SCOTTISH LAW COMMISSION

MEMORANDUM No: 11

PRESUMPTIONS OF SURVIVORSHIP AND DEATH

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comments upon and criticism of the proposals which it contains. It does not represent the concluded views of the Scottish Law Commission.

SCOTTISH LAW COMMISSION

PRESUMPTIONS OF SURVIVORSHIP AND DEATH

INTRODUCTION

1. This Memorandum, presented under Item No. 11 of the Scottish Law Commission's Second Programme of Law Reform, relates to presumptions of survivorship and death. Our attention has been drawn to certain anomalies in this field, and other defects have been disclosed in the course of our examination of the law. These defects are considered here; but it may be that others have been encountered in practice. We would be glad to have these drawn to our attention. Such conclusions and proposals as this Memorandum makes are provisional only and are designed to focus the main issues which the amendment of the law seems to present. We hope that the Memorandum will elicit comments on the basis of which considered advice may be given. We would be grateful to have such comments before 1st December, 1969.

2. The establishment for legal purposes of the fact and time of a person's death is not infrequently a matter of importance, since upon it may depend such matters as the following:

(a) the right to succeed to that person's property;

(b) the right to succeed to other property consequent upon that person's death;

(c) the disburdenment of property from a liferent;

(d) /

(d) the right to the proceeds of policies of assurance upon that person's life or contingent upon his death;

(e) the right to the payment of annuities, whether or not under policies of assurance;

(f) the winding-up of trusts and the cessation of annuities;

(g) the right to pensions, especially widows' pensions, under state and private pension schemes;

(h) the dissolution of a marriage and the right of the surviving party to remarry;

(i) the dissolution of other contracts, including contracts of co-partnery;

(j) the right to dispense with the absentee's consent, for example, his consent as a pro indiviso proprietor.

These illustrations, which are by no means exhaustive, point to the desirability of having a satisfactory system of proof or presumption of death.

THE PRESENT LAW

The Common Law.

3. The starting point of the common law of Scotland is a presumption in favour of the continuance of life, so as to throw the onus of proof of death upon the party alleging that fact.[1] The precise duration of the presumption has not been authoritatively fixed.[2] Stair[3] says that some extend it to eighty /

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1 Stair, 4.45.17 (19); Erskine, 4.2.36.

2 Fife v. Fife (1855) 17 D. 951, at p. 954.

3 4.45.17 (19).

eighty years of age and others to a hundred years. Bankton[1] extends it to the latter figure, and in Bruce v. Smith[2], Lord President Inglis remarked: "Before 1849 Alexander Bruce was not more than eighty-one years of age, and therefore there was a presumption of his being still alive."

4. This presumption of life may, of course, be overcome by direct evidence of death; but it may also be overcome by proof of circumstances which allow an inference of death. The standard of proof has been variously described: judges have required positive proof[3] or have asked "whether any reasonable doubt exists of the death"[4] Account, however, is always taken of the age, health and habits of life of the person concerned, of the circumstances of his employment or vocation, and of the country where he was last known to have lived.[5] The court has probably been less exacting in presuming the deaths of seamen,[6] soldiers on active service,[7] and persons upon expeditions to unexplored territories.[8] The ultimate decision, however, depends solely on the circumstances of the case.[9]

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1 IV.34.1.

2 (1871) 10 M. 130 at p. 132.

3 Fife v. Fife (1855) 17 D. 951 at p. 954.

4 Bruce v. Smith (1871) 10 M. 130 at p. 133.

5 Fife v. Fife, supra, at p. 954.

6 Garland v. Stewart (1841) 4 D. 1, at p. 6; Sands against Her Tenants (1678) Mor. 12645.

7 French v. Earl of Wemyss (1677) Mor. 12 644.

8 Fairholme v. Fairholme's Trs. (1858) 20 D. 813.

9 Greig v. Trustees of the Edinburgh Merchant Company's Widows' Fund, 1921 S.C. 76; X. v. Society of Solicitors in the Supreme Courts of Scotland, 1937 S.L.T. 87.

5. The common law established no presumptions dealing with situations where a person's right to property depends upon the order of death of other persons and where no evidence is available to establish that order of death.[1]

6. A common law action for declarator of presumption of death has always been regarded as being an action directed to ascertaining the personal status of the person whose death the court is asked to presume and, in consequence, a matter within the privative jurisdiction of the Court of Session.[2] It is right, however, to add that "as an incidental issue in a substantive action, an averment that a person has been absent for a period of years, or has disappeared, and his whereabouts are unknown, and that there are grounds for the presumption that he is dead, may form the subject of inquiry, and be disposed of in the Sheriff Court."[3]

7. While a common law decree of declarator of presumption of death binds those who are called as defenders, it is not clear that the decree is res judicata in relation to parties not called or that it has the effect of a decree in rem.

The Presumption of Life Limitation (Scotland) Act 1881.

8. Establishing death under the common law was not always easy, especially where a person had disappeared, and in practice "the old law often kept property in neutral custody for so long a time as to deprive a generation from taking any benefit from

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1 Drummond's Judicial Factor v. Lord Advocate 1944 S.C. 298; Ross's Judicial Factor v. Martin, 1955 S.C. (H.L.) 56.

2 Mackie v. Lyon (1943) 59 Sh.Ct.Rep. 130.

3 Idem, per Sheriff Laing at p. 133F.

a succession which had really opened up to them."[1] To remedy this defect the legislature passed the Presumption of Life Limitation (Scotland) Act 1881[2] which declared that when a person had been absent from Scotland, and had not been heard of for seven years or upwards, whoever was entitled to succeed to that person's property might apply to the Court of Session for authority to uplift the yearly income of his heritable and moveable estate and, after the lapse of further periods and upon a further application to the court, to receive the capital of the estate. The Act also clothed the court with power to dispense with the participation of an absent person in the sale of property held pro indiviso. The 1881 Act, however, had certain limitations:

(a) It applied only in the case of "any person who has been absent from Scotland, or who has disappeared"; and so did not apply to a missing person who had never been in Scotland.[3]

(b) The application could be made only by a person "entitled to succeed to the said absent person," so that the Act did not apply where it was desired to presume the death of the liferenter of a heritable estate[4] or where otherwise the applicant's right, although contingent on the death of the absent person, was not a right of succession to his estate.[5]

(c) /

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1 Williamson v. Williamson (1886) 14 R. 226, per Lord President Inglis at p. 228.

2 c. 47.

3 Rainham v. Laing (1881) 9 R. 207.

4 Peterhead School Board v. Yule's Trustees (1883) 10 R. 763.

5 Minty v. Ellis' Trustees (1887) 15 R. 262.

(c) The Act applied only when the absent person was "possessed of or entitled to heritable or moveable estate in Scotland." It could not, therefore, be used to presume the death of persons who possessed no estate or possessed no estate in Scotland.[1]

The Presumption of Life Limitation (Scotland) Act 1891.

9. The 1881 Act was repealed by the Presumption of Life Limitation (Scotland) Act 1891.[2] Its crucial provision is section 3 which, "when any person has disappeared and has not been heard of[3] for seven years or upwards" enables the court to "find on the facts proved or admitted that he died at some specified date within the seven years after the date on which he was last known to be alive and, where there is no sufficient evidence that he died at any definite date, find that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive." It is worth insisting that the Act creates a mechanism by which a finding of death may be made upon facts pointing to a precise time of death as well as upon the presumption which the Act establishes.[4] The Act cures several of the defects of the 1881 Act. In the first place, the 1891 Act enables the court to presume the death of "any person [who] has disappeared and has not been heard of for seven years or upwards"; there is no restriction upon the ambit of the Act based on the absent person's disappearance from Scotland. /

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1 Mrs. Janet M'Arthur or Fenner (1886) 2 Sh.Ct.Rep. 104.

2 (c. 29). s. 2 saved proceedings in any petition under the 1881 Act presented before the passing of the 1891 Act.

3 On the interpretation of these words see Prudential Assurance Co. v. Edmonds (1877) 2 App. Cas. 487, especially pp. 489, 502 and 513.

4 Tait v. Sleigh and Others 1969 S.L.T. 227.

Scotland. The section permits of the immediate distribution of the absentee's property as if he were dead, subject to the proviso that it should not entitle "any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died."[1] The 1891 Act, however, can and has been used to presume the death of a domiciled Englishman when the estate involved is heritage in Scotland.[2] It is not clear why the application of the proviso is limited to intestate moveable succession. If it is appropriate to exclude the application of the presumption to persons domiciled outwith Scotland in matters relating to their intestate moveable succession, it seems equally legitimate to exclude it in matters relating to their testate moveable succession unless, perhaps, Scots law is specifically chosen as the lex successionis. We will allude to this matter again.

10. In the second place, an application under the 1891 Act may be made not only by a person entitled to succeed to the estate of the absent person but by "... any person [who is] entitled to succeed to any estate on the death of such person, or entitled to any estate the transmission of which to the petitioner depends on the death of such person, or the fiar of any estate burdened with a life-rent in favour of such person."[3]

11. In the third place, the effect of a decree under the Act finding or presuming a missing person to have died is to enable the persons mentioned in para. 10 to "make up titles to and to enter /

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1 s. 3 ad finem.

