



The Law Commission and The Scottish Law Commission

**(LAW COM. No. 146)
(SCOT. LAW COM. No. 96)**

PRIVATE INTERNATIONAL LAW

**POLYGAMOUS MARRIAGES
CAPACITY TO CONTRACT A POLYGAMOUS
MARRIAGE AND RELATED ISSUES**

*Presented to Parliament by the Lord High Chancellor and the Lord Advocate
by command of Her Majesty.*

August 1985

LONDON

HER MAJESTY'S STATIONERY OFFICE

£5.40 net

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POLYGAMOUS MARRIAGES

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
PART I: INTRODUCTION	1.1 -1.6	1
PART II: CAPACITY TO CONTRACT A POLYGAMOUS MARRIAGE	2.1 -2.34	4
A. The present law	2.1 -2.12	4
1. England and Wales	2.1 -2.10	4
(a) The choice of law rule	2.1 -2.3	4
(b) The internal rules	2.4 -2.10	5
(i) Marriages celebrated on or before 31 July 1971	2.4	5
(ii) Marriages celebrated after 31 July 1971	2.5 -2.10	5
2. Scotland	2.11-2.12	8
B. Defects in the present law	2.13-2.16	9
1. England and Wales	2.13-2.15	9
2. Scotland	2.16	10
C. Our proposals for reform	2.17-2.34	10
1. The general principle which we recommend	2.17	10
2. The application of the general principle to mar- riages celebrated before the proposed legislation comes into force: English law	2.18-2.31	11
(a) Introduction	2.18-2.19	11
(b) Marriages that fall within the scope of <i>Hussain</i> <i>v. Hussain</i>	2.20-2.21	12
(c) Marriages that fall outside the scope of <i>Hus-</i> <i>sain v. Hussain</i>	2.22-2.31	13
(i) Nullity decrees	2.23	13
(ii) Subsequent marriage	2.24-2.26	13
(iii) Property rights, etc.	2.27	14
(iv) Legitimacy	2.28	14
(v) Wills	2.29-2.31	15
3. The application of the general principle to mar- riages celebrated before the proposed legislation comes into force: Scots law	2.32	17
4. Summary of our recommendations: England and Wales	2.33	17
5. Summary of our recommendations: Scotland	2.34	18
Part III: THE CONCEPT OF THE POTENTIALLY POLYGAMOUS MARRIAGE	3.1 -3.10	19
A. Introduction	3.1	19
B. England and Wales	3.2 -3.6	19
C. Scotland	3.7 -3.9	22
D. Consequential legislative amendments	3.10	24

PART IV: ACTUALLY POLYGAMOUS MARRIAGES . .	4.1 –4.28	25
A. Introduction	4.1	25
B. Capacity of English or Scottish domiciliaries to enter into an actually polygamous marriage	4.2 –4.9	25
1. England and Wales	4.2 –4.8	25
(a) The present law	4.2 –4.7	25
(i) The choice of law rules	4.2 –4.3	25
(ii) The internal rule	4.4 –4.7	26
(b) our view	4.8	27
2. Scotland	4.9	27
C. The effect of an actually polygamous marriage on a prior marriage	4.10–4.24	27
1. England and Wales	4.10–4.21	27
2. Scotland	4.22	32
3. Conclusion	4.23–4.24	32
D. Future Legislation	4.25–4.26	34
E. Miscellaneous matters	4.27–4.28	34
 Part V: SUMMARY OF RECOMMENDATIONS	 5.1 –5.3	 36
 Appendix A: Draft Polygamous Marriages Bill with Ex- planatory Notes		 39
 Appendix B: List of persons and organisations who submit- ted comments on Working paper No. 83; Con- sultative Memorandum No. 56		 66

POLYGAMOUS MARRIAGES

Summary In this joint report the Law Commission and the Scottish Law Commission recommend that men and women domiciled in England and Wales or in Scotland should not lack capacity to contract a marriage which is in fact monogamous merely because it is celebrated in polygamous form. A draft Bill and explanatory notes on its clauses accompany the report. The draft legislation contains separate provisions for the two jurisdictions reflecting differences in the way the law of England and Wales and that of Scotland have developed, and it extends to existing marriages only in respect of English law. The report also contains a recommendation to ensure that under Scots law, as under the present English law, the same legal effect is given to all marriages which are in fact monogamous. Although the report makes no recommendations relating to actually polygamous marriages, it canvasses some of the problems to which they may give rise.

THE LAW COMMISSION

AND

THE SCOTTISH LAW COMMISSION

Items XIX of the Second Programme and XXI of the Third Programme of the Law Commission

Items 14 of the Second Programme and 15 of the Third Programme of the Scottish Law Commission

POLYGAMOUS MARRIAGES

Capacity to contract a polygamous marriage and related issues

To the Right Honourable The Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain and the Right Honourable The Lord Cameron of Lochbroom, Q.C., Her Majesty's Advocate

PART I

INTRODUCTION

1.1 This joint report of the Law Commission and the Scottish Law Commission deals with a number of problems relating to polygamous marriages, and in particular to the law relating to capacity to enter such marriages. It has been the practice of the Law Commission and the Scottish Law Commission, when examining problems arising in the field of private international law, to do so wherever practicable either as a joint exercise or, at least, in very close co-operation. The matters under review in this report are no exception. We have reached agreement on the main reforms which we wish to recommend and the draft Bill appended to this report¹ contains legislative proposals for both jurisdictions. We attach importance to rules involving private international law issues being essentially the same throughout the United Kingdom wherever possible and we hope that serious consideration will be given to the question of extending our proposals to Northern Ireland.

1.2 We published a joint consultative document² dealing with the subject matter of this report on 13 September 1982. This had been preceded by an informal limited consultation undertaken by the Law Commission at the end of 1979 with a range of individuals and organisations, including government departments, those concerned with judicial issues arising in the field of polygamous marriages, legal practitioners and those with detailed information

¹ See Appendix A. For the subsidiary matters on which the two Commissions have arrived at different conclusions, see paras. 2.33(b) and 3.6 (England and Wales) and paras. 2.34(b) and 3.7 (Scotland).

² Law Commission Working Paper No. 83; Scottish Law Commission Consultative Memorandum No. 56 (referred to hereafter as the "consultative document").

as to how the immigrant communities, in particular, have been affected by this area of the law.³ In the light of the comments received on this first consultation, the preliminary view was formed that reform of this area of the law was desirable. This general conclusion was supported by all those who commented on our joint consultative document. A list of such commentators is to be found in Appendix B; and we are most grateful to them for the comments, advice and assistance which they have provided.

1.3 In the consultative document we provided both a detailed analysis of the present state of the law in England and Wales and in Scotland and a full account of the practical difficulties which had arisen in the operation of the law. We do not think it necessary to repeat that detailed account in this report, especially as the general dissatisfaction with the state of the law which we found on the preliminary consultation in 1979 was mirrored in the comments received on consultation.

1.4 In this report we use the expression "polygamous marriage" to signify not only an actually polygamous marriage (i.e., a union in which either party has more than one spouse) but also a marriage which is "potentially polygamous"—that is to say, one which, though in fact monogamous, is celebrated in a form which permits either party⁴ to take an additional spouse⁵.

1.5 In the consultative document we considered four main issues. These were:

- (i) The rules governing capacity to contract a polygamous marriage.
- (ii) The continued existence in the law, generally, of the concept of the potentially polygamous marriage.
- (iii) The choice of law rules relating in general to capacity to marry and in particular to capacity to enter into a polygamous marriage.
- (iv) The reform of the law of domicile.

This report is concerned only with the first two of these issues. So far as the third issue is concerned, our provisional conclusion⁶ was that the choice of law rules relating to capacity to enter into a polygamous marriage were more appropriate for examination as a facet of choice of law rules relating to marriage generally. There were no dissent from this view on consultation and we have now published a joint consultation paper examining those rules.⁷ As to reform of the law of domicile, we expressed the view in the consultative document that a general review of the law of domicile is now opportune and that any practical problems relating to domicile which arise from the law as to capacity to enter into a polygamous marriage should be examined in that context. On this topic also the two Commissions have now published a consultation paper.⁸

³ *Ibid.*, para. 2.13.

⁴ In practice it is normally the man who has capacity to take another spouse; polyandry is rare.

⁵ Any marriage which is celebrated in polygamous form is regarded as a polygamous marriage—being commonly, but not necessarily, one in which the ceremony takes place in accordance with the rules of the Muslim religion.

⁶ Paras. 5.31 and 6.8.

⁷ Choice of Law Rules in Marriage, Working Paper No. 89; Consultative Memorandum No. 64 (1985).

⁸ The Law of Domicile, Working Paper No. 88; Consultative Memorandum No. 63 (1985).

1.6 In dealing in this report with capacity to contract a polygamous marriage and, more generally, with potentially polygamous marriages, we have adopted the following structure. Part II comprises a brief account of the present law concerning capacity to enter into a polygamous marriage, the Commissions' criticism of that law and their recommendations for its reform. Part III consists of a review of the concept of the potentially polygamous marriage and concludes with our recommendations on the matter. In Part IV certain related issues, which concern actually polygamous marriages, are considered; and Part V contains a summary of the recommendations of the two Commissions. A Draft Bill to give effect to those recommendations, with explanatory notes, is set out in Appendix A.

PART II

CAPACITY TO CONTRACT A POLYGAMOUS MARRIAGE

A. The Present Law

1. *England and Wales*

(a) *The choice of law rule*

2.1 The choice of law rule governing capacity to contract a polygamous marriage abroad⁹ consists of common law principles of English private international law.¹⁰

2.2 There are two theories concerning the nature of the relevant choice of law rule. The traditional and more widely accepted theory is that a polygamous marriage is valid only if each party has capacity to contract the marriage according to the law of his (or her) domicile¹¹ at the time of the marriage.¹² According to the alternative theory,¹³ however, the parties' capacity to marry is determined by the law of their intended matrimonial home.¹⁴ The latter approach was adopted in 1972 by Cumming-Bruce J. in *Radwan v. Radwan* (No. 2).¹⁵

2.3 Although the approach adopted in *Radwan* is not without some support,¹⁶ the great preponderance of judicial¹⁷ and academic¹⁸ opinion favours the dual domicile approach. For the purpose of this report, however, it is unnecessary to consider further the respective merits of the two theories; they will fall

⁹ Every marriage celebrated in England and Wales in accordance with the formalities prescribed by English law is, if valid, necessarily monogamous in character; see the consultative document, para. 2.5.

¹⁰ Although the rules of English internal law relating to capacity to enter into polygamous marriages have been placed on a statutory footing in respect of marriages celebrated after 31 July 1971, specific provision preserves the choice of law rules: see para. 2.6 below.

¹¹ For a brief outline of the relevant aspects of the rules concerning domicile, see the consultative document, paras. 2.8–2.9. For fuller examination of the choice of law rules relating to marriage, see Working Paper No. 89; Consultative Memorandum No. 64 (1985), Part III.

¹² For convenience, the term "orthodox" or "dual domicile" is frequently used in this report to refer to this theory.

¹³ A third approach, namely reference to the law of place of celebration, though supported by Canadian authority (*Kaur v. Ginder* (1958) 13 D.L.R. (2d) 465; *Sara v. Sara* (1963) 36 D.L.R. (2d) 499) has been rejected in this country: *Ali v. Ali* [1968] P. 564.

¹⁴ If there is no evidence of the parties' intention, there is authority for applying the law of the husband's ante-nuptial domicile; *De Reneville v. De Reneville* [1948] P. 100, 114. However, whether such a rule would be adopted now that a married woman may have a domicile independent of her husband's (Domicile and Matrimonial Proceedings Act 1973, s.1) is open to doubt.

¹⁵ [1973] Fam. 35.

¹⁶ See e.g., Stone, "Capacity for Polygamy—Judicial Rectification of Legislative Error", [1983] Family Law 76, 80; Carter, "Classification of a marriage as monogamous or polygamous: a point of statutory interpretation", 1982 B. Y. B. I. L. 298, 301–2; Jaffey, "The Essential Validity of Marriage in the English Conflict of Laws", (1978) 41 M. L. R. 38, 38–43, who has pointed out that *Radwan* was the only case in which the issue had arisen directly and expressly for decision; that it did not conflict with the *ratio decidendi* of any previous decision; that it dealt with the contrary arguments; that the reasoning is clear; and that the justice of the result in the circumstances of the case is not questioned. And in a New Zealand case it was stated, obiter, that capacity to enter into a marriage in the Egyptian consulate in Athens between a man domiciled in Egypt and a woman domiciled in New Zealand was not governed by the law of New Zealand: *Hassan v. Hassan* [1978] 1 N. Z. L. R. 385, 389–390.

for consideration in the context of our work on the choice of law rules relating to marriage generally.¹⁹

(b) *The internal rules*

(i) *Marriages celebrated on or before 31 July 1971*

2.4 It has been widely assumed that at common law, the rules of which govern marriages celebrated on or before 31 July 1971, a person domiciled in England and Wales cannot (in the eyes of English law) validly contract a marriage abroad which, under the *lex loci celebrationis*, is either actually or potentially polygamous.²⁰ On the basis of the dual domicile test, these rules would apply in all circumstances; if *Radwan v. Radwan* (No. 2)²¹ is correct, they would not apply if the law of the intended matrimonial home permitted both parties to enter into such a marriage

(ii) *Marriages celebrated after 31 July 1971*

2.5 Statutory rules governing the capacity of English domiciliaries to enter into a polygamous marriage after 31 July 1971 were enacted by section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 and are now

¹⁷ Authorities before *Radwan* which appear to support the dual domicile theory include *Re Ullee* (1885) 53 L.T. 711, 712; *Crowe v. Kader* [1968] W.A.R. 122; and see *Bethell v. Bethell* (1888) 38 Ch. D. 220; *Risk v. Risk* [1951] P. 50. In the following cases subsequent to *Radwan*, no reference was made to that decision, and English law was applied as the law of the domicile of the man: *Zahra v. Visa Officer, Islamabad* [1979–80] Imm. A.R. 48; *Morris v. Morris*, unreported, 22 April 1980 (Wood J.); *Hussain v. Hussain* [1983] Fam. 26 (though *Radwan* was cited in argument (*ibid.*, 28)). In *Lawrence v. Lawrence* (C.A.), *The Times*, 27 March 1985, the dual domicile theory was described as “the traditional and still prevalent view”.

¹⁸ See, e.g., Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), pp. 316–319 (where it is submitted that *Radwan* was wrongly decided); Cheshire and North, *Private International Law*, 10th ed. (1979), pp. 349–350; Karsten, (1973) 36 M.L.R. Pearl, [1973] C.L.J. 43; Wade, (1973) 22 I.C.L.Q. 571. It might be noted that in *Radwan* Cumming-Bruce J. rather expected an unfavourable reaction to his judgment because he ended it as follows: “I do not think that this branch of the law relating to capacity for marriage is quite as tidy as some very learned authors would have me believe, and I must face their displeasure with such fortitude as I can command” ([1973] Fam. 35, 54).

