

SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 34)

REPORT ON PRESUMPTION OF DEATH

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

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

To THE RIGHT HONOURABLE RONALD KING MURRAY, Q.C., M.P.
Her Majesty's Advocate

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965 we submitted on 14th May 1968 our Second Programme for the examination of several branches of the law of Scotland. Item No. 11 of that Programme, which was published on 19th July 1968, required us to proceed with an examination of the law relating to the presumptions of survivorship and death.

In pursuance of Item No. 11 we have carried out an examination of the law in so far as it relates to the presumption of death and connected matters. We have the honour to submit our proposals for the reform of this branch of the law.¹

20th March 1974

J. O. M. HUNTER
Chairman of the Scottish Law Commission

¹The Transfer of Functions (Secretary of State and Lord Advocate) Order 1972 (S.I. 1972/2002) removes the requirement to submit Reports to the Secretary of State for Scotland.

REPORT ON PRESUMPTION OF DEATH

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SCOTTISH LAW COMMISSION
REPORT ON PRESUMPTION OF DEATH

PART I: INTRODUCTION

1. Item No. 11 of our Second Programme of law reform, published on 19th July 1968, envisaged that the Commission should examine the law relating to the presumption of death. We explained that at common law a person is presumed, in the absence of proof of death, to continue in life. He will not, in the absence of such proof, be presumed to have died until he has reached an age which is not authoritatively decided but specified either as eighty or as one hundred years. For certain limited purposes, including the obtaining of title to and entry into possession of the estate of a person who has disappeared and the dissolution of his marriage, there are statutory provisions in the Presumption of Life Limitation (Scotland) Act 1891 and the Divorce (Scotland) Act 1938 under which such a person may be presumed dead after a period of seven years. These presumptions do not apply for all purposes, however, and our attention was drawn to problems which arise by reason of this fact and because, in other respects, the existing law is archaic and unsatisfactory.

2. We are dealing here with situations of fact which are not of daily occurrence and with legal problems which may seem abstruse and technical. But the disappearance of individuals without trace, while not a common event, is not one which is extremely rare¹ and the situation is one where it is necessary to have a satisfactory system to establish for legal purposes the fact of a person's death. Upon it may depend such matters as the following:

- (a) the right to succeed to that person's property;
- (b) the right to succeed to other property consequent upon that person's death;
- (c) the disburdenment of property from a liferent;
- (d) the right to the proceeds of policies of assurance upon that person's life or contingent upon his death;
- (e) the right to the payment of annuities, whether or not under policies of assurance;
- (f) the winding-up of trusts and the cessation of annuities;
- (g) the right to pensions, especially widows' pensions, under state and private pension schemes;
- (h) the dissolution of a marriage and the right of the surviving party to remarry;
- (i) the dissolution of other contracts, including contracts of co-partnership;
- (j) the right to dispense with the missing person's consent, for example, his consent as a *pro indiviso* proprietor.

¹The Department of Health and Social Security estimate that there are some fifty cases a year in which a claimant seeks to obtain benefit on the insurance of a person who has disappeared. Approximately five of these might be persons of Scottish domicile.

3. On 8th September 1969 we issued Memorandum No. 11 in which we set out the existing law in some detail, examined its specific deficiencies, and, in a statement of provisional conclusions, outlined an entirely new approach to the topic. We hoped that in this way comments might be elicited on the basis of which we might offer considered advice. We received many useful comments and criticisms and we are grateful to all those who submitted them. A list of those persons is to be found in Appendix I to this Report. The general reaction to our proposals, even those which were most radical, was favourable and we are encouraged by this to take a broad view of the problems raised.

4. The comments which we received and the conclusions which we consequently reached have involved in some cases further consultation. In this connection we have benefited greatly from the specialised knowledge of the Registrar General of Births, Deaths and Marriages and we have also received considerable assistance from the Law Commission, the Lord Chancellor's Office, the Department of Health and Social Security and the Inland Revenue, Edinburgh.

PART II: THE PRESENT LAW

Introduction

5. In Memorandum No. 11 we first set the stage for further discussion by describing the present law and pointing to some of its deficiencies in detail. It may be convenient if we do so once again, dealing first with the common law and then with the legislation directly or indirectly concerned with the presumption of limitation of life.

The Common Law

6. The starting point of the common law of Scotland is a presumption in favour of the continuance of life, so as to throw the onus of proof of death upon the party alleging that fact¹. The precise duration of the presumption has not been authoritatively fixed². Stair³ says that some extend it to eighty years of age and others to a hundred years. Bankton⁴ extends it to the latter figure, and in *Bruce v. Smith*⁵, Lord President Inglis remarked: "Before 1849 Alexander Bruce was not more than eighty-one years of age, and therefore there was a presumption of his being still alive".

7. This presumption of life may, of course, be overcome by direct evidence of death; but it may also be overcome by proof of circumstances which allow an inference of death. The standard of proof has been variously described: judges have required positive proof⁶ or have asked "whether any reasonable doubt exists of the death"⁷. Account, however, is always taken of the age,

¹Stair, IV.45.17 (19); Erskine, IV.2.36.

²*Fife v. Fife* (1855) 17 D.951 at p. 954.

³IV.45.17 (19).

⁴IV.34.1.

⁵(1871) 10 M.130 at p. 132.

⁶*Fife v. Fife* (1855) 17 D.951 at p. 954.

⁷*Bruce v. Smith* (1871) 10 M.130 at p. 133.

health and habits of life of the person concerned, of the circumstances of his employment or vocation, and of the country where he was last known to have lived⁸. The court has probably been less exacting in presuming the death of seamen⁹, soldiers on active service¹⁰, and persons upon expeditions to unexplored territories¹¹. The ultimate decision, however, depends solely on the circumstances of the case¹².

8. The common law established no presumptions dealing with situations where a person's right to property depends upon the order of death of other persons and where no evidence is available to establish that order of death¹³.

9. A common law action for declarator of presumption of death has always been regarded as being an action directed to ascertaining the personal status of the person whose death the court is asked to presume and, in consequence, a matter within the privative jurisdiction of the Court of Session¹⁴. It is right, however, to add that "as an incidental issue in a substantive action, an averment that a person has been absent for a period of years, or has disappeared, and his whereabouts are unknown, and that there are grounds for the presumption that he is dead, may form the subject of inquiry, and be disposed of in the sheriff court"¹⁵.

10. While a common law decree of declarator of presumption of death binds those who are called as defenders, it is not clear that the decree is *res judicata* in relation to parties not called or that it has the effect of a decree *in rem*.

11. The common law has always enabled steps to be taken to protect the property of a missing person during his absence. The present procedure involves a petition to the Court of Session to appoint a factor *loco absentis* under its *nobile officium*, and this is competent at any time after the missing person's disappearance. Statutory provision is made for the appointment of a factor *loco absentis* to an absent heir of entail in possession of heritable property¹⁶. While the Sheriff is empowered by section 4 of the Judicial Factors (Scotland) Act 1880 to appoint judicial factors in certain cases where the yearly value of the estate, heritable and moveable, does not exceed £100, these powers do not extend to the appointment of a factor *loco absentis*. The Committee on the Sheriff Court under the chairmanship of Lord Justice Clerk Grant recommended that the sheriff court might be empowered to appoint a factor *loco absentis*¹⁷, and it also recommended that the existing financial limits of the sheriff court

⁸*Fife v. Fife, supra*, at p. 954.

⁹*Garland v. Stewart* (1841) 4 D.1 at p. 6; *Sands against Her Tenants* (1678) Mor. 12645.

¹⁰*French v. Earl of Wemyss* (1667) Mor. 12644.

¹¹*Fairholme v. Fairholme's Trs.* (1858) 20 D.813.

¹²*Greig v. Trustees of the Edinburgh Merchant Company's Widows' Fund* 1921 S.C. 76; *X v. Society of Solicitors in the Supreme Courts of Scotland* 1937 S.L.T. 87.

¹³*Drummond's Judicial Factor v. Lord Advocate* 1944 S.C. 298; *Ross's Judicial Factor v. Martin* 1955 S.C. (H.L.) 56.

¹⁴*Mackie v. Lyon* (1943) 59 Sh. Ct. Rep. 130.

¹⁵*Idem*, per Sheriff Laing at p. 133F.

¹⁶Entail (Scotland) Act 1882 section 14, as amended by the Presumption of Life Limitation (Scotland) Act 1891.

¹⁷Cmnd. 3248 (1967) paragraph 131.

in the appointment of judicial factors should be abolished¹⁸. We welcome these proposals. As the Committee pointed out, "an application to the Court of Session where the estate is worth little more than £100 a year may have serious financial effects on the estate"¹⁸.

The Presumption of Life Limitation (Scotland) Act 1881

12. Establishing death under the common law was not always easy, especially where a person had disappeared, and in practice "the old law often kept property in neutral custody for so long a time as to deprive a generation from taking any benefit from a succession which had really opened up to them"¹⁹. To remedy this defect the legislature passed the Presumption of Life Limitation (Scotland) Act 1881 which declared that when a person had been absent from Scotland, and had not been heard of for seven years or upwards, whoever was entitled to succeed to that person's property might apply to the Court of Session for authority to uplift the yearly income of his heritable and moveable estate, and, after the lapse of further periods and upon a further application to the court, to receive the capital of the estate. The Act also clothed the court with power to dispense with the participation of an absent person in the sale of property held *pro indiviso*. The Act did, however, have certain limitations:

- (a) It applied only in the case of "any person who has been absent from Scotland, or who has disappeared"; and so did not apply to a missing person who had never been in Scotland²⁰.
- (b) The application could be made only by a person "entitled to succeed to an absent person", so that the Act did not apply where it was desired to presume the death of the liferenter of a heritable estate²¹ or where otherwise the applicant's right, although contingent on the death of the absent person, was not a right of succession to his estate²².
- (c) The Act applied only when the absent person was "possessed of or entitled to heritable or moveable estate in Scotland". It could not, therefore, be used to presume the death of persons who possessed no estate or possessed no estate in Scotland²³.

