to another sheriffdom[27].

[27]Sheriff Court Rules, Rule 20 (see Sheriff Courts (Scotland) Act 1907, Sch. 1).

114. In relation to the internal aspects of jurisdiction our proposals are similar to those of the Morton Report[28] and the *Report of the Departmental Committee on The Sheriff Court*[29]. They would meet two important criticisms of section 6 of the 1950 Act, namely, that a husband-pursuer cannot found on his own residence though a wife can, and that a wife-pursuer living say in Dumfries can found on her own residence where her husband is resident in Carlisle, but not if he is resident in Wick[30].

RECOMMENDATIONS 19 AND 20

115. We **recommend** that the sheriff court should have jurisdiction in actions of separation if:

(1) the Court of Session would have jurisdiction to entertain the action otherwise than *ex necessitate*, and

(2) one of the parties either:

(*a*) is resident within the sheriffdom at the date of the commencement of the action and has been resident there for a period of not less than 40 days before that date; or

(*b*) has resided within the sheriffdom for a period of not less than 40 days ending not more than 40 days before the date of the commencement of the action and has no known residence in Scotland at that date.

As a consequence of this recommendation, we further **recommend** that actions of separation should be excluded from the scope of section 6 of the Sheriff Courts (Scotland) Act 1907 and of section 6 of the Maintenance Orders Act 1950.

PART X: JURISDICTION IN CROSS-ACTIONS AND FURTHER ACTIONS

116. It is a general rule that the court can entertain an action (or petition) only where there is a basis of jurisdiction at the date of commencement of proceedings and in this context, as we have seen, the proceedings are commenced by the citation of the defender to court by service of the summons[1]. This rule seems to have two corollaries. Firstly, if the original and all other bases of jurisdiction are lost during the proceedings, the defender cannot bring a cross-action[2]. It has been held in England that the statutory provisions giving the court jurisdiction in proceedings for divorce by a wife on the basis of her residence for three years in England do not concede or imply jurisdiction in cross-proceedings by her husband[3] and, since the relevant legislation is analogous[4], the same rule would seem to apply to Scotland. The second corollary

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[28](1956) Cmd. 9678, paras. 977–979 and recommendation 68 (Scottish).

[29](1967) Cmnd. 3248, paras. 90–93 and recommendation 12.

[30]Grant Report (see n. 29), para. 92.

[1]See para. 61 and authorities in p. 25, n. 24 above.

[2]Prorogation by the defender is not a possible basis of jurisdiction in status actions: see para. 16 above, p. 7, n. 30.

[3]*Levett* v. *Levett* [1957] P. 156; *Russell* v. *Russell* [1957] P. 375.

[4]Matrimonial Causes Act 1965, s. 40 (1) (*b*); Law Reform (Miscellaneous Provisions) Act 1949, s. 2(1).

may be that the pursuer cannot bring what is in substance a new action, as by adding a conclusion for declarator of nullity on the ground of impotence, or for declarator of marriage, to a conclusion for divorce[5]. The fact that the original and later actions are the same 'proceedings' from a procedural standpoint does not necessarily imply that they are the same from a jurisdictional standpoint, so that proceedings which are procedurally continuous may have different 'commencements' for jurisdictional purposes[6].

117. It is clearly unsatisfactory that, where a husband (or a wife) finds a competent consistorial action directed against him in any country, he should not be able to raise a cross-action there. We have in part provided against this contingency by recommending general rules of jurisdiction based on domicile and habitual residence so that the court should have jurisdiction if *either* the pursuer or the defender fulfils the appropriate criteria at the date when the summons is served. But the problem would remain in cases where, after raising (say) a divorce action founded upon his (or her) domicile or habitual residence in Scotland, the original pursuer, with the intention of abandoning his Scottish domicile or habitual residence, leaves Scotland before the raising by the defender of a cross-action of divorce or of an action to have the marriage, which she claims to be voidable, declared null. While in the latter case the defender in the Scottish action of divorce might well be able to initiate nullity proceedings in another country and apply for the divorce action in Scotland to be sisted on the dependence of these proceedings, we think it unreasonable to require her to do so. We advocate, therefore, that where the court is exercising jurisdiction in actions for divorce, separation, declarator of marriage, or declarator of nullity of marriage, it should have jurisdiction to entertain any cross-action by the defender or any further action by the pursuer if the cross-action or further action is one of these four actions. We exclude petitions for dissolution of a marriage on the ground of presumed death. Here cross-proceedings cannot occur and, in relation to further consistorial proceedings (*e.g.* for divorce for desertion) by the petitioner, a situation unlikely to occur in practice, it would be inappropriate to allow a missing person's last known domicile or habitual residence indirectly to govern jurisdiction. We see no reason why our proposals should not extend to sheriff court actions for separation though cross-proceedings for separation must be very rare.

RECOMMENDATION 21

118. We **recommend** that where an action of divorce, separation, declarator of marriage or declarator of nullity of marriage is before the court, and another action whether of divorce, separation, declarator of marriage or declarator of nullity of marriage, relating to the same marriage, is brought, if the court has jurisdiction to entertain the original action it shall have jurisdiction to entertain the other notwithstanding that the original and other bases of jurisdiction are lost.

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[5]Thus, in a damages action begun before the date of expiry of a statutory limitation period, it is not competent to change the basis of the action by amending the pleadings after that date: *Pompa's Trs.* v. *Edinburgh Magistrates* 1942 S.C. 119 *per* L.J.C. Cooper at p. 125; *McPhail* v. *Lanarkshire C. C.* 1951 S.C. 301; *O'Hare's Executrix* v. *Western Heritable Investment Co. Ltd.* 1965 S.C. 97.

[6]See e.g. *Miller* v. *N.C.B.* 1960 S.C. 376 where the service of an amended closed record on an additional defender was held to be the commencement of proceedings for jurisdictional purposes. See also *McShane* v. *McShane* 1962 S.L.T. 221 discussed at para. 125 below.

PART XI: JURISDICTION IN ANCILLARY AND COLLATERAL PROCEEDINGS FOR CUSTODY, MAINTENANCE AND FINANCIAL PROVISION ETC.

(1) The Nature of the Problem

119. Some of those whom we consulted were rightly concerned about the jurisdiction of the Scottish courts to entertain, in consistorial actions, ancillary or collateral proceedings for orders as to custody and access. Although this problem has been raised mainly in the context of custody, the problem is wider and, for example, relates also to applications for orders for the maintenance and education of children and financial provision for spouses. The powers of the courts to make such ancillary and collateral orders in consistorial actions derive from a confusing amalgam of legislative provisions, which do not deal with questions of jurisdiction, and of common law authorities which, in matters of jurisdiction, are not always consistent with each other. In its most general form, the question for consideration is whether the court's jurisdiction in the international sense over the principal action relating to matrimonial status carries with it jurisdiction in that sense to make competent ancillary or collateral orders as to matters which attract different jurisdictional criteria when they form the principal conclusion or crave in separate proceedings. This problem of implied or derivative jurisdiction is particularly acute where the ancillary or collateral orders are sought subsequent to the granting of the final decree disposing of the issue of matrimonial status. After we had formulated our recommendations in this Part of our Report, we were invited by Ministers to review, along with the Law Commission, the basis of jurisdiction to make custody orders and their recognition and enforcement. While the two Commissions will require to consider the problem of ancillary custody jurisdiction in consistorial actions as part of that review, we believe that in the meantime there would be advantage in legislation clarifying the basis of such jurisdiction in Scotland.

(2) The Existing Law

(a) *Financial provision etc. for spouses in the Court of Session*

120. It is clear that, prior to the Succession (Scotland) Act 1964, jurisdiction in divorce implied jurisdiction to determine the legal rights[1] which, except in the case of a divorce for insanity[2], emerged on divorce. The 1964 Act substitutes for these legal rights a system whereby the court may order the defender in a divorce action to pay to the pursuer such capital sum or periodical allowance, or both, as it thinks fit and the Act also makes provision for the variation, reduction or interdict of avoidance transactions[3]. Though the Act provides no jurisdictional rules, it is generally accepted that no change was intended in the older rule by which jurisdiction in divorce implies jurisdiction to determine relevant ancillary conclusions as to patrimonial matters. As yet, however, there is no judicial authority on the point. It is also a matter of inference that the same principle would apply in actions of divorce for insanity where the court also has power to make an order for the payment of a capital sum or an

[1] *Manderson* v. *Sutherland* (1899) 1 F. 621 at p. 624; *Cathcart* v. *Cathcart* (1904) 12 S.L.T. 183; *Montgomery* v. *Zarifi* 1917 S.C. 627 at p. 637.

[2] Divorce (Scotland) Act 1938, s. 2(1) as originally enacted.

[3] Ss. 25 to 27.

annual or periodical allowance[4], in actions of separation where the court has common law and statutory[5] powers to award aliment, in nullity actions where it has common law powers to award damages and order restitution of property, and in all status actions (including actions of declarator of marriage) where it has power to award interim aliment.

121. Where questions of financial provision arise subsequent to the final decree, different issues arise. Applications for the variation or recall of an existing award, or for a first award in certain circumstances, of a periodical allowance or aliment, may be made by minute in the original process[6] which, for that purpose, continues in dependence after final decree. In the case of a divorce decree, the liberty to apply for variation etc. of a periodical allowance is conferred by statute[7]: in the case of a separation decree, the liberty derives from the continuing nature of the obligation of aliment at common law. Applications may also be made to the sheriff court for variation or recall of certain Court of Session orders[8]. It is not absolutely clear that the Court of Session or sheriff court has jurisdiction in the international sense subsequent to decree and clarifying legislation is needed.

(*b*) *Ancillary conclusions for damages and expenses against a co-defender*

122. The Conjugal Rights (Scotland) Amendment Act 1861, s. 7, provides that, in an action of divorce for adultery, a husband may cite as co-defender the person with whom his wife is alleged to have committed adultery and may obtain decree for the expenses of the action. The Act confers no comparable right upon the wife. It has been held that the Act confers a power of citation but does not confer jurisdiction over a co-defender who would not otherwise be subject to the jurisdiction of the Court of Session[9]. Under Scots law a husband is still entitled to claim damages from a person who commits adultery with his wife and may do so either in a substantive action for damages, independently of divorce proceedings, or by a conclusion in the summons of divorce. There is no authority as to the jurisdictional criteria appropriate to such a conclusion for damages, but it is thought that the criteria appropriate to personal actions apply. In England, on the other hand, before damages for adultery were abolished, the court's jurisdiction in the divorce action was held to confer upon it jurisdiction in relation to the claim for damages and costs against a co-respondent[10]. While there are arguments for the adoption of the English approach, we consider that it would be premature to reach a concluded view on this matter before considering whether actions of damages for adultery should be retained in their present form or indeed at all. We shall

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[4]Divorce (Scotland) Act 1938, s. 2 as substituted by the Divorce (Scotland) Act 1964 (c.91), s. 7.

[5]Married Women's Property (Scotland) Act 1920, s. 4.

[6]Rules of Court of Session 1965, (S.I. 1965/321; 1965 I, p. 803), Rule 158(*b*), as amended by Act of Sederunt (Rules of Court Amendment No. 1) 1972 (S.I. 1972/164).

[7]See Divorce (Scotland) Act 1938, s. 2(2); Succession (Scotland) Act 1964, s. 26(3) and (4). No reservation of liberty to apply need be included in the decree; cf. custody etc. orders discussed at para. 124 below.

[8]See para. 126 below.

[9]*Fraser* v. *Fraser* (1870) 8 M. 400; *Thomson* v. *Thomson* 1935 S.L.T. 24. In the latter case it was suggested that where a co-defender intervened from abroad of his own accord, the court might assume jurisdiction on the ground that he had been responsible for occasioning the expense. This may be doubted.

[10]Dicey & Morris, *The Conflict of Laws* (8th ed; 1967) pp. 305–307.

require to examine this question in our review of family law since, Parliament having recently abolished the comparable English remedy[11], it is questionable whether the retention of its Scottish analogue can be justified. For these reasons we do not propose to make recommendations for a change in the basis of jurisdiction over co-defenders.

RECOMMENDATION 22

123. We **recommend** that the rules governing the Court of Session's jurisdiction, in actions of divorce, to entertain conclusions for damages for adultery or expenses against a co-defender should not be changed at the present time.

(c) Provision for the custody, maintenance and education etc. of children in the Court of Session

124. The Court of Session has power to award capital allowances for children only in actions of divorce for insanity[12]. It has power in all actions of divorce[13], separation[14] and nullity[15] to make such provision, including the making of interim awards, 'as to it shall seem just and proper' with respect to the custody[16], maintenance and education of any children of the marriage up to the age of 16[17], and of certain other children[18]. Awards may be made to parents or third parties[19]. Applications subsequent to the disposal of the principal subject matter of the action are competent only if the decree reserves leave to apply[20] and Rules of Court now provide that directions reserving leave to apply in the process until the youngest child reaches 16 must be included in the final decree in all defended and undefended actions[21] and that for the purpose of subsequent applications the action continues in dependence until that time[22]. Liberty to apply is given even if the court grants decree of absolvitor or of dismissal provided proof on the merits in the principal action has been allowed[23], and even if no order as to custody, maintenance and education is made[24]. The liberty is given to third parties having an interest as well as parties to the marriage[25]. The court has also power to make care orders or supervision orders[26]

[11]Law Reform (Miscellaneous Provisions) Act 1970 (c.33), s. 4.

[12]Divorce (Scotland) Act 1938, s. 2.

[13]Conjugal Rights (Scotland) Amendment Act 1861, s. 9.

[14]*Idem.*

[15]Matrimonial Proceedings (Children) Act 1958 (c.40), s. 14(1).

[16]'Custody' in this context includes the less important matter of access: Matrimonial Proceedings (Children) Act 1958, s. 14(2); *Shanks* v. *Shanks* 1965 S.L.T. 330 *per* Lord Fraser at p. 332.

[17]Custody of Children (Scotland) Act 1939 (c. 4), s. 1.

[18]Matrimonial Proceedings (Children) Act 1958, s. 7(1).

[19]*Ibid.* s. 14(2): see also Guardianship of Infants Act 1886 (c. 27), s. 7 under which the court can declare the defender to be unfit to have custody.

[20]*Sanderson* v. *Sanderson* 1921 S.C. 686.

[21]Rules of Court of Session 1965, Rules 163(*c*) and 164.

