

The Law Commission and The Scottish Law Commission

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(SCOT. LAW COM. No. 105)

PRIVATE INTERNATIONAL LAW CHOICE OF LAW RULES IN MARRIAGE

*Laid before Parliament by the Lord High Chancellor and the Lord Advocate
pursuant to section 3(2) of the Law Commissions Act 1965*

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CHOICE OF LAW RULES IN MARRIAGE

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CHOICE OF LAW RULES IN MARRIAGE

Summary

In this joint report the Law Commission and the Scottish Law Commission review the rules for determining which country's law should govern the validity of marriages in cases involving a foreign element. They conclude that it would not be desirable at the present time to introduce major legislative reform, and comprehensive restatement, of those rules. The report, however, makes recommendations for the reform of some provisions of the legislation (Foreign Marriage Act 1892) governing the celebration abroad of consular marriages and of marriages of members of British Forces. It also recommends the repeal of some obsolete statutes. A draft Bill accompanies the report to give effect to the appropriate recommendations.

**THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION**

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

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

CHOICE OF LAW RULES IN MARRIAGE

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

PART I

INTRODUCTION

1.1 Although the Law Commission undertook preliminary work in 1971 on the topic of the choice of law rules to be applied in the field of marriage,¹ this work was suspended in 1973. The reason was that, by then, both Commissions thought that it was desirable to pursue reform of this area of the law on an international basis.² The opportunity to do this arose in the forum of the Hague Conference on Private International Law which, in 1976, completed the Convention on Celebration and Recognition of the Validity of Marriages. The Convention was opened for signature in October 1977 and was finally concluded in March 1978.

1.2 Unfortunately this did not prove to be one of the more successful Hague Conventions. It had a critical reception in both the common law and civil law worlds and has been signed by only five states³ and ratified by none.⁴ When we were told that the Government did not propose to sign or ratify the Convention on behalf of the United Kingdom, it was thought appropriate for the two Commissions to return to a consideration of the reform of the choice of law rules relating to marriage.

1.3 In February 1984, the two Commissions jointly established a small Working Party to assist in the review of this area of the law. The membership of the Working Party is set out in Appendix B and we are very grateful for the advice which they gave. In the light of that advice, it was decided to publish a consultation document to seek views on the need for, and nature of, any reform. The general policy for this paper was agreed by both Commissions, though the responsibility for the detailed preparation of the paper was delegated to three Commissioners from each Commission.

1.4 The consultation document⁵ was published in April 1985. It raised for discussion whether it was appropriate to introduce legislative reform of the choice of law rules relating to the validity of marriage and to annulments. It canvassed various alternative approaches for the reformulation of those rules which might be thought to be in need of revision. The consultation process proved most helpful. We are grateful to all those who submitted comments to us, and a list of the individuals and organisations who commented appears at the end of this Report as Appendix C. We must also thank the British Institute of International and Comparative Law for arranging a Discussion Meeting in July 1985 for consideration of the matters raised in the consultation document. The points put forward there have been taken

¹Under Item XIX of their Second Programme of Law Reform. This requires the Law Commission to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification. Law Com. No. 14 (1968): Item XIX: Family Law. Specific reference to the recognition of foreign marriages is made in the Law Commission's Third Programme (Law Com. No. 54 (1973): Item XXI: Private International Law). The Scottish Law Commission similarly included general proposals for an examination of family law in their Second Programme of Law Reform (Scot. Law Com. No. 8 (1968): Item No. 14) and again as part of their suggested review of private international law in their Third Programme (Scot. Law Com. No. 29 (1973): Item No. 15).

²Eighth Annual Report (1972-1973), Law Com. No. 58, para. 49.

³Australia, Egypt, Finland, Luxembourg and Portugal.

⁴Australia has, however, put the Convention into effect in the Marriage Amendment Act 1985.

⁵Law Commission Working Paper No. 89; Scottish Law Commission Consultative Memorandum No. 64.

into account in the formulation of our conclusions in this Report. Finally, we would like to record our particular indebtedness to Sir Wilfrid Bourne, K.C.B., Q.C., who helped us in analysing the response to the consultation document, and to Dr. P. M. North for the extensive help which he has given us in the preparation of this Report.

1.5 We expressed the view in the consultation document⁶ that it is desirable that any reform of the rules of private international law should be uniform throughout the United Kingdom. To that end, we maintained close contact with the Office of Law Reform in Belfast in the preparation of the consultation document and we have continued that process in reaching the conclusions in this Report.

1.6 This Report examines two main topics. The first, dealt with in Part II, is whether it is desirable to introduce major legislative change in, and codification of, the choice of law rules relating to marriage. Our conclusion is that this should not be attempted. We do think, however, that the opportunity should be taken to improve the rules and procedures contained in the one significant piece of legislation in the field under review, namely the Foreign Marriage Act 1892 and the secondary legislation made thereunder. We examine and make recommendations on these matters of detailed reform in Part III of this Report. Part IV contains our proposals for the repeal of obsolete legislation as part of the statute law revision process, and Part V contains a summary of our recommendations. A draft Bill to give effect to the relevant recommendations, with explanatory notes, is set out in Appendix A.

⁶Para. 1.5.

PART II

REFORM OF CHOICE OF LAW RULES IN MARRIAGE

The need for legislation

2.1 The consultation document examined the current choice of law rules governing the formal and essential validity of marriage, the rules applicable to consent to marriage and to annulments. The present state of the law is described in full in that paper and it is not proposed here to do other than refer in outline to the main rules and to the response on consultation to them. The purpose in so doing will be to assist in the consideration of the fundamental question whether any, or any substantial, reform is needed.

The present law

2.2 The formal validity of marriage is, as a general rule, to be determined by the law of the country where the marriage is celebrated,⁷ and there is some authority⁸ to support the view that reference to a foreign law includes the choice of law rules of that legal system, i.e. that the doctrine of *renvoi* applies. There is a number of exceptions to the general rule. The Foreign Marriage Act 1892⁹ provides for the celebration of marriages abroad by British 'marriage officers' where one party at least is a British subject¹⁰ and, in the case of a marriage abroad where one party is a member of the Armed Forces of the Crown serving in that territory, the celebration of the marriage by a Forces chaplain or person authorised by the commanding officer.¹¹ There is a further exception well established in the law of England and Wales that a marriage abroad will be recognised as formally valid if it complies with the formal requirements of English common law if the circumstances are such that compliance with the law of the place of celebration is impossible or extremely difficult.¹² This exception also extends to some marriages in countries under belligerent occupation, at least where one party is a member of, or directly associated with, the occupying forces;¹³ though the exact scope of this aspect of the exception is unsettled. Whilst it is probable that Scots law would hold that the law of the place of celebration is inapplicable in cases of impossibility or extreme difficulty,¹⁴ there is no certainty whether Scots law, or the law of the domicile would be applied in its place. There is also uncertainty whether Scots law would adopt the further extension of the exception in the case of marriages involving occupation forces.

2.3 Turning now to matters of essential validity, the weight of authority in both England and Scotland is in favour of applying the law¹⁵ of a person's ante-nuptial domicile to determine that person's capacity to marry,¹⁶ and a number of statutory provisions appear to support this approach.¹⁷ However, the matter is far from settled as there is also significant support¹⁸ for applying the law of the country in which the spouses intend to establish their matrimonial home and, indeed, some recent support for the application of the law of the country with which the marriage has its most real and substantial connection.¹⁹ The position is further complicated by three other matters. First, it has been suggested that different choice of law rules may apply depending upon the incapacitating factor in issue;²⁰ second, there is some, though not clear, authority in both England and Scotland that capacity according to the law of the place of celebration is also required;²¹ and, third, the validity of a marriage

⁷*Berthiaume v. Dastous* [1930] A.C. 79; *Bliersbach v. MacEwen* 1959 S.C. 43.

⁸*Taczanowska v. Taczanowski* [1957] P.301.

⁹And see the Foreign Marriage Order 1970, S.I. 1970 No. 1539, made thereunder.

¹⁰"British subject" means "Commonwealth citizen" (British Nationality Act 1981, s.51(1)) and includes British citizens, British Dependent Territories citizens, British Overseas citizens and citizens of Commonwealth countries (Sched. 3 of the 1981 Act) as well as the residual group of those who are British subjects under the 1981 Act.

¹¹Foreign Marriage Act 1892, s.22, as amended by the Foreign Marriage Act 1947.

¹²*Wolfenden v. Wolfenden* [1946] P. 61; *Isaac Penhas v. Tan Soo Eng* [1953] A.C. 304.

¹³*Taczanowska v. Taczanowski* [1957] P. 301; *Preston v. Preston* [1963] P. 411.

¹⁴Clive, *Husband and Wife*, 2nd ed. (1982), p. 147.

