Scottish Law Commission

DISCUSSION PAPER No. 85

FAMILY LAW
Pre-consolidation reforms

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 June 1990. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

2. Further copies of this Discussion Paper can be obtained, free of charge, from the above address.

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PART I - INTRODUCTION

Purpose of discussion paper

1.1 The purpose of this discussion paper is to pave the way for a codification of Scottish family law. "Codification" is a word with different shades of meaning. All we mean by it in this context is a statute, in the normal form, which contains most, but not necessarily all, of the rules of Scottish family law in an orderly, easily accessible form. Most of these rules are already statutory and so the work of preparing a code on the lines we envisage would be, to a large extent, merely one of consolidation. However, there are some areas of family law - such as much of the law on nullity of marriage - which still rest on the common law. It would, we believe, lead to a more useful product in the end of the day if the rules in these areas were put into statutory form, any defects or uncertainties being removed in the process, and included in the proposed consolidation. There are also parts of the existing statute law - such as the conveyancing provisions in the Matrimonial Homes (Family Provisions) (Scotland) Act 1981 - which have proved to be inconvenient and unpopular and which perhaps ought to be changed if new legislation is contemplated. This discussion paper therefore makes proposals for new statutory provisions on certain matters which are not governed by statute at present and for amendments to certain existing statutory provisions, all with a view to eventual consolidation.

Complementary discussion papers

1.2 We also propose to publish two other discussion papers as part of the same project. One is on Child Law: Parental Rights and Duties, Guardianship, Custody and Access. This paper will seek views on possible restatement and reform of the law in these

areas, which still depends to a large extent on the common law and which, in relation to guardianship, is very out of date. This child law material could have been included in this discussion paper but because it forms a coherent topic, and because it will be of interest to a different but overlapping group of consultees, we have decided to publish it separately. The other complementary discussion paper is on The Effects of Cohabitation in Private Law. Again, the material could have been included in this paper but it raises questions of such wide public importance and interest that we thought it better to publish it separately.

Scope of this discussion paper

1.3 We attach, in the Appendix, a preliminary draft outline of the form an eventual comprehensive Bill might take, showing how existing statutory provisions would be arranged within it, and also showing in bold print the areas where new statutory provisions would be required or where policy decisions about the fate of certain rules will have to be taken. It is these matters in bold print which form the contents of this discussion paper. We wish to stress that the draft outline is indicative only and is not intended to restrict in any way the freedom of action of whichever Parliamentary draftsman is eventually assigned to this project.

Why work towards a family law code?

1.4 We believe that it would be useful to all who have to use family law - whether lawyers or non-lawyers - if its rules were contained in one statute instead of being scattered over a number of statutes and cases. Having the rules in one statute would enable the whole subject matter to be arranged in a systematic way which would, in itself, make the law easier to find and use.

In the course of preparing this discussion paper we have come across several areas of the law where many pages of inconclusive speculation in text books could quite easily be superseded by one simple statutory provision a few lines long.

1.5 Section 3(1) of the Law Commissions Act 1965 places us under a duty to take and keep under review the law with which we are concerned:

> "with a view to its systematic development and reform, including in particular the codification of such law ...."

Family law is one of the topics in our first programme of law reform and work towards codification of it is therefore squarely within our statutory functions.

1.6 It is not perhaps every subject within the scope of our law reform programmes which is at a stage suitable for codification. In some areas the first priority is for reform of the substance of the law. However, most of the work of substantive reform in family law has now been done and the time seems ripe for attention to be paid to the form of the law.

Proposed method of proceeding

1.7 Once the results of consultation on this discussion paper, and the related discussion papers mentioned earlier, are available we propose to prepare a report recommending legislation on all those matters which, in the light of consultation, appear to require legislation. In accordance with our usual practice we would attach to the report a draft Bill to give effect to the recommendations. This Bill would, we anticipate, be worthy of enactment in its own right in order to effect certain reforms and remove uncertainties

in the law. It would also, however, be intended to put the Scottish family law statutes into such a position that the normal consolidation process could be used to produce a single comprehensive Family Law (Scotland) Act arranged in a systematic way.

Limited nature of review of recent statutes

1.8 It is not our intention or wish to open up the whole of Scottish family law for fundamental reconsideration at this stage. Our intention is to take as established, for the time being, the substance of the rules in family law statutes enacted by Parliament in recent years. Only by doing this will we be able to work effectively towards recommendations for a significant improvement in the form of the law. We cannot deal with the whole of the substance and the whole of the form at the same time.

1.9 This does not mean, however, that a certain amount of fine-tuning cannot be done. Indeed we see one of the benefits of this exercise as being that it will give an opportunity to practitioners and others to suggest minor improvements, not affecting basic policy, to existing legislation. One set of provisions which we have ourselves identified as suitable for improvement is the part of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 dealing with the effect of occupancy rights on ordinary conveyancing transactions. We hope that consultees will suggest other improvements and refinements of existing legislation which do not undermine its basic policy.

PART II - MARRIAGE BY COHABITATION WITH HABIT AND REPUTE

Introduction

2.1 Most of the law on the constitution of marriage is statutory.[1] However, the law on marriage by cohabitation with habit and repute (CHR) still depends on the common law. In the context of a proposed codification of family law the question therefore arises whether marriage by CHR should be left to depend on the common law, put into statutory form, with or without changes, or abolished.

2.2 **Present law.** If a man and a woman who are free to marry each other cohabit as husband and wife in Scotland for a considerable time and are generally regarded as being husband and wife they are presumed to have consented to be married, even if only tacitly, and, if the presumption is not rebutted, will be held to be married by cohabitation with habit and repute (CHR).[2] Although the marriage results from the combination of mutual consent and the outward elements of cohabitation and repute, without the need for a court decree, in practice a court decree of declarator is sometimes necessary before third parties will accept that the requirements for this type of marriage have been met. There are never more than a few declarators of marriage by CHR per year.[3] Section 21 of the Marriage (Scotland) Act 1977 requires the principal clerk at the Court of Session to send to the Registrar General for Scotland details of any decree of declarator of marriage by CHR including "the date, as determined by the Court, on which the marriage was constituted" so that the marriage can be registered. As a marriage by CHR exists independently of any court decree of declarator, it follows that

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1 See the Marriage (Scotland) Act 1977.

2 Campbell v Campbell (1866) 4 M 867 at p925; Nicol v Bell 1954 SLT 314 at p326. For a discussion of the origin and nature of cohabitation with habit and repute in Scots law see Clive, Husband and Wife (2nd edn 1981) pp59-76.

3 The average since 1961 has been between 3 and 4 a year. Annual Reports of Registrar General for Scotland.

third parties, such as the trustees of occupational pension funds, may choose to accept the evidence of a marriage by CHR without requiring a court decree to be obtained.[1] It also follows that there are, at any one time, a number of undeclared and unregistered marriages by cohabitation with habit and repute.

2.3 **Problems in present law.** The law on CHR gives rise to a number of difficulties. First, what is a sufficient length of cohabitation? No firm answer can be given. It was stated in the Inner House in 1909 that a period of 10 months was not enough.[2] More recently, however, a period of 10 months and 23 days was accepted as sufficient in the Outer House.[3] Secondly, what is sufficient reputation? Again no firm answer can be given. The fact that a few people know that the cohabitants have never been regularly married will not necessarily prevent a marriage by CHR,[4] but the repute of marriage must be "substantially unvarying and consistent".[5] Thirdly, when will the presumption of tacit consent be rebutted? Clearly the presumption will be rebutted if both parties deny, credibly, that they ever intended to get married.[6] Indeed, as both parties must consent, it should be sufficient if one party denies ever having had matrimonial intent, provided that he or she is believed.[7] The presumption will also be rebutted if the parties believed throughout the period of cohabitation that one of them was married to someone else, even if, unknown to the parties, that marriage had ended by death or

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[1] Another consequence of the existence of the marriage, independently of a declarator, is that either spouse can raise an action for damages for the death of the other without first obtaining a declarator of marriage. See Forbes v House of Clydesdale Ltd 1987 SCLR 136.

[2] Wallace v Fife Coal Co 1909 SC 682 at p686. See also Low v Gorman 1970 SLT 356.

[3] Shaw v Henderson 1982 SLT 211.

[4] Ibid.

[5] Cunningham v Cunningham (1814) 2 Dow 482 at p514. Cf Petrie v Petrie 1911 SC 360.

[6] Cf Bairner v Fels 1931 SC 674.

[7] In Nicol v Bell 1954 SLT 314 the man was not believed.

divorce.[1] In theory the presumption ought to be rebutted if the parties thought that a regular ceremony was necessary for marriage and intended to go through such a ceremony at some time in the future.[2] In practice, however, judges have sometimes been prepared to hold a marriage by CHR established in this type of case.[3] The presumption of tacit consent may also be held to be rebutted by evidence of the bad terms on which the parties lived together.[4] There may, of course, be other situations where the presumption will be rebutted: it is all a question of evidence. A further problem with marriage by CHR is the difficulty of fixing the date of the marriage. There are cases and *dicta* which tend to push the date of the marriage back to the earliest possible date - for example, the date when an impediment to the marriage is removed but, as a matter of logic, it seems odd to regard a marriage as constituted before the requirements for it (including a sufficient period of cohabitation while the parties are free to marry) have been fulfilled.[5]

2.4 **Assessment of present law.** As a way of getting married marriage by CHR has little to commend it. It is inherently vague and unregulated and causes difficulty and expense at a later stage. In reality marriage by CHR is a way of conferring rights on some cohabitants, usually after the death of the other party to the relationship. It is as a protective mechanism for cohabitants that it must be judged.

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[1] Cf *Lapsley* v *Grierson* (1845) 8 D 34; 1 HLC 498.

[2] See *Wallace* v *Fife Coal Co* 1909 SC 682 at p686.

[3] See eg *Shaw* v *Henderson* 1982 SLT 211 and the unreported case of *Doran* v *Ld Adv*, Feb 13, 1975 referred to in Clive, *Husband and Wife* (2nd edn 1981) at p66, footnote 32.

[4] Cf *Low* v *Gorman* 1970 SLT 356.

[5] The cases are reviewed in Clive, *op cit* pp67-74.

2.5 One criticism of marriage by CHR as a protective mechanism for cohabitants is that it is not available to couples who have lived together without ever pretending to be married or acquiring the reputation of being married. This type of open cohabitation is increasingly common nowadays.[1] Whatever its merits as a protective mechanism in the past, marriage by CHR is an inadequate, and statistically insignificant, protection for cohabitants in the conditions now prevailing.

2.6 A second criticism of marriage by CHR as a protection for cohabitants is that, even among those who have had the reputation of being married, it operates in a capricious way because of the vagueness and uncertainty of the law and the emphasis on tacit consent. A cohabitant may lose protection simply because the couple were unaware that the man's prior marriage had been ended by divorce and continued to believe, throughout the period of cohabitation, that he was still married to his first wife. A person who thinks he is married to X cannot tacitly consent to marry Y. Much may depend on how a surviving cohabitant answers questions about the couple's attitude to a regular marriage. If he or she says "We intended to get married in a registrar's office but kept putting it off" it could be difficult to hold that there was a

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[1] See "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners" Population Trends (OPCS Winter 1989) pp23-31. It is estimated that in 1986-87 9.4% of people in Scotland, who were single, separated or divorced, were cohabiting with a person of the opposite sex (p28). The interviewers for the General Household Survey have found that people are quite prepared to describe themselves as living together, without claiming to be married. Ibid p23. See also the report of the 1986 General Household Survey p23. There is clearly much less stigma attaching to cohabitation than formerly.

tacit consent to marriage.[1] An intention to get married in the future seems inconsistent with regarding oneself as married now.

2.7 A third, and possibly the most serious, criticism of marriage by CHR as a protective device is that it creates uncertainty and endangers subsequent regular marriages. It seems likely that in many cases of marriage by CHR the couple never regard themselves as married at all, and that the idea of marriage first presents itself when the survivor consults a solicitor after the death of the other partner. People who do not think they are married do not think they need a divorce when they separate. The device of holding a couple to be actually married by CHR is therefore potentially dangerous. They may split up. One of them may marry someone else. That marriage will always be at risk from an attempt by the former cohabitant to establish a marriage by CHR. A woman could lose all her succession rights on the death of the man to whom she thought she had been married because another woman with whom her "husband" had formerly cohabited establishes a marriage by CHR.

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[1] See Wallace v Fife Coal Co 1909 SC 682 at p686. Judges have, however, sometimes overcome this difficulty. See eg the cases of Shaw v Henderson and Doran v Ld Adv referred to above. The rather odd result of holding a couple married by CHR even although they intended to have a regular ceremony is that, logically, they could not have had a valid regular marriage. They would already have been married and people who are married already cannot get married again, without an intervening divorce.

2.8 Notwithstanding these criticisms one option for consideration is clearly the retention of the existing law unaltered. The other two options are reform and abolition.

2.9 **Retention?** If the existing law were to be retained, the proposed legislation could either say that the statutory rules on marriage were without prejudice to the law on marriage by CHR or attempt to restate the law on marriage by CHR in statutory form. The first course would fall short of the objective of codifying Scottish family law but would be legislatively easy. It would leave the considerable difficulties of the present law (for example, as to the date from which a marriage by CHR exists) hidden and unresolved. The second course would mean incorporating some very vague concepts - like a "considerable period of time" and a reputation which is "substantially unvarying and consistent" - into a modern statute, which would no doubt attract justified criticism, particularly as the statute would be laying down criteria for the acquisition of a status and not simply factors to be taken into account in the exercise of a discretion. It would not be legislatively easy and it would require decisions to be made about the precise nature and content of the present law. There is, for example, a view that even a very short period of cohabitation, much less than the considerable period normally required, may suffice if there is a void marriage or other very clear evidence of matrimonial intent.[1] Should this view be incorporated in a new legislative formula or would this amount to the re-introduction of marriage by simple declaration of present consent? There is also a view that the correct way of expressing the existing law is to refer to marriage by consent inferred from

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[1] See eg Shaw v Henderson 1982 SLT 211. Cf Wilson, "Validation of Void Marriages in Scots Law" 1964 Jur Rev 199 at p203 and the Report of the Kilbrandon Committee on The Marriage Law in Scotland (Cmnd 4011, 1969) para 155.

cohabitation with habit and repute.[1] Should this view be preferred in a new legislative formula or does it fail to take into account that marriage by simple declaration of consent was abolished by the Marriage (Scotland) Act 1939 and that the necessary cohabitation must be in Scotland, which indicates that it is not simply a matter of evidence? The question has an important bearing on the date from which a marriage by CHR is held to exist. If the marriage comes into existence by consent, then it may be held to have existed before the expiry of the required period of cohabitation. The very confusing result is that there was, for a time, a marriage which was not only unproved but also unprovable.[2]

2.10 **Reform?** Some of the criticisms of the present law could be met by legislation. For example, a minimum period of cohabitation could be prescribed, thus removing an element of uncertainty (but at the price of arbitrariness). It could be made clear that a marriage by CHR does not come into existence until the minimum period of cohabitation in Scotland, during which the parties were free to marry, has elapsed. This would clear up confusion and make it easier to fix a date for the commencement of the marriage. The requirement of "repute" could be removed, thus focussing attention on the parties' own intentions and actions and ignoring the, arguably irrelevant, opinions of others. This would make marriage by CHR more readily available in cases of open

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[1] See Ashton-Cross "Cohabitation with Habit and Repute" 1961 Jur Rev 21; Shaw v Henderson 1982 SLT 211 at p212.

[2] See Ashton-Cross, loc cit. The author thought that the best solution for this confused state of affairs was the complete abolition of all irregular marriages.

cohabitation where there has never been any pretence of marriage. It might even be suggested that the consent required should not be consent to be married (which will often not be present even in relationships of some permanence and which, as we have seen, gives rise to legal difficulties) but consent to live together in a certain way for a certain length of time. Clearly, devising a suitable test would be extremely difficult. Nonetheless it might be possible to modernise the law on marriage by cohabitation in such a way that it would apply to a large proportion of those unmarried couples who are cohabiting in relationships of some stability and permanence. Something of the sort was suggested in a leading article in The Times of 27 September 1989.[1] We doubt, however, whether this would be desirable. Quite apart from the question whether it would be justifiable to impose marriages, and in many cases divorces, on people who had chosen not to get married, there is the serious practical objection that a significant increase in the number of irregular marriages would lead to all the uncertainties, disputes and litigation which characterised the old Scottish law on this subject. Many couples would not know whether they were married or when they were married. Many people would not know whether or not they had committed bigamy. Many apparently valid regular marriages would be at risk from proceedings to establish earlier irregular ones. Apparently valid divorces would turn out to be invalid, because the marriage in question was, unknown to the parties, bigamous. On a person's death several former cohabitants could claim succession rights on the basis of irregular marriages. The one who established the earliest marriage, undissolved by divorce, would prevail. If the requirements for marriage by cohabitation were liberalised to such an extent that they were capable of applying to cases of pre-

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[1] The article suggested, at least for couples with children, something similar in effect to "the resurrection of the common law marriage, in which a legal marriage - with all the obligations implied - is assumed to exist from the pattern of life of the partners rather than from the existence of legal documents".

marital cohabitation[1] then many couples who intended to have a regular marriage would find that this was impossible because they were already married to each other. Yet it would be difficult or impossible, given that the intentions of cohabitants in relation to an eventual marriage are often unclear, to distinguish in advance between pre-marital cases and others. Any considerable increase in the number of irregular, unregistered marriages would also make life more difficult for officials who have to decide for various purposes whether people are or were married and would lead to an increase in public expenditure. We cannot see a reformed law on marriage by CHR as a suitable mass remedy for the mass phenomenon of cohabitation. The question, as we see it, is whether marriage by CHR should be retained, perhaps with slight amendments, as a minor anomaly increasingly irrelevant to contemporary conditions, or abolished. We intend to consider in a separate discussion paper on The Effects of Cohabitation in Private Law the advantages and disadvantages of protecting cohabitants directly, in various ways, without actually holding them to be married.

2.11 **Abolition?** Two preliminary points should be made clear. The first is that the question of abolition relates only to marriage by CHR and not to the evidential effect of long cohabitation and

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[1] There has been a very significant increase in the incidence of pre-marital cohabitation in the last 20 years. For marriages which took place in Great Britain in 1987 over one half of the couples had lived together before marriage. See "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners", Population Trends (OPCS) Winter 1989 p25.

reputation in raising a presumption of marriage by any method available at the relevant time and place. This evidential effect of long cohabitation and reputation is found in other legal systems, including English law,[1] and there is no suggestion that it should be removed. We are concerned only with the possible abolition of CHR as a way of getting married. If need be, any statutory provision abolishing marriage by CHR could make it clear that it was without prejudice to the evidential effect just noted. The second preliminary point is that there is no question of retrospective abolition: any marriage constituted by CHR (whether or not there had been a declarator of marriage) before the commencement of legislation to abolish it would remain valid.

2.12 The Departmental Committee set up in 1936, under the chairmanship of Lord Morison, to consider the Scottish marriage laws recommended the abolition of all three forms of irregular marriage - marriage by declaration of present consent, marriage by promise subsequente copula, and marriage by CHR.[2] However, the government, in introducing the Bill which led to the Marriage (Scotland) Act 1939, decided to retain marriage by CHR. Its main reason was that marriage by CHR validated regular marriages which were void because of some formal defect.[3] If it were to be abolished separate provision for the curing of informalities would have to be made and it seemed simpler to retain marriage by CHR.[4] Now, however, separate provision has been made for formal defects. If a marriage is registered by or at the behest of an appropriate registrar then, provided both parties were present at the ceremony, the validity of the marriage cannot be questioned, in any legal proceedings whatsoever, on the ground of failure to comply with the formal requirements of the Marriage (Scotland)

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[1] See eg Re Shephard, George v Thyer (1904) 1 Ch 456; Re Taylor, Taylor v Taylor [1961] 1 WLR 9.

[2] Report p13 (Cmd 5354, 1937).

[3] See 111 Parl Deb (HL) (1938-39) col 566.

[4] Ibid.

Act 1977.[1] We consider later whether this useful provision might be extended still further,[2] but even in its present form it suffices, for all practical purposes, to make marriage by CHR unnecessary as a cure for formal defects.

2.13 Another reason for preserving marriage by CHR which was mentioned in the debates on the Marriage (Scotland) Bill in 1938-39 was its beneficial effect in cases where the parties had actually been married by a regular marriage ceremony but adequate evidence of it could not be obtained.[3] This concern would, however, be met by making it clear that the abolition of marriage by CHR was without prejudice to the evidential effect of long cohabitation and reputation in raising a presumption of an actual marriage by any method available at the relevant place and time.[4]

2.14 The avoidance of illegitimacy was also mentioned in the debates on the Marriage (Scotland) Bill in 1938-39 as a reason for retaining marriage by CHR.[5] Now, however, the legal position of children in Scots law does not depend on the marital status of their parents.[6] It seems doubtful whether there would be any social advantages for children in a marriage by CHR. If the

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1 Marriage (Scotland) Act 1977, S23A (added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s22(1)(d).

2 Para 3.14 below.

3 See 111 Parl Deb (HL) (1938-39) cols 567 and 569; 345 Parl Deb (HC) (1938-39) cols 2249 and 2294.

4 It is also worth noting that where both parties are still alive they can avail themselves of the facility of a second ceremony provided for by s20 of the Marriage (Scotland) Act 1977.

5 111 Parl Deb (HL) (1938-39) cols 567 and 569.

6 Law Reform (Parent and Child) (Scotland) Act 1986, s1. See also Part XI below.

parents have successfully passed themselves off as married in their community then the children probably stand to lose rather than gain by any embarrassing disclosures made in an action for declarator of marriage. If the parents have not successfully passed themselves off as married in their community then there is little hope of establishing a marriage by CHR.

2.15 The Kilbrandon Committee on The Marriage Law of Scotland in 1969 recommended no change in the law on marriage by CHR.[1] It noted that the establishing of an irregular marriage by declarator was comparatively costly and "had its administrative inconvenience" but considered that there were advantages in a judicial power to

> "declare as marriages, with all the social and financial consequences, associations which have been marriages in all but name, the parties to them having accepted and discharged all the duties arising from the married state, save only the ceremony of marriage."

This perhaps gives a misleading impression of the scope of marriage by CHR at the present time. In fact, as we have seen, it is only a few associations which qualify for this remedy. Couples who have never attempted to pass themselves off as married and who have never acquired the reputation of being married do not qualify. Since 1969 there has been a significant change in the number of openly cohabiting unmarried couples and in the public acceptability of cohabitation without marriage.[2] There have also been the changes, noted above, in the law on the effect of formal defects and the effect of birth out of marriage. The factual and legal positions have changed significantly since the Kilbrandon Committee reported.

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[1] Cmnd 4011 (1969) para 143.

[2] See "Cohabitation in Great Britain - characteristics and estimated numbers of cohabiting partners", Population Trends, Winter 1989, p23.

2.16 It remains true, of course, that the establishment of a marriage by CHR can still have significant advantages for a cohabitant - principally in relation to succession and pensions but also in relation to a claim for financial provision on divorce. We propose to consider in a separate discussion paper on The Effects of Cohabitation in Private Law whether succession rights could be conferred directly on certain cohabitants and whether there could usefully be some provision for financial provision or a redistribution of certain property on the breakdown of a cohabitation. So far as the state widow's pension and other benefits for widows are concerned, it is not for us to make suggestions as to policy. Within the context of a United Kingdom social security system, funded and administered on a United Kingdom basis, it does, however, seem anomalous that certain cohabitants who have passed themselves off as married in Scotland should be able to obtain widows' benefits which are not available to cohabitants in exactly the same factual position in other parts of the United Kingdom. The same applies to inheritance tax, where the married person's exemption can be very important.[1] The anomaly is made more objectionable by the difficulty and expense involved in deciding whether there was a marriage by CHR.[2] These factors, and the nature of marriage by CHR in general, perhaps make it unlikely that the benefits of marriage by CHR would be conferred on cohabitants in the rest of the United Kingdom. Similar considerations apply to statutory occupational

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[1] Inheritance Tax Act 1984, s18.

[2] There are numerous Commissioners' decisions on this subject in the social security field.

pension schemes.[1]

2.17 So far as contractual arrangements, such as life insurance and private occupational pension schemes, are concerned, everything depends on the terms of the arrangement. There is no reason why one cohabitant should not take out an insurance on his or her own life for the benefit of the other. Where a private sector occupational pension scheme allows the employee to nominate the person who is to receive death benefits under the scheme there is no reason why a cohabitant should not be nominated. Where the scheme provides for death benefits to be payable to the executors of the member then the benefits may go to a cohabitant under the terms of the member's will.

2.18 There is no doubt that marriage by CHR could be abolished. Cohabitants could be given direct protection, where appropriate, in Scottish private law, as has already been done in relation to damages for wrongful death, occupancy rights in the matrimonial home and domestic violence. So far as public law rights are concerned it is arguable that the position of cohabitants under United Kingdom statutes on such matters as social security and taxation ought to be the same throughout the United Kingdom and that marriage by CHR is an unjustifiable anomaly.

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[1] Under such schemes a cohabitant can sometimes qualify as a "dependant" but the position of cohabitants is not in general satisfactory. See Rosettenstein "Cohabitation and English Public Sector Occupational Pension Schemes" in Marriage and Cohabitation in Contemporary Societies (Eekelaar & Katz eds 1980) pp323-332.

2.19 Our provisional view is that as a protective mechanism marriage by CHR is inadequate (because it protects only a few in a capricious and unpredictable way), and undesirable (because it creates uncertainty and places later marriages at risk). We suspect that attempts to remedy the first defect and make marriage by CHR more widely applicable and more easy to establish would merely exacerbate the second and lead to more uncertainty and more danger to later regular marriages. We therefore provisionally favour abolition of marriage by CHR. We would welcome views on the questions:

1(a) **Should marriage by cohabitation with habit and repute be retained or abolished?**

(b) **If it is to be retained, should there be any changes - for example, specification of a minimum period of cohabitation; clarification of the date when the marriage comes into existence; removal of the "repute" requirement - designed to remove the present uncertainties in the law and increase the availability of this type of marriage?**

PART III - NULLITY OF MARRIAGE

Introduction

3.1 We deal with private international law questions relating to marriage later.[1] In this part of the report, therefore, it is assumed that there are no foreign aspects to complicate matters: the marriage in question is celebrated in Scotland between parties who are domiciled in Scotland. For the sake of convenience, it is also assumed that the marriage is a regular one, although most of the rules discussed would apply also to marriage by cohabitation with habit and repute (if that form of marriage is retained).[2]

3.2 Some rules on nullity of marriage are already in statutory form in Scotland. Section 1(2) of the Marriage (Scotland) Act 1977 provides that a marriage is void if either party is under the age of 16 and section 2 provides that a marriage is void if either party is within the prohibited degrees of relationship laid down in the Act. Section 23A of the same Act provides that the validity of certain marriages is not to be questioned on the ground of certain formal defects.[3] However, most of the rules on nullity of marriage still depend on the common law. One of the early reports of the English Law Commission was on nullity of marriage[4] and it led to the Nullity of Marriage Act 1971 (now consolidated in the Matrimonial Proceedings Act 1973). We have not engaged in a similar law reform project on nullity of marriage until now because it did not seem to us that it was of high priority. Problems are very infrequent in practice. However, a proposed codification makes it necessary to consider putting the existing law into statutory form. This provides a useful opportunity to examine some aspects of the present law - notably the law on

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[1] See Part IX.