2 Jones, Petr. 1923 S.L.T. 31.

3 s. 3.

enter into possession of and to sell or dispose of or to burden such estate as if the [missing] person had actually died at the date on which the Court has found that he is proved or presumed to have died."[1]

12. The 1891 Act contains other provisions of a miscellaneous character. Section 4 allows the court to dispense with the participation of a missing pro indiviso proprietor of Scottish heritage in the sale of the property. The Entail (Scotland) Act 1882,[2] as amended by section 8 of the 1891 Act, permits the appointment of a factor loco absentis to the absent heir in possession of entailed property.[3] Sections 6 and 7 of the 1891 Act deal with claims to his heritable or moveable estate by the missing person on his reappearance, or by any person deriving right from him who has a right to the estate preferable to the person taking under the Act. The missing person or a person deriving right from him is entitled to demand and receive the estate or the value thereof from the person taking under the Act or from any person who has acquired the estate gratuitously from the person taking under the Act. He receives the estate free of new burdens, but he does not receive the income which may have accrued prior to the demand and he must account for meliorations. After thirteen years, however, the rights of the missing person and those deriving rights from him finally lapse.

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1 s. 3.

2 c. 53.

3 s. 14.

13. Jurisdiction in petitions under the Act is vested in the Court of Session, save where the value of the estate is not over £500, when the Sheriff Court of the county in which the estate, or the greater part thereof, is situated has jurisdiction.[1]

14. There are, however, certain important limitations, express and implied, to the operation of the 1891 Act:

(a) An application may be made under the 1891 Act only by a person "entitled to succeed to any estate on the death of [an absent person], or entitled to succeed to any estate the transmission of which to the petitioner depends on the death of such person."[2] In Fraser Petitioner[3] a woman's husband disappeared in 1937 and nothing was heard from him thereafter. He was possessed of no estate nor was his wife entitled to any in consequence of his death. The court rejected her petition under the 1891 Act since it had no patrimonial object. Again, in Murray v. Chalmers[4] a petition was presented to presume the death of Robert Chalmers, who had disappeared in 1904. The petitioner was the purchaser of the reversionary rights of Chalmers under the settlement of his father. Those rights were dependent upon Chalmers surviving his mother who died in 1905. The petition was contested inter alios by the persons who had the right to Chalmers' share of the estate if he predeceased his mother. Lord Hunter accepted their argument that the /

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1 s. 12(1)(b).

2 s. 3.

3 1950 S.L.T. (Sh.Ct.) 51.

4 1913, 1 S.L.T. 223.

the petitioner was not a person whose entitlement to estate depended on the death of the missing person but one whose entitlement depended rather on his date of death. He, therefore, dismissed the petition.

(b) The Act does not apply to claims against insurers under a policy of assurance upon the life of any person who has disappeared.[1] Persons claiming under such a policy are required, in a question with the insurers, to prove the death of the person whose life is insured under the common law rules.

(c) The Act enables successors "to make up titles to and to enter into possession of and to sell or dispose of or to burden such estate as if the said person had actually died at the date on which the Court has found that he is proved or presumed to have died."[2] The court's decree, however, does no more than this; it does not in other respects allow the petitioner or third parties to act upon the assumption that the missing person is dead. In particular, it does not of itself permit the spouse of the missing person to contract a new marriage.[3]

(d) While section 6 of the 1891 Act contemplates the situation where the absentee re-appears and makes provision for the return to him of his estate, the language of the section, though applying in terms both to moveable as well as to heritable estate, suggests that it was drafted mainly to deal with the restitution of heritable property. Today, moveable property has become more important than it was in 1891 and, once title to it has been obtained by the absentee's successors, /

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1 s. 11; Murray v. Chalmers 1913,1 S.L.T. 223.

2 s. 3.

successors, such property is liable rapidly to become inmixed with the successors' own estate. In this situation, and against the background of the current mobility of moveable property, restitution in kind presents formidable problems. These are discussed in paragraphs 36 - 38.

(e) Under section 7 of the 1891 Act, the absentee continues to have a right to recover his own estate within a period of thirteen years from the date when its holder took infeftment or obtained possession of the estate. In other words, at least twenty years, the period of the now current long negative prescription, must elapse from the date when the absentee was last seen or heard of before the risk of a claim by the absentee or his successors disappears. This period is possibly too long, but we consider that it should correspond with the period of the long negative prescription. It is possible, however, that as a result of representations made to us following our Memorandum No. 9 on Prescription and Limitation of Actions, we may recommend to the Secretary of State for Scotland and to the Lord Advocate that the period of the long negative prescription should be reduced from twenty years to fifteen years. If this recommendation were implemented by legislation, or if otherwise the period of the long negative prescription were reduced, we recommend that the period during which an absentee should have a right to recover his estate from the presumed successors should be reduced so that the total period during which the absentee may recover his estate should correspond /

correspond with the period of the long negative prescription. We should, however, welcome views on this matter.

(f) Under section 7 of the 1891 Act the period after which the absent person, or any persons deriving right from him, may not recover his or their estate from the putative successors is computed from the date on which the title to the property was made up or possession of the property obtained. This means that the date on which prescription takes effect may differ for different items even of the absent person's personal estate. We suggest that the period should be made to run from the date on which the absentee was declared or was presumed to have died, or, where the property passed at some other date, from that date.

(g) The 1891 Act makes provision for a judicial declaration that a person who has disappeared died, or may be presumed to have died, on a particular date. It makes no express provision, however, enabling the court to declare who are entitled to succeed upon the basis of the findings as to the time of death.[1] It would seem to be desirable to confer upon the court express authority to determine competing rights.

The Divorce (Scotland) Act 1938

15. The operation of the 1891 Act was subject to several important limitations, but perhaps the most striking deficiency was its absence of effect in matters of status. Despite /

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1 See Dear and Lumgair, Petitioners (1905) 12 S.L.T. 862 and (1906) 13 S.L.T. 850, particularly the judgment of Lord Johnston at pp. 851-2.

Despite the existence of a decree under that Act the spouse of a missing person could not enter into a marriage which was assuredly valid.[1] If in fact the missing person was alive, any other marriage which his spouse might contract was ipso facto invalid.[2] Even if there was no evidence that the missing person was alive, in the absence of affirmative evidence that he was dead the new spouse could resist claims for aliment on the ground that his marriage was void.[3] The spouse of a missing person could not obtain a decree of divorce for desertion unless the circumstances pointed to the absent spouse's intention to desert.[4] These problems were not resolved until the passing of the Divorce (Scotland) Act 1938.[5] Section 5 provides:

> "5. (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court craving a decree of dissolution of the marriage on the ground of the presumed death of the other party, and the Court, if satisfied that such reasonable grounds exist, may grant such a decree.
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> (2) In any proceedings on a petition presented under the last foregoing subsection, the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, /

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1 Brady v. Murray, 1933 S.L.T. 534; see also Fraser 1950 S.L.T. (Sh.Ct.) 51.

2 Sharp v. Sharp (1898) 25 R. 1132 per L.J.C. Macdonald at p. 1135.

3 Sharp v. Sharp (1898) 25 R. 1132.

4 See Lough v. Lough 1930 S.C. 1016 and the comments on that case in Lench v. Lench 1945 S.C. 295.

5 c. 50.

petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead unless the contrary is proved."

16. Section 5 used the expression "any married person ..... may present a petition to the Court" but did not give express guidance as to the appropriate rules of jurisdiction.[1] The court, however, construed section 5 against the background of the existing law and required the petitioner to be domiciled in Scotland at the date of raising the action. This presented difficulties for petitioning wives because of the operation of the rule that a wife's domicile follows that of her husband. In Labacianskas v. Labacianskas[2] such a wife was able to invoke the jurisdiction only because of the rule that a domicile, once established, is presumed to subsist in the absence of evidence to the contrary. In giving the judgment of the court Lord Keith remarked: ".... the present Act drives us, in my opinion, to judge of domicile as at the date when the absentee was last known to be alive. That will be either the date of his presumed death, where facts point to his death at a definite date (when ex hypothesi he must have been known to be alive), or the date when he was last heard of, where no known event is averred as likely to have caused his death at that date."[3] Statutory effect was given to this principle by section 2(3) of the Law Reform (Miscellaneous Provisions) Act 1949,[4] which declares that in such petitions the Court shall have /

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1 See Labacianskas v. Labacianskas 1949 S.C. 280.

2 Supra.

3 Supra, at p. 285.

4 c. 100.

have jurisdiction where the petitioner is domiciled in Scotland. In determining whether for this purpose a woman is domiciled in Scotland her husband is treated as having died immediately after the last occasion on which she knew or had reason to believe him to be alive. But the section also provides that, in proceedings by a wife, the court has jurisdiction where she is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. These rules are open to objections similar to those applying to ordinary actions of divorce; in particular, to the objections -

(a) that a man, however long he may have resided in Scotland, cannot have recourse to the Scottish courts unless he is domiciled there;

(b) that a woman of Scottish origin, married to a person domiciled abroad, cannot obtain relief in Scotland unless she returns and resides there for no less than three years; and

(c) that a person's domicile is not always easy to establish, particularly after the lapse of time.

17. It is a defect of section 5 of the 1938 Act that it does not provide expressly for the contingency of the reappearance of the absent spouse. It is suggested in Walton on Husband and Wife that the validity of any second marriage would not be affected by the mere fact of the absent spouse's reappearance but that such reappearance would found a reduction of the decree of dissolution of the marriage on the ground of presumed death, "as the whole basis of the decree is then destroyed."[1]

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1 3rd edn. (Edinburgh, 1951), p. 122.

