



SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 8)

SECOND
PROGRAMME OF
LAW REFORM

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

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE
PRICE 1s. 9d. NET

SECOND PROGRAMME

Branches of the Law of Scotland
recommended for examination

- *6. Insolvency, Bankruptcy and Liquidation.
7. Succession.
8. Diligence.
9. Reciprocal Enforcement of Judgments.
10. Damages arising from Personal Injuries and Death.
11. Presumption of Death.
12. Legal Capacity of Minors and Pupils.
13. Criminal Procedure.
14. Family Law.

*The items in our First Programme were numbered 1 to 5. For ease of reference we have numbered the items of this programme from 6 onwards.

In terms of section 3(2) of the Law Commissions Act 1965 this programme was approved by the Secretary of State and the Lord Advocate on 25th June 1968.

Memorandum by the Commission

In September 1965, three months after our appointment, we submitted our First Programme for examination of branches of the law in Scotland with a view to reform. The subjects selected were "Evidence", "Obligations", "Prescription and the Limitation of Actions", "Judicial Precedent" and "Interpretation of Statutes".

A summary of the progress made in these subjects was given in our Second Annual Report submitted on 4th July 1967, and laid before Parliament on 24th October 1967.¹ We have not yet concluded our study of these subjects, but nevertheless we think it proper to submit a Second Programme now. Preliminary papers on the First Programme subjects have been, or are about to be, completed and it seems opportune, while these are being considered by the legal profession and by other interested persons, to proceed with the examination of other subjects. Having received a regular flow of proposals for reform over the past three years, we are now in a better position to know where the demand for reform lies and to assess priorities. Having regard to these proposals, we have included in our Programme "Insolvency, Bankruptcy and Liquidation", "Succession", "Diligence", "Reciprocal Enforcement of Judgments", "Presumption of Death", and "Criminal Procedure". Our work in connection with the First Programme has disclosed problems which have led us to suggest the study of "Damages arising from Personal Injuries". We have included other subjects because they have been, or are being, considered by bodies concerned with law reform in England. We think it desirable, for example, that in matters of Family Law the reform of the two systems should not be entirely uncoordinated.

We are conscious that our choice of topics for consideration would not necessarily reflect the order of priority which would appeal to the legal practitioner on the one hand or to different sections of the public on the other. Our choice must inevitably be a compromise and, in reaching that compromise, we have been influenced by the fact that we have already initiated preliminary studies in some of the selected fields in examining proposals for reform submitted by the general public. We have been influenced also by a consideration of the resources likely to be available to us in the immediate future.

The following paragraphs elaborate these points in connection with each branch of the law recommended for inclusion in our proposed Second Programme.

Item No. 6—Insolvency, Bankruptcy and Liquidation

(To be examined by the Commission with the assistance of a Working Party)

The need for examination of this branch of the law has become apparent from the number of representations made to us pointing out anomalies and defects. In particular we have received a report on the subject by the Bankruptcy Committee of the Institute of Chartered Accountants of Scotland which contains many suggestions for reform of the law. We understand that the Law Society of Scotland have also been considering this subject. This is a technical branch of the law and we consider that its examination should be made with the assistance of a Working Party including representatives of the legal and accountancy professions and of other interests such as banking, industry and commerce.

¹SCOT. LAW COM. No. 7.

Item No. 7—Succession

(To be examined by the Commission)

We drew attention in our Second Annual Report¹ (paragraph 35(e)) to the fact that we had received a number of proposals for amendment of the Succession (Scotland) Act 1964 and that we had invited the Faculty of Advocates and the Law Society of Scotland to bring to our notice any other points which occurred to them. We are grateful to these bodies for their response to our invitation, and we have now reached the stage when this branch of the law should be given detailed examination. We propose to carry out this examination ourselves although we shall, of course, do so in consultation with the legal profession. Our aim is to produce firm proposals for legislation in a Succession (Amendment) (Scotland) Bill.

Item No. 8—Diligence

(To be examined by the Commission with the assistance of a Working Party)

This was one of the branches of the law which your Departments suggested for inclusion in an early Programme and we have also received from other sources a number of complaints about, and proposals for reform of, the law and practice of diligence. A committee has been set up in England under Mr. Justice Payne to examine the question of enforcement of orders of the English Courts and it may well be that its recommendations could have repercussions in Scotland. It is only ten years since this subject was examined by the McKechnie Committee.² Few of that Committee's recommendations have been implemented, and we consider that the time has come to re-examine the subject in greater detail with particular regard to comparative and international aspects.

We consider that this subject should be examined by ourselves with the assistance of a Working Party including persons having practical experience of the operation of this branch of the law.

Item No. 9—Reciprocal Enforcement of Judgments

(To be examined by the Commission)

The statutes concerned with the enforcement in one part of the United Kingdom of decrees granted by Courts in other parts have various anomalies, and complaints about their operation have come to our notice. This branch of the law is part of the law of diligence but it merits separate mention since it involves consideration of the law of other parts of the United Kingdom.