[2] See Part II.

[3] This section was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. We consider later whether it could with advantage be slightly widened and strengthened. See paras

[4] Law Com No 33, 1970.

sham marriages and the law on nullity for impotency - which seem unsatisfactory. For the rest, we do not believe that much more is required than a restatement, with clarification of doubtful points where appropriate, of the existing common law. For this reason, and because this is an area where theoretical discussion of certain fascinating points could easily get out of all proportion to their practical importance, we do not propose to go into the topic in excessive depth.

Prior subsisting marriage

3.3 All that is required here is an enactment in statutory form of the existing rule of law that a marriage is void if either party to it is, at the time of the marriage, already married. As we have noted, we deal with private international law questions later.[1] We suggest therefore that

2 **It should continue to be a ground of nullity of marriage that either party is at the time of the marriage already married.**

Nonage

3.4 We are assuming for present purposes that the policy on the minimum age for marriage is unchanged since the Marriage (Scotland) Act 1977 was enacted. On this basis all that is required is a re-enactment of the existing rule that a marriage is void if either of the parties is, at the time of the marriage, under the present age of 16. We suggest therefore that

3 **It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.**

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[1] See Part IX.

Parties of same sex

3.5 Again we are assuming that policy is unchanged since the enactment of the Marriage (Scotland) Act 1977, section 5(4)(e) of which provides that there is a legal impediment to a marriage if both parties are of the same sex. This is also a ground of nullity at common law. On this basis all that is required is an enactment of the rule in 5(4)(e) as a ground of nullity. We suggest that

4 It should continue to be a ground of nullity of marriage that both parties are of the same sex.

Prohibited degrees of relationship

3.6 The Marriage (Scotland) Act 1977 provides that a marriage is void if the parties are within the prohibited degrees of relationship set out in the Act.[1] In the case of blood relationships this means that a person cannot marry his or her parent, grandparent, or great-grandparent; child, grandchild or great-grandchild; brother or sister; uncle, aunt, nephew or niece.[2] We do not suggest any change in these rules.

3.7 In the case of relationships by marriage the only restrictions are on marriage with a former spouse's child, grandchild or parent,[3] and even in these cases the law was relaxed in 1986.[4] In the case of a former spouse's child or grandchild, marriage is now permitted provided that both parties are at least 21 years of age at the time of the marriage and

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[1] S2.

[2] 1977 Act Sch 1, para 1.

[3] Marriage (Scotland) Act 1977, Sch 1 paras 2 and 2A, as substituted by the Marriage (Prohibited Degrees of Relationship) Act 1986.

[4] Marriage (Prohibited Degrees of Relationship) Act 1986.

"the younger party has not at any time before attaining the age of 18 lived in the same household as the other party and been treated by the other party as a child of his family."[1]

Whether this restriction is necessary or desirable is a question on which different views could be held, but it is not manifestly unreasonable and, as the law was reformed as recently as 1986, we do not think that this would be an appropriate time to re-open debate on this issue. In the case of a former spouse's parent, marriage is now permitted provided that both parties have attained the age of 21 and the marriage is solemnised

"(a) in the case of a man marrying the mother of a former wife of his, after the death of both the former wife and the former wife's father;

(b) in the case of a man marrying a former wife of his son, after the death of both his son and his son's mother;

(c) in the case of a woman marrying the father of a former husband of hers, after the death of both the former husband and the former husband's mother;

(d) in the case of a woman marrying a former husband of her daughter, after the death of both her daughter and her daughter's father."[2]

Although these restrictions seem very odd we might have been tempted to suggest that they should be left undisturbed for the

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[1] Marriage (Scotland) Act 1977, s2(1A), as inserted in 1986.

[2] 1977 Act s2(1B), as inserted in 1986.

time being on the ground that they had been recently enacted by Parliament. However, as we were beginning work on this discussion paper we were asked by a Member of Parliament for assistance with a case involving a constituent of his, and in the light of this request we think that some consultation on the above provisions is justified, particularly as the provisions have not as yet been the subject of wide public consultation or debate in Scotland.

3.8 The case to which we were referred involved a woman who divorced her husband and obtained custody of the children of the marriage. She was greatly supported in looking after the children by her former husband's father and mother. She in turn provided support when her ex-mother-in-law became ill. Some time after the death of the ex-mother-in-law the woman and her former husband's father decided they would like to marry each other but found that they could not because the woman's former husband was still alive. Section 2(1B) of the Marriage (Scotland) Act 1977 provides, as we have seen, that a marriage between a woman and the father of a former husband is permissible only

> "after the death of both the former husband and the former husband's mother."

3.9 Other cases where the restrictions in section 2(1B) might seem even more unreasonable can readily be imagined. Suppose that a man aged 40 marries a woman aged 25 who has never known her father. The wife is killed in a road accident and, some time later, the man and his former wife's mother, who is closer to his own age, want to get married. Why should it matter whether the former wife's father, who might not even know that she ever existed, is alive or dead? What is the point of this restriction on a marriage between two people who are both unmarried and

unrelated by blood? Or suppose that a man divorced his wife in 1970. She remarried and went to live in London, taking the son of the marriage with her. In 1977 the son married. He continued to live in London and saw very little of his father. In 1980 the son and his wife were divorced on the ground of 2 year's separation. In 1983 the son's former wife moved to Scotland. She and her former father-in-law began to see more of each other. They would now like to marry each other. Why should they have to wait until both of their former spouses are dead?

3.10 It is worth noting that a person can marry his or her former cohabitant's parent, without restriction. It is also worth noting that sexual intercourse between a person and the parent of his or her former spouse is not incest, so that in all the examples given the couple could cohabit as husband and wife without committing any offence. All that the law does is to prevent them from marrying each other.

3.11 Section 2(1B) is the result of an amendment introduced at the report stage in the House of Lords, at a time when the Bill in question did not yet extend to Scotland.[1] It was a compromise amendment designed to meet objections which had resulted in the defeat of an earlier proposal to allow people to marry the parent of a former spouse. The reasons for the rejection of the earlier proposal were that to allow such marriages

> "would endanger roles within the family and would open up possible erotic overtones."[2]

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[1] See Parl Debs (HL) (1985-86) Vol 471 cols 885-892.

[2] Ibid col 887. See also Vol 470 cols 957-960.

The type of case which concerned the objectors, and the reason why they were prepared to allow a marriage where both the intervening spouses were dead, were explained by Lord Meston as follows[1]

> "One can take a typical example. A young couple marry. They may go to live with the parents of, say, the young husband. There may be a weak, immature perhaps teenage duaghter-in-law who may be very vulnerable to the influence of her father-in-law. There is a situation of proximity and dependency. If a relationship did develop between the young husband's wife and his father, there are two subsisting marriages which potentially would be ended by divorce.
>
> As the noble and learned Lord, Lord Simon, said, with his great experience, and I can echo with my lesser experience, there is nothing more painful than a divorce in that kind of situation. There is a great alienation and distress. The father would divorce his son's mother to marry his son's wife. It would be worse if the young couple had produced children. The children would probably stay with their mother after the disintegration of the family which I have just suggested. The grandfather would be marrying the children's mother. The alienation and upset could well be so profound that all contact between the children and their natural father and between the children and their grandmother would be completely severed. The grandmother herself would have lost her husband and lost her daughter-in-law and may well have lost meaningful contact with her grandchildren.
>
> Those problems in what might be described as a fairly extreme but not an unlikely example would not arise if both the intervening spouses were already dead."

The question which must be asked is whether the prohibition in section 2(1B) is likely to prevent this type of situation. Are the parties likely to know the law at the time when an attachment is developing? Even if they do, is that likely to prevent the

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[1] Parl Debs (HL) (1985-86) Vol 471 col 891.

attachment developing further? It must also be asked why this situation, unfortunate and distressing though it may be, is regarded as so much worse than any other situation in which an attraction between two married people results in the break-up of the two families? Why does the parent-in-law relationship itself justify a restriction? Would the situation be so much less distressful if the younger man were the older man's foster son or brother or nephew or business partner or close friend? Would it be so much less distressful if the young woman were the son's cohabitant rather than his wife?

3.12 These issues were considered in the report entitled No Just Cause by a group appointed by the Archbishop of Canterbury to look into the law of affinity in England and Wales.[1] A majority of the group's members referred to the fear that the removal of prohibitions might encourage the formation of attachments between parents-in-law and their sons-in-law or daughters-in-law, but did not feel that the law could prevent such cases arising. They pointed out that similar fears had been expressed in relation to the removal of earlier prohibitions, such as the former prohibition of marriage with the brother or sister of a former spouse, but that there was no evidence to suggest that the removal of these prohibitions had had any ill effects.[2] They did not accept that the removal of the remaining prohibitions on marriage with former in-laws would tend to undermine the family.[3] They thought that marriage between former in-laws would in practice be rare and that most people, particularly those with religious objections to them, might still prefer to avoid them but that this was not a reasonable argument for prohibiting the lawful marriage of such former in-laws as did wish to marry.[4] They concluded that the prohibition was based simply on tradition and

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[1] The Report was published in 1984.

[2] Para 100.

[3] Para 101.

[4] Para 102.

could not now be justified on any logical, rational or practical ground.[1] The experience of other states where there had never been such a prohibition provided a strong and persuasive argument for abolishing the impediment.[2] A minority of the group recommended that the existing legal impediments to marriage between parent-in-law and children-in-law should not be removed.[3] They said that to allow such marriages would be

> "to condone sexual rivalry between father and son, or mother and daughter, which, within the close confines of the family, would be destructive of the father and son, or mother and daughter, relationships.[4]
>
> In addition, it would deprive the child-in-law of his or her safety of place as child in the new family into which he or she marries. When, for instance, a son brings his wife to his father's home, there is an underlying assumption that the daughter-in-law will assume a role in relation to her father-in-law which is exempt from sexual expectations. To admit the possibility of a future marriage between parent-in-law and child-in-law would be to undermine assumptions which make for the safety and comfort of the adult family."[5]

These arguments are very similar to the arguments which were made many years ago against marriage with a deceased wife's sister. They seem to us to be just as unrealistic and just as unsupported by anything in the way of evidence. The picture of unbridled lust and sexual rivalry painted by the minority seems to us to be far removed from the ordinary decencies of family life in this country, and far removed, for example, from the actual constituency case referred to earlier. The idea that women visiting

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[1] Para 221.

[2] Para 221. In many states of the USA there are no prohibitions based on affinity.

[3] Para 276.

[4] Para 257.

[5] Para 258.

their fathers-in-law are passive creatures who need the protection of a provision in the Marriage (Scotland) Act 1977 to give them "safety of place" and "a role ... which is exempt from sexual expectations" strikes us as unconvincing. The minority's arguments would seem to lead to an outright prohibition of marriage with a former parent-in-law and that is what they actually recommended. They did concede, however, that there were not such strong objections to a marriage between a parent-in-law and a child-in-law if the intervening spouse[1] were dead

> "for then our concern about disruption within the immediate family circle would lose some of its immediate force."[2]

As we have seen, it was a compromise solution on these lines which was adopted in the Marriage (Prohibited Degrees of Relationship) Bill for England and Wales and which was later extended to Scotland when the Bill was amended to include Scottish clauses.

3.13 It is not entirely satisfactory that Scots law should be based on the unconvincing arguments of a minority of a group appointed by the Archbishop of Canterbury to consider the law of affinity in England and Wales. We think, in the light of the case referred to us, that this question deserves to be properly discussed in

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[1] This refers to the former spouse of the son-in-law or daughter-in-law and not to any spouse the parent-in-law might have had. See para 9 of the Report.

[2] Para 274. The minority said that what they would really have liked to recommend was a return to the position as it was before the Marriage (Enabling) Act 1960 (when marriage with a divorced wife's sister, aunt or niece; or a divorced husband's brother, uncle or nephew was prohibited so long as the divorced spouse was still alive). They accepted, however, that such a recommendation would not be realistic.

Scotland. Our preliminary view is that the restrictions presently in section 2(1B) of the Marriage (Scotland) Act 1977 lead to anomalies and results which cannot be justified by any reasonable argument. It would seem to be more sensible to abolish altogether the prohibition on marriage between a person and the parent of his or her former spouse. The age limit in section 2(1B) does not seem necessary, given that both parties are old enough to have been through at least one former marriage. Removal of the prohibition would bring the law on the prohibited degrees for marriage into line with the Scottish law on incest, which is desirable in itself. A change of this nature for Scotland need not await a corresponding change in English law, which would probably be resisted by bishops in the House of Lords.[1] Capacity to marry depends primarily on the law of a person's domicile.[2] So a person domiciled in England could not validly marry in Scotland if the marriage would be within the prohibited degrees by English law. Nor would a person or persons domiciled in Scotland be able to have a marriage celebrated in England if the parties were within the prohibited degrees by English law.[3] So there is no necessity for the laws on this point, which would in any event affect very few cases indeed, to be the same in Scotland as in England and Wales. We suggest for consideration that

5 **It should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977,**

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[1] See Parl Debs (HL) (1985-86) Vol 471, cols 886 to 887.

[2] See para 9.5 below.

[3] See Cheshire & North, Private International Law (11th ed 1987) p586 - "An English registrar ... cannot be required to sanction a marriage if it would be void for incapacity by English law ...".

subject, however, to the removal of the remaining limited prohibition on marriage between a person and the parent of his or her former spouse.

Non-compliance with formal requirements

3.14 Most marriages in Scotland are now immune from challenge on the ground of non-compliance with formal requirements. This is the result of section 23A of the Marriage (Scotland) Act 1977 (added in 1980)[1] which provides that, subject to the provisions in the Act on under-age marriages and marriages within the prohibited degrees,

> "where the particulars of any marriage at the ceremony in respect of which both parties were present are entered in a register of marriages by or at the behest of an appropriate registrar, the validity of that marriage shall not be questioned, in any legal proceedings whatsoever, on the ground of failure to comply with a requirement or restriction imposed by, under or by virtue of this Act."[2]

This is a very useful provision. We think, however, that it could, with advantage, be widened in two respects. First, it could be applied to non-compliance with formal requirements under earlier laws (provided that there had not already been a decree of declarator of nullity in respect of the marriage in question) and, secondly, it could provide that the marriage in question is not invalid rather than that its validity "shall not be questioned". The latter formula suggests that the marriage might actually be invalid

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[1] By the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 s22(1)(d).

[2] The "appropriate registrar" is, in the case of a civil marriage, an authorised registrar and, in any other case, a district registrar. S23A(2).

but that there is a sort of procedural bar to raising this question. We suggest that:

6 There should continue to be a general rule that a marriage is void if not entered into in a way recognised by the law as sufficient to constitute a marriage, but this general rule should be subject to a proviso on the lines of section 23A of the Marriage (Scotland) Act 1977, to the effect that a duly registered marriage, where both parties were present at the ceremony, is not invalid by reason only of any failure to comply with any legal preliminaries or formal requirements or by reason of any lack of qualification on the part of the celebrant.

Defects in consent

3.15 A marriage is void in Scots law if either party is incapable of understanding the nature of marriage or of consenting to marriage; or if either party is in error as to the nature of the ceremony or the identity of the other party; or if either party was forced against his or her will to marry the other party.[1] In all of these cases it is probably necessary for the validity of the marriage to be challenged as soon as is reasonably practicable after the incapacity (if temporary) has disappeared, or the error has been discovered, or the source of the duress has been removed.[2] The law to this effect is, however, not clear. There is a lack of modern authority. We consider that the substance of the above rules is reasonably satisfactory. There is, so far as we are aware, no evidence that the law in this area gives rise to any difficulty or injustice. The ready availability of divorce as a remedy for marriage breakdown means that there is little need for the law of nullity to provide a remedy in a wide range of cases.

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[1] See Clive, Husband and Wife (2nd ed 1982) pp95-101.

[2] Ibid pp110-111.

This being so, there is in our view much to be said for keeping that law within its existing narrow bounds.

3.16 A marriage is also void in Scots law if the parties, even although consenting freely to go through a marriage ceremony and in no error, had at the time of the ceremony a mental reservation to the effect that a legal marriage would not result from the ceremony. For example, the parties may have tacitly withheld consent to be married by a civil ceremony because they believed a religious ceremony to be essential for their religious purposes, or because they were going through the ceremony merely for immigration purposes.[1] Although this rule is consistent with the traditional view that true consent, and not merely the external appearance of consent, is essential for the constitution of marriage it is open to the objection that it allows parties to use Scottish marriage ceremonies cynically for their own purposes and, in effect, to approbate and reprobate a formal legal ceremony. In the case of Akram v Akram[2] Lord Dunpark was clearly unhappy with the state of the present law but was forced to grant the decree of declarator of nullity sought. He said that it was for Parliament to decide

> "whether legislation should preclude parties from challenging the legal effect of any formal ceremony of marriage on the ground that they knowingly but tacitly withheld their true consent to marriage."[3]

Scots law seems to be peculiarly generous in relation to such sham marriages. In England and Wales secret mental reservations

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[1] See Brady v Murray 1933 SLT 534; Orlandi v Castelli 1961 SC 113; Mahmud v Mahmud 1977 SLT (Notes) 17; Akram v Akram 1979 SLT (Notes) 87.

[2] 1979 SLT (Notes) 87.

[3] Ibid at p89.

have no effect.[1] The Canadian courts have generally taken the same view.[2]

3.17 Although there is authority for the view that one party will not be allowed to found on his own unilateral mental reservation of matrimonial consent,[3] the existing law of Scotland allows one party to a marriage to have it declared null on the ground that the other party did not really intend to get married.[4] This can give rise to some remarkable results if, for example, a man wrongly believes that he is committing bigamy when in fact his prior marriage has been dissolved by divorce. His second marriage, although not bigamous, can nonetheless be declared void because he thought it was bigamous and could not therefore have given true consent.[5]

3.18 It seems to us that it is undesirable to allow parties, who know full well what they are doing, to determine for themselves the legal effects which will follow from participation in a formal legal ceremony of marriage. In our view this is a matter for the law to determine. We suggest therefore that tacit mental reservations as to the legal effects of a marriage ceremony should have no effect.

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[1] H v H [1954] P 258; Silver v Silver [1955] 2 All ER 614.

[2] See eg Singh v Singh (1977) 77 DLR (3d) 154. The cases are discussed in Hahlo, Nullity of Marriage in Canada (1979) pp31-35.

[3] Cf Balshaw v Balshaw 1967 SC 63 at p82.

[4] See eg McLeod v Adams 1920 1 SLT 229.

[5] See the unreported cases of McEwan v Risi (March 25, 1964) and Scott v Risi (March 25, 1965) discussed in Clive, op cit at pp106-107.

3.19 A great deal more could be written about defects of consent as grounds for nullity of marriage but we doubt whether this would be useful. We are, of course, willing to consider any representations for change which consultees may make but, in order to keep this section of the paper brief we suggest that the law on defects of consent should be put into statutory form by means of provisions to the following effect. We would welcome comments on these proposals. We do not think that it matters whether they exactly reproduce the present law. The important question is whether they would be a satisfactory basis for a new statutory law on this topic.

7(a) Subject to the subsidiary rules suggested below, a marriage should be void if, because of mental incapacity, error, duress or other reason either party does not freely consent to marry the other party.

(b) (i) A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.

(ii) A person should be conclusively presumed not to have been under a temporary mental incapacity at the time of the marriage ceremony if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity.

(c) (i) A marriage should be void on the ground of error only if at the time of the ceremony either party was in error as to the nature of the ceremony or the identity of the other party.

(ii) A party should be regarded as being in error as to the identity of the other party only if he or she mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry, regardless of the name or qualities of that person.

(iii) A person should be conclusively presumed not to have been in error as to the nature of the ceremony or the identity of the other party to the marriage if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after discovering the error.

(d) (i) A marriage should be void on the ground of duress only if one party was forced against his or her will to marry the other party.

(ii) A person should be conclusively presumed not to have been forced against his or her will to marry the other party if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after the duress ceases to have effect.

(e) (i) **Without prejudice to the rules recommended above, a marriage should not be void merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.**

Voidable marriages: impotency

3.20 Under the existing law in Scotland a marriage is voidable if either party is at the time of the ceremony permanently and incurably impotent in relation to the other spouse.[1] A person can found on his or her own impotency.[2] This is the only ground on which a marriage is voidable, as opposed to void, in Scots law.

3.21 The idea of a voidable marriage, which is perfectly valid until declared void by a court but which is then regarded as having been void from the beginning, leads to difficulties. What, for example, is the position if one of the parties entered into a second marriage before the declarator of nullity was granted? Is the second marriage retrospectively validated when the first is declared void? There is no clear answer to this problem in Scots law.[3] It is a question of whether logic or commonsense is to prevail. What is the effect of a declarator of nullity on the ground of impotency on other transactions which turned on the existence of a valid marriage and which were entered into while

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[1] CB v CB (1884) 11 R 1060 at p1067; affd (1885) 12 R (HL) 36. See generally, Clive, pp111-116.

[2] F v F 1945 SC 202.

[3] See Clive, p88.

the marriage was valid? Are completed transactions to be retrospectively disturbed? Again there is a lack of certainty on this point in Scots law, although it seems likely that the artificial theory of retroactive nullity would not be pushed to its logical conclusion where this would lead to absurdity or interference with completed transactions.[1]

3.22 In English law a decree of nullity in respect of a voidable marriage now has prospective effect only. It operates

> "to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time."[2]

3.23 Proof of incurable impotency generally requires medical evidence. The courts assess incurability in the light of the circumstances of the particular marriage, and will not regard impotency as curable merely because in other hypothetical circumstances it might have responded to treatment.[3] A pursuer may, in certain circumstances, be personally barred from founding on impotency (whether his or her own, or the other spouse's) in order to obtain a declarator of nullity.[4]

3.24 There are not now many actions for declarator of nullity on the ground of impotency. Divorce on one of the separation grounds will often be a simpler and more acceptable remedy for the spouses. The Civil Judicial Statistics for Scotland since 1979 reveal an average of 8 actions for declarator of nullity of

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[1] See Clive, p87; Mackle v Mackle 1984 SLT 276.

[2] Matrimonial Causes Act 1973, s16.

[3] See M v W or M 1966 SLT 152.

[4] L v L 1931 SC 477; AB v CB 1961 SC 347.

marriage a year. Even if all of these are on the ground of impotency the number is still very low.

3.25 The question for consideration here is whether nullity for impotency is worth retaining in a new codified family law. Our preliminary view is that this is at least doubtful. The notion of the valid but retrospectively voidable marriage is very odd and leads to unnecessary difficulties. There does not seem to be much point in amending the law to provide that a declarator of nullity for impotency dissolves a marriage only for the future. That would simply be divorce by another, and singularly inappropriate, name. Given the availability of non-fault divorce on the basis of a period of separation, it must be open to doubt whether a special ground of this nature would be justifiable.[1] There are various serious personal inadequacies, which may be present at the time of a marriage, and which may unfortunately cause it to break down irretrievably. We are not convinced that there is sufficient justification for singling this one out for special treatment. If a marriage survives serious difficulties, whether sexual or otherwise, then well and good. If it does not, and breaks down irretrievably, then there is a remedy in divorce. Moreover the ground of impotency invites the drawing of distinctions which seem meaningless from the point of view of the viability of a marriage. Why should it matter whether impotency was present at the time of the marriage, or supervened a week later? If the sexual side of a marriage has been unsatisfactory from the start, is any good purpose served by a careful consideration of whether a person was capable on one or two occasions of sufficiently complete intercourse for legal purposes or only of insufficiently complete

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[1] In our report on Reform of the Ground for Divorce (Scot Law Com No 116, 1989) we have recommended a shortening of the separation periods to 1 year (with the consent of the other party to divorce) or 2 years (even in the absence of such consent). A provision to implement this recommendation is included in the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament.

intercourse for such purposes?[1] Why should incapacity for sexual intercourse make a marriage voidable but not a deliberate refusal to attempt sexual intercourse?[2] Why should a woman who marries an impotent man, not knowing of his impotency, be able to obtain a declarator of nullity but a woman who marries a sterile man, not knowing of his sterility, be unable to do so? In either case, if she accepts the position she does not need a legal remedy while if she cannot accept the position and the marriage breaks down irretrievably she has the remedy of divorce. The only reason for the distinctions presently drawn by the law on voidable marriages is, we think, tradition.[3] They seem to make little sense today when the law makes divorce available as a remedy for marriage breakdown.

3.26 We have considered whether, if impotency were no longer recognised as a ground on which a marriage is voidable, it ought to be added to the Divorce (Scotland) Act 1976 as one of the facts from which the irretrievable breakdowm of a marriage may be inferred. The argument for this is that it would provide the possibility of an immediate divorce. The party who wished to have the marriage dissolved would not have to wait for a period of

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[1] Cf J v J 1978 SLT 128.

[2] This might in certain circumstances justify divorce on the ground that

> "since the date of the marriage, the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender".

Divorce (Scotland) Act 1976, s 1(2)(b).

[3] Impotency has been a ground of nullity since before the Reformation.

years, after the parties had separated, before raising an action.[1] There are also, however, arguments against special provision for impotency. First, impotency by itself is not necessarily an indication of marriage breakdown. Both parties may have known the position at the time of the marriage. The marriage may have been entered into for companionship only. The pursuer may have accepted the position for many years. At the very least, therefore, the law on divorce for impotency would have to provide for certain additional bars to divorce. Secondly, the new ground would apply to only a few cases a year. In recent years there have only been about 8 declarators of nullity a year in Scotland. It must be doubtful whether a special new ground of divorce should be enacted to cater for such a small number of cases, particularly as there would ususally be no great hardship involved in waiting for a year or two. Thirdly, a new ground of divorce for impotency would involve making arbitrary distinctions of the type criticised above. Why distinguish between impotency at the time of marriage and impotency occurring later? Why distinguish between impotency and near-impotency? Why allow divorce for impotency but not sterility or incurable disease or a serious personality defect or any other condition which might make it more difficult for both parties to achieve a fully satisfying marriage? We are not persuaded that there is an overwhelming case for making special provision for impotency as a fact justifying divorce but we mention this option so that consultees can consider it and comment on it if they wish.

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[1] Under the present law the period would be 2 years if the other spouse consented to divorce or 5 years if he or she did not. Divorce (Scotland) Act 1976 s1(1)(d) and (e). Provisions in the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament would reduce these periods to 1 year and 2 years respectively.

3.27 We invite views on the suggestion that:

8 **Given the availability of divorce as a remedy for the irretrievable breakdown of marriage it is no longer necessary or desirable to retain impotency as a ground on which a marriage is voidable.**

Voidable marriages - other possible grounds

3.28 It will be clear from what we have said above that we regard the concept of the valid but restrospectively voidable marriage as thoroughly unsatisfactory and that we regard the conferring of the name "nullity" on a decree which dissolves a valid marriage for the future as a perverse and nonsensical use of words. It will therefore not be surprising if we simply invite views on the proposition that:

9 **There should be no new grounds on which a marriage is voidable in Scots law.**

3.29 If the two preceding propositions are accepted the result would be that the concept of the voidable marriage would disappear from Scots law. That would in itself be a simplification and it would also help to resolve in a clear and simple way some problems in private international law which have caused difficulty in the past.[1]

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[1] See para 9.13 below.