On such reduction the second marriage would ipso facto be null and void.[1] This suggestion, however, is not accepted by all authorities.[2] Whatever the legal position, both from a moral and from a social point of view it seems undesirable that the second marriage should be contingent upon the failure of the absent spouse to reappear. We are fortified in this conclusion by the opinion of the Royal Commission on Marriage and Divorce that "the real purpose of the proceedings is to obtain a declaration of presumption of death and the provision for the dissolution of the marriage by decree of the court is really a safeguard for the applicant in case the facts belie the presumption."[3] We accept, and advocate the adoption of, the recommendation of the Royal Commission that the fact that the spouse presumed to be dead is alive, or was alive at the material time, should not of itself be a ground for the reduction of a decree of divorce founded upon a presumption of death once the decree has become final and the time for appeal has elapsed.[4] This recommendation, as the Royal Commission points out, would leave it open for the decree to be attacked on other grounds such as fraudulent misrepresentation on the part of the petitioner.[5]

The Succession (Scotland) Act 1964

18. It was mentioned in paragraph 5 above that, when two or more persons have died in circumstances making it uncertain in which order their deaths occurred, the common law gives no /

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1 3rd edn. (Edinburgh, 1951) p. 122.

2 See T.B. Smith, Short Commentary on the Law of Scotland (Edinburgh, 1962), p. 336.

3 Cmd. 9678 (1956), para. 1197.

4 Ibid, p. 338, recommendation no. 79.

5 Ibid, para. 1198.

no guidance as to the order in which they may be presumed to have died. In Ross's Judicial Factor v. Martin[1] Lord Keith of Avonholm suggested[2] that the facts of the case suggested the desirability of introducing into the law of Scotland statutory rules for cases of common calamity. These were introduced in the Succession (Scotland) Act 1964.[3] Section 31 provides that:

> "31. -(1) Where two persons have died in circumstances indicating that they died simultaneously[4] or rendering it uncertain which, if either, of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse,
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> (a) where the persons were husband and wife, it shall be presumed that neither survived the other; and
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> (b) in any other case,[5] it shall be presumed that the younger person survived the elder. ....."

19. The 1964 Act was concerned with succession on death and section 31 deals only with the case where it is clear that "two persons have died" in the circumstances indicated by the section. A similar problem, however, may arise where two or more persons, though not known to be dead, may be presumed to have died either in circumstances indicating that they died simultaneously or in circumstances which render it uncertain which /

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1 1955 S.C. (H.L.) 56.

2 At p. 73.

3 c. 41.

4 The word "simultaneously" may be presumed to have been inserted having regard to In re Grosvenor [1944] Ch. 138.

5 Unless in the special circumstances specified in section 31(2).

which of them survived the other. It is suggested, therefore, that the presumptions embodied in section 31, subsections (1) and (2) should also be applied in these situations.

20. The exclusion of spouses from the rule established by section 31 contemplates primarily the situation of the childless couple and has the effect, in the event of a common calamity, of preventing the estate of the older spouse passing in whole or in part to the relatives of the younger spouse to the exclusion in whole or in part of those of the older spouse himself. Professor Meston has doubted whether this exception for spouses is really justified: it may lead to intestacies in the commonest form of common calamity.[1] Our attention has been drawn, in particular, to the situation where a policy has been effected by a husband for the benefit of the wife but, in the event of her predeceasing him, then for the benefit of the children. Under the law as it stands the provision in favour of the children would not operate in the case of a calamity involving both husband and wife. Certain practical difficulties also arise. If, as commonly occurs, husband and wife are both trustees under such a policy, the absence of a presumption of survivorship means that the life office must take a discharge from the executors of both rather than one of them. We are not convinced, however, that the law would be improved by applying the general presumption to common calamities involving spouses. If the older spouse had children by a prior marriage, they might well be injuriously affected by its application. The question, however, is a complicated one as to which we would welcome comments.

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1 M.C. Meston, The Succession (Scotland) Act 1964 (Edinburgh, 1964), p. 16.

21. Professor Meston has also criticised the terms of section 31(2) which, in the common calamity situation, excludes the operation of the general presumption when the older person has made a testamentary gift to the younger person coupled with, in the event of the latter's failure to survive, a conditional gift to a third person. In this case, if, and only if, the younger person has died intestate, the older person is presumed for the purpose of this gift alone to have survived the younger. Professor Meston suggests that, "if this exception to the usual presumption of survivorship is necessary, which seems doubtful, it [should have been] applied whether or not the younger person made a will or alternatively only in cases where he was intestate as to the property subject to the survivorship destination."[1]

22. The rule in section 31(2) is presumably designed to give effect, where practicable, to the probable intentions of the testator, namely, to benefit one named person if he is alive or, if not, another named person.[2] On this view, we accept the principle which it embodies as a justifiable exception to the ordinary presumption of the survivorship of the younger person in a common calamity. There is room, perhaps, for debate whether or not it should be a condition of the application of this exception that the younger person should have died intestate, or intestate in relation to the property devolving under the older person's provision. It is our view, however, that it may be difficult, and it should be unnecessary, for the executors of the older person to have to ascertain whether or not the younger person died intestate. We also think that, if the probable intentions of the older person are the factor of prime importance in considering the relevant rule, the testacy /

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1 M.C. Meston, The Succession (Scotland) Act 1964 p. 17.

2 See the statement of Lady Tweedsmuir made in the House of Commons on 11th May 1964, Hansard, 1963-64 Vol. 695, col. 148.

testacy or intestacy of the younger person would not be likely to have been a material consideration in the eyes of the older person when making the destination over. We suggest, therefore, the deletion of the words "and the younger person has died intestate."

Legislation concerned with registration of death

23. Special problems arise when persons die or disappear in the course of travel by sea or air outside the United Kingdom or when members of Her Majesty's naval, military or air forces, members of their families, and other persons accompanying them, die or go missing outside the United Kingdom. Provision is made by the Merchant Shipping Act 1894,[1] the Civil Aviation Act 1949,[2] the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957[3], and the Registration of Births, Deaths and Marriages (Scotland) Act 1965[4] for the maintenance of records of the deaths of such persons and their transmission, in appropriate cases, to the Registrar General of Births, Deaths and Marriages for Scotland. Under the provisions of these Acts the Registrar General for Scotland keeps a "Marine Register Book,"[5] a "Service Departments Register"[6] and an "Air Register Book of Births and Deaths."[7] Entries from these registers may be extracted and such extracts are declared to be "sufficient evidence of the birth, death or marriage as the case may be."[8]

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1 (c. 60) ss. 254, 339, 385, and Eighth Schedule.

2 (c. 67) s. 55.

3 (c. 58) ss. 1 and 2. This Act came into force on 1st April 1959: S.I. 1959, No. 405.

4 (c. 49) s. 22(4).

5 1894 Act, s. 254(4).

6 S.I. 1959, No. 406.

7 Civil Aviation Act 1949, ss. 55(5) and 70(2) and S.I. 1948, No. 1411.

8 1965 Act, s. 41(3), when read in conjunction with the 1894 Act, s. 254(4), the 1949 Act, s. 55(8), the 1957 Act, s. 3(2).

24. In this Memorandum, however, we are primarily concerned with the case of persons whose death is not quite certain because of their disappearance. When a person goes missing at sea the particulars of the incident are entered in the ship's official log-book[1] and, upon its next arrival in port, a copy of the particulars is delivered to the superintendent or chief officer of customs or to a consular officer, for transmission to the Registrar-General of Shipping and Seamen.[2] An investigation is carried out by an authorised officer of the Board of Trade with a view to ascertaining the truth of the entry in the log-book, and a report thereon is sent to the Registrar-General of Shipping and Seamen. On being satisfied as to the circumstances the Registrar-General of Shipping and Seamen will register the death of the person concerned, entering as the cause of death "Missing at sea presumed killed or drowned." It is understood that copies of such registry entries transmitted to the Registrar General of Births, Deaths and Marriages for Scotland are entered by him in the Marine Register Book as cases of death.

25. When a registered ship is lost or abandoned and the master does not survive, the Registrar-General of Shipping and Seamen receives a list of the crew at the time of the loss from the owner.[3] The names are not officially returned to the Registrar General of Births, Deaths and Marriages for Scotland, but extracts of entries in the list are issued by the Registrar-General of Shipping and Seamen which are understood to be acceptable as evidence of death for probate purposes in England and Wales. In the case of the death or disappearance on /

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1 Merchant Shipping Act 1894, s. 254(1).

2 Idem s. 254(2) and (3).

3 Idem s. 255(2).

on shore abroad of a seaman belonging to a British ship or of a British seaman off a foreign ship, the Registrar-General of Shipping and Seamen often receives reliable information, from foreign registration authorities and Masters' reports, and he will, on the basis of this information, issue an "Extract relating to the death or supposed death of a seaman". This document makes it clear that no statutory return of the death has been received but that it appears, from facts specified, that the death occurred. There is no statutory provision for the issue of such extracts, but it is clear that they have evidential value.

26. The Civil Aviation Act 1949 section 55(9) provides for the keeping[1] of a record of persons reported as missing "being persons with respect to whom there are reasonable grounds for believing that they have died in consequence of an accident to an aircraft registered in Great Britain and Northern Ireland." It also provides for the rectification of such record and the transmission of information contained in it to inter alios the Registrar General of Births, Deaths and Marriages for Scotland who, on the basis of this information, keeps a "Missing Persons Air Register."[2] It is understood that the purpose of these provisions was to provide evidence of death, which, while open to subsequent attack in the courts, should be regarded as prima facie evidence of death. The Registrar General of Births, Deaths and Marriages for Scotland does not issue extracts from this Register. In England, it is understood, extracts are issued, signed but not sealed, to indicate that they are not to be considered as conclusive.

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1 At present, by the Board of Trade.