[22]*Ibid.* Rule 166(*b*) substituted by Act of Sederunt (Rules of Court Amendment No. 1) 1969 (S.I. 1969/474; 1969 I, p. 1361).

[23]Matrimonial Proceedings (Children) Act 1958, s. 9(1) overruling *McArthur* v. *McArthur* 1955 S.C. 414; see *Driffel* v. *Driffel* 1971 S.L.T. (Notes) 60; *Gall* v. *Gall* 1968 S.C. 332.

[24]Rules 163(*c*) and 164 (n. 21 above).

[25]Rule 166(*b*) (n. 22 above) overruling *Sutherland* v. *Sutherland* 1959 S.L.T. (Notes) 61; *McKenzie* v. *McKenzie* 1963 S.C. 266; *Copeland* v. *Copeland* 1968 S.L.T. (Notes) 101; affd. 1969 S.L.T. (Notes) 70.

[26]Matrimonial Proceedings (Children) Act 1958, ss. 10(1) and 12(1).

and similar provision is made or applications after final decree for variation or recall of the orders[27].

125. There are two conflicting approaches to questions of jurisdiction to make orders for custody, maintenance and education. One approach suggests that section 9 of the 1861 Act, in conferring power to make these orders, must be deemed to confer upon the court jurisdiction in the international sense to make such orders wherever it has jurisdiction in relation to the principal conclusions of the action. In no other way may the court fulfil its statutory duty to satisfy itself, before granting decree, as to the arrangements for the welfare of the children[28]. It has been held that the Court has jurisdiction in applications disposed of at or before decree[29]. There seem to be no decisions supporting the view that this jurisdiction continues, unaffected by changes in the original basis of jurisdiction, after decree while the action continues in dependence[30]. A rule to that effect appears to apply in England[31]. In *McShane* v. *McShane*[32] it was expressly held that section 9 of the 1861 Act does not confer implied jurisdiction to make ancillary custody orders; that jurisdiction depends on the normal criteria in custody proceedings—the child's domicile, or his residence coupled with the risk of danger to him; and that the rule of liberty to apply is purely procedural and cannot extend the jurisdiction conferred by the 1861 Act. We question whether this approach is appropriate.

(d) Ancillary and collateral jurisdiction of the sheriff court

(i) Variation and recall of Court of Session orders

126. The sheriff court is empowered by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966[33] to dispose of applications for the variation or recall of certain orders for financial provision, aliment, custody, etc. made in consistorial actions by the Court of Session. The application must be one which would have been competent in the Court of Session[34]; and the sheriff must have jurisdiction over one of the parties on whom the application has to be served, on the ground of residence or place of business or of prorogation[35]. The jurisdictional problems relating to applications made to the Court of Session for variation or recall or orders[36] arise also where the application is made to the sheriff court but with the additional complication that the proceedings before the sheriff are not in theory part of the original Court of Session process[37].

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[27]*Ibid.* s. 14(3); Rule 168 (n. 21 above).

[28]As to this duty, see Matrimonial Proceedings (Children) Act 1958, s. 8.

[29]*Battaglia* v. *Battaglia* 1967 S.L.T. 49 *per* Lord Avonside at p. 51; approved in *Oludimu* v. *Oludimu* 1967 S.L.T. 105 *per* Lord Fraser at p. 107.

[30]Cf. *Hamilton* v. *Hamilton* 1954 S.L.T. 16 and *Shanks* v. *Shanks* 1965 S.L.T. 330 where the original grounds of jurisdiction did not change.

[31]Dicey and Morris, *The Conflict of Laws* (8th ed; 1967) p. 303.

[32]1962 S.L.T. 221: see also *Jelfs* v. *Jelfs* 1939 S.L.T. 286 *per* Lord Keith at p. 290.

[33]S. 8(1).

[34]1966 Act, s. 8(2).

[35]*Ibid.* s. 8(6), applying Sheriff Courts (Scotland) Act 1907, s. 6(*a*), (*b*) and (*j*).

[36]See para. 125 above.

[37]The proceedings do not become part of the original Court of Session process until the sheriff court process is remitted to the Court of Session either for disposal by that Court or after disposal by the sheriff court: Act of Sederunt (Variation and Recall of Orders in Consistorial Causes) 1970, (S.I. 1970/720; 1970 II, p. 2271), Rules 6 and 12.

(ii) Collateral jurisdiction of the sheriff court in actions of separation

127. In actions of separation, the sheriff court has common law powers 'hardly susceptible of exact definition'[38] to make orders as to interim custody of children[39], and also as to interim aliment. These powers are largely superseded by statutory powers to make interim and final ancillary or collateral orders as to the custody, maintenance or aliment and education of the children[40]. The sheriff court has also powers to award permanent aliment in favour of a spouse in a separation action[41]. Applications for variation of orders as to custody or aliment are made by application in the original process[42]. While in the Court of Session a conclusion for custody in a consistorial action is ancillary, in the sheriff court craves for separation and for custody are procedurally severable and, at least until 1958, decree for custody could be granted whatever the fate of the crave for separation[43]. However, the Matrimonial Proceedings (Children) Act 1958 seems to have made it incompetent for the sheriff court to grant a custody decree in such a combined action unless either proof on the merits of the separation action has been allowed or decree of absolvitor was granted therein[44]. Applications after decree in respect of aliment are in theory consistorial and not proceedings for debt[45]. The primary basis of jurisdiction in statutory proceedings for separation, custody and aliment is the same, namely the residence of the defender within the sheriffdom as provided by section 6 (*a*) of the Sheriff Courts (Scotland) Act 1907[46]. It is not clear, however, whether there is an additional requirement that the criteria of jurisdiction obtaining in the Court of Session apply in cases with a foreign element[47]. It is even less clear whether, if the court has jurisdiction in the international sense in a separation action, it has implied jurisdiction to make orders as to custody.

(3) THE NEED FOR LEGISLATION

128. In the special case of ancillary conclusions for damages and expenses

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[38]*Kitson* v. *Kitson* 1945 S.C. 434 *per* L.J.C. Cooper at p. 442.

[39]E.g. in cases of emergency such as abduction. At common law it may perhaps also enforce a parent's title to custody or adjust a right of access: *Brand* v. *Shaws* (1888) 15 R. 449; *Murray* v. *Forsyth* 1917 S.C. 721; *Kitson* v. *Kitson* (n. 38 above) at p. 441.

[40]Sheriff Courts (Scotland) Act 1907 s. 5(2); Custody of Children (Scotland) Act 1939, s. 1; Matrimonial Proceedings (Children) Act 1958, ss. 7(1) and 9(1).

[41]Sheriff Courts (Scotland) Act 1907, s. 5(2); it has been held that in separation proceedings a crave for aliment is essential; see p. 38, n. 1 above.

[42]Rule 171 of the Sheriff Court Rules; (see Sheriff Courts (Scotland) Act 1907, Sch. 1, as amended by Act of Sederunt dated 16 July 1936). As to applications by persons other than the parents, see *Richardson* v. *Burns* 1963 S.L.T. (Sh.Ct.) 26.

[43]*O'Brien* v. *O'Brien* (1957) 73 Sh.Ct.Rep. 129 at p. 133, construing the 1907 Act s. 5(2); cf. *Scorey* v. *Scorey* (1919) 35 Sh.Ct.Rep. 169.

[44]See s. 9(1); it is paradoxical that this was an enabling provision for the Court of Session (see n. 23 above) but has had a limiting effect on the sheriff court's powers.

[45]*Thomson* v. *Thomson* (1934) 50 Sh.Ct.Rep. 270.

[46]As to separation see paras. 100–103 above; as to custody see *Kitson* v. *Kitson* (n. 38 above) and *Campbell* v. *Campbell* 1956 S.C. 285 *per* L.P. Clyde at p. 289.

[47]In *Hood* v. *Hood* (1871) 9 M. 449, it was held that even if the sheriff had power to entertain an action as to permanent custody, he did not have jurisdiction to grant an award to a father resident in Canada which would remove the child out of Scotland. In *Kitson* v. *Kitson* (n. 38 above) L.J.C. Cooper at p. 443 stated *obiter* that in custody the 'Court of Session,. . . . in the case of a father of Scottish domicile, is the only Court with pre-eminent jurisdiction from the standpoint of international law'.

against a co-defender, we have already suggested that it would be premature to recommend a change in the basis of jurisdiction[48]. Otherwise we consider that, in the existing state of the law, there is a need for legislation to clarify the power of the Court of Session and of the sheriff court to assume jurisdiction in matters collateral or ancillary to consistorial actions. This need will become more acute if the bases of jurisdiction are widened. In relation to custody, for example, the fact that a wife is conceded a separate domicile for jurisdictional purposes enhances the risk of a divergence between the appropriate forum in divorce and the appropriate forum in questions of custody. In our view, it would be advantageous if the law provided that a court which has jurisdiction to entertain a consistorial action should also have jurisdiction to determine matters of financial provision, and questions relating to the custody, maintenance and education of children affected by the decree. As we see them, the advantages may be summarised as follows:

(*1*) The court with jurisdiction to entertain a consistorial action is likely to be a court appropriate to deal with the affairs of the family as a whole. In any event, where there are concurrent proceedings for custody or financial provision in another jurisdiction, it would be open to the court to sustain a plea of *forum non conveniens* although that plea would not be available in the principal status action.

(*2*) It is right that questions of financial provision, etc. should be dealt with by a judge familiar with the facts of the case or who has before him a record of those facts.

(*3*) The disposal of these questions by the court seized of the consistorial action would tend to reduce expense by making separate proceedings unnecessary.

129. We concede that there are disadvantages associated with this approach.

(*a*) It seems illogical to make jurisdiction depend on whether the claim is presented separately or in the course of consistorial proceedings.

(*b*) There will be an increased risk of conflicts in custody questions unless the general rule which we advocate is accepted by international agreement[49].

(*c*) If the court makes orders in ancillary patrimonial matters on the basis of a jurisdictional criterion appropriate to status rather than to personal actions, there is a risk that these orders may be ineffective.

(*d*) It is arguable that assumption of jurisdiction in the original status action does not justify its assumption in later applications as to custody or financial provision when the parties, especially the debtor spouse, or the child, may have severed all domiciliary, residential and social connections with Scotland.

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[48]Para. 123 above.

[49]Ancillary orders are excluded from the Hague Convention on Divorces and Legal Separations by Article 1 and are not dealt with by the Recognition of Divorces and Legal Separations Act 1971.

130. On balance, we consider that these disadvantages are outweighed by the advantages. Point (*a*) above is one of theoretical rather than of practical importance. The disadvantage alluded to in point (*b*) may be minimised by reciprocal legislation, especially as between United Kingdom countries. As to point (*c*), it may well be that other courts would accept the general principle that courts dealing with matters of status may properly deal with ancillary matters. Point (*d*), we concede, has considerable force. Nevertheless, irrespective of any theory that the original process may continue in dependence for the purpose of such applications, there are practical advantages in conceding to the court which has the full record of the facts relating to the breakdown of the marriage power to continue to deal with collateral or ancillary orders. This reasoning would apply also to cases where the sheriff court entertains an application to vary or recall a Court of Session order for maintenance, custody, etc. by virtue of section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.

RECOMMENDATIONS 23 AND 24

131. We **recommend** that legislation should make it clear that where the Court of Session has jurisdiction in an action of divorce, separation, declarator of marriage or declarator of nullity of marriage, it should also have jurisdiction to entertain applications, whether brought before or after decree, for ancillary or collateral orders relating to financial provision for spouses or children, the custody, maintenance and education of children and kindred matters. We **recommend** also that the same principle should apply, first, in determining the right of any person to make an application under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 for the variation or recall of an order made in a consistorial action, and, second, to proceedings for separation in the sheriff court.

PART XII: CONFLICTS OF JURISDICTION

(*1*) The Problem of Conflicts

132. It is highly undesirable that two or more actions of divorce should proceed at the same time and between the same parties in different jurisdictions. Concurrent actions waste judicial effort and the parties' and legal aid resources. They may lead to conflicting decisions causing limping marriages, unwelcome publicity, and other attendant problems. They are bad for the parties, for the children, and for the reputation of the law, the courts and the legal profession. While the unfortunate consequences of conflicts are the same whether the concurrent proceedings arise in a United Kingdom country or outside the United Kingdom, conflicts between United Kingdom jurisdictions can be prevented by reciprocal legislation. We shall therefore discuss separately the problem of concurrent proceedings in United Kingdom jurisdictions[1]. (It is to be noted that these jurisdictions do not include the Channel Islands and Isle of Man. We hope that the competent legal authorities will consider whether the rules discussed hereafter should be extended to cover proceedings arising in these other parts of the British Isles under the Crown.)

[1]Paras. 144–152 below.

133. Concurrent actions may be the result of one of the parties seeking in another forum an advantage not available to him in the forum selected by his spouse. The problem of concurrent actions will continue perhaps even if there is international harmonisation of the law of divorce, both procedural and substantive. For geography is one advantage to a litigant which cannot be enacted out of existence. Moreover, parties and lawyers both tend to prefer their own courts to those of another country. In any event, harmonisation of this kind is unlikely to occur in the foreseeable future.

(a) One possible solution: 'first come, first served'

134. In this situation we have considered several possible solutions. One solution likely to prevent conflicts of jurisdiction arising would be a rule giving priority to the courts first seized of a consistorial question. But the crude rule of 'first come, first served' would have many disadvantages. Given the divergences in the existing jurisdictional, procedural and substantive rules of different countries in consistorial matters, it could be used as a device to prevent, or at least delay, a party from invoking the jurisdiction most appropriate to determine the issue between the parties and to force him to defend an action in an inconvenient forum. It could effectively prevent, or at least delay, a party with Scottish jurisdictional qualifications from seeking and obtaining the matrimonial remedies normally available to him under the law of Scotland. We accordingly reject it.