PART IV - DECLARATORS RELATING TO MARRIAGE

Declarators of marriage or nullity of marriage

4.1 Where the validity of a marriage is a matter of doubt or dispute the question can be resolved by means of an action for declarator of marriage or an action for declarator of nullity of marriage. In the case of a declarator of marriage or declarator of nullity of a void marriage any person with an interest may bring the action: in the case of a declarator of nullity of a voidable marriage only one of the parties to the marriage can do so.[1] In all of these actions the pursuer cannot obtain decree until the grounds of action have been established by evidence, which must consist of or include evidence other than that of a party to the purported marriage.[2] The court granting a declarator of nullity of marriage has the same powers to award a party to the purported marriage financial provision, and must apply the same principles in doing so, as in an action for divorce.[3] An action for declarator of marriage or nullity of marriage is not competent in the sheriff courts.[4] A decree of declarator of marriage or of nullity of marriage is binding not only on the parties but also on other people.[5]

4.2 The only aspect of declarators of marriage or nullity of marriage which seems to call for attention is their exclusion from

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[1] See Clive, pp118-119, 123 and cases there cited.

[2] Civil Evidence (Scotland) Act 1988, s8(1).

[3] Family Law (Scotland) Act 1985, s17.

[4] The Sheriff Courts (Scotland) Act 1907, s5(1) gives sheriffs jurisdiction in "actions of declarator (except declarators of marriage or nullity of marriage)"

[5] Longworth v Yelverton (1867) 5 M (HL) 144 at p147; Administrator of Austrian Property v Von Lorang 1927 SC (HL) 80.

the jurisdiction of the sheriff courts. Now that the sheriff courts have jurisdiction in divorce, and other family law matters, this exclusion seems to us to be impossible to justify. There are only about 8 actions for declarator of nullity of marriage a year in Scotland on average and even fewer actions for declarator of marriage.[1] If impotency ceased to be a ground of nullity and marriage by cohabitation with habit and repute were abolished the number of these actions would diminish still further. The matter is not, therefore, of great importance one way or the other but there seems to be no reason to perpetuate an anomaly and we therefore suggest that:

10 Actions for declarator of marriage or nullity of marriage should be competent in the sheriff courts.

For the rest, it would simply be a question of restating in statutory form the competency of these actions, and the rules on title to sue and the effects of a decree.

Declarators of freedom and putting to silence

4.3 An action for declarator of freedom and putting to silence is a hybrid remedy available against someone who falsely asserts that he is married to the person bringing the action. The pursuer seeks (a) a declarator that he or she is free of the asserted marriage and (b) a decree ordaining the defender to desist from asserting that he or she is the spouse of the pursuer, and putting the defender to silence thereanent.[2]

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[1] Civil Judicial Statistics for Scotland.

[2] See M v Y 1934 SN 20; Rules of Court Appendix, Form 2, para 19.

4.4 There may have been a need for this type of nominate action in the days when irregular marriages were common and when there was often doubt as to whether a couple had privately exchanged consent to marry. The action is, however, now virtually unknown. Given the courts' general powers to grant interdict, we do not believe that a special form of action, with special rules of jurisdiction,[1] is now necessary to deal with a false assertion of marriage. We have been interested to note that petitions for jactitation of marriage, which were equivalent in function to actions for declarator of freedom and putting to silence, were abolished in England and Wales by the Family Law Act 1986.[2] They have also been abolished in Australia and New Zealand.[3] We suggest that

11 The remedy of an action for declarator of freedom and putting to silence should be abolished.

Other declarators relating to marriage

4.5 In England and Wales the courts now have statutory power to grant the following declarations in relation to a marriage, in addition to their power to grant remedies corresponding to our declarators of marriage and nullity of marriage:

> "(a) a declaration that the marriage subsisted on a date specified in the application;

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[1] Domicile and Matrimonial Proceedings Act 1973, s7.

[2] S61. This implemented a recommendation of the English Law Commission in its report on Declarations in Family Matters (Law Com No 132, 1984).

[3] See Law Com No 132 para 4.9.

(b) a declaration that the marriage did not subsist on a date so specified;

(c) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of the marriage is entitled to recognition in England and Wales;

(d) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition in England and Wales."[1]

In Scotland declarators as to the effect of a foreign divorce have been granted in the Outer House, where it was a matter of genuine doubt whether the divorce was entitled to recognition in Scotland.[2] However, questions of jurisdiction, title to sue and the effect of a decree have not been fully worked out in relation to this new type of action.[3] There might, therefore, be something to be said for clarifying the position by statute. The solution which has commended itself to the Law Commission and Parliament in England and Wales is to apply the same rules as in relation to declarations as to the initial validity of marriage, and this solution

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[1] Family Law Act 1986, s55(1), implementing recommendations in Law Com No 132, cited above.

[2] Makouipour v Makouipour 1967 SC 116; Galbraith v Galbraith 1971 SLT 139; Bain v Bain 1971 SLT 141; Broit v Broit 1972 SLT (Notes) 32.

[3] See Clive, pp664-665.

would seem appropriate for Scotland too.[1]

4.6 If declarators as to the entitlement, or otherwise, to recognition of a divorce, annulment or legal separation obtained outside Scotland were put on a statutory footing it seems to us that there would be no need to provide for separate declarators as to the subsistence or otherwise of a marriage.[2] Questions as to the death of a spouse can be resolved under the Presumption of Death (Scotland) Act 1977. We invite views on the following questions.

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[1] This would mean that the Scottish courts would have jurisdiction if, and only if, either of the parties to the marriage

(a) is domiciled in Scotland on the date when the action is begun; or

(b) was habitually resident in Scotland throughout the period of one year ending with that date; or

(c) died before that date and either--

(i) was at death domiciled in Scotland, or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death."

See Domestic and Matrimonial Proceedings Act 1972, s7(3).

[2] The only reason given for the inclusion of such declarations in the English legislation was that they might be useful to a foreign court which wanted to know (eg for pension purposes) whether a person was married (by English law) on a particular date. See eg Re Meyer [1971] P 298. However, a declarator of marriage, or nullity of marriage, or a declarator as to whether a foreign divorce is recognised, or a declarator under the Presumption of Death (Scotland) Act 1977 ought to suffice to establish the position.

12(a) Would it be useful to provide by statute for the competency of a declarator as to whether a divorce, annulment or legal separation obtained outside Scotland is entitled to recognition in Scotland?

(b) If so, should the rules as to jurisdiction, title to sue and the effect of the decree be the same as in the case of a declarator of marriage?

PART V - LITIGATION BETWEEN SPOUSES

Introduction

5.1 At one time spouses could not sue each other in contract or delict.[1] This was sometimes said to be based on the idea that the husband and wife were one person in law, but there was also a fear that the courts would be burdened by actions arising out of domestic squabbles and that such litigation would not be in the spouses' own interests.[2] The courts departed from this rule in the case of contract, holding that the changes in the legal position of married women made by the Married Women's Property (Scotland) Act 1920 were inconsistent with the restriction.[3] Parliament changed the rule in the case of delict, allowing spouses to sue each other but giving the court a power to dismiss the proceedings if it appeared that no substantial benefit would accrue to either party.[4] The question for consideration here is whether this power to dismiss is necessary.

Present law

5.2 The present law on actions between spouses in delict is contained in section 2 of the Law Reform (Husband and Wife) Act 1962 which provides as follows.

> "(1) Subject to the provisions of this section, each of the parties to a marriage shall have the like right to bring proceedings against the other in respect of a wrongful act, as if they were not married.

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[1] Young v Young (1903) 5 F 330; Harper v Harper 1929 SC 220; Cameron v Glasgow Corporation 1935 SC 533; 1936 SC (HL) 26.

[2] Young v Young (1903) 5 F 330.

[3] Horsburgh v Horsburgh 1949 SC 227.

[4] Law Reform (Husband and Wife) Act 1961, s2.

(2) Where any such proceedings are brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may dismiss the proceedings if it appears that no substantial benefit would accrue to either party from the continuation thereof; and it shall be the duty of the court to consider at an early stage of the proceedings whether the power to dismiss the proceedings under this subsection should or should not be exercised."

The power to dismiss conferred by subsection (2) does not apply to proceedings under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.[1]

Background to present law

5.3 The power to dismiss in subsection (2) of the 1962 Act is based on a recommendation of the (English) Law Reform Committee.[2] In recommending the removal from English law of the old prohibition of actions in tort between spouses (which was similar to the prohibition operating in Scotland) the Committee noted that in several foreign countries "whose social standards are similar to our own" there was no bar on proceedings and that there was no reason to believe that marriages had been put in jeopardy in consequence.[3] They also noted, however, that only one of the memoranda submitted to them advocated the removal of all restrictions. They considered that to allow spouses to sue each other in tort without any restrictions could lead to harmful results. An action could lead to strains in the relationship and, if the action was in respect of "petty acts of negligence in the domestic sphere", would "certainly not be conducive to the continuance of the marriage".[4] In a later passage the Committee explained that the recommended power to stay proceedings should

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[1] 1981 Act, s21.

[2] Ninth Report, Liability in Tort between Husband and Wife.

[3] Para 8.

[4] Para 9.

apply even if the spouses were no longer cohabiting because there might be some possibility of a reconciliation and because, in any event, litigation might serve "only as an excuse for the airing of matrimonial grievances and bitterness".[1] The Committee's recommendation was therefore that the court should have power to stay an action in tort between spouses

> "if, having regard to all the circumstances, including the conduct of the parties and the nature of the matter complained of, the judge is satisfied that the complaint is not one of substance or that it is not in the interests of the parties that the action should proceed."[2]

5.4 The last part of the Law Reform Committee's recommendation (relating to the interests of the parties) was not included in the Bill put before Parliament because it was recognised that it would be impracticable and undesirable to ask a court to assess in the early stages of an action what would be in the best interests of the parties. That would require an examination of the whole nature of their relationship. As was pointed out in Parliament, securely married couples would be allowed to sue each other, and couples whose relationship had already broken down would be allowed to sue each other, but those whose relationship was in a state of doubt might not be. Indeed, a court would have to ask itself not only about the soundness of the parties' marriage and the likely effect of the action on it, but also about "the advantages or disadvantages of maintaining a married state in the society in which we live."[3] The "no substantial benefit" formula was intended to provide a more practicable test which would meet the concern behind the other part of the Law Reform Committee's recommendation. It was explained in Parliament that the formula had nothing to do with the likely effect of the

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[1] Para 13.

[2] Para 17(2).

[3] Parl Debs (HC) (1961-62) Vol 659 cols 1705-1708.

litigation on the spouses' relationship or with the "ethical or moral disadvantages or advantages of pursuing a spouse in a court of law".[1] It was confined to monetary or property matters and was intended to allow cases to be dismissed if there was no prospect of recovery from the other party or if the injury complained of was quite trivial.[2] It was explained that if either party could show that he or she would receive a substantial benefit from pursuing the litigation the court would not have power to dismiss.[3]

5.5 The "no substantial benefit" formula did not escape criticism in Parliament. It was pointed out that it was vague and would be difficult to apply, and that if there was any real damage, sufficient to justify litigation at all, then compensation for that damage could be said to be a substantial benefit.[4]

Assessment of present law

5.6 It is anomalous to give a court power to dismiss proceedings because in the judge's view their continuation would result in no substantial benefit to either party. Normally it is for the pursuer or petitioner to decide whether litigation is worthwhile. There are obvious and powerful disincentives to embarking on litigation without legal aid if no substantial benefit is likely to accrue. Civil legal aid is not available unless the Legal Aid Board is satisfied that the applicant has a probabilis causa litigandi and that

> "it is reasonable in the particular circumstances of the case that he should receive legal aid."[5]

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1 Ibid col 1708 (Solicitor-General).

2 Ibid col 1708 (Solicitor-General).

3 Ibid cols 1707 and 1709 (Solicitor-General).

4 Ibid cols 1695, 1698, 1701 and 1710.

5 Legal Aid (Scotland) Act 1986 s14(1).

It is not available at all for defamation proceedings.[1] A Lexis search of Scottish cases, reported and unreported, in the Court of Session and sheriff courts, since 1962 has revealed no case in which section 2(2) has been referred to. That does not necessarily mean that it has not served a purpose as a deterrent, preventing cases from ever getting to court, but even that seems unlikely. We would be interested to hear from court practitioners whether they have had cases which did not proceed because of section 2(2) but which would have proceeded in the absence of section 2(2). There is no equivalent of section 2(2) in relation to actions between other near relatives, or between cohabitants, or between any other categories of litigants. Yet the courts are not flooded by pointless actions.

Proposal for consideration

5.7 Our preliminary view is that section 2(2) is anomalous and unnecessary. It might be argued that it does no harm. However, every anomalous and unnecessary qualification on the statute book does some harm. The advantages of a codifying Act will only be fully realised if all unnecessary exceptions and qualifications are eliminated. We would welcome views on the proposition that:

13 Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (which gives the court power to dismiss proceedings between spouses in delict if it appears that no substantial benefit would accrue to either party) is anomalous and unnecessary and should be repealed.

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[1] Ibid s13 and Sch 2, PartII, para 1.

PART VI - THE MATRIMONIAL HOMES (FAMILY PROTECTION) (SCOTLAND) ACT 1981

Introduction

6.1 The Matrimonial Homes (Family Protection)(Scotland) Act 1981 implemented, with certain important changes, the Commission's report on Occupancy Rights in the Matrimonial Home and Domestic Violence.[1] The basic policy objectives of the Act are to confer occupancy rights in the matrimonial home on the "non-entitled spouse" who happens not to be the owner or tenant (so that he or she cannot be evicted like a mere squatter or unwelcome guest by the "entitled spouse" who is the owner or tenant) and to provide increased protection against domestic violence (in particular by providing for exclusion orders, and interdicts with a power of arrest attached). These basic policy objectives were strongly endorsed when the Bill was going through Parliament[2] and we believe they are very widely accepted.[3] There is, in our view, no question of repealing the Act entirely or of altering its basic structure.

6.2 Certain provisions of the 1981 Act have, however, been the subject of criticism and have given rise to practical difficulties. It is with these provisions, rather than the basic policy or structure of the Act, that we are here concerned. We begin with the

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[1] Scot Law Com No 60 (1980).

[2] See Parl Debs (HL) (1980-81) Vol 417 cols 1000-1013; (HC) Scottish Grand Committee, 12 May 1981, cols 8, 15, 17, 21, 26, 28, 34, 35.

[3] See Jackson, Robertson and Robson, (of the Law School, University of Strathclyde)The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (a report to the Scottish Home and Health Department, 1988) (referred to in the rest of this Part as the "Strathclyde report") p4.

provisions on occupancy rights in relation to dealings with third parties.

Dealings with third parties

6.3 **Introduction.** Some protection against dealings, such as a sale of the home, by the entitled spouse is obviously necessary. Otherwise he or she could sell the home to someone acting in collusion with him and the purchaser could evict the non-entitled spouse. There would be little point, for example, in a wife's obtaining an exclusion order if her excluded husband could immediately defeat her occupancy rights by selling the home. The Commission's report on Occupancy Rights in the Matrimonial Home and Domestic Violence[1] therefore recommended a scheme for the protection of a spouse's occupancy rights against dealings, such as a sale, by the other spouse. In the case of owner-occupied houses, the Commission's scheme was based on registration of a matrimonial home notice in the Register of Sasines or the Land Register. If, but only if, a spouse had registered such a notice, he or she could have any subsequent dealing struck down within certain, fairly short, time limits. This scheme was designed to enable protection to be obtained against transactions designed to defeat occupancy rights while confining protection to cases where it was likely to be needed.

6.4 The Commission's scheme, which was admittedly likely to be more complicated in its practical operation than the above summary suggests, was not favoured by the government. The following explanation was given in the House of Commons.

> "The reasons why we chose not to exercise the matrimonial notice option are basically twofold. First, the

[1] Scot Law Com No 60 (1980).

> Law Commission's view was that if a spouse had lodged a matrimonial notice which indicated her occupancy rights, then that should be an entirely overriding right which gave her total protection as regards occupancy of her home. There are many attractions in this approach, but I think the biggest single unattractive aspect is that it is unlikely that other than a relatively small minority of spouses would have taken advantage of such an opportunity, because of an unawareness of the opportunities existing under the law, but, more importantly, because spouses are unlikely to conceive of the need for such precautions as long as the marriage is working well. By the time the marriage has broken down, it might be too late to start thinking in terms of the lodging of a matrimonial notice. Therefore, it seems sensible and appropriate to have a wider-ranging provision, which will give a high level of protection to the vast majority of spouses, whether or not they have at an earlier date, when the marriage was working quite successfully, anticipated the problems that might arise in the event of marital breakdown.
>
> That, therefore, was the main reason why the Government did not feel that the matrimonial notice approach was suitable. There are also the additional bureaucratic requirements that such a procedure would involve. It would involve very significant increases in staffing in the Department of Registers in terms of dealing with the lodging and processing of matrimonial notices. These and other implications which I mentioned earlier led the Government to conclude that a different approach, as outlined in the Bill, would be more suitable."[1]

6.5 The scheme preferred by the government, and now enacted, conferred general protection against dealings, without any need for registration of a notice, and did not provide for dealings in fraud of occupancy rights to be struck down or set aside. Instead the spouse's occupancy rights can continue to be exercised after the dealing and the person acquiring the home or an interest in it is not entitled to occupy it. This achieved the objective of protection without registration but it means that occupancy rights

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[1] Parl Deb, (HC) First Scottish Standing Committee, 16 June 1981, col 101 (Mr Rifkind).

are a potential problem in every conveyancing transaction. The purchaser of any house has to be sure that there are no occupancy rights or that an appropriate consent or renunciation or dispensation is obtained, and cannot rely on the registers. Even a purchaser from an unmarried person has to be sure that the person is unmarried. To make the position of purchasers more tolerable the 1981 Act provides that a purchaser who acts in good faith is protected if there is produced to him by the seller, at or before the delivery of the disposition,

> "(i) an affidavit sworn or affirmed by the seller declaring that the subjects of sale are not a matrimonial home in relation to which a spouse of the seller has occupancy rights; or
>
> (ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse".[1]

There is a similar protection for heritable creditors who may, if conditions similar to the above are fulfilled, exercise their normal rights (eg their rights to sell on default) under the security and may also apply to a court for an order requiring the non-entitled spouse to make any payment due by the entitled spouse in respect of the loan.[2]

6.6 A further protection for purchasers was added in 1985.[3] It was provided that the non-entitled spouse's protection against a dealing would not apply if

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[1] 1981 Act 36(e) as amended, with effect from 30 November 1985, by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s13(6).

[2] S8, as amended.

[3] By the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s13.

"the entitled spouse has permanently ceased to be entitled to occupy the matrimonial home, and at any time thereafter a continuous period of 5 years has elapsed during which the non-entitled spouse has not occupied the matrimonial home".[1]

This means that the purchaser of a house from someone who has owned it, and had exclusive occupation of it, for five years or more does not need to be concerned about the occupancy rights of spouses of former proprietors.[2] It also protects the purchaser from an entitled spouse against a delayed assertion of occupancy rights if, for example, there has been a false affidavit or forged consent.

6.7 The protection of occupancy rights against dealings applies also to leased property. If the spouse who is the sole tenant assigns or renounces the tenancy without the consent of the other spouse (or a renunciation or a dispensation) the other spouse's occupancy rights are not prejudiced by the dealing. This is a simpler system than that recommended by the Commission in 1980, which would have required the non-entitled spouse to give notification to the landlord of his or her occupancy rights. It does, however, mean that a landlord may find that his property is occupied by someone who is not a tenant and who has rights but no corresponding obligations.[3]

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[1] 1981 Act s6(3)(f).

[2] It is arguable that such occupancy rights are not protected anyway because s6 says that the continued exercise of occupancy rights is not to be prejudiced "by reason only of any dealing of the entitled spouse relating to that home". A sale by a subsequent owner is not a dealing by the entitled spouse. See Clive op cit pp726 and 727.

[3] See para 6.27 below. There is valuable information on housing policies and the 1981 Act in the Final Report of the Institute of Housing (Scottish Homeless Group) (University of Strathclyde) on Housing and Marital Breakdown - The Local Authority Response (Feb 1985).

6.8 We have referred to the obtaining of a dispensation. This is provided for in section 7 of the 1981 Act which enables a court to make an order dispensing with the consent of a non-entitled spouse to a dealing which has taken place or a proposed dealing if, among other things, the consent is unreasonably withheld. There may be a problem about how much specification must be given of a proposed dealing.[1] We return to this later.[2] The main questions about the provisions on occupancy rights and dealings are whether the balance between protection of occupancy rights and protection of third parties, particularly purchasers, is right and, if not, how it could best be corrected.

6.9 **Assessment of existing law.** It might be argued that, notwithstanding the complaints about expense, inconvenience and delay, the existing law actually gives too much, rather than too little, protection to third parties at the expense of spouses' occupancy rights. There were fears in Parliament at the time when the legislation was being debated that spouses would be subjected to excessive pressure to renounce occupancy rights.[3] We

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[1] Cf O'Neill v O'Neill 1987 SLT (Sh Ct) 26 at p30; Fyfe v Fyfe 1987 SLT (Sh Ct) 38. See also Longmuir v Longmuir 1985 SLT (Sh Ct) 33 for valuable observations about the procedure for applying for a dispensation. In Perkins v Perkins Glasgow Sheriff Court, 11 Dec 1984, (unreported but referred to in the Strathclyde report at p45) the sheriff dispensed with the husband's consent to a sale of the home by his wife. Among the sheriff's reasons were that the husband had not lived in the house for 2 years and had accommodation of his own. It appeared that his reason for withholding consent related to disagreement as to how the proceeds of sale should be divided.

[2] Para 6.23.

[3] See eg Parl Deb (HC) First Scottish Standing Committee, 9 June 1981, cols 25 to 53.

are not aware of this having proved to be a problem,[1] but we would welcome information. In theory too, the affidavit procedure puts a non-entitled spouse at risk. An entitled spouse could secure a sale or obtain a loan, by giving a false affidavit that there are no occupancy rights and could then disappear with the proceeds. If the buyer or lender was in good faith, the non-entitled spouse is left without a remedy. Again, however, we are not aware of this having proved to be a problem in practice, but we would welcome information.

6.10 A more plausible argument, at first sight, might be that the existing balance is about right. Protection is given to the non-entitled spouse, without the need to go to court or register a notice, while third parties, who act in good faith and obtain the necessary documentation, are adequately protected. Most married couples have the title to their home in joint names,[2] and in these

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[1] The Strathclyde report found that the problems envisaged in the Parliamentary Debates did not seem to have arisen. The researchers found that renunciations were used occasionally in the context of reconciliation attempts. For example, a wife who was the entitled spouse might agree to allow her violent husband back only if he renounced his occupancy rights. Renunciations were also used, quite properly, to allow sales or transfers of tenancies to proceed. Report p55.

[2] The survey by Manners and Rauta on Family Property in Scotland (OPCS, 1981) carried out for us in 1979 showed that 57% of married owner-occupiers held the title to their home in joint names. The more recently the purchase, the more likely (regardless of the ages of the spouses) was title to be in joint names. For houses bought in 1977-79 the proportion was 78%. It is likely that this proportion has increased considerably since then.

cases the Act causes few if any problems.[1] The Act itself must have encouraged the taking of titles in joint names,[2] and this must be regarded as a welcome development. Solicitors and officials have adapted to the Act's requirements, which in most cases are not unduly onerous. Fundamental change, such as the introduction of a notice system, would require re-adaptation and would inevitably throw up new problems. On this view, the balance of protections achieved by the 1981 Act, as amended in 1985, is broadly correct, although minor adjustments, falling short of the introduction of a notice system, might be possible and useful.

6.11 A third view is that the existing scheme overprotects occupancy rights at the expense of third parties. There is, first of all, no need for protection where there is no non-entitled spouse. Yet a purchaser from an unmarried person has to obtain affidavits under section 6(3)(e) to be sure of protection. There is also no need for protection in the many normal cases where the spouses are happily married and there is no question of occupancy rights being defeated. Even where a marriage has broken down there is only a need for protection where the entitled spouse is the sole owner and is unscrupulous. On this view the existing scheme causes extra trouble and expense in thousands of perfectly ordinary transactions in order to provide a protection which might only actually be needed in a few transactions a year. It is an over-reaction, well-intentioned but misguided, to a very small problem.

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[1] S9 protects the occupancy rights of one spouse against a sale by the other spouse of his or her undivided share, but such sales are unusual in any event.

[2] See McNeil, "The Matrimonial Homes Act: the implications for conveyancers" (1982) Journal of the Law Society of Scotland 369 at p376.

6.12 We would be interested to hear the views of consultees on these issues and to have detailed information of cases where the existing law either provides inadequate protection for occupancy rights or creates serious problems for third parties. We set out below some options for reform which range from the radical to the minor.

6.13 **Options for reform. (1) Repeal.** The most radical option would be simply to repeal the provisions on dealings (ie sections 6 to 9 of the 1981 Act, and the related references in the Land Registration (Scotland) Act 1979) and not replace them. A non-entitled spouse would still have occupancy rights and would still be protected against eviction by the entitled spouse. This, however, would be a matter between the spouses themselves. Third parties would not be affected. Although this might seem a very extreme option it is arguable that the practical benefits would be great and the practical disadvantages slight. It is significant that a cohabitant who has obtained occupancy rights by means of an application to the court under section 18 of the 1981 Act is not protected against dealings. We would be interested to know whether this has given rise to abuse. It is also significant that sections 6 to 9 of the 1981 Act do not apply to the case of a divorced spouse who has been granted occupancy rights in a matrimonial home by the court under section 14(2) of the Family Law (Scotland) Act 1985. Again we would be interested to know whether this has given rise to problems in relation to dealings. A repeal of sections 6 to 9 of the 1981 Act, and corresponding references in the 1979 Act, would be legislatively simple. It would save a good deal of unnecessary trouble and expense. The objection that it would make exclusion orders pointless if dealings could defeat them can be met by pointing out that the court has

power under section 3(1)(e) of the 1981 Act to make an order

> "protecting the occupancy rights of the applicant spouse in relation to the other spouse."

