SCOTTISH LAW COMMISSION

CONSULTATIVE PAPER

ON

DIVORCE FOR INCURABLE INSANITY

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PART I
INTRODUCTORY

Purpose of Paper

1. The purpose of this Consultative Paper, which is intended for limited circulation only, is to elicit views and information from interested bodies on the place of incurable insanity in proceedings for divorce in Scotland. In Part I, the existing law of Scotland is shortly described and the policy background to the Paper is explained by reference to recent changes in the English law of divorce and current proposals to change the law of Scotland on broadly similar lines. Part II of the Paper seeks information and views about possible modifications of the existing law, upon the legislative assumption that the existing statutory provisions relating to incurable insanity should be retained as a means of proving irretrievable breakdown of marriage. Part III of the Paper seeks information and views upon the question whether the existing statutory provisions should be retained, with or without modification, or abandoned in a reformed law of divorce. Part IV contains a summary of the questions canvassed in the Paper.

The existing law of Scotland

2. Insanity was introduced as a ground of divorce in Scotland by the Divorce (Scotland) Act 1938 (c.50), section 1 of which provides that divorce may be granted on the ground that the defender is incurably insane[1]. Under section 6(2), the pursuer must prove that the defender "is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person". Proof of care and treatment raises a presumption of incurable insanity. The presumption is rebuttable by evidence adduced on behalf of the defender by his curator ad litem[2] and the Mental Welfare Commission for Scotland always supplies a report on the probability of recovery of the defender[3]. "Care and treatment" is restricted by statute to mean one of only two things, viz:

(i) that the defender was:

"liable to be detained by reason of mental illness in a hospital or place of safety under the Mental Health (Scotland) Act 1960, or in a hospital, mental nursing home or place of safety under the" (English) "Mental Health Act 1959"[4]; or

(ii) that the defender was:

"receiving treatment for mental illness:-

(a) as a resident in a hospital or other institution provided, approved, licensed, registered, or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands: or

(b) as a resident in a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in paragraph (a) of this subsection."[5]

For brevity, we call the first category 'detained patients' and the second category 'informal patients'. The second category was added in 1958 following the Report of the Royal Commission on Marriage and Divorce, ("the Morton Report")[6]. In determining whether the care and treatment has been continuous, any interruption of the period for 28 days is to be disregarded.[7] The purpose of this rule is "to meet

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[1] The relevant statutory provisions are set out in Appendix I.

[2] The court has a duty to appoint a curator ad litem for the defender in every case; 1938 Act, s.3: Rules of Court 1965, Rule 170(d).

[3] The Commission is under a statutory duty to furnish the report on the request of the Court (1938 Act, s.3) and under Rule 170(d) of the Rules of Court 1965 the Lord Ordinary must, in every case, make an order calling upon the Commission to furnish the report.

[4] 1938 Act, as amended by the Mental Health (Scotland) Act 1960, Schedule 4, paragraph 3.

[5] Divorce (Insanity and Desertion) Act 1958, s.1(1).

[6] (1956) Cmd. 9678, paragraphs 177, 189, 190-193. Appendix II below.

[7] 1958 Act, s.1 (3).

the case where a patient is discharged or discharges himself from hospital but is readmitted, or admitted to another hospital, within a very short time".[1] A detained patient may discharge himself by being absent from hospital without leave for 28 days[2]. To interrupt the continuity of "care and treatment" for divorce purposes, the patient must be absent without leave for 28 days and not readmitted to hospital for a further 28 days, a total of 56 days.

Changes in the English divorce law

3. Before 1 January 1971, while the law in England relating to divorce for insanity was similar to Scots law, it differed in one important respect, namely, that the English court had to be satisfied both that the insanity was incurable and that there had been continuous care and treatment for five years[3]. In other words, proof of care and treatment for five years did not set up a presumption of incurable insanity: it was merely a precondition of divorce on that ground. After that date, under the Divorce Reform Act 1969, irretrievable breakdown of marriage is the sole ground of divorce in England. The petitioner must prove one of five sets of facts which raise a presumption, in practice a very strong presumption, of breakdown. Three sets of facts imply some degree of fault on the part of the respondent[4]; two relate to non-fault facts[5]. Incurable insanity is not, as such, a fact evidencing breakdown but the sponsors of the 1969 Act believed that insanity cases would fall under s.2(1)(b) (replacing the matrimonial offence of cruelty) and s.2(1)(e), which provide as follows:

1969 Act, s.2(1)(b): "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".

ibid., s.2(1)(e): "that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition".

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[1] Morton Report, para.201.

[2] The Mental Health (Scotland) Act 1960, section 36(3)(c) provides that, after 28 days absence without leave, the patient cannot be taken into custody and section 41(1)(a) provides that he will then cease to be liable to detention.

[3] Matrimonial Causes Act 1965, s.1(1).

[4] Section 2(1)(a), (b) and (c), though it will be seen that s.2(1)(b) includes behaviour on the respondent's part caused by some mental abnormality or illness and in such cases he or she cannot be regarded as at fault in the strict sense.

[5] Section 2(1)(d) and (e).

In reckoning whether a period of 5 years has been continous, no account is taken of any one period (not exceeding six months) or any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties live with each other is to count as part of the period for which the parties lived apart; (s.3(5)). In other words, the period may be between 5 and 5½ years of living apart if it is interrupted by a period or periods of living together not amounting singly, or in aggregate, to more than 6 months. The latter provision is designed to encourage marital reconciliation.

Current proposals for divorce reform in Scotland

4. The Scottish Law Commission submitted a Report in 1967 for reform of the law of divorce[1] broadly on the lines of what is now the English Act of 1969. The main difference is that under the Scottish proposals, proof of the facts implying fault (eg adultery or desertion) or non-fault facts (two years separation or five years separation) would raise an irrebuttable presumption of irretrievable breakdown. The Report envisaged that incurable insanity would be retained as a fact, separately designated by statute, evidencing breakdown[2], but the separate grounds were not treated in detail. Since then, three Bills based on the Report have been introduced by private Members of Parliament. In two of these[3], incurable insanity was not expressly retained as an autonomous, separate 'fact'; in the most recent Bill[4], the existing provisions were retained in consolidated form. None of these Bills has become law.

5. Incurable insanity is statistically the least important ground of divorce in Scotland, apart from sodomy and bestiality. It accounts for less than one half of one per cent of all divorce actions. While we have not yet undertaken specific consultations on the separate grounds of divorce in connection with our review of Family Law

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1. Divorce: The Grounds Considered, (1967) Cmnd. 3256.

2. Ibid., para. 15.

3. Divorce (Scotland) Bill (1970) presented by Mr Donald Dewar MP, printed on 27 January 1970; Divorce (Scotland) Bill (1970) presented by Mr Robert Hughes MP, printed on 25 November 1970.

4. Divorce Law Reform (Scotland) Bill (1973) presented by Mr William Hamilton MP, printed on 23 January 1973: see especially clauses 1(2)(f), 1(6), and 3.

under Item 14 of our Second Programme, we feel bound to consult interested persons specifically on the question of the place which incurable insanity should occupy in a reformed divorce law. The reason for treating the insanity of a spouse separately is that it raises peculiarly difficult medico-legal problems whose solution requires, among other things, an expertise in medicine and psychiatry which we do not profess. Insanity which is incurable and sufficiently severe arguably "involves a more complete frustration of the fundamental purpose of marriage than perhaps any other ground"[1]. This suggests that it should be retained in a reformed divorce law. On the other hand, as a result mainly of a change in emphasis from treatment in hospitals to treatment within the community, the existing statutory provisions are perhaps of dwindling importance even under the present law[2]. In a reformed divorce law in which separation for five years provides irrebuttable evidence of breakdown, these provisions might eventually become a dead letter. We must carefully consider, therefore, whether retention is justified without modification. In Part II below, we deal with the question whether the present statutory provisions relating to incurable insanity can be modified so that they will perform a distinctive and useful role in a reformed divorce law. In Part III, we discuss the question whether these provisions should be retained, with or without modifications, or abandoned.

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1. per Lord Alness in introducing the Divorce (Scotland) Act 1938; H.L. Deb. (7 December 1937) col. 357. See also Morton Report, para. 187, quoted at para. 29 below.

2. See Appendix III, Table 2 for the relevant statistics.

PART II

MODIFICATION OF THE EXISTING LAW

6. On the legislative assumption that incurable insanity (however defined) should be retained as a separate basis for divorce in the sense that it should be a separate autonomous "fact" evidencing irretrievable breakdown, a number of linked questions arise which consist of or include the following:

(a) whether "incurable insanity" is an appropriate concept to use as a test of irretrievable breakdown;

(b) whether the scope of "care and treatment", as defined by statute, is too limited;

(c) whether five years is too long a period of "care and treatment" to require in order to set up a presumption of incurable insanity;

(d) whether positive proof of incurable insanity should be allowed;

(e) whether positive proof of a prescribed period of "care and treatment" should set up a presumption of incurable insanity;

(f) whether the presumption under section 6(2) of the 1938 Act should extend to persons liable to be detained in Northern Ireland, the Channel Islands and the Isle of Man.

We consider these questions in the following paragraphs. We are conscious that some other and possibly more radical alterations could be made and we invite those whom we are consulting to raise such other questions as they may think appropriate.

(a) Is "incurable insanity" an appropriate test?