(b) Another possible solution: forum non conveniens

135. Conflicts of jurisdiction would not be prevented, but their disadvantages considerably reduced, if the Scottish principle of *forum non conveniens* were applied generally in consistorial proceedings. The essence of this principle is that a Scottish court may decline to exercise a jurisdiction which it undoubtedly possesses because it is satisfied that a foreign court also possesses jurisdiction to try the case and that the ends of justice would be better served by its trial there than in the Scottish court[2]. The principle has been widely applied in actions concerned with patrimonial matters but has hitherto received only limited recognition in the consistorial field. There are authorities suggesting that it may be applied in actions of adherence and aliment[3] and in actions for the custody of children[4]. But, in actions where the issue relates to the status of the spouses as married persons, discussion of the plea was naturally excluded so long as the rule obtained that the court of the husband's domicile was the sole appropriate forum. The erosion, however, of this rule has already led to discussion of the relevance of the plea in this context[5] and makes it desirable to consider whether statutory sanction should be given to the general application of the principle of *forum non conveniens,* whether in its ordinary or in a modified form. The Recognition of Divorces and Legal Separations Act 1971 s.3, by requiring our courts to recognise foreign divorces and legal separations on the

[2] *Longworth* v. *Hope* (1865) 3 M. 1049 *per* L.P. McNeill at p. 1053; *Sim* v. *Robinow* (1892) 19 R. 665 *per* Lord Kinnear at p. 668; *Societe du Gaz de Paris* v. *Armateurs francais* 1926 S.C. (H.L.) 13 *per* Lord Sumner at p. 22.

[3] *Finlay* v. *Finlay* (1885) 23 S.L.R. 583.

[4] *McLean* v. *McLean* 1947 S.C. 79; *Babington* v. *Babington* 1955 S.C. 115.

[5] *Balshaw* v. *Balshaw* 1967 S.C. 63.

basis of habitual residence and nationality as well as of domicile, may indirectly enhance the risk of concurrent proceedings. Our present recommendations would do so directly by enabling, unless steps were taken to prevent this, the Scottish courts to assume jurisdiction in circumstances where jurisdiction may well be competently assumed in England or elsewhere. Legislation, then, would appear to be desirable.

136. Yet the principle of *forum non conveniens* in its present form would hardly be satisfactory because the circumstances in which it may be applied are narrow. The emphasis of the doctrine is not on the convenience of the parties, nor even upon their interests, but rather upon whether the ends of justice would be better served by the trial of the action elsewhere. A court, however, is naturally reluctant to declare that the proceedings before it are less likely to secure justice than those of a foreign court[6]. In England, where the courts have powers to stay even matrimonial proceedings, they exercise those powers with great caution and, it would seem, only when the continuance of the action would be oppressive or vexatious to the defendant and when the stay would not cause an injustice to the plaintiff[7]. The Court of Session might well adopt a similar approach. If this were so, an extension of the ambit of the principle of *forum non conveniens* to actions determining matrimonial status would not significantly reduce the risk of such actions arising concurrently in Scotland and elsewhere.

(*c*) *Recommended solution: discretionary sist*

137. In our view, a broader rule is required which would empower the court to sist an action before it in a variety of circumstances where in a literal sense no injustice to either party would follow from allowing it to proceed. Such circumstances include cases where in the course of a Scottish action of divorce, an action for a remedy affecting the validity of the marriage is brought in another jurisdiction. The question whether a marriage exists should *prima facie* be settled before the logically posterior question whether it should be dissolved. There are also circumstances where an action of divorce in Scotland should be sisted having regard to the existence of divorce proceedings elsewhere as, for example, where the Scottish action has been raised to harass the defender or to gain an improper advantage.

138. Since it is impossible to predict, and therefore to prescribe by statute, the wide variety of circumstances in which a sist would be appropriate, the court should have a discretionary power to sist an action where such a course would achieve a more satisfactory balance of convenience and fairness as between the parties. It is envisaged that the Court of Session would exercise this discretion having regard to the written pleadings and to the oral explanations of counsel on the Motion Roll. We have considered whether this discretion should be fettered by statutory guidelines requiring the court to have regard to certain specified considerations such as the relative strength or substance of the parties' domiciliary and residential connections with the competing jurisdictions; the place of the spouses' last common matrimonial residence;

[6]See, for example, *Babington* v. *Babington* 1955 S.C. 115 (a custody case).
[7]See *Orr Lewis* v. *Orr Lewis* [1949] P. 347; *Sealey* (or *Callan*) v. *Callan* [1953] P. 135.

the date when the proceedings commenced; or the parties' conduct of the respective actions. Such guidelines would not be satisfactory. They would not achieve certainty as to the appropriate forum because they would too often point different ways. Moreover the investigation of their relevance to a particular case would too often cause undue delay and expense especially where they involved disputed questions of fact requiring the court to hold a preliminary proof[8].

RECOMMENDATION 25

139. We **recommend** that the court should have power to sist any depending action of divorce, separation, declarator of marriage or declarator of nullity of marriage, either *ex proprio motu* or on the application of a party, if, where proceedings in respect of the marriage or which might affect its validity are in dependence in any other country whether within or outside the United Kingdom, the court considers that, in all the circumstances, having regard to the balance of convenience and fairness as between the parties, it would be preferable for the proceedings in the other country to be disposed of first.

(*2*) Duty to Disclose Extra-Territorial Proceedings

140. If the power which we have recommended is to be effectively used the pursuer and any other person who has entered appearance in a consistorial action must inform the court of the existence of concurrent proceedings in other countries which might affect their matrimonial status. Such proceedings may be one of two types. They may be proceedings in respect of the marriage in the Scottish action, *e.g.* to dissolve or annul that marriage, or else, proceedings which might affect the validity of that marriage but which relate to a prior marriage between one of the spouses and a third party, for the validity of the marriage at issue in the Scottish action may depend on whether, at the time when it was contracted, a prior marriage was valid and subsisting. The duty of disclosure should continue until the beginning of the proof on the merits in the Scottish action. To make the duty effective, the Scottish court should be able to exercise the discretionary power to sist proceedings if it discovers after the proof has begun that a person is in breach of the duty. But no action, *e.g.* of damages, should be competent in respect of a breach of the duty.

RECOMMENDATION 26

141. We **recommend** that a duty be imposed upon the pursuer and any other person who has entered appearance in an action for divorce, separation, declarator of marriage or declarator of nullity of marriage, to disclose as soon as he or she receives knowledge of them, the existence of any proceedings in dependence outside Scotland which are in respect of the marriage or might affect its validity.

(*3*) Non-Judicial Proceedings Outside Scotland

142. In some countries, consistorial proceedings, including proceedings for divorce or separation, may be brought before an administrative body and, under existing Scots law, a remedy given in such proceedings may be recognised

[8]Such preliminary proofs are at present rare, but see *Duffes* v. *Duffes* 1971 S.L.T. (Notes) 83.

in Scotland[9]. We consider that such non-judicial proceedings should be disclosed to the court and that where they are still pending, the court should have power to sist the action before it if it considers such a course to be appropriate having regard to the balance of fairness and convenience. Rules of court should prescribe the kind of non-judicial proceedings to which the duty of disclosure and discretionary sist provisions would apply.

RECOMMENDATION 27

143. We **recommend** that the duty of disclosure and the court's discretionary power to sist proceedings should apply, where appropriate, in respect of non-judicial proceedings outside Scotland.

(*4*) CONFLICTS BETWEEN SCOTTISH AND OTHER UNITED KINGDOM JURISDICTIONS

144. At present the rules for the assumption of jurisdiction in Scotland, England and Wales, and Northern Ireland are virtually identical in relation to divorce and very similar indeed in relation to other consistorial or matrimonial actions. Accordingly the risk that concurrent proceedings will arise within these jurisdictions is small. If, however, the grounds of jurisdiction in such actions are widened, the risk will be greatly increased, especially since any changes in Scottish jurisdictional rules are likely to be accompanied by similar changes in other United Kingdom jurisdictions. We have already referred to the disadvantages of concurrent actions in different jurisdictions[10]. Though these disadvantages are the same whatever the competing jurisdictions, they are the more objectionable within a unitary state, such as the United Kingdom, which has the legislative power to minimise their incidence and to resolve them when they do occur. Further, they are likely to be more frequent. It is essential to our proposals that effectual measures be taken on both sides of the border to deal with this problem.

(*a*) *Possible solutions*

145. If conflicts between United Kingdom jurisdictions are to be avoided, rules to the same effect must be adopted in each jurisdiction for different rules might point to different jurisdictions. We have therefore worked in close collaboration with the Law Commission to reach an agreed solution. We rejected two possible approaches before adopting a third.

146. The first approach, adopted in our Memorandum No. 13[11], consisted of positive rules which, if enacted, would have made it incompetent, once proceedings for divorce had commenced in one United Kingdom country, to initiate divorce proceedings thereafter in another United Kingdom country unless the first-mentioned proceedings had been terminated or sisted. The rules were designed to persuade, but not necessarily compel, a spouse to select the most appropriate forum for divorce within the United Kingdom by requiring the court to sist divorce proceedings where certain conditions were not fulfilled,

[9]Recognition of Divorces and Legal Separations Act 1971, s. 2; cf. *Makouipour* v. *Makouipour* 1967 S.C. 116.

[10]See para. 132 above.

[11]See Memorandum, Part III, Rules 6 and 7.

including the fact that the parties did not last habitually reside together in that part of the United Kingdom.

147. We do not now recommend the adoption of this solution. It is not in our view an objection to these rules that they might prevent a person from invoking the separation grounds applicable in England under the Divorce Reform Act 1969, s.2(1) (*d*) and (*e*). The answer to this objection is to amend the law of divorce, not to distort the rules of jurisdiction. We reject the approach adopted in Memorandum No. 13 rather on the grounds that:

(*a*) its rules allow an action of divorce, if the defender does not apply for a sist, to proceed in a court which, under those rules, that court would have held to be inappropriate if he had applied for a sist;

(*b*) in consequence, the rules permit spouses acting in concert to select the forum and the substantive law most suited to their own convenience; and

(*c*) although the rules would achieve certainty, without either being arbitrary or encouraging the precipitate commencement of divorce proceedings, they do so in a complicated way.

148. The second approach was that the courts in each United Kingdom country should in respect of divorce exercise the general discretionary power to sist, which we have already recommended, and that this power would be sufficient to eliminate, or at least reduce to an acceptable minimum, the disadvantages of concurrent actions. We also reject this approach because it would not achieve the fundamental objective of preventing concurrent divorce proceedings from going ahead in more than one jurisdiction within the United Kingdom. It is true that the exercise of a discretionary sist after divorce proceedings have arisen would, in an ideal situation, do something to prevent competing decrees but this would demand a degree of responsibility on the part of litigants and their legal advisers and of restraint by courts in the respective jurisdictions which it might be unrealistic to expect in practice. Moreover, the principle of discretionary sist would not help a party or his advisers to ascertain beforehand the appropriate forum. Statutory guidelines fettering the discretion would not improve the position for reasons which we have already given[12]. While considering that the discretionary sist would not by itself be an adequate solution for concurrent United Kingdom divorce proceedings, we envisage it being used in many situations where other consistorial proceedings are continuing in another part of the United Kingdom and a mandatory sist would be inappropriate.

(*b*) *The mandatory sist: conflicts between concurrent divorce proceedings*

149. In our view, the best solution to a difficult problem is that the courts in a United Kingdom country should be under a duty to sist divorce proceedings where, on the application of a simple, factual test, it appears that the court of another United Kingdom country in which proceedings are in dependence is the appropriate forum to entertain the action.

[12]See para. 138 above.

150. This solution depends for its success on the formulation of a test having the following characteristics. It must indicate clearly to the parties the appropriate court in which to commence proceedings, given that the rules for assuming jurisdiction point to two different courts as equally competent. It must be simple and easily applied by the courts on *ex parte* statements of counsel in order to avoid the trouble and expense of preliminary proofs on a question of fact whether the test is satisfied. It must be wide enough to comprehend most of the cases involving conflicts. In addition it should not be arbitrary, as for example is the test of 'first come, first served', and it should seek to identify the jurisdiction with which the marriage is likely to have the stronger connection. After considering many alternatives along with the Law Commission, we reached the conclusion that in the event of concurrent divorce proceedings, the appropriate forum should be that of the country in which (*a*) the parties last resided together and additionally (*b*) either spouse had habitually resided for not less than a year immediately preceding the date when the parties' joint residence ended. While this test is not wholly comprehensive, it should cover the great majority of concurrent divorce proceedings and has the other characteristics outlined above.

151. On one matter we regret that we have not reached agreement with the Law Commission. We consider it essential that where in a divorce action the court is informed that other divorce proceedings have been commenced elsewhere in the United Kingdom, it should itself order a hearing to deal with the question of a sist. The Law Commission, however, consider that it ought to be left to a party to apply for a sist. In our view, if that solution were adopted, there would be cases where, though the mandatory sist test would be satisfied if it were applied for, nevertheless the parties would fail to apply for it. For example each party may be so anxious for a speedy divorce that each lets the other's action go undefended to enable the marriage to be dissolved by whichever court first grants decree. Again a party might fail to apply for a sist through inadvertence or inertia. Such cases would occasion unnecessary concurrent litigation wasteful of time and money, often public money, and the other disadvantages described at paragraph 132 above. We therefore propose that where the court receives information that concurrent divorce proceedings are going ahead in another part of the United Kingdom, it must arrange for a hearing to consider whether the action before it should be sisted. We understand that this would not cause procedural difficulties in the Court of Session.

(*c*) *Other conflicts: mandatory or discretionary sist*

152. We consider that if the principle of mandatory sist which we have just outlined is applied to conflicts between concurrent proceedings for divorce, then divorce being by far the most common of the remedies with which we are concerned, the risk of conflicts within the United Kingdom will be reduced to an acceptable level. Where there are concurrent proceedings for nullity and divorce in respect of the same marriage, then the court should be required to sist the divorce proceedings if, on the mandatory sist test, the court entertaining the nullity action is the appropriate forum. But a rule which always compelled a court to sist nullity proceedings to await the outcome of a divorce would be difficult to defend since the question whether a marriage exists is logically anterior to the question of divorce.

153. This example shows that the mandatory sist test cannot be applied indiscriminately to all conflicts between concurrent consistorial proceedings and other examples can be figured. For instance, it seems clear that a divorce should never have to be sisted merely to allow proceedings for the lesser remedy of separation to proceed. It is necessary to avoid unduly complicated rules specifying the various permutations of concurrent proceedings where the mandatory sist test must be applied. We have concluded, therefore, that the test should be applied by the court only in divorce proceedings and there only where there are concurrent divorce or nullity proceedings. This conclusion allows the court to resolve other conflicts by the discretionary power to sist proceedings which we have already recommended[13] which would in any event be available to the court if the conditions for the mandatory sist were not satisfied.

