

The Law Commission

(LAW COM. No. 15)

**THIRD ANNUAL REPORT
1967-1968**

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3 (3) of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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THE LAW COMMISSION
THIRD ANNUAL REPORT: 1967-68

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THE LAW COMMISSION

THIRD ANNUAL REPORT: 1967-68

*To the Right Honourable the Lord Gardiner,
Lord High Chancellor of Great Britain*

My Lord,

We have the honour to present our Third Annual Report pursuant to section 3(3) of the Law Commissions Act 1965. The Report relates to the year ending 15th June 1968.

INTRODUCTION

1. During the year under review you approved our Second Programme of Law Reform, which was submitted on 14th November 1967. This programme makes two major additions to our work: the Codification of the Criminal Law, a task which is to be shared between the Commission and the Criminal Law Revision Committee; and an extension of our Family Law investigation to include a comprehensive examination of this branch of the law with a view to its systematic reform and eventual codification.

2. Part I of this Report contains a detailed progress report on the Items in our law reform programme; Part II gives an account of work done on miscellaneous law reform proposals and requests for advice outside our programmes; Part III reviews the work done in the field of Consolidation and Statute Law Revision; and in Part IV we outline briefly the year's developments in the organisation and working methods of the Commission.

3. The Commission's responsibilities are threefold. In law reform we are engaged in the examination of the topics listed in the two Programmes: additionally, we have to consider proposals for law reform made to us by others, whether or not they relate to programme items. Secondly, we are concerned with improving the state of statute law through the repeal of obsolete and unnecessary enactments and the reduction of the number of separate enactments. These tasks are governed by the comprehensive programme of Consolidation and Statute Law Revision which you approved in November 1965. Thirdly, we have a duty to provide advice and information to Government Departments and others concerned at the instance of the Government with proposals for the reform or amendment of the law.

4. Under the law reform programme we have submitted one final report—"Civil Liability for Animals".¹ We expect to submit several further reports in the next year, though they will continue to be outnumbered by the working papers published. Our role in law reform demands research and then consultation. The working paper marks the transition from research to consultation.

¹ LAW COM. No. 13.

Only when consultations are complete are we in a position to proceed to a final report and the formulation of legislative proposals.

5. The statute law programme has seen two milestones passed this year: a consolidated Rent Act is now on the statute book; and the first stage of the Income Tax consolidation has been reached by the enactment of the Capital Allowances Act.

6. During the year, Government Departments have increasingly sought our advice on questions of law reform.

7. Generally we are able to report progress over the whole range of our responsibilities.

PART I

LAW REFORM PROGRAMMES: REPORT ON PROGRESS

8. Items I–XVII derive from our First Programme of Law Reform and Items XVIII–XX from our Second. We include in Appendix I lists of the Commission's papers that have been (a) laid before Parliament under sections 3(2) and (3) of our Act, (b) presented to Parliament as Command Papers or (c) produced by the Commission as Published Working Papers.

Item I. Codification of the Law of Contract

9. Two meetings were held in Edinburgh in September and January with the Scottish Law Commission and the Scottish members of the Advisory Panel.² A draft dealing with remedies has already been circulated to the Advisory Panel as a whole for comment and criticism. It was convenient to embark first on this part of the subject while discussions were taking place on more fundamental questions. Following these discussions, we have turned to the central core of the Code and our preliminary drafts dealing with formation of contracts and with third party rights are well advanced. Here we face the problem not only of modernising the present law but also that of reconciling certain basic differences between English and Scots law. Since both Commissions and their advisers are conscious of the defects as well as the merits of their own systems and are rapidly being educated in the defects and merits of the other, we are hopeful that it will prove possible to suggest solutions which are an improvement on both.

10. The joint team has kept in close touch at all times with the work proceeding under Item II on Exemption Clauses, which necessarily impinges upon the work of codification. The draft Laws on International Agency (see paragraph 69(i)) are also of relevance, and here too the closest liaison has been maintained.

Item II. Exemption by Contract from Common Law Liabilities

11. The Joint Working Party³ of the Law Commission and the Scottish Law Commission has completed its examination of proposed amendments to sections 12–15 of the Sale of Goods Act 1893 and of possible restrictions upon the right to contract out of the conditions and warranties implied by those sections. In January of this year the Working Party submitted to the two Law Commissions an Interim Report on these two topics. After consideration of this Report, the two Commissions have published a Joint Working Paper⁴ putting forward a number of preliminary proposals and seeking views on a number of questions.

² The constitution of this Panel is described in paragraph 31 and Appendix II of our Second Annual Report.

³ Its composition is as set out in Appendix I to our First Annual Report, except that Mr. W. M. H. Williams resigned because of a professional commitment involving frequent absences from the United Kingdom and was replaced by Mr. J. H. Walford.

⁴ Published Working Paper No. 18.

12. Meanwhile the Joint Working Party is proceeding with the examination of exemption clauses found in contracts for the supply of services, and in particular of clauses which purport to exclude or limit liability for negligence. We are grateful to the British Insurance Association and to Lloyds, who were good enough to arrange for experts in the relevant fields of insurance to meet the Commission's representatives on the Working Party and to give them the benefit of their experience and advice.

Item III. Consideration, Third Party Rights in Contract and Contracts under Seal

13. This Item has been merged for working purposes with Item I (Codification of Contract).

Item IV. Civil Liability for Dangerous Things and Activities

14. The publication of a Working Paper on this complex subject has been delayed by the heavy demands made on our resources by other Items in our programme. We have, however, completed that part of the Working Paper which reviews the nature and incidence of the liability at common law at present attaching to certain dangerous things and activities. This has required examination not only of the rules of strict liability laid down in *Rylands v. Fletcher* but also of a number of allied topics, including liability for fire, nuisance (with special reference to dangers affecting the highway) and liability for the negligence of independent contractors. We have published our proposals on the liability relating to one type of dangerous activity, keeping dangerous animals, under Item V below, and are now considering other situations of special risk, with a view to providing a more comprehensive, rational and consistent treatment. We hope to publish a Working Paper before the end of 1968.

Item V. Civil Liability for Animals

15. We completed our study of this branch of the law and our recommendations were contained in a Report⁵ laid before Parliament on 19th December 1967. Attached to the Report was a draft Bill to give effect to our recommendations.

16. Our two main recommendations concerned liability for highway accidents caused by straying animals and liability for dangerous animals. As to the first, we proposed that the rule in *Searle v. Wallbank* [1947] A.C. 341, whereby there is no duty to take reasonable care to prevent one's animals causing damage by straying on to the highway, should be abolished: however, in determining whether there has been a breach of the duty to take care, the court should have regard to a number of special considerations. As to the second, we proposed that the principle of the common law imposing strict liability for animals belonging to a dangerous species or with known dangerous characteristics should be retained but restated and modified in order to avoid the obscurities and technicalities of the present law. Our other recommendations involved changes in the law relating to liability for straying livestock, liability for dogs which injure livestock, the right to detain straying livestock as security for damage done and the right to shoot dogs in order to protect livestock.

⁵ LAW COM. No. 13.

Item VI. Personal Injury Litigation

(a) Jurisdiction and procedure

17. The Committee, under the chairmanship of Lord Justice Winn, which was appointed on 12th January 1966, has now completed its task and submitted its report on 27th May 1968, thus completing the investigation recommended in our First Programme.

(b) Assessment of damages

18. We have made progress in three directions:

- (i) We have circulated, in two instalments and to a limited number of experts, a paper containing a detailed study of the existing law and a survey of suggestions for possible reforms, such as a system of periodic payments to replace, or be used in combination with, the present system of lump sum awards; the "itemisation" of awards; the fuller use of scientific aids (e.g. actuarial evidence) in the assessment of damages; and the establishment of a scale of damages applicable to different types of injury. On all these matters we have received a large number of helpful comments.
- (ii) We have virtually completed the collection of relevant comparative materials. In this, we have received invaluable help from the British Institute of International and Comparative Law and from a number of individual experts in Europe and North America who have generously given of their time to answer the comprehensive questionnaire we had submitted to them.
- (iii) Our project of a survey into the social and economic effects of awards of compensation in personal injury cases has been actively pursued during the period now under review. Under the direction of the Government Social Survey Department a firm of social survey consultants has carried out a feasibility study based on a random sample; their report is at present under examination.