¹⁵Including that country's choice of law rules, i.e. *renvoi* is probably applicable: *R. v. Brentwood Superintendent Registrar of Marriages ex p. Arias* [1968] 2 Q.B. 956 (C.A.).

¹⁶e.g. *Re Paine* [1940] Ch. 46; *Pugh v. Pugh* [1951] P. 482; *Padolecchia v. Padolecchia* [1968] P. 314; *Szechter v. Szechter* [1971] P.286. *MacDougall v. Chitnavis* 1937 S.C. 390; *Bliersbach v. MacEwen* 1959 S.C. 43.

¹⁷e.g., Marriage (Enabling) Act 1960, s. 1(3); Matrimonial Causes Act 1973, s.11(d); Marriage (Scotland) Act 1977, ss. 1(1), 2(1) and (3), and 5(4)(f).

¹⁸*De Reneville v. De Reneville* [1948] P.100; *Kenward v. Kenward* [1951] P. 124; *Radwan v. Radwan (No. 2)* [1973] Fam. 35.

¹⁹*Vervaeke v. Smith* [1983] 1 A.C. 145, 166; *Lawrence v. Lawrence* [1985] Fam. 106.

²⁰*Radwan v. Radwan (No. 2)* [1973] Fam. 35, 54.

²¹*Breen v. Breen* [1964] P. 144; *Lendrum v. Chakravarti* 1929 S.L.T. 96, 103; cf. *Reed v. Reed* (1969) 6 D.L.R. (3d) 617.

celebrated in England between parties one of whom is domiciled there and the other elsewhere is governed by English law;²² though whether there is an equivalent rule in Scotland is a matter of considerable doubt.²³

2.4 Issues of essential validity more likely to arise in the context of petitions for annulment are lack of consent and physical incapacity, English case law supports the application of the law of the domicile²⁴ to issues of consent and there is also authority for upholding the validity of a marriage celebrated in England where one party was domiciled there and the other abroad.²⁵ In Scotland, however, there is no direct judicial authority on the choice of law rules relating to consent to marry.²⁶ In the case of physical incapacities such as impotence or wilful refusal to consummate the marriage the choice of law rules are undeveloped and unclear. The English authorities provide support for the application of the law of the forum,²⁷ of the country of celebration²⁸ and of the husband's domicile.²⁹ The Scottish courts have always applied Scots law in cases of declaration of nullity of marriage on the ground of impotence, and have never applied foreign rules on wilful refusal;³⁰ though there is no clear indication of the juridical basis on which Scots law has been applied.³¹

The consultation document's proposals and comments thereon

2.5 The consultation document proposed that the basic choice of law rules for issues of formal validity should remain unchanged, so that reference would continue to be made to the law of the place of celebration though it should be made clear that this included the doctrine of *renvoi*. A number of detailed amendments to the Foreign Marriage Act 1892 were put forward and these are considered more fully in Part III of this Report. Views were sought on whether the common law exception should be retained and, if so, in what form; but no provisional recommendation was made on that issue.³² The weight of comment favoured the retention of the basic choice of law rule, though there was no clear preponderance of view as to whether reference to the law of the place of celebration should include the doctrine of *renvoi*. Turning to the common law exception, there was a clear majority in favour of its retention, though opinion was divided as to whether it should be retained in its present common law form or be replaced by a statutory restatement. The latter was seen to have the disadvantage, for Scots law, of introducing an exception which may not now exist and for which no clear need can be made out.

2.6 Retention of the personal law, i.e. the law of the domicile, to govern capacity to marry received almost universal support, and a substantial majority approved the proposals that all issues of legal capacity should be referred to the law of the ante-nuptial domicile, and a number of commentators indicated that this should include the doctrine of *renvoi*. Adoption of these proposals would confirm the general approach of the present law, though firm rules in statutory form would exclude the possibility of the development of other rules to meet circumstances as yet not envisaged. It was also proposed in the consultation document that a marriage should not be regarded as valid if the capacity rules of the law of the place of celebration had not been satisfied. It is not clear whether there is such a requirement under the present law,³³ and commentators on this proposal were sharply divided, some accepting the proposal, others rejecting all reference to the law of the place of celebration in this context and a third view being to ignore the law of the place of celebration where it is not the forum. On further consideration, both Commissions would favour this third approach which is, at the least, consistent with the present state of the authorities.

²²Thus, the validity of such a marriage is not affected by an incapacity which, though existing under the law of the foreign domicile, does not exist under English law: *Sottomayer v. De Barros (No. 2)* (1879) 5 P.D. 94; *Vervaeke v. Smith* [1981] Fam. 77, 122 (C.A.).

²³Clive, *Husband and Wife*, 2nd ed. (1982), pp.153–154.

²⁴*Szechter v. Szechter* [1971] P. 286; though there is some uncertainty as to which spouse's domiciliary law is to be applied, see Working Paper No. 89; Consultative Memorandum No. 64 (1985) paras. 5.12–5.23.

²⁵*Vervaeke v. Smith* [1981] Fam. 77, 122 (C.A.) applying *Sottomayer v. De Barros (No. 2)* (1879) 5 P.D. 94.

²⁶See Clive, *op. cit.*, p. 156.

²⁷*Easterbrook v. Easterbrook* [1944] P. 10; *Hutter v. Hutter* [1944] P. 95.

²⁸*Robert v. Robert* [1947] P. 164. The Northern Ireland decision in *Addison v. Addison* [1955] N.I. 1 also supports this approach.

²⁹*Ponticelli v. Ponticelli* [1958] P. 204.

³⁰Wilful refusal is not available as a ground of annulment under Scots law.

³¹See Working Paper No. 89; Consultative Memorandum No. 64 (1985), para. 5.27.

³²*Ibid.*, paras. 2.54–2.68.

³³See para. 2.3 above.

2.7 We have seen³⁴ that there is one major exception under the current law to the general rule of referring capacity to marry to the law of the ante-nuptial domicile. This is the rule in *Sottomayer v. De Barros (No.2)*³⁵ under which a marriage celebrated in England is valid if one party is domiciled there and has capacity under English law, even though the other spouse is domiciled in a country under whose law he or she lacks capacity. It was proposed in the consultation document and widely supported on consultation that this rule should be abolished. Although the rule is now over a hundred years old, it has received some recent support³⁶ and its abolition could probably only be achieved by statute.

2.8 Most commentators agreed with the provisional proposal that consent to marry should be governed by the law of the domicile, an approach which substantially confirms the present law. Furthermore, there was broad support for the proposal that the rule in *Sottomayer v. De Barros (No.2)*³⁷ should be abandoned in this context also. The idea that issues of consent should be referred also to the law of the place of celebration was generally rejected, an approach which the Commissions now support and which is not inconsistent with the present law.

2.9 The final major issue examined in the consultation document was that of the choice of law rules to govern impotence and wilful refusal. It will be recalled that the law in both England and Scotland is undeveloped,³⁸ and the consultation document expressed no firm, albeit provisional, view on what the law should be. Rather, it canvassed³⁹ a variety of options for consideration, these in essence amounting to the application of either the law of the forum or the law of the domicile. The views of commentators were divided both on this issue and on whether, if reference were made to the law of the domicile, the governing law should be that of the spouse alleged to be incapable, of the petitioner, or of either spouse. The present law on these issues is unclear and the consultation provided no clear guidance either as to the need for reform or the course that any reform should take. Any reforming legislation in this field would undoubtedly clarify the law and would probably change it.

The impact of our provisional proposals

2.10 The proposals in the consultation document, when considered in the light of the comments made on them by consultees and of the Commissions' assessment of those comments, would not lead to major reforms of the choice of law rules relating to marriage. In many instances, such as the main rules relating to formal validity, capacity⁴⁰ and consent, the proposals would go little further than to confirm or clarify the existing law. In a number of other cases, statutory restatement along the lines of the proposals would bring clarity and certainty where there is presently neither. The best example of this would be the choice of law rules governing issues of physical incapacity. A few of the proposals would, if implemented, involve a clear change in the present law. The detailed proposals for amendment of the Foreign Marriage Act 1892 (to be discussed below⁴¹) fall into this category, as does the recommendation to abandon the rule in *Sottomayer v. De Barros (No. 2)*.⁴² It is also the case that a statutory rule that all aspects of capacity should be governed by the law of the domicile would involve a change in, for example, the rules governing the capacity of a foreign domiciliary to enter a polygamous marriage, there being authority at the moment for referring such an issue to the law of the intended matrimonial home.⁴³ The limited nature of any changes that it is thought desirable to include in a reforming and codifying statute on choice of law in marriage raises the fundamental issue, to which we now turn, whether any such legislation can really be recommended.

³⁴*Ibid.*

³⁵(1879) 5 P.D. 94.

³⁶*Vervaeke v. Smith* [1981] Fam. 77, 122 (C.A.).

³⁷*Supra.*

³⁸See para. 2.4 above.