The Presumption of Life Limitation (Scotland) Act 1891

13. The Presumption of Life Limitation (Scotland) Act 1881 was repealed by the Presumption of Life Limitation (Scotland) Act 1891. Its crucial provision is section 3 which, "when any person has disappeared and has not been heard of²⁴ for seven years or upwards" enables the court to "find on the facts proved or admitted that he died at some specified date within seven years after the date on which he was last known to be alive, and where there is no sufficient evidence that he died at any definite date, find that he shall be presumed to have died exactly seven years after the date on which he was last known to be

¹⁸Paragraph 132.

¹⁹*Williamson v. Williamson* (1886) 14 R.226, per Lord President Inglis at p. 228.

²⁰*Rainham v. Laing* (1881) 9 R.207.

²¹*Peterhead School Board v. Yule's Trustees* (1883) 10 R.763.

²²*Minty v. Ellis' Trustees* (1887) 15 R.262.

²³*Mrs Janet McArthur or Fenner* (1886) 2 Sh. Ct. Rep. 104.

²⁴On the interpretation of these words see *Prudential Assurance Co. v. Edmonds* (1877) 2 App. Cas. 487 especially pp. 489, 502 and 513.

alive". It is worth emphasising that the 1891 Act creates a mechanism by which a finding of a date of death may be made upon facts pointing to a precise time of death as well as upon the presumption which the Act establishes²⁵. The 1891 Act cures several of the defects of the 1881 Act. In the first place, the 1891 Act enables the court to presume the death of "any person [who] has disappeared and has not been heard of for seven years or upwards"; there is no restriction upon the ambit of the Act based on the missing person's disappearance from Scotland. The section permits of the immediate distribution of the missing person's property as if he were dead, subject to the proviso that it should not entitle "any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died"²⁶. The 1891 Act, however, can be and has been used to presume the death of a domiciled Englishman when the estate involved is heritage in Scotland²⁷. It is not clear why the application of the proviso is limited to *intestate* moveable succession. If it is appropriate to exclude the application of the presumption to persons domiciled outwith Scotland in matters relating to their *intestate* moveable succession, it seems equally legitimate to exclude it in matters relating to their *testate* moveable succession unless, perhaps, Scots law is specifically chosen as the *lex successionis*.

14. In the second place, an application under the 1891 Act may be made not only by a person entitled to succeed to the estate of the absent person but by ". . . any person entitled to succeed to any estate on the death of such person, or entitled to any estate the transmission of which to the petitioner depends on the death of such person, or the fiar of any estate burdened with a liferent in favour of such person"²⁸.

15. In the third place, the effect of a decree under the 1891 Act finding or presuming a missing person to have died is to enable the persons mentioned in paragraph 14 to "make up titles to and to enter into possession of and to sell or dispose of or to burden such estate as if the [missing] person had actually died at the date on which the court has found that he is proved or presumed to have died"²⁹.

16. The 1891 Act contains other provisions of a miscellaneous character. Section 4 allows the court to dispense with the participation of a missing *pro indiviso* proprietor of Scottish heritage in the sale of the property. Sections 6 and 7 deal with claims to his heritable or moveable estate by the missing person in the event of his reappearance, or by any person deriving right from him who has a right to the estate preferable to the person taking under the Act. The missing person or a person deriving right from him is entitled to demand and receive the estate or the value thereof from the person taking under the Act or from any person who has acquired the estate gratuitously from the person taking under the Act. He receives the estate free of new burdens, but he does

²⁵*Tait v. Sleigh and Others* 1969 S.L.T. 227.

²⁶Section 3 *ad finem*.

²⁷*Jones, Petitioner* 1923 S.L.T. 31.

²⁸Section 3.

²⁹Section 3.

not receive the income which may have accrued prior to the demand and he must account for meliorations. After thirteen years, however, the rights of the missing person and those deriving rights from him finally lapse.

17. Jurisdiction in petitions under the 1891 Act is vested in the Court of Session, save where the value of the estate is not over £500, when the sheriff court of the county in which the estate, or the greater part thereof, is situated has jurisdiction³⁰.

18. There are, however, certain important limitations, express and implied, to the operation of the 1891 Act:

- (a) An application may be made under the Act only by a person "entitled to succeed to any estate on the death of [an absent person], or entitled to any estate the transmission of which to the petitioner depends on the death of such person"³¹. In *Fraser, Petitioner*³² a woman's husband disappeared in 1937 and nothing was heard from him thereafter. He was possessed of no estate nor was his wife entitled to any in consequence of his death. The court rejected her petition under the 1891 Act since it had no patrimonial object. Again, in *Murray v. Chalmers*³³ a petition was presented to presume the death of Robert Chalmers, who had disappeared in 1904. The petitioner was the purchaser of the reversionary rights of Chalmers under the settlement of his father. Those rights were dependent upon Chalmers surviving his mother who died in 1905. The petition was contested *inter alios* by the person who had the right to Chalmers' share of the estate if he predeceased his mother. Lord Hunter accepted the argument that the petitioner was not a person whose entitlement to the estate depended on the death of the missing person but one whose entitlement depended rather on his **date** of death. He, therefore, dismissed the petition.
- (b) The Act does not apply to claims against insurers under a policy of assurance upon the life of any person who has disappeared³⁴. Persons claiming under such a policy are required, in a question with the insurers, to prove under the common law rules the death of the person whose life is insured.
- (c) The Act enables successors "to make up titles to and to enter into possession of and to sell or dispose of or to burden such estate as if the said person had actually died at the date on which the court has found that he is proved or presumed to have died"³⁵. The court's decree, however, does no more than this; it does not in other respects allow the petitioner or third parties to act upon the assumption that the missing person is dead. In particular, it does not of itself permit the spouse of the missing person to contract a new marriage³⁶.

³⁰Section 12(1)(b).

³¹Section 3.

³²1950 S.L.T. (Sh. Ct.) 51.

³³1913, 1 S.L.T. 223.

³⁴Section 11; *Murray v. Chalmers* 1913, 1 S.L.T. 223.

³⁵Section 3.

³⁶*Brady v. Murray* 1933 S.L.T. 534.

- (d) While section 6 of the Act contemplates the situation where the missing person reappears and makes provision for the return to him of his estate, the language of the section, though applying in terms to moveable as well as to heritable estate, suggests that it was drafted mainly to deal with the restitution of heritable property. Today, moveable property has become more important than it was in 1891 and, once title to it has been obtained by the missing person's successors, such property is liable rapidly to become inmixed with the successors' own estate. In this situation, and against the background of the current mobility of moveable property, restitution in kind presents formidable problems. These are discussed in paragraphs 95 to 107.
- (e) Under section 7 of the Act, the missing person continues to have a right to recover his own estate within a period of thirteen years from the date when its holder took infetment or obtained possession of the estate. In other words, at least twenty years, the period of the now current long negative prescription, must elapse from the date when the missing person was last seen or heard of before the risk of a claim by him or his successors disappears. We consider in paragraph 110 whether this period is appropriate.
- (f) The Act makes provision for a judicial declaration that a person who has disappeared has died, or may be presumed to have died, on a particular date. It makes no express provision, however, enabling the court to declare who are entitled to succeed upon the basis of the findings as to the time of death³⁷.

The Divorce (Scotland) Act 1938

19. Of the limitations to the operation of the 1891 Act perhaps the most striking was its absence of effect in matters of status. Despite the existence of a decree under that Act the spouse of a missing person could not enter into a marriage which was assuredly valid³⁸. If in fact the missing person was alive, any other marriage which his spouse might contract was *ipso facto* invalid³⁹. Even if there was no evidence that the missing person was alive, in the absence of affirmative evidence that he was dead the new "spouse" could resist claims for aliment on the ground that his marriage was void⁴⁰. The spouse of a missing person could not obtain a decree of divorce for desertion unless the circumstances pointed to the missing spouse's intention to desert⁴¹. These problems were not resolved until the passing of the Divorce (Scotland) Act 1938. The relevant provisions, contained in section 5, are as follows:

"(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court craving a decree of dissolution of the marriage

³⁷See *Dear and Lumgair, Petitioners* (1905) 12 S.L.T. 862 and (1906) 13 S.L.T. 850, particularly the judgment of Lord Johnston at pp. 851-2.

³⁸*Brady v. Murray* 1933 S.L.T. 534; see also *Fraser, Petitioner* 1950 S.L.T. (Sh. Ct.) 51.

³⁹*Sharp v. Sharp* (1898) 25 R.1132 per Lord Justice-Clerk Macdonald at p. 1135.

⁴⁰*Sharp v. Sharp* (1898) 25 R.1132.

⁴¹See *Lough v. Lough* 1930 S.C. 1016 and the comments on that case in *Lench v. Lench* 1945 S.C. 295.

on the ground of the presumed death of the other party, and . . . the court, if satisfied that such reasonable grounds exist, may grant such a decree.

- (2) In any proceedings on a petition presented under the last foregoing subsection, the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead unless the contrary is proved.”

20. Section 5 provides that “any married person . . . may present a petition to the court” but as originally enacted did not give express guidance as to the appropriate rules of jurisdiction. The court, however, construed section 5 against the background of the existing law and required the petitioner to be domiciled in Scotland at the date when the action was raised. This presented difficulties for petitioning wives because of the operation of the rule that a wife’s domicile followed that of her husband⁴². The rigour of that rule was mitigated by the Law Reform (Miscellaneous Provisions) Act 1949, section 2(3), which, in addition to expressly providing that domicile conferred jurisdiction, provided that in petitions by a wife under section 5 of the 1938 Act, the court had jurisdiction “if she is resident in Scotland and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings”. The bases of jurisdiction as set out in the 1949 Act were, however, still open to certain objections, which are fully discussed in paragraphs 85 to 92 of our Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status (Scot. Law Com. No. 25). Paragraph 93 of that Report contains our recommendations for amendment of the law to meet the objections, and those recommendations find expression in subsection (3) of section 5 of the 1938 Act, a subsection added to that section by paragraph 2 of Schedule 4 to the Domicile and Matrimonial Proceedings Act 1973. The subsection provides that in proceedings on any petition under the said section 5—“the court shall have jurisdiction to entertain the petition if, and only if,—

- (a) the petitioner is domiciled in Scotland on the date when the proceedings are begun, or was habitually resident there throughout the period of one year ending with that date; or
- (b) the person whose death is sought to be presumed was domiciled in Scotland on the date on which he was last known to be alive, or had been habitually resident there throughout the period of one year ending with that date.”