7. Before we consider the question whether "incurable insanity" is an appropriate test of irretrievable breakdown, a preliminary question arises: what is "insanity" within the meaning of the 1938 Act, section 1(1)? To put the question another way, what must the defender prove to rebut the statutory presumption of incurable insanity raised by proof of care and treatment for five years? The leading Scottish case is Ramsay v. Ramsay[1], in which the defender was said to have suffered from hebephrenic schizophrenia. The main legal question was whether the expression "incurable insanity" meant such a degree of mental illness as rendered the defender incapable of managing his affairs and of discharging the duties of married life, a functional test, or whether it denoted a more serious degree of mental illness where the person could be described as "mad" and had overt signs of mental disorder. Adopting the second approach, the Lord Ordinary held that mental illness was not to be regarded, even roughly, as synonymous with incurable insanity. On the facts he held that behaviour of a passive eccentric character ("more a lack of initiative, a lack of interest") did not amount to evidence of insanity, still less incurable insanity though improvement in the patient's condition was unlikely[2]. His Lordship said:[3]

> "I doubt whether any useful purpose would be served by an attempt to interpret the words "incurably insane" or "incurable insanity" where they occur in sections 1 and 6 of the Act of 1938. In Scotland the difficult problem of deciding whether a person is or is not insane has always been approached on somewhat broad lines in both our civil and our criminal law and has always been treated as a question of fact and degree for decision by the judge or jury, as the case may be. I think there is no doubt that lay evidence as well as the evidence of medical practitioners would be admissible in solving that question, as much when it arises in connection with divorce as when it arises in connection with crime or, to take another example, capacity to make a will. It is therefore wise to avoid purely scientific or clinical definitions or solutions, particularly when it is borne in mind that medical opinions may differ to a greater or less degree, as the present case shows. In any event, any attempt to define insanity is likely to be defeated by the constant search which goes on from generation to generation to discover euphemisms for that condition. The word "lunatic", for example, is now out of fashion, and "medical recommendation" has been found to lack the sinister connotation of "medical certificate". If I were to be asked to interpret the word "insane" where it is used in the 1938 Act, I think I would prefer the short word "mad" to any more compendious definition, though no doubt the phrase "of unsound mind" conveys the same meaning."[4]

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[1] 1964 S.C. 289; (see also 1964 S.L.T. 108 (O.H.); 309 (I.H.)).

[2] Ibid at p.297.

[3] Ibid at p.298.

[4] cf. Lord Cooper's statement: 'However much you may charge a jury as to the McNaghten Rules or any other test, the question they would put to themselves when they retired - "Is the man mad or is he not?"': Royal Commission on Capital Punishment, Minutes of Evidence, Q.5479.

8. This approach was rejected, on a reclaiming motion, by the First Division. It was held by the Lord President that, to rebut the statutory presumption, it must be proved that "although the defender has had five years' care and treatment, yet she is not so incapacitated as to be incapable of managing her own affairs"[1]. His Lordship contined:

> "It would clearly be wrong in such a situation to break up the marriage. This is the interpretation given to the corresponding provision in the English statutes: see Whysall v. Whysall [1960] P. 52. This accords with the well established Scottish test for the appointment of a curator bonis, namely, capacity to manage one's own affairs. It would obviously only be in a very special case that the presumption would be redargued, as persons are detained in mental hospitals only if they are suffering from some degree of mental illness (see section 6 and section 23 of the 1960 Act)".

"Insanity" did not mean "what in the old days was connoted by certifiable insanity"; such an interpretation "would make the statutory ground of divorce almost a dead letter"[2]. Lord Guthrie adopted a similar approach. The test was satisfied if:

> "The defender is by reason of her mental condition incapable of managing herself and her affairs and cannot hope to be restored to a state in which she will be able to do so."[3]

9. While the Court in Ramsay adopted a practical functional test of incapacity to manage affairs, it arrived at that result by reference to analogies which might point different ways in different cases. The opinions relied on three analogies:

(i) the Scottish test for appointment of a curator bonis[4];

(ii) the interpretation of "unsound mind" in pre-1971 English divorce statutes[5]; and

(iii) the criteria for compulsory admission to, and liability to detention in, mental hospitals under the Mental Health (Scotland) Act 1960, s.23[6];

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1. 1964 S.C. 278, at p.301.
2. Idem.
3. Ibid. at p.307.
4. See quotations in para. 8 above.
5. Ramsay v. Ramsay 1964 S.C. 289 at p.301.
6. Ibid., per Lord Guthrie at p.306, "the terms of section 6(2) of the Act of 1938 ..... explain the meaning of incurable insanity for the purposes of the statute which made it a ground of divorce".

Since these analogies can point different ways, it may be that, despite the pitfalls of definition, some definition is required. We consider each of these tests in turn.

The test for appointing a curator bonis.

10. This test is directed towards capacity to manage a person's assets or financial or business affairs. The court will not appoint a curator if the mental condition in question does not affect capacity in that sense, even though it is manifested in insane delusions or other symptoms of mental illness[1]. We understand that a mental condition affecting a person's capacity to manage financial and business affairs might not affect his capacity to lead a normal married life and that, conversely, a person may have full or adequate mental capacity in relation to the problems of married life but be unable, through mental illness, to manage his financial and business affairs. If this is right, the cases covered by the test for divorce and the cases covered by the test for appointment of a curator bonis should relate as overlapping rather than conterminous circles and the analogy with appointment of curators is incomplete. The test for appointment of a curator bonis may therefore be unsuitable as a test for divorce.

[1] See Forsyth (1862) 24 D.1435; cf. AB v. CD (1890) 18 R.90; affd. (1891) 18 R. (H.L.) 40.

(ii) Unsoundness of mind: the test in English law before 1971.

11. The expression "of unsound mind" in the pre-1971 English divorce statutes[1] denoted a person who is incapable of managing his affairs, including the problems of work, society and marriage; the standard of capability was that of the reasonable man[2]. The courts in England held that the expressions "insane" in section 1(1)(d) of the Scottish 1938 Act and "of unsound mind" have the same meaning[3], and Scottish judges seem to have agreed[4]. It has been pointed out judicially[5] that the Oxford Dictionary definitions support this assimilation.

12. In considering whether "of unsound mind" is a suitable criterion for a Scottish Divorce Act, it is relevant to point to its association with English statutory provisions. First, the test of incapacity to manage affairs derives from the Lunacy Act 1890 which empowered the Judge in Lunacy to assume powers in cases which appear similar to the cases where a Scottish court may appoint a curator bonis[6]. But a Scots lawyer does not easily understand English trust law nor should he be required to. Second, the Law Commission in England have stated[7] that "of unsound mind" for the purposes of the old divorce law has the same meaning as in the context of provisions empowering the annulment of a voidable marriage where at the time of the marriage either spouse:

> "(i) was of unsound mind; or
> (ii) was suffering from mental disorder of such a kind and to such an extent as to be unfitted for marriage;"

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[1] Matrimonial Causes Act 1965, s.1(1) derived ultimately from the Act of 1937.

[2] Whysall v. Whysall [1960] P.52 at p.66; Robinson v. Robinson [1965] P.192; Woolley v. Woolley [1968] P.29.

[3] Smith v. Smith [1940] P.179; Whysall v. Whysall (n.2 above) at pp 64-65.

[4] Ramsay v. Ramsay 1964 S.C.289 at p.298.

[5] In Whysall v. Whysall, (n.2 above).

[6] See Whysall v. Whysall, (n.2 above).

[7] Report on Nullity of Marriage (1970), Law Com. No. 33, para. 69.

The Commission took the view[1] that (i) was fully covered by (ii) since in an English case, Bennett v. Bennett[2], it was decided that "unfitted for marriage" is "something in the nature of" -

> "Is this person capable of living in a married state and of carrying on the ordinary duties and obligations of marriage? ..... In order to succeed the petitioner must establish 'mental disorder' within the meaning of section 4 of the Act of 1959 and go on to show that as a result of such mental disorder the respondent is incapable of carrying on a normal married life".[3]

The Commission regarded this test as indistinguishable from the test for unsoundness of mind[4]. If the reasoning of the courts in Ramsay, Whysall, and Bennett, and of the Law Commission, is sound, then "incurable insanity" in the Act of 1938 has the same meaning as in the passage just quoted, subject no doubt to the substitution of mental illness within the meaning of the Scottish Act of 1960 for mental disorder within the meaning of the Act of 1959. We revert to the latter question below.

13. The Law Commission's proposals were enacted for England in the following terms by the Nullity of Marriage Act 1971, section 2(d):-

> "that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage".

This might be modified as a test of irretrievable breakdown for divorce purposes as follows:-

> "that the defender is suffering from incurable mental illness within the meaning of the Mental Health (Scotland) Act 1960 of such a kind or to such an extent as to render him unfitted for marriage".

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[1] Ibid at para. 71.
[2] [1969] 1 W.L.R. 430.
[3] Ibid at p. 434.
[4] Law Com. No. 33, para. 71.

The phrase used in the 1971 Act is referable to the pre-marital condition of the spouse and imports that he is unfitted for any marriage. It may be argued that in divorce actions, especially where insanity has supervened since marriage, the question is whether a particular marriage has broken down irretrievably and that the relevant question should be "Is the defender unfit for this marriage to this pursuer?" i.e. a subjective test. While we recognise that every marriage is unique, we think nevertheless that the test should be objective so far as the spouses are concerned. We do not regard the concept of a person being insane in relation to a particular marriage as satisfactory. The policy underlying "incurable insanity" in divorce is, we think, that it so affects a spouse's powers of rational judgement as to render him unfit for the normal obligations of marriage. A subjective test would, we think, require the court to have regard to the effect of the defender's mental illness on the pursuer, which in turn might involve an examination by the court of the personality, sensitivity or resilience and other attributes of the pursuer. In paras. 31-32 below, we discuss the question whether the presumption should be retained.