³⁹Paras. 5.25–5.55.

⁴⁰Our provisional proposal in the consultation document that all issues of legal capacity to marry should be governed by the law of each party's ante-nuptial domicile would clarify and extend the present law. In *Radwan v. Radwan (No. 2)* [1973] Fam. 35 Cumming-Bruce J. applied the intended matrimonial home test in relation to capacity to contract a polygamous marriage and indicated that differing policy factors may point to differing choice of law rules for differing types of incapacity.

⁴¹In Part III.

⁴²(1879) 5 P.D. 94.

⁴³*Radwan v. Radwan (No. 2)* [1973] Fam. 35.

Should there be general legislation?

2.11 The issue whether the choice of law rules relating to marriage are in such need of reform as to justify major new legislation was one raised by a number of those who commented on the consultation document. Their concern that legislation might have the unfortunate effect of ossifying rules which are still in the process of development has caused us to look carefully at the desirability of recommending a statutory restatement of those choice of law rules. There are arguments ranged on both sides on this issue which we shall now examine.

2.12 In favour of legislation, it can be said that some at least of the choice of law rules are generally agreed to be undesirable and in need of reform, as indicated in paragraph 2.10 above. Other rules are uncertain, unclear or undeveloped. The best example of this is the set of rules governing issues of physical incapacity where it is impossible to state with any conviction just what the present law is. A restatement of the marriage choice of law rules would provide a clear statement of those rules in areas where we cannot now indicate with certainty what the law is; it would resolve present conflicts of authority, as in the rules on capacity to marry; and it would provide a means of reforming those limited areas where the law, though clear, is felt in policy terms to be wrong. Finally, a new set of statutory rules in this area could be seen as a further (perhaps final) part of the systematic restatement of private international law rules relating to family law matters which have been a concern of the Commissions since their creation.

2.13 Powerful though some of these arguments are, we have concluded that, on balance, the case for comprehensive legislation is not made out. As has been seen already, very many of the provisional proposals in the consultation document do little more than confirm the existing law. On some points (such as those relating to the characterisation of parental consent⁴⁴ or retrospective changes in the law governing validity of marriage⁴⁵) the consultation document suggested that legislation was undesirable, and with this approach there was broad agreement on consultation. In the consultation document we were unable to identify major areas where, in practice, the law seems to go wrong, i.e. to lead to an undesirable result. No comments received on consultation indicated to the contrary. Indeed, unusually, we received little in the way of comment from the practising profession and neither they nor administrators directly concerned with marriage law in operation drew serious practical problems to our attention. The fact that some of the choice of law rules are unclear or undeveloped would seem to be because, in practice, they are little used and provide no significant cause for concern. It has also to be said that the satisfactory resolution of some of the uncertainties in the present law, in particular the exact scope of any common law exception to the general rule that formal validity is governed by the law of the place of celebration and the rules governing the effect of physical incapacity in a marriage, would almost certainly require legislation of considerable sophistication and complexity. The use of the necessary resources within the Commissions to achieve this and the expenditure of time by Parliament on such proposed legislation would be hard to justify.

2.14 There is one final argument against comprehensive legislation in this field which we find very persuasive. It is that major statutory intervention at this time might be not only unhelpful, it might actually be harmful. Some marriage choice of law rules are still in the process of development. This can be illustrated by recent developments in the area of capacity to marry where the courts have been approaching the issue with considerable flexibility, concerned to uphold, wherever proper, the validity of a marriage and, if appropriate, to develop fresh choice of law rules for particular types of circumstance.⁴⁶ Much of the flexibility of such development would be lost in new, firm statutory rules, and if they were not fairly fixed in nature they would not achieve the certainty which might be their justification. The law in this field is, as has been said, still developing and it is better to leave that process to the judges for the time being. Obviously, if practical difficulties or problems arose, legislative intervention might be needed, but that has not occurred to any significant degree. In our view, the case for major legislation has not been made out and we recommend that there should be no comprehensive restatement in statutory form of the choice of law rules relating to marriage.

⁴⁴Working Paper No. 89; Consultative Memorandum No. 64 (1985), paras. 4.2–4.10.

⁴⁵*Ibid.*, paras. 4.11–4.13.

⁴⁶e.g., *Radwan v. Radwan* (No. 2) [1973] Fam. 35; *Vervaeke v. Smith* [1983] 1 A.C. 145; *Lawrence v. Lawrence* [1985] Fam. 106.

2.15 There remains the issue whether there should be *any* statutory reform of the marriage choice of law rules. It can be argued that abolition of the rule in *Sottomayer v. De Barros (No. 2)*⁴⁷ is a reform on the acceptability of which there is wide agreement and for which legislative provision might be made. The rule is, however, an exception to a general rule on capacity to marry, but that general rule is itself still in the process of development. Reforming legislation would probably need to state the general rule before the exception to it could be abolished and this would involve the more general restatement of the choice of law rules which we are not prepared to recommend. The other area where a case for detailed reform may be made concerns the Foreign Marriage Act 1892. In our consultation document, we indicated⁴⁸ a number of areas where improvement of that legislation might be achieved. Consultation supported this and commentators have also suggested further matters to be examined in that context. All these improvements can be achieved within the context of the present legislation, both primary and secondary, and we have concluded that it would be desirable to propose limited statutory reforms to achieve these improvements. It is with amendments of the 1892 Act that Part III of this Report is concerned.

⁴⁷(1879) 5 P.D. 94.

⁴⁸Working Paper No. 89; Consultative Memorandum No. 64 (1985), paras. 2.15–2.19, 2.49–2.53.

PART III

FOREIGN MARRIAGE ACT 1892

3.1 The Foreign Marriage Act 1892⁴⁹ (as amended by the Foreign Marriage Act 1947) provides two statutory exceptions to the general rule that a marriage which is formally invalid by the law of the country in which it is celebrated is also formally invalid within the United Kingdom. Both exceptions apply only where the marriage is celebrated abroad. They relate to consular marriages celebrated under the 1892 Act and to marriages of members of British Forces celebrated under that Act. We shall examine them in turn.

A. Consular marriages

3.2 The Foreign Marriage Act 1892 recognises the validity of what is more commonly known as a “consular marriage”, i.e., a marriage celebrated in any foreign country⁵⁰ by or before a British “marriage officer”⁵¹ in the statutory form. Section 1 of the 1892 Act provides that such a marriage between parties, one of whom at least is a British subject, shall be as valid as if it had been solemnised in the United Kingdom with a due observance of all forms.

3.3 The 1892 Act prescribes requirements as to the giving of notices to the marriage officer in whose district the parties have their residence,⁵² parental consents,⁵³ the taking of an oath⁵⁴ and registration of marriages⁵⁵. But all these requirements are directory; non-compliance with them will not render a marriage invalid, provided that the mandatory requirements as to the form of solemnisation prescribed by section 8 have been complied with.⁵⁶ Section 8 provides that the marriage must be solemnised at the official residence of the marriage officer with open doors between the hours of 8 a.m. and 6 p.m., in the presence of two or more witnesses, either by the marriage officer or by some other person in his presence, according to the rites of the Church of England⁵⁷ or in such other form as the parties see fit to adopt. In the latter case, however, the parties must at some stage declare that they know of no lawful impediment to the marriage and utter the statutory words of consent.

3.4 It is also possible for a person to lodge a caveat with the marriage officer objecting to the solemnisation of the marriage.⁵⁸ In a case of doubt as to whether he should go ahead with the celebration of the marriage, the marriage officer may transmit a copy of the caveat to a Secretary of State who is to refer it to the Registrar-General⁵⁹ for decision.

3.5 Once the marriage has been solemnised no evidence may be given in any legal proceedings that the parties have not complied with the preliminary requirements as to residence or consents.⁶⁰ Moreover, the authority of the marriage officer cannot be challenged

⁴⁹The legislation applies throughout the United Kingdom.

⁵⁰This means any country outside the Commonwealth. The Act may, however, be extended by regulations to marriages solemnised within the Commonwealth (s.11(2)(c)) but no such regulations have been made.

⁵¹Marriage officers include British ambassadors, High Commissioners, and consular officers, provided that they hold a marriage warrant from the Secretary of State. We understand that marriage warrants are only granted to consular officers in countries where the local marriage facilities do not meet the needs of British subjects. They have been granted to consular officers in Afghanistan, Bahrain, Belgium, Burma, Egypt, Iran, Iraq, Israel, Jerusalem, Jordan, Kuwait, Lebanon, Libya, Morocco, Nepal, Oman, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syrian Arab Republic, United Arab Emirates, Yemen Arab Republic and People’s Democratic Republic of Yemen. The number of consular marriages performed in the five years 1981-1985 was 172, 218, 195, 145 and 128 respectively.