¹⁹ Working Paper No. 89; Consultative Memorandum No. 64 (1985).

²⁰ The Law Commission took this view of the law in 1971 (see Law Com. No. 42, para. 18), as did the Lord Chancellor during the passage through the House of Lords of the Bill which became the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (see *Hansard* (H.L.), 15 June 1972, vol. 331, cols. 1192–3). It has been suggested, however, that this view of the law is erroneous and that a better view, which is based on principle and policy and is suggested by authority, is that:

“(i) a marriage celebrated in a monogamous country is monogamous regardless of the husband’s domicile and the intended matrimonial residence and (ii) a marriage celebrated in a polygamous country is polygamous if in addition the husband is, at its celebration, domiciled in such a country or, possibly, if the intended matrimonial residence is in such a country but (iii) a marriage is monogamous, despite its being celebrated in a polygamous country, if at its celebration the husband is domiciled in a monogamous country, at any rate if the intended matrimonial residence is also in a monogamous country. (Where the law of a country provides for both monogamous and polygamous marriages, and distinguishes them by reference to the form of the ceremony or the religion of the parties, it is treated as a monogamous or polygamous country according to how it treats the marriage in question.)”

See Stone, “Capacity for Polygamy—Judicial Rectification of Legislative Error”, [1983] Family Law 76, 77.

²¹ See para. 2.2 above.

embodied in section 11 of the Matrimonial Causes Act 1973, the relevant parts of which are as follows:

“A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say . . .

(b) that at the time of the marriage either party was already lawfully married; . . .

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other.”

2.6. However, it may be helpful to refer briefly to two preliminary matters which constitute the background to our consideration of section 11. The first is the specific provision (originally in the Nullity of Marriage Act 1971 section 4(1), and now in the 1973 Act, section 14(1), which preserves the existing choice of law rules. It is in the following terms:

“Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11 . . . above shall—

(a) preclude the determination of that matter as aforesaid; or

(b) require the application to the marriage of the grounds . . . there mentioned except so far as applicable in accordance with those rules.”

2.7 The second preliminary matter concerns the abrogation, by the 1972 Act, section 1 (replaced with minor amendments by the 1973 Act, section 47), of the long established common law rule that the parties to an actually or potentially polygamous marriage were not entitled to matrimonial relief granted by an English court.²² Section 47(1) of the 1973 Act provides that:

“A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy.”

2.8 We return now to section 11 of the 1973 Act, the relevant parts of which are set out in paragraph 2.5 above. Before the decision of the Court of Appeal in *Hussain v Hussain*, which we consider in paragraphs 2.9–2.10 below, it was generally assumed that, in consequence of paragraphs (b) and (d) of that section, under English internal law no one domiciled in England and Wales had capacity to enter into a polygamous marriage, even if the marriage was only

²²In *Hussain v Hussain* Ormrod L. J. explained the former principle in the following terms: “. . . the word ‘marriage’, where it appeared in the matrimonial legislation, did not, as a matter of construction, include any kind of ceremony which did not create a monogamous relationship of the kind adopted by Christianity. Consequently, in all the cases before 1972 it was the nature and incidents of the ceremony which were crucial, and these could only be ascertained by reference to the *lex loci celebrationis*”: [1983] Fam. 26, 31.

potentially of that nature.²³ That this assumption was ill founded in relation to potentially polygamous marriages was shown by the *Hussain* case, to the consideration of which we now turn.

2.9 The facts of *Hussain v Hussain* were straightforward. The husband and wife were both Muslims and they married in Pakistan in 1979 in accordance with the Muslim Family Laws Ordinance 1961, i.e., in a form appropriate for polygamous marriages. The marriage was, however, at its inception *de facto* monogamous, and remained so. At the time of the marriage, the wife was domiciled in Pakistan and the husband was domiciled in England. On the subsequent breakdown of the marriage, the wife petitioned for a decree of judicial separation. The husband argued before the Court of Appeal that, because he was domiciled in England and the marriage was potentially polygamous in form, he lacked capacity to contract it by reason of section 11(d) of the 1973 Act and that it was, accordingly, void. However, the Court of Appeal rejected this argument, and held that the marriage was monogamous in law (as well as in fact). Accordingly, the husband did not lack capacity by reason of section 11(d); the marriage was valid; and the wife was entitled to the decree that she sought. Ormrod L. J., who gave the judgment of the court, concluded that had the intention of Parliament been “to prevent persons domiciled in England and Wales from entering into marriages under the Muslim Family Laws Ordinance, or under other similar laws which ‘permit polygamy’, it would have been easy to say so in so many words”;²⁴ and he decided that the language used by the draftsman was, at least, “consistent with”²⁵ the following construction: in the case of persons domiciled in England and Wales, there is no capacity to enter into an actually polygamous marriage because section 11(b) of the 1973 Act renders a person who is already married incapable of marrying again. This means that, although the purpose of section 11(d) is to prevent a person domiciled in England and Wales who is not already married from contracting a polygamous union, whether potentially or actually so, “a marriage can only be potentially polygamous if at least one of the spouses has the capacity to marry a second spouse.”²⁶

2.10 The result of the reasoning referred to in the previous paragraph is that, because a man domiciled in England lacks capacity to take more than one wife (by reason of section 11(b) of the 1973 Act) and a wife is not allowed by Muslim law to have more than one husband, the marriage in *Hussain v Hussain* was not potentially polygamous and so did not fall within section 11(d). On this approach, section 11(d) operates to render void only a marriage between a woman domiciled in England and Wales (who, as she will only have one husband, does not fall within section 11(b)) and a foreign domiciled man whose

²³ See however, n. 20 above.

²⁴ [1983] Fam. 26,32.

²⁵ *Ibid.* Ormrod L. J. pointed out that, had Parliament wished to prevent English domiciliaries from entering into marriages which “permit polygamy”, the expression used in section 47 of the Act, it would have been easy to use the same expression in section 11, and that the difference in the language of the two sections was significant: [1983] Fam. 26, 31–32.

²⁶ *Ibid.*

personal law allows him to have more than one wife.²⁷ In arriving at these conclusions Ormrod L. J. explained that section 1 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (subsequently replaced by section 47 of the 1973 Act), which conferred power upon the English courts to grant matrimonial relief in relation to polygamous marriages, had radically altered the common law rule relating to marriages celebrated in polygamous form. The only question in relation to marriages celebrated after 31 July 1971 was whether the marriage under consideration was valid by English law, and this was a question of capacity.²⁸

2. Scotland

2.11 There is no Scottish case which holds that capacity to marry depends on the law of the intended matrimonial home and the prevailing view is that each party must have capacity to marry by the law of his or her domicile and probably also by the law of the place of celebration.²⁹ The development of the law on polygamous marriages has been broadly similar in Scotland and in England,³⁰ but there is no equivalent in Scotland of section 11 of the Matrimonial Causes Act 1973, with the result that the question of capacity of someone domiciled in Scotland to enter into a polygamous marriage abroad depends on the common law. Just what the common law is on this point is a matter of doubt and uncertainty.

2.12 It may be that the common law in Scotland is to the same effect as English common law has been thought to be³¹ and that, accordingly, a person domiciled in Scotland does not have capacity to enter into a potentially polygamous marriage abroad.³² On the other hand, it may be that the common law in Scotland does not have any rule to this effect.³³ There is, so far as we are aware, no case which provides clear authority for the existence of any such restriction. A rule that a person domiciled in Scotland lacks capacity to enter into a marriage in polygamous form abroad would, as we note below, have great potential for injustice and it may therefore be thought unlikely (particularly in view of the decision of the Court of Appeal in *Hussain v. Hussain*³⁴) that a Scottish court would now be keen to hold such a rule to be part of Scots law. The only safe conclusion on the present law of Scotland on this point is, however, that it is completely undeveloped.

²⁷ See, e.g., Social Security Decision R(SB) 17/84, where this principle was held to be applicable in the context of a claim for supplementary benefit by a woman who in 1981 had entered into a marriage in polygamous form in Pakistan.

²⁸ [1983] Fam. 26, 31. The reasoning in the judgment, as distinguished from its policy, has been criticised; see n. 41 below.

²⁹ See Anton, *Private International Law*, p. 278.

³⁰ See Anton, *Private International Law*, pp. 267–273; Clive, *Husband and Wife*, 2nd ed. (1982), pp. 128–135.

³¹ See para. 2.2 above.

³² There is an *obiter dictum* by Lord Mackay in *Lendrum v. Chakravarti* 1929 S.L.T. 96, 99 to the effect that a woman domiciled in Scotland could not enter into a marriage which was “not a Christian marriage or a monogamous one.”

³³ The dictum of Lord Mackay in *Lendrum v. Chakravarti* 1929 S.L.T. 96, 99 cannot be regarded as settling the law.

³⁴ [1983] Fam. 26.

B. Defects in the present law

1. England and Wales

2.13 The ambit of *Hussain v. Hussain*³⁵ is limited to marriages entered into after 31 July 1971 by men domiciled in England and Wales. Any other marriage entered into abroad in a form appropriate for polygamous marriages by a person who has an English domicile (and possibly also by a person who has a Scottish domicile) is apparently void, even though both spouses were unmarried at the time.³⁶ The practical effect of such a rule may be illustrated by the following example. An unmarried man of the Muslim religion and of Bangladeshi origin comes to this country to reside. In 1969, on a visit to Bangladesh, he marries in a mosque a woman of the same faith who is domiciled there. He then returns here with his wife, and never purports to take a second wife. If at the date of the marriage the man was domiciled in Bangladesh, the marriage, though potentially polygamous, is valid. However, if the husband had acquired a domicile here before he married, the marriage will, under the common law rules, be void.³⁷ A whole range of practical consequences flow from the invalidity of the marriage. They cover such matters as succession, taxation, the provision of social security benefits, matrimonial relief, legitimacy, citizenship and immigration. We canvassed these at length in Part IV and Part VI of our consultative document, and we remain of the view there expressed, which has been fortified by consultation, that the rule of invalidity has created a range of serious practical difficulties in these fields. It is true that the couple can regularise their matrimonial position by going through a further civil marriage ceremony in this country, but we do not consider that this constitutes a satisfactory solution to the difficulties: such a procedure is likely to be offensive and embarrassing to people who may well have believed that they have been validly married for some considerable period of time.³⁸ We have accordingly arrived at the conclusion that the present law is unsatisfactory and that reform is necessary.

2.14 To turn now to marriages which fall within *Hussain v. Hussain*, there is no doubt that the interpretation placed upon section 11 in that case has greatly alleviated the major social difficulties to which this area of the law had been thought to give rise. The decision has, however, produced the anomalous situation that some potentially polygamous marriages (namely, those entered into after 31 July 1971 by men domiciled in England and Wales) are valid, and some are not. For example, section 11 operates to invalidate a marriage

³⁵ (1983] Fam. 26; see paras. 2.9–2.10 above. The decision is not limited to Muslim marriages: see n. 5 above.

³⁶ See paras. 2.5 and 2.11–2.12 above.

³⁷ It was held, in the context of the question whether the court had jurisdiction at common law to grant matrimonial relief in respect of a marriage which at its inception was potentially polygamous, that the *subsequent* acquisition by both parties of an English domicile of choice converted the marriage into a *de jure* monogamous union: *Ali v. Ali* [1968] P. 564. However, this principle could have no bearing on the case where the husband was already domiciled in England and Wales at the date of the marriage. (By statute, the court now has jurisdiction to grant relief in respect of both actually and potentially polygamous marriages: see para. 2.7 above.)

³⁸ Notwithstanding that a formula is available for such ceremonies which avoids the use of the expressions “bachelor” and “spinster”. For a discussion of the possible “cure” of the invalidity of the marriage by means of a civil ceremony, see the consultative document, para. 4.39. On consultation we were informed by the General Register Office that very few such ceremonies had taken place.

entered into after 31 July 1971 by a woman³⁹ domiciled in England and Wales with a man who is domiciled in a country whose law permits him to have more than one wife, but not a marriage contracted by a man domiciled in England and Wales. This would seem to be discriminatory and therefore unsatisfactory. Ormrod L.J. suggested that “. . . Parliament, having decided to recognise polygamous marriages as marriages for the purpose of our matrimonial legislation, would think it right to preserve the principle of monogamy for persons domiciled here.”⁴⁰ Section 11 preserves that principle for husbands, on the Court of Appeal’s interpretation, by categorising the marriage as being of a legally monogamous character; but, if it is the wife who was domiciled here, and the husband was domiciled at the date of the marriage in a country under whose law he may have more than one wife, her marriage is void by virtue of that provision, even if it has always been monogamous in fact.

2.15 We have considered whether, in view of *Hussain*, we should limit our recommendations to the validation of potentially polygamous marriages which are outside the scope of that decision. We have, however, concluded that the legislation which we propose should not be so limited. This is because the conclusion reached by the Court of Appeal in that case, though we welcome it in general policy terms, constitutes an interpretation of the law quite different from that on which advice had been given by lawyers, government officials and others for the previous decade and different from the views expressed in Parliament as to the meaning and effect of the relevant legislation during the debates on the relevant clause.⁴¹ Further litigation on this issue is always possible and uncertainty in rules of law, particularly in those which relate to status, is undesirable.⁴² We have accordingly arrived at the conclusion that the rules governing capacity to enter all polygamous marriages should be placed beyond doubt by legislation.

2. *Scotland*

2.16 The defect in the law of Scotland on the capacity of a person domiciled in Scotland to enter into a marriage abroad in polygamous form is that it is undeveloped and uncertain. We consider that it would be desirable to clarify the law by legislation.

C. Our proposals for reform

1. *The general principle which we recommend*

2.17 We provisionally proposed in the consultative document that every

³⁹ [1983] Fam. 26, 32. In *Zaal v. Zaal* (1983) 4 F.L.R. 284, which was decided before *Hussain v. Hussain*, Bush J. assumed, in the context of a wife’s petition for the dissolution of a potentially polygamous marriage into which she had entered in 1975 when domiciled in England, that the marriage was valid. However, the issue in the case was whether a foreign divorce should be recognised in England, and the question of the validity of the marriage does not appear to have been raised.

⁴⁰ *Ibid*

⁴¹ See the consultative document, para 2.11.

⁴² For a detailed criticism of the reasoning in *Hussain v. Hussain*, see Carter, “Classification of a marriage as monogamous or polygamous: a point of statutory interpretation”, 1982 B.Y.B.I.L. 298; Schuz, “When is a Polygamous Marriage not a Polygamous Marriage?”, (1983) 46 M.L.R. 653, 656–7.

man and woman domiciled in England and Wales⁴³ or in Scotland⁴⁴ should have capacity to enter into a marriage outside the United Kingdom which, though celebrated in a form appropriate to polygamous marriages, is not actually polygamous. On consultation, this proposal was widely supported; indeed, no commentator expressed opposition and we now so recommend. In view of the differences which obtain at present between English⁴⁵ and Scots law,⁴⁶ we deal separately with the effect to be given to this general recommendation in the two jurisdictions.