(iii) Mental illness, and liability to dentention under the Mental Health (Scotland) Act 1960

14. Under the Act of 1938, as amended, divorce cannot be granted on the ground of incurable insanity unless a presumption of incurable insanity is set up by proof of care and treatment for mental illness extending over five years. As we mentioned at paragraph 2 above, the presumption applies to only two categories of patients. These categories therefore limit the scope of divorce for incurable insanity.

Detained patients

15. The first category, whom we call detained patients, consists of those "liable to be detained by reason of mental illness in a hospital or place of safety under the Mental Health (Scotland) Act 1960" or in similar institutions in England and Wales[1]. It excludes certain persons suffering from certain mental disorders which may be susceptible of treament, among them the following, namely:

(a) Persons suffering from mental deficiency. A mental defective may nevertheless be made a detained patient if he is under 21, or if he over 21 and is "incapable of living an independent life or of guarding himself against serious exploitation"[2]. These persons suffer from "mental disorder", but not "mental illness", within the meaning of the Act of 1960[3].

(b) Persons over 21 suffering from a mental illness consisting of "a persistent disorder which is manifested only by abnormally agressive or seriously irresponsible conduct."[4] Under the equivalent English legislation such persons are said to suffer from "psychopathic disorder"[5]. They are excluded from the presumption in divorce proceedings because they cannot be made liable to be detained.

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1. Divorce (Scotland) Act 1938 s.6(2) as amended by the Mental Health (Scotland) Act 1960, Schedule 4, paragraph 3; quoted at para. 2 above.

2. Mental Health (Scotland) Act 1960, section 23.

3. Under the 1960 Act, section 6, "mental disorder" includes both "mental illness" and "mental deficiency" and the two latter expressions are used throughout in contrast.

4. 1960 Act, section 23.

5. See Mental Health Act 1959, section 4(4).

16. Persons liable to be detained are received into hospital by a statutory procedure prescribed by Part IV of the 1960 Act involving (i) two medical recommendations; (ii) an application for admission made by the nearest relative or by a mental health officer; (iii) approval of the application by the sheriff, which approval is authority for the removal of the patient to hospital; (iv) notification to the Mental Welfare Commission for Scotland; (v) examination of the patient by the responsible medical officer and another medical practitioner; and (vi) notification to the Mental Welfare Commission that the patient is not to be discharged.[1] The two medical recommendations include statements of opinion on the following matters and the grounds therefor:-

"(a) a statement of the form of mental disorder from which the patient is suffering, being mental illness or mental deficiency or both;

(b) a statement that the said disorder requires or is susceptible to medical treatment and is of a nature and degree which warrants the patient's detention in a hospital for such treatment; and

(c) a statement that the interests of the health or safety of the patient or the protection of other persons cannot be secured otherwise than by such detention as aforesaid".[2]

Informal Patients

17. The second category of patients who may be presumed incurably insane for divorce purposes is described by the Act of 1958 as persons "receiving treatment for mental illness as a resident in a hospital or other institution" which fulfils the conditions laid down in the Act.[3] Patients resident in hospital because of mental deficiency are excluded.

Interruption of care and treatment

18. The positions of detained patients and informal patients differ as respects the requirement of residential treatment. The presumption of incurable insanity applies in the case of a person liable to be detained for five years whether or not he is actually resident in hospital throughout that period. He is deemed to be receiving "care and treatment" for so long as he is liable to be detained, including periods when he is living in the community on leave of absence.[4] The 1958 Act, s.1(3) provides that in determining whether the period of care and treatment for five years has been continuous any interruption of the period for 28 days or less is to be disregarded.

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[1] See 1960 Act, sections 24 and 26 to 29.

[2] Mental Health (Scotland) Act 1960, section 24(2).

[3] Section 1.

[4] Section 35 enables leave of absence to be given for specified periods of not more than six months which may be extended for further such periods.

The interruption is accordingly an interruption of his liability to detention, not of his residence in hospital. By contrast, an informal patient must be continuously resident in hospital throughout the five year period to be presumed incurably insane, except that any interruption for 28 days or less is disregarded. There is thus a greater emphasis, in law if not practice, on residential treatment in the case of informal patients than in the case of detained patients.

Is the criterion for liability to detention the same as the the test for incurable insanity?

19. A material question for consideration is whether the criterion for incurable insanity, namely, incurable incapacity to manage oneself and one's "affairs" in the widest sense of that term, is broadly the same as the criterion for becoming a detained patient. In either case, the patient must be suffering from "mental illness". In Ramsay v. Ramsay, "mental illness" was, in the light of the evidence led in the case, described as:

> "a somewhat large and vague clinical term, which might possibly cover anything from a mental illness producing a mild degree of eccentricity or of what used to be called a nervous breakdown, at one end of the scale, to a mental illness resulting in raving mania at the other".[1]

The criteria for liability to detention under the Mental Health (Scotland) Act do not refer to incapacity to manage oneself and one's affairs, described at paragraph 16 above, including the problems of work, society and marriage. It may be, however, that the requirement that (a) the illness must have endured for five years and (b) that liability to detention in a hospital must be necessary in the interest of the health and safety of the patient or the protection of other persons, will in practice ensure that the mental illness amounts to incapacity to manage affairs. In other words, these requirements may provide evidence as to the severity of the mental illness as well as to its incurability. These are not questions which we are in a position to answer and we invite comments on the question whether the criterion for liability to detention is the same as the test for incurable insanity and, if not, what are the differences?

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[1] Ramsay v. Ramsay 1964 S.C. 289 per Lord Hunter at pp 295-6.

Mental deficiency: divorce or annulment?

20. We have considered whether detained patients suffering from mental deficiency who are "incapable of living an independent life or guarding themselves against serious exploitation"[1] or informal patients suffering from mental deficiency should be liable to be divorced for incurable mental disorder after receiving five years' care and treatment. As at present advised, we consider that the existing provisions relating to incurable insanity should not be extended to comprise mental defectives. Until 1960, the legislation relating to mental defectives was quite distinct from that relating to insane persons or lunatics,[2] and a similar distinction is made in the Mental Health (Scotland) Act 1960 between "mental deficiency" and "mental illness", although these terms are not defined.[3] Most persons treated as mental defectives under the Act of 1960 were subnormal at birth or, because of arrested development, have become subnormal at an early age. We understand that, although mental defectives can receive training, during and after school age, to teach them how to cope with the problems of life and to mitigate the adverse results of their subnormality, their condition cannot, as a general rule, be cured by treatment. They may, of course, suffer also from a psychosis or other mental illness which can be cured by treatment. For their subnormal condition, however, they receive training rather than curative treatment. It would seem inapt to subsume such cases under the head of "incurable" mental disorder since the disorder is congenital and permanent[4]. Since the condition must have existed before the marriage, annulment would appear to be a more appropriate remedy (provided the mental deficiency or disorder at the time of the marriage was such as to render the person in question unfitted for marriage).[5]

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[1] See Mental Health (Scotland) Act 1960, section 23.

[2] Contrast the Mental Deficiency (Scotland) Acts 1913 and 1940 and the Lunacy (Scotland) Acts 1857 to 1913.

[3] See 1960 Act, section 6.

[4] In an English case, it was held that "The word 'incurable' is not apt to describe a mental defective for his condition is congenital and permanent": Woolley v. Woolley 1968 P.29 per Park J. at p 35.

[5] cf. the Nullity of Marriage Act 1971, section 2, quoted at para. 13 above.

21. We also understand that, since the Mental Health (Scotland) Act 1960, there has been a shift in emphasis from residence in hospital to training, in occupation or training centres and other institutions, designed to enable the mental defective to live within the community. It has been represented to us that, as a result of this shift in emphasis, there is little point in extending the existing statutory divorce provisions to mental defectives nominatim because the numbers likely to be covered by such an extension would be insignificant. It is arguable that a mental defective who has not cohabited with his or her spouse for the prescribed period of five years should be liable to divorce in the same way as the mentally ill who have lived apart for that period. We think, however, that this anomaly could be cured by relying on the five year separation period. However the law describes the mental condition appropriate for divorce - whether mental illness, or mental disorder - the court may be forced to determine the precise quality of the mental condition. This point is illustrated by two English cases. In Robinson v. Robinson[1], the husband had been a detained patient for about eleven years and it was held that his condition was subnormality. Though incurably of unsound mind within the meaning of the English divorce enactments, he was held not to have been under "care and treatment" but rather "care and training". Divorce would have been refused but for the respondent's cruelty. In Woolley v. Woolley[2] the High Court in England held that though the respondent-wife had been detained as being mentally deficient, she was not incurably of unsound mind within the meaning of the divorce legislation. As we stress in Part III below, where divorce is based on separation for five years, such anomalous cases will not arise for the defender's mental condition is then irrelevant.

22. We conclude this section of our Paper by inviting comments on two tentative proposals:

(1) First, in the light of Ramsay v. Ramsay, it appears that incurable insanity means incapacity by reason of incurable mental illness to manage oneself and one's "affairs" in the

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[1] [1965] P.192.

[2] [1968] P.29.

widest sense of that term, including the problems of leading a normal married life. It has been represented to us that the word "insane" is regarded by many as having an unnecessarily unpleasant ring. In our view, the expression "of unsound mind" would be open to the same criticism. We think that since under existing law "incurable insanity" imports a functional test, that test should be made explicit in the statutory provisions. We suggest the following:

> "that the defender is suffering from incurable mental illness [within the meaning of the Mental Health (Scotland) Act 1960] of such a kind or to such an extent as to render him unfitted for marriage".

We invite comments on and criticisms of this test.

(2) The foregoing definition excludes persons who are mental defectives. For the reasons given at paragraphs 20 and 21 above, we consider that the existing divorce provisions relating to incurable insanity should not be extended to comprise mental defectives. We invite comments on this negative proposal.