RECOMMENDATION 28

154. We **recommend** that the Court of Session should be under a duty *ex proprio motu* to sist an action of divorce if it appears to the Court:

(*1*) that proceedings for divorce or nullity in respect of the same marriage are continuing in another United Kingdom country; and

(*2*) that (*a*) the parties last resided together in that country; and (*b*) either of the parties had been habitually residing in that country for a period of not less than one year immediately preceding the date on which the residence together terminated.

(*5*) Recall of a Mandatory or Discretionary Sist

155. Since the purpose of a sist is to enable extra-territorial proceedings to be disposed of, the Scottish court should be empowered to recall a mandatory or discretionary sist where the concurrent proceedings in respect of which the sist was made are concluded or sisted. Once the sist of the Scottish proceedings has been recalled, the Scottish court should not be required to sist those proceedings again even where, for example, new proceedings are begun elsewhere in the United Kingdom. While the mandatory sist provisions should apply only once, the discretionary power to sist proceedings should be available to the court after a sist is recalled.

RECOMMENDATIONS 29 AND 30

156. We **recommend** that the court should have power to recall a discretionary sist or a mandatory sist if the concurrent proceedings in respect of which the sist was made are concluded or sisted. We also **recommend** that where a mandatory or discretionary sist is recalled, the court should thereafter have a power, but not a duty, to sist proceedings a second or subsequent time.

(6) The Effect of a Sist on Interim Orders

157. We turn now to the question of what should be the effect of a mandatory or discretionary sist on orders made in the course of consistorial proceedings prior to the sist. We discussed above in some detail the powers of the Court of Session in actions of divorce, separation, declarator of marriage and declarator of nullity of marriage and of the sheriff court in actions of separation to make ancillary and collateral, interim and final, orders concerning financial obligations

[13]See para. 139 above.

and orders affecting children[14]. These do not comprise the full range, uncertain in its boundaries, of powers available to the courts by statute and at common law. Questions relating to money and to children, however, are in practice those which most frequently give trouble when conflicting orders are in force in different jurisdictions. This part of our Report is confined to conflicting interim orders relating to such matters made by courts in different parts of the United Kingdom.

158. Even at the present time, there is some risk that a person may be subject to conflicting orders made by courts in different parts of the United Kingdom in matters relating to financial obligations or the children. This risk will be increased if our proposals for widening the bases of jurisdiction in consistorial actions and for clarifying the basis of ancillary jurisdiction are implemented.

159. In this Report, we cannot propose a general solution to the problem for it also concerns competing orders given in custody and other proceedings unassociated with consistorial actions affecting matrimonial status[15]. Our recommendations for a mandatory or discretionary sist could not be framed for the express purpose of resolving conflicts in ancillary or collateral issues. Yet that purpose can be achieved in part if the appropriate consistorial forum assumes in ancillary matters an exclusive jurisdiction which supersedes the competing ancillary jurisdiction of the court sisting proceedings. While this proposal may not reduce the existing risk of conflicts, it is likely to prevent the increase which would otherwise result from the widening of the basis of consistorial jurisdiction.

160. To enable the appropriate forum to assume exclusive jurisdiction in controversial ancillary matters, interim orders made by the sisting court should lapse. Interested parties must however be given time to apply to the other court for a new order where none has already been made by that court. Accordingly, the orders should lapse on the expiry of a period of three months after the sist unless an order of the other court in respect of the same subject-matter, *e.g.* custody, is already in force. In that event there would be no need for a transitional period and the order would lapse immediately upon the sist. If the other court made an order in respect of the same subject-matter before the three month period had expired, that order would, as soon as it came into effect, supersede the order of the sisting court. The machinery can be summarised as involving lapse of an order as soon as there is a relevant order of the other court and in any event at the conclusion of a period of three months.

161. The court sisting proceedings should during the transitional period be able to vary or recall an existing order. In circumstances of urgency, for example the threatened abduction of a child, the sisting court should also be able both to make a new order and to extend, if it thought necessary, the operation of that order, or of an existing order, beyond the transitional period. An emergency order made during this period would subsist until a new order relating to

[14]See especially paras. 120, 124 and 127 above for references to interim orders.

[15]This matter was discussed in the Report of the Hodson Committee on *Conflicts of Jurisdiction Affecting Children* (1959), Cmnd. 842. It is about to be reviewed by the Law Commissions (see para. 119 above).

the same subject-matter is made by the court of the country in whose favour the sist was made. We envisage that the lapse of an order would not prevent the court sisting proceedings from making orders to enforce something which ought to have been done before the lapse *e.g.* the payment of arrears of aliment accrued before that time.

162. We consider that certain types of order should not be subject to the provisions as to lapse since, in our opinion, they should cease to have effect only if the court has first considered, either *ex proprio motu* or on application, whether the order in question should be recalled. An example is an interim interdict against molestation of a wife. Another example is an interim order committing the care of a child to a local authority[16]. Such orders differ from orders entrusting the custody or care of a child to an individual in so far as the court outside Scotland in whose favour the action is sisted cannot preserve existing arrangements by making an order committing the care of a child to the Scottish local authority to whose care the child is committed[17]. In any event, such orders, which in practice are rarely made before final decree, cater for the relatively unusual situation where it is inappropriate to give custody of the child to either spouse, and there may be no other individual to whom care or custody should be given. No express statutory provision need be made for the lapse of local authority supervision orders since such orders endure only so long as the child is committed by a Scottish order to the custody of any person[18] and accordingly a supervision order will cease to have effect when the Scottish custody order lapses.

163. For practical reasons our proposals are limited to an area, such as the United Kingdom, within which it is possible to ensure that there is a high degree of reciprocity between jurisdictions in conflict rules. Extension by international agreements in the future would be welcome.

RECOMMENDATIONS 31–33

164. We **recommend** that certain interim orders relating to financial obligations or affecting children made in proceedings which are sisted as a result of concurrent proceedings in another United Kingdom country should cease to have effect, (*a*) on the date of the sist in cases where an order in respect of the same subject-matter is in force in the concurrent proceedings, (*b*) on the date of the coming into effect of an order in respect of the same subject-matter made in the concurrent proceedings within a period of three months from the date of the sist, and otherwise (*c*) on the expiry of a period of three months following the date of the sist. We also **recommend** that the court should have power to vary or recall existing orders during the period in which they remain in force after the date of the sist, and should in circumstances of urgency have power to make new orders, or extend the operation of existing orders beyond the expiry of the three month period, until an order is made in the concurrent

[16]Matrimonial Proceedings (Children) Act 1958, ss. 10 and 14(3).

[17]See for example Matrimonial Causes Act 1965, s. 36(1) which refers only to local authorities in England and Wales.

[18]Matrimonial Proceedings (Children) Act 1958, s. 12(1).

proceedings in respect of the same subject-matter. We further **recommend** that personal interim interdicts should not be subject to automatic lapse upon a sist except personal interdicts affecting children.

PART XIII: JURISDICTION IN CERTAIN OTHER CONSISTORIAL PROCEEDINGS

165. We turn now to consider five types of consistorial proceedings which it has been convenient to discuss separately either because of their unfamiliarity or because we do not propose to make recommendations concerning them in this Report.

(*1*) *Actions of declarator of freedom and putting to silence*

166. Actions of declarator of freedom and putting to silence[1] are consistorial actions affecting status[2] and as such are competent only in the Court of Session[3]. The essence of an action of putting to silence is that 'the defender is alleged to be asserting a false relationship holding out that there is a relationship which does not exist to the prejudice of the pursuer'[4]. Usually the defender will be claiming that he or she is the pursuer's spouse but an action appears to be competent where the defender claims that the pursuer is married to a third party[5]. The issue is therefore the same as in actions of declarator of marriage or actions of declarator of nullity relating to a void marriage, namely whether or not a valid marriage exists or existed. Such actions, which are in practice very rare, usually relate to irregular marriages[6]. As in actions of declarator of marriage, the domicile of a woman depends on the result of the action.

167. While it has been suggested that an action of declarator of freedom and putting to silence attracts the same jurisdictional criteria as apply to actions of declarator of marriage[7], the existing basis of jurisdiction is obscure and accordingly legislation is desirable. We think that the basis of jurisdiction should be the same as in actions for divorce, rather than actions of declarator of marriage, since special provision for actions brought after the death of a spouse seem unnecessary.

RECOMMENDATIONS 34 AND 35

168. We **recommend** that the Court of Session should have jurisdiction in actions of declarator of freedom and putting to silence on the same principles as in actions for divorce. We further **recommend** that any legislation implementing our recommendation 21 relating to jurisdiction in cross-actions etc. should apply also to actions of declarator of freedom and putting to silence.

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[1]These should be distinguished from actions of declarator of bastardy and putting to silence.

[2]Conjugal Rights (Scotland) Amendment Act 1861, s. 19; *Willians* v. *Forsythe* (1909) 2 S.L.T. 252.

[3]Court of Session Act 1830, s. 33 as read with Court of Session Act 1850, s. 16.

[4]*Imre* v. *Mitchell* 1958 S.C. 439 *per* L.P. Clyde at p. 461, (action of declarator of bastardy and putting to silence).

[5]This seems to follow from *Imre* v. *Mitchell* (n. 4 above).

[6]E.g. *Longworth* v. *Yelverton* (1862) 1 M. 161; (1864) 2 M. (H.L.) 49; (1865) 3 M. 645.

[7]McLaren, *Court of Session Practice* (1916) p. 61.

(2) Other actions of declarator relating to matrimonial status

169. In addition to the nominate consistorial actions of declarator, namely of marriage, of freedom, and of nullity, we have also considered other actions for decrees declaratory of matrimonial status which are given by the Court of Session under its general common law powers to grant decrees of declarator. In recent times the Court of Session, after initial hesitation[8], has recognised the competence of an action for declarator that a marriage has been validly dissolved by a foreign decree of divorce, whether judicial or non-judicial[9]. Actions of declarator of this kind may raise rather different jurisdictional problems from actions of divorce and the traditional nominate actions of declarator. For example it is not clear whether an innominate declarator of this kind should be treated as a consistorial decree affecting status and having extra-territorial effect, or as merely recognising in Scotland a decree or act *in rem* issued elsewhere. Moreover, because of the relative novelty of the action, its characteristics are less well defined than are those of the older nominate actions of declarator.

170. As a result of the Recognition of Divorces and Legal Separations Act 1971, actions for a declarator recognising a foreign decree of divorce or separation are likely to become more frequent, and *Indyka* v. *Indyka*[10] may have a similar effect in relation to other consistorial decrees, such as of nullity, not covered by that Act. Since the grounds on which the courts may assume jurisdiction in such actions are not free from doubt, we shall be undertaking consultations to enable us to present a Report on the matter.

(3) Petitions for a protection order for a deserted wife's property under section 1 of the Conjugal Rights (Scotland) Amendment Act 1861

171. Section 1 of the 1861 Act enabled a wife whose husband had deserted her to petition the court for an order protecting property which she had acquired after the desertion or might acquire in the future by her own efforts. Such an order of protection, after intimation, had 'the effect of a decree of separation *a mensa et thoro* in regard to the property, rights and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued[11]'. It therefore affected status. However the abolition of the husband's paramount rights *stante matrimonio* by the Married Women's Property Acts 1881 and 1920[12] has removed the need for such petitions which are now unknown in practice[13]. We shall be considering whether these petitions need be retained in our law and in the meantime we make no recommendations as to the basis of jurisdiction.

(4) Actions of adherence

172. Actions of adherence are considered to be consistorial for the purpose

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[8]See *Arnott* v. *Lord Advocate* 1932 S.L.T. 46; *McKay* v. *Walls* 1951 S.L.T. (Notes) 6; *Sim* v. *Sim* 1968 S.L.T. (Notes) 15.

[9]*Makouipour* v. *Makouipour* 1967 S.C. 116; *Galbraith* v. *Galbraith* 1971 S.L.T. 139; *Bain* v. *Bain* 1971 S.L.T. 141; *Broit* v. *Broit* 1972 S.L.T. (Notes) 32.

[10][1969] 1 A.C. 33.

[11]1861 Act, s. 5.

[12]1881 c. 21; 1920 c. 64.

[13]Walton, *Husband and Wife,* (3rd ed; 1951) pp. 198–199.

of jurisdiction[14]. Since 1861, however, when a decree of adherence ceased to be a condition precedent to an action for divorce[15], actions of adherence have become very rare in practice, except as a preliminary conclusion to an action of permanent aliment[16]. It is arguable, therefore, that they should be treated as actions whose aim is to seek a patrimonial remedy. Following the extension of the remedy of interim aliment in the case of *Donnelly* v. *Donnelly*[17] and in section 6 of the Divorce (Scotland) Act 1964, the relationship of actions of adherence and aliment to actions of interim aliment requires review, both to simplify terminology and to restore a measure of principle to a confused branch of the law. It may be considered, indeed, on further study, that there is no case for the retention of actions of adherence in our family law. We therefore deem it premature to make recommendations as to jurisdiction in actions of adherence until we have had an opportunity of reviewing the remedy in the context of our study of family law.

(*5*) *Actions for aliment between spouses*

173. Our Report is restricted to actions affecting matrimonial status. We have not considered matrimonial financial remedies because, as we indicate in the previous paragraph, they belong to a branch of the law which has become confused in some respects and which requires review. As in the case of actions of adherence and for similar reasons, we deem it premature to consider and recommend any change in the basis of jurisdiction in actions of aliment between spouses.

PART XIV: SUMMARY OF RECOMMENDATIONS

APPLICATION OF THE PERSONAL LAW OF THE SPOUSES: (PART IV OF REPORT) *Page*

1. No change should be made in the present rules whereby (*a*) the internal law of Scotland is applied in determining the substantive issues in actions of divorce and separation and in actions to have a voidable marriage declared null, and (*b*) foreign law may be applied in actions of declarator of marriage, and in actions of declarator of nullity relating to a marriage alleged to be void from its beginning. (paragraph 30) 13

NEGATIVE RECOMMENDATIONS CONCERNING POSSIBLE BASES OF JURISDICTION OTHER THAN DOMICILE AND RESIDENCE: (PART V)

2. Nationality should not be introduced as a general ground of jurisdiction in consistorial actions between spouses. (paragraph 36) 15

3. Nationality should not be introduced as a ground of jurisdiction in divorce in cases where British nationals are domiciled in a country which

[14]Anton, *Private International Law*, (1967) pp. 340–341.
[15]Conjugal Rights (Scotland) Amendment Act 1861, s. 11.
[16]Walton, *op.cit.* (n. 13 above) pp. 134–135.
[17]1959 S.C. 97.