2. *The application of the general principle to marriages celebrated before the proposed legislation comes into force: English law*

(a) *Introduction*

2.18 For the reasons which we have outlined,⁴⁷ we proposed in the consultative document that the reform referred to in the preceding paragraph should extend to marriages celebrated before, as well as to those which took place on or after, the date (to which we shall often refer, for convenience, as “the commencement date”) on which the legislation that we recommend should come into force. In general, there was no dissent from this aspect of our proposal, although one or two commentators suggested minor qualifications in relation to its application. We made no attempt in the consultative document to develop detailed rules for the operation of the retrospective effect of our proposal, and it is accordingly necessary to do so now.

2.19 We have formed the view that marriages celebrated before the commencement date which are the subject matter of *Hussain v. Hussain*—namely, those entered into after 31 July 1971 by men domiciled in England and Wales, or by women so domiciled in relation to a marriage to a man the law of whose domicile permits him to have only one wife⁴⁸—call for different and simpler treatment, so far as the detailed application of the legislation which we recommend is concerned, from existing marriages which are outside the ambit of that decision. This is because, in the light of *Hussain v. Hussain*, marriages covered by that decision are regarded as valid monogamous unions under the present law⁴⁹; other marriages, by contrast, are generally considered to be void,⁵⁰ and it follows, if they are, that the proposed legislation will alter their status. Accordingly, the need arises to determine in relation to those other marriages what

⁴³ Paras. 1.9, 5.2–5.7 and 7.4. The proposal is subject to the qualification that English law as to capacity to marry is applicable under English rules of private international law; see Matrimonial Causes Act 1973, s.14.

⁴⁴ Paras. 6.1–6.4 and 7.4. The two Commissions were firmly of the view that “the law of the two jurisdictions, indeed throughout the United Kingdom, ought to be the same on this issue”; see the consultative document, para. 7.4.

⁴⁵ See paras. 2.1–2.10 above.

⁴⁶ See paras. 2.11–2.12 above.

⁴⁷ See paras. 2.13–2.15 above.

⁴⁸ See paras. 2.9–2.10 above.

⁴⁹ *Ibid.* We consider in paras. 2.20–2.21 below the question whether, since *Hussain v. Hussain* overturned the previous widely held view that section 11(d) of the Matrimonial Causes Act 1973 had not altered the common law rule, the legislation which we recommend should contain saving provisions for the purpose of taking that factor into account.

⁵⁰ See n. 20 above.

should be the consequential effects upon various matters such as the devolution of property upon death, and the legitimacy of children.

(b) *Marriages that fall within the scope of Hussain v. Hussain*

2.20 The construction which the Court of Appeal placed upon section 11(d) of the Matrimonial Causes Act 1973 in *Hussain v. Hussain* undoubtedly overturned the widely held assumption that that section specifically rendered invalid a potentially polygamous marriage entered into after 31 July 1971 by any person domiciled in England and Wales at the date of such marriage.⁵¹ We have accordingly considered whether the legislation which we propose should contain provision for the purpose of preserving rights acquired before the date of that decision; but for the following reasons we have concluded that such provision would not be desirable. In the first place, *Hussain v. Hussain* has been welcomed on all sides,⁵² and we understand that it has since been acted upon by government departments;⁵³ and no suggestion was made to us on consultation or otherwise that it gives rise to the need for provision along the lines to which we have referred. Secondly, the decision will no doubt have been taken into account by private individuals, perhaps on legal advice, in arranging their affairs, and they would not now welcome legislative intervention. As to this consideration, we would illustrate the type of situation which we have in mind by the following hypothetical example:

In 1973 H, a Muslim who has acquired an English domicile, returns to Pakistan on a visit for the purpose of marrying W1, who is domiciled in Pakistan, in a mosque there. Neither party has previously been married.

In 1975 H is advised, in accordance with the view of the law that obtained at the time, that his marriage is not recognised in England and Wales; and in 1976 he marries W2 in a register office in London.

In 1983 H is advised that, in the light of *Hussain v. Hussain*, his marriage to W1 is recognised in this country as valid, and that in consequence his marriage to W2 is void. He accordingly makes a will for the first time making W2 his universal beneficiary, and he files a petition seeking the dissolution of his marriage to W1 with a view to "remarrying" W2 on the grant of a decree.

If the legislation which we recommend were to include provision that, say, a potentially polygamous marriage should be invalid where one of the parties to it has subsequently married another person, H could justifiably complain that his arrangements had been unwarrantably disturbed by a retrospective change of the law for what to him would be the second time.

⁵¹ See para. 2.14 above.

⁵² See, e.g., Schuz, "When is a Polygamous Marriage not a Polygamous Marriage?", (1983) 46 M.L.R. 653, 658.

⁵³ We have ascertained that, in the light of *Hussain v. Hussain*, the Home Office does not now enquire into the domicile of the husband as at the date of the potentially polygamous marriage in the context of an application for registration as a British citizen or for naturalisation. We have been informed, further, that where in such a case representations are made against a decision under the previous practice, that decision will be reconsidered and reversed, if it was based solely on the conclusion that the husband was domiciled in this country. We have also been informed that procedures operated by the relevant departments of the Foreign and Commonwealth Office have been similarly amended.

2.21 One point remains. We believe that, exceptionally, a marriage should not be validated by the proposed legislation if it has been declared void, whether by a decree of nullity granted by a court in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales under the rules which, at the date on which the proposed legislation comes into force, govern the recognition of such annulments.⁵⁴

(c) *Marriages that fall outside the scope of Hussain v. Hussain*

2.22 As we explained in paragraph 2.19 above, detailed provisions are required in relation to marriages which are not covered by *Hussain v. Hussain* for the purpose of dealing with the consequences of the retrospective validation of such marriages by the legislation which we recommend. We turn now to consider in turn each of the relevant issues.

(i) *Nullity decrees*

2.23 We take the view that the principle to which we have referred in paragraph 2.21 above, in relation to marriages which fall within the ambit of *Hussain v. Hussain*, should apply also to marriages outside the scope of that decision; i.e., that a marriage should not be validated by the proposed legislation if it has been declared void, whether by a decree of nullity granted by a court in England and Wales or by an annulment obtained elsewhere and recognised here under the rules which, at the date on which the proposed legislation comes into force, govern the recognition of such annulments.

(ii) *Subsequent marriage*

2.24 Where either of the parties to a potentially polygamous marriage, perhaps acting on advice that the marriage was not recognised as valid in this country, has married another person in, say, a register office in England the retrospective validation of the original union would invalidate the second marriage. In our view to render void by retroactive legislation such a valid marriage would be both wrong in principle and unacceptable in practice; and we accordingly propose that where either party to a potentially polygamous marriage has, before the commencement date, subsequently entered into another marriage with a different partner, the first marriage should remain invalid.

2.25 In one rather unusual kind of situation, however, this principle would appear to call for the creation of an exception. We refer to the case in which the subsequent marriage is celebrated in a polygamous form and recognised as valid in this country. To illustrate: a Muslim immigrant from Pakistan, after acquiring an English domicile, returned to Pakistan on a visit and married a local woman in polygamous form in a mosque there (the marriage being celebrated before August 1971). Subsequently, however, he returns to Pakistan where he becomes domiciled, and, again in a mosque, enters into a marriage

⁵⁴ In Law Com. No. 137; Scot. Law Com. No. 88 (1984) we have recommended new statutory provisions governing the recognition of annulments and that they should be included in a composite Bill governing the recognition of divorces, annulments and legal separations, replacing the Recognition of Divorces and Legal Separations Act 1971.

with a second wife. The second marriage would be regarded here as valid.⁵⁵ We propose that, since in these circumstances the retrospective validation of the first marriage would not render the subsequent marriage invalid, the first marriage should be validated.

2.26 To summarise, the provision which we recommend in respect of potentially polygamous marriages falling outside *Hussain v. Hussain* where either party has, before the commencement date, entered into a subsequent marriage with another partner is that the first marriage should remain invalid in such circumstances, except where the validation of that marriage would not invalidate the subsequent marriage.

(iii) *Property rights, etc.*

2.27 The purpose of our proposals relating to potentially polygamous marriages which were celebrated before the commencement date is to confer upon the parties to such marriages the status of husband and wife by virtue of the ceremony that they have undergone. We do not have in mind that existing property rights should thereby be affected, bearing in mind, in particular, that formidable practical difficulties would be involved in the unravelling of completed transactions based upon the invalidity of the marriage; and we recommend that property rights which have arisen before the commencement date⁵⁶ should be unaffected by the legislation which we propose. Similarly, we propose that the validation of a marriage celebrated before the commencement date should not (i) give rise to or affect entitlement of a benefit (for example, a State pension or one payable under an occupational scheme) in respect of a period before that date⁵⁷ or (ii) affect any tax which relates to such a period. We recommend, finally, that the succession to a title of honour should not be affected by the validation of a marriage which was celebrated before the commencement date.

(iv) *Legitimacy*

2.28 At common law a child of a void marriage is illegitimate. And although the Legitimacy Act 1976, section 1(1),⁵⁸ provides that a child, when ever born, is legitimate if at the time of conception (or of the marriage if later)

⁵⁵ See paras. 2.1—2.3 above.

⁵⁶ Where an interest (including a future interest) has arisen under a will or on an intestacy, the relevant date is that on which the death occurred. Thus, if, for example, one party to a potentially polygamous marriage dies intestate before the commencement date, the other party will not be entitled to an interest in the deceased's estate as a surviving spouse. The survivor may, however, have a right to apply to the court, if the death takes place after 1970 and before 1 April 1976, for maintenance out of the estate or, if the death occurs on or after the latter date, for financial provision on a more generous basis: see the Law Reform (Miscellaneous Provisions) Act 1970, s.6, superseded by the Inheritance (Provision for Family and Dependents) Act 1975, ss.1(1)(a) and 25(4).

⁵⁷ As in the case of property rights, where a benefit arises in respect of a death, the relevant date is that on which the death occurred, whether or not the whole or part of the benefit is payable after the commencement date.

⁵⁸ Re-enacting the Legitimacy Act 1959, s. 2(1). The rule applies only if the father is domiciled in England and Wales when the child is born or, should the father die before the birth, if he was so domiciled at his death: Legitimacy Act 1976, s.1(2).

either or both of the parties reasonably believed the marriage to be valid, it is not clear that a mistake of law falls within the scope of this provision.⁵⁹ If it does not, the belief of those who enter into a void marriage that the marriage is valid will not render their children legitimate; and any child born after both parents have learned that their marriage is, or may be, invalid will not be legitimate under the 1976 Act. In some cases, therefore, the validation of a marriage will legitimise a child of the marriage, and we consider this to be a desirable result. We should emphasise, however, that in accordance with the principle referred to in the previous paragraph, existing property rights will not be affected by the legislation which we propose.⁶⁰ For example, if a party to a void potentially polygamous marriage makes a will in 1969⁶¹ in which he or she gives property to "my children" and dies before the commencement date, the gift will be prima facie construed as relating only to legitimate children. This situation will not be affected by the proposed legislation.

(v) *Wills*

2.29 The general rule⁶² is that a will is automatically revoked by the marriage of the testator.⁶³ This rule does not apply, however, to a void marriage.⁶⁴ It follows that, where a party to a potentially polygamous marriage which is void under the present law has made a will before that marriage, it will be automatically revoked in consequence of the validation of the marriage under the proposed legislation; and we have considered whether special provision should be made for the purpose of avoiding that result.⁶⁵ We have in mind, for example, a situation in which T makes a will in 1967 in which he leaves all his property to B. In 1969 T enters into a potentially polygamous

⁵⁹ See the consultative document, para. 4.31 and the first sentence of para. 4.32. The Law Commission has recommended that, for the avoidance of doubt, a mistake of law should be declared by statute to be capable of founding a belief that a marriage is valid; see its Report on Illegitimacy (1982), Law Com. No. 118, para 14.67 and, at p. 286, clause 35 of the draft Bill annexed to the report.

⁶⁰ Similarly, we propose that the succession to a title of honour should not be affected by the legislation: see the final sentence of para. 2.27 above. (Sect. 1 of the Legitimacy Act 1976 extends to titles of honour, but only as to children born after 28 October 1959: *ibid.*, Sch. 1, para. 4(1).)

⁶¹ Many of the disadvantages of illegitimacy in relation to property were removed by Part II of the Family Law Reform Act 1969, though only, in relation to intestacy, as to deaths which occur after 1969 and to dispositions (including wills) which are made after that year. Under the Act, for example, a testamentary gift to "my children" will, in the absence of a contrary intention, include the testator's illegitimate children (s.15(1)(a)). Again, on the death intestate of either of his parents, an illegitimate child will be entitled to an interest in the estate as if he were legitimate (s.14(1)).

⁶² There are two exceptions, neither of which is material in this context, and it is assumed throughout the discussion in the text that neither is applicable. The first relates to a will from which it appears that at the time it was made the testator expected to marry a particular person and intended that the will should not be revoked by the marriage; see the Wills Act 1837, s.18 as substituted by the Administration of Justice Act 1982 s.18(3) and (4) which replaces (with minor amendments), in relation to wills made after 1982, the Law of Property Act 1925, s.177. The second exception concerns certain appointments made by will; see the Wills Act 1837, s.18 (as amended, in relation to wills made after 1982, by the 1982 Act, s.18(2)).

⁶³ Wills Act 1837, s.18 (as amended by the Administration of Justice Act 1982, s.18(1) in relation to wills made after 1982).

⁶⁴ *Mette v. Mette* (1859) 1 Sw. & Tr. 416.

⁶⁵ The issue arises only in relation to dispositions of property in wills made by testators who die after the commencement date, because the distribution of the estate of a person who dies before that date will be governed by the present law: see n. 57 above.

marriage with W which is void on the ground that T is domiciled here at the time of the marriage. In 1973 T learns that his marriage is void and that accordingly his will has not been revoked by the marriage. However, since at the time T wishes his estate to go to B in accordance with the provisions of his will, he refrains from making a new one. It might be argued that in circumstances of this kind the automatic revocation of T's will on the commencement date would unjustifiably defeat his reasonable belief that on his death his estate will be distributed in accordance with the provisions of the will.

2.30 We have, however, arrived at the view that no special provision is called for in relation to the question referred to in the previous paragraph. First, in many cases a party to a potentially polygamous marriage will not realise that under the present law his marriage may be invalid; and in such cases the validation of the marriage by the proposed legislation will cause the true position to correspond with his belief. Secondly, in some circumstances the existence of a right to apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 may mitigate the effect of the revocation of the will on the commencement date. Thus, in the example referred to in the previous paragraph, if the will is automatically revoked on that date, the testator's wife will become entitled on the death of her husband intestate to a substantial share of his estate; if, on the other hand, provision were made in the proposed legislation that the will is to remain valid, she could apply under the 1975 Act for "such financial provision as it would be reasonable in all the circumstances of the case for a . . . wife to receive, whether or not that provision is required for . . . her maintenance."⁶⁶ Thirdly, we believe that in practice a legal adviser would normally suggest that his client ought to make a new will rather than, as in the hypothetical illustration outlined in the previous paragraph, place reliance on one made before the marriage. Finally, we consider that it would be anomalous to preserve the validity of a will made before the marriage, because the enactment of a rule along those lines would result in the situation that the parties to the marriage would, alone among married couples, have to take into account wills made before their marriage in arranging their affairs. The anomaly that would arise from the enactment of such a rule is the more striking when viewed against the fact that if, in the example referred to in the previous paragraph, the marriage took place after 31 July 1971, the will would be revoked automatically by the marriage.⁶⁷

2.31 We take the view that the possible existence of an occasional difficulty in this context is greatly outweighed by the considerations to which we have referred in the previous paragraph; and we have therefore concluded that a will which was made before the celebration of a void potentially polygamous marriage should be revoked automatically in consequence of the retrospective validation of the marriage in the legislation which we propose.⁶⁸

⁶⁶ Sect. 1(2)(a). Other dependants would be entitled to apply only for maintenance: s.1(2)(b).