(b) Is the scope of "care and treatment" too narrow?

23. We pointed out at paragraph 18 above that the emphasis on care and treatment as a resident in hospital appears to be greater in the case of detained patients, who may be granted leave of absence for up to 6 months at a time while remaining liable to be detained, than in the case of informal patients whose care and treatment for divorce purposes is broken by absence from hospital of mor than 28 days.

24. In the case of detained patients, the procedure for admission coupled with the duration of treatment may be a sufficient safeguard of the severity of the mental illness. In the case of informal patients, the requirement that the treatment must be as a resident in hospital coupled with duration provides the appropriate safeguard. It may be difficult to find a safeguard other than residence in hospital in the case of informal patients which would allow treatment within the community to be reckoned. However, we invite views on this question.

25. We may add that if persons suffering from mental deficiency are to be liable to divorce for incurable mental disorder rendering them unfitted for marriage, then it would be necessary for the definitio of "care and treatment" to be modified so that detained patients or informal resident patients receiving treatment or training for mental deficiency for the prescribed period would be presumed to suffer from incurable mental disorder.

(c) Is the period of five years "care and treatment" too long?

26. It was suggested to the Morton Commission that with modern advances in medical skill and knowledge, it is possible to ascertain whether or not a patient will respond to treatment well within the period of five years' care and treatment prescribed by the Scottish and English statutes[1]. It was suggested that the period should be shortened to three years[2]. The Morton Report rejected these proposals on the ground that the most stringent safeguards should be taken for the benefit of the person who is being divorced[3]. The length of the period is more important in Scotland than it was under pre-1971 English law because in Scotland the period sets up a presumption of incurable insanity: at paragraphs 31 to 32 below we consider whether the presumption should be retained. The period of five years may well be not only a test of the incurability of the mental illness but also of its severity as we suggested at paragraph 19 above.

27. Under current proposals for divorce reform, a divorce would be competent without the consent of the defender after the spouses had lived apart continuously for five years disregarding interruptions which amount in aggregate to not more than six months. As we point out in Part III, if these proposals become law, it is questionable whether there would be any point in retaining actions based on incurable insanity (or mental illness or disorder) presumed after five years' care and treatment. On the other hand, if in the present state of medical knowledge, it has become appropriate and safe to presume incurable mental illness from care and treatment for a shorter period than five years, - say from four or three years - , there would be a much stronger case for retention of incurable insanity as a separate fact evidencing breakdown. We invite views, therefore, on the question whether the period of five years care and treatment required by the present law should be reduced to a shorter period and, if so, what that period should be.

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[1] Para. 179.
[2] Para. 184.
[3] Para. 202.

(d) Should positive proof of incurable insanity be allowed?

28. It would be legislatively possible to make a more radical modification of the existing law by adopting a proposal suggested to the Morton Commission. Under this proposal[1]:

> "the question whether the (defender) is incurably of unsound mind should be treated solely as a question of fact and should be the only matter upon which the court would require to be satisfied before granting a decree. Thus, evidence that there had been a period of care and treatment, whether as a certified or voluntary patient[2] and whether in England or Scotland or any other country, would be relevant only insofar as it formed part of the evidence as to incurability; the (pursuer) would, therefore, be able to bring divorce proceedings as soon as the other spouse's condition was pronounced to be incurable".

A possible refinement of this proposal would be to retain the existing provisions whereby care and treatment for five years (or some shorter period) sets up a presumption of incurable insanity, but the prescribed period of care and treatment would not be a requirement if the pursuer undertook to prove incurable insanity positively.

29. The Morton Report rejected the proposal to dispense with the requirement of a prescribed period of care and treatment - for three reasons. First, while medical opinion was divided, the majority were reluctant to assume responsibility for giving a decision as to incurability without the supporting background of a prescribed period during which the mental disorder must have existed[3]. Second, the need for a waiting period does ensure that a spouse is not tempted to obtain speedy release from marital obligations which have become onerous and unrewarding and gives the patient opportunity for recovery[4]. Third, insanity has no precise definition and described varying degrees of mental disorder from mild delusional states to extreme cases of paranoia or schizophrenia[5]. They took the view that:

> "divorce should be available only to a person whose spouse is suffering from insanity to such an extent that it can be said that the objects of the marriage relationship can be wholly frustrated. (Accordingly) the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the severity of the mental disorder"[6].

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1. Morton Report, para. 183; see Appendix II.

2. The nearest equivalent under the present law of a certified patient is a detained patient. Voluntary patients are now known as informal patients.

3. Ibid., para. 186.

4. Idem.

5. Ibid., para. 187

6. Idem.

In their view, only a prescribed period of treatment as an in-patient, whether detained or informal (to use the newer terminology), provided the necessary safeguard. Proof of the duration of mental illness was not enough[1].

30. The proposal would have other effects which seem to be objectionable in the light of an important aim of the new divorce law, namely, to enable dead marriages to be buried with the minimum of pain and embarrassment. Under the existing law of Scotland, there are few defended cases[2] and positive proof of incurable insanity is not required. Therefore the occasions are rare when the court is required to investigate the painful and embarrassing details of the defender's conduct or behaviour. On the other hand, if proof of incurable insanity by positive evidence is not to be allowed in appropriate cases, then such details might nevertheless be brought into the open as a spouse might then feel constrained to seek a divorce upon the ground of breakdown presumed from the fact that, because of the defender's behaviour, the pursuer cannot reasonably be expected to cohabit with the defender. Moreover, a legislative requirement that the defender must be suffering from incurable mental illness "of such a kind or to such an extent as to render him unfitted for marriage" would go some distance towards meeting the third reason given by the Morton Commission for rejecting the proposal submitted to them. If, in a significant number of cases which can be envisaged, it could be established affirmatively that a defender was suffering from incurable mental illness of the kind and degree referred to even without proof of care and treatment for five years there might be a case for entertaining such a proposal. For example, it seems possible that recent advances in medical knowledge might in some cases justify the conclusion that the defender was suffering from incurable mental illness of the kind and degree referred to although liability to detention or informal residential treatment had lasted for less than five years (or such lesser period as might be substituted therefor). We would therefore welcome

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1. Idem.

2. In the period 1949-1971, of 314 cases founded on incurable insanity, 302 were undefended and 12 were defended: see Appendix III, Table 2.

comments on the following two questions. Should a spouse be entitled to obtain divorce by way of positive proof of the other spouse's incurable insanity (whether defined as mentioned in paragraph 22(1) above or otherwise)? If so, should this method of proof be an alternative to the existing presumption raised by a prescribed period of care and treatment or should it be the sole method of proving incurable insanity.

(d) Should proof of care and treatment set up a presumption of incurable insanity?

31. When incurable insanity was a ground of divorce in England, it was anomalous that proof of five years' care and treatment set up a presumption in Scotland but not in England. The Morton Report recommended that the courts in Scotland should require positive proof of incurability rejecting the evidence of the General Board of Control for Scotland that, in spite of advances in the treatment of mental illness, there may be some cases where it would be difficult to provide positive evidence of incurability and that the presumption should be retained[1]. The Morton Report also suggested that the widening of the scope of care and treatment to voluntary (i.e. informal) patients demanded positive proof of incurability[2]. Their recommendation was, however, not implemented by the Divorce (Insanity and Desertion) Act 1958.

31. As at present advised, we doubt whether the widening of the scope of care and treatment has had the results feared by the Morton Commission. Moreover, since incurable insanity is not retained nominatim in English divorce proceedings, the anomaly objected to has already disappeared. We regard the presumption as giving the spouses of incurably insane persons evidential advantages which it would be wrong to take away. Of 99 cases in the Court of Session in the 12 years between 1960 and 1971 in which final judgment was given, only two were defended (both unsuccessfully) despite the fact that

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1. Paras. 203-204.

2. Para. 204

a curator ad litem is always appointed[1]. We think that the abolition of the presumption would, in this situation, cause unnecessary trouble and expense. It would lead to more defended actions and contested proofs which tend to involve pain and embarrassment to pursuers. We therefore consider provisionally that the presumption should be retained and invite views on this provisional proposal.

(e) Territorial extent of liability to detention

33. We have noted one minor discrepancy between pre-1971 English law and the present law of Scotland. Under section 1(3)(b) of the Matrimonial Causes Act 1965, a person was deemed to be under care and protection while he was detained in pursuance of an order for his detention or treatment as a person of unsound mind or a person suffering from mental illness made under the law of Northern Ireland, the Isle of Man or the Channel Islands. Such persons would be treated in Scotland in the same way as informal patients under section 1(1) of the 1958 Act; that is, the qualifying period is of residence in hospital, and is not linked to an order for detention or treatment. We think that this discrepancy may be so minor as not to warrant any change in the law, we do not propose any change in the territorial extent of the existing provisions. However, we invite comments on the question whether liability to detention in pursuance of orders made under the law of Northern Ireland, the Isle of Man or the Channel Islands be deemed to be "care and treatment" for the purpose of Scottish divorce proceedings?

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[1] These figures can be deduced from Appendix III; Table 2.