21. Decrees of presumption of death and dissolution of the marriage operate, *quoad* the marriage, as a declaration of death and the rules relating to property rights on divorce in section 2 of the 1938 Act and in section 25 of the Succession (Scotland) Act 1964 have no application in this situation. Nor is any specific provision made as to what effects (if any) the decree has in relation to the survivor’s rights of succession to the estate of the missing person. It seems likely that recourse to the procedures of the 1891 Act is required. If this is so, the obligation of restitution imposed by the 1891 Act would bear hard upon the

⁴²See *Labacianskas v. Labacianskas* 1949 S.C. 280 at p. 285.

surviving "widow" where her husband's estate was a small one. The 1938 Act, indeed, makes no provision for the contingency of the reappearance of the missing spouse⁴³.

The Succession (Scotland) Act 1964

22. It was mentioned in paragraph 8 above that, when two or more persons have died in circumstances making it uncertain in which order their deaths occurred, the common law gives no guidance as to the order in which they may be presumed to have died. In *Ross's Judicial Factor v. Martin*⁴⁴ Lord Keith of Avonholm suggested⁴⁵ that the facts of the case suggested the desirability of introducing into the law of Scotland statutory rules for cases of common calamity. These were introduced in the Succession (Scotland) Act 1964. Section 31 provides that:

- "(1) Where two persons have died in circumstances indicating that they died simultaneously⁴⁶ or rendering it uncertain which, if either, of them survived the other⁴⁷, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse,
- (a) where the persons were husband and wife, it shall be presumed that neither survived the other; and
 - (b) in any other case, it shall be presumed that the younger person survived the elder unless the next following subsection applies.
- (2) If, in a case to which paragraph (b) of the foregoing subsection would (apart from this subsection) apply, the elder person has left a testamentary disposition containing a provision, however expressed, in favour of the younger if he survives the elder and, failing the younger, in favour of a third person, and the younger person has died intestate, then it shall be presumed for the purposes of that provision that the elder person survived the younger."

This section, while it clarifies the law, is not free from difficulties and Memorandum No. 11 contained two provisional conclusions⁴⁸ for amendment of the section. For reasons which we will explain later⁴⁹ we have decided not to deal in this Report with amendment of the section but to consider the question of presumptions of survivorship as part of our proposed examination of the law of succession.

Legislation concerning entails

23. The Entail (Scotland) Act 1882 contains provisions analogous to a presumption of death in circumstances where there has been absence from Scotland or disappearance either of (a) an heir in possession of an entailed estate, or (b) another heir whose consent is required to a process of disentailing.

⁴³This problem is discussed in paragraphs 114 to 116.

⁴⁴1955 S.C. (H.L.) 56.

⁴⁵At p. 73.

⁴⁶The word "simultaneously" may be presumed to have been inserted having regard to *In re Grosvenor* [1944] Ch. 138 and *Hickman v. Peacey* [1945] A.C. 304.

⁴⁷In other words, section 31 is not limited in its application to a common calamity situation. See the remarks of Viscount Simon in *Hickman v. Peacey*, *supra*, at p. 314.

⁴⁸Nos. 16 and 17.

⁴⁹Paragraph 54.

24. The third paragraph of section 14 makes it clear that a factor *loco absentis* to an absent heir in possession may apply to the court for authority to feu, lease, borrow and charge for improvement expenditure in the same manner as the heir in possession himself might have done. The first paragraph of section 14 provides that where the absence has continued for a period of seven years⁵⁰, the next heir may apply to the court for the appointment of a factor *loco absentis* with a view to the execution by the factor *loco absentis* of an instrument of disentail of the estate, an instrument to be as effective as if executed by the heir in possession himself. The following paragraph enables the factor to sell the estate at the sight of the court, to pay to the heirs whose consents to the disentail are required the value of their interests, and to pay into the bank or invest the balance for behoof of the heir in possession, a balance which becomes moveable and subject to the provisions of the Presumption of Life Limitation (Scotland) Act 1891. It is thought that if the procedure for disentail is not carried out the estate under the present law would remain under the care of the factor *loco absentis* until the absent heir was declared to be dead under the procedures of the common law.

25. Sections 15 and 16 deal with the situation where an application is made to the court for which the consent of an heir is required (for example, in an application for disentail) and this consent cannot be obtained because of his absence or disappearance. Section 15 provides that the value in money of the expectancy or interest of such heir in the estate may be ascertained and held for his behoof, and thereafter that the application may proceed as if his consent had been obtained. The following section provides for the disposal of this fund after fourteen years from the date when he was last heard of as being alive as if the absent heir had been dead at the date of the disentail.

26. Although there are now fewer entails than in former times, provision must be made for the situations envisaged by sections 14 to 16 of the 1882 Act. This presents problems of co-ordination with the proposals in the present Report. We allude to these problems in paragraphs 124 to 129.

Legislation concerning registration of death

27. Special difficulties arise when persons die or disappear in the course of travel by sea or air outside the United Kingdom or when members of Her Majesty's naval, military or air forces, members of their families, and other persons accompanying them, die or go missing outside the United Kingdom. Provision is made by the Civil Aviation Act 1949⁵¹, the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957⁵² the Registration of Births, Deaths and Marriages (Scotland) Act 1965⁵³ and the Merchant Shipping Act 1970⁵⁴ for the maintenance of records of the deaths of such persons and their transmission, in appropriate cases, to the Registrar General of Births, Deaths and Marriages for Scotland. Under the provisions of these Acts the

⁵⁰The original period of fourteen years was reduced to seven by section 8 of the Presumption of Life Limitation (Scotland) Act 1891.

⁵¹Section 55 as amended by the Civil Aviation Act 1971, Schedule 10, paragraph 2.

⁵²Sections 1 and 2.

⁵³Section 22(4).

⁵⁴Sections 72 and 92.

Registrar General for Scotland keeps "Service Departments Registers"⁵⁵ an "Air Register Book of Births and Deaths"⁵⁶ and a "Marine Register"⁵⁷. Entries from these registers may be extracted and such extracts are declared to be "sufficient evidence of the birth, death or marriage as the case may be"⁵⁸.

28. In this Report, however, we are primarily concerned with the cases of persons who have disappeared and whose death or date of death is not quite certain. When a person goes missing at sea a return containing particulars of the incident is made, on the arrival of the ship at port, to the superintendent or to a consular officer, for transmission to the Registrar General of Shipping and Seamen⁵⁹. The Registrar General of Shipping and Seamen is required to send a certified copy of the return to the appropriate Registrar General of Births, Deaths and Marriages⁶⁰. The information contained in the returns transmitted to the Registrar General of Births, Deaths and Marriages for Scotland is recorded by him in the Marine Register⁶¹. When a registered ship is lost or abandoned a list of the crew at the time is delivered to a superintendent⁶², and the Merchant Shipping Act 1894 makes provision for the holding of a preliminary inquiry or formal investigation into the casualty⁶³.

29. Section 55(9) of the Civil Aviation Act 1949 as amended by the Civil Aviation Act 1971, provides for the keeping by the Civil Aviation Authority of a record of persons reported as missing "being persons with respect to whom there are reasonable grounds for believing that they have died in consequence of an accident to an aircraft registered in Great Britain and Northern Ireland". It also provides for the rectification of such record and the transmission of information contained in it to *inter alios* the Registrar General of Births, Deaths and Marriages for Scotland. It is understood that the purpose of these provisions was to provide evidence of death, which, while open to subsequent attack in the courts, should be regarded as *prima facie* evidence of death.

30. The Mineral Workings (Offshore Installations) Act 1971 provides⁶⁴ for the making of regulations relating to the making of returns of deaths (including presumed deaths) connected with such installations to the Registrar General of Shipping and Seamen, and the duties of the Registrar General in respect of such returns⁶⁵. Equally, the terms of the Hovercraft Act 1968⁶⁶ permit the

⁵⁵Registration of Births, Deaths and Marriages (Special Provisions) Act 1957, section 3(1).

⁵⁶Civil Aviation Act 1949, section 55(5).

⁵⁷Merchant Shipping Act 1970, section 72(3).

⁵⁸1965 Act, section 41(3), read with the 1949 Act, section 55(8), the 1957 Act, section 3(2), the 1965 Act, section 33(1), and the 1970 Act, section 72(3).

⁵⁹The Merchant Shipping (Returns of Births and Deaths) Regulations 1972 (S.I. 1972/1523), regulations 3 to 6.

⁶⁰*Idem*, regulation 7.

⁶¹Merchant Shipping Act 1970, section 72(3).

⁶²The Merchant Shipping (Crew Agreements, Lists of Crew and Discharge of Seamen) Regulations 1972 (S.I. 1972/918), regulation 17.

⁶³Merchant Shipping Act 1894, sections 464-468; see also Merchant Shipping Act 1970, section 55.

⁶⁴Section 6 and Schedule, paragraph 12.

⁶⁵The relevant regulations are the Offshore Installations (Logbooks and Registration of Death) Regulations 1972 (S.I. 1972/1542).

⁶⁶In particular, section 1(1)(h).

extension to hovercraft of statutory and other rules of law relating to ships or aircraft⁶⁷.