This could be used to reinforce an exclusion order by an interdict prohibiting the other spouse from disposing of the home or entering into any dealing adverse to the applicant's occupancy rights, without the consent of the applicant spouse or the leave of the court. Indeed the power could be used even in the absence of an exclusion order - for example, if the entitled spouse has left the home voluntarily or if a dealing is suspected. The power is also available in the case of a cohabitant who has occupancy rights,[1] and a similar power is available in the case of a divorced spouse who has occupancy rights.[2] Any doubts there may be about the availability of this power in the type of case we are considering could easily be clarified by legislation, if that were thought necessary. It should also be noted that a spouse or cohabitant deprived of occupancy rights by an act of the other spouse or cohabitant has a claim for compensation against the other spouse or partner.[3] One attraction of a repeal of sections 6 to 9 of the 1981 Act, and related provisions in the 1979 Act, would therefore be that the same protection could be made available to all those with occupancy rights of the type under discussion whether married, divorced or cohabiting. The question is whether this would be an adequate protection of occupancy rights. Would there be a significant number of cases where a spouse would deliberately breach an interdict? Would there be a significant number of cases where a dealing intended to defeat occupancy rights took place before an interdict could be obtained? We would welcome views on these questions. There would certainly

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[1] See s18(3). This point was made in the Parliamentary Debates on the Bill as a reason for not extending clause 6 to cohabitants. See Parl Deb (HC) First Scottish Standing Committee 16 June 1981, col 170 (Mr Rifkind).

[2] Family Law (Scotland) Act 1985 s14(2)(d) and (k), read with s8.

[3] 1981 Act s3(7), read with s18(3).

be significant practical advantages in regarding occupancy rights as a matter between the two individuals concerned and in not allowing them to affect purchasers or other third parties. Given that a fraudulent affidavit or forged signature may defeat occupancy rights under the existing law, it is possible that the risks to occupancy rights would not be significantly greater under the system outlined above. On the other hand the need for a false affidavit or forged signature may represent a significant step into criminal behaviour and may operate as an effective deterrent in many cases. It must also be said that there could be a danger of secret and collusive dealings and that to deprive non-entitled spouses of all protection against dealings would be, from the point of view of such spouses, a major step backwards. One effect of the present law is that the non-entitled spouse has to be involved in the decision to sell the home or burden it with a security. That, it may be said, is a welcome recognition that both spouses, and not just the one in whose name the title stands, have an interest in such matters. Quite apart from the danger of collusive sales it might be considered retrogressive to return to a position where the spouse who holds the title to the home could sell it or burden it without so much as consulting his or her marriage partner.

6.14 (2) **A more limited protection.** A second option would be to repeal sections 6 to 9 of the 1981 Act and related references in the 1979 Act but to add a provision to the effect that a court could, on the application of the non-entitled spouse made within, say, 6 months after a dealing, reduce or set aside any dealing by the entitled spouse relating to the matrimonial home if satisfied that it was entered into without the consent of the non-entitled spouse and that its purpose was wholly or mainly to defeat the occupancy rights of the non-entitled spouse. This would be

accompanied by an express provision to the effect that a dealing could not be reduced or set aside if to do so would prejudice any rights of a third party who had in good faith acquired the home or any interest in it for value, or the rights of anyone deriving title to the home or the interest in it from any such third party. It could be added that a person would be regarded as being in good faith unless he or she knew, or had information which would have led a reasonable person to conclude, that the purpose of the dealing was wholly or mainly to defeat occupancy rights. This would fit in well with the scheme of protection of occupancy rights against collusive adjudications[1] and sequestrations[2] and with the protection which a spouse enjoys against transactions calculated to defeat claims for financial provision on divorce.[3] There would be an exclusion of indemnity under the Land Registration (Scotland) Act 1979 if a title were reduced.[4]

6.15 There are attractions in this option, when considered along with the courts' powers to interdict proposed dealings under section 3(1)(e) of the 1981 Act. It would provide protection against collusive dealings with third parties who are not in good faith, but it would not interfere with the rights of bona fide purchasers or lenders. The fact that collusive third parties, not in good faith, would not be protected should not cause concern. They do not deserve to be protected. They are not protected by an affidavit under sections 6 or 8 of the 1981 Act or against reduction under

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[1] 1981 Act s12.

[2] Bankruptcy (Scotland) Act 1985, s41(1)(b).

[3] Family Law (Scotland) Act 1985, s18.

[4] Cf 1979 Act s12(3)(b).

section 18 of the Family Law (Scotland) Act 1985, but that does not cause conveyancing problems. The main defect in the existing law is, arguably, that thousands of ordinary purchasers, buying in good faith, are placed at risk and that complications have to be introduced to protect them. By protecting them expressly these complications could be removed. The main question, as with the preceding option, is whether there would be sufficient protection for a spouse's occupancy rights. It must be conceded that the test suggested for striking down a dealing would be difficult to satisfy. Indeed a similar test in the context of transactions calculated to defeat claims for financial provision on divorce was found to be too stringent, because intention was so difficult to prove, and was changed to a more objective test.[1] The new test in that context is whether the transaction had the effect of defeating a claim.[2] However, the two situations are different. A person cannot defeat claims for financial provision on divorce by simply changing his or her assets: there has to be a net loss of assets. An objective test - whether a dealing "had the effect of" defeating occupancy rights would clearly not be appropriate in the context of the 1981 Act. It would enable practically any dealing to be challenged. There is, in our view, no reason why a genuine sale at full market value, made because the owner needs to buy another house or for some other legitimate reason, should be open to challenge. In practice, the solicitors for the selling spouse would probably seek to obtain the consent of the non-entitled spouse whenever possible so as to guard against the possibility of a claim by that spouse for compensation under section 3(7) of the 1981 Act. In practice, too, solicitors for purchasers, in order to provide an extra protection against any remote possibility of a challenge, might well continue to stipulate for the consent of a spouse to be given or for an assurance (not necessarily in the form of an affidavit, and not

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[1] See our Report on Aliment and Financial Provision (Scot Law Com No 67, 1981) para 3.150

[2] Family Law (Scotland) Act 1985, s18(2).

necessarily by the seller personally) that there was no spouse with occupancy rights. We can see no objection to that. Indeed, as we have already observed, it is a desirable development that one spouse cannot easily sell or encumber the matrimonial home without consulting the other spouse. The big differences would be (a) that the consent or assurance would be an optional extra (b) that, accordingly, if there were practical difficulties in securing the consent or assurance any genuine transaction could still proceed (c) that there would be a short time limit on challenges, even where the requirements for a challenge were met and (d) that the Keeper of the Registers of Scotland and his staff would not have to concern themselves with occupancy rights.

6.16 We can see very considerable advantages in this option. It would preserve the major gains of the 1981 Act (notably, in this context, the conferring of automatic statutory occupancy rights against the other spouse) without the troublesome consequences for ordinary house purchase transactions which have given the Act a bad name. It could be applied to divorced spouses and cohabitants who have occupancy rights, thus making the law more coherent. We can see one disadvantage and that is that a spouse who unreasonably refused consent, alleged wrongly that the purpose of a proposed sale was wholly or mainly to defeat his or her occupancy rights, and threatened to challenge any disposition granted by the other spouse could make a sale difficult in practice even if it was entirely reasonably and proper that a sale should proceed. We think, however, that this difficulty could be readily met by giving the courts an express power to grant a declarator that the purpose of a proposed dealing (which would not have to be specifically identified, other than, say, as a sale on the open market) was not wholly or mainly to defeat the spouse's

occupancy rights. This would take the place of the dispensation provisions in section 7 of the Act but would have the advantage of providing a clearer test for the court to apply. It is by no means clear under section 7 when a spouse should be regarded as withholding consent unreasonably.[1]

6.17 (3) **A notice system.** A third option would be to introduce a system of matrimonial home notices of the kind recommended by this Commission in 1980. This scheme was designed to enable protection to be obtained without the need to apply to a court (except at the stage of having a dealing struck down) while confining protection to cases where it was needed and protecting third parties. In theory third parties would have been able to rely on the registers and would have been at no risk if no notice had been registered. If such a scheme could have been made to work simply and efficiently it would clearly have had much to commend it. However, its practical application would have been more complicated and difficult than the above simple summary might suggest. The Commission ruled out the creation of a special new register on grounds of cost and because it would have imposed on purchasers and lenders the burden of searching in yet another register.[2] It ruled out use of the Register of Inhibitions and Adjudications because that was a register of persons, not property, and because it would have been burdensome for spouses to require notices to be renewed every five years[3] and burdensome for searchers if matrimonial home notices were, by statute, allowed to

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[1] See "Bogus spouse signs consent" Journal of the Law Society of Scotland (1985) p181 where this problem is noted and some examples considered. In O'Neill v O'Neill 1987 SLT (Sh Ct) 26 it was held that consent was unreasonably withheld where the motive was not to protect the occupancy rights but to put pressure on the entitled spouse in relation to other matters.

[2] Scot Law Com No 60, para 3.33.

[3] Entries in the register prescribe in 5 years.

continue in force indefinitely.[1] That resulted, by a process of elimination, in the Commission's recommendation that notices should be registrable in the Sasine Register or the Land Register.[2] That, however, also posed problems. Even if up-to-date searches of these registers were available (which would not be so in the case of the Sasine Register) they would not have provided security because the Commission recommended that a notice could be effectively registered at any time before the disposition or other deed giving effect to the dealing was registered or recorded.[3] This was regarded as essential in order to provide protection in cases where the non-entitled spouse heard of the dealing (which might be an obviously collusive dealing) only after missives were concluded. Yet it meant that the registers could never be relied on at the date of settlement of a transaction. In practice, therefore, solicitors would have had to rely on consents or their equivalent in all cases. This was a point made by the Law Society of Scotland in response to the Commission's proposals in 1980 and it clearly has considerable force.

6.18 We have every sympathy with the objectives which our predecessors were trying to achieve. In theory the system of registrable notices was a correct and principled way of balancing the interests of non-entitled spouses against the interests of ordinary purchasers and lenders in good faith. However, there were, as we have seen, various objections to the scheme as it would have had to operate in practice. These can be summed up as follows--

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[1] Scot Law Com No 60, para 3.34.

[2] Ibid para 3.35.

[3] Ibid paras 3.49 to 3.51.

(a) The scheme would not protect, even against a collusive sale, in the absence of a notice.

(b) Some spouses might not register a notice (because of the trouble and expense, or because it would seem a hostile act) even in cases where, as it turned out, protection was needed.

(c) Solicitors for purchasers and lenders would not be able to rely on the registers at the time of settlement and would need to rely on consents or their equivalent.

(d) Matrimonial home notices would therefore be an unnecessary extra formality.

(e) The operation of the scheme would cost money and would have considerable staffing implications for Register House.[1]

These objections seem to us to be as powerful now as they proved to be in 1980. We do not therefore think that a system based on matrimonial home notices can be considered a realistic option at the present time.

6.19 **(4) Minor modifications.** A fourth option would be to keep the present system but to make minor modifications to it to improve its operation. We have considered three such modifications, which we discuss in the following paragraphs. Consultees may be able to suggest others.

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[1] One concern was that there might have been an enormous number of notices registered as soon as the new law became operative.

6.20 One modification to the existing provisions which would have significant benefits, particularly in relation to registration of title, would be to reduce or eliminate the need to be sure that there are no occupancy rights of spouses of prior owners (ie owners prior to the person now selling the property) liable to interfere with vacant possession. There is some doubt whether, under the existing law, the spouse of a prior owner could ever assert occupancy rights. Clearly the prior owner is no longer an entitled spouse and no longer has occupancy rights under section 1 of the Act. Any claim by the spouse of a prior owner must be based on section 6(1) of the Act which provides, perhaps illogically, that "the continued exercise" of (the now non-existent) occupancy rights

> "shall not be prejudiced by reason only of any dealing of the entitled spouse relating to that home"

and that a third party

> "shall not by reason only of such a dealing be entitled to occupy that matrimonial home or any part of it.". (Emphasis added.)

A sale by someone who has bought from an entitled spouse is not a dealing by the entitled spouse. A spouse whose claim to occupy the home is challenged or resisted by a subsequent purchaser is not prejudiced by reason only of the entitled spouse's dealing but at least partly by the fact that there has been a subsequent sale by someone other than the entitled spouse. It may perhaps be thought unlikely that the legislature, in enacting a family protection measure, would have intended that the husband or wife of a former owner should be able to come along and put a family out of the house which they had acquired in good faith and at considerable cost, or that, in enacting provisions which were

designed to avoid extra demands on the staff at Register House, it would have intended that checks would have to be made in relation to prior owners in connection with registration of title.[1] Nonetheless, the official view appears to be that spouses are protected not only against dealings by the entitled spouse but also against subsequent dealings by other people. This causes a great deal of trouble and expense in relation to registration of title.[2] The position is relieved to some extent by section 6(3)(f) of the 1981 Act[3] which disapplies section 6 if

> "the entitled spouse has permanently ceased to be entitled to occupy the matrimonial home, and at any time thereafter a continuous period of 5 years has elapsed during which the non-entitled spouse has not occupied the matrimonial home.".

6.21 The obvious remedy for the difficulties caused by the doubt about whether section 6 affects subsequent purchasers would be to make it clear that it does not. This could be done by adding a provision to section 6 to the effect that the section does not affect third parties who have acquired the home, or an interest in it, in good faith and for value from anyone other than the entitled spouse. Section 6(3)(f) would still have a role to play in protecting the first purchaser from an entitled spouse against a delayed assertion of occupancy rights by the seller's spouse. The period of five years seems too long, however. The object of the Act is to protect spouses from eviction or the threat of eviction,

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[1] A different view is, however, taken in Nichols and Meston, The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (2d edn 1986) para 6-05.

[2] See Robertson, "The Matrimonial Homes (Family Protection) (Scotland) Act 1981" (1982) Journal of the Law Society of Scotland (Workshop) p308.

[3] Added by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s13.

not to enable them to evict others from houses which were formerly the matrimonial home. We would suggest that a period of 2 years would be quite sufficient to protect a spouse who has been temporarily absent.

6.22 We do not believe that amendments on the above lines would significantly reduce the protection afforded by occupancy rights to spouses in occupation of the matrimonial home, or only temporarily absent from it. What they would do would be to prevent spouses who had long ceased to occupy a home from putting out bona fide purchasers. That seems to us to be the right policy to adopt in a provision designed to protect occupancy rights. There is no reason why the occupancy rights of the bona fide purchaser and his or her family should be regarded as less worthy of protection than those of the spouse of a former owner.

6.23 Another amendment which might be made to the existing provisions, if they were retained, would be a clarification of what is meant by a "proposed dealing". In the case of Fyfe v Fyfe,[1] the sheriff principal held that

> "'a proposed dealing' required that a stage of negotiations has been reached in which proposals in regard to price and other conditions are being discussed"

and that

> "the consent of the non-entitled spouse must specifically relate to a particular dealing or proposed dealing".

He explained that until the terms of such a dealing were known a court could not determine whether the non-entitled spouse was reasonably or unreasonably withholding consent. Accordingly, the

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[1] 1987 SLT (Sh Ct) 38 at p41.

husband's application for a dispensation by the court with the wife's consent to a proposed sale of the home was held to have been properly refused by the sheriff, as matters had only reached the stage where he wished to put the house on the market, knowing that there were several prospective purchases.

6.24 This view of the meaning of "proposed dealing" is highly inconvenient for entitled spouses wishing to sell the house in circumstances where it is likely that a court would eventually dispense with consent. The seller wants to be able to make an offer to sell with as few difficult conditions as possible attached. A prospective purchaser is likely to be discouraged if it is a condition of the sale that a court dispenses with the spouse's consent. From both seller's and purchaser's points of view it is clearly desirable that a court should be able to dispense with the spouse's consent before the house is put on the market. Provided that the dispensation relates to a sale at not less than a certain price and on conditions that are reasonable in the circumstances we can see no risk of prejudice to the non-entitled spouse. A suggestion on these lines was put to us by the Law Society of Scotland in October 1989. They added that, in addition to a minimum price and reasonable conditions, the order granting the dispensation should also specify a period of time within which the proposed dealing should be effected. This too seems reasonable. The Society also suggested a similar set of provisions in relation to the grant of a heritable security, and this seems right.

6.25 A further amendment might be to give the court power, on refusing to dispense with the consent of the non-entitled spouse to a dealing, to order the non-entitled spouse to make reasonable payments to the owner of the house in lieu of rent. The effect of

refusing to dispense with consent is that the non-entitled spouse can continue to occupy the home. This could cause hardship enough to the entitled spouse or other owner of the house. It would seem to be completely unjustifiable that the continued occupation should be free of charge. The prospects of recovery under common law principles of recompense[1] would be poor or non-existent where the occupancy is by virtue of a statutory right and where the statute clearly envisages that occupancy will be gratuitous.

6.26 **Assessment of options.** Although more husbands than wives are sole owners or sole tenants of the matrimonial home,[2] occupancy rights are not exclusively women's rights. Spouses of either sex may have, and assert, occupancy rights. They may assert them reasonably or unreasonably. Nor are the disadvantages of the existing system suffered only by men, or only by women. All of those involved in house purchase, whatever their sex, are affected by the need to obtain affidavits or consents, and by any delays at Register House which are caused by the Act. Adults and children, whatever their sex, are likely to suffer if their home cannot be occupied because the spouse of the seller or a prior owner asserts occupancy rights. We think that, in assessing the options for reform, the interests of all citizens liable to be affected by the law have to be kept in mind.

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[1] See e g Earl of Fife v Wilson (1864) 3 M 323; Glen v Roy (1882) 10 R 239; Cooke's Circus Buildings Co Ltd v Welding (1894) 21 R 339; County Council of Stirling v Cullen (1943) 59 Sh Ct Rep 83; HMV Fields Properties Ltd v Skirt 'n' Slack Centre of London Ltd 1987 SLT 2.

[2] Manners & Rauta, Family Property in Scotland (OPCS, 1981) p4. So far as tenancies of married couples were concerned, the husband was sole tenant in 85% of cases. The survey took place in 1979.

6.27 We have concentrated on house sales because that is where the defects of the existing law are most apparent. In assessing the options for reform it is, however, very important to bear in mind the effect on tenancies. Under the existing law a non-entitled spouse's occupancy rights do not prevent the tenant spouse from terminating the tenancy without the other spouse's consent. If he or she does terminate the tenancy[1] there is then no tenancy left to transfer. So the non-entitled spouse cannot obtain a tenancy transfer order under section 13 of the 1981 Act.[2] However, the continued exercise of that spouse's occupancy rights is not prejudiced by the other spouse's termination of the tenancy. So the spouse continues in occupation, but not as a tenant - a somewhat anomalous situation, which makes it impossible to apply any statutory provisions regulating tenancies. If the former landlord wishes to terminate the occupancy rights and cannot obtain the occupying spouse's consent or agreement he would have to ask the court to dispense with the non-entitled spouse's consent to the dealing under section 7 of the 1981 Act.[3] In practice a new tenancy would often be granted to the occupying spouse who would then become "entitled" and would no longer have rights pertaining only to a non-entitled spouse. This would, however, require the occupying spouse's agreement and if that agreement is withheld the former landlord is in an awkward position. If sections 6 to 9 of the 1981 Act were repealed the tenant spouse could still terminate the tenancy, and the landlord could, with the agreement of the other spouse, grant him or her a new tenancy

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[1] In the case of a public sector secure tenancy coming under the Housing (Scotland) Act 1988 the tenancy may be brought to an end by, among other things, or "4 weeks' notice given by the tenant to the landlord". 1988 Act s46(1).

[2] Cf Morgan v Morgan and Kyle and Carrick District Council, Ayr Sheriff Court, 12 June 1984 (unreported - referred to in the Strathclyde Report at p43).

[3] It is by no means clear when it would be held to be unreasonable for a spouse to withhold consent in this situation. It is, however, clear that section 48 of the Housing (Scotland) Act 1987 could not be used to recover possession, there being no tenancy, no tenant and no landlord. It is arguable that if the landlord grants a tenancy to a new tenant, that tenant is not affected by s6, because his or her rights do not arise by reason only of a dealing by the entitled spouse.

immediately. If the landlord were unwilling to grant a new tenancy the spouse would have the bargaining counter of an application to have the termination of the tenancy set aside as a dealing, the sole or main purpose of which was to defeat occupancy rights. If the dealing were set aside then a transfer of tenancy order under section 13 of the 1981 Act could be applied for. This solution would avoid the anomaly of having a non-tenant in legal occupation of a house, without any corresponding obligations. We suspect that, in practice, the normal outcome under all the options under consideration would be the grant of a tenancy to the non-entitled spouse.[1] We would, however, be particularly grateful for views and information on this point. None of the options under discussion would affect the position as between the spouses themselves. In particular they would not affect transfers of tenancies where the entitled spouse has not attempted to affect the position by a dealing.[2]

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[1] The Strathclyde report (p60) found an apparently low level of granting of tenancy transfer orders under s13 of the 1981 Act. This stemmed "from the fact that local authority policies on rehousing and voluntary transfer are frequently a much simpler route than a court transfer". By the time legal proceedings reached their final order stage "the question of tenancy has been resolved between the parties and the local authority". Solicitors interviewed indicated that most transfers took place on a voluntary basis.

[2] This is an important matter in practice. Section 13 of the 1981 Act is not the only provision bearing on it. The Housing (Scotland) Act 1987 Sch 3 para 16, read with s48, enables the landlord to recover possession of a house let under a secure tenancy on the ground that:- "The landlord wishes to transfer the secure tenancy of the house to - (a) the tenant's spouse (or former spouse); or (b) a person with whom the tenant has been living as husband and wife ...". This ground is available where the spouse, former spouse or cohabitant has applied for the transfer, and one of the parties no longer wishes to live with the other in the house. In practice this technique will often be used instead of an application by the spouse for a tenancy transfer order under s13 of the 1981 Act. Voluntary transfers are also very common. See the Strathclyde report pp66-68.

6.28 If complete repeal of the provisions on dealings, without any replacement even in relation to manifestly collusive dealings, is ruled out as irresponsible, and if the introduction of a system of matrimonial home notices at this stage is ruled out, for the reasons given above, there are two main options left. These are

(a) to repeal sections 6 to 9 of the 1981 Act and substitute a protection against those dealings which are designed wholly or mainly to defeat occupancy rights, on the lines suggested in paragraphs 6.14 to 6.16 above;

(b) to retain sections 6 to 9 of the 1981 Act and make minor amendments--

(i) to make it clear that they do not affect subsequent purchasers or lenders acting in good faith;

(ii) to shorten the period in section 6(3)(f);

(iii) to clarify the meaning of the term "proposed dealing" and

(iv) to give a court which refuses to dispense with consent power to order the non-entitled spouse to make payments in lieu of rent.

Of these two options our provisional preference is for the first. It gets to the heart of the problem which, as we see it, is the idea of occupancy rights continuing, or continuing to be exercised, after there is no longer an entitled spouse and a non-entitled

spouse. It would do away with the need, which is often fairly absurd, to obtain affidavits as to the absence of a spouse's occupancy rights from people who are known without a shadow of a doubt to be unmarried. It would protect both the Keeper of the Registers and third parties acquiring for value and in good faith. It would avoid the anomaly whereby, on the termination of a tenancy, the house is occupied by someone with rights but no corresponding obligations. It could readily be applied to all persons having occupancy rights. The other option would remedy some of the main defects and inconveniences of the existing system but it would not do away with the need for affidavits and consents and it would preserve some risk that a bona fide purchaser who had taken up residence in his or her new home with his or her family would have no right to occupy it because the husband or wife of the seller came along and asserted occupancy rights. The purchaser would probably have a claim against his or her solicitor in such a case but that would be little consolation and no solution to the immediate problem of where to go with children and furniture when all available funds had been invested in the house. However, even although there seems to be a fundamental defect in the existing law, people may possibly have become so used to it that they would prefer to keep it than to see sections 6 to 9 repealed and replaced by a more limited provision. For this reason we present both options for consideration.

6.29 **Questions for consideration.** We would welcome views on the following questions:

14(a) Are the provisions on dealings in sections 6 to 9 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 satisfactory?

(b) Should sections 6 to 9 be repealed and replaced with provisions whereby

(i) a court could, on the application of a non-entitled spouse within, say, 6 months after a dealing, reduce or set aside any dealing by the entitled spouse relating to the matrimonial home if satisfied that it was entered into without the consent of the non-entitled spouse and that its purpose was wholly or mainly to defeat the occupancy rights of the non-entitled spouse;

(ii) the court's power would be subject to a provision that a dealing could not be reduced or set aside if to do so would prejudice any rights of a third party who has in good faith acquired the home or any interest in it for value, or the rights of anyone deriving title from any such third party;

(iii) a person would be regarded as being in good faith unless he or she knew, or had information which would have led a reasonable person to conclude, that the purpose of the dealing was wholly or mainly to defeat occupancy rights;

(iv) there would be an exclusion of indemnity under the Land Registration Act 1979 if a title were reduced under these provisions;

(v) a court could, if necessary, grant a declarator that the purpose of a proposed dealing was not wholly or mainly to defeat occupancy rights;

(c) Alternatively, should sections 6 to 9 be retained but amended so as to

(i) make it clear that they do not affect subsequent purchasers or lenders acting in good faith;

(ii) shorten the period in section 6(3)(f);

(iii) clarify the meaning of "proposed dealing" and

(iv) give a court which refuses to dispense with a non-entitled spouse's consent power to order that spouse to make payments in lieu of rent?

(d) Should protection against dealings apply to divorced spouses with occupancy rights and, if so, what form should it take?

(e) Should any other changes be made in relation to sections 6 to 9?

Prescription

6.30 There is no provision in the 1981 Act for occupancy rights, in a question between the spouses, to be lost by the passage of time even if the spouses have been separated. Section 6(3)(f) of the 1981 Act, which we have considered above, operates only to disapply the protection against dealings in a case where the entitled spouse has sold the house, or otherwise ceased to be entitled to occupy it. It has no application where the entitled spouse continues to occupy the house. It follows that a spouse who owns the matrimonial home, or is the tenant of it, could be

exposed to an assertion of occupancy rights by the other spouse even after the couple had been separated for, say, 15 years. It is probable that the long negative prescription of 20 years would apply[1] but this seems excessively long.

6.31 It would be dangerous to allow occupancy rights to be lost by a short period of non-occupation and separation, as a violent spouse might terminate the other spouse's rights by making him or her terrified to return. However, a period of a year ought to suffice to enable a spouse to obtain legal advice with a view to seeking an exclusion order. We suggest for consideration that

> **15 The occupancy rights of a non-entitled spouse in a home should terminate if the spouses have been separated for a continuous period of one year during which period the non-entitled spouse has neither occupied the home nor been engaged in court proceedings to assert his or her occupancy rights.**

This would protect a spouse from an assertion of occupancy rights by a separated husband or wife after many years, but would ensure that a non-entitled spouse would not lose occupancy rights merely because the spouses had been living together elsewhere for a year or more. The introduction of a prescriptive rule on these lines would also make it easier to extend occupancy rights to cohabitants without the need for a preliminary court decree.[2]

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[1] Prescription and Limitation (Scotland) Act 1973, s8. This is on the assumption that the right is not a right exercisable as a res merae facultatis.

[2] We discuss this question in our separate discussion paper on The Effects of Cohabitation in Private Law.

Exclusion orders

6.32 A spouse can apply under section 4 of the 1981 Act for an order (called "an exclusion order") suspending the rights of the other spouse in the matrimonial home. Section 4(2) contains the main rule and provides as follows.

> "Subject to subsection (3) below, the court shall make an exclusion order if it appears to the court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child."

It is clear that this test must be applied on the hypothesis that the applicant spouse or child of the family is to be in the matrimonial home.[1] It is not an answer to the application to say that they could protect themselves by leaving or staying away. It will be noted that the subsection is mandatory: it says that the court "shall" make an exclusion order if the test is satisfied.