2 S.I. 1948, No. 1411.

27. It is a feature of accidents both to ships and aircraft that a number of persons are likely to be involved and that official inquiries, frequently of an exhaustive nature, will have been conducted into the accident. Official certificates of death or of supposed death are issued with greatest caution. Yet the present practice of the Commissary Courts in Scotland is that: "In all cases the fact of death must be distinctly averred ..... A statement that the person to whose estate confirmation is wanted has disappeared, and is believed to be dead, is not sufficient ..... In cases of disappearance the application must be preceded by a decree under the Presumption of Life Limitation (Scotland) Act 1891."[1] We believe that the rigid insistence upon this requirement in the case of persons who are believed to have died in the course of disasters at sea or of aircraft accidents adds unnecessarily to the cost of obtaining confirmation. The Confirmation of Executors (War Service) (Scotland) Act 1940[2] contemplated the situation where a competent authority had issued a certificate to the effect that a person engaged on war service was missing on a specified date and had been presumed or concluded for official purposes to be dead. The Act provided that the production of such a certificate should permit a person to depone to credibility of death rather than to death for purposes of confirmation. This Act ceased to have effect in 1959, but it embodied a valuable principle. We suggest that the issue by a competent authority within the United Kingdom of a certificate that a person was missing on a specified date in consequence of an /

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1 Currie on Confirmation, 6th edn., (Edinburgh 1965), p. 115 The position in England is different. We understand that a decree of presumption of death is not a necessary condition of the grant of probate, and where the estate is under £3,000 even a registrar of the principal probate registry may accept an oath of credulity - Gibson's Probate 16th edn., p. 109.

2 c. 41.

an accident to or on a ship or aircraft registered in the United Kingdom, and is dead, or may be presumed to have died, should raise a legal presumption that the missing person died on the date and at the time specified in the certificate. It should also permit his executors to depone to belief that he has died, rather than to the fact of his death, for the purposes of confirmation.

COMMENTARY ON THE PRESENT LAW

28. The preceding outline of the terms of the present common and statute law was accompanied by a consideration of the special and technical limitations and defects which that law appeared to present. But, in addition to these defects, the present scheme of the law presents more general deficiencies of which the more important are these, namely: the duration of the presumption of life at common law, the absence of any general presumption of death, the variety of processes and of standards of proof required to establish a person's death for different purposes, the expense occasioned by the multiplicity of the proceedings, the absence of provision for the recognition of foreign decrees, and the archaic nature of the provisions for restitution on the return of the absentee.

Duration of the common law presumption of Life

29. The common law rule was developed against a social and technical background which has now radically changed. As Lord Salvesen has remarked[1]: "That rule was established when the facilities of travel and postage, not to mention advertisement, were in a very backward state compared with the times in which we now live. At that time, if a man went to a distant country, the expense of returning and even the expense /

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1 Greig v. Trustees of the Edinburgh Merchant Company's Widows' Fund 1921 S.C. 76, at p. 88.

expense of communicating with his friends was so great as to make it difficult for anyone who did not attain a position of some affluence to undertake the cost. Mere silence, accordingly, even for a very long period of time, was held not sufficient per se to overcome the presumption of life, unless the absent person had at the date when the declarator was sought, already reached the utmost span of human existence." These conditions, as Lord Salvesen remarked, have radically altered and silence for a number of years would seem to make it more probable that the absent person has died. It is still not unlikely that a person who has gone abroad in circumstances which do not indicate danger to his life remains alive; but with the passage of years it becomes clear either that the absentee is dead or that he deliberately intended to cut off his ties with the past. In these circumstances Scots law has a choice between establishing a special set of rules, like those of French law, which govern the effect of "absence" for different periods, or of treating the absent person as if he were dead for legal purposes, but envisaging the possibility of his return. The former alternative would require the creation of a complex body of new law to deal with a relatively unusual state of affairs. We, therefore, prefer the latter and suggest that, where a person has been continually absent from his home and family for a relatively short number of years, and where there is no evidence of his being alive during this period, he should be treated in principle as if he were dead for legal purposes.

Absence of a General Presumption of Limitation of Life

30. The law at present reaches this result in two special fields, those of succession and marriage, by creating in those fields a presumption of death, or what is tantamount to a presumption of death, seven years from the date when the absentee was /

was last known to be alive. While we do not care for the creation of evidential presumptions which may well be contrary to the facts and would prefer merely to say that the absentee must be treated for legal purposes as if he were dead, the concept of a legal presumption of death is already so familiar in Scotland and in the countries with which it has closest legal connections that, with some hesitation, we have decided to continue to use it. The availability of a presumption of death after seven years under the 1891 and 1938 Acts has not led to any judicial relaxation of the common law rule[1] and, while the procedures of these Acts are useful within the sphere of their application, the existence of a decree under them does not raise any presumption that, for purposes outside these Acts, the absent person may be presumed to have died. In such cases the court must continue to apply the rules of the common law.

31. The absence of any generalised presumption of death may lead to conclusions which, while legally justifiable, strike laymen as being extremely harsh. In a case discussed in "The Guardian" newspaper on 13th, 16th and 17th September 1966 a Scottish merchant seaman left his ship in Australia in 1954, and was not afterwards heard of. His wife obtained in the Court of Session a decree of presumption of death under the 1891 Act on the basis of which the Inland Revenue paid her husband's post-war credits to her. She subsequently applied for a widow's pension but the Ministry of Social Security rejected her claim, because of a finding by the National Insurance Commissioner that decrees under the 1891 Act were not conclusive of the fact of death, since by the terms of the Act they /

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1 Secretary of State for Scotland v. Sutherland 1944 S.C. 79; Clark's Executor and Another v. Clark 1953 S.L.T. (Notes) 58.

they determined only questions of property. This conclusion was characterised in the newspaper's editorial as: "A pedantic determination to cling to the letter of the law."[1] The facts do point to a defect in the existing law, which would be remedied if a general presumption of limitation of life were introduced on the lines suggested in para. 29 above.

32. Another situation where the absence of a general presumption of death arguably causes hardship exists in the law of bigamy. It is a defence to a charge of bigamy that the accused had reasonable grounds for believing that his or her spouse was dead, but grounds which a court would think reasonable may not exist and, in their absence, a spouse will be presumed to live for the ordinary duration of human life.[2] The possibility of dissolving the marriage under section 5 of the 1938 Act would appear to tell against rather than for an accused who has not petitioned under the Act or who has petitioned unsuccessfully. In England, however, by section 57 of the Offences against the Person Act 1861[3] an accused escapes the penalties of bigamy "whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by that person to be living within that time ....." There are two possible views on the question whether a similar rule should be enacted in Scotland. One view is that, if the presumption that a missing person lives for the ordinary duration of human life is replaced by a presumption that he lives only for a period of (as we recommend) seven years, it would be unduly harsh /

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1 "The Guardian", 17th September 1966.

2 See Mackenzie v. Macfarlane (1897) 5 S.L.T. 292 and Sharp v. Sharp (1898) 25 R. 1132, although these are not bigamy cases.

3 c. 100.

harsh to punish his spouse for anticipating a finding of death which, in the circumstances at the time of the second marriage, the court might have been bound to make. Another view is that a person who has once married should not marry again until he has regularised his position by obtaining a judicial decree dissolving his first marriage. If, indeed, the recommendations of the Committee on the Marriage Law of Scotland are accepted, the form of notice to be completed by the parties to a prospective marriage will require them to disclose the existence of any previous marriage, and to say how and when it was terminated.[1] The spouse of a missing person, therefore, who remarries without a decree dissolving the marriage could only do so, if the Committee's recommendations are accepted, by defying the formal requirements of the law relating to the constitution of marriage. As between these two different approaches, we have not as yet come to a concluded view, and would welcome advice on the matter.

Variety of Processes and Standards of Proof Required.

33. Another defect in the existing law consists in the variety of processes necessary to establish that for different purposes a person is dead. A wife whose husband has disappeared must initiate one species of action to establish his death for purposes of succession to his general estate and another species of action to establish her right to remarry. To recover monies under insurance policies on her husband's life she can rely upon no special presumption and, even where a decree has been obtained under the 1891 Act, the insurer could conceivably oppose against her the common law rule that a missing person continues to live until the limit of human life. A separate action against the insurer would then be required. Moreover, a finding in proceedings against one defender that, under the common law of Scotland, /

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1 Report of Committee on the Marriage Law of Scotland, Cmnd. 4011 (1969), para. 64.

Scotland, a person may be presumed to have died, is not binding in proceedings against other defenders and, conceivably, the question of death could be reopened by every person owing a debt contingent upon the deceased's death. Separate proceedings, for example, in the ordinary courts might be required to recover an annuity which a wife has contracted to obtain on her husband's death. Separate proceedings under the National Insurance Acts may be necessary before a wife can establish her right as a married person to an old-age pension.[1] Not only is there a multiplicity of procedures, but the burden of proof required differs as between those which depend on the common law and those which depend upon the statutory presumptions of the 1891 and 1938 Acts. Even as between the two statutory procedures the burden of proof on the petitioner may possibly differ. The burden required by the 1891 Act is apparently stricter in that it requires proof of disappearance rather than proof of absence from the petitioner and proof that the person who has disappeared "has not been heard of for seven years or upwards"[2] rather than an averment that "the petitioner has no reason to believe that the other party has been living within that time."[3]

Expense of proceedings

34. The variety of proceedings necessary to establish death for different purposes places a considerable and unnecessary burden of expense upon the relatives of the missing person. Additional expense is also occasioned by the fact that proceedings in /

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1 Secretary of State for Scotland v. Sutherland 1944 S.C. 79.