PART III: RETENTION OR ABANDONMENT OF INCURABLE INSANITY

34. We turn now to the question whether incurable insanity should be retained, with or without modifications, in a reformed divorce law in which breakdown is irrebuttably presumed where the spouses have lived apart continously for five years, discounting periods of cohabitation not exceeding 6 months in all. There are strong arguments for abandonment if modifications in the existing law are not appropriate. In the first place, the spouse of an informal or detained patient can always obtain a divorce on the 5 year period basis if he or she is determined to do so. While the period of 5 years is the same under the existing insanity ground, as in the proposed action based on separation without consent, the periods of interruption are different. In the latter case, resumption of cohabitation for a period of more than six months in aggregate would interrupt the separation but it would not interrupt the 5 year period under section 6(2) of the 1938 Act because the patient would remain "liable to be detained" while on leave of absence[1]. There could conceivably be cases where the patient's spouse would refuse to receive a detained patient lest he (or she) lose his right of action whereas this moral dilemma would not arise under the existing law. We do not, however, think that the risk of this moral dilemma arising is sufficient for legislative purposes. We were informed in 1970 by the Mental Welfare Commission for Scotland that in relation to the divorce cases for insanity between 1962 and February 1970, there was no case where the patient had lived at home for a total period of more than 6 months in the five years during which they were liable to be detained. While the Mental Welfare Commission regarded the risk as "a real possibility rather than a remote contingency", we understand that the risk will diminish with changes in the pattern of detention of patients.

35. As we have seen, under the existing law, it is a good defence to prove that, notwithstanding care and treatment as a detained or informal patient for five years, the defender is not incurably insane. Cases may accordingly arise where the court is

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1. See para. 18 above.

bound to determine the precise mental condition of the defender. This can lead to anomalies as pre-1971 English law shows[1]. A second arguement for abandonment, therefore, is that under the proposed divorce action based on 5 years separation without consent, the mental condition of the defender is irrelevant and the anomalies referred to could not occur. Thirdly, the law would be considerably simplified[2]. Fourthly, many people object to legal rules imposing civil legal disadvantages upon grounds of mental illness or insanity. Moreover, we understand that many doctors and psychiatrists dislike the concept of "incurable" mental illness, holding that only a few types of mental illness, such as dementia or organic brain damage, are incurable in fact.

36. We do not think that harmonisation with English law is important in this area of Scots law since, as we noted at paragraphs 31-32 above, the law has always differed and the issue is not one of broad social policy affecting many cases. For the pursuer in an insanity case, Scots law has advantages over pre-1971 English law because, in Scotland, insanity is presumed from care and treatment, and positive evidence of insanity need not be led unless a defence is raised which shows that, at the time of the action, the defender is not suffering from the same illness for which he received care and treatment. Nevertheless, it will normally be more advantageous to the pursuer to invoke the five year separation period. We think it extremely unlikely that the court would ever refuse divorce, when the defender has been a detained or informal patient for 5 years, on the ground of grave financial hardship to the defender, - a power which under current proposals would be available to the court in 5 year separation cases[3] but is not available in insanity cases under existing law.

37. If the existing statutory provisions cannot appropriately be modified, we provisionally propose that they should be abandoned,

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1. Robinson v. Robinson [1965] P.192; Woolley v. Woolley [1968] P.29; see para. 21 above.

2. On the other hand, some of the complexities of the existing law could be removed by consolidation.

3. See Divorce Law Reform (Scotland) Bill (1972), presented by Mr William Hamilton M.P.; clause 1(5) (court not bound to grant divorce if, in its opinion, the decree would result in grave financial hardship to defender); cf. Divorce Reform Act 1969, section 4 (decree nisi to be refused where divorce would result in grave financial or other hardship to respondent and it would be wrong to dissolve marriage).

reliance being placed on breakdown evidenced by separation for five years, or, in suitable cases, by behaviour on the part of the defender making it unreasonable to expect the parties to live together. If the existing provisions can appropriately be modified by reduction of the qualifying period of care and treatment from five to (say) four or three years, then these provisions would have a distinctive role to play in a reformed divorce law. We discussed this question at paras. 26-27 above. If the period could safely be reduced, we consider provisionally that incurable insanity (however defined) should be retained as a fact evidencing irretrievable breakdown. To sum up, we invite comments and views on the following question: If the existing statutory provisions relating to divorce for incurable insanity cannot appropriately be modified, should they be retained or abandoned?

PART IV: SUMMARY OF QUESTIONS

38. In this paragraph, we sum up the questions and topics canvassed in this Paper. We recognise that those whom we consult may wish to raise other relevant questions and we invite them to do so.

(1) Is the criterion for liability to detention the same as the test of incurable insanity for divorce purposes under the existing law, namely incurable incapacity to manage oneself and one's "affairs" in the widest sense of that term? If not, what are the differences? (paragraph 19)

(2) We suggest that the following test might be appropriate as a criterion implying irretrievable breakdown of marriage, namely:

> "that the defender is suffering from incurable mental illness [within the meaning of the Mental Health (Scotland) Act 1960] of such a kind or to such an extent as to render him unfitted for marriage".

We invite comments and criticisms: (paragraph 22)

(3) We suggest that the existing divorce provisions relating to incurable insanity should not be extended to comprise mental defectives: (paragraph 22)

(4) Is there a safeguard, akin to liability to detention, other than residence in hospital in the case of informal patients which would allow treatment within the community to be reckoned as "care and treatment" from which incurable mental illness can be presumed? (paragraph 24)

(5) We invite views on the question whether the period of five years care and treatment required by the present law should be reduced to a shorter period and, if so, what that period should be: (paragraph 27)

(6) Should a spouse be entitled to obtain divorce by way of positive proof of the other spouse's incurable insanity (whether defined as mentioned in question (2) above or otherwise)? If so, should this method of proof be an alternative to the existing presumption raised by a prescribed period of care and treatment or should it be the sole method of proving incurable insanity? (paragraph 30).

(7) Should proof of care and treatment set up a presumption of incurable insanity? (paragraph 32).

(8) Should liability to detention in pursuance of orders made under the law of Northern Ireland, the Isle of Man or the Channel Islands be deemed to be care and treatment for the purpose of Scottish divorce proceedings? (paragraph 33).

(9) If the existing statutory provisions relating to divorce for incurable insanity cannot appropriately be modified, should they be retained or abandoned? (paragraph 37).

APPENDIX I

INSANITY

STATUTORY PROVISIONS

Divorce (Scotland) Act, 1938 c.50

S.1 (1) (b) Competent for Court to grant decree of divorce on ground that th defender "is incurably insane". "Provided that ..... the Court shall not be bound to grant a decree of divorce if in the opinio of the Court the pursuer has during the marriage been guilty of such wilful neglect or misconduct as has conduced to the insanity". (as amended by Mental Health (Scotland) Act 1960 Sch. 4)

S.3 "The Court shall appoint a curator ad litem to the defender in any action of divorce on the ground of incurable insanity, and it shall be the duty of the Mental Welfare Commission for Scotland on the request of the Court to furnish to it a report as to the probability of recovery in the case of the defender to any such action".

S.6 (2) "In any action of divorce on the ground of incurable insanity, t defender shall not be held to be incurably insane, unless it is proved that he is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person, and where such care and treatment as aforesaid is proved, the defender shall, unless the contrary is shown to the satisfaction of the Court, be presumed to be incurably insane".

S.6 (3) As amended by Divorce (Insanity & Desertion) Act 1958 S.4 and Mental Health (Scotland) Act 1960 c.61 Sch. 4).

"A person shall be deemed to be under care and treatment as an insane person while he is liable to be detained by reason of mental illness in a hospital or place of safety under the Mental Health (Scotland) Act, 1960, or in a hospital, mental nursing home or place of safety under the Mental Health Act, 1959 and no otherwise."

S.1 (1) Divorce (Insanity & Desertion) Act, 1958

"Notwithstanding anything in .... subsection (3) of section 6 of the Divorce (Scotland) Act, 1938 a person shall be deemed to be under care and treatment as an insane person for the purposes of the said section 6, at any time when he is receiving treatment for mental illness:-

(a) as a resident in a hospital or other institution provided, approved, licensed, registered, or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands: or

(b) as a resident in a hospital or other institution in any other country, being a hospital or institution in which his treatment is comparable with the treatment provided in any such hospital or institution as is mentioned in paragraph (a) of this subsection."

(2) "For the purposes of the foregoing subsection a certificate by the Admiralty or a Secretary of State that a person was receiving treatment for mental illness during any period as a resident in any naval, military or air-force hospital under the direction of the Admiralty, the Army Council or the Air Council shall be consluvie evidence of the facts certified."

(3) "In determining for the purposes of the said ... section 6 whether any period of care and treatment has been continuous, any interruption of such a period for 28 days or less shall be disregarded."

Appendix II

Views of fourteen members (*continued*)

spouse could not in the face of it reasonably be expected to continue with the conjugal life should be a ground of divorce at the instance of that other spouse where it has resulted in the separation of the spouses (otherwise than by agreement) for a period of three years or more, provided that the court should take into account any *bona fide* offer of amendment made by the defender before the raising of the action and should not grant a decree to a pursuer who has unreasonably rejected such offer.

Views of five members

171. (i) Five of us[50] consider that there is no justification for such a striking extension of the grounds for divorce in Scotland. No doubt the introduction of this proposed new ground would relieve some present cases of hardship but on balance, in our view, it is not likely to "promote and maintain healthy and happy married life and to safeguard the interests and well-being of children", matters which we are enjoined by our terms of reference to bear in mind. Indeed, it is more likely to lead to divorce being granted in a number of cases for nothing more than mere incompatibility of temperament.

(ii) Moreover, we do not think that there is any wide general desire in Scotland for the introduction of this ground of divorce. Apart from one witness who supported its introduction, those who thought that some modification of the law was necessary had in mind a new definition of cruelty. Furthermore, it was said that there was a strongly held minority opinion in the legal profession that no alteration in the present law was necessary or desirable.

INSANITY: ENGLAND AND SCOTLAND

THE PRESENT POSITION

172. The Gorell Commission recommended that insanity should be made a ground of divorce in England, but this recommendation was not implemented until the passing of the Matrimonial Causes Act, 1937. The provisions of the Act of 1937 have now been embodied in Section 1 (1) of the Matrimonial Causes Act, 1950, under which a petition for divorce may be presented on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition".