19. The paper referred to under 18(i) above is now being developed into a Working Paper.

Item VII. Civil Liability of Vendors and Lessors for Defective Premises

20. By the end of 1967 consultation on our Published Working Papers had been completed and we were able to reach conclusions as to the area in which reforms are needed. Since then we have considered the extent of the legislation which is required, taking into account the growth of the protection scheme introduced by the National House-Builders' Registration Council to which we referred in our last Report.⁶ Draft clauses and our final Report on this subject are now in preparation.

⁶ See paragraph 54 of our Second Annual Report.

Item VIII. Codification of the Law of Landlord and Tenant

21. The Working Party⁷ has been meeting once a month and has continued to discuss specific topics so as to formulate provisional proposals for purposes of consultation.

(a) Obligations of landlords and tenants

22. Circulation of our Working Paper⁸ on this topic elicited a large number of replies most of which welcomed the idea of a code of obligations between landlords and tenants. When we have received certain comments which are outstanding, we hope to formulate some firm proposals.

(b) Termination of tenancies

23. The greater part of the Working Party's time has been spent on this subject, which includes such difficult matters as forfeiture, frustration and notices to quit. Provisional proposals have now been embodied in a Working Paper⁹ which was published in April. This Paper covers, among other things, the problem of rent accruing while proceedings for possession are pending.¹⁰

(c) Covenants

24. The Working Party has now turned its attention to two further topics: covenants and fire insurance. The former involves the question whether landlords should be able to impose absolute covenants against assignment, subletting, change of user and making alterations or improvements, or whether such covenants should be construed as qualified covenants requiring the tenant to obtain the landlord's consent which must not be unreasonably withheld. The second topic covers the consequences which should follow, on destruction of the demised premises by fire, according to whether it is the landlord or the tenant who has undertaken to insure.

(d) Landlord and Tenant Act 1954, Part II

25. Consultation on the Working Party's proposals for amendments to this Act was mentioned in paragraph 62 of our last Report. Having taken account of the views expressed on those proposals and the additional points suggested to us, we have formulated our recommendations. Draft clauses are now being prepared and the Report will be submitted when these are ready.

(e) Disclaimer of leases in bankruptcy and liquidation

26. A preliminary study has been made, in the course of which we have had consultations with the Board of Trade and with specialists in this field. The results of the study will be considered by the Working Party.

⁷ Its composition is set out in Appendix I to our First Annual Report, but as we forecast in a footnote to paragraph 55 of our last Report it has been augmented by the addition of five new members: Mr. W. N. D. Lang and Mr. P. S. Edgson, nominated by the Committee of the Chartered Land Societies; Mr. D. S. Gordon and Mr. J. Austin, representing respectively the Lord Chancellor's Office and the Ministry of Housing and Local Government; and Mr. M. G. Dunnett, Chief Surveyor of the Estate Department of the Prudential Assurance Co. Ltd.

⁸ Published Working Paper No. 8.

⁹ Published Working Paper No. 16.

¹⁰ See paragraph 66 of our Second Annual Report.

(f) Notices to quit as a prerequisite of variation of rent in periodic tenancies

27. In our Second Annual Report¹¹ we referred to the advice which we had given to the Minister of Housing and Local Government on this question. Clause 12 of the current print of the Government's Prices and Incomes Bill contains provisions, broadly on the lines which we had suggested, to deal with the problem in its relation to local authorities. Enactment of that clause would remove the difficulties in that limited field for the time being, while the general question of variation of the terms of a tenancy remains to be considered.

Item IX. Transfer of Land

28. Our land law team spent much time during the year in considering the form of the common code which we suggested¹² should be introduced to deal with restrictive and positive covenants. We have taken the view that it would be better to postpone preparation of the proposed code for land obligations until it can be seen, as a result of our study of appurtenant rights, whether it should cover a wider field, including, for example, easements and profits-à-prendre. In the meantime, we recognise the urgent need for legislation to implement the proposals of the Wilberforce Committee on Positive Covenants; we would welcome the inclusion in any such legislation of provisions to amend section 84 of the Law of Property Act 1925 as recommended in proposition 9 of Law Com. No. 11 so as to widen the powers of the Lands Tribunal to modify or discharge restrictive covenants.

29. We have made progress with our study of appurtenant rights. As in the case of restrictive covenants, we formed a consultative group¹³ of lawyers and surveyors with expert knowledge of the principles and practice of this branch of the law to consider studies prepared by our team. These papers have covered such matters as the extension of the provisions of the London Building Acts relating to party structures, implied grant and reservation, the general words of section 62 of the Law of Property Act 1925, as well as prescription in the light of the recommendations of the Law Reform Committee.¹⁴ Our tentative views, formed after discussions with the consultative group, will be embodied in a Working Paper.

30. Consultation has been completed on our Working Paper on land charges, other than local land charges, and a Report is in preparation. That Working Paper also contained provisional proposals relating to local land charges. We discussed these and related matters at a meeting held with representatives of local authority associations. Members of our land law team also visited the County Borough of West Bromwich at the invitation of the Town Clerk, Mr. J. M. Day, to study the work which is there being done on the computerisation of information relating to local land charges and to the supplementary enquiries which are commonly made of the local authority in conveyancing transactions. We are grateful to Mr. Day for his help and for the valuable experience which we gained. We have yet to complete consultations which will

¹¹ In paragraphs 64 and 65.

¹² See LAW COM. No. 11, page 26.

¹³ For the membership of this group see Appendix II.

¹⁴ Fourteenth Report (Acquisition of Easements and Profits by Prescription). Cmnd. 3100, 1966.

enable us to reach a final conclusion as to what changes may be necessary in the law relating to local land charges.

31. The Law Society's memoranda on conveyancing reform¹⁵ contained some proposals which were relevant to our specific studies in this Item. They also contained a number of miscellaneous points which we shall be considering later. Since, however, these memoranda were prepared before the Misrepresentation Act 1967 was passed, The Law Society are now re-examining their proposals in the light of that Act. They have also undertaken to give us some amplification of their proposal for avoiding the accidental creation of strict settlements.¹⁶

32. Upon the subject of rentcharges, we have had meetings with the Chief Land Registrar and with representatives of the Ministry of Agriculture, Fisheries and Food, of The Law Society and of the Committee of the Chartered Land Societies. Rentcharges are common in some areas, like Bristol and Manchester, but rarely found in others and we have been greatly assisted in our study of this subject by Mr. N. C. O'Brien and Mr. R. V. B. Webb, solicitors of Manchester, and by Mr. J. E. Adams and a group of his solicitor colleagues in Bristol. We have also received information from the Board of Inland Revenue, the Charity Commission and the Department of Education and Science, all of whom have special interests in the subject. We are in the course of formulating proposals which will soon be published as a Working Paper.

33. In October 1967 your Office sent us for information and comment a draft of some regulations relating to leasehold enfranchisement which were to be made under section 22 of the Leasehold Reform Act 1967. We examined these in detail from the conveyancing standpoint and suggested certain amendments.

Land Registration

34. In our review of the basic principles of the law relating to land registration in the context of conveyancing,¹⁷ we have so far mainly concentrated on obtaining views on the working of the existing system and suggestions for its improvement. We have sought these not only from those who are concerned with the day-to-day practice of land registration in the legal profession but also from those who are concerned in other capacities with the principles of the system. Among those whom we have consulted are the Chartered Land Societies, the nationalised industries, banks, the British Insurance Association, the Building Societies Association, the Confederation of British Industry, the National Chamber of Trade and organisations representing local authorities, property and land owners and farmers. In addition, some of the larger companies which are engaged in land development have been approached individually. We have also conferred with the Chief Land Registrar and received the benefit of his views. The response to our enquiries and to the publicity given in the legal press has been encouraging and we have already received much useful material. When this and further material that we expect shortly to receive has been analysed we shall be in a position to assess the nature and size of the problem and to publish a Working Paper.

¹⁵ Receipt of which we acknowledged in our last Report.

¹⁶ First Memorandum on Conveyancing Reform, paragraphs 53 and 54.

¹⁷ See paragraph 68 of our Second Annual Report.

Item X. Family Law

Item XI. Financial Limits on Magistrates' Orders in Domestic and Affiliation Proceedings

Item XII. Recognition of Foreign Divorces, Nullity Decrees and Adoptions

} These Items are dealt with under Item XIX below.

Item XIII.¹⁸ Imputed Criminal Intent (*D.P.P. v. Smith*)

35. The first of our proposals under this Item (namely, that a "subjective" test of intent or foresight should be applied whenever the accused's intent or foresight is relevant in the criminal law) was implemented in section 8 of the Criminal Justice Act 1967.