2 1891 Act, s. 3.

3 1938 Act, s. 5(2). A contrast between the vague language of the 1938 Act and the more precise language of the 1891 Act is drawn by Lord Keith in Labacianskas v. Labacianskas 1949 S.C. 280 at p. 284.

in the Sheriff Court under the 1891 Act may be taken only when the missing person's estate in Scotland does not exceed £500 in value. This figure has remained unchanged since 1891, despite changes in the value of money. The Committee on the Sheriff Courts in Scotland (the Grant Committee) referred to criticism of this limitation[1] and suggested that the figure should be increased to £5,000. The Committee declined to accept a proposal that the financial limit to the jurisdiction of the Sheriff Court should be abolished since the Committee thought that "legal questions of difficulty and importance might be involved."[2] The difficulty, however, of legal questions is not necessarily related to the amount at stake, and the problems involved where a large estate consists of quoted securities may be negligible. We think that the proper course is to leave it to the commonsense of the petitioner's solicitor to advise which forum is appropriate in all the circumstances of the case. The Sheriff, however, should be empowered to remit the case to the Court of Session when he considers that, in view of the importance and complexity of the matters at issue, the Court of Session is the appropriate forum.

Absence of Provision for the Recognition of Foreign Decrees.

35. A feature of the present legislative scheme is that it contains no provision for the recognition of foreign decrees presuming a person's death. In Simpson's Trustees v. Fox and Others[3] Lord Guthrie declined to recognise the decree of an Ohio /

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1 Cmnd. 3248 (1967), paras. 150-152.

2 Idem, para. 152.

3 1951 S.L.T. 412.

Ohio court presuming the death of a person alleged to have been last domiciled in the State of Ohio. He considered that proof of death was a question of fact to be determined according to the lex fori and that the law of Scotland had provided the procedures of the 1891 Act for this purpose. The decision, however, may rest upon its special facts because it was not admitted that the person in question was last domiciled in the State of Ohio and because the proceedings in the Ohio court appear to have been taken during the pendency of the Scottish proceedings. It would seem that in England, where the courts of the domicile of a person presumed to be dead have granted a declaration of death and made an order vesting that person's estate in the persons entitled to it, the Probate, Divorce and Admiralty Division is prepared to presume his death without further evidence being adduced, though such evidence is required to be adduced where there is merely a declaration of death.[1] While proof of questions of fact is in principle a matter for the lex fori, it may well be inconvenient for the Scottish courts to determine whether a person living in a distant foreign country should be presumed to have died. It may also be unjustifiably expensive to take such proceedings in Scotland to determine the devolution of a trivial amount of property here. There is, it is thought, a case for providing that where the death of a person, or the time of a person's death, has been established by evidence or by presumptions of law in the courts of that person's domicile, then, in any judicial proceedings in Scotland, including proceedings for confirmation of executors, that person shall be presumed to have died or to have died at the time so established until /

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1 In the goods of Schulhof [1948] P. 66; In the goods of Dowds [1948] P. 256.

until evidence to the contrary is adduced. It would seem necessary to restrict this presumption to decrees of the courts of the domicile to avoid the risk of conflicting presumptions. We would, however, welcome comments on this matter.

Archaic nature of Provisions for Restitution on the return of the Absentee.

36. The possibility of the return of the absentee was dealt with in the 1891 Act by entitling him, or any person deriving right from him, until a period of thirteen years had elapsed, to demand and receive from the person who had become entitled to the absentee's property in terms of the Act,[1] or

> ".... from anyone acquiring the same from him by gratuitous title, the said estate or the price or value thereof, if the same shall have been sold or otherwise disposed of, free of any burden which did not affect the said estate at the date of the judgment of the court, subject to a claim for the value of any meliorations which may have been made upon the estate by the person from whom the demand is made, but shall not be entitled to demand or receive any income which may have accrued from the said estate before notice of the demand: Provided always, that any person denuding of the estate or any part thereof under this section [i.e., s. 6] shall be bound, but always at the expense of the person or persons receiving the same, to grant such deeds and instruments as may be necessary for the completion of title, but with warrandice from fact and deed only; and shall also be bound in case the person receiving the same is the person who had disappeared, to free and relieve him of all claim and demand in name of relief, composition, or other casualty which may be competent to the superior of the subjects in respect of or /

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1 Or, indeed, from a person who had become entitled under the repealed Act of 1881.

or consequent upon the completion of the title of the person who had disappeared; and, in the event of the estate or any part thereof having been burdened with debt since the date of the judgment of the Court, the person denuding shall be bound to purge such encumbrances at his own expense, and obtain and deliver discharges thereof, unless it is shown that the money borrowed was expended on meliorations for which he is entitled to credit."[1]

37. The language of the section makes it clear that it was designed mainly to deal with heritable property. It does not adequately deal with the situation where the absentee's property is moveable and, in present conditions, liable to become quickly inmixed with the successor's own estate. The situation, moreover, is materially altered by reason of the complexity of the law relating to estate duty, and short and long term capital gains taxes. Suppose, for example, that in 1970 A is presumed to have died leaving considerable moveable property. His executors will be liable for the estate duty and capital gains tax on his estate. After meeting the expenses of administration, the balance of his estate falls to be divided between two sons S_1 and S_2 and a daughter D. S_1 invests his share of the estate along with his own monies in a business where much of the income is directed to capital growth. S_2 gradually squanders his share. D invests and reinvests in growth equities paying for new issues out of her own or her husband's funds, and her husband pays capital gains tax upon periodic disposals of investments. A returns when the notional value of the equities has doubled. Still more complicated problems arise where it is disclosed that the absentee has died, /

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1 s. 6.

died, but at a date different from that upon which he has been held to have died, so that different persons are entitled to his estate.

38. Any solution to these problems is bound to be arbitrary, but we consider the property rights of the parties should be adjusted on the following principles:-

> (a) that persons who, in consequence of a decree declaring or presuming the death or date of death of a missing person, or the order of death of missing persons, succeed to property (whether or not of the missing person) or to an interest in such property, and the successors to the persons first-mentioned (whom collectively we will call "presumed successors") shall not be bound, on the reappearance of the missing person or upon other evidence becoming available contradicting the facts found or assumed in the decree, to restore the fruits or income of such property to the absentee or to the person who would have been entitled to that income if the decree had proceeded on the true facts as re-ascertained.

This principle is already accepted in section 6 of the 1891 Act.

> (b) that "presumed successors", similarly, shall not be bound, upon the reappearance of the missing person or upon other evidence becoming available contradicting the facts found or presumed in the decree, to restore in kind property to which they have succeeded by virtue of the decree.

The justification for this principle is given in the commentary to the immediately following sub-paragraph.

> (c) that "presumed successors" shall be bound to restore to the absentee, or to the person who would have been entitled to the property which they received in consequence of the decree if it had proceeded upon the facts as subsequently ascertained, the money value of the property to which they succeeded without any account being taken of the gains or losses made or incurred by them (the "presumed successors") by reason of the fact that they had the property at their disposal since or following the date of the decree. This "money value" should be ascertained as at the date on which the absentee was declared or was presumed to have died or, where the property passed at some other date, as at that date.

We recommend the adoption of these principles because of their simplicity, because it is undesirable to sterilise the assets against the somewhat remote contingency of the absentee's return, /

return, and because it seems to us to achieve a reasonable balance between the interests of the absentee and his successors respectively. We cannot over-stress the need for simplicity. If, as seems right to us, after a decree of death or disappearance the successors should be free to deal with the estate as their own and employ it to best advantage, it will sometimes be difficult and may be expensive to differentiate the estate which represents the absentee's property from that of his successors. If such differentiation were attempted, the law would have to decide whether the absentee should benefit from the special financial skills of his successor or suffer from his inexpertise. The law would also have to make special provision to deal with the capital gains taxes. It might be argued that the original capital should be deemed to increase or decrease annually on the basis of an index of share values. In a monetary situation, however, which has for long been marked by gradual inflation such a solution would tend to increase rather than to decrease the successors' liability with the passage of years. For this reason we reject it in favour of the simple solution that the absentee is restored to the money value of his estate as at the date he was declared or presumed to have died or, if the property passed at some other date, for example on the death of a liferenter, on that date. An additional reason for restricting the absentee, or anyone coming in his place, to recovery of the original "money value" of the property is to facilitate the protection by insurance of the interests of those persons. To protect them against the contingency of the dissipation of their assets by putative successors, we propose -

(d) /

(d) that the court, if it thinks fit, may require any person who becomes entitled to property in consequence of a decree declaring or presuming death to make provision to ensure that the "money value" of the property can be readily paid over to the persons properly entitled to it should the decree turn out to be based upon errors of fact.

This proposal envisages the safeguard of contingent interests by the taking out of an insurance policy written in terms benefiting not the proposer but the persons contingently entitled to payment of the "money value" of the property to which the proposer succeeded. We have received provisional advice that, if the sum assessed is determined in advance - as it would be if the "presumed successors'" obligations to the absentee or anyone coming in his place were restricted to the "money value" of the property to which he succeeded - there should be no serious difficulty in arranging such insurance. We would, however, welcome further advice on the basis of the detailed proposals made in this paragraph.