173. Insanity became a ground of divorce in Scotland by virtue of the Divorce (Scotland) Act, 1938, Section 1 (1) of which provides that decree of divorce may be granted on the ground that the defender is incurably insane. By Section 6 (2), proof that the defender is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person, raises a presumption that the insanity is incurable; the burden then rests upon the defender to prove the contrary. By Section 3, the court must in every case appoint a curator *ad litem* to protect the defender's interests and the General Board of Control for Scotland must on the request of the court supply a report on the probability of recovery of the defender. In practice a report is submitted in every case.

174. It will be noted that the provisions of the English and Scottish statutes differ in an important respect, in as much as the court in England

[50] Lord Morton of Henryton, Sir Frederick Burrows, Mr. Lawrence, Mr. Mace, Lord Walker.

has to be satisfied both that the insanity is incurable and that there has been a period of care and treatment for at least five years, whereas in Scotland proof of five years' care and treatment raises a presumption of incurable insanity. The provisions in the Scottish statute were introduced when the Matrimonial Causes Act, 1937, had been only a very short time in operation and were designed to avoid the difficulties which it was thought would arise from the requirement in the English statute that positive proof of incurable insanity must be given. It was said that it would often be impossible to get medical experts to testify that a person was incurably insane and that the most which could reasonably be expected of a medical expert was that he should certify that in his view recovery was improbable.

175. The circumstances in which a person of unsound mind is to be deemed to be under care and treatment have been strictly defined by the respective statutes, which provide, in effect, that a spouse must have been the subject of an order or warrant, issued under one or other of the various statutory provisions relating to lunacy, for his detention as a person of unsound mind during the whole of the period of five years[51]. (Hereafter, for convenience, we refer to such persons as certified patients.) In England, one exception is allowed in as much as a period of treatment as a voluntary patient which immediately follows a period of treatment as a certified patient may be included in the qualifying period.

RETENTION OF INSANITY AS A GROUND OF DIVORCE

176. All but a few of the witnesses accepted that insanity should be retained as a ground of divorce. The reasons given by those few for their view that insanity should no longer be a ground were much the same as the reasons rejected by the majority of the Gorell Commission and by Parliament in 1937 and again in 1938. We do not think that the arguments against having insanity as a ground are any more cogent than before. Where a spouse, at the end of sufficient period of care and treatment, is held to be incurably insane, the continuance of a normal married life has clearly become impossible; as the Gorell Commission said, "the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated". Such circumstances constitute a very exceptional case in which the hardship to the other spouse is so great that, in our view, the remedy of divorce should be available.

CRITICISMS OF THE PRESENT LAW

177. The chief criticism of the present law arises from the fact that, subject to the minor exception already noted in respect of England, divorce is available to a spouse only if the other spouse has been a certified patient for at least five years in a mental hospital or similar institution. There has been an increasing tendency, however, to regard certification as the very last step in the course of treatment for mental illness and then to be taken only when it is imperative for the patient's own welfare or the public safety. Thus, in England Section 1 of the Mental Treatment Act, 1930, provides that a person suffering from mental illness may voluntarily submit himself for treatment in a mental hospital on making a written application. In Scotland

[51] This has been held to include
(i) in certain circumstances, a "temporary patient" detained under Section 5 of the Mental Treatment Act, 1930, *Benson* v. *Benson*, [1941] P. 90, and *Bithell* v. *Bithell*, [1951] 3 W.L.R. 463, and
(ii) a person detained under an urgency order issued under Section 11 (1) of the Lunacy Act, 1890, *Chapman* v. *Chapman* (*No.* 2), [1954] 1 W.L.R. 1332.

treatment as a voluntary patient has been possible for a long time, by virtue of Section 15 of the Lunacy (Scotland) Act, 1866. The stigma which is still to some extent attached in the public mind to certification is thus avoided and the sufferer is encouraged to undergo treatment as a voluntary patient at an early stage in his illness and in the knowledge that he may ordinarily end such treatment at will. Moreover, as a result of comparatively recent developments, mental illness can now be treated outside the provisions of the relevant Acts[52]. In England, for instance, treatment is available in the psychiatric ward of general hospitals or in special neurosis hospitals or in an annexe of certain designated mental hospitals, the annexe having been specifically excluded from the designation. In Scotland, observation wards and psychiatric units have similarly been attached to general hospitals for the treatment of mental illness outside the provisions of the Acts.

178. As the witnesses pointed out, while it is desirable to avoid certification as far as possible, this may result in considerable hardship for the patient's spouse. The patient may have spent some years in a mental hospital before he is certified; by that time it may be clear that his insanity is incurable and that all hope of the resumption of a normal marriage relationship must be given up, yet his spouse has to wait until the full period of five years' care and treatment as a certified patient has elapsed before taking divorce proceedings. It is also possible for relief to be completely denied, because the patient, although incurably insane, continues to keep his voluntary status simply because the need for certification never arises. (We understand, however, that the number of persons in this category is small.)

179. It was also said that with modern advances in medical skill and knowledge, it is possible to ascertain whether or not the patient will respond to treatment well within the period of five years prescribed by the English and Scottish statutes; and that to have to wait for so long before being able to take divorce proceedings causes unnecessary hardship to the patient's spouse.

180. A further criticism relates to the geographical limitation imposed on the statutory definition of care and treatment. For the purpose of divorce proceedings in England, the Matrimonial Causes Act, 1950, recognises care and treatment, as defined, in Scotland, Northern Ireland, the Channel Islands and the Isle of Man but no provision is made for the recognition of care and treatment undergone in any other country[53]. This limitation may occasion hardship, as for instance, where a man has sent his wife, for special treatment for her mental illness, to some country other than those listed; or if his wife's illness develops in some country to which his work has taken him.

181. The statutory requirement that the care and treatment must have been continuous has also given rise to difficulty; for instance, where there has been an omission to comply with some formality in respect of the issue or continuation of the order for the detention of the person of unsound mind; or there has been a period of temporary absence from the mental hospital; or the patient has been discharged and has then had a relapse necessitating his re-admission to the hospital.

182. Lastly, it was put to us by some witnesses that those members of the medical profession who are called upon in divorce proceedings in England

[52] A patient receiving treatment under the provisions of these Acts can be admitted only (i) to a hospital under the National Health Service which has been designated or approved for that purpose, or (ii) to a hospital or home outside the National Health Service which has been specially registered, licensed or approved. (In England he may also be committed to the single care of an individual, though this form of treatment is now rarely used.)

[53] Some doubt exists whether care and treatment in Northern Ireland, the Channel Islands and the Isle of Man can be included in the qualifying period in proceedings in Scotland.

to give an opinion on the state of mind of a patient are in some difficulty, in as much as they are often reluctant to commit themselves to the positive statement that the insanity is incurable. This problem does not arise in Scotland because the fact that the patient has been under care and treatment for at least five years raises a presumption of incurability.

PROPOSALS RECEIVED

183. Some English witnesses made proposals for a radical change in the law in order to meet the criticisms described. One proposal was that the question whether the respondent is incurably of unsound mind should be treated solely as a question of fact and should be the only matter upon which the court would have to be satisfied before granting a decree. Thus, evidence that there had been a period of care and treatment, whether as a certified or voluntary patient and whether in England or Scotland or any other country, would be relevant only in so far as it formed part of the evidence as to incurability; the petitioning spouse would, therefore, be able to bring divorce proceedings as soon as the other spouse's condition was pronounced to be incurable. A similar proposal contained, in addition, the safeguard that the respondent should have been of unsound mind for at least two years before the proceedings were taken. The English legal witnesses who supported these proposals agreed in oral evidence that they would accept that there should be a short period of care and treatment in a mental hospital before proceedings were started if the medical profession considered this necessary.

184. Another proposal was that, in addition to proof that the insanity is incurable, the court should have to be satisfied that the respondent had been suffering from mental disorder for a continuous period of five—some witnesses said three—years. In addition, the respondent should have been under care and treatment in a mental hospital for at least one year before proceedings were started. This proposal was supported by the English medical witnesses. It was argued that in view of the extended facilities for treatment at the present day, it is more appropriate to look to the continuity of the mental disorder as indicative of its severity rather than to the continuity of care and treatment in a mental hospital. The hardship to the patient's spouse caused by a long waiting period before divorce is available would thereby be greatly reduced, but there would still be a safeguard for the patient against hasty divorce. The requirement that there should be a short period of care and treatment in a hospital would ensure that medical evidence on the nature and extent of the disorder was available to the court and would prevent proceedings being started against a spouse living in the matrimonial home.

185. Other English witnesses and the Scottish witnesses contemplated that the difficulties might be met within the present framework of the law by modifying the definition of care and treatment so as to include treatment as a voluntary patient and treatment in other countries. Some witnesses also suggested that it should be possible to aggregate a number of periods of care and treatment, where it was clear that the mental illness itself had persisted over the whole period.

THE COMMISSION'S VIEWS AND RECOMMENDATIONS

186. We understand that opinion in the medical profession is divided on whether incurability should be the sole test, but that the majority is averse from assuming the responsibility for giving a decision on the incurability of the patient's condition without the supporting background of a prescribed period during which the mental disorder must have been in existence. The

need to wait for some specified period does ensure that a spouse is not tempted to obtain a speedy release from marital obligations which may have become onerous and unrewarding and also ensures that every opportunity is given for the patient to recover from his illness.

187. Moreover, insanity has no precise definition and is a term used to describe varying degrees of mental disorder ranging from a mild delusional state to the extreme cases of paranoia or schizophrenia. In our view, divorce should be available only to a person whose spouse is suffering from insanity to such an extent that it can be said that the objects of the marriage relationship have been wholly frustrated. It seems to us, therefore, that the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the severity of the mental disorder.