6.33 Section 4(3)(a) introduces an element of discretion by providing that a court is not to make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable

> "(a) having regard to all the circumstances of the case including [various matters such as the conduct, needs and financial resources of the spouses]."

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[1] Section 4(1), as amended in 1985, provides expressly that an application can be made by a spouse "whether or not that spouse is in occupation at the time of the application". See also Brown v Brown 1985 SLT 376 at p379 (application of s4(2) "must be based on the hypothesis that the wife returned to the matrimonial home with the husband also in residence".)

There is a further special provision in section 4(3)(b) for cases where the home is part of an agricultural holding or is occupied "as an incident of employment" but we are not concerned with that here.

6.34 The need for subsection (3)(a) has occasionally been doubted, on the view that if protection is necessary under subsection (2) it will never be unjustified or unreasonable to make an exclusion order.[1] The Strathclyde report went so far as to recommend the repeal of subsection (3)(a).[2] We cannot support this recommendation. In our view subsection (3)(a) is essential to prevent the mandatory requirement in subsection (2) from operating unreasonably. Without subsection (3)(a) a court would, for example, have to make an exclusion order if the non-applicant spouse was a heavy smoker who refused to give up smoking and whose conduct was therefore "injurious to the physical ... health of the applicant". The court would also have to make an exclusion order against a husband who was violent, under extreme provocation, to his drunken and aggressive 25 year-old stepson, even if the stepson could easily obtain accommodation elsewhere. The court would also have to grant an exclusion order against a wife whose conduct would be injurious to her husband's health if he returned to the home, even although her husband had been living elsewhere in perfectly satisfactory accommodation for ten years and had no need to return to the home. Perhaps the most absurd result of repealing subsection (3)(a) is that a court would have to grant exclusion orders against both spouses if each applied for an order and proved that his or her health would be injured by the conduct of the other if both remained in the home. We have no doubt that section 4(3)(a) must remain.

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[1] See eg Brown v Brown 1985 SLT 376 at p378.

[2] At pp101 and 159.

Interdicts

6.35 Section 15 of the 1981 Act provides for a power of arrest to be attached to certain interdicts in the matrimonial context. This has proved to be a useful weapon in the fight against domestic violence, often making the task of the police very much easier.[1] The interdicts to which a power of arrest may (or, in some cases, must) be attached are described in the Act as "matrimonial interdicts" and a "matrimonial interdict" is defined as

> "an interdict including an interim interdict which--
>
> (a) restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family, or
>
> (b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified area in the vicinity of the matrimonial home."[2]

It has been suggested by the Law Society of Scotland[3] and by Scottish Women's Aid[4] that this definition is too narrow. Paragraph (b) does not apply, for example, to a house bought or rented by a spouse after separation which is not a matrimonial home,[5] or to a spouse's place of work, or to the school which the parties' children attend. It may be argued that in all of these cases protection may be necessary. On the other hand an interdict without a power of arrest could be obtained against molestation in these places and there is an argument that attachment of a power of arrest should not be used too widely because it might unduly restrict a citizen's freedom of movement. In a small village, for example, a person who could not go near a house at one end of

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1 See the Strathclyde report pp122-144.

2 S14(2).

3 In their Memorandum on the Matrimonial Homes (Family Protection) (Scotland) Act 1981 dated October 1983.

4 In comments on the above Memorandum published in the Journal of the Law Society of Scotland (1984) at p436.

5 We consider the definition of "matrimonial home" later. Here it is enough to note that it does not include a new home provided by a spouse (eg after separation) for himself or herself to live in, whether or not with children, separately from the other spouse. See s22.

the main street, a shop where his or her spouse worked in the middle, or a school at the other end might be very severely restricted indeed. Against this it could be said that a court, if it had enough discretion,[1] would not grant such an interdict and that there would be no harm in at least giving the power to do so in appropriate cases.

6.36 Our inclination would be not to extend paragraph (b) to schools and workplaces, because of the implications for freedom of movement. We cannot see, however, why it should be limited to a matrimonial home rather than extending to any home occupied by the applicant spouse. We invite views on the questions:

16(a) Should the definition of "matrimonial interdict" in section 14(2) of the 1981 Act be extended so that paragraph (b) would apply not to a "matrimonial home" but to any home occupied by the applicant spouse?

(b) Should paragraph (b) of the definition apply also to the applicant spouse's place of work, or to the school which his or her children attend, or both?

6.37 It has already been mentioned that a power of arrest must be attached to matrimonial interdicts in some cases whereas in others the court has some discretion. This is governed by section 15(1) of the 1981 Act which provides as follows:

> "The court shall, on the application of the applicant spouse, attach a power of arrest--
>
> (a) to any matrimonial interdict which is ancillary to an exclusion order, including an interim order under section 4(6) of this Act;

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1 We discuss the question of discretion in paras 6.37 and 6.38 below.

(b) to any other matrimonial interdict where the non-applicant spouse has had the opportunity of being heard by or represented before the court, unless it appears to the court that in all the circumstances of the case such a power is unnecessary."

It is suggested in the Strathclyde report[1] that the attachment of a power of arrest to a matrimonial interdict should be mandatory in all cases. The reason for this suggestion was the authors' finding that judges had very varying views on attaching powers of arrest. Some thought that section 15 was a very useful provision and were prepared to use it freely, on the view that if the interdict was going to be obeyed the power to arrest would do no harm whereas if it was going to be breached the power would be useful. The danger of arrest for "innocent" conduct was not regarded as serious because the police had a discretion and were not likely to be eager to arrest unnecessarily.[2] Some judges, however, were reluctant or very reluctant to attach a power of arrest partly because of the seriousness of the power and partly because of the problem of the "innocent" or "non-deliberate" breach.[3]

6.38 We have grave reservations about the suggestion that the attachment of a power of arrest to a matrimonial interdict should be mandatory in all cases. A power to arrest a man or woman for simply being in a house or street is not a light matter and it seems wrong on principle to require it to be given even in a case where it appears to the court that in all the circumstances of the case it is unnecessary. Indeed the resistance of some judges to attaching powers of arrest may call into question the mandatory

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[1] At pp144 and 161.

[2] Strathclyde report p130.

[3] Ibid pp130 and 131.

nature of section 15(1)(a) as much as the discretion conferred by section 15(1)(b). We suspect that the balance between mandatory and discretionary attachment of powers of arrest in section 15 is about right but, as this question has been raised, we would welcome comments on the proposition that:

17 It should continue to be the case that the attachment of a power of arrest to matrimonial interdicts should not be mandatory in all cases.

6.39 Section 15(3) of the 1981 Act provides that

> "If ... a power of arrest is attached to an interdict, a constable may arrest without warrant the non-applicant spouse if he has reasonable cause for suspecting that spouse of being in breach of the interdict."

Scottish Women's Aid,[1] and the authors of the Strathclyde report,[2] have suggested that "may" should be changed to "shall" in this provision. We cannot support this suggestion. It does not seem sensible to place a police constable under a legal obligation to arrest a man or woman in circumstances where there is no need for that to be done. In saying this we do not mean to suggest that the power of arrest should not be freely used.[3] It seems unwise, however, to insist on automatic arrest in all cases, even if the breach is trivial and has not upset the "protected" spouse, or even if the breaching spouse has left the scene in a case where the only breach was passing along a street. An obligation to arrest would be particularly unreasonable, in our view, if the breach (for example, being in the matrimonial home) had occurred at the invitation of the protected spouse. It would bring the law, and the police, into disrepute to force a constable to make an arrest if he

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1 1984 Journal of the Law Society of Scotland 436 at p437.

2 Pp144 and 162.

3 See the Strathclyde report pp131-142 for existing practice.

observed the interdicted spouse and the protected spouse emerging happily from the matrimonial home after a mutually arranged visit.[1] There could also be cases where it was a matter of doubt whether there had been a breach of interdict, and where a duty to arrest would place a constable in a difficult position.[2] The imposition of a statutory duty to arrest would also raise the question of the sanction for breach of that duty. As this suggestion for reform of the 1981 Act comes from reputable and well-informed sources we should consult on it. We do not, however, as at present advised, support it. Our proposal, on which we would welcome views, is that:

18 **Where a power of arrest is attached to an interdict the police should continue to have a discretion as to whether or not to arrest where a breach is reasonably suspected.**

6.40 Under the existing law a power of arrest attached to a matrimonial interdict ceases to have effect on divorce.[3] Moreover, a power of arrest cannot be attached to an interdict against molestation of one former spouse by the other.[4] When we consulted recently on divorce law reform Scottish Women's Aid suggested that the power of arrest attached to a matrimonial interdict should continue after divorce and also that interdicts

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[1] An interdict made in connection with an exclusion order will prohibit the interdicted spouse from entering the matrimonial home "without the express permission of the applicant". 1981 Act s4(4)(b). However, a matrimonial interdict under s14 might be quite general.

[2] There might, for example, be doubt about the precise extent of a prohibited area mentioned in the interdict. Cf the Strathclyde report p136.

[3] 1981 Act s15(2).

[4] This follows from the definition of "matrimonial interdict" in s14(2).

with attached powers of arrest should be available after divorce.[1] The authors of the Strathclyde report also recommended that there should be provision for powers of arrest to be attached to interdicts which restrain or prohibit any conduct of one former spouse towards the other former spouse or a child of the family or which prohibit remaining in a specified area in the vicinity of a matrimonial home of the former relationship.[2]

6.41 So far as the duration of powers of arrest is concerned, there does seem to be something artificial about a cut-off on divorce. A divorce changes the legal position but not the factual position and a need for protection may well continue. On the other hand there is a case for not continuing powers of arrest indefinitely. They are liable to get out of date because of changed circumstances, such as a move by the protected spouse to a new address. To clog up police records with dead interdicts also seems undesirable and not in the interests of those in need of current protection. One remedy would be to provide for powers of arrest to terminate, say, five years after the date when the power was granted, but to allow them to continue for the full five years (unless previously recalled) notwithstanding the termination of the marriage. We would welcome views on this suggestion.

19 A power of arrest attached to a matrimonial interdict should not cease to have effect on the termination of the marriage but should cease to have effect 5 years after the date when the power was granted.

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[1] See our Report on Reform of the Ground for Divorce (Scot Law Com No 116, 1989) paras 4.5 and 4.6.

[2] Pp78, 144 and 162.

6.42 The question of attaching a power of arrest to an interdict granted after a divorce to restrain conduct by one former spouse towards the other is more difficult. There is an argument of principle that, as between people who are no longer married, the ordinary criminal law ought to suffice. However, the counter-argument is that a divorce only changes the legal position and not the actual need for protection. There may well be continuing disputes over children, occupancy rights, property or finance. It seems particularly anomalous that occupancy rights granted by a court on divorce cannot be fortified by an interdict with power of arrest attached. We invite views on the proposition that:

20 **The definition of "matrimonial interdict" should be wide enough to cover an interdict against molestation of a** former spouse or against entering or remaining in a home **occupied by that former spouse.**

6.43 The 1981 Act provides quite a complicated procedure for the situation where a person has been arrested under a power of arrest attached to a matrimonial interdict. If the arrested person has not been liberated by the police (on the ground that there is no likelihood of violence to the other spouse or any child of the family)[1] and the procurator fiscal has decided that no criminal proceedings are to be taken then the arrested person must, wherever practical, be brought before a sheriff by the end of the first day after the arrest (not being a Saturday, Sunday or court holiday).[2] Before the person is brought before the sheriff the procurator fiscal must take all reasonable steps to intimate to the other spouse and his or her solicitor that no criminal proceedings

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[1] S16.

[2] S17(1) and (2).

will be taken.[1] The purpose of this is to enable the other spouse to decide whether or not to take civil proceedings for breach of interdict. The procedure once the arrested person is brought before the sheriff is regulated by section 17(5) of the 1981 Act, which provides as follows.

"(5) On the non-applicant spouse being brought before the sheriff under subsection (2) above, the following procedure shall apply--

(a) the procurator fiscal shall present to the court a petition containing--

(i) a statement of the particulars of the non-applicant spouse;

(ii) a statement of the facts and circumstances which gave rise to the arrest; and

(iii) a request that the non-applicant spouse be detained for a further period not exceeding 2 days;

(b) if it appears to the sheriff that--

(i) the statement referred to in paragraph (a)(ii) above discloses a prima facie breach of interdict by the non-applicant spouse;

(ii) proceedings for breach of interdict will be taken; and

(iii) there is a substantial risk of violence by the non-applicant spouse against the applicant spouse or any child of the family,

he may order the non-applicant spouse to be detained for a further period not exceeding 2 days;

(c) in any case to which paragraph (b) above does not apply, the non-applicant spouse shall, unless in custody in respect of any other matter, be released from custody;

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[1] S17(4). Intimation should be made, where reasonably practicable, to "the solicitor who acted for [the other spouse] when the interdict was granted or to any other solicitor who the procurator fiscal has reason to believe acts for the time being for that spouse."

and in computing the period of two days referred to in paragraphs (a) and (b) above, no account shall be taken of a Saturday or Sunday or of any holiday in the court in which the proceedings for breach of interdict will require to be raised."

6.44 There is reason to believe that the procedure outlined above is not effective.[1] It causes difficulties for procurators fiscal, for solicitors and for sheriffs. First, the procurator fiscal may encounter practical difficulties in making intimation to the other spouse's solicitor, as required by section 17(4) of the 1981 Act.[2] Secondly, the solicitor may encounter difficulties in obtaining instructions from his or her client in relation to the taking of proceedings for breach of interdict.[3] Consequently, there may not be information before the sheriff as to whether or not proceedings for breach of interdict are to be taken. Unless it appears to the sheriff that proceedings for breach of interdict will be taken the arrested person must be released from custody.[4] We have been informed by one sheriff that he has never been able to grant a petition presented under section 17(5) because there has never been information before him indicating that proceedings for breach of interdict would be taken. Even if a petition were granted, the further period of two days (excluding Saturday and Sunday) is hardly long enough in practice to enable proceedings for breach of interdict to be brought before a court.[5] It is certainly not long enough to permit the determination of breach of interdict proceedings if the breach is denied and a proof has to be fixed.[6]

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[1] Strathclyde report pp139-140, 142, 144.

[2] Ibid p140.

[3] Ibid p139.

[4] S17(5)(b)(ii) and (c) provided, of course, that he is not in custody in respect of any other matter.

[5] Strathclyde report p140.

[6] See Macphail, Sheriff Court Practice, p775.

6.45 The authors of the Strathclyde report have recommended that consideration be given to making breach of a matrimonial interdict in itself a criminal offence.[1] This suggestion had been made in the Commission's consultative memorandum on this subject,[2] with a view to ensuring that the police could play a protective role in cases of breach of matrimonial interdicts, but was departed from in the subsequent report[3] in favour of a system which gave the police powers of arrest directly without extending the criminal law. The Commission did not make detailed procedural recommendations on this subject in its report and the rules in what is now section 17 were not considered, or recommended, by the Commission.

6.46 We are not convinced that the best solution to the practical problems encountered in operating section 17 is to criminalise all breaches of matrimonial interdicts. The creation of new criminal offences is not something to be undertaken lightly, particularly where, as in this instance, they could involve simply being in a street or building. We fully appreciate that the purpose of a matrimonial interdict is to protect the other spouse, and that the mere presence of the interdicted spouse near the home may be terrifying to the other spouse. However, the power of arrest and temporary detention is a remedy for that, and indeed may be all the more effective as a remedy if it can be used by the police without bringing serious consequences or procedural complications in its wake. We need hardly point out that if there is any assault,

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[1] P144.

[2] Scottish Law Commission memorandum on Occupancy Rights in the Matrimonial Home and Domestic Violence (Memo No 41, 1978).

[3] Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com No 60, 1980) paras 4.32 to 4.48.

or threat of serious violence, or breach of the peace (which is very widely defined in Scots law) then there will in any event be a criminal offence quite apart from the breach of interdict.[1]

6.47 Our provisional view is that a better solution would be to leave the criminal law as it is but to eliminate the complicated and probably ineffective procedure under section 17 by simply giving authority to the police to detain the arrested person for up to 48 hours.[2] The officer in charge of a police station to which a person arrested for breach of a matrimonial interdict was brought would therefore have two options - (a) to liberate the person, if satisfied that there was no likelihood of violence to the applicant spouse or any child of the family or (b) to refuse to liberate the person and detain him or her for a period not exceeding 48 hours. Detention under this power would not subject the officer to any claim whatsoever.[3] This power of detention would be without prejudice to any other power exercisable where the arrested person was charged with any criminal offence. Whether the person was liberated or detained, the facts and circumstances which gave rise to the arrest would be reported forthwith to the procurator fiscal who, if he decided to take no criminal proceedings, would be obliged to take all reasonable steps to inform the other spouse

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[1] See Gordon, Criminal Law (2nd ed 1978) paras 29-01 to 20-03, 29-61 to 29-63, 41-01 to 41-10. At para 41-05 the author notes that "almost any threat may be prosecuted as a breach of the peace if it can be said to place the threatened person 'in a state of fear and alarm'" and that "it is common to charge the putting of a particular person in a state of fear and alarm as a breach of the peace."

[2] Art 5(1)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms permits "the lawful arrest or detention of a person for non-compliance with the lawful order of a court ...".

[3] The provision to this effect in s16(1) of the 1981 Act would be retained.

and his or her solicitor (where known) of his decision.[1] Where the person was detained then, as under the existing law, subsections (1) and (2) of section 3 of the Criminal Justice (Scotland) Act 1980 (intimation to a named person) would apply.[2]

6.48 We appreciate that any power of detention gives rise to extremely important questions of civil liberty. However, we would regard the power suggested above as a rationalisation of existing procedures after an arrest for breach of a matrimonial interdict rather than as a new departure. It is worth noting that under the existing law a person arrested for breach of a matrimonial interdict on a Friday can be deprived of liberty, under section 17, without appearing before a court, for more than 48 hours. For example, someone arrested at 11 am on a Friday and brought before a sheriff at 11 am on the following Monday would be deprived of liberty for some 72 hours. A uniform maximum period of 48 hours would remove a number of practical problems in the existing law, provide a useful deterrent and a useful cooling off period, and remove the anomaly whereby the actual length of detention under section 17 varies according to whether the period immediately after the arrest or court appearance happens to include a Saturday or Sunday or court holiday. In some cases it would considerably reduce the period of detention.[3]

6.49 We invite views on the proposition that:

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[1] Cf 1981 Act 16(2).

[2] 1981 Act s17(3).

[3] If the sheriff grants a petition under section 17(5) of the 1981 Act the arrested person could be detained for 4, 5 or 6 days, depending on the day on which he or she was arrested, even although no criminal offence had been committed.

21 **The complicated procedure laid down by section 17 of the 1981 Act for the situation where a person has been arrested for breach of a matrimonial interdict should be replaced by a much simpler provision giving authority to the police to detain the arrested person for up to 48 hours.**

Cohabitants

6.50 Cohabitants can apply for occupancy rights under the 1981 Act.[1] There have been suggestions that their rights should be extended.[2] We propose to deal with this topic in our separate discussion paper on The Effects of Cohabitation in Private Law.

Definition of matrimonial home

6.51 Section 22 of the 1981 Act, as amended in 1985, defines a matrimonial home as

> "any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building attached to, and usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure but does not include a residence provided or made available by one spouse for the spouse to reside in, whether with any child of the family or not, separately from the other spouse".

There are a few small points here which might usefully be tidied up. The first relates to a home provided by one spouse for the other spouse to live in separately. As a matter of policy we think that this should not be regarded as a matrimonial home and it has

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[1] S18.

[2] See the comments by Scottish Women's Aid in 1984 Journal of the Law Society of Scotland 436 at p437 and the Strathclyde report at pp68 and 158.

been held in the Outer House of the Court of Session that it is not.[1] The existing definition, however, leaves room for doubt and we think that doubt should be removed. A similar doubt exists in relation to a home provided by a third party - say, a spouse's parent - for that spouse to live in separately after the marriage has broken down. Again we think that this should not be a matrimonial home for the purposes of the Act. We propose that:

22 **It should be made clear in the definition of "matrimonial home" that that term does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not, separately from the other spouse.**

If, as we have suggested earlier,[2] matrimonial interdicts were not defined in terms of the matrimonial home then this proposal would not cut down the protection which they can give.

6.52 The second point is a very minor one indeed. There is a doubt as to whether the definition of "matrimonial home" includes any garden or other ground or building which is not attached to the house but which is required for its amenity or convenience - for example, a discontiguous garage.[3] We think that this should be included and propose that:

23 **It should be made clear that the definition of "matrimonial home" includes any ground or building which is required for its amenity or convenience even if not attached to it.**

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[1] McRobbie v McRobbie 3 Aug 1983 (noted at 1984 Journal of the Law Society of Scotland p5).

[2] Para 6.36 above.

[3] See Nichols and Meston op cit para 2.14.

Other matters

6.53 We invite submissions on any other ways in which the 1981 Act could be improved while maintaining its basic policy objectives, and to provide a focus for such submissions pose the question:

24 Are there any other amendments which should be made to the 1981 Act?

PART VII - JUDICIAL SEPARATION

Introduction

7.1 Judicial separation is a remedy for marital breakdown which terminates the spouses' obligation of adherence (ie their obligation to live together) and ordains the defender to live apart, but which does not terminate the marriage. It is an older remedy than divorce and was well developed in the canon law before the Reformation. For centuries the only grounds were cruelty and adultery but in 1976 the grounds were changed to (a) adultery (b) intolerable behaviour (c) desertion followed by two years' separation (d) two years' separation plus the defender's consent to decree and (e) five years' separation.[1]

7.2 The usefulness of judicial separation in Scotland has varied over the years. Before 1938 there was no divorce for cruelty or intolerable behaviour. Judicial separation was therefore an important remedy for abused wives. Before the introduction of legal aid in 1950 another attraction of separation was that it was a more readily accessible remedy for many people. It was available in the sheriff courts, whereas divorce was only available, at greater cost, in the Court of Session. At one time, too, an action for separation was necessary if a wife wished to obtain an award of permanent aliment from a husband who had been guilty of cruelty or adultery.

7.3 Before the Married Women's Property (Scotland) Acts of 1881 and 1920 a separation decree had important effects in relation to obligations and property. Property acquired by a wife after she had obtained a decree of separation was excluded from her husband's jus mariti and jus administrationis and, on her death

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[1] Divorce (Scotland) Act 1976, ss1 and 4.

[2] Conjugal Rights (Scotland) Act 1861 s6.

intestate, passed to her heirs as if her husband was dead.[2] A judicially separated wife could enter into obligations, sue and be sued, as if she were unmarried.[1] These consequences, apart from the provision on intestate succession, ceased to be of importance with the disappearance of the old law on matrimonial property and the incapacity of married women.[2] The provision on succession is now anomalous. It applies only to a separation decree obtained by a wife, only if the wife dies intestate, and only to property acquired after the decree. In our report on Succession we have recommended its repeal.[3]

The present position

7.4 The legal reasons for separation actions have now disappeared. Divorce is as readily available as separation, in the same courts and on the same grounds. It is a more effective remedy than judicial separation in relation to property and succession. It is not now necessary to seek a separation decree in order to obtain aliment. An action for aliment can be raised on its own.[4] It never has been necessary to raise a separation action in order to obtain custody of, and aliment for, a child. Separate proceedings for custody and aliment can be raised. A separation decree is not now regarded as the obvious remedy for a spouse who is the victim of domestic violence. Exclusion orders and matrimonial interdicts under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 are more appropriate and effective remedies. The fact that a separation decree cancels the obligation of adherence between the spouses is of no practical importance. A spouse does not need a separation decree from a court in order to separate. A court will

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1 Ibid.

2 See now the Family Law (Scotland) Act 1985, s24.

3 Scot Law Com No 124 (1990) para 7.33.

4 Family Law (Scotland) Act 1985, s2.

not order him or her to return.[1] If there is reasonable cause for separating, he or she cannot be divorced for desertion.[2] Legally, judicial separation has become an unnecessary remedy.

7.5 Separation actions are now comparatively infrequent. We have been informed that there were only 172 actions of separation and aliment in the sheriff courts in 1988.[3] It can confidently be stated that in none of these cases was a crave for separation necessary in order to obtain aliment,[4] and it may be that some of them represent merely the use of old styles rather than a conscious decision to seek a decree of separation for its own sake.

Assessment

7.6 The question for consideration is whether there is a place for the remedy of judicial separation in a new family law code. Legally, as we have seen, it is now an unnecessary remedy. A spouse who does not wish to seek a divorce can separate and can obtain protection, aliment and custody or access without seeking a

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[1] The action for adherence was abolished by the Law Reform (Husband and Wife) (Scotland) Act 1984 s2(1). Even before that a decree for adherence would not be enforced. See Hastings v Hastings 1941 SLT 323 at p325.

[2] Divorce (Scotland) Act 1976 s1(2)(c). In our report on Reform of the Ground for Divorce (Scot Law Com No 116, 1989) we recommended the abolition of divorce for desertion. A provision to implement this recommendation is included in the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament.

[3] Information supplied by Central Research Unit, Scottish Office and based on statistics kept by Scottish Courts Administration.

[4] This follows from the Family Law (Scotland) Act 1985, s2.

decree of separation. Unnecessary remedies are undesirable. They add to the complexity of the law and make it less efficient. Moreover, the remedy of judicial separation is in itself undesirable. It orders the parties to separate but does not terminate the marriage. It creates a divergence between the social position and the legal position. This has been the subject of adverse comment for over a hundred years.[1]

7.7 In the past the main argument for retaining judicial separation has been that it provides a remedy for people who object to divorce on religious grounds.[2] There are two points to be made on this. First, the legal changes which we have mentioned already have weakened the argument that judicial separation is necessary as an alternative remedy. Secondly, we do not know of any major religious group in Scotland which does not permit its adherents to use civil divorce for civil purposes, such as the regulation of property and financial matters, when a marriage has unfortunately broken down irretrievably. We understand, for example, that the present position of the Catholic Church is that, while finding any divorce situation regrettable, it accepts that civil divorce proceedings may be a necessary and proper method of dealing with property settlements, maintenance, the future of the children and so forth. It goes without saying that no-one is obliged to regard a civil divorce decree as having any effect for religious purposes.

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[1] See Maidment, Judicial Separation (1982) pp73-75.

[2] This was why the Royal Commission on Divorce in 1912 recommended the retention of judicial separation in spite of criticising it as "an unnatural and unsatisfactory remedy". (Cmnd 6478). This was also why the Royal Commission on Marriage and Divorce in 1956 recommended retention of a remedy which they regarded as "undesirable in principle". (Cmd 9678).

Proposition for consideration

7.8 Our provisional view is that judicial separation has outlived its usefulness and is now an unnecessary remedy as well as an undesirable one. We do not think it should feature in a new family law code. We invite views on the proposition that:

25 Judicial separation should be abolished.

PART VIII - BARS TO DIVORCE

Introduction

8.1 In our report on Reform of the Ground for Divorce we recommended that the ground for divorce should continue to be the irretrievable breakdown of the marriage but that the periods of separation which can be used to establish breakdown should be reduced from 2 years to 1 year (where the defender consents to the divorce) and from 5 years to 2 years (whre the defender does not consent). As a consequence, divorce for desertion followed by 2 years separation would no longer be necessary. If this recommendation is implemented[1] the ground for divorce would be the irretrievable breakdown of the marriage and this could be established by proving

(a) adultery

(b) intolerable behaviour

(c) separation for one year plus the other party's consent to divorce or

(d) separation for two years.