⁵²One of the parties must sign a notice stating, *inter alia*, the residence of both parties and that they have resided for at least one week immediately preceding the notice in the district of the marriage officer: s.2. In special cases, the Secretary of State may authorise the marriage officer to dispense with the requirements as to residence and notice: Foreign Marriage Order 1970 (S.I. 1970 No. 1539) Art. 4(1).

⁵³Sect. 4. A feature of this provision, which we consider further in paras. 3.8–3.10 below, is that the same consents are required as for a marriage solemnised in England, even if the parties are domiciled in Scotland.

⁵⁴Sect. 7.

⁵⁵Sect. 9.

⁵⁶*Collett v. Collett* [1968] P. 482.

⁵⁷Sect. 8 does not expressly refer to solemnisation of a marriage according to the rites of the Church of Scotland. We return to this matter in paras. 3.11–3.12 below.

⁵⁸Sect. 5.

⁵⁹It is provided by s. 24 that this means the Registrar-General of Births, Deaths and Marriages in England. In para. 3.15 below, we consider the appropriateness of this where the party in question is closely connected with Scotland or Northern Ireland.

⁶⁰Sect. 13(1). There is statutory authority in England (s. 17) but not in Scotland or Northern Ireland, for the issue of extracts of entries in the marriage register books relating to consular marriages under the 1892 Act. We examine in paras. 3.18–3.19 below, whether provision should also be made in relation to Scotland and Northern Ireland.

after the solemnisation and registration of the marriage.⁶¹ Provision is made for the forfeiture of property in England in the case of a fraudulent marriage under the 1892 Act,⁶² though there is no similar provision in relation to Scotland or Northern Ireland. A false oath or notice may be punished in Scotland as perjury, though the relevant provision has been repealed for both England and Northern Ireland.⁶³

3.6 If section 8 of the Act is complied with, the marriage will be formally valid in the United Kingdom, even though it may be void by the law of the country of celebration.⁶⁴ However, a marriage officer under the Act is entitled to refuse to solemnise a marriage or to allow it to be solemnised in his presence if in his opinion it would be “inconsistent with international law or the comity of nations”.⁶⁵ This provision has been criticised as being unclear and imprecise,⁶⁶ but it would appear that it is designed to prevent “limping marriages”, i.e., marriages which would be void under the law of the country of celebration or perhaps under the domiciliary laws of the parties.⁶⁷ That this is the probable purpose of this provision is shown by the regulations made under section 21 of the Act. This section enables Orders in Council to be made to restrict the solemnisation of a marriage where it would be “inconsistent with international law or the comity of nations” or where adequate facilities already exist. The Foreign Marriage Order 1970,⁶⁸ made pursuant to section 21, provides that a marriage officer must not solemnise a marriage under the Act unless he is satisfied—

- “(a) that at least one of the parties is a British subject; and
- (b) that the authorities of [the foreign] country will not object to the solemnisation of the marriage; and
- (c) that insufficient facilities exist for the marriage of the parties under the law of that country; and
- (d) that the parties will be regarded as validly married by the law of the country to which each party belongs.”⁶⁹

3.7 In our consultation paper⁷⁰ we identified three areas in which the rules for the celebration of consular marriages were in need of amendment. They were: (i) the need for all parties, wherever their domicile or residence, to satisfy the English law on parental consent to marry;⁷¹ (ii) the preference in terms of form of ceremony given to the rites of the Church of England;⁷² (iii) the uncertainty of meaning of the requirement that the marriage be regarded as valid in the country to which “each party belongs”.⁷³ In the light of comments made to us and our own further consideration of the foreign marriage legislation, we think that there are five further matters requiring reform. These are: (iv) the procedure for lodging caveats;⁷⁴ (v) the provisions on forfeiture of property;⁷⁵ (vi) the provisions on the punishment of a false oath or notice;⁷⁶ (vii) the authorisation of the provision of extracts of entries in the marriage registers;⁷⁷ and (viii) the validation of pre-1892 marriages.⁷⁸ We shall examine these eight matters in turn.

(i) Section 4(1): requirement of parental consent

3.8 Section 4(1) of the Foreign Marriage Act 1892 provides that “the like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England.” This provision applies both to persons domiciled in any part of the United

⁶¹Sect. 13(2).

⁶²Sect. 14. We return to this matter in para. 3.16 below.

⁶³Sect. 15. We return to this matter in para. 3.17 below.

⁶⁴See *Hay v. Northcote* [1900] 2 Ch. 262.

⁶⁵Sect. 19.

⁶⁶Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), p. 276.

⁶⁷See n. 69 below. It may also be that the provision is intended to cover the situation where the authorities in the foreign country of celebration raise an objection to consular marriages.

⁶⁸S.I. 1970 No. 1539.

⁶⁹Art. 3(1). It is not clear what is meant by the phrase “the law of the country to which each party belongs”. It could mean the national law or the law of the domicile. In para. 3.14 below we make recommendations for the amendment of the Order to resolve this uncertainty.

⁷⁰Paras. 2.49–2.52.

⁷¹1892 Act, s. 4(1).

⁷²*Ibid.*, s. 8(2).

⁷³Foreign Marriage Order 1970, Art. 3(1)(d).

⁷⁴1892 Act, s. 5.

⁷⁵*Ibid.*, s. 14.

⁷⁶*Ibid.*, s. 15.

⁷⁷*Ibid.*, s. 17.

⁷⁸*Ibid.*, s. 26(2).

Kingdom and to persons domiciled elsewhere. Thus, for example, a Scottish domiciliary under the age of eighteen as well as the other party to the marriage would have to comply with the provisions as to consent required by English law,⁷⁹ even though no consent to marriage is required under Scots law. We raised the issue in our consultation document⁸⁰ whether a person domiciled in Scotland or Northern Ireland should have to comply with the provisions as to parental consent (if any) of the law of his domicile rather than with the English provisions as to consent.

3.9 The case for retaining section 4(1) in its present form is that it is simpler and easier for marriage officers (who generally have no legal background) to refer to one law only, that is, English law. If reference is to be made instead, in some circumstances, to the law of the domicile, this might (in the view of the Foreign and Commonwealth Office) cause the celebration of a marriage to have to be delayed whilst a party's domicile was determined. However, everyone (including the Foreign and Commonwealth Office) who commented on the proposal to amend section 4(1) accepted that reference to the parental consent provisions of the law of the domicile in some cases would be more appropriate than the present assumption that the law of England applies throughout the United Kingdom.

3.10 If the 1892 Act is no longer to require that the English law of parental consent is to apply in all cases, it has to be decided whether, instead, the personal law, i.e. the law of the domicile, is to apply in all or only a limited number of cases. Whilst it might be said that it would best accord with principle for a marriage officer to apply the domiciliary law on parental consent in all cases, we are persuaded that this might pose some practical problems for marriage officers. We prefer a more modest reform, along the lines identified in the consultation document and on which virtually all consultees were agreed. We recommend that, because there is no requirement of parental consent under Scots law, section 4(1) should be disappplied in relation to a party domiciled in Scotland and that, in the case of a party domiciled in Northern Ireland, section 4(1) should require compliance with the Northern Ireland law on parental consent.⁸¹ In all other cases the English law on parental consent would be applied. We do not think that these limited recommendations will unduly complicate the task of marriage officers under the 1892 Act. They will, in practice, act on the oath of the party concerned just as they would do if the party swore that there was no person whose consent was required by English law.⁸²

(ii) Section 8: form of the ceremony

3.11 Section 8(2) of the Foreign Marriage Act 1892 provides that the marriage ceremony may be performed according to the rites of the Church of England or in such other form as the parties see fit to adopt. If the marriage is not solemnised according to the rites of the Church of England, then section 8(3) provides that in some part of the ceremony the parties must make the following declarations:

“I solemnly declare, that I know not of any lawful impediment why I A.B. [or C.D.] may not be joined in matrimony to C.D. [or A.B.]”

And each of the parties shall say to the other,

“I call upon these persons here present to witness, that I A.B. [or C.D.] take thee, C.D. [or A.B.], to be my lawful wedded wife [or husband].”

In our consultation document⁸³ we expressed concern that section 8, whilst it does not preclude the solemnisation of a marriage according to a form of ceremony recognised by, for

⁷⁹The English rules relating to consent to marriage (contained in s. 3 of the Marriage Act 1949 and its Second Schedule) are similar to the Northern Ireland provisions (contained in the Marriages Act (Northern Ireland) 1954). However, the Northern Ireland (but not the English) legislation requires consent to be given to the marriage of a widower or widow under the age of 18. The Family Law Reform Act 1987 (which is not yet in force) amends the consent rules in the 1949 Act in relation to the marriage of a child born out of wedlock who is under 18. Draft legislation for Northern Ireland corresponding to this Act is expected to be published by the end of this year.

⁸⁰Paras. 2.49–2.50.

⁸¹A consequential amendment to s. 7(c) will be required.