⁶⁷ Because the marriage is valid under the present law: *Hussain v. Hussain* [1983] Fam. 26. See paras. 2.9-2.10 above.

⁶⁸ Similarly, we intend that a potentially polygamous marriage which is not covered by *Hussain v. Hussain* should fall within the terms of the Wills Act 1837, s.15, in consequence of the validation of the marriage by the proposed legislation. That section disqualifies not only a man or woman who attests a will but also the person who is his or her spouse at the date of the attestation from taking any benefit under the will.

3. *The application of the general principle to marriages celebrated before the proposed legislation comes into force: Scots law*

2.32 This matter admits of different and simpler treatment in Scots law. The defect in the present Scots law on capacity to enter into a marriage in polygamous form is not that there is a clearly established rule which must be corrected with retrospective effect. The defect in Scots law is, as we have seen, that the law on this point is undeveloped. Arguably, therefore, all that is required is to settle the law for the future. Retrospective provisions give rise to difficulties and are, in general, justified only if there is a strong reason for them. In the view of the Scottish Law Commission the present state of Scots law on this question (which differs markedly from the present state of English law) is not such as to make a retrospective provision on capacity for polygamy necessary. Accordingly, we recommend that in Scotland legislation to implement our recommendation on the capacity of a person domiciled in Scotland to enter into a marriage under a law which permits polygamy should not be retrospective.

4. *Summary of our recommendations: England and Wales*

2.33 (a) We recommend that a marriage which is entered into by a man or woman domiciled in England and Wales should not (if English law is applicable thereto in accordance with English rules of private international law) be invalid by reason of the fact that the marriage is entered into under a law which permits polygamy, provided that neither party to the marriage is already married.

(b) The recommendation referred to in subparagraph (a) should in general apply to marriages celebrated before, as well as to those which take place after, the date (the "commencement date") on which legislation implementing the recommendation comes into force, but the retrospective effect of that legislation should be qualified as follows.

(c) A marriage celebrated before the commencement date should not be validated if it has been declared void either by a decree of nullity granted by a court in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales under the rules which, on the commencement date, govern the recognition of such annulments.

(d) A marriage which falls outside the scope of *Hussain v. Hussain* (that is to say, one entered into on or before 31 July 1971 by a man or a woman domiciled in England and Wales or at any time before the commencement date by a woman so domiciled in the case of a marriage to a man the law of whose domicile permits him to have more than one wife) should not be validated if either party to the marriage has subsequently entered into another marriage with a different partner which would be rendered invalid by the retrospective validation of the first marriage.

(e) The validation of marriages not covered by *Hussain v. Hussain* should not:—

- (i) affect property rights which have arisen before the commencement date, including rights which arise in consequence of the death of a person before that date and those which depend upon legitimacy;

- (ii) create or affect entitlement to a benefit, allowance, pension or other payment which is payable in respect of a period before the commencement date or in respect of a death before that date;
- (iii) affect tax which relates to a period or an event before the commencement date;
- (iv) affect the succession to a dignity or title of honour.

5. *Summary of our recommendations: Scotland*

2.34 (a) We recommend that a person domiciled in Scotland should not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy.

(b) Legislation to implement the recommendation in subparagraph (a) should not be retrospective.

PART III
THE CONCEPT OF THE POTENTIALLY
POLYGAMOUS MARRIAGE

A. Introduction

3.1 We are concerned in this Part of the report with marriages which our law regards as validly contracted. At present this would include, for example, a marriage celebrated today in polygamous form between a bachelor domiciled in England and Wales and a spinster domiciled in a country which permits a man to have more than one wife,⁶⁹ but not⁷⁰ a similar marriage where she is domiciled in England and Wales and he is domiciled in the foreign country. Where a marriage in polygamous form is regarded as validly contracted, the question arises as to whether it has the same legal effects as a valid marriage in monogamous form. This depends to some extent upon whether it is merely potentially polygamous, having remained actually monogamous throughout its subsistence.

B. England and Wales⁷¹

3.2 Until the middle years of this century the general approach of English law was to refuse recognition to a marriage celebrated in polygamous form in accordance with the *lex loci celebrationis*, whether or not the marriage was *de facto* monogamous.⁷² The leading case is *Hyde v. Hyde*,⁷³ in which Lord Penzance refused to grant a decree on an undefended petition for the dissolution of a potentially polygamous marriage, on the ground that the parties to a polygamous marriage were not entitled to “the remedies, the adjudication, or the relief of the matrimonial law of England”.⁷⁴

3.3 During the last three or four decades, however, the attitude of English law to polygamous marriages has altered radically. For many purposes every marriage is recognised as valid, irrespective of whether it is on the one hand legally monogamous or, on the other, either actually or potentially polygamous. Perhaps the most significant instance is the approach adopted in

⁶⁹ *Hussain v. Hussain* [1983] Fam. 26, 32; see para. 2.9 above.

⁷⁰ Assuming that English law applies under the relevant choice of law rule: i.e. if the dual domicile theory is correct, as the law of her domicile or, if *Radwan v. Radwan* (No. 2) represents the law, as the law of the intended matrimonial home: see paras. 2.2–2.3 above.

⁷¹ The account of the present law which follows is concerned only with the civil law. In the consultative document, we examined the position of potentially polygamous marriages in the English law relating to the crime of bigamy (see paras. 4.45–4.46); and we reached the conclusion that it would be inappropriate to make proposals for the reform of the law of bigamy in the present exercise. On consultation, no one disagreed with this conclusion, and we do not discuss the English law of bigamy in this report.

⁷² “Where the *lex loci contractus* allows polygamy, marriage under it, even in the case of a first wife, is a different thing from monogamous marriage, and will not be regarded in England as a marriage, nor will the matrimonial duties arising under it be enforced, or any divorce or other relief granted for a breach of them”; Westlake, *Private International Law*, 7th ed. (1925), 68. This passage was cited with approval in *R. v. Naguib* [1917] 1 K.B. 359, 360.

⁷³ (1866) L.R. 1 P. & D. 130.

⁷⁴ *Ibid.*, at p. 138. Although Lord Penzance made it clear that his judgment was confined to the grant of matrimonial relief (*ibid.*), the decision appears to have been taken as authority that polygamous marriages were invalid. However, some have suggested that a marriage entered into by a man domiciled in a “monogamous country”, though celebrated by means of a polygamous ceremony, was valid at common law if the marriage was not actually polygamous: see n. 20 above.

section 47 of the Matrimonial Causes Act 1973⁷⁵ under which the rule in *Hyde v. Hyde* was abrogated and the English courts were empowered to grant matrimonial relief in respect of polygamous marriages. Another example arises under section 17 of the Married Women's Property Act 1882 (as amended by section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958), which provides a summary procedure for determining disputes between husband and wife over property during their marriage and for three years after its dissolution or annulment;⁷⁶ and it has been held that a polygamous marriage falls within the section.⁷⁷ Again, a polygamous marriage has been held to be a marriage for the purposes of the Inheritance (Provision for Family and Dependents) Act 1975;⁷⁸ the rights conferred upon a spouse by the Matrimonial Homes Act 1983, which, broadly speaking, relates to occupation rights in the matrimonial home, extend to the spouses both of potentially and of actually polygamous marriages;⁷⁹ and it has been suggested that the wives of a polygamous union would be entitled to claim under the Fatal Accidents Acts to the extent of their dependence on the deceased husband.⁸⁰ Furthermore, in the field of income tax, it is the practice of the Inland Revenue to treat the relevant legislation as entitling a taxpayer to the higher personal allowance which applies where the claimant's wife either lives with him or is wholly maintained by him,⁸¹ notwithstanding that the marriage in question is either potentially⁸² or actually⁸³ polygamous. And there is little doubt that the children of a polygamous marriage are legitimate.⁸⁴

3.4 In addition to the areas of law referred to in the previous paragraph, in which no distinction is drawn between monogamous and polygamous unions, there are some cases in which recognition is accorded to a polygamous marriage provided that it is in fact monogamous. For example, regulations⁸⁵ made under the Social Security Act 1975 and the Child Benefit Act 1975⁸⁶ provide that a polygamous marriage should be treated as monogamous for any day on which it is in fact monogamous. A similar approach was adopted by the Law Commission in its recommendations relating to co-ownership of the

⁷⁵ Re-enacting the Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.1: see para. 2.7 above. The Act was based upon the recommendations in the Law Commission's Report on Polygamous Marriages (1971), Law Com. No. 42.

⁷⁶ Matrimonial Proceedings and Property Act 1970, s. 39.

⁷⁷ *Chaudhry v. Chaudhry* [1976] Fam. 148 (where the marriage happened to be potentially, not actually, polygamous).

⁷⁸ *Re Sehota* [1978] 1 W.L.R. 1506. In this case the plaintiff wife, the deceased and his second wife had all acquired a domicile in this country after the marriage to the second wife, to whom the deceased had left his estate by will.

⁷⁹ Sect. 10(2).

⁸⁰ See our Report on Polygamous Marriages (1971), Law Com. No. 42, para. 124; Hartley, (1969) 32 M.L.R. 155, 169-170.

⁸¹ Income and Corporation Taxes Act 1970, s.8(1).

⁸² *Nabi v. Heaton* [1981] 1 W.L.R. 1052, 1059.

⁸³ In *Nabi v. Heaton* it was held at first instance that the taxpayer was not entitled to the higher allowance in respect of an actually polygamous marriage ([1981] 1 W.L.R. 1052), but the Crown did not contest his appeal, and the Court of Appeal ([1983] 1 W.L.R. 626) did not deliver a considered judgment.

⁸⁴ *The Sinha Peerage Claim* (1939) 171 Lords' Journals 350; [1946] 1 All E.R. 348n; *Baindail v. Baindail* [1946] P. 122, 127-8; *Hashmi v. Hashmi* [1972] Fam. 36.

⁸⁵ S.I. 1975 No. 561, rr.1(2) and 2(2); S.I. 1976 No. 965, r.12.

⁸⁶ Sect. 162(b) (Social Security Act); s.9(2) (Child Benefit Act).

matrimonial home,⁸⁷ in which it was made clear that, although the proposals applied to potentially polygamous marriages, they did not extend to a marriage which at the relevant time was actually polygamous.⁸⁸

3.5 The question therefore arises: are there circumstances in which the present law distinguishes between monogamous marriages on the one hand and potentially polygamous marriages on the other? Apart from the issue of capacity to marry discussed in Part II of this report, it is difficult to identify any instances in which the distinction might still obtain. The only situations in which it is possible that the distinction remains appear to lie in the field of succession. Thus, there is no direct authority as to whether, on the proper construction of the Administration of Estates Act 1925, the surviving wife of a polygamous marriage could succeed to the husband's property, but such authority as there is suggests that she would come within the scope of that provision.⁸⁹ Again, it might be thought that the child of a polygamous marriage cannot succeed as an "heir" to real property in England and Wales⁹⁰ or to an entailed interest.⁹¹ In the *Sinha Peerage Claim*⁹² (which concerned succession to a title of honour) Lord Maugham specifically left the point open. However, in relation to the devolution of titles of honour, the approach adopted by Lord Maugham in that case suggests that a potentially polygamous marriage⁹³ (as distinguished from one which is actually polygamous) would be regarded as valid.⁹⁴

⁸⁷ Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978), Law Com. No. 86.

⁸⁸ *Ibid.*, paras. 1.74–1.81, and (at p. 138) clause 1(2) of the draft Matrimonial Homes (Co-ownership) Bill annexed to the report. However, the Law Commission's recommendations in relation to rights over household goods extended to actually, as well as potentially, polygamous marriages: *ibid.*, paras. 3.89–3.101, and clause 10 of the draft Matrimonial Goods Bill annexed to the report (see at p. 400).

⁸⁹ *Chaudhry v. Chaudhry* [1976] Fam. 148, 152, in which it was successfully argued that the English courts would give to parties who had been married "according to the law of their domicile" the status of husband and wife, notwithstanding that the marriage was potentially polygamous; *Re Sehota* [1978] 1 W.L.R. 1506, 1511, where it was suggested that questions arising under the law of succession had never fallen within the ambit of *Hyde v. Hyde*. In *Coleman v. Shang* [1961] A.C. 481 the Judicial Committee of the Privy Council construed the word "wife" in the English Statute of Distributions 1670, which governed intestate succession in Ghana, as including the wife of a potentially polygamous marriage.

⁹⁰ The rules as to intestate succession to real property that obtained before 1926 were in general abolished by the Administration of Estates Act 1925, so that the concept of the heir is largely obsolete. There could be, however, some rare cases in which succession as an heir may still occur. For example, where property is expressly limited to the heir of a deceased person, the grantee is ascertained according to the general law in force before 1926; see Megarry and Wade, *The Law of Real Property*, 5th ed. (1984), p. 556.

⁹¹ Entailed interests are excluded from the ambit of s.14 of the Family Law Reform Act 1969, whereby an illegitimate child's relationship with his parents is assimilated in certain respects to that of a legitimate child for the purposes of intestate succession (s.14(5)); and the presumption created by s.15(1) of that Act to the effect that dispositions *inter vivos* or by will by reference to the relationship of one other person to another include "illegitimate" relationships does not extend to the construction of the word "heir", to any expression used to create an entailed interest or to any disposition limited to devolve along with a dignity or title of honour (s.15(2) and (5)).

⁹² [1946] 1 All E.R. 348n., 349.

⁹³ The marriage appears to have become monogamous *de jure*; but Lord Maugham referred to the fact it was "... throughout, so far as actual fact is concerned, a monogamous marriage" ([1946] 1 All E.R. 348, at p. 348), and he pointed out later that the term "polygamous", as he used it, signified a marriage "where there has been in fact a plurality of wives" (*ibid.*, at p. 349).

⁹⁴ The Legitimacy Act 1976, s.1, which confers legitimacy upon the child of a void marriage one of whose parents reasonably believed at the date of the child's conception (or, if later, at that of the marriage) that the marriage was valid applies to, and to property limited to devolve with, a dignity or title of honour in respect of a child born after 28 October 1959.