The main reason for our recommendation was to enable spouses, whose marriages had broken down irretrievably, to use the non-fault separation grounds in a higher proportion of cases, rather than the more hostile and aggressive fault grounds of adultery or intolerable behaviour. We mention the ground for divorce only by way of background. Our concern in this part of this discussion

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[1] Provisions to implement it are included in the Law Reform (Miscellaneous Provisions) (Scotland) Bill currently before Parliament.

paper is only with bars to divorce and, in particular, with lenocinium, collusion and grave financial hardship. The questions on which we would welcome views are (a) whether the term "lenocinium" should be replaced, in any new legislation, by a more informative expression, without altering the substance of the law, (b) whether collusion has any role to play, as an independent bar to divorce, in the new divorce law and (c) whether the power to refuse certain divorces on the ground of grave financial hardship should continue to be available.

Lenocinium

8.2 Section 1(3) of the Divorce (Scotland) Act 1976 provides that

> "The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of [adultery] if the adultery ... has been connived at in such a way as to raise the defence of lenocinium."

This is not particularly helpful to a lay person reading the Act. The policy, however, is clear and understandable. A pursuer should not be able to divorce his or her spouse for adultery if the pursuer has actively promoted the adultery in question. For example, a husband who has encouraged his wife to prostitute herself should not be able to found on the adultery in question in order to obtain a divorce.[1]

8.3 Cases on lenocinium have been very rare but they establish that there must be active promotion of, and not merely passive acquiescence in, the adultery.[2] A spouse is not, for example, barred by lenocinium merely because he or she does not attempt

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[1] Marshall v Marshall (1881) 8 R 702. Contrast Hunter v Hunter (1883) 11 R 359 where the husband's words were not intended to be taken seriously.

[2] Hannah v Hannah 1931 SC 275; Riddell v Riddell 1952 SC 475.

to dissuade the other from committing adultery,[1] or merely because, suspecting adultery, he or she has the other spouse watched by detectives in order to obtain evidence.[2] The cases also establish that the pursuer's words or conduct must have been the immediate cause of the adultery before there will be lenocinium.[3]

8.4 We think that the policy of the present law is correct. So long as adultery is used as an indicator of marriage breakdown it must, we think, be right to say that it is not a good indicator of breakdown if it has been actively promoted or encouraged by the spouse founding on it. On the other hand it remains a good indicator of marriage breakdown notwithstanding that the pursuer has merely acquiesced in something he or she had no power to prevent. Our concern is not with the policy but with the terminology. We would be reluctant to see the uninformative word "lenocinium" appear in a new family law code. We suggest for consideration that:

26 **The reference in section 1(3) of the Divorce (Scotland) Act 1976 to adultery which "has been connived at in such a way as to raise the defence of lenocinium" should be replaced by a reference to adultery which has been actively promoted or encouraged by the pursuer.**

Collusion

8.5 Section 9 of the Divorce (Scotland) Act 1976 abolished the oath of calumny in divorce actions (and other consistorial actions) but provided that

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[1] McMahon v McMahon 1928 SN 37 and 158. But cf CD v AB 1908 SC 737.

[2] Cf Thomson v Thomson 1908 SC 179.

[3] Gallacher v Gallacher 1928 SC 586 and 1934 SC 339.

"nothing in this section shall affect any rule of law relating to collusion".

The oath of calumny was an oath by the pursuer to the effect that there was no agreement between the parties to put forward a false case or hold back a good defence. Collusion was sometimes defined by reference to the oath of calumny,[1] which is no doubt why the saving provision in section 9 was thought necessary. The existing law is that collusion remains a bar to divorce. Notwithstanding the abolition of the oath of calumny, collusion is still defined as an agreement to permit a false case to be substantiated or to keep back a good defence.[2] The question is whether it has any independent function as a bar to divorce, given that if the court discovers that there is a false case or a good defence divorce will be refused anyway.

8.6 A typical case of collusion would be one where both parties want a divorce but do not want to wait for two years in order to obtain one. They, therefore, agree to concoct a false case of adultery. The husband pretends to commit adultery with a woman hired for the purpose and the parties arrange for witnesses to be able to speak to the events observed by them. If the absence of true grounds for divorce does not come to light before decree then, whether or not collusion remains part of the law, the divorce will be granted. If it comes to the court's knowledge before decree of divorce then, whether or not collusion forms part of the law, no divorce will be granted. Any liability to sanctions

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[1] See eg Fairgrieve v Chalmers 1912 SC 745 at 747 - "there never can be collusion unless you can show facts which, if proved, would show that the oath of calumny had been falsely sworn".

[2] See Walker v Walker 1911 SC 163 at p168; Fairgrieve v Chalmers 1912 SC 745 at p747; Riddell v Riddell 1952 SC 475 at p482.

for contempt of court, perjury or subornation of perjury arises from the facts, regardless of whether or not collusion forms part of the law. It seems therefore that collusion as a bar to divorce has no independent function.

8.7 Collusion has been abolished as a bar to divorce in English law. The Divorce Reform Act 1969 provided that

> "nothing ... in any rule of law shall be taken as empowering or requiring the court to dismiss such a petition [ie for divorce or judicial separation] ... on the ground of collusion between the parties in connection with the presentation or prosecution of the petition ..."[1]

8.8 We invite views on the proposition that

27 There is no need to retain collusion as a bar to divorce.

Grave financial hardship

8.9 Section 1(5) of the Divorce (Scotland) Act 1976 provides that

> "Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce by reason of [5 years' separation], the court shall not be bound to grant decree in that action if in the opinion of the court the grant of decree would result in grave financial hardship to the defender. For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit."

This provision is inconsistent with the philosophy of the Act, in that it envisages a marriage which has irretrievably broken down being kept in existence for purely financial reasons. It was enacted before the reform of the law on financial provision on divorce by the Family Law (Scotland) Act 1985 and does not fit

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[1] S9(3).

well with that law. The 1985 Act is designed to enable the court to make whatever financial provision on divorce is (a) justified by the principles in the Act and (b) reasonable having regard to the resources of the parties.[1] The principles in the 1985 Act include the principle that

> "a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period."[2]

The logical, but perhaps surprising, result is that the power to refuse a divorce under section 1(5) of the 1976 Act is in reality a power to refuse a divorce on the grounds of hardship which it is reasonable or justifiable that the defender should be expected to suffer. This seems unnecessary and undesirable. The approach of the law should be to enable such financial provision as is justifiable and reasonable to be ordered on divorce, but not to give one party a bargaining counter to seek more by threatening to found on section 1(5).

8.10 There have been very few reported cases on section 1(5). In Boyd v Boyd[3] it was held that there was no financial hardship where the periodical allowance awarded to the defender on divorce exceeded the aliment she was receiving before divorce. In Nolan v Nolan[4] it was held that the contingent loss of a widow's pension rights (under an occupational pension scheme and the state scheme) coupled with the loss of the contingent right to claim legal rights out of any lump sum received by the husband's estate from his occupational pension fund amounted to grave financial hardship. Divorce was refused, even although the parties had been separated for more than 5 years, and the action was continued to

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1 S8(2).

2 S9(1)(e).

3 1978 SLT (Notes) 55.

4 1979 SC 40.

enable the husband to produce better proposals for compensating the wife for these losses. This case illustrates the inconsistency between section 1(5) and the law on financial provision on divorce. Under that law the purpose of financial provision on divorce is not to place the spouses in the position in which they would have been had the marriage continued. That used to be the objective in England, and it is that objective which seems to be reflected in the decision in Nolan v Nolan. However, it has now been abandoned in England as unrealistic and undesirable.[1] It has never been part of the statute law in Scotland. The approach of the 1985 Act to occupational pension rights is to regard the accrued rights as a form of savings. The proportion applicable to the years between the date of the marriage and the final separation is regarded as matrimonial property and, as such, is subject to the norm of equal division.[2] If section 1(5) were to be applied now as it was in Nolan the husband would, in effect, be asked to make financial provision on a basis which has now been firmly abandoned and which is inconsistent with the principles of the 1985 Act.

8.11 We invite views on the proposition that:

28 **In an action for divorce on the basis of 5 years' separation it is not now necessary or desirable for a court to have power to refuse a divorce on the ground that, in the opinion of the court, the grant of decree would result in grave financial hardship to the defender.**

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[1] See Law Com No 112 (1981) para 17; Matrimonial and Family Proceedings Act 1984, s3.

[2] Family Law (Scotland) Act 1985, s10(1) and (5).

PART IX - CHOICE OF LAW RULES ON VALIDITY OF MARRIAGE

Introduction

9.1 The rules as to which law governs the validity of a marriage in cases involving a foreign element (eg where a party domiciled in one country marries in another) depend partly on statute and partly on common law. The two Law Commissions reviewed this whole area in a discussion paper published in 1985[1] and summarised the results of the consultation in a report published in 1987.[2] That report recommended certain changes in the Foreign Marriage Act 1892, designed to remove anomalies (such as the application of English law to Scottish domiciliaries) and bring the Act up to date. It also recommended certain minor changes in related subordinate legislation and the repeal of various spent Acts validating certain foreign marriages. The report was implemented by the Foreign Marriage (Amendment) Act 1988.

9.2 On the broader question of the basic choice of law rules in marriage the report summarised the results of the consultation and the views of the two commissions on some of the major questions for consideration but did not recommend legislation. The main reason for this was that there was little dissatisfaction with the basic rules of the existing law, so that the need for reforming legislation was not established. Subsidiary reasons were that the resolution of some of the uncertainties in the existing law was

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[1] Private International Law: Choice of Law Rules in Marriage (Law Com Working Paper No 89; Scot Law Com Consultative Memorandum No 64), referred to in this Part as "the discussion paper" or "the 1985 discussion paper".

[2] Private International Law: Choice of Law Rules in Marriage (Law Com No 165; Scot Law Com No 105), referred to in this Part as "the 1987 report"

thought to require quite complicated legislation and that to reduce the law to statutory form might prevent its further development by the courts.[1] The first of these arguments loses its force in the context of a proposed codification, where the law is being set out in statutory form in any event. The second argument - that complicated legislation would be required - also loses its force in the context of a proposed Scottish codification where, as we show later, the most difficult problems canvassed in the discussion paper[2] can be dealt with quite simply.[3] The third reason - that statutory rules would prevent judicial development of a still undeveloped area of the law - is hardly applicable in Scotland where cases on this area of the law are few and far between, and it must in any event, as was recognised in the report,[4] be weighed in the balance against the argument that it is desirable, in the public interest, to provide a clear statement of the law in those areas where the very lack of development makes it impossible to state with any certainty what the law is.

9.3 We have no doubt that a new Scottish family law code should include choice of law rules on marriage and we proceed to consider what those rules should be. We do not propose to cover again ground already covered in detail in the 1985 discussion paper and we would refer the reader to that paper for a full discussion of the existing law and the options for reform. Here we propose to concentrate on the rules which, in the light of the comments

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[1] Report, paras 2.13 and 2.14.

[2] Particularly the so-called common law exception to the rule that formal validity is governed by the law of the place of celebration and the choice of law rules on annulment for impotency or wilful refusal to consummate a marriage.

[3] See paras 9.13 to 9.19 below.

[4] Para 2.12.

made on the discussion paper, we would propose for inclusion in new legislation.

Proposed basic rules

9.4 Formal validity. We propose that, subject to the Foreign Marriage Acts 1892 to 1988 (which deal with marriages by British consuls etc abroad, and marriages of members of the British armed forces etc abroad) the question whether a marriage is formally valid should be governed by the law of the place of celebration. This is the existing law[1] and it was strongly supported on consultation. We do not think it is necessary or desirable to prevent a reference of the matter by the law of the place of celebration to some other law (renvoi) in the unlikely event of this occurring. Nor do we think it necessary to spell out that the law of the place of celebration should be applied in the light of any retrospective changes made in it. It may happen, for example, that all marriages celebrated in a particular place over a certain period were formally invalid because of some factor which was not appreciated at the time and that a statute is subsequently passed validating those marriages retrospectively. A reference to the law of the place of celebration after this statute had been passed would have to take account of it. This, we think, would be the result which would follow in the absence of any provison to the contrary[2] and we do not think that any such provision to the contrary should be inserted.

9.5 Essential validity. We propose that, subject to a special exception for marriages celebrated in Scotland,[3] the question

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[1] See Anton, Private International Law, pp284-290; Clive, Husband and Wife (2nd ed 1982) pp145-148.

[2] Cf Starkowski v Att-Gen [1954] AC 155

[3] Para 9.6 below.

whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it, or did not give a legally effective consent to it, should be governed by the law of that party's domicile immediately before the marriage. This rule was supported by most of those who commented on the discussion paper. Under the existing law there is some uncertainty as to whether a party must also have capacity by the law of the place of celebration.[1] Opinion was divided on this question on consultation. We propose later that a party marrying in Scotland should be required to have capacity by Scots law, but we regard this as a limited exception on grounds of public policy to the general rule and do not now suggest that, in the case of a marriage outside Scotland, the law of the place of celebration should have any role to play in relation to capacity.[2] In relation to capacity to marry, the rule which we propose would resolve a doubt in the existing law but would not be inconsistent with the existing authorities.[3] In relation to defective consent the proposed rule would clarify what is a very uncertain area of the present law.[4] Again, we do not think it necessary or desirable to prevent the law of the domicile referring a question of essential validity to another personal law (renvoi).[5] Nor do we think it necessary or desirable to exclude from the scope of the applicable law of the domicile any rules providing for defects in capacity or consent to be disregarded in certain situations. Examples of such rules might be a rule that a lack of capacity due to nonage would be restrospectively ignored if the marriage had not been challenged by the time the younger party attained the minimum age, or a rule that a defect in consent due to duress would be restrospectively ignored if the marriage had not been challenged

[1] This is certainly required in relation to nonage and prohibited degrees of relationship in the case of marriages celebrated in Scotland. Marriage (Scotland) Act 1977 ss1 and 2. See also Lendrum v Chakravarti 1929 SLT 96 at p103.

[2] This is the view favoured by both Law Commissions in the 1987 Report. See para 2.6.

[3] See Anton, pp278 and 279; Dicey and Morris, The Conflict of Laws (11th edn 1987) p638; Cheshire and North, Private International Law (11th ed 1987) pp586 and 587.

[4] See Clive, Husband and Wife, (2nd ed 1982) pp156 and 157.

[5] Cf the Marriage (Scotland) Act 1977, s3(5).

promptly once the source of the duress was removed.[1]

9.6 **Marriages in Scotland.** No matter where the parties are domiciled a marriage solemnised in Scotland is void if either party is under the age of 16 or if the parties are within the prohibited degrees of relationship set out in the Marriage (Scotland) Act 1977.[2] The justification for this exception to the rule that capacity to marry is governed by the law of the domicile is no doubt that it would be contrary to public policy to allow people under 16 or within the, now quite restricted, prohibited degrees to conclude a valid marriage in Scotland even if they had by lies or concealment of the truth, managed to induce someone to solemnise a purported marriage. The same considerations, we believe, apply to the other grounds of essential invalidity in Scots law.[3] These are all of a fundamental nature - going to the very basis of the concept of marriage - and we do not think that a marriage purportedly entered into in Scotland should be regarded as valid if one of these grounds of invalidity exists. We therefore suggest that, no matter what the domiciles of the parties may be, a marriage entered into in Scotland should be invalid if, according to Scottish internal law, (a) the parties are within the prohibited degrees of relationship (b) either party is already married (c) either party is under the age of 16 (d) the parties are of the same sex or (e) because of mental incapacity, error, duress or other reason either party does not effectively consent to the marriage. In relation to this last ground it is worth stressing that Scots law confines invalidity for defective consent to cases where

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[1] We have suggested a rule of this nature for Scots law at para above. Clearly if Scots law were the law governing the question of duress this rule would apply as part of Scots law.

[2] Marriage (Scotland) Act ss1(2) and 2(1).

[3] See Part III above. We are referring to Scottish internal law here. Moreover we are not including impotency as a ground of essential invalidity. Impotency is a ground on which a valid marriage may be dissolved by means of a decree which, for purely historical reasons, is called a declarator of nullity. The question whether it should continue to be a ground for dissolving a marriage in this way is considered in Part III.

the lack of consent goes to the very root of the marriage and where there is no meaningful consent at all.

9.7 We have suggested above that a tacit mental reservation on the part of one or both of the parties as to the legal effect they intend the ceremony to have should not be regarded as a defect in consent. In some of the cases where this gives rise to difficulty the marriage is entered into for immigration purposes, and one of the parties may well be domiciled abroad. It could frustrate the operation of the proposed rule, in so far as it is designed to prevent abuse of Scottish marriage ceremonies, if a party were allowed to plead that by the law of his or her ante-nuptial domicile a tacit mental reservation precluded consent. We therefore suggest that this rule too should apply to marriages entered into in Scotland, no matter what the domiciles of the parties may be.

Proposed ancillary rules

9.8 **Parental consent.** At present a requirement of parental consent to the marriage of a minor is regarded as a matter of form.[1] It is therefore governed by the law of the place of celebration rather than by the law of the domicile of the party concerned. This rule has been much criticised.[2] It seems perverse to characterise all requirements of parental consent as pertaining to form. Such a requirement may be a mere matter of form if, for example, it applies only to a marriage celebrated in the jurisdiction concerned or one celebrated in a particular way. But it may not be. It may be intended to prevent the young person from entering into a valid marriage anywhere, in any way, just as the Scottish rule about under-age marriages is intended to prevent

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[1] Bliersbach v MacEwen 1959 SC 43. The position is the same in English law. See Simonin v Mallac (1860) 2 Sw & Tr 67; 164 ER 917; Ogden v Ogden [1908] P 46.

[2] See eg Falconbridge, Essays on the Conflict of Laws (2d ed 1954) pp74-86; Anton, pp275, 276 and 282; Cheshire and North, (11th ed 1987) pp50 and 51.

a Scottish domiciliary under the age of 16 from entering into a valid marriage anywhere.[1]

9.9 The 1985 discussion paper suggested that this question should be left to judicial development. It also, however, set out various possible legislative solutions and invited comments.[2] In the context of a new code it would, we think, be desirable to include a provision on this matter. In the light of the criticisms made of the present law and of the comments made on the discussion paper we consider that it would be unsatisfactory to classify all requirements of parental consent automatically as formal requirements. It would be equally unsatisfactory to classify a requirement which related only to marriages in a particular form or place as one which resulted in a legal incapacity. It would also be unsatisfactory if our courts were obliged to follow a foreign classification, which might be perverse or non-existent. As a number of commentators on the 1985 discussion paper pointed out, it is for our law to classify rules, for our choice of law purposes, as rules relating to form or legal capacity. The simplest and most satisfactory solution, in our view, is to provide that a rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.

9.10 A solution on these lines would mean that the rule of English law requiring consent to the marriage of a person under 18 would continue to be regarded in Scots law as one which did not result

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[1] Marriage (Scotland) Act 1977 s 1(1).

[2] Paras 4.8 to 4.10.

in a legal incapacity for marriage, because it applies only to marriages in certain forms.[1] Similarly, a rule of a foreign system which merely delayed a minor's marriage without parental consent for a period after consent was refused (in order to give time for second thoughts) would not be regarded in Scots law as giving rise to a legal incapacity because it would not preclude, but would only delay, the marriage of the minor.[2] A rule of the law of the domicile which said that a minor could not marry anywhere in any form without parental consent would, however, be regarded as resulting in a legal incapacity for marriage.[3] This, as we have seen earlier, would have meant a different decision in Bliersbach v MacEwen[4] where the question was whether a Dutch minor should be allowed to marry in Scotland without the parental consent required by Dutch law. However, the result under our proposed rule would be much more consistent with the policy behind section 3(5) of the Marriage (Scotland) Act 1977, which requires foreign domiciliaries to produce certificates of capacity to marry under their own law and which was designed to discourage "runaway" marriages by foreign minors without parental consent.[5] The proposed rule would also have resulted in a different decision in

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1 Marriage Act 1949, s3. The requirement applies only to marriages by common licence or on the authority of a superintendent registrar's certificate. It would probably be characterised in English law as relating to form. See Dicey and Morris, p604. The English Law Commission has recommended its abolition. Report on Guardianship and Custody (Law Com No 172, 1988) para 7.11.

2 Thus the same result would be reached on the facts of Simonin v Mallac (1860) 2 Sw & Tr 67; 164 ER 917.

3 See eg art 148 of the French Civil Code which provides that minors cannot contract marriage without the consent of their parents, or one of them.

4 1959 SC 43.

5 See the Report of the Committee on the Marriage Law of Scotland (1969) Cmnd 4011.

the much-criticised case of Ogden v Ogden.[1]

9.11 Effect of divorce. It may happen that the law of a person's ante-nuptial domicile does not recognise that he or she is divorced, and therefore regards him or her as still married, whereas the divorce is recognised in Scotland. Indeed the divorce may have been granted in Scotland. This matter is dealt with by section 50 of the Family Law Act 1986 which, broadly speaking, provides that in this situation the divorce granted or recognised in Scotland prevails. Accordingly the person can marry in Scotland,[2] and a marriage by that person (wherever it takes place) is not treated as invalid in Scotland. This provision would be repeated in any consolidation or codification. We mention it here only because it is an essential qualification of the rule that legal capacity to marry depends on the law of the domicile.

9.12 Public policy. Under the present law there are certain cases where the normal choice of law rules will not be applied because to do so would be contrary to Scottish public policy. For example, an incapacity by the law of the domicile would probably not be recognised if it were based on religion[3] or skin colour.[4] Conversely, a law of the domicile conferring capacity might not be recognised if, for example, it allowed a girl of five years of age to marry. In the 1985 discussion paper we suggested that a public policy exception should continue to apply.[5] No-one disagreed with this.

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[1] [1908] P 46.

[2] See also Marriage (Scotland) Act 1977 s3(5).

[3] Cf MacDougall v Chitnavis 1937 SC 390.

[4] Cf Sottomayor v De Barros (No 2) (1879) 5 PD 94 at p104.

[5] Para 3.49.

9.13 **Annulment of voidable marriages on grounds unknown to Scots law.** The question for consideration here is whether, assuming that an initially valid marriage has been entered into,[1] a Scottish court should be able to declare it null on some ground, such as wilful refusal to consummate, not recognised as a ground of nullity in Scots law. We are concerned here with initially valid marriages. The question is really whether such marriages should be dissoluble. This question is similar to the question whether Scottish courts should grant divorces on grounds unknown to Scots law. We suggest that it should be made clear that a marriage, which on applying the above choice of law rules is initially valid, cannot be annulled or declared null by a Scottish court on any ground other than incurable impotency. This is the only ground on which an initially valid marriage can be declared null at present in Scotland. Of course, the reference to it would be omitted if it were abolished as a ground on which a marriage is voidable.[2] The proposal made here would not change Scottish practice. It would resolve, in a simple way, some of the difficulties raised in the discussion paper as to the appropriate choice of law in nullity proceedings based on incurable impotency or wilful refusal to consummate. It would be for other countries to decide whether their courts should dissolve initially valid marriages on these grounds, and whether the decree dissolving them should be called a divorce or a nullity decree. Of course, foreign nullity decrees would continue to be recognised in Scotland, if the foreign court had jurisdiction, even if the ground of annulment were one not

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[1] It should be noted that a marriage may be initially invalid under an applicable law notwithstanding that in that law there are restrictions on title to sue for a declarator of nullity.

[2] See para 3.27 above. If impotency is retained as a ground on which a valid marriage may be declared null it might be desirable to make it clear that a Scottish court could grant a declarator of nullity on this ground whether or not it was recognised as a ground of nullity by the law of the domicile of either party or by the law of the place of celebration.

found in Scots law.[1] We are not proposing any change in that rule. One problem with the solution proposed here is that grounds which might be expected to make a marriage initially invalid, and which would do so in Scotland, might be regarded in some countries as not affecting initial validity but as merely enabling the marriage, although valid to begin with, to be declared null later. In England, for example, lack of consent to the marriage, "whether in consequence of duress, mistake, unsoundness of mind or otherwise" is, surprisingly, only a ground on which a marriage is voidable.[2] It follows that if a person domiciled in England entered into a marriage in England while incapable of consenting because of mental illness, that marriage could not be declared null in Scotland, even if the person had since the marriage shifted his or her domicile to Scotland and wished to use the Scottish courts to obtain an annulment. This problem is unlikely to arise often and the result, which flows from a rather strange rule of English law,[3] must just be accepted. People who seek to have valid marriages dissolved in Scottish courts can, we think, be expected to find that Scots law applies. The difficulty of any other approach is shown by the fact that, in relation to voidable marriages in English law, the English courts have certain statutory restrictions placed on them.[4] These restrictions would not affect a Scottish court. Yet it would seem to be wrong to apply an English rule without its attendant qualifications. Moreover an English decree annulling a voidable marriage has prospective effect only.[5] A Scottish decree of declarator of nullity declares the marriage to have been void from the beginning. This would be an inappropriate remedy for a defect, governed by the law of the domicile, which that law does not regard as making a marriage void from the beginning.

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[1] Family Law Act 1986, s46.

[2] Matrimonial Causes Act 1973, s12(c).

[3] The rule also has the effect that a marriage by a completely demented person cannot be declared null, even in England, after that person's death.

[4] Matrimonial Causes Act 1973, s13. For example, proceedings must be begun within 3 years of the date of the marriage. S13(2).

[5] Matrimonial Causes Act 1973, s16.

Matters omitted from proposed rules

9.14 **The Sottomayor v De Barros rule.** This is a rule of English law to the effect that an incapacity by the law of one party's domicile will be ignored if the marriage is celebrated in England and the other party is domiciled in England.[1] This rule has been strongly criticised as being nationalistic and unprincipled.[2] There is an apparent recognition of it in one Scottish case,[3] but it is not included in the Marriage (Scotland) Act 1977.[4] In the discussion paper it was suggested that this rule should be abolished.[5] This proved, in general, to be acceptable to those who commented on the paper, some Scottish consultees taking the view that as the rule was not a clearly established rule of Scots law its abolition would have no effect in Scotland. We think that the rule should simply be omitted from the proposed new statutory scheme.

9.15 **A general exception to the rule that formal validity depends on the law of the place of celebration.** In England there is a common law exception to the rule that the law of the place of celebration governs the formal validity of a marriage. English law recognises a marriage as formally valid if (a) it is celebrated in circumstances where compliance with the local law is virtually impossible or is celebrated in a country under belligerent occupation where one of the parties is a member of the occupying forces and (b) it complies with the requirements of the English

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1 Sottomayor v De Barros (No 2) (1879) 5 PD 94.

2 See eg Dicey and Morris, Conflict of Laws (11th ed 1987) p624; Cheshire and North, Conflict of Laws (11th edn 1987) p585.