Recommendations as to the test of habitual residence

13. The Court of Session should have jurisdiction to entertain actions of divorce, separation, declarator of nullity of marriage or declarator of marriage (*a*) if either party to the marriage was habitually resident in Scotland throughout the year immediately preceding the date of commencement of the proceedings or (*b*) in the case of actions of declarator of marriage or nullity brought after the death of one or both of the spouses, if the deceased spouse was habitually resident in Scotland throughout the year immediately preceding the death. (paragraph 84) 32

14. As a consequence of recommendation 13, section 2(1) and (2) of the Law Reform (Miscellaneous Provisions) Act 1949 (which makes the ordinary residence of a wife for three years in Scotland a basis of jurisdiction in divorce and nullity of marriage in certain circumstances) should be repealed. (paragraph 84) 32

PETITIONS FOR DISSOLUTION OF MARRIAGE ON PRESUMED DEATH: (PART VII)

15. In petitions under section 5 of the Divorce (Scotland) Act 1938 for dissolution of marriage on the ground of presumed death, the Court of Session should have jurisdiction:

(*a*) where the petitioner is domiciled in Scotland at the date of the commencement of proceedings, or was habitually resident there throughout the year preceding that date; or

(*b*) where the missing person was domiciled in Scotland on the date when he was last known to be alive or had been habitually resident there throughout the year preceding that date. This recommendation is made with the explanation that the period of habitual residence for one year is selected to conform with that recommended for other consistorial proceedings. (paragraph 93) 35

16. For the purpose of the foregoing recommendation the domicile of a married woman should be determined independently of that of her husband. (paragraph 93) 36

17. As a consequence of recommendations 15 and 16 section 2(3) of the Law Reform (Miscellaneous Provisions) Act 1949 (under which the petitioner's domicile founds jurisdiction in petitions for dissolution of a marriage on the ground of presumed death) should be repealed. (paragraph 93) 36

ACTIONS OF REDUCTION OF CONSISTORIAL DECREES: (PART VIII)

18. The Court of Session should have jurisdiction in actions of reduction of any consistorial decree granted by a Scottish court whether or not at the date of the commencement of the action of reduction the defender was otherwise subject to the jurisdiction of the Scottish courts. (paragraph 99) 38

JURISDICTION OF THE SHERIFF COURT IN ACTIONS OF SEPARATION AND ALIMENT: (PART IX)

19. The sheriff court should have jurisdiction in actions of separation if:

(1) the Court of Session would have jurisdiction to entertain the action otherwise than *ex necessitate*, and

(2) one of the parties either:

(*a*) is resident within the sheriffdom at the date of the commencement of the action and has been resident there for a period of not less than 40 days before that date; or

(*b*) has resided within the sheriffdom for a period of not less than 40 days ending not more than 40 days before the date of the commencement of the action and has no known residence in Scotland at that date. (paragraph 115) 43

20. As a consequence of recommendation 19, actions of separation should be excluded from the scope of section 6 of the Sheriff Courts (Scotland) Act 1907 and of section 6 of the Maintenance Orders Act 1950. (paragraph 115) 43

JURISDICTION IN CROSS-ACTIONS AND FURTHER ACTIONS: (PART X)

21. Where an action of divorce, separation, declarator of marriage or declarator of nullity of marriage is before the court, and another action whether of divorce, separation, declarator of marriage or declarator of nullity of marriage, relating to the same marriage, is brought, if the court has jurisdiction to entertain the original action it shall have jurisdiction to entertain the other notwithstanding that the original and other bases of jurisdiction are lost. (paragraph 118) 44

ANCILLARY AND COLLATERAL PROCEEDINGS FOR CUSTODY, MAINTENANCE AND FINANCIAL PROVISION ETC.: (PART XI)

22. The rules governing the Court of Session's jurisdiction, in actions of divorce, to entertain conclusions for damages for adultery or expenses against a co-defender should not be changed at the present time. (paragraph 123) 47

23. Legislation should make it clear that where the Court of Session has jurisdiction in an action of divorce, separation, declarator of marriage or declarator of nullity of marriage, it should also have jurisdiction to entertain applications, whether brought before or after decree, for ancillary or collateral orders relating to financial provision for spouses or children, the custody, maintenance and education of children and kindred matters. (paragraph 131) 51

24. The same principle should apply, first, in determining the right of any person to make application under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 for the variation or re-

call of an order made in a consistorial action, and, second, to proceedings for separation in the sheriff court. (paragraph 131) 51

CONFLICTS OF JURISDICTION: (PART XII)

25. The court should have power to sist any depending action of divorce, separation, declarator of marriage or declarator of nullity of marriage, either *ex proprio motu* or on the application of a party, if, where proceedings in respect of the marriage or which might affect its validity are in dependence in any other country whether within or outside the United Kingdom, the court considers that in all the circumstances, having regard to the balance of convenience and fairness as between the parties, it would be preferable for the proceedings in the other country to be disposed of first. (paragraph 139) 54

26. A duty should be imposed upon the pursuer and any other person who has entered appearance in an action of divorce, separation, declarator of marriage or declarator of nullity of marriage, to disclose as soon as he or she receives knowledge of them, the existence of any proceedings in dependence outside Scotland, which are in respect of the marriage or might affect its validity. (paragraph 141) 54

27. The duty of disclosure and the court's discretionary power to sist proceedings should apply, where appropriate, in respect of non-judicial proceedings outside Scotland. (paragraph 143) 55

28. The Court of Session should be under a duty *ex proprio motu* to sist an action of divorce if it appears to the Court:

(1) that proceedings for divorce or nullity in respect of the same marriage are continuing in another United Kingdom country; and

(2) that (*a*) the parties last resided together in that country; and (*b*) either of the parties had been habitually residing in that country for a period of not less than one year immediately preceding the date on which the residence together terminated. (paragraph 154) 58

29. The court should have power to recall a discretionary sist or a mandatory sist if the concurrent proceedings in respect of which the sist was made are concluded or sisted. (paragraph 156) 58

30. Where a mandatory or discretionary sist is recalled, the court should thereafter have a power, but not a duty, to sist proceedings a second or subsequent time. (paragraph 156) 58

31. Certain interim orders relating to financial obligations or affecting children made in proceedings which are sisted as a result of concurrent proceedings in another United Kingdom country should cease to have effect, (*a*) on the date of the sist in cases where an order in respect of the same subject-matter is in force in the concurrent proceedings, (*b*) on the date of the coming into effect of an order in respect of the same subject-matter made in the concurrent proceedings within a period of three months from the date of the sist, and otherwise (*c*) on the expiry of a period of three months following the date of the sist. (paragraph 164) 60

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32. The court should have power to vary or recall existing orders during the period in which they remain in force after the date of the sist, and should in circumstances of urgency have power to make new orders, or extend the operation of existing orders beyond the expiry of the three month period, until an order is made in the concurrent proceedings in respect of the same subject-matter. (paragraph 164) 60

33. Personal interim interdicts should not be subject to automatic lapse upon a sist except personal interdicts affecting children. (paragraph 164) 60

ACTIONS OF DECLARATOR OF FREEDOM AND PUTTING TO SILENCE: (PART XIII)

34. The Court of Session should have jurisdiction in actions of declarator of freedom and putting to silence on the same principles as in actions for divorce. (paragraph 168) 61

35. Any legislation implementing recommendation 21 relating to jurisdiction in cross-actions etc. should apply also to actions of declarator of freedom and putting to silence. (paragraph 168) 61

In Appendix II, we annex a draft Bill, with explanatory notes, giving effect to the above recommendations so far as they require legislation.

APPENDIX I

SUMMARY OF EXISTING BASES OF JURISDICTION IN CONSISTORIAL CAUSES AFFECTING MATRIMONIAL STATUS, CLASSIFIED BY TYPES OF PROCEEDINGS

1. ACTIONS FOR DIVORCE

(1) Domicile of the husband at the date of the commencement of the proceedings: (para. 8 of the Report).

(2) Domicile of the husband at the date of the matrimonial offence: (para. 9).

(3) Residence of a wife-pursuer for 3 years prior to the date of the commencement of proceedings, subject to certain provisos: (para. 12).

2. ACTIONS FOR SEPARATION

(*a*) *Court of Session*

(1) Domicile of the husband at the date of the commencement of the proceedings: (para. 8).

(2) Domicile of the husband at the date of the matrimonial offence: (para. 9).

(3) Jurisdiction *ex necessitate*: (para. 14).

(*b*) *Sheriff Court**

(4) Residence of the defender in the sheriffdom for 40 days, subject to certain provisos: (paras. 11 and 12).

(5) Possibly other grounds of jurisdiction relevant to patrimonial actions: (paras. 101 and 102).

(6) Residence of a wife-pursuer in the sheriffdom at the commencement of the proceedings, subject to certain provisos: (paras. 12 and 104).

*N.B.—Additionally the requirements of jurisdiction in the Court of Session may in certain cases require to be satisfied: (para. 103).

3. ACTIONS FOR DECLARATOR OF NULLITY OF MARRIAGE

(*a*) *Void and voidable marriages*

(1) Domicile of the husband or alleged husband at the date of the commencement of the proceedings: (para. 8).

(2) Residence of a wife-pursuer for 3 years prior to that date, subject to certain provisos: (para. 12).

(*b*) *Void marriages*

(3) Possibly, place of celebration of the marriage coupled with either personal citation within the country or the consent of the defender: (paras. 13 and 41).

(4) Possibly, domicile of the wife or alleged wife at the date of the commencement of proceedings: (para. 10).

4. ACTIONS FOR DECLARATOR OF MARRIAGE

(1) Domicile of the husband at the date of the commencement of the proceedings: (para. 8).

(2) Possibly, celebration of the marriage coupled with either personal citation within the country or the consent of the defender: (paras. 13 and 41).

5. ACTIONS FOR DECLARATOR OF FREEDOM AND PUTTING TO SILENCE

(1) Possibly the same as 4 above: (para. 164).

6. PETITIONS FOR DISSOLUTION OF MARRIAGE ON THE GROUND OF PRESUMED DEATH

(1) Domicile of the husband-petitioner at the date of the commencement of the proceedings: (para. 8).

(2) Domicile of a wife-petitioner at that date subject to certain relaxations: (paras. 10 and 87).

(3) Residence of a wife-petitioner for 3 years prior to that date, subject to certain provisos: (paras. 12 and 87).

7. ACTIONS FOR REDUCTION OF CONSISTORIAL DECREES

(1) If the defender is personally subject to the jurisdiction at the date of the commencement of the action of reduction: (para. 95).

(2) Possibly, the domicile of the husband at the date of the commencement of the action of reduction: (para. 95).

Draft Consistorial Causes (Jurisdiction) (Scotland) Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

BILL

TO

Make further provision with respect to the jurisdiction of the Scottish courts to entertain certain consistorial causes, including actions for reduction of consistorial decrees, and with respect to the sisting of such causes; and for purposes connected with the matters aforesaid.

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

Actions for divorce etc. in Court of Session.

1.—(1) Subject to the following provisions of this section and to section 8(6) of this Act the Court of Session shall have jurisdiction to entertain—

(*a*) an action for any of the following three remedies, namely, divorce, separation and declarator of freedom and putting to silence, if, and only if, either of the parties to the marriage in question is domiciled in Scotland on the date when the action is begun, or was habitually resident there throughout the period of one year ending with that date;

(*b*) an action for either of the following remedies, namely, declarator of marriage and declarator of nullity of marriage, if, and only if, either of the said parties is domiciled or was habitually resident as mentioned in the preceding paragraph, or died before the date when the action is begun and either was on the date of the death domiciled in Scotland or had been habitually resident there throughout the period of one year ending with the date of the death.

EXPLANATORY NOTES

Clause 1

1. Clause 1 implements the recommendations concerning the jurisdiction of the Court of Session in Scotland to entertain actions for divorce, separation, declarator of marriage, declarator of nullity of marriage (in Part VI of the Report) and for the combined remedy of declarator of freedom and putting to silence (Part XIII). It also makes provision for jurisdiction in cross-actions by the defender and further actions by the pursuer (Parts X and XIII). With one minor exception, jurisdiction in those five types of consistorial action will in future depend exclusively on the domicile in Scotland, or on one year's habitual residence there, of either spouse. (Clause 4 gives an independent domicile to married women for the purpose of jurisdiction). The case for retaining domicile as a basis of jurisdiction and for allowing the domicile of either spouse to found jurisdiction is set out in paras. 48 to 64 of the Report. The case for introducing the basis of one year's habitual residence of either spouse is set out in paras. 65 to 84. Clause 1 applies only to actions commenced after the Bill comes into operation; (see clause 8(6)).

Subsection (1)

2. *Subsection* (1) enacts the new bases of jurisdiction in the five types of consistorial action, leaving unaffected the cases mentioned in subsections (4) and (5). It implements recommendations 8 to 11, 13 and 34 of the Report (see paras. 58, 60, 63 and 168).

3. *Paragraph* (*a*) of the subsection prescribes the new bases of jurisdiction in *actions for divorce, separation* and *declarator of freedom and putting to silence.* The paragraph provides that jurisdiction may be founded either on the domicile in Scotland, or on one year's habitual residence there, of either spouse at the date when the action is begun, viz. the date of the service of the summons (see para. 61 of Report). At present, jurisdiction in *divorce* and (except in certain cases of necessity) *separation* depends on the domicile in Scotland of the spouses (a wife's domicile by law is the same as her husband's) at the commencement of proceedings, or at the date of a matrimonial offence where that is the ground of action (paras. 8 and 9 of the Report), or in certain divorce cases, on the residence in Scotland of a wife-pursuer (para. 12). Paragraph (*a*) thus restricts domicile as a basis of jurisdiction to domicile at the commencement of proceedings. (On the other hand, as a result of clause 4, the domicile may be either of two domiciles.) The paragraph also provides a new basis, available to either spouse, of one year's habitual residence in Scotland of either spouse and this replaces the existing residential basis of jurisdiction, available only to a wife-pursuer, applicable in divorce, but not separation, under the present law. In implement of recommendation 34 (para. 168) of the Report, paragraph (*a*) also assimilates the bases of jurisdiction in *actions for declarator of freedom and putting to silence* to the new grounds enacted for divorce.