3.6 We were unable in our consultative document to identify any areas, apart from capacity to marry, in which potentially polygamous marriages are treated differently from marriages celebrated in monogamous form. In that document,⁹⁵ we specifically sought views on this matter, but no other instances were drawn to our attention. The movement in favour of recognising polygamous marriages for very many purposes in our plural society is now so broad that we have reached the conclusion that, provided our recommendations in Part II relating to capacity to enter into a marriage celebrated in polygamous form are implemented, the civil law now draws no distinction between actually monogamous marriages on the basis of the nature of the ceremony. In the light of that conclusion we have decided not to recommend any general legislative provision to that effect. Not only do we consider such a provision unnecessary, we would also not wish there to be any implication that actually polygamous marriages are in future to be regarded any differently from the way in which they are regarded at present. We do, however, examine below⁹⁶ the need for minor legislative amendments to reflect the present state of the law relating to potentially polygamous marriages.

C. Scotland

3.7 Although the introduction of the concept of the potentially polygamous marriage into Scots law had been criticised as being both unnecessary and contrary to principle,⁹⁷ the fact remains that the concept has been used in at least one Scottish case⁹⁸ and in legislation applying to Scotland as well as England.⁹⁹ Although the statutory treatment of polygamous marriages in social security law and revenue law is the same in Scotland as in England, the Scottish common law on the circumstances in which a polygamous marriage (whether actually or potentially polygamous) will or will not be recognised as a legal marriage is as yet unclear. Although there are early dicta suggesting that a polygamous marriage would not be recognised in Scots law,¹⁰⁰ in a more recent case Lord President Cooper somewhat guardedly remarked—

“It may be that the learned editors of Walton on Husband and Wife (3rd edn., p. 3) are right in hazarding the prophecy that the Scottish courts would be prepared to recognise a polygamous marriage ‘for some purposes provided (a) that it was valid by the *lex domicilii* and *lex loci celebrationis* and (b) the man has in fact taken only one wife’.”¹⁰¹

⁹⁵Para. 5.13..

⁹⁶ See para. 3.10 below.

⁹⁷ See Anton, “The ‘Christian Marriage’ Heresy”, 1956 S.L.T. (News) 201.

⁹⁸*Muhammad v. Suna* 1956 S.C. 366. The actual decision in this case has now, however, been superseded by the Matrimonial Proceedings (Polygamous Marriages) Act 1972.

⁹⁹ Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.2; Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (S.I. 1975, No. 561); Child Benefit (General) Regulations 1976 (S.I. 1976, No. 965).

¹⁰⁰ An *obiter dictum* by Lord Brougham in *Warrender v. Warrender* (1835) 2 Sh. & MacL. 154, 201 could be read as suggesting that a polygamous marriage would not be recognised in Scotland, but this view must now be regarded as somewhat dated. The dictum is, in any event, open to different interpretations. See “Polygamy”—A New Approach”, 1970 Jur. Rev. 135.

¹⁰¹*Prawdzc-Lazarska v. Prawdzc-Lazarska* 1954 S.C. 98, 102.

There is no more recent authority in Scots law and, although it may be that the Scottish courts would recognise a valid potentially polygamous marriage as an effective marriage for all legal purposes, there is unfortunately no authority to justify a statement that that is already the law. In this state of the law (which differs from the more developed state of the law of England and Wales on this subject) the Scottish Law Commission considers that it is necessary to make it clear by legislation that a marriage which is valid by the law of Scotland and which is only potentially polygamous (in the sense that, although it was entered into under a law permitting polygamy, neither spouse has in fact married anyone else) has, so long as it remains in fact monogamous, the same legal effects for all purposes of the law of Scotland as a marriage entered into under a law which does not permit polygamy. A proposal to this effect in the consultative document¹⁰² was generally supported on consultation and we now so recommend.

3.8 A legislative provision on the above lines would affect for the future the legal position of all potentially polygamous marriages, even if entered into before the provision came into force. This seems entirely appropriate. There is no reason to deny effect to an actually monogamous marriage merely because it was entered into, before or after the commencement date, under a law which permits polygamy. It would, however, be undesirable to go beyond this and to attempt to regulate retrospectively the effects which marriages may have had in the past. This would be undesirable because, in so far as anything could or would be changed by such a provision,¹⁰³ it could only be changed by altering acquired rights, which would be wrong in principle and extremely inconvenient in practice.

3.9 It is important to note the limitations of a rule giving valid potentially polygamous marriages, so long as they remain in fact monogamous, the same effects as marriages entered into under a law which does not permit polygamy. Such a rule would not prevent a party to such a marriage from entering into a valid actually polygamous marriage where that was permitted by the applicable laws. First, it would be implicit in the rule itself that it was not intended to prevent a potentially polygamous marriage from becoming actually polygamous.¹⁰⁴ Second, the fact that a marriage was entered into under a law which did not permit polygamy would not, it seems, necessarily preclude an actually polygamous marriage being entered into where that was permitted by the law of the parties' domiciles at the time of the second ceremony and by the law of the place of celebration.¹⁰⁵ Another important limitation of the rule proposed is that it would not affect the question of the first wife's rights should the husband enter into a valid second marriage during the subsistence of the first. The rule would simply have no application in that situation: it would apply only so long as there was not a second wife. Once the second marriage took

¹⁰² Para. 6.5

¹⁰³ It would not, for example, help retrospectively a person who was refused a divorce in 1956 on the ground that a valid potentially polygamous marriage was not recognised as a marriage for the purposes of the Scottish divorce jurisdiction.

¹⁰⁴ See clause 5 of the draft Bill appended, which provides that the marriage is to have the stated effects "so long as neither spouse marries a second spouse during the subsistence of the marriage" thus clearly implying that such a second marriage is possible.

¹⁰⁵ See paras. 4.10-4.14 below.

place the position would be regulated by the existing law, which would be unchanged on this point.¹⁰⁶

D. Consequential legislative amendments

3.10 Once the earlier recommendations in this report are implemented, both English law, by reason of the changes proposed to the rules for capacity to marry and of the developments in the law relating to potentially polygamous marriages over the last few decades, and Scots law, by reason of the recommendations in this report, will not discriminate between valid marriages contracted by spouses, neither of whom was already married, on the basis of the form of the marriage ceremony. It is, however, the case that some current legislation is drafted on the basis of the existence of such a distinction. Some provisions apply only to England and Wales, namely section 47 of the Matrimonial Causes Act 1973 and section 10 of the Matrimonial Homes Act 1983; others only to Scotland, namely section 2 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972; and others apply throughout Great Britain, namely section 162(b) of the Social Security Act 1975, section 9(2) of the Child Benefit Act 1975 and section 32A of the Supplementary Benefits Act 1976. In all these cases, we recommend that the description of a polygamous marriage should be limited to one which is or has been actually polygamous.¹⁰⁷ The object of this is to remove any possible suggestion that special legislative provision need any longer be made for potentially polygamous marriages. We do not thereby intend any changes in the law relating to actually polygamous marriages which will remain as explained in paragraph 4.25 below. It should also be mentioned that regulations have been made under the relevant provisions of the Child Benefit Act 1975¹⁰⁸ and the Social Security Act 1975¹⁰⁹ and consideration will need to be given to the amendment of these regulations in the light of the amendments proposed to the parent legislation.¹¹⁰

¹⁰⁶ See paras. 4.15–4.23 below. It would thus still be open to the courts to hold that, where the marriage was entered into under a law which permitted polygamy, intercourse by the husband with a second wife, validly married during the subsistence of the first marriage, was not adultery.

¹⁰⁷ See the Schedule to the draft Polygamous Marriages Bill in Appendix A.

¹⁰⁸ S.I. 1976 No. 965, para. 12.

¹⁰⁹ S.I. 1975 No. 561.

¹¹⁰ Consideration will also need to be given to amendment of the Matrimonial Causes Rules 1977, r.108.

PART IV
ACTUALLY POLYGAMOUS MARRIAGES

A. Introduction

4.1 We made no proposals in the consultative document for reforming the law governing capacity to enter into actually polygamous marriages¹¹¹ and nothing has arisen out of our consultation upon the proposals in that document which renders it necessary or desirable for us to make recommendations in that field. There are, however, certain matters relating to actually polygamous marriages which were discussed in the consultative document or were brought to our attention on consultation and which are considered in this Part of the report.¹¹²

B. Capacity of English or Scottish domiciliaries to enter into an actually polygamous marriage

1. *England and Wales*

(a) *The present law*

(i) *The choice of law rule*

4.2 We have explained in Part II of this report¹¹³ that there are two theories concerning the nature of the rule which governs capacity to enter into a polygamous marriage. According to the traditional and more widely accepted theory, the marriage is valid only if each party has capacity to contract it according to the law of his or her domicile at the time of the marriage. The alternative approach, which was adopted by Cumming-Bruce J. in 1972 in *Radwan v. Radwan (No. 2)*,¹¹⁴ is that capacity to marry is governed by the law of the parties' intended matrimonial home.¹¹⁵ In that case a woman domiciled in England was held to have capacity to contract an actually polygamous marriage abroad with a man domiciled in Egypt on the ground that the law of Egypt, where at the time of the marriage the parties intended to live together and where they subsequently did live together, governed the question of capacity, and by Egyptian law the marriage was valid.

¹¹¹ As to the incidence of actually polygamous marriages in practice, it has been pointed out that most observers believe their number around the world to be "infinitesimal"; that all the evidence suggests that they are "extremely rare indeed" in the Indian-Pakistan sub-continent; and that very few Muslim immigrants into this country "avail themselves of the alleged advantage of multiple matrimony"; see Pearl, "Polygamy for English Domiciliaries?", [1983] C.L.J. 26, at p. 26. And on consultation the Immigration and Nationality Department of the Home Office informed us, in relation to immigration into this country, that the numbers of actually polygamous marriages involved were "minimal".

¹¹² References in this report to a party entering into an actually polygamous marriage apply to both parties to the marriage. Thus, if by means of a polygamous form of ceremony, a woman becomes the second (or subsequent) wife of a man during the subsistence of his previous marriage, she has "entered into an actually polygamous marriage", notwithstanding that at all times she has only one husband.

¹¹³ See paras. 2.1-2.3 above.

¹¹⁴ [1973] Fam. 35.

¹¹⁵ More fully stated, this theory is that a presumption exists that capacity is governed by the law of the husband's domicile, which is, however, rebutted if it can be inferred that, when they married, the parties intended to establish their home in a different country, and they implemented their intention within a reasonable time; see Cheshire and North, *Private International Law*, 10th ed. (1979), p. 331.

4.3 As we pointed out in Part II,¹¹⁶ the great preponderance of judicial and academic opinion favours the dual domicile theory; but the respective merits of the two theories fall for consideration not here, but in the context of our current work on the choice of law rules relating to marriage generally.¹¹⁷

(ii) *The internal rules*

4.4 As to marriages celebrated on or before 31 July 1971, capacity to enter which is governed by common law rules, we have explained in Part II¹¹⁸ that an English domiciliary lacks capacity to contract a marriage abroad which is actually polygamous, although, if *Radwan v. Radwan (No. 2)* represents the law, this principle would not apply if (as in that case) the law of the intended matrimonial home permitted both parties to enter into the marriage.

4.5 Marriages entered into after 31 July 1971 are governed by section 11 of the Matrimonial Causes Act 1973, the relevant parts of which provide that such a marriage:

“. . . shall be void on the following grounds only, that is to say . . .

- (b) that at the time of the marriage either party was already lawfully married; . . .
- (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales. . .”

4.6 In Part II¹¹⁹ we also explained that, according to this provision as construed in *Hussain v. Hussain*,¹²⁰ a marriage entered into in polygamous form in Pakistan by a man domiciled in England and Wales was a valid monogamous marriage if neither party was already married. In the course of delivering the judgment of the Court of Appeal, Ormrod L.J. pointed out that the husband of the marriage lacked capacity to contract a further marriage because, being an English domiciliary, he fell within the terms of paragraph (b) of section 11.¹²¹

4.7 To summarise: under the internal rules of English law, a man or woman domiciled in England and Wales lacks capacity to enter into an actually polygamous marriage at common law, which governs marriages celebrated on or before 31 July 1971, and under section 11 of the Matrimonial Causes Act 1973, which applies to marriages which take place after that date.

¹¹⁶ See para. 2.3 above.

¹¹⁷ See para. 1.5 above and Choice of Law Rules in Marriage, Working Paper No. 89; Consultative Memorandum No. 64 (1985).

¹¹⁸ Para. 2.4 above.

¹¹⁹ See para. 2.9 above.

¹²⁰ [1983] Fam. 26.

¹²¹ *Ibid.*, 30. Ormrod L.J. went on to explain that, under the law of Pakistan, her domicile at the date of the marriage, the wife could not marry another man so long as she was married to the husband.

(b) *Our view*

4.8 In the consultative document¹²² we raised the question whether the internal English rule¹²³ should be changed so as to permit a man or woman domiciled in England and Wales to enter into an actually polygamous marriage abroad. After setting out possible arguments both for¹²⁴ and against¹²⁵ this proposition, we provisionally rejected it. On consultation, almost every commentator indicated express support for, or implicit acceptance of, our provisional approach in the consultative document. We accordingly do not propose any change in the present law governing the capacity of men and women domiciled in England and Wales to enter into actually polygamous marriages abroad.

2. *Scotland*

4.9 The prevailing view in Scots law is that each party to a marriage must be free to marry by the law of his or her domicile at the time of the marriage and (probably) by the law of the place of celebration.¹²⁶ A married person domiciled in Scotland cannot enter into a second marriage during the subsistence of the first. It may also be the case, although the law on this point is unclear, that an unmarried person domiciled in Scotland cannot enter into a valid polygamous marriage abroad with a person who already has a spouse.¹²⁷ The results of the Scottish consultation were firmly against any change in the law relating to the capacity of Scottish domiciliaries to enter into actually polygamous marriages and we propose no such change.

C. The effect of an actually polygamous marriage on a prior marriage

1. *England and Wales*

4.10 One issue which we canvassed in the consultative document¹²⁸ and which our recommendations in Parts II and III of this report do not purport to resolve is that of the effect on a first marriage of an actually polygamous marriage subsequently entered into by either party. What ought the law to be, for example, in the following circumstances? A bachelor, having emigrated from Pakistan to this country and acquired an English domicile, returns to Pakistan on a visit and marries W1 (a single woman domiciled in Pakistan) in a mosque there. Under the present law the marriage is regarded in this country as a valid monogamous union, provided that it was celebrated after 31 July

¹²² Paras. 5.3–5.9.

¹²³ If *Radwan v. Radwan (No. 2)* (see para. 4.2 above) is correct, a person domiciled here has capacity to enter into an actually polygamous marriage if he has capacity to do so under the law of the intended matrimonial home; but the question whether the approach adopted in that decision ought to be the choice of law rule is a separate issue, which will be considered in the context of our work on choice of law rules relating to the marriage.

¹²⁴ Para. 5.4

¹²⁵ Paras. 5.5–5.7.