Recognition of foreign decrees and presumptions

31. Statute law makes no provision at present for the recognition of foreign decrees declaring or presuming a person to have died. In *Simpson's Trustees v. Fox and Others*⁶⁸ Lord Guthrie declined to recognise the decree of an Ohio court presuming the death of a person alleged to have been last domiciled in the State of Ohio. He considered that proof of death was a question of fact to be determined by the *lex fori*, and that the law of Scotland had provided the procedures of the 1891 Act for that purpose. This decision, as we pointed out in Memorandum No. 11⁶⁹, may rest upon its special facts because it was not admitted that the person in question was last domiciled in the State of Ohio and because the proceedings in the Ohio court appear to have been taken during the pendency of the Scottish proceedings. It may be that in an appropriate case the Court of Session would recognise a decree declaring or presuming a person to have died pronounced by the courts of that person's domicile, but the matter is not entirely clear. There appears, moreover, to be no authority in Scotland relating to the application of foreign presumptions of limitation of life. We consider in paragraphs 121–123 whether legislation would be desirable to clarify these questions.

PART III: COMMENTARY ON THE LAW

Introduction

32. The preceding outline of the present law relating to limitation of life contained brief allusions to a number of its special and technical limitations and defects. While it would be valuable to remove these limitations and to eradicate these defects, this would be a partial cure at best. A systematic study of the law throws into relief the fact that there are more fundamental defects inherent in the law's general approach to questions of survivorship. These defects include the duration of the presumption of life at common law, the fact that the existing statutory presumptions of limitation of life cover only specific situations, the variety of processes required to establish a person's death for different purposes, the expense occasioned by the multiplicity of proceedings and the channelling of cases to the Court of Session, the absence of provision for the recognition of foreign decrees, the archaic and unsatisfactory nature of the provisions for restitution of property on the return of the missing person, and the absence of guidance as to the effect of such return upon a subsequent marriage contracted by the missing person's spouse. In this section of our Report we propose to consider these defects, along with a number of minor defects of a miscellaneous character.

⁶⁷See the Hovercraft (Births, Deaths and Missing Persons) Regulations 1972 (S.I. 1972/1513).

⁶⁸1951 S.L.T. 412. A sequel to this case is reported in 1954 S.L.T. (Notes) 12.

⁶⁹Paragraph 35.

Duration of the common law presumption of life

33. The common law, as we have explained, starts with a presumption in favour of the continuance of life so that, in the absence of direct or circumstantial evidence of earlier death, the onus of proof of the death of a missing person is always on the person who asserts it. A man is not presumed to have died until the ordinary maximum span of life has elapsed. The common law rule, it was generally conceded, led to considerable hardship, because it tended to sterilise property, perhaps for more than a generation, and because it bound the spouse of a missing person to a marriage which was dead in all but name. The Presumption of Life Limitation (Scotland) Act 1891 and the Divorce (Scotland) Act 1938 attempted to meet these specific problems but, while the facilities they offer eliminate the disadvantages of the common law rule in its principal spheres of application, they do not eliminate those disadvantages in the situations to which the Acts do not apply. In such situations the court must continue to apply the rules of the common law, so that the layman may be puzzled to see a person being treated as alive for some purposes under the common law, but dead for others by virtue of statute law.

34. A case of this kind was discussed in "The Guardian" on 13th, 16th and 17th September 1966, where a Scottish merchant seaman left his ship in Australia in 1954, and was not afterwards heard of. His wife obtained in the Court of Session a decree of presumption of death under the 1891 Act on the basis of which the Inland Revenue paid her husband's post-war credits to her. She subsequently applied for a widow's pension but the Ministry of Social Security rejected her claim, because of a finding by the National Insurance Commissioner that decrees under the 1891 Act were not conclusive of the fact of death, since by the terms of the Act they determined only questions of property. This conclusion was characterised in the newspaper's editorial as "a pedantic determination to cling to the letter of the law"¹.

Need for a general presumption of limitation of life

35. The common law rule was developed against a social and technical background which has now radically changed. As Lord Salvesen has remarked²: "That rule was established when the facilities of travel and postage, not to mention advertisement, were in a very backward state compared with the times in which we now live. At that time, if a man went to a distant country, the expense of returning and even the expense of communicating with his friends was so great as to make it difficult for anyone who did not attain a position of some affluence to undertake the cost. Mere silence, accordingly, even for a very long period of time, was held not sufficient *per se* to overcome the presumption of life, unless the absent person had, at the date when the declarator was sought, already reached the utmost span of human existence." These conditions, as Lord Salvesen remarked, have radically altered and silence for a number of years would seem to make it more probable that the missing person has died. It seemed right to us, therefore, as we argued in Memorandum No. 11, that the law should recognise the situation by providing that, where a person has been

¹"The Guardian", 17th September 1966.

²*Greig v. Trustees of the Edinburgh Merchant Company's Widows' Fund* 1921 S.C. 76 at p. 88.

continually absent from his home and family for a period of time, and where there is no evidence of his being alive during this period he should be treated as if he were dead for all and not merely for some legal purposes.

36. This suggestion was welcomed by nearly everyone who offered comments, but one commentator thought that a general presumption of death after a number of years was “unrealistic”, because “people of many ages disappear and actuarially the great majority must survive for longer than seven years”. It may be conceded that, both under the system of law which now operates and also under the reforms which we propose, courts are often called upon to presume the deaths of persons who may well be, and may be strongly suspected to be, still alive. For this reason we considered whether it might be preferable to approach the problem through the creation of a Missing Persons Code rather than a presumption of death. There is much to be said for the view that the practical problems which arise on a person’s prolonged absence do not necessarily depend on whether he is or is not still alive. A Missing Persons Code would require, however, the creation of a complex body of new law to deal with a relatively unusual state of affairs. We have found it possible to make what seem to us to be satisfactory proposals without going so far as to abandon the whole basis of the present law and procedure. Moreover, although it is still not unlikely that a person who has gone abroad in circumstances which indicate no danger to his life remains alive, with the passage of years it becomes clear either that he is dead or that he deliberately intended to cut off his ties with the past. In the latter situation it does not seem entirely unreasonable to treat him as if he were dead.

We **recommend**, therefore, that where it is established that a person is missing and has not been known to be alive for a period of years, the court should declare him to be dead, and that (subject as aftermentioned) this declarator should have effect for all legal purposes.

Period which must elapse before presumption takes effect

37. In Memorandum No. 11 we said³ that, in considering whether a rule should be adopted limiting the time during which a missing person should be presumed to live, the important thing to consider was less the risk of fraud than the need to maintain a reasonable balance between the interests of the missing person on the one hand and those of his relatives on the other. We thought that, with the ease of modern communications, a seven-year period might be too long, and asked for advice. We suggested, however, that in the absence of satisfactory reasons for choosing a different period, the advantages of correspondence with existing Scottish legislation and with existing English law pointed to the adoption of a seven-year period.

38. Most of those who commented upon this aspect of our Memorandum accepted the seven-year period as being appropriate, but the Sheriffs-Substitute Association and an individual commentator desired the period to be reduced to five years. The Association stated as their opinion that it was only if the absentee were dead that “he will have left behind estate of any consequence. That being so, the period within which no-one may intrude with that estate

³Paragraph 40.

might reasonably be reduced to less than seven years. Seven years is a very long time for a wife, who is most often the person concerned, to have to cope with life without support although funds for her support are available. We suggest that the period might be reduced to, say, five years. We do not think that a longer period should be provided just out of consideration for the possible interests of the absentee who has disappeared with the deliberate intention of cutting off his ties with the past. If a person does that, he takes the risk of such events as that he may thereafter turn out to be the heir to a fortune."

39. We have considerable sympathy with this point of view, although in fact a woman is not necessarily bereft of support after her husband's disappearance. As we have explained in paragraph 11, the Court of Session has power to appoint a factor *loco absentis* on the estate of a person who has disappeared. The factor has a duty, in so far as the estate permits, to aliment the wife and other dependants of the missing person. While we do not regard the seven-year period, sanctioned in England by tradition and in Scotland by legislation, as being in any way sacrosanct, a strong case would have to be made for the creation of different periods of presumption of limitation of life in different parts of the United Kingdom. We understand from the Law Commission that they would be unlikely to advocate a reduction of the period in England. In the light of this we adhere to our view that the period of any presumption of limitation of life should be fixed at seven years and we so **recommend**.

Method of determining applicability of the presumption

40. In Memorandum No. 11 we did not make it clear whether or not we considered that this presumption might arise in the absence of a judicial determination that the conditions for its coming into operation had been fulfilled. We have since examined this question. We were attracted initially to the view that, even in the absence of a judicial determination of its applicability, the presumption might be relied upon, though naturally at his own risk, by any person concerned with matters depending upon the continued existence or death of the missing person. It seemed to us that it would be undesirable to require recourse in every case to judicial proceedings with their attendant expense. An insurer, we thought, on being satisfied that the conditions for the application of the presumption had been fulfilled, would be prepared to meet some claims on the assumption of the death of the missing person irrespective of a judicial determination of his presumed death. We thought, also, that the Social Security authorities might wish to act likewise. We feared, moreover, that if the presumption could be drawn only by a court, it would be interpreted as being of a procedural character, to be applied by the Scottish courts irrespective of the personal law of the missing person and not to be applied by foreign courts when dealing with a missing person whose personal law was that of Scotland.