188. The choice appears to us to lie between the duration of the mental illness, and the duration of care and treatment received in a hospital or similar institution. The first test was proposed by the English medical witnesses. We have given it very careful consideration and we have decided that we cannot accept it as a sufficient safeguard. In itself it provides no sure criterion of the severity of the disorder. It is possible for a person to suffer from mental illness in a minor degree for a long time without being required to attend a hospital as an in-patient. Moreover, the introduction of evidence of the existence of mental illness before the patient had been treated in a hospital would lead to doubt and controversy whether the illness was in fact present at the material time.

189. In our opinion the most satisfactory safeguard is to require a sufficient period of care and treatment in a hospital or similar institution to have elapsed before proceedings can be started. This is a test which has worked quite satisfactorily in both England and Scotland over a number of years. But we think that the present statutory definition of care and treatment is too narrow in the light of modern developments in the treatment of persons suffering from mental illness. As the evidence submitted to the Royal Commission on the Law relating to Mental Illness and Mental Deficiency shows, there is a wide measure of agreement in the medical profession that in order to encourage people to seek treatment in the early stages of mental illness, it is important to allow them to obtain such treatment with the minimum of formalities, and as far as possible in the same way as they can obtain treatment for any other kind of illness. There is now less emphasis placed on certification and future developments may cause a test based on that status to become unworkable. Further, it is clear that considerable importance is attached to the desirability of encouraging patients, as part of their treatment, to resume their place in the community by allowing them to go on holiday or to return home for short periods. We have made our recommendations against this background.

(1) Scope of Care and Treatment

190. Most witnesses considered that care and treatment as a voluntary patient should be recognised as constituting care and treatment for the purpose of divorce proceedings. We think that this is right. The objection advanced against this proposal is that the knowledge that treatment as a voluntary patient may be used to support divorce proceedings against him will deter a person from submitting himself to care and treatment at an early stage of his illness, when treatment is more likely to be successful. We do not agree. We doubt very much whether the possibility of divorce proceedings being taken against him would enter the mind of the person suffering from mental disorder at the time he applied for admission to a mental hospital.

191. We consider, however, that it would be inadvisable merely to add care and treatment as a voluntary patient to the present definition of care and treatment. As we have already mentioned (in paragraph 177), mental illness may now be treated outside the provisions of the relevant Acts. We have been told that it often depends on the facilities which are available in his district whether a person is admitted to a mental hospital as a voluntary patient or to the psychiatric ward of a general hospital. To exclude from the qualifying period treatment in hospitals or institutions outside the provisions of the Acts would, in our opinion, create an arbitrary distinction. It is not the status of the patient which is significant, but the fact that he has been receiving care and treatment for mental illness in a hospital or other institution.

192. We accordingly recommend that care and treatment in any hospital or other institution in England, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, which is provided or approved, by the appropriate authority, for the treatment of mental illness, should be deemed to be care and treatment for the purpose of divorce proceedings on the ground of insanity in England and in Scotland.

193. This definition is intended not only to cover care and treatment in those hospitals in England and Scotland which are at present affording treatment for mental illness either within[54] or outside the relevant Acts, but also to allow for the recognition of care and treatment in any hospital or other institution which may be provided by or approved by the appropriate authority under any machinery which is later established. As we have said, the Royal Commission on the Law relating to Mental Illness and Mental Deficiency has had considerable evidence on this matter and we have therefore thought it advisable to keep in mind developments which may take place in the future[55].

194. It may be noted that our definition will clarify the position in respect of treatment in England as a temporary patient[56]. At one time there was some doubt whether such treatment qualified under the definition of care and treatment in the Matrimonial Causes Act, 1950. It has now been held[57] that, as from the time when the patient has been visited in accordance with the terms of Section 5 of the Mental Treatment Act, 1930, and the visitors have signed a certificate that he should continue to be detained as a temporary patient, the detention ranks as detention under an order. There remains, however, the period of two or three weeks before the patient is visited.

195. The definition would also remove the difficulty which has arisen in England, when, owing to some technical irregularity, there has not been an order in force for a patient's detention as a certified patient, although the patient has in fact been receiving care and treatment in the hospital. In those circumstances, the court has sometimes had to refuse a decree of divorce.

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[54] We include for this purpose treatment in the single care of an individual.

[55] See also Cmd. 9623, 1955, for proposals for the amendment of the law in Scotland.

[56] Section 5 of the Mental Treatment Act, 1930, provides that where a person suffering from mental disorder is incapable of expressing either willingness or unwillingness to undergo treatment, he may be admitted to a mental hospital on an application, accompanied by a recommendation signed by two doctors. The patient may then be detained for a period of up to six months. The period of detention may be extended by direction of the Board of Control for two further periods of three months each.

[57] ***Bithell* v. *Bithell*, [1954] 3 W.L.R. 463.**

(2) Continuity of Care and Treatment

196. In both England and Scotland care and treatment during the qualifying period must have been continuous. We think that this rule should be retained. It would, however, result in unnecessary hardship if it were so interpreted as to exclude the possibility of short absences from any hospital (or other institution) where treatment has been given. In view of our adoption of a definition of care and treatment which recognises care and treatment in any approved hospital, irrespective of the status of the patient, we have had to give some thought to the exceptions which should be allowed to the rule.

197. We first describe the arrangements at present in force in respect of absences from a hospital in the case of certified and voluntary patients. As we have said, it is now an accepted part of treatment for some forms of mental illness that the patient should be allowed to leave the hospital for short periods. In England, with the permission of the person in charge, a certified patient may leave a mental hospital in certain circumstances without the absence being regarded as a discharge. He may be absent for not more than four days on short leave, or for an indefinite period, in practice usually three months, on trial if he is under consideration as being suitable for discharge. In addition, sometimes a patient may be boarded out with a relative or friend, if the hospital authority is satisfied that he will receive proper care. It has now been held that the continuity of care and treatment is not broken by such absences so long as the order remains in force[58]. In Scotland, whenever there is a probability of recovery, a certified patient may be authorised by the General Board of Control to be absent on probation for a period not exceeding twelve months, during which time the order for his detention remains in force[59]. Leave of absence from a mental hospital may also be granted by the person in charge for a period not exceeding twenty-eight days.

198. However, in both England and Scotland the order automatically lapses and the patient has to be certified again before he can be re-admitted to the hospital, if a patient who has been absent with leave fails to return at the appointed time, or if a patient escapes and is at large for longer than the period laid down by statute (fourteen days in England and twenty-eight days in Scotland).

199. A voluntary patient may discharge himself on giving seventy-two hours notice to the medical superintendent of the hospital. If the discharge takes place against the advice of the medical superintendent and he thinks that the patient ought not to be at large, for his own good or for the public safety, arrangements will be made for him to be certified within a short time of his discharge. Alternatively, a voluntary patient is sometimes allowed to be absent for a short period without discharge, on the understanding that he will return for further care and treatment[60]. In this case, his name is retained in the hospital's current records, and he does not have formally to apply for re-admission.

200. In the first place, we think that so long as the patient's name is retained in the current records of the hospital it is right to regard him as being under care and treatment. Accordingly, we recommend that for the purpose of divorce proceedings a patient should be deemed to have been continuously under care and treatment if, notwithstanding that he has been absent from the hospital or other institution, his name has been retained

[58] *Sofford* v. *Sofford*, [1914] P. 61.

[59] The Divorce (Scotland) Act, 1938, provides that a person is to be deemed to be under care and treatment while the order for his detention is in force.

[60] We understand that in Scotland in practice these absences are for not more than three days.

in the current records of the hospital or other institution. This provision would allow a patient, whatever his status, to be absent from the hospital for a holiday or on trial or to undergo treatment for physical illness[61], without the continuity of care and treatment being regarded as broken.

201. We consider, however, that, if hardship is to be avoided, provision should also be made to meet the case where a patient is discharged or discharges himself from a hospital but is re-admitted, or admitted to another hospital, within a very short time. So long as any break in care and treatment does not exceed twenty-eight days, we think that the continuity of care and treatment, for the purpose of divorce proceedings, should be deemed not to have been interrupted[62], and we recommend accordingly. We do not contemplate that any limit should be set to the number of such breaks, provided that each is not longer than twenty-eight days.

(3) Length of Period of Care and Treatment

202. We appreciate that, because of advances in medical skill and technique and the increasing practice of allowing the patient in the first stages of his illness to receive care and treatment in his home, it may be possible to say that his condition is incurable before the statutory period of five years' care and treatment has elapsed. But with this ground of divorce the most stringent safeguards should be taken for the benefit of the person who is being divorced. We consider that, if the definition of care and treatment is to be extended, as we have recommended, it would be unwise to make any further change in the law at the present time by reducing the length of the qualifying period of care and treatment.

(4) Uniformity between England and Scotland

203. It seems to us anomalous that in respect of a comparatively new ground of divorce there should continue to be a fundamental difference between England and Scotland such as exists at the present time (see paragraph 174). We consider, therefore, that it would be preferable in this particular instance to have uniformity between the laws of the two countries.

204. While the requirement to testify positively that the patient is incurably of unsound mind may have raised some difficulties in England when it was first introduced, these seem to have been of a temporary nature only. Since 1937 considerable advances have been made in treating the various types of mental disorder and we can see no reason why the formula at present accepted by the court in England, namely, that the mental disorder is incurable in the light of present-day medical knowledge, should present any real difficulty. The alternative formulae which have been suggested would all, in our opinion, considerably widen the scope of this ground of divorce. So long as some prospect of recovery remains, the remedy of divorce should not be available to the other spouse. The General Board of Control for Scotland has said that in spite of the advances made in the treatment of mental illness there may, in its opinion, still be some cases where it would be difficult to provide positive evidence of incurability. The Board considers, therefore, that the present procedure in Scotland should be retained, that is to say, that care and treatment for five years should raise a presumption of incurability. We have carefully considered the Board's representations but we remain of the opinion that the court should require positive proof of incurability. The Board has

[61] See *Swymer* v. *Swymer*, [1954] 3 W.L.R. 803.