⁸²See Foreign Marriage Act 1892, s. 7(c). At present internal administrative regulations require any necessary consents to be given in writing.

⁸³Para. 2.51.

example, the Church of Scotland, appeared to give a certain preference to the solemnisation of a marriage according to the rites of the Church of England. If one abandoned such a preference, there is a further difficulty that the prescribed form of words is not used in precisely those terms in the ceremonies of a number of denominations, including in fact the Church of England.

3.12 We received comments on this issue on consultation from both legal commentators and from representatives of various Churches. It was agreed by all that the present position is not defensible. We have concluded that it would be most appropriate to remove from section 8 the references to the rites of the Church of England. This is acceptable to the General Synod of the Church of England and we so recommend. We need to go further than this, however, because the declarations in section 8(3) are not expressly made in the course of a Church of England marriage ceremony and we accept the view of the General Synod that a Church of England ceremony should be sufficient in itself. It should be sufficient that the ceremony chosen by the parties indicates that they know of no lawful impediment to their marriage and that at some point therein there is an express declaration by each party to the effect that he or she takes the other as husband or wife. A Church of England ceremony would satisfy both these requirements. If either is missing from the chosen ceremony, then the relevant statutory declaration as presently contained in section 8(3)⁸⁴ would have to be made. Such changes would have the result that section 8 no longer discriminated between denominations but also ensured that a Church of England ceremony satisfied the statutory requirements and we so recommend.

(iii) Foreign Marriage Order 1970, Article 3(1)(d)

3.13 The Foreign Marriage Order 1970⁸⁵ provides that a marriage officer must not solemnise a marriage under the Foreign Marriage Act 1892 unless he is satisfied that a number of conditions are satisfied, including the condition that the parties will be regarded as validly married by the law of the country to which "each party belongs".⁸⁶ We expressed concern in our consultation document⁸⁷ that it was unclear to what legal system the phrase referred. It could be to the law of the nationality or to the law of the domicile. We understand that it is the current practice of the Foreign and Commonwealth Office to refer to the law of the nationality, but it might be thought more appropriate, as Article 3(1)(d) is concerned with the essential validity of a marriage, to refer to the law of the domicile and that is what we provisionally proposed.

3.14 All who commented on this issue agreed that there was a need for clarification, and most accepted that it would be more appropriate for reference to be made to the law of the domicile than to that of the nationality. However, there were some expressions of unease over this, most particularly by the Foreign and Commonwealth Office who, whilst not in terms opposing the provisional proposal, expressed concern that marriage officers would be required to investigate the domicile of the parties, that this was a more difficult task than determining nationality and that the result might be that some ceremonies would be delayed. Whilst we accept that, in some though not all cases, nationality may be easier to prove than domicile,⁸⁸ we believe that nationality provides an inappropriate connecting factor in this context. First, it is inappropriate in terms of principle in that the validity of a marriage is never under our choice of law rules referred to the law of a spouse's nationality. Secondly, it is inappropriate in practice. The Foreign Marriage Act 1892 only applies where one of the parties is a "British subject"⁸⁹ but a reference to the law of the nationality will give no indication as to the law of which part of the United Kingdom (or any other country of which a British subject may be a national) reference must be made to test the validity of a marriage. Similarly in a number of federal or composite states, such as the U.S.A., there is a wide variation in the substantive marriage laws of the territories within the national state. We remain, therefore, of the view that it is more appropriate to refer to domicile than to

⁸⁴We have given consideration to modernising the wording of the declarations contained in s.8(3) but have decided against recommending any change which would make them different in form from those required under English domestic law (Marriage Act 1949, s.44(3)). If the domestic forms are changed, the opportunity could be taken to alter the form of the declarations contained in s. 8(3). There are no prescribed forms under Scots domestic law.

⁸⁵S.I. 1970 No. 1539.

⁸⁶Art. 3(1)(d).

⁸⁷Para. 2.52.

⁸⁸Though this may be the case less often under our proposals for reform of the law of domicile: Working Paper No. 88; Consultative Memorandum No. 63 (1985).

⁸⁹See n. 10 above.

nationality. We recommend that Article 3(1)(d) of the Foreign Marriage Order 1970 be amended by the substitution of the phrase “in which each party is domiciled” for the current phrase “to which each party belongs.”

(iv) Section 5: lodging of caveats

3.15 Section 5 of the 1892 Act allows for the lodging of caveats against a proposed marriage. In any case of doubt the marriage officer may send a copy of the caveat to a Secretary of State who will then refer it to the Registrar-General for decision. Under section 24 of the Act, “Registrar-General” is defined as “the Registrar-General of Births, Deaths and Marriages in England”. We believe that it is inappropriate for the Registrar-General in England to be the person to whom reference is necessarily made where the party in question is closely connected with Scotland or Northern Ireland. We have consulted the Foreign and Commonwealth Office, the General Register Office, the General Register Office for Scotland and the Office of Law Reform for Northern Ireland. All are content that there should be an amendment of section 5 in the terms of the following recommendation, namely that the Secretary of State should have a discretion to refer the case to whichever Registrar General in England, Scotland or Northern Ireland he thinks appropriate.⁹⁰

(v) Section 14: forfeiture of property

3.16 Section 14⁹¹ provides for the forfeiture of property in England in the case of a fraudulent marriage celebrated under the 1892 Act. There were similar provisions in relation to marriages celebrated in England,⁹² but they were repealed in 1949⁹³ as being virtually obsolete. We are not aware of any reported decision in which section 14 of the Foreign Marriage Act 1892 has been invoked and we believe that it is similarly obsolete, a view with which the Foreign and Commonwealth Office and the General Register Office agree. We recommend that section 14 be repealed.⁹⁴

(vi) Section 15: punishment of false oath or notice

3.17 Section 15 provides for the punishment of a false oath or notice under the 1892 Act as perjury and for trial in any county in England. It was repealed for England and Wales in 1911⁹⁵ and for Northern Ireland in 1979.⁹⁶ It is of no relevance for Scotland, the point being covered in any event by the False Oaths (Scotland) Act 1933.⁹⁷ With the agreement of the Foreign and Commonwealth Office and the General Register Office for Scotland, we recommend that section 15 be repealed.

(vii) Provision of extracts

3.18 Section 9 of the 1892 Act provides for the registration of marriages falling within the Act in marriage register books and for a certified copy of an entry in such a marriage register to be sent to the appropriate Registrar-General.⁹⁸ Statutory authority for the issue of extracts of entries in the marriage register books is provided for England and Wales,⁹⁹ but not for Scotland or Northern Ireland. In practice, the General Register Office for Scotland does issue certified copies and we agree with them that the provision of statutory authority to do so would be desirable. It seems appropriate that similar authority be provided for Northern Ireland and the Office of Law Reform for Northern Ireland agrees. The Foreign and Commonwealth Office, the General Register Office and the General Register Office for Scotland are also content that such provision be made.

3.19 There is provision in Article 7 of the Foreign Marriage Order 1970¹⁰⁰ that, in the case of a marriage celebrated abroad according to the local law, a certified copy of a marriage certificate under the local law may be provided on payment of a fee. Furthermore, such a

⁹⁰We think it would be undesirable to prescribe any rigid criteria for the making of such references.

⁹¹This section is a consolidation of s.16 of the Consular Marriage Act 1849.

⁹²Marriage Act 1823, s. 23; Marriage Act 1836, s. 43; Marriage and Registration Act 1856, s. 19. These provisions lost their importance after the enactment of the Married Women's Property Act 1882.

⁹³Marriage Act 1949. The repeals were recommended in a memorandum by the Lord Chancellor under the Consolidation of Enactments (Procedure) Act 1949.

⁹⁴This recommendation will require further consequential amendments to ss. 21(3) and 24 of the 1892 Act.

⁹⁵Perjury Act 1911, s. 17 and Schedule.

⁹⁶Perjury (Northern Ireland) Order 1979 (S.I. 1979/1714 (N.I.) 19), Article 19(2) and Schedule 2.

⁹⁷Sect. 5.

⁹⁸Sect. 10; and see Art. 6 of the Foreign Marriage Order 1970, S.I. 1970 No. 1539.

⁹⁹Sects. 17 and 24.

¹⁰⁰S.I. 1970 No. 1539.

certified copy is to be of equal evidential value as if it had been issued by the authorities of the foreign country in which the marriage took place.¹⁰¹ Article 6 of the 1970 Order deals with entries in the marriage register in relation to consular marriages. It would, in our view, be appropriate to amend that Article to make provision for the issuing of certified copies from the registers in relation to such marriages and to provide, on the analogy of Article 7, for the payment of a fee and for the evidential effect of any certified copy. We think that this could be achieved by adding¹⁰² the following paragraphs to Article 6 of the Foreign Marriage Order 1970:

- “(2) Any person shall be entitled to obtain from the appropriate Registrar General a certified copy of any document received by that Registrar General under paragraph (1) of this Article on payment of a fee in respect of the provision of the copy and any necessary search for the document.
- (3) The fee payable under paragraph (2) of this Article shall be the same fee as is for the time being charged by the appropriate Registrar General for the provision of a certified copy of, and any necessary search for, an entry in the records in his custody of marriages performed in Scotland or Northern Ireland, as the case may be.
- (4) A certified copy issued by the appropriate Registrar General under paragraph (2) of this Article of an entry in the marriage register shall be sufficient evidence of the marriage.
- (5) In this Article “the appropriate Registrar General” means the Registrar General for Scotland or Northern Ireland, as the case may require.”