4. *Paragraph* (*b*) assimilates jurisdiction in *actions for declarator of marriage* and for *declarator of nullity* (whether relating to void or voidable marriages) to the new bases of jurisdiction prescribed for divorce by paragraph (*a*). It also makes new provision for cases where such actions are brought after the death of one or both of the spouses; (paras. 15, 62 and 82 of the Report). In *actions for declarator of marriage,* at present, the bases of jurisdiction are the husband's domicile at the commencement of the action (a wife's domicile being dependent on her husband's) and possibly, in certain cases, the celebration of the marriage in Scotland (see paras. 8, 13 and 41 of the Report). In *actions for declarator of nullity* of a *void marriage,* jurisdiction at present may be founded on these bases (paras. 8, 13 and 41 of the Report) but a wife's domicile remains independent of her husband's (para. 10) and in certain cases, a wife-pursuer may found on her own residence (para. 12). Where the nullity action relates to a *voidable marriage,* jurisdiction at present depends only on the husband's domicile (the wife's domicile being dependent on his) (para. 10 of the Report) and in certain cases a wife-pursuer's residence in Scotland (para. 12).

(2) Where the Court of Session has by virtue of the preceding subsection or this subsection jurisdiction to entertain a particular action, but apart from this subsection has not jurisdiction to entertain another action such as is mentioned in the preceding subsection which is begun in the Court in respect of the marriage in question by either party to the marriage while the particular action is pending, then, subject to the following provisions of this section, the Court shall have jurisdiction to entertain the other action.

(3) No action for divorce in respect of a marriage shall be entertained by the Court of Session by virtue of subsection (1) or (2) of this section while proceedings for divorce or nullity of marriage begun before the commencement of this Act are pending in England and Wales, Northern Ireland, the Channel Islands or the Isle of Man in respect of the marriage; and provision may be made by rules of court as to when, for the purposes of this subjection, proceedings were begun or are pending in any of those countries.

(4) Nothing in this section affects the rules governing the jurisdiction of the Court of Session to entertain, in an action for divorce, an application for payment by a co-defender of damages or expenses.

(5) The foregoing provisions of this section are without prejudice to any rule of law whereby the Court of Session has jurisdiction in certain circumstances to entertain actions for separation as a matter of necessity and urgency.

Clause 1(2)-(5)

5. *Subsection* (2) implements in part recommendations 21 (para. 118) and 35 (para. 168) of the Report. Under the existing law the Court of Session cannot entertain a consistorial action unless a jurisdictional basis exists in respect of the action at the time when the proceedings are commenced by service of the summons. If, thereafter, the original and all possible bases of jurisdiction are lost, the defender cannot bring a cross-action and the pursuer cannot bring a new action. Subsection (2) provides that if there is jurisdiction under subsection (1) to entertain an action mentioned in that subsection, the court will have jurisdiction to entertain another such action (whether for the same remedy or for another of the five named remedies) relating to the same marriage brought while the first action is pending. Moreover, jurisdiction under subsection (2) in the second action will in turn confer jurisdiction in a subsequent action to which the clause applies (if it is brought when the first action has been dismissed or abandoned but the second action is pending) and so forth. The word 'pending' is defined in clause 8(4) to include the period when an action is pending on appeal since cross-actions may be competently brought at that time in certain circumstances: *Walker* v. *Walker* (1871) 9 M. 460; *Duncan* v. *Duncan* 1959 S.L.T. (Notes) 81.

6. *Subsection* (3) is a transitional provision dealing with certain conflicts of jurisdiction which may arise between courts in Scotland and courts in other parts of the British Isles when the new jurisdictional rules in subsections (1) and (2) of the clause come into operation. The effect of subsection (3) is that where divorce or nullity proceedings begun in another part of the British Isles (England and Wales, Northern Ireland, the Channel Islands or the Isle of Man) *before* the date when the Bill comes into operation are pending, then a divorce action cannot be entertained in Scotland *after* that date until the non-Scottish proceedings are concluded. The reference to subsection (2) is necessary to prevent a pursuer from taking advantage of it in order to avoid the operation of subsection (3), e.g. by bringing an action for separation and then a further action for divorce.

7. *Subsections* (4) *and* (5) are saving provisions. *Subsection* (4), implementing recommendation 24 (para. 123) of the Report, ensures that the Bill will not affect the present rules governing jurisdiction to deal, in divorce actions, with ancillary conclusions for payment by a co-defender of damages or expenses. The reason for the saving is set out at para. 122 of the Report.

8. *Subsection* (5), implementing recommendation 12 (para. 81) of the Report, saves the existing jurisdictional rule whereby the Court of Session may entertain separation actions *ex necessitate*. The rule is explained at para. 14 of the Report and the case for the saving is made at para. 80.

Proceedings under section 5 of Divorce (Scotland) Act 1938 (Presumption of death and dissolution of marriage). 1938 c. 50.

2. Subject to section 8(6) of this Act, in proceedings under section 5 of the Divorce (Scotland) Act 1938 (Proceedings for decree of presumption of death and dissolution of marriage) the Court of Session shall have jurisdiction if, and only if,—

(*a*) the petitioner is domiciled in Scotland on the date when the proceedings are begun or was habitually resident there throughout the period of one year ending with that date; or

(*b*) the person whose death is sought to be presumed was domiciled in Scotland on the date on which he was last known to be alive, or had been habitually resident there throughout the period of one year ending with that date.

Clause 2

1. Clause 2, implementing recommendation 15 (para. 93) of the Report, amends the bases of the Court of Session's jurisdiction to entertain petitions under section 5 of the Divorce (Scotland) Act 1938 for dissolution of marriage on the ground of presumed death which are treated in Part VII of the Report. The present rules of jurisdiction and their background are set out at paras. 85-87 of the Report and are criticised generally at para. 88. Under clause 8(6), clause 2 applies only to petitions commenced before the clause comes into operation.

2. *Paragraph* (*a*) provides that the petitioner may found on his or her own domicile in Scotland, or habitual residence there for a year, at the commencement of proceedings: (see para. 89 of the Report). Under *paragraph* (*b*), the petitioner may found on the missing spouse's domicile in Scotland, or habitual residence there for a year, at the date when he or she was last known to be alive. The case for this is set out at paras. 90-92 of the Report.

3. Three main changes are effected by clause 2. First, whereas under the existing law, in ascertaining a wife-petitioner's domicile, the missing husband may be treated as having died immediately after the last occasion when she knew or had reason to believe him to be alive, the effect of clause 2, together with clause 4, is to enable a petitioning wife to found on her own independently ascertained domicile at the commencement of proceedings. Second, under clauses 2 and 4, jurisdiction may in future be based on the independently ascertained domicile in Scotland, or a year's habitual residence there, of either the petitioner or the missing spouse. Under the existing law, only the petitioner's domicile founds jurisdiction. Third, the clause provides a new ground of jurisdiction, available to a petitioning husband or wife, of one year's habitual residence in Scotland of either spouse and this replaces the residential ground, available only to a petitioning wife, under the existing law. The relevant time for ascertaining a missing spouse's domicile or habitual residence is the date when he was last known to be alive.

Actions for separation in sheriff court.

3.—(1) Subject to subsections (2) and (3) of this section and to section 8(6) of this Act a sheriff court shall have jurisdiction to entertain an action for separation if, and only if,—

(*a*) either party to the marriage in question—

(i) is domiciled in Scotland at the date when the action is begun, or

(ii) was habitually resident there throughout the period of one year ending with that date,

and

(*b*) either party to the marriage—

(i) was resident in the sheriffdom for a period of forty days ending with that date, or

(ii) had been resident in the sheriffdom for a period of not less than forty days ending not more than forty days before the said date, and has no known residence in Scotland at that date.

(2) Where a sheriff court has by virtue of the preceding subsection or this subsection jurisdiction to entertain a particular action for separation, but apart from this subsection has not jurisdiction to entertain another such action which is begun in that court in respect of the marriage in question by either party to the marriage while the particular action is pending, the court shall have jurisdiction to entertain the other action.

(3) The foregoing provisions of this section are without prejudice to any jurisdiction of a sheriff court to entertain an action of separation remitted to it in pursuance of any enactment or rule of court.

Clause 3

1. *General:* Clause 3, implementing recommendation 19 (para. 115) in Part IX of the Report, makes fresh provision for the jurisdiction of the sheriff court in actions for separation. Clause 8(2) and (3) explain what is meant, in relation to a sheriff court, by references to actions for separation (see explanatory notes on those subsections). Under clause 8(6), clause 3 applies only to separation actions commenced after the clause comes into operation.

2. *Subsection* (1) provides that a sheriff court will have jurisdiction if the requirements in paragraphs (*a*) and (*b*) are satisfied. *Paragraph* (*a*), together with clause 4, prescribes the same jurisdictional criteria as apply, in the normal case, to separation actions in the Court of Session under clause 1(1)(*a*) as read with clause 4. *Paragraph* (*b*) prescribes a test allocating cases to individual sheriff courts within Scotland. Jurisdiction will be founded at the date when the action is begun (by service of the initial writ). The present jurisdictional criteria, described at paras. 100-102 and 104 of the Report, are the defender's residence in the sheriffdom, possibly other grounds of jurisdiction relevant in patrimonial actions, and the residence of a wife-pursuer subject to certain conditions. Additionally the tests of jurisdiction in the Court of Session may require to be satisfied (para. 103).

3. Four main changes are effected by subsection (1). First, the subsection makes it clear that the new bases of jurisdiction in the Court of Session apply also in the sheriff court. Second, as a result of the exclusive words 'if, and only if', the ordinary criteria applying to the sheriff court's jurisdiction in patrimonial actions will not in future apply to separation actions; (see also clause 8(7)(*b*) and Schedule 3, paragraph 1). Third, a husband-pursuer will be able to found jurisdiction on his own residence in the sheriffdom. Fourth, a wife-pursuer will be able to found on her own residence in the sheriffdom even though the other conditions required by the present law are not satisfied. The general case for treating separation as akin to divorce for jurisdictional purposes is set out at paras. 105-109 of the Report; the detailed changes are discussed at paras. 110-114.

4. *Subsection* (2) implements recommendation 21 (para. 118) of the Report in relation to the sheriff court.

5. *Subsection* (3) is a saving provision which ensures that the powers of the sheriff court to remit a case to another sheriff court will continue to be available even though the residential requirements in subsection (1)(*b*) are not satisfied in relation to the particular sheriff court to which the case is remitted. This saving is made necessary by the words 'if, and only if' in subsection (1).

Domicile of women for purposes of sections 1, 2 and 3.

4. For the purposes of sections 1, 2 and 3 of this Act a woman's domicile shall be determined without regard to any rule of law providing for her domicile at any time to be the same as that of her then husband.

Actions for reduction of consistorial decrees.

5. Subject to section 8(6) of this Act, the Court of Session shall have jurisdiction to entertain an action for reduction of a decree granted (whether before or after the commencement of this Act) by a Scottish court in any consistorial proceedings whether or not the Court would have jurisdiction to do so apart from this section.

Clause 4

This clause, implementing recommendations 7, 16 and (in part) 34 (paras. 58, 93 and 168) of the Report, abrogates the rule of a wife's dependent domicile in the context of jurisdiction in the consistorial causes for which provision is made in clauses 1 to 3 of the Bill. Abrogation of the rule enables clauses 1 to 3 to provide that either party to a marriage can found jurisdiction on the wife's separately ascertained domicile in Scotland. The case for clause 4 is set out at paras. 53-57 of the Report (consistorial actions) and see also paras. 88-90 (petitions for dissolution of marriage on presumed death).

Clause 5

Clause 5, implementing recommendation 18 (para. 99) in Part VIII of the Report, ensures that the Court of Session will have jurisdiction to reduce any consistorial decree granted by itself or any other Scottish court. The only test of jurisdiction will be that a Scottish court granted the decree. The existing bases of jurisdiction are described at para. 95 of the Report and the case for the clause is set out at paras. 96-98. The clause is the only provision of the Bill which is not restricted to proceedings affecting matrimonial status. While under clause 8(6), clause 5 applies only to actions of reduction brought after the date when the clause comes into operation, the clause affects consistorial decrees granted before that date.

Ancillary and collateral orders.

6.—(1) Where after the commencement of this Act—

(*a*) an application is made to the Court of Session or to a sheriff court for—

(i) the making as respects any person or property of an order under any of the enactments or rules of law specified in Part I or Part II of Schedule 1 to this Act, or

(ii) the variation or recall as respects any person or property of an order made (whether before or after the commencement of this Act) under any of those enactments or rules of law,

and

(*b*) the application is competently made in connection with an action for any of the following remedies, namely, divorce, separation, declarator of marriage and declarator of nullity of marriage (whether the application is made in the same proceedings or in other proceedings and whether it is made before or after the pronouncement of a final decree in the action),

then, if the court has or, as the case may be, had by virtue of this Act or of any enactment or rule of law in force before the commencement of this Act jurisdiction to entertain the action, it shall have jurisdiction to entertain the application as respects the person or property in question whether or not it would have jurisdiction to do so apart from this subsection.

(2) It is hereby declared that where—

(*a*) the Court of Session has jurisdiction by virtue of this section to entertain an application for the variation or recall as respects any person of an order made by it, and

(*b*) the order is one to which section 8 (Variation and recall by the sheriff of certain orders made by the Court of Session) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 applies,

1966 c. 19

then, for the purposes of any application under the said section 8 for the variation or recall of the order in so far as it relates to that person, the sheriff, as defined in that section, has jurisdiction as respects that person to exercise the power conferred on him by that section.

Clause 6

1. Clause 6, which introduces Schedule 1, implements recommendations 23 and 24 (para. 131) in Part XI of the Report. It makes express provision giving jurisdiction to the courts to entertain applications for orders as to custody, maintenance, financial provision and certain other ancillary or collateral matters arising in connection with actions for divorce, separation, declarator of marriage and declarator of nullity of marriage. The existing powers of the courts to make ancillary or collateral orders are set out in paras. 119-127 of the Report, which also indicate the different approaches adopted by the courts to the principle of implied or derivative jurisdiction. The case for express statutory jurisdiction is set out at paras. 128-130 of the Report. As a corollary to clause 1(4), however, ancillary conclusions for damages or expenses against a co-defender are not included in Schedule 1 (paras. 122-123).