Item XIV. Common law misdemeanours: crime of conspiracy

36. The Criminal Law Revision Committee is continuing its examination of this matter.

Item XV. Miscellaneous Matters involving Anomalies, Obsolescent Principles or Archaic Procedures

(a) *Actions for loss of services, loss of consortium, seduction and enticement*

37. We mentioned in our last Annual Report the unforeseen difficulties encountered by our study of these subjects. In order to conduct wider consultations than those already carried out we have prepared a Working Paper.¹⁹

(b) *Breach of promise of marriage and damages for adultery*²⁰

38. In our Second Annual Report we said that we believed it would be wrong to abolish the present action for breach of promise of marriage without formulating an alternative which would cover financial losses arising from and property rights affected by a plan of marriage which does not go through. However, our consultations revealed a substantial divergence of opinion on the means which should be adopted to achieve this purpose. One view supported the retention of the present action but limited to pecuniary loss; the other view advocated the abolition of the present action and the substitution of a procedure whereby the court would be given a wide discretion to adjust losses and gains arising from an engagement which has fallen through.

39. In view of these differences of approach we felt it necessary to prepare a paper on this subject which would give legal and lay interests an opportunity to consider the suggestions which have been put to us. We are now receiving comments on this paper.

(c) *Actions for pound-breach, rescous and replevin*

40. Nothing was done, for the reasons given in our Second Annual Report, paragraph 93.

¹⁸ LAW COM. No. 10.

¹⁹ Published Working Paper No. 19.

²⁰ The subject of damages for adultery was formerly included in this Item but, as we stated in our Second Annual Report, the topic was transferred to the study of Family Law (now Item XIX of our Second Programme).

(d) and (e) *The tort and crime of maintenance: obsolete crimes*²¹

41. The Criminal Law Act 1967 gave effect to our proposals on these subjects, contained in Law Com. No. 3.

Item XVI. Judicature Act (Northern Ireland)

42. Lord MacDermott's Committee are continuing their examination of this matter.

Item XVII. Interpretation of Statutes

43. This topic formed the subject of Published Working Paper No. 14, prepared jointly with the Scottish Law Commission (Memorandum No. 6) and published in August 1967. The Joint Working Paper, after summarising the development and present position of the British system for the interpretation of statutes and providing information on the comparable rules in a number of other countries, put forward certain tentative views, on which critical comment was invited.

44. The Joint Working Paper was given an extensive circulation, and secured considerable attention in the legal and general press. We received comments and information from judges, Members and officials of Parliament, Government Departments and their legal advisers and from individual members and representative bodies of the practising and academic branches of the legal profession, as well as from distinguished lawyers overseas. Together with the Scottish Law Commission, we have now begun to prepare a Report, which will cover the major part of the topic in the light of the wide ranging and very helpful responses to the Joint Working Paper. We are indebted to all those who have so generously helped our work.

Item XVIII. Codification of the Criminal Law

(a) General principles of the criminal law

45. Following the recommendation contained in our Second Programme of Law Reform, a Working Party²² has been set up to examine this topic. Our expressed intention to carry out the work "in close touch with those concerned with other parts of the code" is being implemented and four members of the Criminal Law Revision Committee and the Secretary of that Committee are members of the Working Party. The Working Party has recently published a paper²³ in which the field of enquiry is canvassed and specific questions for consideration are formulated.

46. On behalf of the Society of Public Teachers of Law, Professor J. C. Smith, of Nottingham University, has arranged a seminar on codification of the criminal law in which we are actively involved. This seminar will take place in Nottingham in September this year. We are also taking part in July in a conference on the same subject arranged by the Cambridge Institute of Criminology.

(b) Certain specific offences

(i) Preliminary papers on malicious damage to property, and bigamy and offences against the marriage law are being prepared and will be

²¹ See Second Annual Report, paragraph 93.

²² Its composition is shown in Appendix II.

²³ Published Working Paper No. 17.

published as soon as they are ready. We have begun a study of forgery and will later examine perjury.

- (ii) The Criminal Law Revision Committee is to be asked, as soon as its other commitments allow, to review the law relating to sexual offences and the law relating to offences against the person (including homicide).
- (iii) A preliminary paper on extra-territorial jurisdiction in criminal offences is nearly ready.

Item XIX. Family Law

47. This Item, as was stated in our Second Programme of Law Reform of 14th November 1967, extends and reformulates our terms of reference under Items X and XII of our First Programme. We deal with Item XI in paragraph 59 below.

48. We maintain continuous and close contact with the Scottish Law Commission on many questions of family law and therefore welcome warmly the introduction of this subject into their Second Programme; it is clearly desirable that reform of the law in both jurisdictions should be kept in step even if complete unification is not possible.

49. Our ultimate aim is a complete codification of family law, but for the immediate future we are concentrating on preparing reforms of the law which must precede its systematic restatement. In tackling this large task we have had to give careful thought to the order in which we should examine the various topics but, as our priorities have given rise to some criticism, we feel that we should take this opportunity to explain the plan to which we are working.

Divorce

50. Priority for this has been dictated to some extent by events. The publication of "Putting Asunder" by the Archbishop's Group on Divorce prompted you to refer it to us for immediate advice. After the publication of our advice²⁴ and the debate in the House of Lords on 23rd November 1966, we were asked to conduct talks directly with the Archbishop's Group. The outcome of these discussions and the terms of our understanding with the Group were published in July. Since this understanding has not appeared in any of our published papers, we have set it out in Appendix III to this Report.

51. In November 1967, Mr. William Wilson, M.P., was successful in the ballot for Private Members' Bills and announced his intention of introducing a Bill to give effect to our understanding with the Archbishop's Group. The Government agreed to provide drafting assistance for Mr. Wilson, and the Divorce Reform Bill, now before Parliament, was the result. We for our part have given assistance so as to ensure that the Bill as introduced should accord with the understanding which we reached with the Archbishop's Group.

Financial provision

52. At the same time, we have been continuing our study of the financial rights and obligations arising out of marriage and its termination and have now

²⁴ *The Field of Choice*. Cmnd. 3123, 1966.

received a wide range of views on our Working Paper No. 9²⁵ which we circulated shortly before publication of our last Annual Report. In the light of these comments we have made as much progress as we can towards settling final proposals, which we intend to submit to you together with a draft Bill. It is impossible to complete our proposals on financial provision and to translate these into legislative form until the precise nature of the changes, if any, which Parliament may make in the divorce law, becomes known. The Divorce Reform Bill itself contains novel financial provisions, the ultimate form of which, if enacted, must affect our proposals.

Family property

53. We are also proceeding with our examination of the law of family property including the possibility of introducing into our law a form of community of matrimonial property. There has been a good deal of public interest recently in this aspect of our work and we are aware of pressure to hasten our study of it. But as we said in our last Annual Report²⁶ it will necessarily be a lengthy task. At present English law does not treat the property of a family as a separate subject governed by a distinct and consistent set of principles. Any major reform would necessarily have repercussions on many other areas of the law, such as bankruptcy, succession on death and conveyancing. Moreover, much thought has recently been given to community systems in many other countries and the studies and reforms undertaken there need thorough investigation. Fortunately the need for haste has been somewhat reduced, thanks to the passing of the Matrimonial Homes Act 1967 and recent judicial decisions to the effect that each spouse has an interest in the matrimonial home if he or she has contributed to any substantial extent to its acquisition or improvement. Moreover, the practice of vesting the matrimonial home in both spouses as joint tenants is increasing. As a result of these developments something approaching community already exists in many instances as regards the home, often the only substantial capital asset. Although we appreciate the urgency and importance of this part of our work, we think it right to emphasise that those who see in further developments in this field a panacea for all the financial ills flowing from broken marriages are, in our view, mistaken. When there are ample funds there is no intractable problem even under the present law; when there are not, the problem is not solved by simply dividing between two families resources scarcely adequate for the maintenance of one.

Nullity

54. If the Divorce Reform Bill becomes law and if legislation is passed to rationalise and improve the law governing financial provision, it will be desirable to restate the whole law of matrimonial causes in an accessible and simple form. Before this can be done, certain related subjects must be dealt with, of which one of the most important is nullity. We have prepared a Working Paper²⁷ on this subject, in which we examine the present classification of valid, voidable and void marriages and invite comment on a number of suggestions for improving and clarifying this part of the law. This paper leaves aside an examination of the law of marriage, on which we have already had preliminary discussions

²⁵ *Financial Relief in Matrimonial and Related Proceedings.*

²⁶ Paragraph 79.

²⁷ Published Working Paper No. 20.

and to which we intend to return when more urgent tasks allow. We hope then to have the advantage of knowing the recommendations for the reform of this branch of the law of Scotland which will be made by the Kilbrandon Committee on the Constitution of Marriage in Scotland.