¹²⁶ Anton, *Private International Law*, pp. 276–283; Clive, *Husband and Wife* (2nd ed., 1982), pp. 132, 148–154; *Lendrum v. Chakravarti* 1929 S.L.T. 96; *MacDougall v. Chitnavis* 1937 S.C. 390; *Bliersbach v. MacEwen* 1959 S.C. 43. Cf. also the Marriage (Scotland) Act 1977, ss. 1, 2 and 5(4).

¹²⁷ See *Lendrum v. Chakravarti* 1929 S.L.T. 96, at p. 99, where Lord Mackay expressed the view *obiter* that a woman domiciled in Scotland could not enter into a polygamous marriage.

¹²⁸ Paras. 5.15–5.25.

1971.¹²⁹ If, however, the husband returns to Pakistan in circumstances such that his domicile of origin in that country revives, and then takes another wife by a ceremony in a mosque there,¹³⁰ the question arises whether W1 has, or ought to have, any remedies in consequence of the husband's second marriage and, if so, what form they should take. Furthermore, assuming that the recommendations in Part II are implemented, a similar problem would arise in future where the first marriage was that of a woman domiciled in England and Wales to a man who is domiciled throughout in Pakistan.¹³¹

4.11 The problem arises from the interaction between the choice of law rule governing capacity to marry in general with the internal English rule as to the capacity of men and women domiciled in this country to contract a valid marriage. According to the view of the law which was widely held before *Hussain v. Hussain*, no one domiciled in England and Wales had capacity to enter into a marriage in polygamous form, irrespective of whether or not the marriage was actually polygamous. On the one hand, therefore, it could be argued with some force that in principle the position of a woman domiciled here who entered into a valid marriage in, necessarily, monogamous form ought not to be adversely affected if the husband should subsequently purport to take an additional wife since, if that later marriage was recognised as valid, the first wife's marriage would be transformed automatically into a polygamous marriage. On the other hand, in principle the application of the general choice of law rule governing capacity to marry would lead to the recognition of the later marriage in this country if, under those rules, the husband had capacity to contract that marriage.¹³²

4.12 The ambit of the problem outlined in the preceding paragraph has been extended by the decision in *Hussain v. Hussain*, which makes clear that, contrary to the general view that formerly obtained, a man, or a woman if her marriage is to a man domiciled in a country under whose law he may have only one wife, who is domiciled in England and Wales has had capacity, since 1 August 1971, to contract a marriage which, provided that it is *de facto* monogamous, will be recognised as a valid monogamous marriage in this country; and the legislation which we recommend will extend that principle, first, to women domiciled here regardless of whether or not the marriage is to a man who has capacity under his personal law to have more than one wife and secondly, to marriages celebrated prior to that date. This gives rise to the following further question: ought the principle which regulates the effect of a subsequent marriage upon a first marriage entered into by a person domiciled in this country (which will necessarily be monogamous in law) to differ according as the original marriage was celebrated in monogamous or polygamous form?

¹²⁹ *Hussain v. Hussain*: see para. 2.10 above.

¹³⁰ The second marriage is valid because, in accordance with the dual domicile theory, capacity to marry is governed by the law of Pakistan as the law of each party's domicile or, if *Radwan v. Radwan* (No. 2) represents the law, because capacity is governed by the law of that country as the parties' intended matrimonial home: see paras. 2.2 and 2.3 above.

¹³¹ The issue would also arise where the first marriage was celebrated in monogamous form in (for example) a Christian ceremony in a church in this country; see *Drammeh v. Drammeh* (1970) 78 Ceylon Law Weekly 55 (P.C.).

¹³² See para. 4.2 above.

4.13 There are two aspects of the problem. The first concerns the essential validity of the second (or subsequent) marriage; the second relates to the availability of remedies by way of matrimonial relief to which the first wife is, or ought to be, entitled on the basis that the later marriage is, or may be, valid in the eyes of English law.

4.14 So far as the present law is concerned, there is little authority as to the validity of the second marriage in the circumstances with which we are here concerned. However, the issue arose in relation to the law of income tax in *Nabi v. Heaton*.¹³³ In that case, a man who at all material times was domiciled in Pakistan married his first wife in a civil ceremony in England in 1968, and in 1969 took a second wife by a Muslim ceremony in Pakistan. The General Commissioners held that "the first marriage having been solemnised in England in English form", the second marriage was not recognised under English law. The point was not, however, fully argued before Vinelott J. and he expressly refrained from expressing an opinion on the question.¹³⁴ In a previous case, *Attorney-General of Ceylon v. Reid*,¹³⁵ it was held by the Privy Council that, for the purpose of the offence of bigamy, the existence of a prior monogamous marriage did not invalidate a polygamous marriage entered into by the husband after he had become converted to the Muslim faith. However, the case concerned only the law of Ceylon, where both marriages were celebrated; and the Privy Council specifically refrained from expressing an opinion upon what would be the position in "a purely Christian country".¹³⁶

4.15 To turn now to the question of the matrimonial relief which may be available to the wife of the first marriage, it is convenient to refer briefly to the relevant statutory provision. The Matrimonial Causes Act 1973, section 1(1), provides that "a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably", but section 1(2) goes on to state that one or more of certain facts must be proved if the court is to hold that the marriage has so broken down. The "facts" that are relevant in the present context are:

- "(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- "(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- "(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."

¹³³ [1981] 1 W.L.R. 1052.

¹³⁴ *Ibid.*, 1057. The case was determined against the taxpayer on another ground. (The taxpayer's appeal was subsequently allowed by consent and no reasoned judgment was given in the Court of Appeal: [1983] 1 W.L.R. 626.)

¹³⁵ [1965] A.C. 720.

¹³⁶ *Ibid.*, 734. However, in giving reasons for its advice, Lord Upjohn stated that the Judicial Committee "... noted with interest the recent observations of Sir Jocelyn Simon P. in *Cheni (or se. Rodriguez) v. Cheni* [[1965] P. 85, 90], who said: 'After all, there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses,' which recognises that the obligations assumed upon undertaking a Christian monogamous marriage may not in some circumstances be incapable of change": *ibid.* (emphasis added.)

Similar principles apply to a petition for judicial separation, except that the court is not concerned with the question whether or not the marriage has broken down irretrievably.¹³⁷

4.16 It is not clear under the present law whether the wife of the first marriage can ever rely upon the husband's intercourse with a subsequent wife as adultery or, if so, in what circumstances. It would seem that in principle an allegation of adultery made by one wife cannot be grounded upon intercourse between the husband and another wife, because it is an essential element of adultery that intercourse has taken place between parties who are not married to each other.¹³⁸ However, such authority as there is suggests that this principle is limited to those circumstances in which the first marriage was celebrated in polygamous form¹³⁹ and in which (possibly) it has not in law become monogamous in consequence of the subsequent acquisition by both parties¹⁴⁰ of a domicile in a country whose domiciliaries lack capacity to enter into an actually polygamous marriage.

4.17 There can be little doubt that, in appropriate circumstances, for the purpose of section 1(2)(b) or (c) of the 1973 Act the first wife may base a petition for divorce or judicial separation on the fact that the husband has taken an additional wife.¹⁴¹ This is illustrated by the decision of Butler-Sloss J. in *Quoraishi v. Quoraishi*.¹⁴² In that case both parties, who were of the Muslim faith, were domiciled in Pakistan at the time of the marriage there in 1964. The marriage was celebrated in polygamous form. In 1970 the parties came to live in England and in 1979, without the consent of his wife, the husband, being then domiciled in Bangladesh, entered into an actually polygamous marriage there. Shortly after his return to England his first wife left him; but the husband's petition, which was founded on her desertion, was rejected on the ground that she had just cause to remain apart from him. In arriving at this conclusion, Butler-Sloss J. took into account, among other circumstances, that a Muslim court would presume under modern conditions that, in the absence of cogent explanation, the husband's action involved cruelty to the wife and that it would be inequitable to compel her to live with him; that the parties had been resident here since 1970; that "both [parties] being doctors and educated", by taking a second wife without the consent of the first the husband was seriously risking the continuance of the first marriage; and that the marriage had been of a *de facto* monogamous character for 15 years, 9 of which had been spent in a monogamous society.¹⁴³

¹³⁷ Matrimonial Causes Act 1973, s.17(2).

¹³⁸ This view is taken in *Rayden's Law and Practice in Divorce and Family Matters*, 14th ed. (1983), p. 204; In Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), p. 330; and in Bromley, *Family Law*, 6th ed. (1981), p. 59.

¹³⁹ *Onobrauche v. Onobrauche* (1978) 122 S.J. 210; *Attorney-General of Ceylon v. Reid* [1965] A.C. 720, 729 (P.C.) (decided under the law of Ceylon); *Drammeh v. Drammeh* (1970) 78 Ceylon Law Weekly 55 (P.C.) (decided under the law of The Gambia).

¹⁴⁰ *Ali v. Ali* [1968] p. 564, 577-579. In *Onobrauche v. Onobrauche* (1978) 122 S.J. 210 it was held that the subsequent acquisition of such a domicile by the first wife alone did not convert the marriage into a monogamous union.

¹⁴¹ See para. 4.15 above. In addition, after five years' separation from the husband she can present a petition under s.1(2)(e) of the Act based on that fact alone.

¹⁴² (1983) 4 F.L.R. 706. Although the case concerned the question whether the wife could resist a petition by her husband based on desertion, the reasoning in the judgment would apply to a petition brought by the wife on the ground of "unreasonable behaviour".

¹⁴³ *Ibid.*, at pp. 710-711.

4.18 The decision in *Quoraishi v. Quoraishi* exemplifies the principle that, in determining the issues which arise on petitions based on desertion or “unreasonable behaviour”, the court will have regard to the particular circumstances of the marriage under consideration. No question arose as to the validity of the second marriage, because the first marriage was celebrated in polygamous form between parties who were domiciled in Pakistan. Since matrimonial relief would apparently be available nevertheless to the first wife in consequence of the husband’s subsequent marriage against her wishes, it follows that it would be available in appropriate circumstances to a wife whose marriage was in law monogamous at its inception.

4.19 In the consultative paper we considered in some detail the problem of the effect of an actually polygamous marriage upon a prior marriage¹⁴⁴ and we canvassed in turn three alternative approaches which might be adopted—namely (i) to make no provision for the problem,¹⁴⁵ (ii) to provide that all first marriages should as a matter of law be monogamous¹⁴⁶ and (iii) to treat first marriages differently, according to the closeness of the spouse’s connection with this country.¹⁴⁷ We provisionally concluded that the second option was unacceptable,¹⁴⁸ and after stating that we were undecided whether any change in the existing law by means of legislation was desirable, we tentatively proposed, if such change was thought to be desirable, only a limited rule whereby a marriage entered into by an English domiciliary should be regarded as legally monogamous until he or she acquired a domicile in a country whose law permitted polygamy.

4.20 On consultation our tentative suggestion found little favour. However, the comments submitted contained a variety of conflicting views on the issue, of which we need cite only a selection. One view expressed was that the law should be altered by providing that, in every case where the first marriage was celebrated in monogamous form, the second marriage should be void. By contrast, however, another commentator suggested that no distinction ought to be made between a monogamous marriage celebrated in monogamous form (at, say, an English register office) and a monogamous marriage entered into in polygamous form in, say, Pakistan, on the ground that for a Muslim a marriage by means of a polygamous ceremony is the only way in which he or she may marry in that country; however (this commentator also suggested), when either the first wife or the husband was domiciled in England and Wales at the date of the first marriage in Pakistan, she should automatically be entitled to present a petition based on adultery or on “unreasonable behaviour” if the husband

¹⁴⁴ Paras. 5.15–5.25.

¹⁴⁵ Para. 5.20.

¹⁴⁶ Para. 5.21.

¹⁴⁷ Para. 5.23–5.24.

¹⁴⁸ On the ground that its adoption would have too sweeping an effect on the way in which English law regards foreign marriages in polygamous form. It would mean, for example, that a first wife, domiciled in Pakistan, who there married in polygamous form a man also domiciled there would be regarded by the English courts as a party to a monogamous marriage if the husband subsequently contracted a valid actually polygamous marriage, even though she had never visited England. This might be of practical significance in the context of social security benefits and of intestate succession to immovable property in England. See the consultative document, para. 5.22.

should take an additional wife. A third approach was proposed by another commentator, who suggested that where the parties have married in polygamous form and subsequently come to live in this country, their marriage should not be regarded as valid until they have gone through a ceremony of marriage here. Several commentators, finally, expressed the view that nothing need be done about the problem, as the courts would be able to resolve particular questions as they arose.

4.21 In the consultative document we also sought information as to whether this issue was, or was likely to be, significant in practice, since we had been told that the problem of the effect of a second valid marriage on the legal position of the first wife is unlikely to cause many practical problems here.¹⁴⁹ We were informed on consultation that the judges of the Family Division had encountered no practical difficulties over the issue.

2. *Scotland*

4.22 There is no conclusive Scottish authority on the legal position of a woman, married monogamously, whose husband retains or acquires a domicile in a country permitting polygamy and enters into a second marriage there in polygamous form, but the view was expressed in one case that the second marriage would be:

“an infringement of the contract of monogamy into which he has entered and of the marital rights of his wife under that contract, and accordingly would afford her a remedy in any competent Court where such a breach was recognised as inferring dissolution.”¹⁵⁰

Whether the remedy could be an action for divorce based on section 1(2)(a) of the Divorce (Scotland) Act 1976 (adultery) would presumably depend on the view taken of the validity of the second marriage in Scots law¹⁵¹ and (if it is valid) on the view taken on the appropriate definition of adultery in such cases.¹⁵² On both issues there is room for doubt and difference of opinion. There seems little doubt, however, that a divorce would be available under section 1 (2)(b) of the 1976 Act (behaviour such that the pursuer cannot reasonably be expected to cohabit with the defender) and the important thing is that a remedy should be available rather than that it should be available under any one particular head. In the Scottish section of the consultative document we invited comments on the options set out in paragraph 4.19 above but the Scottish consultation on this issue was as inconclusive as the English.

3. *Conclusion*

4.23 We summarise the result of our consultation as follows:

- (a) The limited proposal which we tentatively advanced in the consultation document (namely, that a marriage contracted by a person domiciled in England and Wales or in Scotland should be regarded as

¹⁴⁹ Para. 5.18

¹⁵⁰ *Lendrum v. Chakravarti* 1929 S.L.T. 96, at p. 99.

¹⁵¹ The considerations here are the same as those set out in para. 4.11 above.

¹⁵² Is it to be defined, in the case of a man, as voluntary intercourse with a woman who is not his wife, or as voluntary intercourse in breach of the obligation of fidelity undertaken by him to his first wife?

having a legally monogamous character until that person should acquire a domicile in a country whose law permits polygamy) did not in general find favour.

- (b) The incidence of cases in which the problem would arise is not likely to be significant.
- (c) No single solution is favoured; and some commentators suggested that legislative intervention would not be appropriate.

Our conclusion is that no recommendation on this issue is either necessary or desirable in the context of this report.