2. The effect of *subsection* (1) is that where jurisdiction in an action for divorce, separation, declarator of marriage or declarator of nullity of marriage is or has been established, the Court of Session, and in the case of an action for separation the sheriff court, will have jurisdiction to entertain an application in connection with the action, for the making, variation or recall of an order of the kinds described (by reference to specified order-making powers) in Parts I and II of Schedule 2 to the Bill even though under the existing law the court would not have jurisdiction as respects the person or property to be affected by the order. These orders are described at paras. 120–121 and 124–127 of the Report. The subsection affects applications made after the date when the clause comes into operation (see also clause 8(6)), including applications for the variation or recall of an order made before that date.

3. *Subsection* (2), implementing recommendation 24 in part, ensures that if the jurisdiction of the Court of Session to make a specified order in an action for divorce, separation or declarator of nullity of marriage is or has been established, the appropriate sheriff court will also have jurisdiction to entertain applications under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 for the variation or recall of the order; (see para. 126 of the Report). Orders under sections 26 and 27 of the Succession (Scotland) Act 1964 affecting property as distinct from persons are not within the scope of section 8 of the 1966 Act.

Provisions as to sisting of certain actions.

7. The provisions of Schedule 2 to this Act shall have effect with respect to the sisting of actions for any of the following remedies, namely, divorce, separation, declarator of marriage or declarator of nullity of marriage, and with respect to the other matters mentioned in that Schedule; but nothing in that Schedule—

(*a*) requires or authorises a sist of an action which is pending when this Act comes into force; or

(*b*) prejudices any power to sist an action which is exercisable by any court apart from this Act.

Clause 7

1. Clause 7 introduces Schedule 2 to the Bill which provides for actions for divorce, separation, declarator of marriage and declarator of nullity of marriage to be sisted in certain circimstances when there are concurrent proceedings in respect of the same marriage in another country including another United Kingdom country: see generally Part XII of the Report. The need for provisions to avoid or resolve conflicts of jurisdiction in such concurrent proceedings is described in para. 132 of the Report. The Schedule implements recommendations 25 to 33 (at paras. 139, 141, 143, 154, 156 and 164).

2. *Paragraph* (*a*) of the clause deals with transitional cases. It ensures that Schedule 2 will not apply to actions which are pending when the Bill comes into force: 'pending' is defined in clause 8(4).

3. *Paragraph* (*b*) saves existing powers to sist actions, such as the power to sist an action to enable another action to reach the stage where proof in both actions can be conjoined (e.g. *Pringle* v. *Pringle* 1967 S.L.T. (Notes) 60).

Supplemetal.

8.—(1) In relation to any action for any of the following three remedies, namely, declarator of marriage, declarator of nullity of marriage, and declarator of freedom and putting to silence, references in this Act to the marriage shall be construed as including references to the alleged, or, as the case may be, the purported, marriage.

(2) References in this Act to an action for a particular remedy shall be construed, in relation to a case where the remedy is sought along with other remedies in one action, as references to so much of the proceedings in the action as relates to the particular remedy.

(3) References in this Act to the remedy of separation shall be construed, in relation to an action in a sheriff court, as references to the remedy of separation and aliment.

(4) For the purposes of this Act the period during which an action in the Court of Session or a sheriff court is pending shall be regarded as including any period while the taking of an appeal is competent and the period while any proceedings on appeal are pending; and in this subsection references to an appeal include references to a reclaiming motion.

(5) In this Act any reference to an enactment shall, unless the contrary intention appears, be construed as a reference to that enactment as amended or extended, and as including a reference thereto as applied, by or under any other enactment (including this Act).

(6) Nothing in this Act affects any court's jurisdiction to entertain any proceedings begun before the commencement of this Act.

(7) Consequentially on the provisions of this Act, and subject to the preceding subsection, the following enactments are hereby repealed to the extent specified, that is to say—

1949 c. 100.

(*a*) in the Law Reform (Miscellaneous Provisions) Act 1949, in section 2, subsections (1), (2) and (3); and

1950 c. 37.

(*b*) in the Maintenance Orders Act 1950, in section 6(2), the words 'an action of separation and aliment';

and the enactments specified in Schedule 3 to this Act shall have effect subject to the amendments there specified.

Clause 8

1. *Subsection* (1) extends the meaning of references in the Bill to 'marriage'. The extended meaning is relevant to references to the word in clause 1(1) and (2) and paragraph 2 of Schedule 2 applying to 'marriages' which have not been validly constituted.

2. *Subsection* (2) provides that references in the Bill to an action for a particular remedy are to be construed, in a case where there are conclusions for other remedies, as references to so much of the proceedings as relates to the particular remedy. The effect of this is that where for example an action for divorce is combined with an action for declarator of bastardy (e.g. *Brown* v. *Brown* 1972 S.L.T. (Notes) 25), clause 1 will confer jurisdiction only in relation to that part of the proceedings which relates to divorce. Again, where an action for divorce is sisted under Schedule 2, paragraph 2, any non-divorce proceedings combined in the action will not be automatically sisted by virtue of that paragraph.

3. *Subsection* (3) ensures that references in the Bill to the remedy of separation, in relation to an action in a sheriff court, will be construed as references to the remedy of separation and aliment. This is the name by which the remedy is described in the Sheriff Courts (Scotland) Act 1907, s. 5. The definition is relevant to clause 3 and Schedule 2, paragraph 6(1). As a result of the definition, a sheriff court sisting proceedings for separation under paragraph 3 of Schedule 2 must also sist proceedings for aliment.

4. *Subsection* (4) provides that the period during which an action is pending will be taken as including the period when proceedings on appeal (including a reclaiming motion) are pending. A reclaiming motion is an appeal to the Inner House of the Court of Session from a decision of an Outer House judge. The definition of 'pending' is relevant to clause 1(2), 3(2) and Schedule 2, paragraph 6(1)(*b*).

5. *Subsection* (5) contains the usual provision that references in the Bill to other Acts are to be taken where applicable to refer to those Acts in their amended form.

6. *Subsection* (6) is a transitional provision ensuring that the Scottish courts' jurisdiction to entertain actions or petitions already begun when the Bill comes into operation will not be affected by provisions in the Bill changing or abrogating the existing grounds of jurisdiction e.g. the husband's domicile at the date of a matrimonial offence.

7. *Subsection* (7), implementing recommendations 14, 17 and 20 (paras. 84, 93 and 115) of the Report, repeals, as regards proceedings begun after the Bill comes into operation, the following enactments:

(*a*) (i) the Law Reform (Miscellaneous Provisions) Act 1949 section 2(1) and (2), which enables a wife-pursuer to found jurisdiction on her own residence in Scotland in actions for divorce and actions for declarator of nullity of marriage. This basis of jurisdiction is replaced by provisions in clause 1(2).

(ii) the Law Reform (Miscellaneous Provisions) Act 1949, section 2(3), which sets out the existing grounds of jurisdiction in petitions for a decree of presumption of death and dissolution of the marriage. These grounds of jurisdiction are replaced by clause 2(1).

(*b*) in the Maintenance Orders Act 1950, section 6(2), the words 'an action of separation and aliment'. The residential ground of jurisdiction in the 1950 Act is replaced by clause 3(1) of the Bill.

8. *Subsection* (7) also introduces Schedule 3 to the Bill, which contains amendments to existing enactments consequential on clauses 2 and 3.

Short title, commencement and extent.

9.—(1) This Act may be cited as the Consistorial Causes (Jurisdiction) (Scotland) Act 1972.

(2) This Act shall come into operation on such date as the Secretary of State may appoint by order made by statutory instrument, and different dates may be appointed for different provisions of this Act, or for different purposes; and any reference in any provision of this Act to the commencement of this Act shall, unless otherwise provided by any such order, be construed as a reference to the date on which that provision comes into operation.

(3) This Act extends to Scotland only.

Clause 9

1. *Subsection* (1) contains a provision in common form as to short title.

2. *Subsection* (2) provides for the Bill to come into operation on an appointed day. This will allow time for rules of court to be made to give effect to Schedule 2 to the Bill (see paras. 1 and 6(2) of that Schedule) and also to supplement clause 1(3). Section 37 of the Interpretation Act 1889 (c. 63) enables such rules to be made between the passing of an Act and its coming into operation. The subsection also enables different commencement days to be appointed for different provisions and purposes of the Bill. This will allow clauses 5 and 6 and, for the purposes of clause 6, Schedule 1 to come into operation at an earlier date than other provisions of the Bill since rules of court will not be required for these provisions.

3. *Subsection* (3) deals with the territorial extent of the Bill. A comparable Bill has been annexed to the Law Commission's Report on *Jurisdiction in Matrimonial Causes*. The two Bills are complementary and should come into force on the same date.

Section 6;
SCH. 2, para. 5

SCHEDULES

SCHEDULE 1

ANCILLARY AND COLLATERAL ORDERS

PART I

Enactments and rules of law referred to in section 6(1) *and in Schedule* 2 *paragraph* 5(1)

1. Any rule of law empowering a court to make an order for payment of interim aliment *pendente lite* by one party to the marriage in question for the benefit of the other, including any such rule as extended by section 4 of the Married Women's Property (Scotland) Act 1920.

1920 c. 64.

1907 c. 51.

2. Paragraph (2) of section 5 of the Sheriff Courts (Scotland) Act 1907 so far as relating to orders for aliment or for regulating the custody of a child.

1861 c. 86.
1939 c. 4.
1958 c. 40.

3. Section 9 (Orders with respect to children) of the Conjugal Rights (Scotland) Amendment Act 1861 as extended by section 1 of the Custody of Children (Scotland) Act 1939 and by sections 7 and 14 of the Matrimonial Proceedings (Children) Act 1958.

4. Section 10 of the Matrimonial Proceedings (Children) Act 1958 so far as relating to orders committing the care of a child to an individual.

5. Section 13 (Power to prohibit in certain cases removal of child furth of Scotland or out of control of person having custody of him) of the Matrimonial Proceedings (Children) Act 1958.

6. Any enactment or rule of law empowering a court to vary or recall an order the power to make which is conferred by any enactment mentioned in this Part of this Schedule or by any rule of law so mentioned.

PART II

Further enactments and rules of law referred to in section 6(1)

1886 c. 27.

7. Section 7 (Guardianship in case of divorce or judicial separation) of the Guardianship of Infants Act 1886.

1938 c. 50.
1964 c. 91.

8. Section 2 (Effect of divorce on property rights) of the Divorce (Scotland) Act 1938, both as originally enacted and as substituted by section 7 of the Divorce (Scotland) Act 1964.

9. Section 10 of the Matrimonial Proceedings (Children) Act 1958, so far as relating to orders committing the care of a child to a local authority.

EXPLANATORY NOTES

SCHEDULE 1

1. *Part I* of the Schedule is introduced by clause 6(1) and the definition of 'relevant order' in paragraph 5(1) of Schedule 2. It specifies various enactments and rules of the common law under which, in connection with actions for divorce, separation, declarator of marriage or declarator of nullity of marriage, the Court of Session (or in certain cases the sheriff court) may make, vary or recall orders in respect of the aliment of spouses, or the maintenance, aliment, custody or education of children and certain other matters.

2. Clause 6(1) makes express provision for jurisdiction to entertain applications for these orders; (see explanatory notes on clause 6).

3. Schedule 2, paragraph 5(2), makes provision for the automatic lapse of interim orders made under the powers specified in Schedule 1, Part I, in connection with actions for divorce, separation and declarator of nullity of marriage which are sisted under paragraph 2 or 3 of Schedule 2 by reference to proceedings outside Scotland before proof on the merits in the Scottish action has begun. The specified powers, however, include powers exercisable after the proof has begun, and orders made after that time will not be affected by para. 5(2) of Schedule 2; nor will orders made in connection with actions of declarator of marriage, to which paragraph 5(2) of Schedule 2 does not apply.

4. *Part II* is relevant only to clause 6(1) of the Bill. It specifies further enactments and rules of the common law to which clause 6 applies; (see note 2 above and the explanatory notes on the clause).

10. Section 12 (Power of court to provide for supervision of child) of the Matrimonial Proceedings (Children) Act 1958.

1964 c. 41.

11. Section 26 (Orders for financial provision on divorce) and section 27 (Orders relating to settlements and other dealings) of the Succession (Scotland) Act 1964.

12. Any rule of law empowering a court, in connection with an action for declarator of nullity of marriage, to make an order for restitution of property as between the parties to the marriage or for the payment of damages by either of those parties.

13. Any rule of law empowering a court to make an order for the payment of expenses of the action in question by either party to the marriage.

14. Any enactment or rule of law empowering a court to vary or recall an order the power to make which is conferred by any enactment mentioned in this Part of this Schedule or by any rule of law so mentioned.

See page 91.

Section 7.

SCHEDULE 2

SISTING OF CERTAIN ACTIONS

Duty to furnish particulars of certain proceedings

1. While any relevant action is pending in the Court of Session or a sheriff court and proof in that action has not begun, it shall be the duty of the pursuer, and of any other person who has entered appearance in the action, to furnish, in such manner and to such persons and on such occasions as may be prescribed by rules of court, such particulars as may be so prescribed of any proceedings of which he knows which are continuing in a country outside Scotland and which are in respect of the marriage in question or may affect the validity of that marriage.

SCHEDULE 2

General

Schedule 2 is introduced by clause 7 and applies only to actions begun in Scotland after the Bill comes into operation.

Paragraph 1

Paragraph 1 implements recommendation 26 (para. 141) of the Report. It imposes a duty on the pursuer and any person who has entered appearance in any 'relevant action' to disclose to the court certain proceedings which are continuing in a country outside Scotland and which concern the marriage in question in the Scottish action. A 'relevant action' is an action for divorce, separation, declarator of marriage, or declarator of nullity of marriage (paragraph 6(1) of the Schedule). The duty continues up to the beginning of the proof in the Scottish action; the connotation of 'proof' is restricted by paragraph 6(1) (*a*) (see explanatory note thereon). Certain consequences of a breach of this duty are set out in paragraph 3(3).