41. On further consideration, however, we have concluded that for legislative purposes the presumption ought to be stated as a conclusion to be drawn by the courts when the conditions for its application have been fulfilled. We do so because fulfilment of the conditions depends upon the existence of facts which are not always easily ascertained. Difficulties could arise where a person took an irrevocable step in the honest but mistaken belief that the necessary con-

ditions for the application of the presumption obtained. On the other hand, although the presumption would, in a formal sense, have to be drawn by a court, the absence of a court finding should not in appropriate cases prevent insurers or the Social Security authorities acting as if the presumption had been judicially established. We deal elsewhere in this Report with the characterisation of the presumption in cases involving a foreign element. But, if we may anticipate our conclusions in that part of the Report, we consider that any legislation giving effect to this Report should make it clear that a declarator of death resulting from the application of the presumption should not have the effect of determining a substantive question properly referable to foreign law otherwise than in accordance with that law. We cannot, we concede, legislate to secure that foreign courts will apply the presumption in situations where Scots law is relevant but a provision on the lines suggested should assist those courts to reach the conclusion that the Scottish presumption is not merely procedural in character. Our conclusion, therefore, is that the presumption of death should be stated as one to be drawn by the courts when the conditions for its application have been fulfilled.

Terms of the presumption

42. We have carefully considered the terms of the presumption both because of the stringency of the common law rules relating to declarator of death and because of the variety of formulae used in legislation in this field. As Lord Stott emphasised in *Tait v. Sleigh*⁴:

“At common law the presumption of life is strong and to overcome it the law requires proof of death beyond all reasonable doubt.”

While we consider that a proof should be required in all cases, the common law standard of proof seems unnecessarily high. In view of subsequent proposals for the recall or variation of decrees of declarator of death, we think that the legislation following on this Report should enable the court to make a finding of death where it is satisfied on a reasonable balance of probabilities that the missing person has disappeared and has not been known to be alive for a period of at least seven years. This is the standard which, in the same learned judge's view, applies in applications under the Presumption of Life Limitation (Scotland) Act 1891, though that Act does not so provide in express terms.

Another omission in the 1891 Act is that it makes no express provision as to the exact time at which death is presumed to take place. It is always possible, though unlikely, that the exact time of death of a missing person may be material for legal purposes. An obvious case is where a beneficiary under a missing person's will had died on the same date as that on which the missing person was presumed to have died. We think, therefore, that the death of a missing person should be presumed to take place at midnight on the date seven years after the date on which he was last known to be alive.

43. As we have stated, a variety of formulae have been used in legislation in this field. Section 3 of the 1891 Act uses two formulae. The section is introduced by the words “When any person has disappeared and has not been heard of for seven years or upwards”. In England, where a similar formula is used, the construction of the expression “has not been heard of” has presented

⁴1969 S.L.T. 227 at p. 228.

difficulties. In a leading case⁵, however, it was held that the momentary sighting of a missing person in a crowd, which a jury held was a mistaken one, would not be fatal to the application of the presumption. In the same section of the 1891 Act, however, the court is empowered to find “on the facts proved or admitted that [the missing person] died at some specified date within seven years after the date on which he was last known to be alive, and where there is no sufficient evidence that he died at any definite date, [find] that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive”. Yet another formula is used in section 5(2) of the Divorce (Scotland) Act 1938 which declares that “the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead unless the contrary is proved”. The language of this section and the similar language of section 16(2) of the Matrimonial Causes Act 1950 present a variety of problems, such as onus of proof, whether the grounds of the belief are to be those of the particular petitioner or those to be ascribed to a reasonable man, what are to be the standards of belief and the need to distinguish between belief and mere speculation, and the logical problem which arises from the fact that, at least for a short time after the disappearance of a missing person, a reasonable petitioner would not ordinarily have believed him to be dead⁶. Apart from these objections, the precise terms of the 1938 Act are hardly appropriate in the context of actions of declarator available, as we propose, to any person who has an interest to have a judicial declaration of the death of a missing person. What is relevant cannot be the fact of absence from the petitioner or the petitioner’s absence of reason to believe that the missing person was alive, but simply the fact that in the abstract the missing person has not been heard of or has not been known to be alive during the period of seven years from the date of his disappearance. As between the two expressions “has not been heard of” or “has not been known to be alive”, we prefer the latter as conducing to greater certainty, and commend its acceptance.

It may be convenient at this point to summarise our views relating to the proposed presumption of death in the form of recommendations.

We **recommend** that the court, after proof and on being satisfied on a reasonable balance of probabilities that a person is missing and has not been known to be alive for a period of at least seven years, shall presume that he died at midnight on the date seven years after the date on which he was last known to be alive. We further **recommend** that (except as mentioned in the next paragraph) the decree containing the finding of death should receive effect for all legal purposes.

Criminal responsibility of missing person or any other person

44. The one exception to the proposed universal effect of the decree containing a finding that a missing person has died relates to the criminal responsibility of

⁵*Prudential Assurance Co. v. Edmonds* (1877) 2 App. Cas. 487. Lord Blackburn’s opinion in this case has been described as the leading authority: *Thompson v. Thompson* [1956] P. 414, per Mr Justice Sachs at p. 420.

⁶See *Thompson v. Thompson*, *supra*; *Parkinson v. Parkinson* [1939] P. 346 and *Gallacher v. Gallacher* [1963] 1 W.L.R. 808.

the missing person or any other person. If the missing person was in fact alive at the date specified in the decree as his date of death and he commits a crime (or another person commits a crime against him) it would be absurd if any defence against a criminal charge could be instructed on the ground that the decree of death is declared to be effective for all legal purposes. In order to avoid the possibility of any such defence even being stated, we think that it should be expressly provided that the fact that decree in an action of declarator of death has been pronounced will have no effect upon any person's criminal responsibility. We **recommend** accordingly.

Possible exclusion of insurers

45. The only serious objection to the proposal to establish a presumption of death for virtually all legal purposes came from insurers. The Associated Scottish Life Offices asked us to give further consideration to whether it would be practicable or desirable to establish one presumption to deal with problems in areas so widely different as status, title to property, and rights under contracts. We have given the matter further consideration, and this has served only to reinforce our opinion that this would be both practicable and desirable. A determination of status, while of some independent importance, is also a prelude to the determination of questions of title to property rights, and it would seem wrong to adopt criteria for determining status in the abstract which differ from those used for determining status for particular purposes. It seems equally undesirable to attribute to a person—as the law in effect does at present—one status for purposes of succession and another for the purposes of contract. We favour one presumption because in most situations the nature of the problem is the same, namely, the determination of whether a person should be deemed to be alive or dead for purposes relating to the transmission of property rights. Even when the problem is one relating to the right of the missing person's spouse to remarry, there are associated questions relating to the transmission of property. We may add that to establish a single presumption would have the practical advantage of enabling the legal problems associated with absence of some duration to be dealt with together in a single court action, with corresponding reduction of legal expenses.

46. The Associated Scottish Life Offices further argued that, if a presumption of limitation of life were to be introduced, insurers should be excluded from its operation. We had no concluded view on this matter, when we issued our Memorandum, but merely stated the arguments—as we saw them—for and against the inclusion of insurers, and invited views.

47. The arguments which seemed relevant to us for such exclusion were these:

- (a) the risk of fabricated claims or, at least, of speculative actions designed to secure the proceeds of insurance policies;
- (b) the fact that, in cases of disappearance, the circumstances will often be equally compatible with the desire of the missing person for reasons of his own to sever his contacts with family and friends;
- (c) the undesirability of interfering with contractual freedom in the domain of life insurance and the fact that, unless contracting-out were to be disallowed, policies could be so written as to render nugatory any change in the law;

- (d) the need to make special provision for restitution to insurers if it turned out that the missing person was in fact alive at the date when he was declared to have died; and
- (e) the fact that insurers might feel compelled to intervene in proceedings for declarator of death of a missing person in every case where a policy had been effected upon the life of that person.

48. To these arguments the Associated Scottish Life Offices added the further point that a presumption of limitation of life would affect not only whole life assurances and endowment assurances (where the sum assured would in any event be payable when the policy matured) but term assurances under which payment of the sum assured fell to be made only on the occurrence specified in the policy. They considered that the application of a presumption of limitation of life would give rise to an increased number of fraudulent claims in the latter class of policy.

49. The arguments which seemed relevant to us against placing insurers in a privileged position were the following:

- (a) whatever the risk of fabricated claims, there comes a time when a judicial pronouncement of the fact of a person's presumed death should be taken into account by all concerned in the interest of his relatives;
- (b) the period of the presumption of limitation of life suggested is not sufficient of itself to be an impediment to fabricated claims, and the procedure in actions to presume a person's death can and should be designed to place all the relevant facts before the court;
- (c) the number of cases of presumed death involving insurers is quite small in Scotland, and it is rather for the insurance companies to take the existence of such cases into account when writing policies than for the law to exclude them from the operation of its ordinary rules;
- (d) it would not be difficult to provide by statute that, on the reappearance of the missing person or upon the emergence of other evidence contradicting the findings of the decree, insurance companies may recover the proceeds of policies on the missing person's life from the person or persons to whom they were erroneously paid⁷;
- (e) no special difficulties appear to have been occasioned in England by the existence of a presumption of limitation of life. The insurance monies on whole life policies issued by a British company are seldom payable except on proof satisfactory to the directors of the company of the death of the assured. In practice, however, the presumption is usually applied because the directors would not be justified in imposing unreasonable or capricious requirements⁸.

50. None of those who offered us comments on this question, apart from the Associated Scottish Life Offices, considered that insurers should be exempted

⁷In paragraph 107 we consider in detail the question of the recovery by insurers of monies paid out in consequence of an erroneous decree of declarator of death.

⁸*Braunstein v. The Accidental Death Insurance Co.* (1861) 1 B. and S. 782; *London Guarantie Co. v. Fearnley* (1880) 5 App. Cas. 911 at p. 916.

from the operation of our proposed presumption of limitation of life. The Faculty of Advocates merely expressed the general view of legal bodies when it said that, "On the view which the Faculty have taken that a decree presuming a person's death should be universal in its application, it would be illogical specifically to exclude insurers from the effects of such a decree". There was less unanimity as to whether insurers should be permitted so to write their policies that payment would not necessarily be made on a decree of declarator of death proceeding upon the presumption. We shall revert to this point later⁹.