Polygamous marriages

55. Dr. J. H. C. Morris has furnished us with a thorough survey of this difficult subject which will form the basis of a Working Paper. Our proposals will be designed to adjust our law so as to take account of the social problems presented by marriages at present unrecognised for many purposes because they are actually or potentially polygamous.

Recognition of foreign matrimonial etc., decrees

56. The Draft Convention on Recognition of Foreign Divorces and Legal Separations was discussed and further revised at a meeting in August of the Special Commission of the Hague Conference. It is expected that the Convention will reach its final form and be signed at the plenary session of the Conference to be held in October next. Accordingly, you asked the Working Party mentioned in paragraph 86 of our Second Annual Report to give further advice in order to brief the United Kingdom delegates to that Conference. The Working Party have considered the latest Draft and will report within the next month.

57. If H.M. Government ratifies the Convention, legislation will be needed to give effect to it. But in any case a complete overhaul of the relevant law is urgently needed since recent decisions have left it in a state of considerable uncertainty. Accordingly, we are carrying out a review of the whole question of recognition of foreign decrees. We are also considering the related question of whether those affected by these decrees should, in appropriate circumstances, be able to apply to our courts for financial provision.

Jurisdiction of English courts to grant divorces, etc.

58. The reform of our rules governing the jurisdiction of our courts to grant matrimonial decrees is as urgent as the reform of the law relating to the recognition of foreign divorces and the two subjects are closely interrelated. Accordingly, we are preparing a Working Paper. This branch of the law has long been considered unsatisfactory despite the changes that have been made in the past to mitigate the hardships caused by the use of domicile as the basic jurisdictional test.

Financial provision in magistrates' courts

59. The Committee on Statutory Maintenance Limits has completed the examination recommended in Item XI of our First Programme and has submitted its report to the Home Secretary.²⁸ We welcome the recommendations of the Committee and are glad to see that the most important of them, those relating to the removal of limits on the amounts which magistrates can award and also to "small maintenance payments" which can be paid without deduction of tax, are being implemented in the Maintenance Orders Bill and the Finance Bill now before Parliament. The report contains a great deal of statistical

²⁸ Cmnd. 3587, 1968.

information which has not hitherto been available and which will be of great assistance to us in our future work.

60. As reported in paragraph 77 of our Second Annual Report, we set up a Working Party to study the implications for magistrates' courts of the reforms recommended in our Working Paper No. 9.²⁹ It appeared from their deliberations that the tentative proposals which we had formulated in relation to the divorce court would not need to be substantially modified because of repercussions on proceedings in magistrates' courts. Further work in this field has been postponed for the time being, but once the proceedings on the Divorce Reform Bill are concluded, renewed attention will be given to this matter.

Family law affecting children

61. Dr. J. C. Hall of St. John's College, Cambridge, with the generous assistance of the Cambridge Law Faculty, completed the investigation which we had asked him to undertake into the working of section 33 of the Matrimonial Causes Act 1965, under which the arrangements for the care and upbringing of children of dissolved marriages have to be sanctioned by the court. This report³⁰ has been circulated widely to judges, registrars, probation officers and others, and we expect it to be of immediate assistance to those who exercise this jurisdiction and to us in our future work in this field.

62. Our Working Paper No. 12, dealing with proof of paternity in civil proceedings (principally by the use of blood tests) aroused a good deal of public interest and attracted helpful comment; we hope shortly to present our final report on this subject with a draft Bill attached.

63. Another study which we have instigated is that by the Family Law Subcommittee of the Society of Public Teachers of Law. They have not yet completed their enquiry into the whole question of the legal status of illegitimate children,³¹ but expect to do so before long. We observe that the passing into law of the Law Reform (Miscellaneous Provisions) (Scotland) Bill will place Scots law in advance of ours in a number of respects. We take note of the introduction into Parliament by a Private Member of the Adoption Bill, which brings our law into line with the Hague Convention on the Recognition of International Adoptions.³² Although we have no responsibility for the Bill, we welcome the policy enshrined in it, since it will improve a very unsatisfactory part of our law.

Courts having jurisdiction in family matters

64. On 10th April 1968 you announced to the House of Lords the Government's intention to introduce legislation to implement most of the recommendations made by the Latey Committee on the Age of Majority (Cmnd. 3342), but stated that certain structural changes in the courts suggested by them were for consideration by the Law Commission. As we said in paragraph 83 of our Second Annual Report, we have not thought it right to undertake a detailed study of family courts, until the report of the Royal Commission on Assizes and

²⁹ *Financial Relief in Matrimonial and Related Proceedings.*

³⁰ Working Paper No. 15.

³¹ See Second Annual Report, paragraph 80.

³² Cmnd. 3350, 1967.

Quarter Sessions is published. Reform of the courts exercising jurisdiction in family matters will be discussed at a seminar to be held at All Souls College, Oxford, at the end of the year.

Powers of appeal courts to sit in private in family matters

65. In December the Rt. Hon. Sir Lionel Heald, Q.C., M.P., introduced the Domestic and Appellate Proceedings (Restriction of Publicity) Bill to give effect to the recommendations in our report³³ and the Bill passed all its stages in the Commons without opposition, certain amendments being made in committee to extend its scope. The primary aim of the Bill remains to enable the courts to give greater protection to children and mentally disordered persons from damaging publicity.

Item XX. Interpretation of Wills

66. We recommended that this subject should be examined by the Law Reform Committee.

³³ LAW COM. No. 8. Cmnd. 3149, 1966.

PART II

UNPROGRAMMED LAW REFORM STUDIES

Proposals received

67. During the year the vigilance of judges and the press has increasingly brought to our attention important questions of law reform. We have not, however, as we did in earlier reports, attempted to give statistics of these and other law reform proposals made to us from outside. The reason is that it has become difficult to give any figures that would be accurate or meaningful. Our Programmes now cover very wide areas of the law and on nearly all of them Working Papers have been published in which we ask for information and raise questions. These Papers are circulated widely and are published or summarised in the legal and sometimes the national press. This makes it virtually impossible to distinguish between proposals received in the course of our consultations and proposals submitted spontaneously. We realise, however, that details of the latter and of what we are able to do about them ought to be published and we are trying to find a means of doing so in a way which will be really informative.

Questions considered in co-operation with the Scottish Law Commission

68. (i) One of our number has conferred with the Working Party set up by the Scottish Law Commission at the request of the Board of Trade to consider the revision of the Companies (Floating Charges) (Scotland) Act 1961 including the question whether receiverships should be introduced into Scots law.
- (ii) Some preliminary work has been done to assist The Scottish Law Commission in a study of the Judgments Extension Acts of 1868 and 1882, under which judgments given in any one of the constituent parts of the United Kingdom can be made enforceable in the others.
- (iii) Our attention was drawn by the Law Society to the inconvenience and expense arising from the present system of resealing probates and letters of administration in another part of the United Kingdom. After consultations with the various departments concerned both Law Commissions urged that the matter should be examined by a Working Party of officials. This recommendation has now been implemented.

Advice to Government Departments

69. (i) *International agency*

We recalled in our Second Annual Report³⁴ your Lordship's request to us to advise upon the two draft Laws of International Agency prepared by the International Institute for the Unification of Private Law upon which the United Kingdom had been invited to comment.

³⁴ Paragraph 35.

A joint Working Party³⁵ was appointed by us and the Scottish Law Commission, which had received a similar request. The Joint Working Party has just reported and the two Commissions will be submitting their report shortly.

(ii) *Safety, health and welfare legislation*

In May 1967, the Ministry of Labour sought our advice on a possible review of the form and scope of the Factories Act 1961 and the Offices, Shops and Railway Premises Act 1963. A review of this character would involve questions of principle touching important aspects of law reform: in particular, the form and structure of statutes and subordinate legislation, the principles of criminal liability, the appropriate criminal sanctions in social legislation of this kind. During the past year a number of meetings were held with representatives of the Ministry, in connection with the preparation of a First Consultative Document on the proposed new legislation. The Document was sent in December 1967 to a number of governmental, industrial and professional bodies. It was discussed at a widely representative conference held by the Industrial Law Society on 17th February 1968, at the London School of Economics at which one of us acted as Chairman. We have made a number of suggestions to the Department of Employment and Productivity (by which the Ministry of Labour has been replaced) and have arranged to hold further discussions with them before submitting our advice.