A NEW APPROACH

39. We have come to the conclusion that the reasons which justified the common law presumption of life for the period of its natural span no longer apply with the same force. The common law rule has been departed from in matters of divorce and succession where a person is presumed to have died when he has not been heard of for seven years or upwards. We think that these presumptions should be generalised, and we note the existence of a general presumption in the law of England. In the light of two seventeenth century statutes[1] the English judges developed a general presumption - applicable where no statutory rule applies - that a person of whom others would be likely to have heard and who has not been heard of for seven years or more is dead. The presumption will be drawn only in the /

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1 The Bigamy Act 1604 (now repealed) and the Cestui que Vie Act 1666.

the absence of affirmative evidence of life during that period and only after inquiries have been made appropriate to the circumstances.[1] The English presumption, however, only relates to the fact of death and does not assist in determining the time of death.[2]

40. In considering whether a general rule should be adopted limiting the time during which a missing person should be presumed to live we have given careful thought to the appropriate period. The possibility of fraud is obviously a relevant consideration but, as a practical matter, it is likely to arise only rarely and then chiefly in the context of insurance policies. We give special consideration to the situation of insurers in the following paragraphs, but the risk of fraud on insurance companies strikes us as being of secondary importance in assessing the duration of any general presumption of life. More important is the need to maintain a balance between the interests of the missing person himself on the one hand and those of his relatives on the other. It may be that, with the ease of modern communications, a period of seven years is too long, and we should welcome advice on the matter. In the absence, however, of satisfactory reasons for choosing a different period, we would suggest retaining the seven-year period. It has the advantage of correspondence with existing Scottish legislation and with existing English law.

41. The presumption of death established for purposes of succession by the 1891 Act did not extend to claims under policies of /

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1 Chard v. Chard [1956] P. 259 at p. 272; N. v. N. [1957] P. 385; Prudential Life Assurance v. Edmonds (1877) 2 App. Cas. 487.

2 Re Phené's Trusts (1870) 5 Ch.App. 139.

of assurance on the lives of persons who had disappeared. In considering whether a similar exclusion should apply to the general presumption advocated in this paper, the following arguments point towards exclusion:

(a) the risk of fabricated claims or, at least, of speculative actions designed to obtain payment of proceeds of insurance policies;

(b) the fact that, in cases of disappearance, the circumstances will often be equally compatible with the desire of the missing person for reasons of his own to sever his contacts with family and friends;

(c) the undesirability of interfering with contractual freedom in the domain of life assurance and the fact that, unless contracting-out were to be disallowed, policies could be so written as to render nugatory any change in the law;

(d) the circumstance that, if the absentee was in fact alive at the date when he was declared, or was presumed, to have died, monies paid out under a policy on the absentee's life should not have fallen into the deceased's estate. They would simply be monies paid out on a mistake of fact, and restitution would be due to the company rather than to the deceased himself; and

(e) the fact that insurers might feel compelled to intervene in proceedings for declarator of death or of presumption of death in every case where a policy had been effected upon the life of the missing person.

42. There are, however, a number of counter-arguments, including the following:

(a) whatever the risk of fabricated claims there comes a time when a judicial pronouncement on the fact of a person's presumed death should be taken into account by all concerned in the interest of his relatives;

(b) the seven-year period suggested is not a short one, and the procedure in actions to presume a person's death can and should be designed to place all the relevant facts before the court;

(c) the number of cases of presumed death involving insurers is quite small in Scotland, and it is rather for the insurance companies to take the existence of such cases into account when writing policies than for the law to exclude them from the operation of its ordinary rules;

(d) it would not be difficult to provide by statute that, on the reappearance of the absentee or upon the emergence of other evidence contradicting the findings of the decree, insurance companies may recover the proceeds of policies on the absentee's life from the person or persons to whom they were paid;

(e) no special difficulties appear to have been occasioned in England by the existence of a general presumption of limitation of life. The insurance monies on whole life policies issued by a British company are seldom payable except on proof satisfactory to the directors of the company of the death of the assured. In practice, however, the presumption is usually applied because the directors would not be justified in imposing /

imposing unreasonable or capricious requirements.[1]

43. We have come to no concluded opinion on the questions raised by the risk of fraudulent insurance claims. At present we tend to the view that there is not a sufficiently strong case to justify the special exclusion of insurers though we recognise that, if they were not excluded, the question would arise of their right to contract out of the general rule by special contractual provisions in policies. We invite comment, therefore, on whether or not, if a general presumption of limitation of life were to be introduced, insurers should be given a general or a qualified exemption from its operation and, if not, whether contracting-out should be permissible.

44. Apart, however, from the possibility of excluding from its operation the insurers of the life of an absentee, we consider that a presumption should be introduced, of general application, that where, after inquiries appropriate to the circumstances have been made, no affirmative evidence is disclosed that a missing person is alive, he shall be presumed to have died exactly seven years after the date when he was last known to be alive. The existence of this presumption, however, should not prevent a court finding, as it may at present, on the basis of evidence presented to it, that the missing person died at some specified date within the period of seven years after the date when he was last known to be alive. Equally, the existence of this general presumption should not prevent the court applying other special presumptions including presumptions relating to the order of death of missing persons.

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1 Braunstein v. The Accidental Death Insurance Co. (1861) 1 B. & S. 782; London Guarantie Co. v. Fearnley (1880) 5 App. Cas. 911 at p. 916.

45. The variety of procedures necessary in Scots law to establish a person's death for different purposes causes unnecessary expense and could conceivably lead to judgments in apparent conflict. It would be better if the fact of a person's death could be established, and all consequential questions of law could be determined, in a single action analogous to the common law action of declarator of death, but clearly operating in rem and having effect even in relation to persons who are not parties to the action. The principal objection to the adoption of this solution in Scotland is that such a decree may not necessarily be desired by all interested parties. While some of those interested in a succession depending upon the death of an absent person may wish to obtain a decree declaring him or presuming him to be dead, the absent person's spouse may well be reluctant to do so for personal reasons. Yet we do not think it desirable to make the consent of the spouse of an absent person the condition of a decree declaring or presuming death. In most cases this consent would be willingly granted, since the regularisation of his or her position presents material advantages to the spouse; but in a few cases a spouse might refuse such consent for sentimental reasons and, in this way, prejudice the position of third parties. Nevertheless, while an individual may refuse to face the ordinary facts of life, we do not think that the law should do so. We recommend that, while in proceedings for declarator or for presumption of death any person may present evidence tending to show that an absent person is alive, neither the consent of the spouse nor that of any relative of the deceased should be a condition of the granting of a decree.

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46. On the same reasoning it is arguable that a decree declaring or presuming an absent person to have died ought to have the automatic effect of dissolving his or her marriage. The law certainly must draw this conclusion for purposes of succession. It would be impracticable to distribute the estate of a man who is presumed to have died on the basis that he is presumed to have died for the purposes of his children's succession but not for that of his wife. Yet the wife's rights of succession are normally a consequence of the fact that the marriage no longer subsists. The Royal Commission on Marriage and Divorce were prepared to follow this argument out to its apparently inevitable conclusion and suggested that once a person has been judicially declared or presumed to have died a decree of divorce - a decree explicitly dissolving the marriage - was almost superfluous. It was necessary only, they pointed out, as "an added safeguard designed to avoid the awkward situation which would arise if the presumption proves to have been wrong."[1] Putting this in different words, the effect of a decree of dissolution of a marriage on the ground of presumed death is essentially that of a licence to remarry. Should this licence be an automatic consequence of a decree declaring or presuming a person to have died or should it be granted only at the request of the surviving spouse? The former alternative is a clear and logical one; but it is also arguable that a licence to remarry should not be given to a person who does not desire it, or who does not desire it at the time of the general action. He may still retain hopes of his spouse's return and regard his acceptance of the succession to the absent spouse's estate as only a matter of administrative convenience. In /

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1 Cmd. 9678 (1956), para. 846.

In addition, a problem is presented by the difference between the jurisdictional criteria appropriate in actions relating to property and those relating to a status. The fact that a missing spouse owns property in Scotland may justify the Scottish courts in presuming his death to ensure the proper administration of his property, but, if he was a national and domiciliary of a foreign country, would hardly justify their intervention to dissolve the marriage. We tend, therefore, to the conclusion that a decree in the proposed general action for declarator or for presumption of death should not automatically dissolve a marriage and that a decree of dissolution should be granted only at the instance of the other party to the marriage in consequence either of an ancillary conclusion at the time of that action or of an application by that party at a later date. We would, however, welcome views on this matter.

47. Persons holding the view that a decree of declarator of death or of presumption of death should be regarded as automatically dissolving the marriage may conclude that the ordinary rules relating to divorce jurisdiction are inappropriate in this field. The Royal Commission on Marriage and Divorce tended to this conclusion on the view that "the question whether a person should be presumed to be dead is principally a matter for determination by the court of the country in which the question arises, in accordance with the evidential requirements obtaining there."[1] The other view, which we tentatively espoused in the preceding paragraph, is that a decree which has the effect, whether expressly or impliedly, of permitting a person to remarry should not be granted unless one or other of the spouses has substantial ties with the court granting the decree. This /

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1 Cmd. 9678 (1956), para. 846.

This is the position at present, and the Law Reform (Miscellaneous Provisions) Act 1949 provides criteria of jurisdiction in actions for declarator of dissolution of a marriage on the ground of presumed death which generally resemble those of ordinary actions of divorce.[1] We advocate the retention of these criteria for so long as the ordinary rules of jurisdiction in divorce remain unaltered. If these rules were to be altered, the criteria of jurisdiction enabling a marriage to be dissolved on the ground of death or of presumed death should be altered to conform to the new jurisdictional rules. It would be necessary, however, to make special provision for cases in which the missing person's domicile in Scotland is founded upon as the sole basis of jurisdiction. In such cases the relevant time for ascertaining the domicile of the missing person should not be the date of service, as in divorce actions, but the time when the missing person was last known to be alive. We invite comments on these suggestions.