51. In our view, the principal, indeed unique, problem is the risk of fabricated claims. But that risk is greatly diminished by reason of the fact that the question of the disappearance of the missing person and his not having been known to be alive for a period of years will have been examined in a court of law before whom all the relevant facts are likely to have been placed. Moreover, we propose later¹⁰ that in certain cases an insurer should be entitled to require the payee to effect an insurance policy to protect the interests of the insurer. We **recommend** therefore that no special exemption should be given to insurers¹¹.

52. Insurers, it is clear, could largely avoid the effect of the preceding recommendation by stipulating for payment not simply on death, but on death occurring in specified ways or ascertained in a particular manner. We considered whether it would be desirable to prohibit this since it is arguable that, without such a prohibition, the immediately preceding recommendation might have little practical effect. Among those who commented on this question opinion was divided. While the Society of Writers to H.M. Signet and the Society of Solicitors in the Supreme Courts of Scotland argued that there should be such a prohibition, the Law Society of Scotland, the Royal Faculty of Procurators in Glasgow and the Sheriffs-Substitute Association took a different view. We do not think it would be practicable to impose such a prohibition, whether or not its imposition would be desirable. Insurance policies provide for payment on a variety of contingencies. A large class of policies, for example, provide for payment on accidental death and a decree declaring that a person has died following a specified period of disappearance would not be sufficient proof that he met his death by an accident within the terms of the policy. Even in the case of ordinary life policies, the terms of payment are usually specifically defined and may exclude payment on death following specified contingencies. Any provision, therefore, striking at conditions inserted by insurers to evade a judicial presumption of limitation of life would be likely to strike also at conditions reasonably inserted in the circumstances of a particular case. Insurance companies do not invariably press their legal rights to extremes and, on the whole, we think that missing persons and their relatives might gain advantages rather than suffer disadvantages if insurance companies retained their freedom to write policies in terms which they consider to be appropriate.

⁹Paragraph 52.

¹⁰Paragraph 112.

¹¹The 1891 Act excluded from its operation "claims against the insurers under a policy of life assurance upon the life of any person who has disappeared" (section 11). In this Report, however, the term "insurers" is intended to refer not only to such insurers but to friendly societies and other associations whose rules provide for benefits on the death of a member, and our recommendation should be construed in this sense.

We **recommend** therefore:

- (a) that insurers should be bound by any judicial presumption of limitation of life; and
- (b) that no attempt should be made to strike at possible avoidance of the effect of the preceding recommendation by restricting the terms upon which insurance policies may be written.

Presumptions of survivorship

53. We do not propose to examine possible amendments to section 31 of the Succession (Scotland) Act 1964 in this Report. We are conscious that the section is not without flaws. For example, section 31(1)(a) excludes spouses from the operation of the general rule that, where two persons die in circumstances indicating that they died simultaneously or creating uncertainty as to their order of death, the younger person should be presumed to have survived the older, and provides that neither spouse should be presumed to have survived the other. Professor Meston has commented that a rule presuming that neither of the spouses survived the other is not helpful in the situation where one spouse makes a will in favour of the other with an alternative destination in the event of the other "predeceasing". He points out that the statutory presumption "that the other did not survive is not proof of predecease since they might have died simultaneously". We also criticised in Memorandum No. 11¹² the inclusion of the words "and the younger person has died intestate" in section 31(2) of the 1964 Act (which contains a second exception to the general rule of the presumed survivorship of the younger person).

54. While we were considering the amendment of section 31 of the 1964 Act to meet those difficulties, the Law Commission informed us that they intended to examine the law of England in relation to presumptions of survivorship, and we propose to explore the problems and discuss possible solutions with them. We accept that the existing general rule that the younger person is presumed to survive the older has the distinct merit of simplicity of operation and yields at least a technical solution in every case. Nevertheless, as we have observed, section 31 of the 1964 Act recognises two situations where it would be inappropriate for the rule to operate, and it would not be difficult to postulate other cases where the application of the rule would lead to unjust or unexpected results. The need for the two existing exceptions to the rule and the possibility of other anomalies resulting from its application suggest that it may not be enough merely to amend section 31 of the 1964 Act and that we should at least examine the possibility of alternative solutions to the problems of survivorship. Questions as to survivorship do, in any event, arise most commonly in connection with claims to succeed to a person's estate and it is appropriate that we should examine the problems of this branch of the law as part of whatever examination we decide to carry out in connection with the law of succession¹³.

Operation of Scottish presumption of limitation of life in situations involving a foreign element

55. The Presumption of Life Limitation (Scotland) Act 1891 (which provides for the application of a presumption of limitation of life for purposes of succes-

¹²Paragraph 22.

¹³See our Seventh Annual Report (1971-72) Scot. Law Com. No. 28, p. 5.

sion) does contain a limited choice of law rule in the proviso to section 3, which provides that the section will not entitle "any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died". We have commented above¹⁴ on the inappropriateness of its limitation to questions of **intestate** moveable succession. Clearly, however, the dimensions of the choice of law problem would be greatly increased if by statute the courts were empowered to declare a person to be dead on the basis of the presumption advocated in this Report. The basic question is whether or not the presumption should apply for the determination of issues which would not otherwise be governed by Scots law.

56. Paraphrasing what we said in Memorandum No. 11¹⁵, we advocate a presumption which is primarily intended to facilitate the trial of an issue of fact—namely, whether a person has died or has probably died. Is it, then, to be regarded simply as a rule of evidence governed by the *lex fori* and applicable in any civil proceedings in Scotland? Such an approach, however, would entail that the devolution of a succession might depend on the locality of the proceedings. If, moreover, the Scottish presumption is taken to be merely evidential, there would be no reason to expect its application by foreign courts when dealing with a Scottish succession. In other situations, too, the problem is not essentially different. The right, for example, to the payment of an annuity depending upon the fact of someone's death under a contract governed by Scots law should not depend upon where the proceedings to enforce the right are initiated. We have come to conclude, therefore, that the presumption which we advocate should be treated as creating a rule of substantive law applicable where, but only where, an issue is governed by the law of Scotland.

57. Where the governing law is that of a foreign system, the question arises whether the corresponding presumptions of that law should be applied by the Scottish courts. The classic dichotomy between foreign rules of procedure, which may not be applied in Scotland, and foreign rules of substantive law, which may be so applied where relevant, may lead to distortions in the application of foreign substantive law unless what is regarded as procedural is given a narrow construction. In *In re Cohn*¹⁶ Uthwatt, J. had to consider the devolution of the property of a woman, of German nationality and domicile, who was resident in England and was killed there along with her daughter during an air-raid on London. There was no evidence to show which of them survived the other. The judge pointed out that the real question was not "Did or did not Mrs Oppenheimer survive Mrs Cohn?" but "Is the administration of Mrs Cohn's estate to proceed on the footing that Mrs Oppenheimer survived Mrs Cohn or on the footing that she did not?" The purpose to which the inquiry as to survivorship is directed must be kept in mind. The mode of proving any fact bearing on survivorship is determined by the *lex fori*. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs Oppenheimer survived Mrs Cohn. Proof stops there." On this basis Uthwatt, J.

¹⁴Paragraph 13.

¹⁵Paragraph 57.

¹⁶[1945] Ch. 5.

found that the rules relating to the determination of survivorship contained respectively in section 184 of the (English) Law of Property Act 1925 and in the Law of 4th July 1939 amending Article 20 of the German Civil Code, considered in their context, were best regarded as being part of the substantive laws of the systems in question. We stated in Memorandum No. 11 that we regarded this approach "both as the appropriate one in the circumstances of the case and the only practicable one to apply generally in view of the diversity of foreign systems. It enables foreign substantive law, where relevant, to play its proper part in determining the issues and in consequence makes for harmony of decision at an international level"¹⁷. On the assumption that the Scottish courts would be prepared to follow the approach of Uthwatt, J. in *In re Cohn*¹⁸ when dealing with foreign presumptions of survivorship or of death, we thought it should be left to the court, on the basis of existing rules of private international law, to determine the relevance of foreign presumptions of survivorship or death. Our views on these matters were accepted by all who submitted comments. We recommend therefore:

- (a) that it is unnecessary to make specific provision for the application, in appropriate cases, of foreign presumptions relating to limitation of life; but
- (b) that it would be desirable to make it clear in any legislation following on this Report that the court, in considering the issues in an action of declarator, should not determine a substantive question properly referable to a foreign system of law otherwise than in accordance with that law.

Variety of processes and standards of proof

58. In Memorandum No. 11¹⁹ we suggested that the variety of processes necessary to establish for different purposes that a person is dead constituted a serious defect in the existing law. A wife whose husband has disappeared must initiate one species of action to establish his death for purposes of succession to his general estate and another species of action to establish her right to remarry. To recover monies under insurance policies on her husband's life she can rely upon no special presumption and, even where a decree has been obtained under the Presumption of Life Limitation (Scotland) Act 1891, the insurer could conceivably oppose against her the common law rule that a missing person continues to live until the limit of human life. A separate action against the insurer would then be required. Moreover, a finding in proceedings against one defender that, under the common law of Scotland, a person may be presumed to have died, is not clearly binding in proceedings against other defenders and, conceivably, the question of death could be reopened by every person owing a debt contingent upon the deceased's death. Separate proceedings, for example, might be required to recover an annuity which a wife has contracted to obtain on her husband's death. Separate proceedings under the National Insurance Acts may be necessary before a wife can establish her right

¹⁷Paragraph 59.

¹⁸[1945] Ch. 5

¹⁹Paragraph 33.

as a married person to an old-age pension²⁰. Not only may a multiplicity of procedures be required, but the burden of proof may differ as between actions under the common law and those proceeding upon the statutory presumptions of the 1891 Act and the Divorce (Scotland) Act 1938. Even as between the two statutory procedures the burden of proof on the petitioner may possibly differ. The burden imposed by the 1891 Act is apparently heavier in that it requires proof of disappearance rather than proof of absence from the petitioner and proof that the person who has disappeared "has not been heard of for seven years or upwards"²¹ rather than an averment that "the petitioner has no reason to believe that the other party has been living within that time"²².