(iii) *Drug offences*

Following representations made by the Bar Council and others, we have been consulting the Home Office with a view to formulating proposals to meet the problems exposed by the decisions of the courts in *Sweet v. Parsley*³⁶ and *Warner v. Commissioner of Police for the Metropolis*.³⁷

(iv) *Compulsory passenger insurance*

Since comments were invited on the Kent Committee's Report on compulsory passenger liability insurance, we informed the Minister of Transport that we could see no objection on legal grounds to the acceptance of the Committee's recommendations in their entirety.

Major subjects for possible later consideration

70. (i) *Privacy*

On 14th and 15th July 1967, on our initiative a seminar was held at All Souls College, Oxford; it was attended by your Lordship, by several of Her Majesty's Judges, a number of practising lawyers, Members of Parliament, representatives of the press, radio and television, as well as members of the English and Scottish Law Commissions. At that time we were considering whether certain aspects of the law relating to

³⁵ Its composition is set out in Appendix II of our Second Annual Report.

³⁶ [1968] 2 W.L.R. 1360, [1968] 2 All E.R. 337.

³⁷ [1968] 2 W.L.R. 1303, [1968] 2 All E.R. 356.

privacy should be proposed for examination with a view to reform, and two of our members provided a paper for discussion. Subsequently, we were informed that there was a possibility of the subject being referred to a Parliamentary Select Committee; and pending a decision on this we have taken no further action.

(ii) *Administrative law*

In paragraph 5 of the Note prefacing our First Programme we drew attention to the problems which arise in the reconciliation of the rule of law with the administrative techniques of a highly developed industrial society. In paragraph 140 of our First Annual Report, we undertook to think ahead about topics in the field of public law, "in preparation for the day when they can be brought under the close scrutiny they undoubtedly require."

In the light of the views expressed at the seminar on administrative law held at All Souls College, Oxford, in December 1966³⁸ and of subsequent studies, it has appeared to us that administrative law has strong claims for inclusion in some form in a future programme of the Commission as a subject for examination with a view to reform. Accordingly, in July 1967 we communicated to the press and gave wide circulation to an Exploratory Working Paper,³⁹ the purpose of which was to seek views on the scope of a possible enquiry.

We are now studying the results of this consultation. Whether such an enquiry is timely and what its scope should be are questions upon which opinions vary. In reaching a view on this matter we are under a statutory duty to consider not only what aspects, if any, of this subject should be examined, but also whether in respect of some or all aspects the examining agency should be ourselves or some other body.

Miscellaneous Law Reform Studies

71. (a) *Computers*

We are aware of the research that is being done into the retrieval of legal information by the use of computers.

It is too early yet to formulate proposals for computer application to statute law or case law; but when research is further advanced we shall be concerned to assess the value of computerised information retrieval in making the law more readily accessible to the profession and the public.

(b) *Powers of attorney*

At the end of June last, we circulated the Working Paper referred to in paragraph 98 of our last Annual Report.⁴⁰ Comments on this have now been received. They reveal an interesting difference in the reactions of the Bar and the Solicitors' branch. The former tended to regard the project as scarcely worth undertaking; the latter thought it of considerable importance, a view supported by the governing bodies of a number of other professions. There was a strong preponderance of opinion that

³⁸ See paragraph 20 of our Second Annual Report.

³⁹ Published Working Paper No. 13.

⁴⁰ Working Paper No. 11

a self-contained Powers of Attorney Act would be useful, that filing of powers of attorney, at any rate on a compulsory basis, should be abolished and that steps should be taken to provide a type of power of attorney which would not terminate on the incapacity of the donor so long as adequate safeguards could be found. We are having further discussions on these points and hope in due course to submit a report with draft legislation.

(c) *Registration of wills*

This subject was dealt with in our Published Working Paper No. 4. The comments received on our tentative proposals show that they are regarded as more controversial than we had supposed. We were also informed that they would raise difficulties in Scotland, where home-made holograph wills are frequently resorted to. In the circumstances, we have decided to take no further action for the time being.

(d) *Civil Judicial Statistics*

In our last Annual Report⁴¹ we welcomed the appointment of a Committee to consider the information contained in the Civil Judicial Statistics, pointing out that the scope and speed of law reform depended in no small measure on having more details of the working of the machinery of justice. We understand that the Committee, of which our Special Consultant was a member, has now reported.

(e) *Limitation Acts 1939–1963*

Although we consider that a comprehensive review of the law of limitation of actions has strong claims for inclusion in any future law reform programme,⁴² our resources and commitments do not at present permit this to be undertaken. We have, nevertheless, done some work upon specific problems in this field and have given assistance to certain studies and investigations which are currently being undertaken at University College and Queen Mary College, London. The particular problems which we have had under examination are:—

(i) *Limitation of actions in tort against deceased tortfeasors*

At the suggestion of The Law Society and others we have considered the provision that proceedings against a deceased tortfeasor need to be instituted within six months of the grant of representation. This provision can operate harshly, particularly in personal injury cases where the plaintiff has no personal knowledge of the defendant or his affairs. In such cases whether or not the defendant is dead or a grant has been taken out will frequently be outside the knowledge or means of knowledge of the plaintiff. We were also asked to consider the difficulties which had been left open in *Airey v. Airey*.⁴³ The Court of Appeal had refrained from discussing whether an action which had become statute-barred in the lifetime of the tortfeasor could be maintained after his death if it were brought within six months of the taking out of representation. After further consultation with The Law Society, the British

⁴¹ Paragraph 98(g).

⁴² See paragraph 17 of our Second Annual Report.

⁴³ [1958] 2 Q.B. 300, at p. 308.

Insurance Association and the Masters of the Queen's Bench Division, we have prepared draft clauses for the reform of the law upon these points, which will shortly be sent to you.

- (ii) *Limitation provisions affecting actions in tort by persons under disability*

Following the suggestion by Mr. Justice Donaldson in *Duncan v. London Borough of Lambeth*⁴⁴ we are examining section 22(1) and (2)(b) of the Limitation Act 1939 (as amended) and have consulted The Law Society, the General Council of the Bar, the British Insurance Association and the Masters of the Queen's Bench Division. This task is not yet concluded.

- (iii) Finally, at your suggestion, we have furnished two papers on the Limitation Acts to the Chairman of the Council of Europe's Committee of Experts on "Time Limits."

- (f) *Interest on arrears of annuities*

In *Re Berkeley decd.*⁴⁵ Mr. Justice Cross suggested that the Law Commission might consider whether to recommend the sweeping away of the rule that arrears on an annuity given by will do not carry interest. After consideration and consultation with The Law Society, we have written to you suggesting the abrogation of the rule as soon as there is an opportunity to legislate.

- (g) *Administration bonds and affidavits*

We have consulted with the President of the Probate Divorce and Admiralty Division and with the officers of the Principal Probate Registry upon two proposals which we have received. The first, made by the Council of The Law Society, was that the normal requirement of a bond to be executed before a grant of letters of administration is issued should be dispensed with. We have under consideration a recommendation that the law should be changed by abolishing this requirement, but retaining a discretionary power in the court to order an administration bond in appropriate cases, (e.g. minority, life interests and discretionary grants). The second proposal, made by the Holborn Law Society, was for the amalgamation of the form of oath leading to grant of representation and the estate duty affidavit. The implications of this proposal are now under consideration by the President's Working Party which is examining the organisation and administration of the Probate Registry.

⁴⁴ [1968] 1 All E.R. 84 at p. 93; [1968] 2 W.L.R. 88 at p. 100.

⁴⁶ [1968] Ch. 154.

PART III

CONSOLIDATION AND STATUTE LAW REVISION

Consolidation: First Programme

72. Co-operation with Government Departments has enabled consolidations of major importance to reach the statute book this year.

73. The present Session of Parliament has seen the completion of one major item in this Programme with the enactment of the Rent Act 1968. Consolidation on its own cannot completely solve the problems associated with the complicated and confused state of this branch of the law, but, by putting these statutes, unconsolidated since 1920, into a co-ordinated form, it has made them more accessible to practitioners and the general public. Furthermore, it will be of assistance towards codification of the law of landlord and tenant on which we are engaged under our law reform programme.

74. The passing into law of the Capital Allowances Bill, after its failure to reach the statute book last Session, was a first step towards consolidation of the whole of the revenue statutes. There is a good chance that the consolidation of the Acts relating to income tax and corporation tax can be completed in time for a Bill to be ready for introduction in the autumn of 1969. A matter of almost equal importance in our programme is the consolidation of estate duty legislation and we now hope that this work will be resumed in the next few months—thereby removing what we described in our programme as “a blot on the statute book.” The consolidation of the Stamp Acts is a matter of less urgency, and it is unlikely to be possible to make progress with this at the same time as work on the other revenue legislation.