We propose to carry out the examination ourselves in consultation with the Law Commission and the Director of Law Reform in Northern Ireland. It may also be possible to give the subject even wider consideration in relation to Commonwealth and other countries.

Item No. 10—Damages arising from Personal Injuries and Death

(To be examined by the Commission)

In November 1967 we circulated a Memorandum (No. 5) entitled "Damages for Injuries Causing Death" which contained in Parts I and II proposals for reform of the law in relation to the rights of parties to sue for damages arising

¹SCOT. LAW COM. NO. 7.

²1958 Cmnd. 456.

from personal injuries and death. In Part III of the Memorandum we mentioned a number of other problems in relation to the law of damages which appeared to require further examination, and this we propose to carry out under this Programme. It may be that such work could be included under the head of "Obligations" in our First Programme, but it is of sufficient importance to merit separate mention now. We propose that the examination of the subject by the Commission should be continued.

Item No. 11—Presumption of Death

(To be examined by the Commission)

At common law a person is presumed, in the absence of proof of his death, to continue in life. He will not, in the absence of such proof, be presumed to have died until he has reached an age fixed variously either at eighty or at one hundred years. For certain limited purposes—the distribution of estates, and the dissolution of marriages, of persons who have disappeared—there are statutory provisions in the Presumption of Life Limitation (Scotland) Act 1891 and the Divorce (Scotland) Act 1938 under which such persons may be presumed dead after a period of seven years. These presumptions do not apply for all purposes, however, and our attention has been drawn to several problems which arise, for example, when a person is presumed dead for one purpose but not for others, and when a person disappears, is presumed dead, and subsequently re-appears. As this subject is somewhat narrower in scope than the others and as we have already done some work on it in the course of our preliminary investigation of proposals received, we consider that the more detailed examination of the subject could be carried out by the Commission itself.

Item No. 12—Legal Capacity of Minors and Pupils

(To be examined by the Commission)

The Report of the Latey Committee¹ has disclosed certain problems in the corresponding branch of the law of England which, in our view, ought to be considered also in Scotland. In addition, there has recently been set up in Scotland a Departmental Committee on the Constitution of Marriage, which will be considering the age at which individuals should be permitted to marry.

There is much in this branch of the law that impinges on the work already being done under the head of "Obligations" in our First Programme (e.g. in relation to contract). Many of the problems relating to those under the age of majority are of a social nature—indeed, one of them is whether the now recognised age of majority should be changed. Our primary concern is to examine the existing law with a view to ascertaining its defects and anomalies. In carrying out this task we shall consider the legal problems which may arise if the age of majority is changed.

Item No. 13—Criminal Procedure

(To be examined by a Departmental Committee)

Several proposals have been received from the public and from the legal profession to the effect that reform of the law relating to Scottish criminal procedure is desirable. The Lord Justice-Clerk has recently criticised the state

¹1967 Cmnd. 3342.

of the statute law, with special reference to post-trial procedures. The Index to the Statutes in Force 1966 lists sixty-eight statutes, the earliest dated 1578, as affecting our criminal procedure. A tidying-up of this statute law is obviously desirable but more than this limited object may be required. The Scottish system is, in general, conspicuously fair to the accused, but there are some exceptional features of our Scottish procedure which may give rise to unfairness. There is evidence, on the other hand, of apprehension in members of the public as well as in the legal profession that among the reasons for the current increase in crime is the fact that our criminal procedure places unnecessary obstacles in the way of ascertaining the truth, with the effect of allowing guilty persons to escape conviction.

All this confirms our opinion that a general examination of criminal procedure, especially pre-trial procedure, is required.

We wish to make it clear, however, that such an examination should be confined to matters of procedure and should extend neither to the substantive criminal law, except so far as it impinges on particular points of procedure, nor to penological problems. We have no evidence that the former is in need of review; the latter would not fall within our province.

We therefore recommend that Scottish criminal procedure be examined by a Departmental Committee, under terms of reference wide enough to enable them to examine fundamental principles, such as, for example, the doctrine of self-incrimination, pre-trial judicial examination of accused persons, and the availability to accused persons of statements by Crown witnesses.

Item No. 14—Family Law

(To be examined by the Commission)

The Law Commission included "Family Law" in their First Programme. They have since produced Working Papers examining several topics within this field, including papers on "Matrimonial and Related Proceedings—Financial Relief", and "Proof of Paternity in Civil Proceedings" and are actively examining "The Divorce Jurisdiction of the English Courts", "Nullity of Marriage" and "Polygamous Marriages". The published papers, in addition to throwing light upon deficiencies which exist in English law, incidentally throw light upon possible deficiencies in the law of Scotland. Our study, moreover, at your request, of the grounds of divorce drew our attention to possible deficiencies in collateral rules including those relating to financial provision for the spouses and those relating to judicial separation.

We suggest, therefore, that the Commission should proceed with a preliminary examination of Family Law, both with a view to making specific recommendations for changes in the law and with a view to considering which topics in the light of their social implications, if any, should more appropriately be examined by other agencies.