Mandatory sists

2. Where before the beginning of the proof in any action for divorce which is continuing in the Court of Session it appears to the Court (whether as a result of information furnished in pursuance of the preceding paragraph or otherwise) that in respect of the marriage in question proceedings for divorce or nullity of marriage are continuing in a specified country, it shall subject to paragraph 4(2) below be the duty of the Court then—

(*a*) to enquire—

(i) whether the parties to the marriage have resided together after the marriage was contracted; and

(ii) whether the place where they resided together when the action in the Court was begun or, if they did not then reside together, where they last resided together before the date on which that action was begun is in the specified country in question; and

(iii) whether either of the said parties was habitually resident in that country throughout the year ending with the date on which they last resided together before the date on which that action was begun;

and

(*b*) if the Court is satisfied that all of those questions fall to be answered in the affirmative, to sist the action before it.

Schedule 2 (*continued*)

Paragraph 2

1. Paragraph 2, implementing recommendation 28 (para. 154) of the Report, provides for a 'mandatory sist' procedure to resolve conflicts of consistorial jurisdiction within the British Isles. Under the paragraph, the court is required to sist (i.e. to hold in suspense) a Scottish divorce action if it appears to the court that proceedings for divorce or nullity are pending in another part of the British Isles and if the conditions specified in sub-paragraph (*a*) are satisfied. The court's duty to sist arises even if no application is made to the court for that purpose.

2. The procedure for the sist of the Scottish divorce action must be completed before the beginning of the proof on the merits: (see para. 6(1) as to the meaning of 'proof'). Thereafter the duty to sist the action under paragraph 2 lapses.

3. Under clause 1(3) of the Bill, where divorce or nullity proceedings are pending in another part of the British Isles when the Bill comes into operation, the Court of Session cannot entertain an action for divorce in respect of the same marriage after that date until the pending proceedings have been disposed of.

4. Paragraph 4(2) of Schedule 2 relieves the Scottish court of the duty to sist a divorce action a second time under paragraph 2.

5. See para. 6(1) of the Schedule as to the meaning of 'specified country'.

Discretionary sists

3.—(1) Where before the beginning of the proof in any relevant action which is continuing in the Court of Session or in a sheriff court, it appears to the court concerned (whether as a result of information furnished in pursuance of paragraph 1 above or otherwise)—

(*a*) that any other proceedings which are in respect of the marriage in question or may affect the validity of that marriage are continuing in a country outside Scotland, and

(*b*) that the balance of fairness (including convenience) as between the parties to the marriage in question is such that it is appropriate for those other proceedings to be disposed of before further steps are taken in the action in the said court,

the court may then if it thinks fit sist that action.

(2) The preceding sub-paragraph is without prejudice to the duty imposed on the Court of Session by paragraph 2 above.

(3) If, at any time after the beginning of the proof in any relevant action which is pending in the Court of Session or a sheriff court, the court concerned is satisfied that a person has failed to perform the duty imposed on him in respect of the action and any such other proceedings as aforesaid by paragraph 1 above, sub-paragraph (1) of this paragraph shall have effect in relation to the relevant action and the other proceedings as if the words 'before the beginning of the proof' were omitted; but no action in respect of the failure of a person to perform such a duty shall be competent.

Schedule 2 (*continued*)

Paragraph 3

1. *Sub-paragraph* (1) implements recommendation 24 (para. 139) of the Report and provides a discretionary power for the court to sist a 'relevant action' (see paragraph 6(1)) where proceedings in respect of the same marriage or affecting its validity are continuing outside Scotland. The discretionary power of sist can be exercised at any time up to the beginning of the proof (see explanatory note 2 to paragraph 2). Thereafter, the discretionary power can be exercised only under sub-paragraph (3). The discretionary power to sist can be exercised even though no application is made to the court for that purpose. Rules of court will specify when proceedings in another country are 'continuing' (paragraph 6(2) of Schedule 2).

2. *Sub-paragraph* (2) makes it clear that sub-paragraph (1) does not militate against the operation of paragraph 2 under which, in the circumstances there specified, the imposition of a sist is mandatory.

3. *Sub-paragraph* (3) implements recommendation 26 (para. 141) of the Report and provides for certain consequences which follow from the breach by a person of the duty imposed by paragraph 1. If the breach of duty is not discovered until after the beginning of the proof in the Scottish action, the duty to sist the action under paragraph 2 has by then lapsed; and, but for this sub–paragraph, the discretionary power to order a sist under sub-paragraph (1) of this paragraph would also lapse. This sub-paragraph, however, keeps the latter power alive in these circumstances — i.e. when there has been a breach of the paragraph 1 duty. That duty can arise only in relation to proceedings in another country which the pursuer, or a person entering appearance, knows of before the beginning of the proof. No civil remedy is to be available to any person as a result of a breach of the duty to disclose.

Supplemental

4.—(1) Where an action is sisted in pursuance of paragraph 2 or 3 above, the court may if it thinks fit, on the application of a party to the action, recall the sist if it appears to the court that the other proceedings by reference to which the action was sisted are sisted or concluded or that a party to those other proceedings has delayed unreasonably in prosecuting those other proceedings.

(2) Where an action has been sisted in pursuance of paragraph 2 above by reference to some other proceedings, and the court recalls the sist in pursuance of the preceding sub-paragraph, the court shall not again sist the action in pursuance of the said paragraph 2.

Schedule 2 (*continued*)

Paragraph 4

1. *Sub-paragraph* (1) implements recommendation 29 (para. 156) and provides for the court to have a discretion in certain circumstances, on the application of a party in the Scottish action, to recall a sist ordered under paragraph 2 or 3 of the Schedule.

2. *Sub-paragraph* (2) implements recommendation 30 (para. 156) of the Report and provides that where a mandatory sist of a Scottish divorce action has been ordered by the court under paragraph 2 and is subsequently recalled, the court cannot again sist the action under that paragraph.

5.—(1) The provisions of sub-paragraphs (2) and (3) below shall apply where an action for any of the following remedies, namely, divorce, separation and declarator of nullity of marriage, is sisted by reference to proceedings in a specified country for any of those remedies; and in this paragraph—

'custody' includes access to the child in question;

'the other proceedings', in relation to any sisted action, means the proceedings in a specified country by reference to which the action was sisted;

'relevant order' means an interim order made by virtue of any of the enactments or rules of law specified in Part I of Schedule 1 to this Act; and

'sisted' means sisted in pursuance of this Schedule.

(2) Where an action such as is mentioned in sub–paragraph (1) above is sisted, then, without prejudice to the effect of the sist apart from this paragraph,—

(*a*) the court shall not have power to make a relevant order in connection with the sisted action except in pursuance of paragraph (*c*) of this sub-paragraph; and

(*b*) subject to the said paragraph (*c*), any relevant order made in connection with the sisted action shall (unless the sist or the relevant order has been previously recalled) cease to have effect on the expiration of the period of three months beginning with the date on which the sist comes into operation; but

(*c*) if the court considers that as a matter of necessity and urgency it is necessary during or after that period to make a relevant order in connection with the sisted action or to extend or further extend the duration of a relevant order made in connection with the sisted action, the court may do so, and the order shall not cease to have effect by virtue of paragraph (*b*) above.

(3) Notwithstanding anything in sub–paragraph (2) above, where any action such as is mentioned in sub-paragraph (1) above is sisted and at the time when the sist comes into operation, an order is in force, or at a subsequent time an order comes into force, being an order made in connection with the other proceedings and providing for any of the following four matters, namely periodical payments for a spouse of the marriage in question, periodical payments for a child, the custody of a child, and the education of a child, then, as from the time when the sist comes into operation (in a case where the order is in force at that time) or (in any other case) on the coming into force of the order,—

Schedule 2 (*continued*)

Paragraph 5

1. Paragraph 5 implements recommendations 31 and 32 (para. 164) of the Report and deals with the effect of a sist on interim orders made in connection with a Scottish action, and on the court's power to make such orders. The provisions of paragraph 5 apply only where a Scottish action for divorce, separation or declarator of nullity of marriage is sisted by reference to proceedings elsewhere in the British Isles for divorce, separation or nullity.

2. *Sub-paragraph* (1) defines certain terms used in paragraph 5. In particular it defines, by reference to Part I of Schedule 1, the types of interim order which may be affected by a sist. These are called 'relevant orders'. Under the Matrimonial Proceedings (Children) Act 1958, s. 14(2), 'custody' includes access to a child and this meaning is preserved in the Bill.

3. *Sub-paragraph* (2) provides that where a Scottish action for divorce, separation or declarator of nullity is sisted under the Schedule by reference to proceedings for divorce, separation or nullity in another part of the British Isles, the Scottish court may not make any of the relevant orders (except in an emergency: sub-paragraph (2) (*c*)). Any such order already may continue in force for a maximum period of three months, but (if still in force) it then ceases to have effect, unless the sist has been recalled.

(*a*) any relevant order made in connection with the sisted action shall cease to have effect in so far as it makes for a spouse or child any provision for any of the said matters as respects which the same or different provision for that spouse or child is made by the other order; and

(*b*) the court shall not have power in connection with the sisted action to make a relevant order containing for a spouse or child provision for any of the matters aforesaid as respects which any provision for that spouse or child is made by the other order.

(4) Nothing in this paragraph affects any power of a court—

(*a*) to vary or recall a relevant order in so far as the order is for the time being in force; or

(*b*) to enforce a relevant order as respects any period when it is or was in force; or

(*c*) to make a relevant order in connection with an action which was, but is no longer, sisted.

Schedule 2 (*continued*)

Paragraph 5 (*continued*)

4. *Sub-paragraph* (3)(*a*) applies where a relevant order has been made by the Scottish court before the Scottish action is sisted and if an order dealing with any of four specified matters is made in the 'other proceedings'. If the latter order takes effect before the sist, the Scottish order, so far as it relates to the same matters, ceases to have effect at the time when the sist comes into operation. If the order in the 'other proceedings' takes effect after the Scottish action is sisted, the Scottish order, so far as it relates to the same matter, ceases to have effect when the other order comes into force. For example, that part of a Scottish order providing for periodical payments for a spouse ceases to have effect if the other order makes any provision for payments to that spouse.

5. Under *sub-paragraph* (3)(*b*), once an order has been made in the 'other proceedings', the emergency power (sub-paragraph (2)(*c*)), ceases to be exercisable by the Scottish court in connection with the sisted action in regard to the matter covered by the order in those 'other proceedings'. For example, if the order in the 'other proceedings' provides for periodical payments to be made for a spouse, the emergency power of the Scottish court to make an order for periodical payments for that spouse can no longer be exercised.

6. *Sub-paragraph* (4) preserves such powers as the Scottish court may have to vary, recall or enforce a relevant order, and makes it clear that when a sist of a Scottish action is recalled the court's powers to make relevant orders are no longer restricted by paragraph 5.

6.—(1) In this Schedule—

'relevant action' means an action for any of the following remedies, namely, divorce, separation, declarator of marriage and declarator of nullity of marriage; and

'specified country' means any of the following countries, namely, England and Wales, Northern Ireland, Jersey, Guernsey and the Isle of Man (the foregoing reference to Guernsey being treated as including Alderney and Sark);

and for the purposes of this Schedule—

(*a*) in any action in the Court of Session or a sheriff court neither the taking of evidence on commission nor a separate proof relating to any preliminary plea shall be regarded as part of the proof in the action; and

(*b*) any such action is continuing if it is pending and not sisted.

(2) Any reference in this Schedule to proceedings in a country outside Scotland is a reference to proceedings in a court in such a country and to any other proceedings in such a country which are of a description prescribed for the purposes of this sub-paragraph by rules of court; and provision may be made by rules of court as to when proceedings of any description in such a country are continuing for the purposes of this Schedule.

Schedule 2 (*continued*)

Paragraph 6

1. *Sub-paragraph* (1) defines certain terms for the purposes of the Schedule. 'Relevant action' is defined for the purposes of paragraphs 1 and 3. 'Specified country' is defined for the purposes of paragraphs 2 and 5. The reference to Guernsey includes Alderney and Sark to cover cases where proceedings are continuing in Guernsey, and the parties had resided together in either Alderney or Sark, since all proceedings relating to Alderney and Sark take place in Guernsey.

2. *Sub-paragraph* (1)(*a*) provides that neither the taking of evidence on commission nor a separate proof relating to a preliminary plea is to be regarded as part of the proof in an action. The mandatory duty and discretionary power of the court to sist an action will normally lapse, under paragraphs 2 and 3(1) of the Schedule respectively, at the beginning of the proof. But the possibility of a sist will not be lost merely by the fact that the evidence of a witness has to be taken on commission, nor by the taking of a preliminary plea on which a separate proof is necessary e.g. a plea challenging the court's jurisdiction to entertain the action, or a plea denying the validity, existence or subsistence of the marriage.

3. *Sub-paragraph* (1)(*b*) defines 'continuing'.

4. *Sub-paragraph* (2) implements recommendation 27 (para. 143) and provides that rules of court may extend the application of paragraphs 1 and 3 of Schedule 2 to non-judicial proceedings in a country outside Scotland. It also provides for rules of court to specify when proceedings in respect of a relevant marriage or which may affect the validity of the marriage are 'continuing' in a country outside Scotland.

Section 8.

SCHEDULE 3

CONSEQUENTIAL AMENDMENTS

1907 c. 51. 1. In section 6 of the Sheriff Courts (Scotland) Act 1907, at the beginning, there shall be inserted the words 'Subject to section 2 of the Consistorial Causes (Jurisdiction) (Scotland) Act 1972'.

1938 c. 50. 2. In section 5 of the Divorce (Scotland) Act 1938, in subsection (1), after the words 'death of the other party, and' there shall be inserted the words 'subject to subsection (3) of this section'; and at the end of the said section 5 there shall be inserted the following subsections:

'(3) In proceedings on any such petition the court shall have jurisdiction to entertain the petition if, and only if,—

(*a*) the petitioner is domiciled in Scotland on the date when the proceedings are begun, or was habitually resident there throughout the period of one year ending with that date; or

(*b*) the person whose death is sought to be presumed was domiciled in Scotland on the date on which he was last known to be alive, or had been habitually resident there throughout the period of one year ending with that date.

(4) For the purposes of the last foregoing subsection a woman's domicile shall be determined without regard to any rule of law providing for her domicile at any time to be the same as that of her then husband.'

EXPLANATORY NOTES

SCHEDULE 3

Schedule 3, introduced by clause 8(7), contains consequential amendments to existing legislation. The amendment to section 6 of the Sheriff Courts (Scotland) Act 1907 is consequential to clause 3 of the Bill. The amendments to section 5 of the Divorce (Scotland) Act 1938 are consequential to clause 2.

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