75. Further progress on a third major item in our Programme, the consolidation of the Road Traffic Acts, must await the passage of the Transport Bill and of the proposed legislation about driving licences.

76. Apart from the Capital Allowances Bill and the Rent Bill the following consolidation measures were introduced this Session and have reached the statute book in 1968 ; the Provisional Collection of Taxes Act, the Criminal Appeal Act, the Courts-Martial (Appeals) Act, the Criminal Appeal (Northern Ireland) Act, the Firearms Act, and the Export Guarantees Act. In paragraph 100 of our Second Annual Report, we mentioned four Bills⁴⁶ which had been introduced, in addition to the eight consolidation Acts also mentioned in that paragraph. All those Bills duly reached the statute book last Session.

77. A start has been made on another major item in the Programme, namely the consolidation of the Local Government Acts, but we do not expect that a Bill can be ready for introduction next Session. A Bill to consolidate the National Health Service Acts is in draft and should be ready for next Session.

⁴⁶ The Advertisements (Hire-Purchase) Bill, the Road Traffic Regulation Bill, the Sea Fish (Conservation) Bill and the Sea Fisheries (Shellfish) Bill.

Drafts have also been prepared with a view to the consolidation of the British Nationality Acts. Work on a Bill to consolidate the Friendly Societies Acts has made good progress and it is hoped that it will be possible to introduce it (if the Friendly and Industrial and Provident Societies Bill, now before Parliament, passes into law) in the next Session.

78. It has not been possible, as had been hoped, to introduce the Refreshment Houses Bill or the Monopolies and Mergers Bill in this Session. Drafts of them are in print and they should be introduced early next Session.

79. Work has been done on two other Bills: a Customs Duties (Dumping and Subsidies) Bill and the Sea Fish Industry (Grants and Subsidies) Bill, both of which should be ready for introduction next Session.

Statute Law Revision: First Programme

80. As part of our statutory duty of securing the "repeal of obsolete and unnecessary enactments" we are engaged on a review of the statutes in chronological order with a view to recommending the repeal of all that cannot positively be shown to continue to perform a useful function. Because of the lack of skilled resources, little progress had been made with this important task during the year covered by our Second Annual Report. The lack has been remedied and we can now report progress.

81. The chronological review has been carried up to the year 1705 with the result that on 25th March 1968 we published proposals for a draft Statute Law Revision Bill which would repeal either in whole or in part some 155 enactments. The Schedule to this proposed draft Bill is not restricted to pre-1706 enactments but includes a number of later enactments which are mostly connected with the earlier ones. In some cases it is proposed to substitute new provisions in modern language about matters dealt with by the enactments proposed for repeal.

82. Copies of the proposals were sent to a number of Government Departments and bodies representing practising and academic lawyers, and comments were invited by the end of May 1968. We are in consultation with the Scottish Law Commission and the Director of Law Reform for Northern Ireland in so far as enactments proposed for repeal affect Scotland and Northern Ireland. Consultation on the points arising under the proposals are not yet complete.

83. Other pre-1706 enactments will, after further research and consultation, be proposed for repeal.

A new official edition of the Statutes

84. The Public General Statutes in force are available in useful commercial publications. The official edition is, however, in a sad state and is rarely used by practitioners. Its first part consists of the Third Edition of Statutes Revised which, in 32 volumes, contains the statutes passed between 1235 and 1948, and in force on 31st December 1948. Its second part consists of the volumes of the Public General Acts published annually from 1949 onwards. The Statutory Publications Office prepares annually a volume of Annotations to Acts Which

contain directions for noting the amendments made by the year's legislation to the Third Edition and Annual Volumes previously published. It is not too much to say that this official edition is now in disarray. It is no longer obtainable from the Stationery Office in its entirety because the volume for the year 1952 is out of print. It represents the existing statute law only if written amendments, cancellations and gummed additions have laboriously been inserted into the text. By 31st December 1965, 9,603 out of 26,087 pages of the Third Edition had been cancelled, 4,360 pages out of 21,250 pages of the twenty Annual Volumes had also been cancelled. Thus, at that date, almost one page in three of the 52 volumes of the official publication of the Public General Statutes had been cancelled. Many of the remaining pages are affected by amendments, annotation slips and deletions.

85. These facts are taken from the Report of a Sub-Committee set up by the Statute Law Committee to consider the problems associated with a new official edition of the statutes ; its terms of reference were set out in our Second Annual Report.⁴⁷ The Sub-Committee has made some far-reaching recommendations which have been accepted by the Statute Law Committee. Among the more important are these:—

- (i) that an immediate start be made with the preparation of a new official edition of the Public General Statutes in force ;
- (ii) that the chronological arrangement of the official edition of the statutes be abandoned in favour of an arrangement chosen according to subject matter.
- (iii) that the edition be prepared in a loose-leaf form i.e. statutes for inclusion in the edition to be published in paper-back form, punched with holes for insertion into loose-leaf binders. It is envisaged that the Annual Volumes will be continued so that the historical development of the statute law may be easily traced. It is also contemplated that the edition will be produced under the direction of an Editorial Board responsible to the Statute Law Committee.

86. It is inevitable that the law will increasingly be found in statutes and it is understood that the new edition will contain all the Public General Statutes in force. It is therefore vital that there be evolved a coherent and accessibly arranged official edition which is capable of self-renewal without the disfigurements that afflict the current "Statutes Revised." This process will be greatly helped by consolidation, a technique which reduces into one statute the provisions of several dealing with the same subject matter; by revision, which removes the obsolete; and by a drafting policy which is alert to the requirements of the new edition.

87. We welcome the recommendations of the Statute Law Committee and will do all in our power to assist them and their Editorial Board in implementing their proposals. It will be our policy to assist in the following ways :

- (i) by pressing ahead with consolidation, thus ensuring that "clean" statutes are ready for the new edition ;

⁴⁷ Paragraph 125.

- (ii) by preparing a series of Statute Law Revision Bills designed to eliminate ultimately all the obsolete and unnecessary enactments in the Statute Book; and
- (iii) by encouraging the use of methods of drafting designed to facilitate the “slotting in” to existing statutes of newly enacted amendments or additional material, thus reducing the need for periodical consolidations.

PART IV

ORGANISATION AND WORKING METHODS

Staff

88. Under the Commissioners and the Special Consultant there is now a staff of 46—the Secretary, 4 draftsmen, 15 other lawyers and 26 non-legal members of the staff. The increase of two lawyers and one non-legal member of staff since last year is accounted for by their appointment for the specific task of Statute Law Revision. Our Secretary for the first two and three-quarter years of our existence, Mr. Boggis-Rolfe, C.B.E., was appointed at the beginning of April to be Assistant Permanent Secretary to the Lord Chancellor and Deputy Clerk of the Crown in Chancery. On taking our leave of him we wish to express our high appreciation of the services he rendered in the establishment of the Commission and its working methods.

Library

89. The library collection now consists of some 8,000 volumes and is growing steadily. Although it satisfies most of our day-to-day needs, we nevertheless frequently have to call on the resources of other libraries and we are most grateful to them. Individuals and organisations at home and in many parts of the world have again sent us generous gifts of books and other documents. They are now too many to list and it would be invidious to mention only some of the donors.

Relations with lawyers in the United Kingdom

90. We were the guests of the Scottish Law Commission in Edinburgh for a joint meeting on 22–23 February. This was only one of a series of discussions and other communications between the Commissions throughout the year.

91. Two of our number paid a visit to Northern Ireland last October for a meeting with Lord MacDermott's Committee on the Northern Ireland Judicature Act (see Item XVI of our Law Reform Programme) ; and in April we had the pleasure of receiving in London Mr. Basil Kelly, Q.C., M.P., the newly-appointed Attorney General of Northern Ireland.

92. The assistance given to us by the Bar Council, The Law Society and the Society of Public Teachers of Law is indispensable to our work. It is our custom to meet representatives of each of these bodies annually to discuss methods of co-operation as a result of which we have been able to improve our ways of working. Many of the subjects with which we are concerned and upon which we seek comments and criticisms overlap other subjects, with the result that our requests for views on one item arrive on the desks of the same hard-worked people whom we have consulted in regard to another question. We are extremely grateful for the help we receive from all those whom we consult.