(viii) Validation of pre-1892 marriages

3.20 Section 26(2) of the 1892 Act is a saving provision for the validation of marriages celebrated abroad before the 1892 Act came into effect. Not only is its effect now spent, it is no longer necessary in view of section 16(1)(b) of the Interpretation Act 1978. With the agreement of the Foreign and Commonwealth Office, the General Register Office and the General Register Office for Scotland, we recommend that section 26(2) of the 1892 Act be repealed.

B. Marriages of members of British Forces serving abroad¹⁰³

3.21 Section 22(1) of the Foreign Marriage Act 1892, as amended by section 2 of the Foreign Marriage Act 1947, provides that a marriage solemnised in any foreign territory¹⁰⁴ by a chaplain serving with any part of the naval, military or air forces of the Crown, or by a person authorised by the commanding officer of any part of these Forces, shall be as valid as if celebrated in the United Kingdom. This provision only applies if at least one of the parties is a member of the Forces serving in that territory or a person employed there in such other capacity as may be prescribed by Order in Council,¹⁰⁵ and provided that certain prescribed conditions are satisfied.¹⁰⁶ It is not necessary, however, that either party should be a British subject.¹⁰⁷

3.22 Section 22 does not extend to civilian personnel, such as United Kingdom civil servants and schoolteachers, accompanying the Forces abroad, nor to the dependent children of members of the Forces and of the civilian personnel. At the suggestion of the Ministry of Defence we raised in our consultation document¹⁰⁸ the question whether the scope of section 22 should be extended to include both categories just referred to.

¹⁰¹Art. 7(3).

¹⁰²The 1892 Act, s. 21(1)(h) and (i) authorises the amendment of the 1970 Order.

¹⁰³This matter was originally dealt with by a statute of 1823, which was substantially reproduced by s. 22 of the Foreign Marriage Act 1892. As from 1 February 1948, this section was replaced by s. 2 of the Foreign Marriage Act 1947.

¹⁰⁴This term excludes any part of the Commonwealth but includes ships in foreign waters: s. 22(2) and (3).

¹⁰⁵The capacities prescribed by the Foreign Marriage (Armed Forces) Order 1964 (S.I. 1964 No. 1000) cover women serving in certain auxiliary or nursing services.

¹⁰⁶Before a marriage is solemnised the chaplain must receive a certificate that the commander of the territory has no objection to the marriage and the chaplain must celebrate the marriage in the presence of at least two witnesses: Foreign Marriage (Armed Forces) Order 1964, art. 3 (S.I. 1964 No. 1000).

¹⁰⁷*Taczanowska v. Taczanowski* [1957] P. 301, 319-320.

¹⁰⁸Para. 2.53.

3.23 On consultation there was general agreement with our provisional recommendation that the scope of section 22 be extended to include United Kingdom civil servants and sponsored civilians accompanying the Forces abroad. The Ministry of Defence is content with such a change. It can be effected¹⁰⁹ by adding these categories to those already prescribed in Article 2 of the Foreign Marriage (Armed Forces) Order 1964¹¹⁰ and we recommend that the Order be amended to that effect.

3.24 There was also general agreement with our provisional recommendation that section 22 be broadened in scope to include children of members of the Forces and of the specified civilian personnel. We do not think that there should be any limit on the children who may take advantage of section 22 in terms of their age,¹¹¹ whether their parents are married, whether they are adopted, or of dependency.¹¹² In this last respect we are adopting an approach different from that in the consultation document where we suggested¹¹³ that the child should be dependent on the person serving abroad for support. A test based on dependency would enable the special marriage facilities to be used by children who do not really need them, e.g. a child who is dependent on the relevant parent for support, but who does not have his or her home with that parent; and we are persuaded that such a requirement would prove difficult for the commanding officer¹¹⁴ on the base to operate in practice. We do, however, believe that there should be some qualification on the children (including adult children) who may fall within section 22. That section should be limited to children of the service or civilian personnel who have their home with their parent or parents in the foreign country where the Forces base is situated. It would not be appropriate in our view to limit the provision to families which have a home actually on the base as many qualified service or civilian personnel may live outside the base. The Ministry of Defence is content with these changes, and we recommend, therefore, that section 22 of the Foreign Marriage Act 1892 be extended to include any child of the service and civilian personnel falling within that section who has his home¹¹⁵ with a member of such personnel in the foreign territory in which they are serving.

¹⁰⁹Foreign Marriage Act 1892, s. 22(6).

¹¹⁰S.I. 1964 No. 1000.

¹¹¹An age limit of, say, 18 would exclude children, e.g. the 22 year old student living with his parents in the foreign territory, who would be at least as likely to need the marriage facilities as children between 16 and 18; and there does not seem to be any strong reason for denying to children over 18 a privilege which is to be conferred on children under 18, and for which they may have the same practical need.

¹¹²There was no broad support for the idea, put forward for discussion in Working Paper No. 89; Consultative Memorandum No. 64 (1985), para. 2.53 but not as a recommendation, that section 22 be further extended to all blood or marriage relatives of the service and civilian personnel who are dependent on them for support. We do not pursue that matter further.

¹¹³Para. 2.53.

¹¹⁴The commanding officer must certify that he has no objection to the marriage: Foreign Marriage (Armed Forces) Order 1964 (S.I. 1964 No. 1000) Art. 3.

¹¹⁵The parent's home would not need to be the child's only or principal home. Whether a child has his home with a parent will depend on the facts of each case. Factors such as the duration or regularity of the child's residence with the parent and whether the child regards the parent's house as his base or proper abode will clearly be important: *In Re Y (Minors) (Adoption: Jurisdiction)* [1985] Fam. 136, 140.

PART IV

FOREIGN MARRIAGE CONFIRMATION ACTS

4.1 We are taking the opportunity in this report to recommend the repeal of the Marriages in Japan (Validity) Act 1912 and a series of similarly spent Acts passed before the Foreign Marriage Act 1892. Following the ending of British jurisdiction in Japan in 1899 it became necessary to register marriages there in accordance with Japanese law and the Marriages in Japan (Validity) Act 1912 retrospectively validated for the purposes of British law some 20 to 30 marriages in the case of which this formality had not been observed.¹¹⁶ The earlier Acts¹¹⁷ similarly confirmed particular marriages of British subjects abroad which were believed to be valid at the time they were solemnised but in respect of which doubts later arose because of the uncertain state of the contemporary law, because a change in the law had been overlooked, or because the terms of the Consular Marriage Act 1849 had not been strictly complied with. Thus the Odessa Marriage Act 1867 was passed to confirm the validity of certain marriages in respect of which—due to the “inadvertence” of a consul—the residence provisions of the 1849 Act had not been complied with.¹¹⁸ The Fiji Marriage Act 1878 and the Basutoland and British Bechuanaland Marriage Act 1889 provided for the marriages concerned to be registered locally within a specified period; in other cases, the marriage records were transmitted to the Registrar General of Births, Deaths and Marriages in England.

4.2 These Acts have had their effect. We have consulted the Foreign and Commonwealth Office, the General Register Office and the General Register Office for Scotland, and are satisfied that the Acts are spent and unnecessary¹¹⁹ and that their repeal would not affect their previous operation.¹²⁰ A corresponding and more lengthy series of marriage validation Acts for England and Wales, and Northern Ireland was repealed in 1977.¹²¹

4.3 The statutes which we recommend for repeal, and the marriages to which they relate, are as follows:—

- 1833 c.45. Marriages at Hamburg according to the rites of the Church of England between 1808 and 1833.
- 1854 c.88. Consular marriages in Mexico before 1854.
- 1858 c.46. Marriages in the chapel of the Russia Company, Moscow between 1849 and 1858; consular marriages in Tahiti or its dependencies and at Ningpo, China before 1858.
- 1859 c.64. Marriages in the British Chapel, Lisbon between 1849 and 1859.
- 1864 c.77. Marriages in the Ionian Islands before 1857.
- 1867 c.2. Consular marriages at Odessa before 1867.
- 1867 c.93. Marriages in the chapel of the St. John Del Rey Mining Company, Morro Velho, Brazil before 1868.
- 1878 c.61. Marriages in Fiji between 1849 and 1874.
- 1879 c.29. Marriages on board a British vessel solemnised by the officer commanding the vessel before 1879.
- 1889 c.38. Marriages in Basutoland before 1870 or in British Bechuanaland before 1885.
- 1912 c.15. Marriages in Japan between 1899 and 1912.