4.24 Two points remain. The first concerns the suggestion made to us on consultation of a possible resolution of the problem by distinguishing between first marriages celebrated in monogamous form and those entered into abroad¹⁵³ by means of a polygamous form of ceremony. On this approach a second marriage would be invalid or would, alternatively, give rise to matrimonial relief only if the first had been entered into by a monogamous form of ceremony. It can be argued in favour of a solution along these lines that the obligations undertaken by the parties to the first marriage, and in particular the husband's obligation of fidelity, differ according to the form in which the marriage was celebrated.¹⁵⁴ On the other hand, however, there are powerful arguments for not drawing this distinction, acceptance of which would result in a first marriage celebrated by Muslims in this country in a mosque registered for the solemnisation of marriages under section 41 of the Marriage Act 1949¹⁵⁵ being treated differently from one entered into in a mosque in (for example) Pakistan by parties of that faith either of whom is domiciled in England and Wales. This situation might be perceived by members of the immigrant communities who are likely to be affected by the application of such a rule to be both arbitrary and discriminatory.¹⁵⁶ The second point is that a number of the comments received on consultation related to domicile and to the choice of law rule relating to marriage. Both topics are now under review and the comments will be taken into account in our work on those topics.¹⁵⁷

¹⁵³ Every marriage celebrated in the United Kingdom is, if valid, monogamous in law: see para. 1.4 and n. 9 above, and the consultative document, para. 2.5.

¹⁵⁴ It has been suggested (albeit not specifically in relation to this issue) that "... monogamy and polygamy can . . . only sensibly be seen and treated as two quite separate social and legal institutions", and that polygamy is not simply "... an idiosyncratic variant of monogamy, its special feature being that one party is accorded the special privilege of being able to take additional spouses lawfully"; see Carter, "Classification of a marriage as monogamous or polygamous: a point of statutory interpretation", (1982) B.Y.B.I.L. 298, 300.

¹⁵⁵ For a detailed explanation, see the consultative document, para. 2.6.

¹⁵⁶ One commentator suggested to us on consultation that if (as we have recommended in Part III of this report) a marriage contracted by an English domiciliary in, for example, Pakistan is to be regarded as a monogamous marriage, it must be a monogamous marriage in exactly the same way that a civil marriage performed in a register office in England is a monogamous marriage, and that to introduce different "classes" of monogamous marriage would be invidious and "likely to be as unhelpful as the notion of a 'potentially polygamous' marriage". Similarly, another commentator on the consultative document has suggested (1) that a marriage celebrated in polygamous form should be regarded as monogamous unless at the date of its celebration one party has capacity to take a plurality of spouses, and (2) that the character of a marriage as monogamous or polygamous, as determined at its inception, should not be altered by a change of domicile; see Schuz, "When is a Polygamous Marriage not a Polygamous Marriage?", (1983) 46 M.L.R. 653, 660-661.

¹⁵⁷ See para. 1.5 above.

D. Future legislation

4.25. As we have explained in Part III, many statutes already expressly apply to both potentially and actually polygamous marriages.¹⁵⁸ Where a particular statute does not expressly indicate whether its provisions apply to an actually polygamous marriage, the approach of English law to its construction is now that laid down by Salmon L.J. in *Imam Din v. National Assistance Board*.¹⁵⁹

“When a question arises of recognising a foreign marriage or of construing the word ‘wife’ in a statute, everything depends on the purpose for which the marriage is to be recognised and upon the objects of the statute. I ask myself first of all: is there any good reason why the appellant’s wife and children should not be regarded as his wife and children for the purposes of the National Assistance Act 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognised.”

Hence in the examples given in paragraph 3.3 above no distinction has been drawn between actually polygamous and actually monogamous marriages.¹⁶⁰ There may, however, be some cases in which the court would be unable to reach such a conclusion and others in which the outcome is uncertain.¹⁶¹

4.26 Any uncertainty can be resolved by the inclusion of express provisions in each particular enactment and we hope that such provision will be incorporated in future legislation where appropriate.¹⁶² We also hope that the policy be continued of not discriminating between valid marriages on the ground of monogamy or polygamy unless there is sufficient reason to the contrary in the context of the particular legislation concerned.

E. Miscellaneous matters

4.27 In the consultative document we indicated¹⁶³ that, in our preliminary consultation, a number of matters, often of an administrative nature, arising generally in the field of polygamous marriages, had been mentioned to us. We concluded¹⁶⁴ that, although they fell outside the present exercise, it was desirable to draw attention to several of these matters. Some of those who expressed views to us on the consultative document have also, in their comments, ranged wider than the matters directly under review. We have, for example, received criticisms of the use by the Home Office and the Passport Office of domicile

¹⁵⁸ E.g., Matrimonial Causes Act 1973, s.47; Matrimonial Homes Act 1983, s.10(2). See para. 3.3 above.

¹⁵⁹ [1967] 2 K.B. 213, 218; a woman who had entered into a marriage in Pakistan which at its inception was actually polygamous was held to be a “wife” for the purposes of the statutory liability of a man to maintain his “wife and children” under s.42 of the National Assistance Act 1948.

¹⁶⁰ E.g., *Re Sehota* [1978] 1 W.L.R. 1506; *Nabi v. Heaton* [1981] 1 W.L.R. 1052. See para 3.3 above.

¹⁶¹ In relation, for example, to intestate succession under the Administration of Estates Act 1925; see para. 3.5 above.

¹⁶² For example, the Matrimonial Homes Act 1983, s.10(2), consolidating the Matrimonial Homes and Property Act 1981, s.3. This declaratory provision implemented a Law Commission recommendation that the matter should be placed beyond doubt: see the Third Report on Family Property (1978), Law Com. No. 86, para. 2.34.

¹⁶³ Para. 5.32.

¹⁶⁴ Para. 5.33.

questionnaires. Again, it was suggested to us that the Marriage Act 1949 should be amended to take account of the large number of persons marrying in this country who do not speak or understand English, or to allow marriages celebrated overseas to be registered in this country, the effect of which registration would be to render the marriage monogamous in nature.

4.28 Where appropriate, we have passed on these varied suggestions to the relevant Department, but there are two aspects of the law relating to actually polygamous marriages which a number of commentators singled out for comment. The first is income tax. It was suggested that a taxpayer with more than one wife should not only be entitled to the higher personal allowance if he maintains one of his wives,¹⁶⁵ but should be entitled to such an allowance for each wife he maintains. Other commentators would limit the actual polygamist to such an allowance in respect of only one wife. The second topic singled out for comment was social security benefits, which had also caused concern in our preliminary consultation. In particular, there is concern about the rule that, if a marriage is actually polygamous, social security benefits are denied in respect of all wives,¹⁶⁶ despite the husband's obligation to contribute. A variety of solutions were posed—for example, that the wife of a *de facto* monogamous marriage should continue to be eligible to receive social security benefits notwithstanding that the husband subsequently enters into an actually polygamous marriage, that benefits should be provided in respect of the first wife with the husband allowed to make additional contributions to purchase benefits for other wives, or that the benefits should be provided in respect of each wife. A further, minimal change was suggested, namely that where one wife is resident here and the other or others abroad, benefits should be payable in respect of the wife resident here. These comments, as with those relating to income tax, have been passed to the relevant Department.

¹⁶⁵ See now *Nabi v. Heaton* [1983] 1 W.L.R. 626.

¹⁶⁶ See, e.g., Social Security Act 1975, s162(b); S.I. 1975 No. 561.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 We conclude this report with a summary of our conclusions and recommendations. References are given to the relevant paragraphs of the report and to the relevant clause in the draft Polygamous Marriages Bill contained in Appendix A.

5.2 Our conclusions and recommendations with regard to the law of England and Wales are as follows:

- (1) A marriage which is entered into by a man or woman domiciled in England and Wales should not (if English law is applicable thereto in accordance with English rules of private international law) be invalid by reason of the fact that the marriage is entered into under a law which permits polygamy, provided that neither party to the marriage is already married.

(paragraph 2.33(a) and clause 1(1) and (3))

- (2) The recommendation referred to in (1) above should in general apply to marriages celebrated before, as well as to those which take place after, the date (the "commencement date") on which legislation implementing the recommendation comes into force, but the retrospective effect of that legislation should be qualified as in (3) to (5) below.

(paragraph 2.33(b) and clause 1(2))

- (3) A marriage celebrated before the commencement date should not be validated if it has been declared void either by a decree of nullity granted by a court in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales under the rules which, on the commencement date, govern the recognition of such annulments.

(paragraph 2.33(c) and clause 2(1))

- (4) A marriage which falls outside the scope of *Hussain v. Hussain* (that is to say, one entered into on or before 31 July 1971 by a man or a woman domiciled in England and Wales, or at any time before the commencement date by a woman so domiciled in the case of a marriage to a man the law of whose domicile permits him to have more than one wife) should not be validated if either party to the marriage has subsequently entered into another marriage with a different partner which would be rendered invalid by the retrospective validation of the first marriage.

(paragraph 2.33(d) and clause 2(2))

- (5) The validation of marriages not covered by *Hussain v. Hussain* should not:

- (a) affect property rights which have arisen before the commencement date, including rights which arise in consequence of the death of a person before that date and those which depend upon legitimacy;

(paragraph 2.33(e)(i) and clause 3(a))

- (b) create or affect entitlement to a benefit, allowance, pension or other payment which is payable in respect of a period before the commencement date or in respect of a death before that date;
(paragraph 2.33(e)(ii) and clause 3(b))
 - (c) affect tax which relates to a period or an event before the commencement date;
(paragraph 2.33(e)(iii) and clause 3(c))
 - (d) affect the succession to a dignity or title of honour.
(paragraph 2.33(e)(iv) and clause 3(d))
- (6) It is desirable that no distinction should be made by the civil law between potentially polygamous marriages and those celebrated in monogamous form. However, on the assumption that the recommendations referred to in (1) and (2) above are implemented, no such distinction remains, and accordingly no general legislative provision on the issue is required. However, certain minor amendments should be made to current legislation relating to marriages celebrated in polygamous form.
(paragraphs 3.6 and 3.10; clause 6(2) and Schedule, paragraphs 2–6)
- (7) No legislative provision should be made as to the effect of a valid actually polygamous marriage upon a prior marriage.
(paragraph 4.23)

5.3 Our conclusions and recommendations with regard to the law of Scotland are as follows:

- (1) A person domiciled in Scotland should not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy.
(paragraph 2.34(a) and clause 4)
- (2) Legislation to implement the recommendation in (1) above should not be retrospective.
(paragraph 2.34(b) and clause 4)
- (3) (a) A marriage which is valid by the law of Scotland and which is only potentially polygamous (in the sense that, although it was entered into under a law permitting polygamy, neither spouse has in fact married anyone else) should, so long as it remains monogamous, have the same legal effects for all purposes of the law of Scotland as a marriage entered into under a law which does not permit polygamy.
(paragraphs 3.7–3.9 and clause 5)
- (b) Certain minor amendments should be made to current legislation relating to marriages celebrated in polygamous form.
(paragraph 3.10; clause 6(2) and Schedule, paragraphs 1 and 3–5)

- (4) No legislative provision should be made as to the effect of a valid actually polygamous marriage upon a prior marriage.
(paragraph 4.23)

(Signed) RALPH GIBSON, *Chairman, Law Commission*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT
*PETER NORTH

J. G. H. Gasson, *Secretary*
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JOHN MURRAY
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R. Eadie, *Secretary*
28 June 1985

*Dr Peter North was the Commissioner primarily responsible for this project at the Law Commission before he left on 30 September 1984 to become Principal of Jesus College, Oxford. Since that date he has continued to play an active part in the preparation of the report and he approves its contents. His name appears at the foot of this report and at the request of his colleagues at the Law Commission.

APPENDIX A

DRAFT

POLYGAMOUS MARRIAGES BILL

ARRANGEMENT OF CLAUSES

England and Wales

Clause

1. Validity under law of England and Wales of marriages in polygamous form.
2. Exceptions from section 1.
3. Existing property rights, etc.

Scotland

4. Capacity of domiciled Scot to enter into marriage in polygamous form.
5. Effects of potentially polygamous marriage.

Supplementary

6. Consequential repeal and amendments.
7. Commencement.
8. Short title and extent.

SCHEDULE—Consequential amendments.

Polygamous Marriages Bill

DRAFT
OF A
BILL
TO

Make further provision as to marriages entered into under a law which permits polygamy.

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:—

England and Wales

Validity
under law of
England and
Wales of
marriages in
polygamous
form.

1.—(1) A marriage between parties neither of whom is already lawfully married shall not be void on the ground that it was entered into under a law which permits polygamy.

(2) Subject to section 2 below, subsection (1) above shall apply, and shall be deemed always to have applied, to marriages entered into before the commencement of this Act as well as to those entered into later.

(3) Subsection (1) above shall not apply to a marriage so far as its validity falls to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

EXPLANATORY NOTES

Clause 1

1. This clause applies only to England and Wales.
2. *Subsection (1)* gives effect to the principal recommendation in the report that a marriage entered into by a man or woman domiciled in England and Wales which is not actually polygamous should not be void by reason only of the fact that it is celebrated in polygamous form: see paragraph 2.33(a).
3. The subsection can have no application to marriages celebrated in the United Kingdom, because such marriages are not entered into under a law which permits polygamy. All marriages validly celebrated in the United Kingdom are necessarily legally monogamous in character (see paragraph 2.1, n. 9 of the report).
4. *Subsection (2)*, which implements the recommendation in paragraph 2.33(b) of the report, extends the rule laid down by subsection (1) to marriages celebrated before the date on which the Bill comes into force and deems it always to have applied to such marriages. This does not affect marriages that are valid apart from the Bill.
5. *Subsection (3)* means that subsections (1) and (2) of this clause relate to the internal law of England and Wales. It makes clear that they do not apply where, under the relevant choice of law rule, the law of another country is applied for the purpose of determining the validity of a marriage (see paragraphs 1.5 and 2.1–2.3 of the report). This corresponds to section 14(1) of the Matrimonial Causes Act 1973.

Polygamous Marriages Bill

Exceptions
from
section 1.

2.—(1) Section 1(1) above shall not apply to a marriage which has been annulled before the commencement of this Act (whether by a decree granted in England and Wales or by an annulment obtained elsewhere and recognised in England and Wales at the commencement of this Act).

(2) Section 1(1) above shall not apply to a marriage if a party to it has entered into a later marriage with some other person before the commencement of this Act, and the later marriage either—

- (a) is valid apart from this Act, but would be void if section 1(1) applied to the earlier marriage, or
- (b) is valid by virtue of section 1(1).

EXPLANATORY NOTES

Clause 2

1. This clause applies only to England and Wales. It provides for two exceptional situations in which a marriage celebrated before the Bill comes into force is not validated by clause 1.

2. *Subsection (1)* gives effect to the recommendation in paragraph 2.33(c) that the changes implemented by clause 1(1) should not validate marriages which have been annulled before the Bill comes into force.

3. (a) *Subsection (2)* implements the recommendation in paragraph 2.33(d). It governs the case in which a party has entered, in a polygamous form of ceremony, into a marriage which was then in fact monogamous but which is void under the present law, and has subsequently entered into a marriage with some other person, both marriages having been celebrated before the commencement of the Bill.