93. We have referred in earlier Annual Reports to the seminars which we have held in universities, attended on each occasion by some 25 to 30 people who have

a contribution to make to the subject under discussion. These seminars have proved to be a means of concentrating thought in a congenial atmosphere on the more difficult problems that confront us and have helped us in a way that no other meeting could. The series has been continued with a seminar at All Souls College, Oxford, on the Right of Privacy last July and another in the same College on Administrative Law this spring.

94. One of our number is a member of the Committee on Legal Education which you set up under the Chairmanship of Mr. Justice Ormrod.

Relations with lawyers overseas

95. Our Chairman was invited to visit Canada last autumn and addressed various audiences there on law reform. Another of our number fulfilled a similar engagement in India and Ceylon. Two of us visited Paris to see the Conseil d'État at work; another attended conferences in Berlin, Rouen and Rome. During the year we exchanged views and information with many visitors from overseas.

(Signed) LESLIE SCARMAN, *Chairman.*

L. C. B. GOWER.

NEIL LAWSON.

NORMAN S. MARSH.

ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*

18th June 1968.

APPENDIX I

LIST OF THE LAW COMMISSION'S PUBLICATIONS

(1) Published Working Papers

- No. 1. Transfer of Land: Root of Title to Freehold Land (this is the subject of LAW COM. No. 9)
- No. 2. Draft Proposals on Powers of the Court of Appeal to Sit in Private and Restrictions upon Publicity in Legitimacy Proceedings (this subject was covered by LAW COM. No. 8)
- No. 3. Restrictive Covenants (this is the subject of LAW COM. No. 11)
- No. 4. Should English Wills be Registrable?
- No. 5. Liability of Trade Vendors of New Dwelling Houses to First and Subsequent Purchasers (First Paper)
- No. 6. Liability of Vendors and Lessors for Defective Premises (Second Paper)
- No. 7. Provisional Proposals for Amendments to the Landlord and Tenant Act 1954, Part II (Business Tenancies)
- No. 8. Provisional Proposals Relating to Obligations of Landlords and Tenants
- No. 9. Family Law: Matrimonial and Related Proceedings—Financial Relief
- No. 10. Proposals for Changes in the Law Relating to Land Charges Affecting Unregistered Land and to Local Land Charges
- No. 11. Powers of Attorney
- No. 12. Proof of Paternity in Civil Proceedings
- No. 13. Exploratory Working Paper on Administrative Law
- No. 14. Interpretation of Statutes (Joint Working Paper—Scottish Law Commission Memorandum No. 6)
- No. 15. Family Law: Arrangements for the Care and Upbringing of Children
- No. 16. Provisional Proposals Relating to Termination of Tenancies
- No. 17. Codification of the Criminal Law—General Principles—the Field of Enquiry
- No. 18. Provisional Proposals Relating to Amendments to Sections 12–15 of the Sale of Goods Act 1893 and Contracting out of the Conditions and Warranties Implied by those Sections (Joint Working Paper—Scottish Law Commission Memorandum No. 7)
- No. 19. Loss of Services
- No. 20. Nullity of Marriage

(2) Publications which have been laid before Parliament under section 3(2) and (3) of the Law Commissions Act 1965 and publications which have been presented to Parliament as Command Papers.

- LAW COM. No. 1. First Programme of the Law Commission
- LAW COM. No. 2. Law Commission's First Programme on Consolidation and Statute Law Revision
- LAW COM. No. 3. Proposals to Abolish Certain Ancient Criminal Offences
- LAW COM. No. 4. First Annual Report 1965–66
- LAW COM. No. 5. Landlord and Tenant: Interim Report on Distress for Rent
- LAW COM. No. 6. Reform of the Grounds of Divorce: The Field of Choice (Cmd. 3123)
- LAW COM. No. 7. Proposals for Reform of the Law Relating to Maintenance and Champerty

- LAW COM. No. 8. Report on the Powers of Appeal Courts to Sit in Private and The Restrictions upon Publicity in Domestic Proceedings (Cmnd. 3149)
- LAW COM. No. 9. Transfer of Land: Interim Report on Root of Title to Freehold Land
- LAW COM. No. 10. Imputed Criminal Intent (Director of Public Prosecutions v. Smith)
- LAW COM. No. 11. Transfer of Land: Report on Restrictive Covenants
- LAW COM. No. 11A. Sea Fisheries (Shellfish) Bill. Report by the Law Commission and the Scottish Law Commission on the Consolidation of Certain Enactments Relating to Shellfish Fisheries and Shellfish (Cmnd. 3267)
- LAW COM. No. 12. Second Annual Report 1966-67
- LAW COM. No. 13. Civil Liability for Animals
- LAW COM. No. 14. Second Programme of Law Reform

APPENDIX II

MEMBERSHIP OF ADVISORY BODIES

(1) Working party on general principles of the criminal law (see paragraph 45)

Joint Chairmen:	Mr. Neil Lawson, Q.C. Mr. N. S. Marsh, Q.C.
Law Commission member:	The Hon. Mr. Justice Scarman, O.B.E.
Members, other than representatives of the Law Commission:	*The Rt. Hon. Lord Justice Edmund Davies *His Honour Judge Mervyn Griffith-Jones, M.C. (The Common Serjeant) Mr. T. R. Fitzwalter Butler Mr. J. H. Buzzard Mr. A. E. Cox Mr. J. N. Martin, O.B.E. Mr. Michael Walker (research member) *Professor Glanville L. Williams, Q.C.
alternate	{ Mr. F. L. T. Graham-Harrison, C.B. (Home Office)
alternate	{ *Sir Kenneth Jones, C.B.E. (Home Office) †Mr. G. V. Hart (Home Office)
Secretary:	Mr. A. L. L. Alexander (Law Commission)
Assistant Secretary:	Mr. W. V. H. Rogers (Law Commission)

(2) Consultative group on appurtenant rights (see paragraph 29)

Chairman:	Mr. Neil Lawson, Q.C.
Deputy Chairman:	Mr. Arthur Stapleton Cotton
Members, other than representatives of the Law Commission:	Mr. G. H. Newsom, Q.C. Mr. J. A. Armstrong (Institute of Conveyancers) Mr. E. G. Nugee, T.D. (The Bar Council) Mr. C. M. R. Peacock (The Law Society) Mr. L. D. Bonsall (The Law Society) Mr. C. P. G. Chavasse Professor F. R. Crane (Society of Public Teachers of Law) Professor J. F. Garner (Society of Public Teachers of Law) The Hon. G. J. Bourke, F.R.I.C.S., F.L.A.S. (The Chartered Land Societies) Mr. W. H. Wagstaff, F.R.I.C.S., F.A.I. (The Chartered Land Societies)

* Members of the Criminal Law Revision Committee.

† Secretary of the Criminal Law Revision Committee.

APPENDIX III

REFORM OF GROUNDS OF DIVORCE

RESULT OF DISCUSSIONS BETWEEN ARCHBISHOP'S GROUP ON DIVORCE AND LAW COMMISSION

In accordance with the wishes expressed during the Debate in the House of Lords on 23rd November 1966, the members of the Archbishop of Canterbury's Group on Divorce have had discussions with the Law Commission to see whether their view, expressed in *Putting Asunder*, that breakdown should become the sole and comprehensive ground of divorce could be reconciled with the view expressed by the Law Commission in *Reform of the Grounds of Divorce—The Field of Choice* (Cmnd. 3123) that the suggested inquest into the marriage was impracticable even if acceptable to public opinion. As a result of these discussions, the following proposals are put forward. They are supported by all the Group with the exception of one member who abstained. It will be seen that they fully maintain the principle (affirmed by the Church Assembly on 16th February) that breakdown should replace matrimonial offence and become the sole and comprehensive ground of divorce. But in place of the proposed inquest the court is directed to infer breakdown, in the absence of evidence to the contrary, on proof of the existence of certain matrimonial situations. The Law Commission is satisfied that these amended proposals would be practicable and could form the basis of a really worthwhile reform of the Divorce Law.