¹¹⁶*Hansard* (H.C.) 21 October 1912, Vol. 42, cols. 1874-5.

¹¹⁷See para. 4.3 below.

¹¹⁸Under the modern law, as explained in para. 3.3 above, these marriages would not have been regarded as invalid. Furthermore, by the Foreign Marriage Act 1892, s.13 (1) (consolidating the Consular Marriage Act 1849, s.13), once the marriage has been solemnised, no evidence may be given in any legal proceedings touching its validity that the parties have not complied with the requirements as to residence.

¹¹⁹The Act 1864 c. 77 includes provision corresponding to section 14 of the Foreign Marriage Act 1892 (forfeiture of property in the case of fraudulent marriage) and other now obsolete provisions which were consequential on the relinquishment of British protection over the Ionian States.

¹²⁰Interpretation Act 1978, s. 16(1).

¹²¹Statute Law (Repeals) Act 1977, Sch. 1, Part XII. There is no corresponding series of Acts for Scotland.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 We conclude this Report with a summary of our recommendations. Where appropriate, we identify the relevant clauses in the draft Foreign Marriage (Amendment) Bill (contained in Appendix A to this Report) intended to give effect to particular recommendations.

5.2 Our recommendations are as follows:

(1) There should be no comprehensive restatement in statutory form of the choice of law rules relating to marriage; though there should be reform of some provisions of the foreign marriage legislation.

[Paragraphs 2.14 and 2.15]

(2) Section 4(1) of the Foreign Marriage Act 1892 should not apply to a party who is domiciled in Scotland; and a party domiciled in Northern Ireland should be required to comply with the Northern Ireland law on parental consent to marry. In all other cases the English law on parental consent should continue to be applied.

[Paragraph 3.10 and clauses 1 and 3]

(3) In Section 8 of the 1892 Act there should no longer be express reference to solemnisation of marriage according to the rites of the Church of England and the statutory declarations as to no impediment and agreement to marry shall only be made if the ceremony chosen by the parties does not contain declarations to similar effect or, in the case of impediments to marry, otherwise indicate that the parties know of no lawful impediment to their marriage.

[Paragraph 3.12 and clause 4]

(4) The condition in Article 3(1)(d) of the Foreign Marriage Order 1970 that a consular marriage shall only be solemnised if it would be valid according to the law of the country to which each party belongs should be amended so that reference is made to the law of the country in which each party is domiciled.

[Paragraph 3.14]

(5) When a caveat is lodged against a consular marriage and a copy is sent to the Secretary of State, he may refer it to whichever Registrar General in England, Scotland or Northern Ireland he thinks appropriate.

[Paragraph 3.15 and clause 2]

(6) Provision should be made in the Foreign Marriage Order 1970 for a person, on payment of the appropriate fee, to obtain from the Registrar General in Scotland or Northern Ireland a copy of the entry in a marriage register of a marriage celebrated under the 1892 Act, and as to the evidential effect of such copy.

[Paragraph 3.19]

(7) Section 22 of the 1892 Act (which deals with marriages celebrated abroad by a Forces chaplain or person authorised by a commanding officer) and the Foreign Marriage (Armed Forces) Order 1964 should be extended to include the marriages of United Kingdom civil servants and sponsored civilians accompanying the Forces abroad, and of any child of a member of the service and civilian personnel falling within section 22 who has his home with a member of such personnel in the foreign territory in which they are serving.

[Paragraphs 3.23 and 3.24, and clause 5]

(8) Sections 14 (forfeiture of property), 15 (punishment of false oath or notice) and 26(2) (validation of pre-1892 marriages) of the 1892 Act should be repealed as obsolete.

[Paragraphs 3.16, 3.17 and 3.20, and clause 6 and the Schedule]

(9) The obsolete statutes listed in paragraph 4.3 above should be repealed.

[Paragraph 4.3 and clause 6 and the Schedule]

(Signed) ROY BELDAM, *Chairman, Law Commission*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
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J. G. H. GASSON, *Secretary*

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JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
29 May 1987

Draft Foreign Marriage (Amendment) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Consent to marriage for party domiciled outside Scotland.
 2. Caveat against marriage.
 3. Oath before marriage.
 4. Form of ceremony.
 5. Marriages of children of members of H.M. Forces etc. serving abroad.
 6. Repeals.
 7. Short title, commencement and extent.
- SCHEDULE—Enactments repealed.

DRAFT
OF A
BILL
TO

A.D. 1987.

Amend the Foreign Marriage Act 1892, and to repeal certain enactments which are spent relating to the validation of marriages of British subjects solemnised outside the United Kingdom.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Consent to marriage
for party domiciled
outside Scotland.

1.—Section 4 of the Foreign Marriage Act 1892 (in this Act referred to as “the 1892 Act”) shall be amended as follows:—

(a) for subsection (1) excluding the proviso there shall be substituted the following provision—

“(1) The like consent shall be required in relation to a party to a marriage under this Act as is required in relation to a party to a marriage solemnised in England and Wales.”;

(b) in the proviso to subsection (1) the word “Scotland” shall be omitted;

(c) after subsection (1) there shall be inserted the following subsection—

“(1A) Subsection (1) above—

(a) shall not apply in relation to a party to a marriage under this Act who is domiciled in Scotland; and

(b) shall apply in relation to a party to a marriage under this Act who is domiciled in Northern Ireland as if for the words “England and Wales” there were substituted the words “Northern Ireland.”.

EXPLANATORY NOTES

N.B.: References to "Recommendations" are to the Summary of Recommendations in Part V of this Report.

General

The Bill reforms some of the rules for the celebration outside the United Kingdom of consular marriages, at least one of the parties to which must be a British subject. It also extends the facilities for marriage in a foreign territory (as defined—see para. 3.21) currently available to both members of H.M. Forces and specified civilian personnel serving in that territory, to certain of their children. It achieves these objects by amending some of the provisions of the Foreign Marriage Act, 1892 (referred to in these Notes as "the 1892 Act").

Clause 1

This clause implements Recommendation (2). It provides that a party domiciled in Scotland will no longer have to comply with the provisions of English law relating to parental consent to marriage of those under 18 years of age. Under Scots law such consent is not required. The clause also provides that a person domiciled in Northern Ireland is to be required to comply with the Northern Ireland, rather than the English, law on parental consent. British subjects domiciled anywhere other than Scotland or Northern Ireland (e.g. France, India) will still be required to comply with the English law on parental consent.

Foreign Marriage (Amendment)

Caveat against
marriage.

2. Section 5 of the 1892 Act shall be amended by adding at the end the following subsection—

“(5) In this section “the Registrar General” means the Registrar General of Births, Deaths and Marriages in England, the Registrar General of Births, Deaths and Marriages for Scotland, or the Registrar General of Births, Deaths and Marriages in Northern Ireland, whichever the Secretary of State considers is appropriate.”.

EXPLANATORY NOTES

Clause 2

This clause implements Recommendation (5) by enabling a Secretary of State, on receipt of a caveat under section 5 of the 1892 Act, to forward it for decision to the Registrar General for England and Wales, Scotland or Northern Ireland, whichever he thinks appropriate. Under the present law the caveat has to be forwarded to the Registrar General for England and Wales. The amendment takes account of the fact that the party to whom the caveat relates may have no connection with England and Wales, being instead closely connected with another part of the United Kingdom.

Foreign Marriage (Amendment)

Oath before
marriage.

3. In section 7(c) of the 1892 Act for the words from “not being” to “thereto” there shall be substituted the words “is under the age of eighteen years and consent in relation to that party is required by law, that such consent has been obtained”.

EXPLANATORY NOTES

Clause 3

This clause makes an amendment to section 7(c) of the 1892 Act, consequential on the provisions of Clause 1 (see paragraph 3.10 and footnote 81).

Foreign Marriage (Amendment)

Form of ceremony. 4. In section 8 of the 1892 Act for subsections (2) and (3) there shall be substituted the following subsections—

“(2) Every such marriage shall be solemnised at the official house of the marriage officer, with open doors, between 8 am and 6 pm in the presence of two or more witnesses, and may be solemnised by the marriage officer, or (where the parties so desire) by another person in the presence of the marriage officer according to such form and ceremony as the parties thereto see fit to adopt.

(3) Where the form of ceremony to be used does not contain an express declaration, or does not otherwise indicate, that the parties know of no lawful impediment to their marriage, then, in some part of the ceremony and in the presence of the marriage officer and witnesses, each of the parties shall declare—

‘I solemnly declare that I know not of any lawful impediment why I A.B. [or C.D.] may not be joined in matrimony to C.D. [or A.B.]’