48. The operation in rem of decrees of declarator of death or of presumption of death might be opposed on the ground that all parties affected by the decision will not necessarily be aware of the proceedings and represented in them. This is, however, a general objection to other decrees in rem, including status decrees which directly or indirectly affect persons other than those represented in the action. We would expect existing rules for the service of petitions under the 1891 and 1938 Acts to be revised to take into account the special nature of the action. While it is not for the Commission to specify what the rules for service and intimation should be, we annex to this Memorandum an /

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1 See para. 16 above. The resemblance is only general, because the common law exceptions to the domicile rule in divorce actions are not applicable to a petition for dissolution of the marriage on the ground of presumed death.

an Appendix containing tentative suggestions for consideration by the appropriate authorities. We think it desirable that persons (including banks, solicitors and employers) who possess relevant information should be bound to disclose it to the court. Obviously, however, questions of confidentiality arise as to which we would like to have views.

49. It is conceded that problems will arise where evidence turns up indicating that a person who has been declared, or who had been presumed, to have died is still alive or was alive at a date other than that specified in the decree. But the same difficulties arise when the existing presumptions of the law in the fields of marriage and succession are contradicted by the facts. The existence of proceedings in rem does not alter the nature of the underlying problems. We believe that they would be resolved, or very largely resolved, by the adoption of the suggestions we make in paragraphs 17 and 38.

50. We consider, therefore, that a strong case remains for the establishment of a statutory action for declarator of death or of presumption of death with a wide range of ancillary conclusions. We think, too, for the reasons given in paragraph 34, that this action should be competent both in the Court of Session and in the Sheriff Court, and that no monetary limits should be set to the competence of the Sheriff Court. We freely recognise that such a statutory action would have close affinities with the common law action. The latter, as we pointed out in paragraph 6, is regarded as one affecting status and so within the privative jurisdiction of the Court of Session. It might well be argued, therefore, that the statutory action is one inappropriate to the Sheriff Court or, at least, that the Sheriff should be required to remit the case to the Court of Session where the status of any person other than the absentee himself /

himself is directly at issue. We reject both these suggestions and suggest that the Sheriff Court should have, subject to a discretionary power to remit cases to the Court of Session, unlimited jurisdiction in actions to declare or to presume a person to have died. We concede that this approach, if accepted, would permit the Sheriff Courts to pronounce ancillary decrees dissolving the marriage of the missing person. We consider that this is right in principle. As the Royal Commission on Marriage and Divorce pointed out: "Relief on this ground is in a category of its own, since the real purpose of the proceedings is to obtain a declaration that the other spouse is to be presumed to be dead. The declaration having been obtained, it follows that the marriage came to an end on the death of that spouse, whereupon the applicant became free to marry again."[1] We think, moreover, that it would be complicated and expensive, as well as unnecessary, to require the Sheriff to remit every case to the Court of Session where an application is made for an ancillary decree dissolving the marriage. We add, however, that the Sheriff Court should have jurisdiction to pronounce such a decree only in those circumstances where the Court of Session would have jurisdiction. We suggest in paragraph 34 that the Sheriff should be empowered to remit the case to the Court of Session when he considers that, in view of the importance or complexity of the matters in issue, the Court of Session is the appropriate forum. We envisage, for example, that in a case where there is any doubt whether the Scottish courts have jurisdiction to dissolve a marriage because of foreign elements in the case, the Sheriff would avail himself of the power to remit.

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1 Cmd. 9678, para. 846.

51. As to the jurisdiction in the statutory action in which a decree dissolving a marriage is not sought, we have been convinced by the history of prior legislation on this topic that jurisdictional limits are liable to overlook situations where the Scottish courts do have a reasonable claim to deal with the questions at issue. We have concluded that, at least in actions in the Court of Session, it should be sufficient for the pursuer to disclose that he has an interest, whether patrimonial or personal, in the result. The court's exercise of jurisdiction, however, should be subject to the principle of forum non conveniens, and it should be permissible for the court to apply this principle ex proprio motu. Different considerations, nevertheless, apply to the Sheriff Court, because it is necessary to allocate jurisdiction as between the different Sheriff Courts in Scotland. We consider that the Sheriff should have jurisdiction when the absentee had his or her last known principal residence within the territory of his court, but we invite views as to whether other grounds of jurisdiction would be desirable.

52. It should be competent to the court entertaining the general action, in addition to determining the date and time of the death, to determine a wide range of incidental questions and inter alia -

(a) to declare the absentee's marriage to be dissolved;

(b) to determine, consequently upon the presumed death of the absentee, any questions relating to interests in property in Scotland and any questions relating to property whose devolution is governed by Scots law, including questions of succession to the absentee's estate;

(c) /

(c) to authorise the making up of titles to and entering into possession of the absentee's estate, and to permit its alienation or burdening as if the absentee were dead;

(d) to determine rights under policies of assurance and pension schemes contingent upon the death of the absent person;

(e) where by the law of Scotland the participation of the absent person is required, to declare that such participation shall not be required;

(f) to determine questions relating to or arising out of the absentee's membership of any association, partnership or company;

(g) to determine the domicile of the absentee and his date of death or presumed date of death;

(h) to appoint executors of the deceased's will or to his estate, or to appoint a judicial factor thereon.

53. Apart from the original pursuers in the general action, it should be open to any person who has an interest, personal or patrimonial, in the result to intervene by Minute in the action adding supplementary conclusions which might competently have been incorporated in the original action. Such a person should be treated as a pursuer quoad such conclusions, which the original pursuers (if so advised) might oppose. This procedure should be open to a spouse seeking a decree dissolving the marriage subject to the jurisdictional requirements for such a decree being satisfied.

54. The decree in the general action of declarator of death or of presumption of death which we advocate should be conclusive of the fact and time of death of a person, or of the order of death /

death of two or more persons and that for all purposes other than the remarriage of that person or his spouse, until its recall or variation. It should be competent for any person with an interest to petition for the recall or variation of the original decree on new evidence becoming available of the survival of the absentee, or of his survival beyond the date of death declared or presumed, and an interlocutor varying the decree should have effects corresponding to those of the original decree.

55. A decree declaring or presuming a person to have died is for practical purposes an attestation of the death of the person involved. For this reason we think it appropriate that the terms of the decree, or such as are relevant, should be intimated to the Registrar General of Births, Deaths and Marriages for Scotland. It is equally appropriate that the terms of decrees recalling decrees of declarator of death or of presumption of death, or varying findings relating to the date of death should be so intimated. A convenient method of securing this result would be to provide that decrees declaring or presuming a person to have died, or to have died on a particular date, and orders varying or altering such decrees should be treated as decrees altering status for the purposes of section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

56. Our proposal to introduce a general presumption of limitation of life has repercussions when the Scottish courts are called upon to determine issues in which foreign systems are potentially relevant. In proceedings under the existing law for dissolution of a marriage on the ground of presumed death, the Scottish courts have applied tests of jurisdiction rather than tests of choice of law, and, once the relevant jurisdictional /

jurisdictional criteria have been fulfilled, have applied the presumption of a seven-year limitation of life after disappearance irrespective of the domicile or nationality of the missing person. On the other hand, in proceedings to presume death for purposes of succession under the 1891 Act, the proviso to section 3 - discussed in paragraph 9 above - apparently attempts to ensure that the Act should not affect a succession which is not governed by Scots law. The generalisation of these presumptions of limitation of life requires the creation of clear rules as to application of the general presumption in cases involving a foreign element.

57. The general presumption which we advocate is primarily intended to facilitate the trial of an issue of fact - namely, whether a person has died or has probably died. There is a temptation, therefore, to regard it simply as a rule of evidence governed by the lex fori and applicable in any civil proceedings in Scotland. Such an approach, however, might well prejudice that harmony of decision which it is the object of private international law to promote. It would mean that the manner in which a succession devolves may depend on the locality of the proceedings. If, moreover, the Scottish presumption is taken to be merely evidential, there would be no reason to expect its application by foreign courts when dealing with a Scottish succession. Similar reasoning applies to the presumptions embodied in section 31(1) and (2) of the Succession (Scotland) Act 1964. In other situations, too, the problem is not essentially different. The right, for example, to the payment of an annuity under a contract governed by Scots law should not depend upon where the proceedings to enforce the right are initiated. We have come to conclude, therefore, that the general presumption which we advocate should be treated as creating /

creating a rule of substantive law applicable where, but only where, an issue is governed by the law of Scotland. Thus it would apply in all Scottish proceedings for declarator that a marriage is dissolved on the ground of the presumed death of a spouse, where Scots law is applied, as well as in all patrimonial actions where the law of Scotland is applied as the lex causae.

58. Where the governing law is that of a foreign system, the question arises whether the corresponding presumptions of that law should be applied by the Scottish courts. The classic dichotomy between foreign rules of procedure, which may not be applied in Scotland, and foreign rules of substantive law, which may be so applied where relevant, may lead to distortions in the application of the foreign substantive law unless rules of procedure are narrowly characterised. In In re Cohn[1] Uthwatt J. had to consider the devolution of the property of a woman, of German nationality and domicile, who was resident in England and was killed there along with her daughter during an air-raid upon London. There was no evidence to show which of them survived the other. The judge pointed out[2] that the real question was not "'Did or did not Mrs. Oppenheimer survive Mrs. Cohn?' but 'Is the administration of Mrs. Cohn's estate to proceed on the footing that Mrs. Oppenheimer survived Mrs. Cohn or on the footing that she did not?' The purpose to which the inquiry as to survivorship is directed must be kept in mind. The mode of proving any fact bearing on survivorship is determined by the lex fori. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact /

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1 [1945] Ch. 5.