PROPOSALS

1. Subject to the safeguards mentioned below, divorce should be available upon proof that the marriage had irretrievably broken down, and upon no other ground.
2. In accordance with the present law, no petition for divorce should be presented without leave within three years from the date of the marriage.
3. The solicitor acting for a petitioner should be required to certify whether or not he had discussed the possibility of a reconciliation being effected and had brought to the attention of the petitioner the names of appropriate persons and marriage guidance organisations qualified to assist in effecting a reconciliation.
4. If at any stage in any case the court had reason to believe that a reconciliation might be effected, it should have power to adjourn the case for a period not exceeding three months to permit the possibility of reconciliation to be explored.
- 5.—(1) No marriage should be treated as having broken down irretrievably unless the court was satisfied that:—
 - (a) the respondent had committed adultery and the petitioner found it intolerable to continue or resume cohabitation; or
 - (b) the conduct of the respondent had been so intolerable that the petitioner could not reasonably be expected to continue or resume cohabitation; or
 - (c) the parties had ceased to cohabit for a continuous period of at least two years and the respondent either
 - (i) had deserted the petitioner, or
 - (ii) did not object to the grant of a divorce; or
 - (d) the parties had ceased to cohabit for a continuous period of not less than five years.
- (2) If the court was satisfied that any of the above situations existed, it should treat the marriage as having broken down irretrievably unless satisfied on all the evidence that the marriage had not broken down irretrievably.
6. There should be a procedure to ensure that a respondent's decision not to object to the grant of a divorce had been taken freely and with a full appreciation of the consequences (see the procedure suggested in paragraph 112 of *The Field of Choice*).

7. The court should be:—

- (a) *empowered* to refuse a divorce if the petitioner had attempted to deceive the court, and
- (b) *required* to do so if satisfied that, having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down.

8. The court should be *required* to refuse a divorce until satisfied:—

- (a) that satisfactory arrangements, or the best that could be devised in the circumstances, had been made for the care, upbringing and support of the children,
- (b) that, where the respondent had applied for financial relief, equitable financial arrangements (or the best that could be devised in the circumstances) had been made for the respondent, or that no such financial arrangements should be made.

NOTES

1. It will be observed that all the existing “matrimonial offences” disappear as individual grounds of divorce. On the other hand, many of them are elements of the various guide-posts on the basis of which the court is to infer breakdown in the absence of evidence to the contrary.

2. Under proposal 5(1)(a), if the respondent has committed adultery and the petitioner finds it intolerable to continue or to resume cohabitation, then, subject to proposals 7 and 8, he or she will be entitled to a divorce, unless there is positive evidence that, despite all this, the marriage has not irretrievably broken down. In the latter event, we envisage that the court would normally exercise its power to adjourn (proposal 4—a proposal to which we attach importance), rather than finally dismiss the petition. If both parties have committed adultery and each objects to the other obtaining a divorce, proposal 7(b) will be particularly relevant. We envisage that under this proposal the court will make the sort of assessment made by the President in the recent case of *Inglis v. Inglis & Baxter* [1967] 2 W.L.R. 488. There both parties had committed adultery. The husband petitioned for divorce; the wife for judicial separation. Although the President was satisfied that the husband was more responsible for the breakdown than the wife, he granted the former a divorce, after ensuring that financial arrangements had been made which would adequately compensate the wife for loss of her Army widow’s pension, since to dissolve the marriage was in the best interests of the public and all the parties involved (including the child and the woman named).

It will be observed that, where adultery has been committed a divorce normally follows if the petitioner finds it intolerable to resume cohabitation. In this case, unlike “cruelty” cases, it must, in our view, rest with the petitioner to say whether he or she is able to forgive and forget and not with the judge to say whether he or she ought to do so.

3. “Cruelty” cases are subsumed under 5(1)(b). In effect, the test is the same as that at present required for cruelty, except that it is not necessary to prove actual or apprehended injury to health. In this case it must be for the judge, and not for the petitioner alone, to decide whether the conduct is sufficiently grave to make it unreasonable to expect the petitioner to endure it (otherwise mere incompatibility would be let in). On the other hand, as at present, in testing the gravity of the respondent’s conduct, the judge must consider its effect on the particular petitioner and not on some hypothetical “average reasonable husband or wife”.

A finding that the situation envisaged in 5(1)(b) is established will usually mean that the respondent is substantially responsible for the breakdown of the marriage and may be very relevant when maintenance is assessed. On the other hand, it will not operate as a finding that the respondent is solely to blame. A finding that 5(1)(a) is established need not in itself operate as any finding of responsibility for the breakdown. It will still be open to the respondent to prove if he or she can, that, despite his or her adultery, the beginning of the breakdown of the marriage was solely due to the petitioner. We think this difference is justified; if the marriage has broken down and if the respondent has committed adultery, the other spouse should normally be entitled to a divorce, even though the adultery is not the cause but rather the effect of the breakdown: cf. *Inglis v. Inglis & Baxter*, supra.

4. Desertion cases come within proposal 5(1)(c), the period being reduced from the present three years to two. In our view, it is unrealistic to suppose that normally a breakdown which has lasted for two years is retrievable. If, however, there is evidence that it is in fact retrievable, the court will be entitled to dismiss the petition or, preferably, to exercise the power to adjourn to explore the possibility of reconciliation. 5(1)(c) also covers the situation where there has been a consensual separation for two years and both parties want a divorce—a still clearer indication of irretrievable breakdown. In this case, proposal 6 is particularly relevant—the court must satisfy itself that the respondent’s consent is genuine and informed. Both here and

throughout we have used the expression "ceased to cohabit", rather than "lived separate and apart", to show that we mean a cessation of *consortium*, even though both parties continue to live under the same roof, which, under present housing conditions, they may be forced to do. Here and in proposal 5(1)(d), we have referred to a "continuous period" of two or five years' separation. We would, however, make it clear that, as under the present law, a short period of cohabitation with a view to effecting a permanent reconciliation should not operate to break the period. The wording of any legislation will require careful drafting; the present provisions (ss. 1(2) and 42(2) of the Matrimonial Causes Act 1965) are not wholly satisfactory.

5. Incurable unsoundness of mind is not specifically mentioned at all. Where, however, the conduct of the mentally disordered spouse has produced an intolerable situation for the petitioner, the latter could rely on 5(1)(b); this, in effect, preserves the present law. In other circumstances, the petitioner will normally have to rely on 5(1)(d) which will enable a divorce to be obtained after five years' separation without, as at present, having to prove that the insanity is "incurable"—which involves an impossible forecast of the future state of medical science—or strict compliance with the highly technical existing rules about "continuous care and attention". The definition of "cessation of cohabitation" will need to make it clear that it covers cases where the separation is not wilful but due to the fact that, for example, one spouse is in a mental home.

6. The bars in proposals 7 and 8 are intended to take the place of all the bars existing under the present law. Unreasonable delay, condonation, collusion, connivance, conduct condoning and the disclosed adultery of the petitioner all disappear as separate bars; they will be factors that the court may take into consideration in determining whether the marriage has irretrievably broken down, and in deciding whether even if it has broken down a divorce should be refused under proposal 7. Proposal 7(a) is intended to rationalise the present position, under which deceit of the court is a discretionary bar only if the court has a discretion on some other basis, for example, the petitioner's adultery. To make it workable the Rules will have to state clearly exactly what has to be stated in the petition.

7. Proposal 7(b) is not intended to make the grant of a divorce discretionary; that would be to introduce an impossibly wide area of uncertainty and would inevitably lead to wide variations of practice. It is intended as a "long stop", requiring the court to refuse a divorce in defended cases if the overall justice of the case, including in particular the interests of the respondent and the children, appears to demand it. Where the interests of the respondent and the children can be properly protected, we do not intend that the court should refuse to dissolve the marriage on the ground that to penalize a petitioner who has shown a contempt of the sanctity of marriage in some way upholds the sanctity of marriage. *Inglis v. Inglis & Baxter*, to which we have already referred, affords a good example of circumstances in which the discretion would be relevant. If, as in that case, the respondent-wife could be adequately safeguarded in respect of her loss of widow's pension, the divorce should be granted to the petitioner. If she could not be adequately protected, it may well be that a divorce would be refused.

8. Proposal 8(a) is in accordance with the present law. 8(b) is new, but is, in our view, vital, especially in the light of proposal 5(1)(d). That latter proposal should not be implemented until the present provisions for financial relief have been reformed and, more especially, until both spouses have been afforded greater protection in respect of the home, on the lines proposed in the Matrimonial Homes Bill at present before Parliament. Under the present law, the rule embodied in proposal 8(a) is a bar on the granting of the decree absolute—not nisi. The Morton Commission found that there were administrative difficulties in making it a pre-condition to the grant of a decree nisi. We would much prefer that, if possible, the whole of proposal 8 should operate before decree nisi; and, having regard to the growing extent to which financial arrangements are settled in advance of the hearing under s. 5 of the Matrimonial Causes Act, we are not convinced that this would any longer be impracticable so long as the court had power to adjourn. If that could be done, it might well be possible to abolish the distinction between decree nisi and decree absolute—a distinction which wastes time and money, confuses the parties, especially those not legally represented, and can lead to premature (bigamous) marriages.

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