Need for a general action of declarator

59. This variety of procedures, we contended in Memorandum No. 11²³, certainly occasions unnecessary expense and could conceivably lead to judgments in apparent conflict. We considered, therefore, that it would be better if the fact of a person's death were established, and all consequential questions of law were determined, in a single action analogous to the common law action of declarator of death. We envisaged that decree in such an action should operate *in rem*. In other words, we considered that it should affect not merely the parties to the process but all persons who have to determine for any purpose whether a person has died. In particular, it should enable the spouse of the missing person to remarry. We envisaged, too, that it should have effect until recalled by a decree of the court which granted it.

60. All those who submitted comments on the matter accepted that a general action of declarator of death should be established and we have, of course, already recommended that such an action should be competent where a person has disappeared and has not been known to be alive for a period of at least seven years. There was some anxiety to ensure that the general action should also be competent at any time after a person goes missing in circumstances pointing to his death. At present, where there are circumstances pointing to the death of a person who has disappeared, an action of declarator of death may be initiated at once and when the court is satisfied that the missing person has died it may pronounce upon the fact and the time of his death²⁴. We contemplate that this should be equally competent in the general action and that the court, after proof, if satisfied on a reasonable balance of probabilities that the missing person has died, should so determine and should also make a finding as to the date and time of death of the missing person. From time to time cases will, of course, arise where it may not be possible for the court to determine with any degree of accuracy the time on a particular day on which a missing person died, or even the day on which he died. In any such case the court should find that the missing person died at the end of the period of time within

²⁰*Secretary of State for Scotland v. Sutherland* 1944 S.C. 79.

²¹1891 Act, section 3.

²²1938 Act, section 5(2). A contrast between the vague language of the 1938 Act and the more precise language of the 1891 Act is drawn by Lord Keith in *Labacianskas v. Labacianskas* 1949 S.C. 280 at p. 284. In *Hobkirk v. Hobkirk* 1958 S.C. 136 Lord Walker refers at p. 138 to the light burden of proof which rests upon the petitioner in an action under the 1938 Act.

²³Paragraph 45.

²⁴*Shiells and Others v. University Court of the University of Glasgow and Others* 14th July 1970 (unreported).

which his death is found to take place. We consider that the standard of proof of satisfaction of death should be related to a reasonable balance of probabilities (as in the case where a missing person has not been known to be alive for a period of at least seven years) rather than to the higher standard of proof required by the common law. We **recommend** therefore:

- (a) that an action of declarator of death should be competent not only where a missing person has disappeared and has not been known to be alive for a period of at least seven years but in any case where he is with reason thought to have died; and
- (b) that the court, in a case where a missing person is with reason thought to have died, after proof and on being satisfied on a reasonable balance of probabilities that the missing person has died should so determine and should make a finding as to the date and the time of death; and that where it is uncertain when, within any period of time, the missing person died, the court should find that he died at the end of that period.

61. Those who submitted comments on our proposals, moreover, subject to the reservations of the Associated Scottish Life Offices to which we have alluded and to the reservations which we note below, agreed that the decree in the general action on becoming final should be conclusive of the matters therein contained in relation to all parties and for all purposes until its recall or variation. It was conceded that the right of a person to succeed to property, whether or not of the missing person, which would normally follow as an automatic consequence of the known death of a missing person, should follow also as an automatic consequence of a declarator of death in the general action. The only questions debated by those who sent us comments were whether the decree should affect the marital status of his or her spouse, and whether it should bind the Department of Health and Social Security. We turn to those questions in their order.

Effect of decree on missing person's marriage

62. One of the most difficult problems which has faced us in this domain is whether or not a decree declaring a missing person to have died ought to have the automatic effect of dissolving his or her marriage. In Memorandum No. 11²⁵ we tentatively expressed the view that it should not do so, and suggested that a separate decree of dissolution should be granted only at the instance of the other party to the marriage in consequence either of an ancillary conclusion at the time of the action or of an application by that party at a later date. This view we reached partly because a decree of dissolution is in effect a licence to remarry and such a licence should not be given to a person who does not desire it. We also pointed to a number of technical difficulties, such as the difference between the jurisdictional criteria appropriate in actions relating to property and those appropriate in actions relating to status. The fact, for example, that a missing spouse owns property in Scotland may justify the Scottish courts in presuming his death to ensure the proper administration of his property but, if he was a national and domiciliary of a foreign country, the fact of

²⁵Paragraph 46.

ownership of property would not by itself justify the intervention of our courts to dissolve the marriage. We stated, however, arguments pointing a different way.

63. Those who offered us comments on this question differed in their views and, although the majority favoured the view that a separate conclusion for dissolution should be required, the Faculty of Advocates, the Sheriffs-Substitute Association and an individual commentator argued that the decree of declarator should be general in its character and should extend also to the dissolution of the marriage without any separate application by the spouse of the missing person.

64. We pointed out in Memorandum No. 11²⁶ that the logical and simple approach would be to say that the decree dissolves the marriage for all purposes. For some purposes, at least, the law must draw this conclusion. Where a man has been judicially declared to have died it would be quite impracticable to distribute his estate on the basis that he is to be regarded as dead for the purposes of his children's succession but not for that of his wife. Other cases may be envisaged where it would be incongruous if not impracticable to hold a person to be married for some purposes but not for others. The Royal Commission on Marriage and Divorce were prepared to allow the logic of the situation to lead to the conclusion that, after a person has been judicially declared or presumed to have died, a decree of divorce, in the sense of a court order explicitly dissolving the marriage, was almost superfluous. It was necessary only, they pointed out, "as an added safeguard, designed to avert the awkward situation which might arise if the presumption proves to have been wrong"²⁷.

65. We are now persuaded that the logical approach is here the correct approach and that the finding of death in the general action should entail as a consequence the dissolution of the marriage of the missing person, irrespective of whether the remaining spouse is a party to that action. The jurisdictional problem presented by this approach may be met by requiring, as a condition of our proposed general action, that the missing person should have had or, in the case of applications by a spouse, that he or she should have a connection of a substantial nature with Scotland. The problems the precise nature of which we discuss in paragraphs 114 to 116 presented by the possible return of the missing person are of a somewhat more intractable nature. If we may anticipate at this point conclusions which we reach later in this Report, we consider that the return of the missing person should neither revive a former marriage of the missing person nor affect any subsequent marriage entered into by his ex-spouse. We **recommend**, therefore, that decree in the action of declarator should, on the lapse of the time allowed for appeal, be conclusive of the fact of death in relation to all persons and for all purposes (including the dissolution of the marriage of the missing person), subject to its recall or variation.

Effect of decree in social security matters

66. The Department of Health and Social Security initially suggested that the proposed decree *in rem* should not apply to their own determinations for

²⁶Paragraph 46.

²⁷Cmd. 9678 (1956), paragraph 846.

social security purposes on the ground that there might be a conflict between information which they had received on a confidential basis, which might indicate that the missing person was in fact alive, and the evidence on which the decree was based. We have given full weight to this point but, if our recommendations relating to disclosure are implemented, the objection will largely lose its force. Subject to a right to refuse to disclose information on grounds of privilege, confidentiality or public interest, any person or body, including the Department, will be bound to disclose to the court such information as he or it may possess having a bearing on the death or survival of the missing person. We do not envisage that the Department will often require to withhold such information on the grounds of privilege, confidentiality or public interest. We **recommend**, therefore, that the Department should not be exempt from the operation of the decree *in rem*.

Title to sue in general action

67. One of the defects of the Presumption of Life Limitation (Scotland) Act 1881 was that applications under it could be made only by a person "entitled to succeed to the absent person". The Presumption of Life Limitation (Scotland) Act 1891 attempted to cure this defect by allowing applications by persons entitled to succeed to **any** estate or to be released from a burden on any estate on, or contingently upon, the death of the absent person²⁸. We saw above, however, that even this wide formulation does not cover every case where a person may have a legitimate patrimonial interest in ascertaining the fact or time of death of a missing person. The lesson seems to be that a still wider formula is required, making it clear that any patrimonial interest in the result should suffice. Petitions under section 5 of the Divorce (Scotland) Act 1938 may be presented, understandably, only by the missing person's spouse. Yet there are cases where persons other than the missing person's spouse with no patrimonial interest in the result of an action for declarator of death of a missing person may have a legitimate personal interest in establishing the fact and time of death of the missing person. We can think of no reason why such a person should be excluded from initiating such proceedings but it would be for the court to judge the sufficiency of the personal interest. Accordingly, we **recommend** that an action for declarator of the death of a missing person should be competent at the instance of any person with a personal or patrimonial interest.

Grounds of jurisdiction in general action

68. The institution of a general action of the type we have proposed raises acutely the question: In what circumstances should our courts be competent to entertain it? The 1891 Act, as we have seen, applies only to cases where the person who has disappeared died domiciled in Scotland or left heritage there. Section 5 of the 1938 Act originally contained no rules of jurisdiction in petitions for dissolution of marriage on the ground of presumed death. The omission was made good by section 2(3) of the Law Reform (Miscellaneous Provisions) Act 1949 which provided that the court should have jurisdiction in such proceedings, first, where the petitioner was domiciled in Scotland (and that in determining whether for this purpose a woman was domiciled in Scotland her husband should be treated as having died immediately after the last occasion

²⁸Section 3.

on which she knew or had reason to believe him to be living) and, second, where the wife was resident in Scotland and had been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. These rules were exhaustive of the grounds of jurisdiction under the 1938 Act and were vulnerable to the objections:

- (a) that, however close the connections of the missing person with Scotland, the only relevant jurisdictional criteria were criteria relating to the petitioner, who may himself or herself have lost his or her connections with Scotland; and
- (b) that they admitted a residential ground of jurisdiction in the case of proceedings by a wife but not in the case of proceedings by a husband.