(b) Paragraph (a) of the subsection applies where the later marriage is valid under the present law. It provides that, in general, the earlier marriage is not to be validated by clause 1. Exceptionally, however, the earlier marriage is validated where the later marriage (i) is celebrated in polygamous form, (ii) is recognised in England and Wales under the present law and (iii) would be so recognised regardless of whether or not it is actually polygamous (see paragraph 2.25 of the report). In those circumstances the validity of the later marriage is not affected by the validation of the earlier marriage, and clause 1(1) validates the earlier marriage; both marriages will be recognised as valid (though actually polygamous) after the commencement of the Bill.

(c) Paragraph (b) of the subsection relates to the case in which, before the commencement of the Bill, a party has successively entered into two marriages, both of which are celebrated in polygamous form and both of which are void under the present law on that ground only. The combined effect of the subsection and clause 1(1) is to validate only the later marriage.

Polygamous Marriages Bill

Existing
property
rights, etc.

3. Nothing in this Act, so far as it relates to marriages entered into before the commencement of this Act, shall—
- (a) give or affect any entitlement to an interest—
 - (i) under the will or codicil of, or on the intestacy of, a person who died before the commencement of this Act, or
 - (ii) under a settlement or other disposition of property made before that time (otherwise than by will or codicil),
 - (b) give or affect any entitlement to a benefit, allowance, pension or other payment—
 - (i) payable before, or in respect of a period before, the commencement of this Act, or
 - (ii) payable in respect of the death of a person before that time,
 - (c) affect tax in respect of a period or event before the commencement of this Act, or
 - (d) affect the succession to any dignity or title of honour.

EXPLANATORY NOTES

Clause 3

1. This clause applies only to England and Wales. It provides for the preservation of existing rights in respect of property and certain other matters arising in the context of marriages which were celebrated before the commencement of the Bill. In relation to those marriages which are void under the present law but are validated by clause 1(1), the clause gives effect to the recommendation in paragraph 2.33(e).

2. Under the present law of England and Wales some marriages entered into after 31 July 1971 in polygamous form by persons domiciled in England and Wales are already valid (see paragraphs 2.9–2.10 of the report). Clause 3 has no effect in relation to a marriage whose validity is not dependent upon clause 1(1).

Scotland

Capacity of
domiciled
Scot to
enter into
marriage in
polygamous
form.

4. A person domiciled in Scotland shall not lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy.

EXPLANATORY NOTES

Clause 4

This clause applies only to Scotland and implements the recommendation in paragraph 2.34 of the report. It makes it clear that a person domiciled in Scotland is not to be held to lack capacity to enter into a marriage by reason only that the marriage is entered into under a law which permits polygamy. It will apply only to unmarried persons: a married person domiciled in Scotland would lack capacity to marry because already married. It will apply only to marriages outside the United Kingdom: a marriage in the United Kingdom would not be entered into under a law which permits polygamy. The clause follows existing legislation (see the Marriage (Scotland) Act 1977, sections 1(1) and 2(1)(b)) in making no reference to the law of the intended matrimonial home which is not thought to be relevant in Scots law in this context. Because the existing Scots law on capacity to enter into a marriage in polygamous form is undeveloped, it is not considered necessary to make the clause retrospective.

Effects of
potentially
polygamous
marriage.

5. A marriage valid by the law of Scotland and entered into—

(a) under a law which permits polygamy, and

(b) at a time when neither party to the marriage is already married,

shall, so long as neither party marries a second spouse during the subsistence of the marriage, have the same effects for all purposes of the law of Scotland as a marriage entered into under a law which does not permit polygamy.

EXPLANATORY NOTES

Clause 5

This clause applies only to Scotland and implements the recommendations in paragraph 3.7 of the report. It will apply to marriages entered into abroad in polygamous form where there is in fact only one husband and one wife. There is no reason why such marriages should not be regarded as effective marriages for all purposes so long as they remain in fact monogamous. This is what the clause provides. It is implicit in the clause that it is not intended to prevent a second, actually polygamous, marriage from taking place where that is permitted by the relevant laws (as it might be, for example, if all the parties were domiciled and resident at the relevant times in a country permitting polygamy). Once such a marriage took place the clause would no longer apply. So it would still be open to a Scottish court, for example, to hold that it was not adultery for a man validly married in polygamous form to have intercourse with a second wife to whom he was also validly married. The purposes for which it might be important to give effect to a marriage in polygamous form which was in fact monogamous include divorce, aliment, succession and social security. The clause provides a general rule which would apply for these and other purposes and which paves the way for the amendments in the Schedule in so far as they affect Scots law.

Supplementary

Conse-
quential
repeal and
amend-
ments.

6.—(1) In section 11 of the Matrimonial Causes Act 1973 (grounds on which a marriage is void), paragraph (d) and the words following that paragraph are hereby repealed.

(2) The Schedule to this Act shall have effect; but the amendments made in it to any enactment shall not affect the validity of any rules or regulations made under that enactment before the commencement of this Act (and any such rules or regulations may be varied or revoked accordingly).

EXPLANATORY NOTES

Clause 6

Subsection (1)

1. The material part of section 11 of the Matrimonial Causes Act 1973 provides, in relation to English law, that :

“A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say—

- (a) . . . ;
- (b) that at the time of the marriage either party was already lawfully married;
- (c) . . . ;
- (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other.”

2. Although section 11(d) and the words which immediately follow it do not (as judicially interpreted) render void a marriage entered into in polygamous form after 31 July 1971 by a man who is domiciled in England and Wales (provided that the marriage is not actually polygamous), they do have that effect upon such a marriage entered into by a woman so domiciled with a man who is domiciled in a country the law of which permits him to have more than one wife (see paragraphs 2.9–2.10 of the report). To that extent, therefore, section 11(d) conflicts with clause 1(1) and is accordingly repealed.

3. Paragraph (b) of section 11, which remains in force, renders void an *actually* polygamous marriage entered into by a man or woman whose capacity to enter into such a marriage is governed by English law.

Subsection (2)

4. As is explained in paragraphs 3.2–3.6 of the report, it appears that the present law of England and Wales treats a valid actually monogamous marriage celebrated in polygamous form in the same way as a valid marriage celebrated in monogamous form. For Scotland a recommendation to this effect is made in paragraph 3.7 of the report and is implemented in clause 5. Various enactments provide for marriages in polygamous form to be treated like other marriages. These provisions are now needed only for marriages which are or have been actually polygamous, and are accordingly amended in the Schedule.

5. The subsection provides that the amendments do not affect the validity of subordinate legislation made (before the commencement of the Bill) under the enactments amended. The relevant provisions of existing subordinate legislation are as follows:

The Social Security and Family Allowances Regulations 1975 (S.I. 1975 No. 561).

The Child Benefit (General) Regulations 1976 (S.I. 1976 No. 965), reg. 12.

The Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), r. 108.

The Supplementary Benefit (Aggregation) Regulations 1981 (S.I. 1981 No. 1524), reg. 8.

Each of these provisions treats marriages in polygamous form which are not actually polygamous in the same way as monogamous marriages. But the form of the regulations reflects the existing wording of the enabling legislation.

Commence-
ment.

7. This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

Short title
and extent.

- 8.—**(1) This Act may be cited as the Polygamous Marriages Act 1985.
- (2) This Act shall not extend to Northern Ireland; and
- (a) sections 1 to 3 and 6(1) and paragraphs 2 and 6 of the Schedule extend to England and Wales only, and
 - (b) sections 4 and 5 and paragraph 1 of the Schedule extend to Scotland only.

EXPLANATORY NOTES

Clause 8

Subsection (2)

1. The Bill applies only to England and Wales and to Scotland. However, we express the hope in paragraph 1.1 of the report that consideration will be given to the question of extending our recommendations to Northern Ireland.

2. Paragraphs 2 and 6 of the Schedule respectively amend the Matrimonial Causes Act 1973 and the Matrimonial Homes Act 1983, which apply only to England and Wales, and paragraph 1 of the Schedule amends section 2, which applies only to Scotland, of the Matrimonial Proceedings (Polygamous Marriages) Act 1972. Paragraphs 3, 4 and 5 of the Schedule amend enactments which apply both to England and Wales and to Scotland.

SCHEDULE

CONSEQUENTIAL AMENDMENTS

The Matrimonial Proceedings (Polygamous Marriages) Act 1972

1972 c.38.

1.—(1) Section 2 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 shall be amended as follows.

(2) In subsection (1), for the words “the marriage” onwards there shall be substituted the words “either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person”.

(3) for subsection (3) there shall be substituted—

“(3) Provision may be made by rules of court—

(a) for requiring notice of proceedings brought by virtue of this section to be served on any additional spouse of a party to the marriage in question, and

(b) for conferring on any such additional spouse the right to be heard in the proceedings,

in such cases as may be specified in the rules.”

The Matrimonial Causes Act 1973

1973 c.18.

2.—(1) Section 47 of the Matrimonial Causes Act 1973 shall be amended as follows.

(2) In subsection (1) for the words “the marriage” onwards there shall be substituted the words “either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person”.

(3) For subsection (4) there shall be substituted—

“(4) Provision may be made by rules of court—

(a) for requiring notice of proceedings brought by virtue of this section to be served on any additional spouse of a party to the marriage in question, and

(b) for conferring on any such additional spouse the right to be heard in the proceedings,

in such cases as may be specified in the rules.”

EXPLANATORY NOTES

SCHEDULE

Paragraph 1: The Matrimonial Proceedings (Polygamous Marriages) Act 1972

1. Section 2 of this Act applies only to Scotland. It provides (as amended):

“(1) A court in Scotland shall not be precluded from entertaining proceedings for, or granting, any such decree as is mentioned in subsection (2) below by reason only that the marriage to which the proceedings relate was entered into under a law which permits polygamy.

(2) The decrees referred to in subsection (1) above are—

- (a) a decree of divorce;
- (b) a decree of nullity of marriage;
- (c) a decree of dissolution of marriage under section 1 of the Presumption of Death (Scotland) Act 1977 (Presumption of Death and Dissolution of Marriage);
- (d) a decree of judicial separation;
- (e) a decree of separation and aliment or interim aliment;
- (f) a decree of declarator that a marriage is valid or invalid;
- (g) any other decree involving a determination as to the validity of a marriage;

and the reference in subsection (1) above to granting such a decree as aforesaid includes a reference to making any ancillary order which the court has power to make in proceedings for such a decree.

(3) This section has effect whether or not either party to the marriage in question has for the time being any spouse additional to the other party; and provision may be made by rules of court—

- (a) for requiring notice of proceedings brought by virtue of this section to be served on any such other spouse; and
- (b) for conferring on any such other spouse the right to be heard in any such proceedings,

in such cases as may be specified in the rules.”

Paragraph 2: The Matrimonial Causes Act 1973

2. (a) Section 47(1) of this Act provides:

“A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy.”

EXPLANATORY NOTES

Paragraph 2 (continued)

- (b) Section 47(4) of the Act provides:

“This section has effect whether or not either party to the marriage in question has for the time being any spouse additional to the other party; and provision may be made by rules of court—

- (a) for requiring notice of proceedings brought by virtue of this section to be served on any such other spouse; and
- (b) for conferring on any such other spouse the right to be heard in any such proceedings,

in such cases as may be prescribed by the rules.”

Polygamous Marriages Bill

The Social Security Act 1975

1975 c.14.

3. In section 162(b) of the Social Security Act 1975, for the words between "this Act" and "and regulations" there shall be substituted the words "a marriage during the subsistence of which either party is at any time married to more than one person is to be treated as having, or not having, the same consequences as any other marriage."

The Child Benefit Act 1975

1975 c.61.

4. In section 9(2) of the Child Benefit Act 1975, for the words following "in which" there shall be substituted the words "a marriage during the subsistence of which either party is at any time married to more than one person is to be treated for the purposes of this Part of this Act as having, or not having, the same consequences as any other marriage."

EXPLANATORY NOTES

Paragraph 3: The Social Security Act 1975

3. This Act applies both to England and Wales and to Scotland. Section 162 of the Act provides:

“Regulations may provide—

- (a) . . . ;
- (b) as to the circumstances in which, for the purposes of this Act—
 - (i) a marriage celebrated under a law which permits polygamy, or
 - (ii) any marriage during the subsistence of which a party to it is at any time married to more than one person, is to be treated as having, or not having, the consequences of a marriage celebrated under a law which does not permit polygamy;

and regulations made for the purposes of subsection (b) above may make different provision in relation to different purposes and circumstances.”

Paragraph 4: The Child Benefit Act 1975

4. This Act applies both to England and Wales and to Scotland. Section 9(2) of the Act provides:

“Regulations may make provisions as to the circumstances in which—

- (a) a marriage celebrated under a law which permits polygamy; or
- (b) a marriage during the subsistence of which a party to it is at any time married to more than one person,

is to be treated for the purposes of this Part of this Act as having, or not having, the consequences of a marriage celebrated under a law which does not permit polygamy.”

Polygamous Marriages Bill

The Supplementary Benefits Act 1976

1976 c.71

5. In section 32A(a) of the Supplementary Benefits Act 1976, for the words from “celebrated” to “it” there shall be substituted the words “during the subsistence of which either party”.

The Matrimonial Homes Act 1983

1983 c.19.

6. In section 10 of the Matrimonial Homes Act 1983, for subsection (2) there shall be substituted—

“(2) It is hereby declared that this Act applies as between the parties to a marriage notwithstanding that either of them is, or has at any time during the marriage’s subsistence been, married to more than one person.”

EXPLANATORY NOTES

Paragraph 5: The Supplementary Benefits Act 1976

5. This Act applies both to England and Wales and to Scotland. Section 32A was introduced into the Act by the Social Security Act 1980, sections 6, 8 and 21, and Schedule 2, Part I, paragraph 27. It provides:

“Regulations may provide for any provision of this Act except this section to have effect with prescribed modifications—

(a) in cases involving a marriage celebrated under a law which permits polygamy or a marriage during the subsistence of which a party to it is at any time married to more than one person;

(b)”

Paragraph 6: The Matrimonial Homes Act 1983

6. This Act applies only to England and Wales. Section 10(2) provides:

“It is hereby declared that this Act applies as between a husband and a wife notwithstanding that the marriage in question was entered into under a law which permits polygamy (whether or not either party to the marriage in question has for the time being any spouse additional to the other party).”

APPENDIX B

List of persons and organisations who submitted comments on Working Paper No. 83; Consultative Memorandum No. 56

Attorney-General's Department, Australia
The Rt. Hon. Sir John Arnold, President of the Family Division
Ms. Susan Atkins
Mr. D.J. Bentley
The Church of Scotland
Commission for Racial Equality
Department of Health and Social Security
Equal Opportunity Policy & Law Group
Foreign and Commonwealth Office
General Register Office
Harehills and Chapeltown Law Centre
Professor R.H. Hickling
Home Office (Immigration and Nationality Department)
Junior Chamber Scotland
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Senate of the Inns of Court and the Bar
Sheriffs' Association
The Society of Conservative Lawyers
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