(4) Where the form of ceremony to be used does not contain an express declaration by each party that that party takes the other party as husband or wife, as the case may be, then, in some part of the ceremony and in the presence of the marriage officer and witnesses, each of the parties shall say to the other—

‘I call upon these persons here present to witness that I A.B. [or C.D.] take thee C.D. [or A.B.] to be my lawful wedded wife [or husband].’”

EXPLANATORY NOTES

Clause 4

This clause implements Recommendation (3). It removes express reference to the rites of the Church of England from section 8(2) and (3) of the 1892 Act. The change is one of form rather than substance since most forms of marriage ceremony, including that of the Church of England, will continue to satisfy the requirements of the 1892 Act. Only if, in the course of the marriage ceremony, the parties do not expressly declare, or otherwise indicate, that they know of no lawful impediment to their marriage, does each have to make the declaration set out in the new subsection (3). The words “or does not otherwise indicate” are intended to cover the practice in some ceremonies, e.g., a Church of England ceremony, whereby the parties’ silence in response to the celebrant’s invitation that impediments be stated is taken as a sufficient indication that they know of none. Similarly, only if there is no declaration by each party to the effect that he or she takes the other as husband or wife, does each have to make the declaration set out in the new subsection (4).

Foreign Marriage (Amendment)

Marriages of children of members of H.M. Forces etc. serving abroad.

5. Section 22 of the 1892 Act shall be amended as follows—

- (a) in proviso (a) of subsection (1), after the word “marriage” there shall be inserted “(i)” and after the word “Council” there shall be inserted “or
 - (ii) is a child of such a member or person as is mentioned in subparagraph (i) above and has his home in the foreign territory concerned with that member or person”;
- (b) after subsection (1) there shall be inserted the following subsection—
 - “(1A) In proviso (a)(ii) to subsection (1) above ‘child’ includes—
 - (a) any child who is or was treated by the member or person mentioned in proviso (a)(i) above as a child of the family in relation to any marriage to which that member or person is or, as the case may be, was a party; and
 - (b) a child born out of wedlock.”.

EXPLANATORY NOTES

Clause 5

This clause implements Recommendation (7) by making the special facilities for marriage provided by section 22 of the 1892 Act available to children of those persons who fall within the scope of the section, namely members of H.M. Forces serving in the foreign territory, and specified civilian personnel accompanying those Forces (see paragraphs 3.21, 3.22 and 3.24). To qualify, the child concerned must have his home with the relevant parent in the foreign country where the Forces base is situated. Apart from this requirement, there is no limit as to age, dependency for support, or otherwise on the children who will be able to take advantage of section 22.

Subsection (b) inserts a new subsection (1A) into section 22, to clarify for the avoidance of doubt the meaning of "child". An adopted child is included, without the need for express reference, by virtue of, for England and Wales, the Children Act 1975, Schedule 1, paragraph 3, and for Scotland, the Adoption (Scotland) Act 1978 section 39. No special provision is made for Northern Ireland, because the draft Adoption (Northern Ireland) Order, published as a Proposal on 20 October 1986, is expected to become law by the end of 1987.

For Scotland, the reference in paragraph (b) of the new subsection (1A) to a 'child born out of wedlock' is unnecessary in view of the Law Reform (Parent and Child) (Scotland) Act 1986, section 1. However, that reference is at present necessary for England and Wales, notwithstanding the enactment of the Family Law Reform Act 1987: section 1 of that Act is not yet in force and will apply only to enactments passed after it comes into force. The reference to a 'child born out of wedlock' is also necessary for Northern Ireland. It is expected to be next year before there is legislation for Northern Ireland equivalent to the Family Law Reform Act 1987. Without the express reference to a child born out of wedlock, the term 'child' would be more restricted for England, Wales and Northern Ireland than for Scotland.

Foreign Marriage (Amendment)

Repeals.

6. The enactments mentioned in the Schedule to this Act (which include enactments which are spent) are hereby repealed to the extent specified in column 3 of that Schedule.

EXPLANATORY NOTES

Clause 6

This clause implements Recommendations (8) and (9). It provides for repeal of obsolete provisions of the 1892 Act and various spent foreign marriage validation Acts.

Foreign Marriage (Amendment)

Short title,
commencement and
extent.

7.—(1) This Act may be cited as the Foreign Marriage (Amendment) Act 1987.

(2) This Act shall come into force at the end of the period of three months beginning with the date on which it is passed.

(3) This Act extends to Northern Ireland.

Foreign Marriage (Amendment)

Section 6.

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short title	Extent of repeal
3 & 4 Will. 4. c.45 (1833).	An Act to declare valid marriages solemnised at Hamburgh since the abolition of the British Factory there.	The whole Act.
17 & 18 Vict. c.88 (1854).	An Act to render valid certain marriages of British subjects in Mexico.	The whole Act.
21 & 22 Vict. c.46 (1858).	An Act to remove doubts as to the validity of certain marriages of British subjects abroad.	The whole Act.
22 & 23 Vict. c.64 (1859).	An Act to remove doubts as to the validity of certain marriages of British subjects at Lisbon.	The whole Act.
27 & 28 Vict. c.77 (1864).	An Act to repeal and in part re-enact certain Acts of Parliament relating to the Ionian States, and to establish the validity of certain things done in the said States.	The whole Act.
30 & 31 Vict. c.2.	The Odessa Marriage Act 1867.	The whole Act.
30 & 31 Vict. c.93.	The Morro Velho Marriage Act 1867.	The whole Act.
41 & 42 Vict. c.61.	The Fiji Marriage Act 1878.	The whole Act.
42 & 43 Vict. c.29.	The Confirmation of Marriages on Her Majesty's Ships Act 1879.	The whole Act.
52 & 53 Vict. c.38.	The Basutoland and British Bechuanaland Marriage Act 1889.	The whole Act.
55 & 56 Vict. c.23.	The Foreign Marriage Act 1892.	In section 4, in the proviso to subsection (1) the word "Scotland". Section 14 and 15. In section 21(3) the words from "including" to "or oath". In section 24, the definition of the expression "Attorney-General". Section 26(2).
2 & 3 Geo. 5. c.15.	The Marriages in Japan (Validity) Act 1912.	The whole Act.
24 & 25 Geo. 5. c.13.	The Marriage (Extension of Hours) Act 1934.	The whole Act.

EXPLANATORY NOTES

Schedule

The Schedule implements Recommendations (8) and (9) (see also Clause 6). The last Act listed in the Schedule is the Marriage (Extension of Hours) Act, 1934. The only provision of that Act presently remaining in force is section 1(2) which textually amends section 8(2) of the 1892 Act by inserting the words 'eight in the forenoon and six in the afternoon'. Those words are now being incorporated directly into the new section 8(2) (see Clause 4). The 1934 Act therefore becomes unnecessary and can be repealed.

APPENDIX B

Membership of the Joint Working Party

Dr. P. M. North	}	<i>Joint Chairmen</i>	Law Commission
Dr. E. M. Clive			Scottish Law Commission
Mr. A. Akbar			Law Commission
Miss S. M. J. Brooks			Foreign and Commonwealth Office
Mr. M. Carpenter			Lord Chancellor's Department
Mr. I. G. Dewar			General Register Office for Scotland
Mr. G. Duke			Solicitor's Office, Scotland
Mr. J. Ribbins			General Register Office
Miss J. C. Hern,		<i>Secretary</i>	Law Commission

APPENDIX C

List of persons and organisations who submitted comments on Working Paper No. 89; Consultative Memorandum No. 64.

Archdiocese of St. Andrews and Edinburgh
Attorney-General's Department, Australia
Baptist Union of Scotland
Mr. A. Briggs, St. Edmund Hall, Oxford
Church of Scotland
Congregational Union of Scotland
Dr. E. B. Crawford, University of Glasgow
Family Law Bar Association
Mr. R. D. M. Fife, W. S., Edinburgh
Foreign and Commonwealth Office
General Register Office
General Register Office for Scotland
General Synod of the Church of England
Professor W. M. Gordon, University of Glasgow
Professor R. Graveson, C.B.E., Q.C.
Mr. P. Grose-Hodge, Solicitor, London
Mr. T. C. Hartley, London School of Economics and Political Science
Holborn Law Society
Home Office
Institute of Legal Executives
Mr. A. J. E. Jaffey, University of Exeter
Law Society of Scotland
Methodist Church in Scotland
Ministry of Defence
Miss S. M. Nott, University of Liverpool
Mr. M. L. Parry, University of Hull
Scottish Episcopal Church (Diocese of Edinburgh)
Senate of the Inns of Court and Bar
Sheriffs' Association
Mr. R. Smith, University of Hull
Mr. P. A. Stone, University of Exeter
University of Aberdeen, Faculty of Law
Professor P. R. H. Webb, University of Auckland
Mr. J. R. Young, University of Wales Institute of Science and Technology

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