[62] In the case of a certified patient who fails to return after a period of leave or escapes, the break in care and treatment will be deemed to begin on the date on which the order lapses (see paragraphs 198 and 200).

pointed out that the present procedure in Scotland has worked well. But we are recommending that the scope of the definition of care and treatment should be widened and it seems to us that it is then very necessary that the court should have to be satisfied that the insanity is incurable so far as medical knowledge can ascertain at the time. We recommend accordingly.

(5) Representation of the Person of Unsound Mind

205. By virtue of Rule 64 of the Matrimonial Causes Rules, 1950, the Official Solicitor becomes, if he consents, the guardian *ad litem* of any respondent against whom divorce proceedings on the ground of insanity have been taken in England. There is provision in the Rules for application to be made to the court at any stage of the proceedings for some other person to be appointed guardian but we understand that in practice the Official Solicitor consents to act as guardian *ad litem* in every case that is brought to his notice provided that a suitable undertaking is given by the petitioner for payment of the whole or part of the Official Solicitor's costs. We further understand that the Official Solicitor, acting as guardian *ad litem*, invariably obtains an independent medical opinion on the state of the respondent's mental disorder.

206. In our opinion it is essential, more particularly in view of our recommendations for the widening of the definition of care and treatment, that the interests of the respondent should be carefully safeguarded during the proceedings. We consider that the present practice, as we have just described it, works well, adequately protects the interests of the respondent and should be continued. We are satisfied that the court would not make an order for the appointment of some person other than the Official Solicitor as guardian *ad litem* without requiring the same careful procedure to be adopted.

207. With regard to the practice in Scotland, we have already mentioned that under the present law the court is required in every action for divorce based on the defender's insanity to appoint a curator *ad litem* to protect the defender's interests. We consider that this practice should continue.

208. We understand that the report which is at present furnished to the court on certified patients by the General Board of Control for Scotland is usually based on the report of the medical superintendent of the mental hospital in which the defender is receiving care and treatment. It is only when there is some doubt about the probability of the patient's recovery that the General Board of Control obtains an independent medical opinion based on an examination by the Board's Medical Commissioners. We think it an important safeguard to have an independent medical opinion in every case, as is the practice in England, and we recommend, therefore, that in every action raised on the ground of the defender's insanity the General Board of Control should be required to furnish a report on whether the defender is considered to be incurably of unsound mind in the light of present-day medical knowledge, based on an examination by its Medical Commissioners.

(6) Geographical Limitation on Care and Treatment

209. We are agreed that hardship may be caused to a person whose spouse has received care and treatment in some country other than those at present listed in the statute. We see no reason why a period of care and treatment in any part of the world should not count towards the qualifying period, provided that there are adequate safeguards for the protection of the spouse of unsound mind. Conditions of care and treatment may vary considerably from country to country and it is important to ensure that the patient has been given every possible form of treatment appropriate to the

type of insanity from which he is suffering, before the court accepts that he is incurably insane in the light of present-day knowledge. We recommend, therefore, that for the purpose of divorce proceedings a person should be deemed to have been under care and treatment while he has been receiving care and treatment in a country other than those already listed in the statute, according to standards which are substantially the same as those obtaining in respect of the care and treatment of patients suffering from mental illness in England or in Scotland as the case may be. The burden should be on the spouse taking divorce proceedings to satisfy the court that the standards in the country concerned are substantially the same as those in England or in Scotland. We did consider whether the task of making appropriate enquiries should be placed on a Department of State, which, if satisfied that the conditions in the country investigated were substantially the same as those in England or Scotland, would cause the name of the country to be added to the list by Statutory Instrument. We concluded, however, that there would not be sufficient cases of this type to justify an official investigation and the consequent expenditure of public money.

SODOMY AND BESTIALITY: ENGLAND AND SCOTLAND

210. In England the court may grant a divorce to a wife, but not to a husband, on the ground that the other spouse has been guilty of sodomy or bestiality. Occasionally, however, a husband has been able to obtain relief on the ground of cruelty because his wife has been guilty of such unnatural practices. It would appear that under the criminal law a woman can be charged with the commission of acts of this nature; Section 61 of the Offences against the Person Act, 1861, draws no distinction between male and female in making this type of conduct a criminal offence liable to be punished by imprisonment. Moreover, in allowing a wife to obtain a divorce on the ground of an act of sodomy committed by her husband on her person, the divorce law has recognised that sodomy may take place not only between males but between a male and female. We recommend, therefore, that husband and wife should now be placed on the same footing and that in England either spouse should be able to obtain a divorce on the ground that the other spouse has been guilty of sodomy or bestiality.

211. In Scotland, sodomy and bestiality were made grounds of divorce for the first time by the Divorce (Scotland) Act, 1938. This provision of the Act has not been the subject of judicial interpretation. Under the criminal law of Scotland, sodomy refers only to acts between males and it may well be that, should the occasion arise, the Court of Session would feel bound to follow the criminal law in this respect. Moreover, it is doubtful whether a woman can be charged with the offence of bestiality. We consider, however, that a husband should be able to obtain a divorce in Scotland on the ground that his wife has participated in an act of sodomy or bestiality. We recommend, therefore, **that it be made clear, by definition, that for the purpose of the divorce law in Scotland "sodomy" includes an act between man and woman which if done between man and man would amount to sodomy; and "bestiality" includes intercourse by a woman with a beast.**

APPENDIX III

TABLE 1

Table R1.3 Divorces, by ground, Scotland, 1950 to 1971

Year	Ground of divorce						Nullity of marriage	Dissolution of marriage (presumption of death)	Total
	Insanity	Adultery	Cruelty	Desertion	Sodomy	All grounds of divorce			
1950	15	841	99	1,231	-	2,186	10	8	2,204
1951	22	721	112	1,073	-	1,928	16	11	1,955
1952	27	1,045	196	1,434	-	2,702	16	19	2,737
1953	20	902	194	1,234	2	2,352	13	11	2,376
1954	14	847	219	1,118	2	2,200	16	10	2,226
1955	19	823	210	1,002	-	2,054	19	5	2,078
1956	19	709	244	815	-	1,867	16	8	1,891
1957	16	729	241	736	-	1,722	17	8	1,747
1958	18	773	274	697	-	1,762	19	10	1,791
1959	18	779	284	606	-	1,687	12	5	1,704
1960	14	783	346	660	1	1,804	19	5	1,828
1961	13	805	370	619	1	1,808	17	5	1,830
1962	10	964	419	624	-	2,017	18	7	2,042
1963	7	1,073	499	638	1	2,218	17	10	2,245
1964	7	1,154	587	674	1	2,423	23	9	2,455
1965	2	1,194	634	831	2	2,663	25	3	2,691
1966	9	1,473	947	1,120	-	3,549	21	6	3,576
1967	5	1,284	905	820	1	3,015	18	5	3,038
1968	11	1,808	1,648	1,231	-	4,758	39	6	4,803
1969	3	1,640	1,503	1,069	2	4,217	25	4	4,246
1970	5	1,730	1,850	1,006	-	4,591	22	5	4,618
1971	8	1,829	1,980	969	-	4,786	22	4	4,812

APPENDIX III: TABLE 2

Actions of Divorce for Incurable Insanity in which Final Judgment Given

NOTE: D = Defended Actions U = Undefended Actions

Year	Total Actions	Husband Pursuer		Wife Pursuer		Divorce Granted		Divorce Refused	
		D.	U.	D.	U.	Husband Pursuer	Wife Pursuer	Husband Pursuer	Wife Pursuer
939	21								
940	22								
941	13								
1942	17								
943	28								
1944	18								
945	28								
1946	20								
947	24								
948	19								
1949	20	-	10	-	10	10	10	-	-
950	15	-	11	-	4	11	4	-	-
1951	22	-	13	-	9	13	9	-	-
952	29	-	16	-	13	16	11	-	2
1953	21	1	11	-	9	11	9	1	-
954	14	-	6	-	8	6	8	-	-
1955	21	-	14	2	5	14	5	-	2
956	20	1	6	-	13	7	12	-	1
957	17	1	11	-	5	11	5	1	-
958	18	1	9	-	8	10	8	-	-
959	18	-	7	4	7	7	11	-	-
1960	14	-	5	-	9	5	9	-	-
961	14	-	10	-	4	10	3	-	1
1962	11	-	6	-	5	6	4	-	1
963	8	-	3	-	5	3	4	-	1
1964	8	-	3	-	5	1	5	2	-
965	3	-	3	-	-	2	-	1	-
966	9	-	6	-	3	6	3	-	-
7	5	-	1	-	4	1	4	-	-
968	11	1	5	-	5	6	5	-	-
1969	3	-	1	-	2	1	2	-	-
970	5	-	2	-	3	2	3	-	-
1971	8	1	3	-	4	4	4	-	-

Total Actions 1939-71 = 524

Total Actions 1949-71 = 314

Totals 1949-71

Husband Pursuer

Defended Actions = 6

Undefended Actions = 162

Wife Pursuer

Defended Actions = 6

Undefended Actions = 140

Divorce Granted

Husband Pursuer = 163

Wife Pursuer = 138

Divorce Refused

Husband Pursuer = 5

Wife Pursuer = 8