2 At p. 7.

fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there." On this basis Uthwatt J. found that the rules relating to the determination of survivorship contained respectively in section 184 of the (English) Law of Property Act 1925 and in the Law of 4th July 1939 amending Article 20 of the German Civil Code, considered in their context, were best regarded as being part of the substantive laws of the systems in question.

59. We regard this approach both as the appropriate one in the circumstances of the case and the only practicable one to apply generally in view of the diversity of foreign systems. It enables foreign substantive law, where relevant, to play its proper part in determining the issues and in consequence makes for harmony of decision at an international level. On the assumption that the Scottish courts would be prepared to follow the approach of Uthwatt, J. in In re Cohn,[1] we are content to leave it to the judges, on the basis of existing rules of private international law, to determine for themselves the relevance of foreign presumptions of death and of survivorship.

60. We may sum up our recommendations in the four preceding paragraphs as follows:

(1) The general presumption of limitation of life advocated in this Memorandum and the special presumptions embodied in section 31(1) and (2) of the Succession (Scotland) Act 1964 should be applied in proceedings where the substantive issues are governed by Scots law, but not otherwise.

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1 [1945] Ch. 5.

(2) Otherwise, nothing in any legislation following upon this Memorandum should be treated as affecting the operation of existing rules of private international law.

We would, however, welcome comment upon these recommendations.

SUMMARY OF PROVISIONAL CONCLUSIONS AND OF OTHER MATTERS ON WHICH VIEWS ARE SOUGHT

61. Provisional Conclusions.

(1) A general presumption should be established of the death of a person who has been absent from his place of residence and family (if any) and has not been heard of for a specified number of years (paras. 29-32 and 39-40).

(2) The period of years suggested is seven years, so that such a person should be presumed to have died exactly seven years from the date on which he was last known to have been alive, unless there is evidence to the contrary (paras. 40 and 44).

(3) The issue by a competent authority within the United Kingdom of a certificate concluding or presuming for official purposes the death of a person who went missing in consequence of an accident to or on a ship or aircraft registered in the United Kingdom, should raise a presumption that the missing person died on the date and at the time specified in the certificate. It should also permit the executors of the missing person, for the purposes of confirmation, to depone to belief that he has died rather than to the fact of his death (para. 27).

(4) A general action of declarator of death or of presumption of death should be established enabling the court to pronounce upon the fact and the time of death, or the order in which two or more persons have died, and to make the ancillary orders specified in para. 52 (paras. 44, 45, 47 and 50). The decree in the general action should be conclusive for all purposes other than the remarriage of the absentee or his spouse, until its recall or variation (paras. 46 and 54). Remarriage should be admissible only when an ancillary decree dissolving the marriage has been pronounced (paras. 46 and 47).

(5) /

(5) This general action should be competent both in the Court of Session and in the Sheriff Court (paras. 34 and 50). Except in the case of an ancillary conclusion for dissolution of the absentee's marriage, there should be no limitations upon the jurisdiction of the Court of Session in this action (paras. 50 and 51). The petitioner, however, must be able to disclose an interest, patrimonial or personal, in determining the fact or time of the absentee's death, and the court should have power to sist or dismiss the action on the principle of forum non conveniens (para. 51).

(6) An ancillary conclusion for dissolution of the absentee's marriage should be competent in the Court of Session subject to the present jurisdictional criteria in actions for dissolution of a marriage on the ground of the presumed death of one of the spouses. If the existing criteria for jurisdiction in divorce are reviewed, the jurisdictional criteria in actions for dissolution of a marriage on the ground of the death or presumed death of a spouse should be altered to conform to the new jurisdictional rules. It should be specially provided, however, that, where the sole basis of jurisdiction is that of the absentee's domicile in Scotland, that domicile should be ascertained as at the time when the absentee was last known to be alive (paras. 46 and 47).

(7) It should be a condition of the competence of the Sheriff Court that the absent person had his last known principal residence within its territory and that the action is one which would be competent in the Court of Session (paras. 50 and 51). The competence of the Sheriff Court, however, should not be restricted by reference to the amount of the estate or the nature of the ancillary conclusions. In particular, the Sheriff should have jurisdiction to pronounce an ancillary conclusion dissolving an absentee's marriage (para. 50). It should always be open, however, for the Sheriff to remit a case to the Court of Session /

Session having regard to its importance or complexity (paras. 34 and 50).

(8) In the course of proceedings for declarator or for presumption of death, the court should have power to determine a wide range of incidental questions, in particular those specified in para. 52. It should also be open for persons other than the petitioner with an appropriate interest to intervene by Minute to require the determination of such incidental questions (paras. 52 and 53).

(9) The decree in the general action should be open to recall or variation at the instance of any person with an interest, including a person who has been declared to be dead, on new evidence becoming available in relation to his survival or survival beyond the presumed date of death (paras. 14 and 54).

(10) On the reappearance of a missing person or upon other evidence becoming available contradicting the terms of the decree, persons who have succeeded to property (whether or not of the missing person) in consequence of the decree should not be bound to restore the property in kind, or the fruits thereof, to the absentee or to the persons who would have been entitled to the property if this decree had proceeded upon the facts as re-ascertained (para. 38(a) and (b)).

(11) The successors should, however, be bound to restore to the absentee, or to the persons who would have been entitled to the property if the decree had proceeded upon the facts as re-ascertained, the "money value" of the property to which they succeeded as at the date on which the absentee was declared or was presumed to have died or, where the property passed at some other date, as at that date (para. 38(c)).

(12) The court, if it thinks fit, may require any person who becomes entitled to property in consequence of a decree declaring or presuming death to make provision to ensure that the "money value" of such property can be readily paid over to the persons

properly entitled to it should the decree turn out to be based upon errors of fact (para. 38(d)).

(13) The period during which it should remain competent for the absentee, or any person deriving right through him, to recover his estate should remain unaltered unless the period of the long negative prescription is reduced: in that case the first mentioned period should be reduced by the number of years by which the long negative prescription is reduced (para. 14(e)).

(14) When a decree declaring or presuming a person to have died, or to have died on a particular date, has been recalled or varied in circumstances indicating that an insurer has made mistaken payments under a policy of life assurance, the insurer should be entitled to recover those payments from the person or persons to whom they were made (paras. 42(d) and 43).

(15) The fact that a spouse presumed to have died is alive, or was alive at the date of a decree presuming his death, should not by itself be a ground for the reduction of a decree dissolving the marriage once it has become final and no longer subject to appeal or a ground for the nullity of any marriage contracted on the faith of the decree (para. 17).

(16) The presumptions embodied in section 31(1) and (2) of the Succession (Scotland) Act 1964 should be applied in situations where two or more persons, though not known to be dead, may be presumed to have died either in circumstances indicating that they died simultaneously or in circumstances which render it uncertain which of them survived the other (para. 19).

(17) Section 31(2) of the Succession (Scotland) Act 1964 should be amended by the deletion of the words "and the younger person has died intestate" (para. 22).

(18) Decrees declaring or presuming a person to have died, or to have died on a particular date, and orders varying or altering such decrees should be treated as decrees altering status for the purposes of section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (para. 55).

(19) (a) The general presumption of limitation of life advocated in this Memorandum and the special presumptions embodied in section 31(1) and (2) of the Succession (Scotland) Act 1964 should be applied in proceedings where the substantive issues are governed by Scots law, but not otherwise (paras. 56 and 57).

(b) Otherwise, nothing in any legislation following upon this Memorandum should be treated as affecting the operation of existing rules of private international law (paras. 58 and 59).

Other matters.

62. Views are sought on the following matters as to which provisional conclusions have not yet been reached:

(1) Would it be desirable to amend section 31(1)(a) of the Succession (Scotland) Act 1964 so that the general presumption of the survivorship of the older person by the younger in a common calamity should also apply in the case of spouses? (para. 20).

(2) Would it be desirable to introduce into Scots law a defence to a charge of bigamy on the lines of section 57 of the Offences against the Person Act 1861? (para. 32).

(3) Would it be desirable to exclude the application of any general presumption of limitation of life to the insurers of an absentee's life? (paras. 41-43).

(4) Would it be desirable to make provision for the recognition in Scotland of a decree presuming a person's death issued by the court of his domicile? (para. 35).

We would also welcome views upon our suggestions, made in the Appendix to this Memorandum, for service of the proposed general action for declarator or presumption of death. We should also like to have advice as to whether persons (such as banks, solicitors and employers) who are in possession of relevant information should be bound to disclose it to the court.

APPENDIX

Service and Intimation (paragraph 48)

1. It is suggested that petitions for declarator of the death, or of the date of death, of an absent person should be served upon or intimated to the following persons so far as their existence and whereabouts are known to, or can reasonably be ascertained by, the petitioner -

   (a) the absentee's husband or wife;

   (b) the absentee's children, including illegitimate and adopted children, who are not in pupillarity;

   (c) the nearest of kin of the absentee if not one of his children;

   (d) persons, including insurance companies and the absentee's executors or trustees who may have an interest affected by the determination of the action;

   (e) the absentee's solicitor and banker and, though we suggest this with some hesitation, his employer, partner and doctor.

2. It is also suggested -

   (1) that all such petitions should be intimated to the Lord Advocate in the public interest and to the Minister of Health and Social Security;

   (2) that any person who receives notice, by service or intimation, of the petition, and who possesses information relevant to it, should communicate that information to the appropriate Clerk of Court; and

   (3) that where service is to be made upon a person abroad the *inducíae* should be 28 days.