3 MacDougall v Chitnavis 1937 SC 390 at pp403 and 407.

4 Cf ss3(5) and 5(4).

5 Para 3.48.

common law.[1] There have been suggestions that there is a similar exception in Scots law,[2] but there is no modern authority on it and the law is undeveloped.

9.16 The 1985 discussion paper sought views on various options in relation to this common law exception.[3] So far as Scotland is concerned the preservation of the existing law is not an option, because there is no satisfactory existing law, and the options are (a) to provide a new statutory exception or (b) to provide no exception. If a new exception were to be provided it might be to the effect that a couple would not be regarded as invalidly married by reason only of non-compliance with the formal requirements of the law of the place of celebration of the marriage, if compliance with those formal requirements was impossible or not reasonably to be expected in the circumstances and if they exchanged present consent to marry each other. Would such an exception be necessary or desirable?

9.17 It can hardly be argued that an exception on the above lines is necessary. The need for it has not been obvious in the past. The only Scottish case in which it has been mentioned concerned a marriage in 1780 and the case would have been decided the

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[1] The exception is fully discussed in the 1985 discussion paper at paras 2.14, 2.20 to 2.30 and 2.54 to 2.68.

[2] See Fraser, Husband and Wife, Vol II pp1313 and 1314, and Barclay v Barclay (1849) 22 Scot Jur 127 per Lord Ivory at p131. Modern text-book writers are, not surprisingly, non-committal on this point. See Anton, p289; Clive, (2nd edn 1982) pp147 and 148.

[3] Paras 2.54 to 2.68.

same way even if the exception had not been mentioned.[1] There are statutory provisions for consular marriages abroad where compliance with local forms may be difficult and there are also provisions for marriages of members of the armed forces, and certain accompanying persons, abroad.[2] The speed of travel now means that parties will often be able to marry in their own country in circumstances where in previous centuries an early marriage would have been impossible. Marriage itself is less necessary than in former times, when cohabitation before marriage would have been unthinkable for many people and when the legal consequences of marriage were more important than they are now. There is also a provision in the Marriage (Scotland) Act 1977 which enables people who have gone through a marriage ceremony outside the United Kingdom but who are not, or are unable to prove that they are, validly married to each other in Scots law, to have a second marriage ceremony performed in Scotland.[3] The Marriage Schedule is endorsed by the authorised registrar with the words

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[1] Barclay v Barclay (1849) 22 Scot Jur 127. This case concerned the validity of a marriage between Protestants in a Catholic country in 1780. The parties had always been regarded as validly married during their lives and there was a very strong presumption in favour of their having been validly married, either by the ceremony in question (about which there was a division of legal opinion) or by some other ceremony. This presumption was not rebutted by the evidence led.

[2] Foreign Marriage Act 1892 to 1988.

[3] S20. "Ceremony" is not defined.

"The ceremony of marriage between the parties mentioned in this Schedule was performed in pursuance of section 20 of the Marriage (Scotland) Act 1977, following a statutory declaration by them that they had gone through a ceremony of marriage with each other on the day of 19 , at ."

This facility could be useful, for example, in cases where parties have been forced to resort to a ceremony of doubtful validity in a time of war or great civil upheaval. In short, if an exception has not been found necessary so far in Scots law it would not seem to be necessary now.

9.18 On the question whether, even if not demonstrably necessary, a statutory exception should be introduced just in case a situation should arise for its application, there are two arguments which point against introduction. The first is that there would be a loss of certainty. People who, for some reason, had not married in the regular form might try to avail themselves of the exception. Although designed for genuine cases of difficulty and hardship, the exception might be founded on in undeserving cases with resulting confusion. The uncertainty caused by the old law on marriages by declaration of present consent would, within this limited area, be re-introduced. That the common law exception itself has not given rise to problems of this nature is not a conclusive counter argument. A statutory exception would be drawn to people's attention by the mere fact of its appearance in the legislation and would not be such a speculative ground on which to rely as is the common law exception, especially in Scotland. The second argument is one relating to the form, rather than the substance, of proposed legislation. The full advantages of codification will be gained only if unnecessary exceptions, qualifications and complications are excluded. This seems to us to be an unnecessary exception.

9.19 Our conclusion is therefore that there should be no exceptions to the rule that the formal validity of a marriage is governed by the law of the place of celebration, other than those provided for in the Foreign Marriage Acts 1892 to 1988.

9.20 **A rule on prospective validation.** We have referred earlier to the common type of retrospective validating legislation designed to cure formal defects in certain marriages or to validate marriages void because of, say, error if the error is not founded on timeously. Such rules fall to be regarded, we have suggested, simply as part of the applicable foreign law and require no separate provision to be made for them.[1] It could also happen that a foreign law provided for a marriage to become valid at some time after it had been entered into. For example, there might be a rule validating a bigamous marriage prospectively as from the date when the first marriage is dissolved by the death of the other party or by divorce,[2] or a rule validating an under-age marriage prospectively if the parties are cohabiting as husband and wife when the younger party obtains the minimum age for marriage. We would be reluctant to burden a new statute with special rules on a topic which is likely to arise rarely if at all and have therefore asked ourselves whether any problems caused by prospective validation could be solved by applying the proposed general rules. We think they could be. The first marriage is invalid when entered into and is not retrospectively validated. In reality therefore there is a new marriage at the time of the validating event. It is rather like a marriage by promise subsequente copula in the old Scots law, inasmuch as it is a marriage as a result of an event following on an antecedent ineffective mutual commitment. Under the normal rules the

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[1] Para 9.5 above.

[2] Cf Prawdzic-Lazarska v Prawdzic-Lazarska 1954 SC 98 where, however, the content of the foreign law was not proved and the case was disposed of by applying Scots law.

marriage would, we suggest, be recognised if the law of the country where the parties are when the event occurs regards this as sufficient in respect of formal validity and if the laws of their domiciles at that time regard them as having capacity to marry and regard their deemed or tacit consent as sufficient for marriage.

Summary of proposals for consideration

9.21 The proposals on which we would welcome comments are as follows.

29 Subject to the Foreign Marriage Acts 1892 to 1988, the question whether a marriage is formally valid should be governed by the law of the place of celebration.

30 Subject to proposal 31 below, and to section 50 of the Family Law Act 1986 (effect of divorce), the question whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it or did not give a legally effective consent to it should be governed by the law of that party's domicile immediately before the marriage.

31 A marriage entered into in Scotland should be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into

(a) the parties were within the forbidden degrees of relationship,

(b) either party was already married,

(c) either party was under the age of 16,

(d) the parties were of the same sex, or

(e) because of mental incapacity, error, duress or other reason either party did not effectively consent to marriage

but, without prejudice to the law on error or duress, should not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

32 A rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.

33 Where, on the application of the above rules, a marriage is initially valid it should not be annulled or declared null by a Scottish court on any ground other than incurable impotency (if that is retained as the sole ground on which a marriage is voidable in Scots law).

34 A foreign rule as to the validity or invalidity of a marriage should not be recognised or applied in Scotland where to do so would be contrary to Scottish public policy.

PART X - CHOICE OF LAW RULES ON LEGAL EFFECTS OF MARRIAGE

Introduction

10.1 Marriage has different legal effects, in different legal systems, on capacity, obligations, property and occupancy rights. The question which we consider in this part of the discussion paper is whether a new family law code should contain choice of law rules on these matters and, if so, what these should be.

Capacity

10.2 We do not think that there is any need for a special rule on incapacity arising from marriage. There may well be a need to consider the choice of law rules on capacity generally, because they are not entirely clear or satisfactory,[1] but that is another matter.

Obligations

10.3 The same applies, in our view, to obligations. Any reform should be general. There appears to be no need for any special rule for obligations arising out of marriage, with the exception of the obligation of aliment which we consider separately later.

Property

10.4 There are very important differences between legal systems in relation to matrimonial property. Although in practice choice of law problems involving matrimonial property appear to arise very rarely in Scotland, there is no doubt that they could arise in any case where spouses domiciled in one country own property situated

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[1] See Anton, Private International Law pp199-202, 232-234.

in another.[1]

10.5 The existing Scottish rules draw a distinction between moveable and immoveable property. In general the law of the spouses' domicile governs their moveable property (with the result that if they are domiciled in Scotland each owns his or her own property) and the law of the country where the property is situated governs immoveable property.[2] This is subject to any agreement between the spouses to the contrary.[3] It is also probably subject to a proviso that vested rights are not affected

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[1] There is an extensive international literature on this subject which seems to give rise to more difficulty in practice in countries with community property regimes. See eg Régimes Matrimoniaux, Successions et Liberalités: Droit International privé et Droit comparé (Verwilghen ed 1979). There is a Hague Convention on the Law Applicable to Matrimonial Property Regimes which was concluded on March 14, 1978 but which, as at March 22, 1989, had been ratified by only France and Luxembourg. It makes the governing law, in the absence of express agreement and subject to some important and quite complex qualifications, the law of the State in which both spouses establish their first habitual residence after marriage. (Art 4).

[2] See Anton, 457-458, 464; Dicey and Morris, 1066-1067; Cheshire and North, 864; Clive, 335.

[3] Anton, 454-458, 464; Dicey and Morris, 1053-1058; Cheshire and North, 869-872; Clive, 335, 337.

by a change in domicile.[1] The existing rules date from a period when a wife took her husband's domicile automatically. There is no authority on the position (rare in practice) where the spouses have different domiciles. Most of the cases and textbooks still express the rules primarily in terms of the husband's domicile[2] but this seems inconsistent with the principles of equality and independence which now apply to the legal effects of marriage. If uncertainty and fruitless speculation are to be avoided a legislative solution seems desirable.

10.6 In the present context we do not think that there is any need to call into question the rules relating to immoveable property, vested rights or marriage contracts. The difficulty arises in relation to moveables where there is no choice of regime by the parties. Where the spouses have the same domicile, which is the situation in most cases, then there is no reason why the law of that domicile should not apply. Where they have different domiciles it is at first sight tempting to say that, for each party, the effect which marriage has on his or her property should be determined by the law of his or her domicile. This, however, could mean that if a husband was domiciled in a country which gave each spouse an undivided one-half share in the other's property and the wife was domiciled in a separate property country, the husband would lose half of his property but would not acquire any share in the wife's property in return. This would be an unfair and unacceptable result. The simplest and most satisfactory solution,

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[1] Anton, 456-457; Dicey and Morris, 1068; Cheshire and North, 868; Clive, 336.

[2] See eg Anton, 458, 458; Dicey and Morris, 1066; Cheshire and North, 864. The Married Women's Property (Scotland) Act 1881 used to contain a reference to the husband's domicile (s1) but this has now been repealed.

we suggest, is to say that if the parties are domiciled in different countries then marriage will have no automatic effect on their moveable property. This will leave it open to them to opt into a community property regime if they so wish. It will be a very rare situation indeed where spouses remain domiciled in different countries throughout their marriage and, as separate domiciles imply an absence of a common life plan, it seems appropriate to provide that marriage has no automatic effect on the spouses' moveable property. Alternative solutions, such as the law of the common habitual residence, or the law of the last common domicile, or the law of one spouse's domicile, are all likely to produce arbitrary results and impose on the parties a matrimonial regime with which they have, as a couple, no strong connection. The common habitual residence, for example, may be only temporary, for employment purposes. The last common domicile may have ceased to exist twenty or thirty years previously. To impose the law of one party's domicile on the other seems unjustifiable. Moreover solutions based on nationality would not be suitable as they would not solve problems where, for example, the parties were both British citizens but the question was whether Scots law or English law should apply.

10.7 It follows from the fact that the effect of marriage in relation to immoveable property depends,[1] and would continue under our proposals to depend, on the law of the country where the property is situated that the question whether a spouse has occupancy rights in a house by virtue of marriage will depend on the law of the country where that house is situated. This is consistent with the provisions of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, many of which would be inappropriate or ineffective in relation to houses outside Scotland.

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[1] Welch v Tennant (1891) 18 R (HL) 72.

However, the rule relating to the effects of marriage on immoveable property does not go far enough in relation to occupancy rights and related protective rules. First, some matrimonial homes are moveable property (caravans and houseboats) but the law of the country where they are situated would still seem to be the appropriate governing law. Secondly, the protective rules connected with occupancy rights may apply, as they do in Scotland, to the contents of a matrimonial home and to outgoings related to it but, as these rules are ancillary to the rules on occupation of the home, it would seem to be appropriate that they should be governed by the same law. Thirdly, cohabitants may have occupancy rights and again the same rules ought to apply. We suggest therefore that there ought to be a special rule, applying the law of the country where the home is situated, for protective rights related to the occupation or use of the matrimonial home or its contents.

Propositions for consideration

10.8 We suggest for consideration that:

35 **The effect, if any, which marriage has on a person's capacity and obligations (other than the obligation of aliment, which is considered separately later) should be determined by the law governing that person's capacity and obligations generally.**

36 **The effect, if any, which marriage has on the spouses' property should be determined, in the case of immoveable property, by the law of the country where that property is situated and, in the case of moveable property, by the law of the spouses' common domicile. Where the spouses do**

not have the same domicile marriage should have no automatic effect on their moveable property.

37 The rules in the preceding proposition should be subject

(a) to any agreement between the spouses, and

(b) to the proviso that a change of domicile by one or both spouses should not affect either spouse's vested rights in property.

38 Notwithstanding the rules in the preceding propositions, the question whether a person is entitled to the benefit of protective rules relating to the occupation or use of the matrimonial home (whether moveable or immoveable) or its contents should be determined by the law of the country where the matrimonial home is situated.

PART XI - LEGITIMACY, ILLEGITIMACY AND LEGITIMATION

Introduction

11.1 The question for consideration in this part is whether there is any place in a new Scottish family law code for the concepts of legitimacy, illegitimacy and legitimation. We suggest that there is not and that these concepts, and the associated declarators of legitimacy, illegitimacy and legitimation, should not feature in the new law.

The 1986 reform

11.2 The Law Reform (Parent and Child) (Scotland) Act 1986, which implemented this Commission's report on Illegitimacy,[1] removed the few remaining disabilities of people born out of wedlock and enacted the general principle that

> "The fact that a person's parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person, and accordingly any such relationship shall have effect as if the parents were or had been married to one another."[2]

This general principle is, however, subject to a number of savings (for example, for enactments passed or made, or deeds executed, before the Act came into force) and it does not mean that fathers of children always have parental rights.[3] Under the Act a child's father has parental rights automatically only if he is married to the child's mother or was married to her at the time of the child's conception or subsequently.[4] Otherwise he must apply to a court if he wishes to obtain parental rights.[5] We propose to deal with parental rights in another discussion paper

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[1] Scot Law Com No 82 (1984).

[2] S1(1).

[3] S1(2) and (3).

[4] S2(1)(b).

[5] S3.

and to raise there the question whether unmarried fathers, or certain categories of unmarried fathers, ought to have parental rights without having to apply to court. Here we are concerned with the concepts of legitimacy, illegitimacy and legitimation.

11.3 The Law Reform (Parent and Child) (Scotland) Act 1986 did not abolish the status of legitimacy or the status of illegitimacy. Indeed it referred, in the context of rules on jurisdiction, to actions for declarator of legitimacy, legitimation or illegitimacy,[1] and it left the Legitimation (Scotland) Act 1968 unrepealed. This Commission recommended, however, that the terms "legitimate" and "illegitimate", as applied to people, should whenever possible cease to be used in legislation.[2] We recognised that it was offensive for the law to use terms which suggested that some people were legitimate or lawful, and some people illegitimate or unlawful.[3] We considered at that time that it would not be appropriate to legislate to remove the status of illegitimacy in Scots law. This was partly because the terms "legitimate" and "legitimated" continued to appear in certain United Kingdom statutes and were likely to be found for some time in pre-Act documents, and partly because we hoped that, almost all legal differences between people born in marriage and people born out of marriage having been removed, the idea of a separate status of illegitimacy would gradually wither away.[4]

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[1] S7.

[2] Scot Law Com No 82 (1984) para 9.2. A similar recommendation was made by the English Law Commission in its report on Illegitimacy (Law Com No 118, 1982) para 4.51.

[3] Scot Law Com No 82 (1984) para 9.1.

[4] Ibid para 9.3.

Completing the task

11.4 If the advantages of a codification of family law are to be fully realised, unnecessary and anachronistic concepts will have to be eliminated. It seems clear that legitimacy, illegitimacy and legitimation now fall into this category. A separate status is justifiable in the law where it indicates that the person possessing it is in a significantly different legal position from other people. There are now virtually no legal differences between those whose parents are, or have been, married to each other and those whose parents have never been married to each other, and the retention of a separate status of legitimacy is unnecessary. The separate status of illegitimacy is not only unnecessary but is also considered by many to be offensive. In principle, therefore, there is a strong argument for not using the concepts of legitimacy, illegitimacy and legitimation in a new code. We proceed to consider what legislative changes this would require and what savings or qualifications might be needed.

11.5 It would, we think, be a simple matter to replace the words

> "and accordingly any such relationship shall have effect as if the parents were or had been married to one another"

at the end of section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 with some such words as

> "and accordingly no person whose status is governed by Scots law shall be illegitimate".

This would make it clear that the status of illegitimacy was being abolished. The status of legitimacy would cease to have any content, as everyone would be equally legitimate, but it would be unnecessary to provide expressly for this.

11.6 The concept of legitimation by subsequent marriage would also cease to have any meaning, because everyone would already be legitimate by operation of law, and the Legitimation (Scotland) Act 1968 would therefore be repealed. Its provisions would, in any event, even if no change were made in the underlying concepts, be quite inappropriate in a new code. It proceeds on the assumption that legitimacy carries with it a whole bundle of rights and obligations. That is no longer so and the Act is now an anachronism.

11.7 If the above changes were made then clearly declarators of legitimacy, illegitimacy or legitimation would be unnecessary and inappropriate. References to them, including the references in section 7 of the 1986 Act, would fall to be repealed. Declarators of parentage would, of course, continue to be available and so would declarators of marriage. If anyone wished to obtain a declarator, for any purpose, that he or she was the child of particular parents and that his or her parents were married to each other then this could be done by means of a combined action.

11.8 These changes would simplify and, in our view, improve the law. There would, however, continue to be references to legitimate or legitimated persons, and possibly also to illegitimate persons, in some old or foreign enactments and deeds. Some content would have to be given to these. It would, however, be easy enough to provide that where, for any legal purpose, a reference was made, directly or indirectly, to a legitimate person it would be taken to be a reference to a person whose parents were married to each other at the time of that person's

conception or birth or at any time in between. Similarly, a reference to a person legitimated by the subsequent marriage of his or her parents would be taken to be a reference to a person whose parents had married each other after that person's birth. Any reference to an illegitimate person would have a corresponding meaning - that is, it would be taken as a reference to a person whose parents had never been married to each other at any time since the time of the person's conception. All of this would be subject to the rules on the effects of adoption, noted below. We deal with choice of law rules later. We would hope that, in future deeds and enactments in this country, references to legitimate, illegitimate or legitimated people would not be made, but rules on the above lines would cater for old deeds and enactments, foreign deeds and enactments and for any exceptional cases arising in future. These rules would replace section 1(4) of the 1986 Act, which achieves similar results but in a way which is not so consistent with the abolition of the status of illegitimacy.

11.9 Minor consequential amendments would also be needed in the Adoption (Scotland) Act 1978. Section 39(1) provides that an adopted child is to be treated as the "legitimate" child of the marriage or (if adopted by one person) as the "legitimate" child of the adopter, and as if he were not the child of any other person. The strong emphasis on legitimacy would be inappropriate, if our earlier suggestions were implemented, and we would suggest that section 39(1) should simply provide that the adopted child should be treated in law as the child of the adopter or adopters (and, where relevant for any legal purpose, as his or their legitimate child) and as if he were not the child of any person other than the adopter or adopters. Section 39(2) provides that

> "Where a child has been adopted by one of his natural parents as sole adoptive parent and the adopter thereafter marries the other natural parent, subsection (1) shall not affect any enactment or rule of law whereby, by virtue of the marriage, the child is rendered the legitimate child of both natural parents."

Again the strong emphasis on legitimacy would be inappropriate. We would suggest that the second part of the subsection (after "natural parent") should simply provide that subsection (1) does not prevent the child from being treated in law as the child of both natural parents. A minor amendment, to remove the reference to a "legitimated person", without changing the substance of the law, would also be required in section 46(2) of the Adoption (Scotland) Act 1978.

11.10 We invite views on the propositions that:

39 Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be amended so as to provide expressly that no person whose status is governed by Scots law should be regarded as illegitimate.

40 The Legitimation (Scotland) Act 1968 should be repealed as unnecessary.

41 References to actions for declarator of legitimacy, legitimation and illegitimacy should be repealed.

42 To cater for exceptional cases where references to "legitimate", "legitimated" or "illegitimate" persons may still be encountered (for example, in old enactments or deeds or foreign enactments or deeds) there should be a

translation of these terms on the lines suggested in paragraph 11.8.

43 Consequential amendments should be made in sections 39 and 46 of the Adoption (Scotland) Act 1978.

Choice of law rules

11.11 The existing choice of law rules on legitimacy and legitimation are uncertain[1] and, in so far as they give primacy to the father's domicile, old-fashioned. They would, in any event, have to be reframed if the status of illegitimacy were abolished. In a new code there ought to be clear new rules adapted to the new substantive law. If the law on domicile were to be reformed as the two Law Commissions have recommended[2] then the basic rule for a child's domicile would be that he or she would be domiciled in the country with which he or she was most closely connected. Where the parents were domiciled in the same country and the child had his home with either or both of them then the child would be presumed to be most closely connected with the country of the parents' domicile. Where the parents were not domiciled in the same country and the child had his home with one of them the child would be presumed to be most closely connected with the country in which the parent with whom he had his or her home was domiciled.[3] If these rules were introduced, as we hope they will be, then it would be possible to have a very simple choice of law rule which would not be biased in favour of the father or the mother but would use the person's own domicile at the relevant time as the connecting factor.

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[1] For the existing law see Anton, pp344-358. The Legitimation (Scotland) Act 1968 uses the domicile of a person's father at the date of the marriage as the main connecting factor in relation to legitimation by subsequent marriage. See s1(1) and s4.

[2] Report on the Law of Domicile (Scot Law Com No 107; Law Com No 168, 1987).

[3] See Scot Law Com No 107 (1987), paras 4.13-4.16.

11.12 We suggest for consideration that:

44 On the assumption that the Law Commissions' recommendations on reform of the law of domicile are implemented, the way, if any, in which a person's status at any time is affected by whether his parents are or have been married to each other should depend on the law of the person's domicile at that time.

PART XII ALIMENT: CHOICE OF LAW

Introduction

12.1 The rules on jurisdiction and recognition and enforcement of foreign judgments in relation to aliment are very largely statutory.[1] They also reflect multilateral or bilateral arrangements with other countries. For this reason, we do not propose to discuss them here. We envisage that the statutory provisions on these matters would remain outside, and unaffected by, the proposed codification of Scottish family law. There is, however, a gap in the statute law in relation to choice of the law governing the obligation of aliment. This is the subject of this part of the discussion paper.

Present law

12.2 There is a remarkable dearth of authority on choice of law in relation to the alimentary obligation. The tendency has been for Scottish courts simply to apply Scots law, often without any consideration of private international law questions.[2] In many cases, of course, the parties would gain no advantage from raising such questions as the other system of law would recognise that, say, a husband was bound to support his wife or a father his child, any differences relating only to matters of procedure or quantification which are generally regarded as being matters for the lex fori in any event. In many cases, too, aliment will arise as an incidental matter in a divorce action and will tend to be subsumed under the rule that the lex fori governs such matters.

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[1] Civil Jurisdiction and Judgments Act 1982, s20 and Sch 8, rules 1 and 2(5); Maintenance Orders Act 1950; Maintenance Orders (Reciprocal Enforcement) Act 1972.

[2] Cf Allsopp v Allsopp (1830) 8 S 1032; Thomson v Thomson (1838) 11 J 165 Finlay v Finlay (1885) 23 SLR 583; Pearce v Pearce (1898) 5 SLT 338; Foxwell v Robertson (1900) 2 F 932; Fraser v Campbell 1927 SC 589; Silver v Walker 1938 SC 595; Allum v Allum 1965 SLT (Sh Ct) 26.

The choice of law question was however clearly raised in one case [1] in which an impecunious man of mature years raised an action of aliment against various relatives including his mother who was resident and domiciled in England. She argued that by English law she was under no liability to support the pursuer. The court accepted the argument that English law applied and sisted the action to allow the opinion of English lawyers to be obtained. Here the law of the domicile of the alimentary debtor was apparently taken as the governing law. In another case[2] a woman claimed damages for seduction and aliment for her child from an Indian prince temporarily resident in Scotland. It was held that her right to recover aliment for her child depended on English law, which was the law of the place where the alleged seduction took place, and which was also the law of her domicile, but which was not the law of the defender's domicile. The case was treated primarily as an action for seduction and was decided on the ground that the acts complained of were not actionable by the lex loci delicti - "the grounds of action having arisen entirely in England, the rights and liabilities of parties must be regulated by English law, and ... as by that law the action was not ... maintainable, it must be dismissed."[3] Two of the judges dealt separately with the aliment issue but seemed to assume that the same principles applied.[4] The case, therefore, is strongly coloured by the delictual approach and is an unsatisfactory authority on aliment as such. A more sophisticated approach was favoured by

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[1] Macdonald v Macdonald (1846) 8 D 830. The pursuer's children were also defenders. Two of the judges were for dismissing the action against them on the ground that they had no means: two were for finding out whether there was any liability by English law, the law of their domicile.

[2] Ross v Sinhjee (1891) 19 R 31.

[3] Ibid per the Lord Justice-Clerk at p37.

[4] Lord Young at p37 and Lord Trayner at p38.

Lord Keith in Jelfs v Jelfs[1] when he referred to Bar's opinion that the law of the residence governed the obligation to aliment although it would give effect to a more extensive duty of support sanctioned by the personal law, the underlying consideration being that "if a man was released from his obligation to maintain his wife, because his personal law knew of no such obligation, or ignored it in the particular circumstances of the case, a foreign wife would now and again require to be supported at the expense of the poor's box."[2]

12.3 The Maintenance Orders (Reciprocal Enforcement) Act 1972 contains special choice of law rules for the purposes of proceedings under Part II of the Act for the obtaining and registering of provisional orders. Section 21 defines a maintenance order as an order for the periodical payment of sums of money towards the maintenance of a person whom the person liable to make the payments is, "according to the law applied in the place where the order was made, liable to maintain." Section 7(2) of the Act provides that a Scottish court asked to confirm a provisional order made by a court in a reciprocating country must recognise those defences, and only those defences, available under the law of that country: a statement of the defences available is sent with the provisional order and must be accepted as conclusive. Similarly, under section 3(5) of the Act, the documents sent from a sheriff court which has made a provisional order against a defender resident in a reciprocating country must include a statement of the defences available under Scots law. The scheme of this part of the Act is that the law of the court making the provisional order applies: given the rules on jurisdiction under Part II, this will also be the law of the pursuer's residence.

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1 1939 SLT 286 at pp288-289.

2 L. von Bar, Private International Law, translated by G R Gillespie, 2nd edn (Edinburgh, 1892) p380.

The Hague Conventions

12.4 The conflicts resulting from the fact that the alimentary obligation was referred by some countries to the law of the debtor's or creditor's nationality and by others to the law of the domicile, to say nothing of the important role played by the lex fori, led to the matter being taken up at the seventh session of the Hague Conference on Private International Law in 1951.[1] A special Commission was set up to draw up an avant-project on the conflicts of laws in relation to alimentary obligations for submission to the eighth session of the Conference in 1956.[2] The Special Commission limited its report to alimentary obligations towards minor children and recommended, as the governing principle, that alimentary obligations towards a child should be regulated by the law of the child's habitual residence.[3] It advanced the following arguments for this solution.

(1) The country of the child's habitual residence is the country in which the child will be brought up. The authorities of that country are best qualified to lay down rules as to when aliment is necessary for a child, to what extent, and for how long. The interests of the child will be best served by bringing it under the law of the country of its habitual residence.

(2) Reference to the law of the child's habitual residence avoids the problem of the father or other alimentary

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[1] See Actes de la Septième Session de la Conférence de La Haye (1951) pp238-242, 401.

[2] Documents relatifs à la Huitième Session (1956) pp124-125.

[3] Ibid pp125-127.

debtor who uses his mobility to establish himself in a country with a favourable law. Minor children tend to be less mobile than their fathers.

(3) If the child cannot obtain aliment it is the country of his residence which will have to support it.

(4) Use of the concept of "habitual residence" requires neither "domicile" countries nor "nationality" countries to abandon their general principles on what constitutes someone's personal law.[1]

The recommended solution proved to be genrally acceptable and was embodied, subject to three qualifications,[2] in a Convention on the Law Applicable to Maintenance Obligations towards Children, signed at the Hague on 24 October 1956.[3] This Convention was not signed by the United Kingdom but it did become operative between nine other Contracting States including the six original members of the European Economic Community.[4] It has now, however, been overtaken by a new convention on the Law applicable to Maintenance Obligations signed at the Hague on 28 March 1973, which applies to all alimentary obligations including those between adults,[5] and which replaced, as between the states

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[1] Ibid p127.

[2]
(1) A Contracting State could declare its own law applicable if the claim was lodged with an authority of that State and both parties were its nationals and the defender had his habitual residence in that State.

(2) A State's normal conflicts rules applied if the law of the child's habitual residence denied him any right to maintenance.

(3) Manifest incompatibility with public policy (l'ordre public) of the state of the forum.

[3] Actes de la Huitième Session (1956) pp348-350, available from HMSO as Cmnd. 4533 (1970).

[4] Cmnd. 4533 (1970) p10.

[5] Available from HMSO as Cmnd. 5467 (1973).

who are parties to it, the convention of 1956.[1] The Convention of 1973 retains the general principle that the law of the alimentary creditor's habitual residence governs the alimentary obligation but it qualifies this in several respects. Its provisions on the applicable law are concise enough, and interesting enough, to be set out verbatim.

ARTICLE 4

"The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1.[2]

In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.

ARTICLE 5

If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the

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[1] Article 18.

[2] Article 1 says that the convention shall apply "to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is illegitimate." However, articles 13 to 15 allow a contracting state to make reservations to the effect that (a) the convention is to apply only to maintenance obligations (i) between spouses and former spouses and (ii) in respect of unmarried children under 21 (b) the convention is not to apply to obligations between persons related collaterally or by affinity or between divorced spouses or separated spouses or spouses whose marriage was annulled if the decree of divorce, separation or nullity was granted by default in a state in which the defaulting spouse did not have his or her habitual residence (c) that the state's own law is to be applied if the creditor and the debtor are both its nationals and the debtor is habitually resident in the state.

law of their common nationality shall apply.[1]

ARTICLE 6

If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seised shall apply.

ARTICLE 7

In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence.

ARTICLE 8

Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations.

The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled.

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[1] Article 16 provides that, if the State of the common nationality has two or more systems of law of territorial or personal application, "reference shall be made to the system designated by the rules in force in that state or, if there are no such rules, to the system with which the persons concerned are most closely connected."

ARTICLE 9

The right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject.

ARTICLE 10

The law applicable to a maintenance obligation shall determine inter alia -

1. whether, to what extent and from whom a creditor may claim maintenance;

2. who is entitled to institute maintenance proceedings and the time limits for their institution;

3. the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.

ARTICLE 11

The application of the law designated by this Convention may be refused only if it is manifestly incompatible with public policy ('ordre public').

However, even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance."

Application of these rules would have produced a different result in the case of Macdonald v Macdonald[1] noted above: the pursuer, habitually resident in Scotland, would have been able to recover

[1] (1846) 8 D 830.

aliment from his mother even although this right was denied by English law, the law of her domicile and residence. It would not have been necessary to look beyond the general rule in Article 4. Ross v Sinjhee[1] would have been slightly more complicated. The pursuer could not have recovered under the general rule in Article 4 because, it appears, she and her child were habitually resident in England and English law allowed no claim. That would have brought in a reference to the rule in Article 5 but it is doubtful if the reference to the common nationality (assuming it to be British) would have given the pursuer a claim.[2] That would have brought in a reference to the rule in Article 6 and the application of Scots law as the internal law of the forum, with the result that the pursuer would have recovered aliment for her child if she had proved her averments. These two examples illustrate the extent to which the Convention rules favour the alimentary creditor, at least if he is not related only collaterally or by affinity to the debtor.[3] However, it should be noted that the same results would have been achieved by simply applying the law of the forum.

Options

12.5 It is tempting to say that the best solution to the problem of choice of law in relation to aliment is simply to apply the lex fori. This is certainly the simplest answer and it means that the same rule would apply to aliment as to financial provision on divorce.[4] In theory, it carries with it the danger of forum

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[1] (1891) 19 R 31.

[2] Because of article 16, referred to in an earlier footnote. The law of the closest connection would presumably have been English law.

[3] See Article 7.

[4] Cf Article 8 of the Draft Convention.

shopping. However, in practice it is very doubtful if that danger would be any greater than under a solution based on the Hague Convention but modified to take account of this country's position in relation to the use of nationality as a connecting factor and in relation to existing policy on the question of alimentary obligations. We shall examine the possibility of a solution based on a modified version of the Hague Convention rules and then return to the option of a simple reference to the law of the forum.

12.6 The solution adopted in the Hague Convention would not be suitable for adoption as it stands in this country because of its references to nationality. However, its basic rule of reference to the law of the alimentary creditor's habitual residence could be adopted as a governing principle. In practice, given that most, if not all, actions for aliment in Scotland are brought by people who are habitually resident in Scotland,[1] that would mean that the court would be applying Scots law. In the rare case where the alimentary creditor is not habitually resident in Scotland it might be right that, as a general rule, the law of his or her habitual residence should govern. However, this general rule ought perhaps to be qualified in relation to obligations of aliment other than those owed to spouses and children. It would seem to be undesirable that a Scottish man should be able to take up residence in a country recognising an obligation of aliment between collaterals and then sue his brother for aliment in Scotland. Similarly, it would not be acceptable if, after a Scottish court had decided on a limited award of financial provision in a Scottish divorce, one of the divorced spouses were to be able to claim aliment from the other in Scotland on the basis of the law of the pursuer's habitual residence which, let us suppose, recognised a lifelong obligation of maintenance between divorced

[1] Under the Civil Jurisdiction and Judgments Act 1982, Sch 8 rule 5(2) the Scottish courts have jurisdiction in "matters relating to maintenance" on the basis of the maintenance creditor's domicile or habitual residence, as well as on the general ground of the defender's domicile available under rule 1.

spouses. We have already noted that articles 7 and 8 of the Hague Convention make exceptions for maintenance obligations between those related collaterally or by affinity, and between divorced spouses, and we think that similar, but perhaps slightly wider, exceptions would have to be built into Scots law.

12.7 We doubt whether it would be necessary to provide, on the analogy of article 5 of the Hague Convention that, if aliment was not obtainable under the law of the creditor's habitual residence, the governing law would be that of the common domicile of the parties. We are not convinced that there is any need to enable, say, a person habitually resident in Scotland but domiciled in a country which imposes an obligation of aliment between collaterals to sue his brother, also domiciled in that country, for aliment in a Scottish court. Such cases would be extremely rare and would not, in our view, justify a departure from the general rule.

12.8 There might, however, be a real need to provide, on the analogy of article 6 of the Hague Convention, that if aliment could not be obtained under the law of the creditor's habitual residence, Scots law should apply as the law of the forum. The reason for this is that English law does not recognise that a parent is under any enforceable obligation to aliment his or her child, but merely provides that in certain situations courts may make orders for maintenance.[1] It would be unfortunate if, say, a teenage child habitually resident in England had to be denied aliment by a Scottish court which had jurisdiction on the basis of the parent's domicile in Scotland on the rather technical argument that, although various statutory remedies might be available in England, there was no actual enforceable alimentary obligation. A proviso on the lines of article 6 might also be useful in the case

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[1] See Bromley's Family Law (7th edn, 1989) p588.

of adult children under 25 undergoing further education or training and in relation to children accepted by a person as children of his family.[1] Not all foreign countries would recognise an obligation of aliment in these cases.

12.9 A solution based on the law of the creditor's habitual residence would also have to be subject to an exception for the rules in the Maintenance Orders (Reciprocal Enforcement) Act 1972 noted above, and possibly also to an exception (as in the Hague Convention) for the rights of the state in seeking reimbursement from a liable relative of benefits provided for the alimentary creditor. These exceptions would again mean the application of Scots law as the law of the forum.

12.10 The result of modifying a Hague Convention solution on the above lines would be that the basic rule referring to the law of the alimentary creditor's habitual residence would be qualified by provisos to the effect that

(a) a person domiciled in Scotland would not be liable to be sued in a Scottish court for aliment for anyone whom he or she is not bound to aliment under Scots law

(b) an alimentary creditor who could not recover aliment in Scotland by reference to the law of his or her habitual residence would be able to recover aliment by reference to Scots law if Scots law provided for aliment to be payable in the circumstances

(c) the state would be able to rely on Scots law to recover from a liable relative in respect of benefits paid to the alimentary creditor

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[1] Cf Family Law (Scotland) Act 1985, s1(1) and (5).

(d) the choice of law rules in Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (which apply the law of the court making a provisional order) would be preserved.

Conclusion

12.11 It seems clear that, whatever the theoretical merits of having a choice of law rule which applied even in the absence of court proceedings, the practical effects of a suitably modified version of the Hague rules would be almost the same as those which would be achieved by a simple provision to the effect that a Scottish court should apply Scots law in dealing with any claim for aliment. As the latter solution would be simpler and easier to apply and more directly in line with current practice we think that it is the more sensible solution to propose at this time. We therefore suggest for consideration that:

45 **It should be provided that, subject to the provisions of the Maintenance Orders (Reciprocal Enforcements) Act 1972, courts in Scotland should apply the internal law of Scotland in dealing with claims for aliment.**

PART XIII - OTHER MATTERS

13.1 As we mentioned in Part I one advantage of a general pre-consolidation review of family law is that it provides an opportunity to make any minor modifications to existing provisions in the light of experience. We therefore invite responses to the following general question. In answering it, respondents may wish to bear in mind that we propose to publish separate discussion papers on Child Law and on The Effects of Cohabitation in Private Law.

46 Are there any other rules of Scottish family law which could usefully be amended, without affecting basic policy, as part of a pre-consolidation review?

PART XIV - SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

1(a) Should marriage by cohabitation with habit and repute be retained or abolished?

(b) If it is to be retained, should there be any changes - for example, specification of a minimum period of cohabitation; clarification of the date when the marriage comes into existence; removal of the "repute" requirement - designed to remove the present uncertainties in the law and increase the availability of this type of marriage?

2 It should continue to be a ground of nullity of marriage that either party is at the time of the marriage already married.

3 It should continue to be a ground of nullity of marriage that either party is, at the time of the marriage, under the age of 16.

4 It should continue to be a ground of nullity of marriage that both parties are of the same sex.

5 It should continue to be a ground of nullity of marriage that the parties are within the prohibited degrees of relationship specified in the Marriage (Scotland) Act 1977, subject, however, to the removal of the remaining limited prohibition on marriage between a person and the parent of his or her former spouse.

6 There should continue to be a general rule that a marriage is void if not entered into in a way recognised by the law as sufficient to constitute a marriage, but this general rule should be subject to a proviso on the lines of section 23A of the Marriage (Scotland) Act 1977, to the effect that a duly registered marriage, where both parties were present at the ceremony, is not invalid by reason only of any failure to comply with any legal preliminaries or formal requirements or by reason of any lack of qualification on the part of the celebrant.

7 (a) Subject to the subsidiary rules suggested below, a marriage should be void if, because of mental incapacity, error, duress or other reason either party does not freely consent to marry the other party.

(b) (i) A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.

(ii) A person should be conclusively presumed not to have been under a temporary mental incapacity at the time of the marriage ceremony if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity.

(c) (i) A marriage should be void on the ground of error only if at the time of the ceremony either party was in error as to the nature of the ceremony or the identity of the other party.

(ii) A party should be regarded as being in error as to the identity of the other party only if he or she mistakenly believed that the other party at the ceremony was the person whom he or she had agreed to marry, regardless of the name or qualities of that person.

(iii) A person should be conclusively presumed not to have been in error as to the nature of the ceremony or the identity of the other party to the marriage if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after discovering the error.

(d) (i) A marriage should be void on the ground of duress only if one party was forced against his or her will to marry the other party.

(ii) A person should be conclusively presumed not to have been forced against his or her will to marry the other party if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after the duress ceases to have effect.

(e) (i) Without prejudice to the rules recommended above, a marriage should not be void merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

8 Given the availability of divorce as a remedy for the irretrievable breakdown of marriage it is no longer necessary or desirable to retain impotency as a ground on which a marriage is voidable.

9 There should be no new grounds on which a marriage is voidable in Scots law.

10 Actions for declarator of marriage or nullity of marriage should be competent in the sheriff courts.

11 The remedy of an action for declarator of freedom and putting to silence should be abolished.

12 (a) Would it be useful to provide by statute for the competency of a declarator as to whether a divorce, annulment or legal separation obtained outside Scotland is entitled to recognition in Scotland?

(b) If so, should the rules as to jurisdiction, title to sue and the effect of the decree be the same as in the case of a declarator of marriage?

13 Section 2(2) of the Law Reform (Husband and Wife) Act 1962 (which gives the court power to dismiss proceedings between spouses in delict if it appears that no substantial benefit would accrue to either party) is anomalous and unnecessary and should be repealed.

14 (a) Are the provisions on dealings in sections 6 to 9 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 satisfactory?

(b) Should sections 6 to 9 be repealed and replaced with provisions whereby

(i) a court could, on the application of a non-entitled spouse within, say, 6 months after a dealing, reduce or set aside any dealing by the entitled spouse relating to the matrimonial home if satisfied that it was entered into without the consent of the non-entitled spouse and that its purpose was wholly or mainly to defeat the occupancy rights of the non-entitled spouse;

(ii) the court's power would be subject to a provision that a dealing could not be reduced or set aside if to do so would prejudice any rights of a third party who has in good faith acquired the home or any interest in it for value, or the rights of anyone deriving title from any such third party;

(iii) a person would be regarded as being in good faith unless he or she knew, or had information which

would have led a reasonable person to conclude, that the purpose of the dealing was wholly or mainly to defeat occupancy rights;

(iv) there would be an exclusion of indemnity under the Land Registration Act 1979 if a title were reduced under these provisions;

(v) a court could, if necessary, grant a declarator that the purpose of a proposed dealing was not wholly or mainly to defeat occupancy rights;

(c) Alternatively, should sections 6 to 9 be retained but amended so as to

(i) make it clear that they do not affect subsequent purchasers or lenders acting in good faith;

(ii) shorten the period in section 6(3)(f);

(iii) clarify the meaning of "proposed dealing" and

(iv) give a court which refuses to dispense with a non-entitled spouse's consent power to order that spouse to make payments in lieu of rent?

(d) Should protection against dealings apply to divorced spouses with occupancy rights and, if so, what form should it take?

(e) Should any other changes be made in relation to sections 6 to 9?

15 The occupancy rights of a non-entitled spouse in a home should terminate if the spouses have been separated for a continuous period of one year during which period the non-entitled spouse has neither occupied the home nor been engaged in court proceedings to assert his or her occupancy rights.

16 (a) Should the definition of "matrimonial interdict" in section 14(2) of the 1981 Act be extended so that paragraph (b) would apply not to a "matrimonial home" but to any home occupied by the applicant spouse?

(b) Should paragraph (b) of the definition apply also to the applicant spouse's place of work, or to the school which his or her children attend, or both?

17 It should continue to be the case that the attachment of a power of arrest to matrimonial interdicts should not be mandatory in all cases.

18 Where a power of arrest is attached to an interdict the police should continue to have a discretion as to whether or not to arrest where a breach is reasonably suspected.

19 A power of arrest attached to a matrimonial interdict should not cease to have effect on the termination of the marriage but should cease to have effect 5 years after the date when the power was granted.

20 The definition of "matrimonial interdict" should be wide enough to cover an interdict against molestation of a former spouse or against entering or remaining in a home occupied by that former spouse.

21 The complicated procedure laid down by section 17 of the 1981 Act for the situation where a person has been arrested for breach of a matrimonial interdict should be replaced by a much simpler provision giving authority to the police to detain the arrested person for up to 48 hours.

22 It should be made clear in the definition of "matrimonial home" that that term does not include a residence provided or made available by anyone for one spouse to reside in, whether with any child of the family or not, separately from the other spouse.

23 It should be made clear that the definition of "matrimonial home" includes any ground or building which is required for its amenity or convenience even if not attached to it.

24 Are there any other amendments which should be made to the 1981 Act?

25 Judicial separation should be abolished.

26 The reference in section 1(3) of the Divorce (Scotland) Act 1976 to adultery which "has been connived at in such a way as to raise the defence of lenocinium" should be replaced by a reference to adultery which has been actively promoted or encouraged by the pursuer.

27 There is no need to retain collusion as a bar to divorce.

28 In an action for divorce on the basis of 5 years' separation it is not now necessary or desirable for a court to have power to refuse a divorce on the ground that, in the opinion of the court, the grant of decree would result in grave financial hardship to the defender.

29 Subject to the Foreign Marriage Acts 1892 to 1988, the question whether a marriage is formally valid should be governed by the law of the place of celebration.

30 Subject to proposal 31 below, and to section 50 of the Family Law Act 1986 (effect of divorce), the question whether a marriage is essentially invalid because either party was under a legal incapacity to enter into it or did not give a legally effective consent to it should be governed by the law of that party's domicile immediately before the marriage.

31 A marriage entered into in Scotland should be invalid, no matter what the domiciles of the parties, if, according to Scottish internal law, at the time when the marriage was entered into

(a) the parties were within the forbidden degrees of relationship,

(b) either party was already married,

(c) either party was under the age of 16,

(d) the parties were of the same sex, or

(e) because of mental incapacity, error, duress or other reason either party did not effectively consent to marriage

but, without prejudice to the law on error or duress, should not be invalid merely because one or both parties went through the ceremony of marriage with a tacit mental reservation to the effect that notwithstanding the nature and form of the ceremony no legal marriage would result from it.

32 A rule requiring a person under a certain age to obtain the prior consent of a parent or guardian before he or she can marry should be regarded as resulting in a legal incapacity for marriage if, but only if, it precludes a marriage by that person anywhere in any form while under that age.

33 Where, on the application of the above rules, a marriage is initially valid it should not be annulled or declared null by a Scottish court on any ground other than incurable impotency (if that is retained as the sole ground on which a marriage is voidable in Scots law).

34 A foreign rule as to the validity or invalidity of a marriage should not be recognised or applied in Scotland where to do so would be contrary to Scottish public policy.

35 The effect, if any, which marriage has on a person's capacity and obligations (other than the obligation of aliment, which is considered separately later) should be determined by the law governing that person's capacity and obligations generally.

36 The effect, if any, which marriage has on the spouses' property should be determined, in the case of immoveable property, by the law of the country where that property is situated and, in the case of moveable property, by the law of the spouses' common domicile. Where the spouses do not have the same domicile marriage should have no automatic effect on their moveable property.

37 The rules in the preceding proposition should be subject

(a) to any agreement between the spouses, and

(b) to the proviso that a change of domicile by one or both spouses should not affect either spouse's vested rights in property.

38 Notwithstanding the rules in the preceding propositions, the question whether a person is entitled to the benefit of protective rules relating to the occupation or use of the matrimonial home (whether moveable or immoveable) or its contents should be determined by the law of the country where the matrimonial home is situated.

39 Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 should be amended so as to provide

expressly that no person whose status is governed by Scots law should be regarded as illegitimate.

40 The Legitimation (Scotland) Act 1968 should be repealed as unnecessary.

41 References to actions for declarator of legitimacy, legitimation and illegitimacy should be repealed.

42 To cater for exceptional cases where references to "legitimate", "legitimated" or "illegitimate" persons may still be encountered (for example, in old enactments or deeds or foreign enactments or deeds) there should be a translation of these terms on the lines suggested in paragraph 11.8.

43 Consequential amendments should be made in sections 39 and 46 of the Adoption (Scotland) Act 1978.

44 On the assumption that the Law Commissions' recommendations on reform of the law of domicile are implemented, the way, if any, in which a person's status at any time is affected by whether his parents are or have been married to each other should depend on the law of the person's domicile at that time.

45 It should be provided that, subject to the provisions of the Maintenance Orders (Reciprocal Enforcements) Act 1972, courts in Scotland should apply the internal law of Scotland in dealing with claims for aliment.

46 Are there any other rules of Scottish family law which could usefully be amended, without affecting basic policy, as part of a pre-consolidation review?

APPENDIX

DRAFT OUTLINE

OF

A COMPREHENSIVE FAMILY LAW BILL FOR SCOTLAND

PART I

MARRIAGE

1.1 Engagement to marry.

Provisions based on Law Reform (Husband and Wife) (Scotland) Act 1984.

1.2 Formation of marriage.

Provisions based on Marriage (Scotland) Act 1977 with some rationalisation.

Either codify existing law on marriage by cohabitation with habit and repute or abolish that form of marriage.

1.3 Nullity of marriage.

Codify existing law on void marriages, possibly with minor changes.

Either codify existing law on voidable marriages (impotency) or abolish.

1.4 Actions relating to validity of marriage.

Restate competency of actions for declarator of marriage or nullity, possibly extending to sheriff courts.

Restate competency of, or abolish, actions for declarator of freedom and putting to silence.

Need for evidence.

(Take in from section 8 of Civil Evidence (Scotland) Act 1988).

Power to award financial provision in action for declarator of nullity.

(Take in from section 17 of Family Law (Scotland) Act 1985.)

Effects of decree.

Restate law.

1.5 Legal effects of marriage in private law.

Equality of spouses.

State general principle of legal equality and independence of spouses in private law and that accordingly husband and wife can have different domiciles, are not, save in accordance with specific statutory provisions or the general law on obligations, liable for each other's debts, and can contract with each other and sue each other as if they were unmarried.

(This would replace the Law Reform (Husband and Wife) Act 1962 (without the proviso), section 1 of the Domicile and Matrimonial Proceedings Act 1973, and much of the Law Reform (Husband and Wife) (Scotland) Act 1984).

Capacity and property - take in section 24 of Family Law (Scotland) Act 1985.

Aliment - state general rule but leave details to Part IX.

Matrimonial home - take in occupancy rights provisions from Matrimonial Homes (Family Provisions) (Scotland) Act 1981 - possibly with amendments.

Household goods - take in section 25 of Family Law (Scotland) Act 1985.

Savings from housekeeping allowance.

Take in section 26 of Family Law (Scotland) Act 1985.

Policies of assurance.

Take in from Married Women's Policies of Assurance (Scotland) Act 1880.

Protection from domestic violence.

Take in matrimonial interdicts provisions from Matrimonial Homes (Family Provision) (Scotland) Act 1981.

1.6 Judicial separation.

Either restate law or abolish.

1.7 Divorce

Competent in Court of Session or sheriff courts.

Ground - as recommended in our report on Reform of the Ground for Divorce 1989.

Defences and bars - restate existing law, possibly with modernisation of lenocinium, possibly dispensing with collusion as a separate bar, and possibly repealing s1(5) of Divorce (Scotland) Act 1976.

Need for evidence and standard of proof.

(Take in from section 8 of Civil Evidence (Scotland) Act 1988, and section 1(6) of Divorce (Scotland) Act 1976.)

Financial provision.

(Refer forward to Part II.)

1.8 Private international law.

Restate rules on jurisdiction in actions for divorce, declarator of marriage or nullity of marriage - at present in Domicile and Matrimonial Proceedings Act 1973.

Restate rules on jurisdiction in actions for judicial separation and declarator of freedom and putting to silence (if those remedies are retained).

Codify, and clarify, choice of law rules on validity of marriages.

New choice of law rules on legal effects of marriage.

Restate choice of law rule on divorce (and judicial separation, if retained) - law of forum.

Recognition of foreign divorces, annulments and separations.

Take in from Part II of Family Law Act 1986.

PART II

ALIMENT AND FINANCIAL PROVISION ON DIVORCE

Take in from Family Law (Scotland) Act 1985.

Add private international law provisions including rules on financial provision after foreign divorce taken from Part IV of Matrimonial and Family Proceedings Act 1984.

PART III

LEGAL EFFECTS OF COHABITATION

To be considered in separate discussion paper.

PART IV

PARENTAGE

4.1 Establishing parentage.

May be established by proof on balance of probabilities.

Presumptions.

Take in from section 5 of Law Reform (Parent and Child) (Scotland) Act 1986.

Consent to sample.

Take in from section 6 of 1986 Act.

4.2 Legal equality of children regardless of marital status of parents.

Take in from section 1 of 1986 Act, with slight modifications to make it clear that status of illegitimacy is abolished and to enable Legitimation (Scotland) Act 1968 to be repealed.

4.3 Declarators relating to parentage.

Take in from section 7(1) and 7(4) to (6) of 1986 Act.

Possibly abolish actions for declarator of legitimacy, legitimation or illegitimacy, as nominate actions, without prejudice to courts' general powers to grant declarators.

4.4 Parental rights and duties.

To be considered in separate discussion paper.

4.5 Private international law.

Jurisdiction in actions for declarator of parentage etc. Take in from section 7(2) and (3) of Law Reform (Parent and Child) (Scotland) Act 1986.

New choice of law rules on parentage.

PART V

PARENTAL RIGHTS AND DUTIES: GUARDIANSHIP CUSTODY AND ACCESS

To be considered in separate discussion paper.

PART VI

ADOPTION

Take in from Adoption (Scotland) Act 1978.

PART VII

FOSTERING

Take in from Foster Children (Scotland) Act 1984.

PART VIII

LOCAL AUTHORITY'S POWERS AND DUTIES IN RELATION TO CARE OF CHILDREN

Either consolidate existing legislation (mainly in Social Work (Scotland) Act 1968) with amendments proposed by Child Care Law Review Group or leave out on ground that part of local government law rather than private law.

PART IX

INTERPRETATION ETC.

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