In paragraphs 85 to 92 of our Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status (Scot. Law Com. No. 25) we considered these objections and discussed in detail what, in our opinion, should be the bases of jurisdiction. Our conclusion was that the court should enjoy jurisdiction where the petitioner had substantial ties with Scotland, demonstrated by Scottish domicile or a sufficient period of habitual residence there, or where the missing person had a similar connection with Scotland on the date when he was last known to be alive. We accordingly recommended, in paragraph 93 of our Report, that, in petitions under section 5 of the Divorce (Scotland) Act 1938 for dissolution of marriage on the ground of presumed death, the Court of Session should have jurisdiction:

- (a) where the petitioner is domiciled in Scotland at the date of commencement of proceedings, or was habitually resident there throughout the year preceding that date; or
- (b) where the missing person was domiciled in Scotland on the date when he was last known to be alive or had been habitually resident there throughout the year preceding that date.

These recommendations, as we have noted²⁹, have now been implemented by the Domicile and Matrimonial Proceedings Act 1973³⁰.

69. We also recommended in paragraph 92 of our Report that for the purpose of determining whether or not the Court of Session enjoyed jurisdiction in petitions under section 5 of the 1938 Act, the domicile of a married woman should be determined independently of that of her husband. The 1973 Act provides that subject to a transitional provision "the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile"³¹.

70. The question remains whether the jurisdictional criteria which now operate in relation to petitions for dissolution of marriage on the ground of presumed death are appropriate in relation to an action of declarator leading to a decree conclusive of the fact of death for virtually all purposes. In addition

²⁹Paragraph 20.

³⁰Schedule 4, paragraph 2, which adds a new subsection to section 5 of the 1938 Act.

³¹Section 1.

to the intended universal effect of the decree in the action of declarator, the action is one which we propose should be capable of being initiated not only by the spouse of the missing person but by any person having a personal or patrimonial interest in obtaining a judicial declarator of the death of the missing person, and the declarator in an action so initiated will be conclusive of the status of the spouse of the missing person as well as of that person himself.

71. Section 5(3)(b) of the Divorce (Scotland) Act 1938 confers jurisdiction in a case where "the person whose death is sought to be presumed was domiciled in Scotland on the date on which he was last known to be alive, or had been habitually resident there throughout the period of one year ending with that date". Since, under our law, domicile is a principal ground of jurisdiction in matters of status, we consider that the fact that the missing person was domiciled in Scotland at the time when he was last known to be alive should suffice to confer jurisdiction upon the Scottish courts in the action of declarator. Where the question at issue is the domicile of a married woman, section 1 of the Domicile and Matrimonial Proceedings Act 1973 will allow that domicile to be determined independently of that of her husband. The Committee of the Faculty of Advocates in commenting on Memorandum No. 11 laid considerable stress upon the status aspects of the decree and recommended that the general action should be competent **only** where the missing person was domiciled in Scotland at the date when he or she was last known to be alive. The Committee added the rider that, where the absentee was not domiciled in Scotland, it should be competent to raise an action limited to the specific matter which connected the missing person with Scotland. Our proposals, of course, are not intended to preclude the raising of actions limited to specific matters connecting a missing person with Scotland, such as heritable or moveable property belonging to him there. But the facts, if they are material, that the missing person is dead and that he died at a certain time would require to be established in such actions by proof and by recourse to the appropriate legal presumptions. This we discuss in a later paragraph³². Even with this extension the domicile of the missing person in Scotland, in our view, would be too narrow a ground of jurisdiction and would be open to objections similar to those applicable to the present law. A missing person may have had important social connections with Scotland without it being possible to establish that, in the technical sense, he has been domiciled there. We think, therefore, that the fact that the missing person, at the time when he was last known to be alive, had been habitually resident in Scotland for a period of at least one year should suffice as a ground of jurisdiction. We agree that the status implications of the decree are important in that it is desirable to select grounds of jurisdiction facilitating the recognition of the decree abroad. Habitual residence, however, is a well recognised ground of jurisdiction in European countries in matters of status and has found a place in the draft Hague Convention on the Recognition of Divorces and Legal Separations, and through that Convention, in the Recognition of Divorces and Legal Separations Act 1971. Accordingly, we consider that both jurisdictional criteria contained in section 5(3)(b) of the Divorce (Scotland) Act 1938 are applicable in relation to the action of declarator, and that whether the action is raised by the spouse of the missing person or by any other person.

³²Paragraph 73.

72. The Faculty Committee did not envisage that jurisdiction might be founded upon the petitioner's own domicile or residence. We agree that the domicile or residence of **any** petitioner should not suffice, since this would not ensure that Scots law had a real concern with the issues which the action is designed to determine. The domicile or residence of the spouse of the missing person, however, does strike us as being relevant since the alteration of the status of that spouse would be an inevitable result of success in the action. We consider, therefore, that where the petitioner is the spouse of the missing person, jurisdiction should be established if the petitioner is domiciled in Scotland or has been habitually resident there for a period of at least one year. In effect we propose that where the petitioner is the spouse of the missing person the criteria established by section 5(3)(a) of the Divorce (Scotland) Act 1938 should be adopted, that provision admitting jurisdiction where "the petitioner is domiciled in Scotland on the date when the proceedings are begun, or was habitually resident there throughout the period of one year ending with that date". We **recommend**, therefore, in relation to the general jurisdiction of the Scottish courts in the proposed action of declarator of death, that they should have jurisdiction:

- (a) where the missing person was domiciled in Scotland on the date on which he was last known to be alive or had been habitually resident there throughout the period of one year ending with that date; or
- (b) where the pursuer in the action is the spouse of the missing person and is domiciled in Scotland at the date of raising of the action or was habitually resident there throughout the period of one year ending with that date.

Application of presumption of death in other processes

73. In paragraph 71 we referred to the fact that our proposals were not intended to preclude the raising of actions limited to specific matters connecting a missing person with Scotland. Clearly, if in the course of any action in a Scottish court, the status of a missing person becomes material it is important that the court should be in a position to determine that status as an incidental question without sisting the case to await the action of declarator which we propose³³. Indeed, even under the grounds of jurisdiction suggested above, the Scottish courts might not be a competent tribunal. We envisage, therefore, that when the fact and time of death of a missing person become relevant for a court or statutory tribunal in the course of deciding other questions, that court or tribunal should have the power, but for the purpose only of deciding the issue before the court or tribunal, to make appropriate findings relating to the status of the missing person. It would have the power, in terms of our subsequent proposals, to have regard not only to certificates of death emanating from United Kingdom authorities but to decrees of declarator of death or of presumption of death emanating from courts outside Scotland. But it should also have the power, and this should be clarified in any legislation

³³This is far from being a novel proposition. Although in principle the Court of Session has exclusive jurisdiction in actions of status it is well recognised that any other court, civil or even criminal, may establish by proof the status of any person where this is necessary for the purpose of determining a question properly before it—*Turnbull v. Wilsons and Clyde Coal Co. Ltd.* 1935 S.C. 580 at p. 583; *Brannan v. Ross* 1937 J.C. 123 at p. 126; *Mackie v. Lyon* (1943) 59 Sh. Ct. Rep. 130.

to follow on this Report, to make findings of the fact and time of death of a missing person as if these questions had been raised substantively in the action of declarator which we propose, applying where appropriate the principle that a person who has not been known to be alive for a period of at least seven years may be presumed to have died. We so **recommend**.

Internal allocation of jurisdiction

74. In Memorandum No. 11 we suggested that the action of declarator of death should be competent both in the Court of Session and in the sheriff courts, and that no monetary limits should be set to the competence of the sheriff court³⁴. Our reasons for this suggestion were these:

- (a) The sheriff court has already jurisdiction to pronounce decrees of declarator of death, although only in cases where the missing person's estate in Scotland does not exceed £500 in value.
- (b) The figure of £500 has remained unchanged since 1891 despite changes in the value of money and, if it is accepted that in cases where the monetary sums involved are small the sheriff court should enjoy jurisdiction, this figure should be drastically increased. The Committee on the Sheriff Court (the Grant Committee) suggested a figure of £5,000.
- (c) A financial limit, however, to the jurisdiction of the sheriff court in such actions is not easy to justify. The Grant Committee thought that it should be retained because "legal questions of difficulty and importance might be involved". The difficulty, however, of legal questions is not necessarily related to the amount at stake, and the problems involved where a large estate consists of quoted securities may be small.

75. Apart from the Faculty of Advocates, all those whom we consulted accepted our suggestion. The Faculty's reasons for dissenting were these:

1. An action of this type obviously involves a question of personal **status** and it would therefore be in line with the general rule if such actions were confined to the Court of Session.
 2. The element of wider **publicity** is obviously important in this type of case and from this point of view the Court of Session would be a more satisfactory forum.
 3. Another advantage of confining these actions to the Court of Session lies in the **uniformity** of procedure which this would bring.
- and 4. Perhaps the most important reason is that a decree in this type of action may well have to be considered by a foreign court and it is only a decree of the Court of Session which could be regarded, in a foreign court, as a decree of the person's domicile."

These points may be examined *seriatim*:

- (1) It is conceded that the action of declarator involves questions of status, but this fact alone would not be a sufficient reason for confining the action to the Court of Session. Normally, the questions at issue will

³⁴Paragraphs 34 and 50.

be simple questions relating to the fact of death and a proof in that court might then be inappropriate, and might be inconvenient for the parties and involve unnecessary expense.

- (2) There seems little reason to suppose that an action in the Court of Session would necessarily attract greater publicity. In such actions local publicity may be more important. It may be that the national Press would be more likely to publish the result of an action of this nature if brought in the Court of Session, but that publicity comes too late. It is at the stage of advertisement that publicity is important and it may be secured irrespective of the court in which the action is brought.
- (3) With regard to uniformity of procedure, this is secured by a common code of sheriff court practice and by the existence of appellate courts, including the Inner House of the Court of Session.
- (4) The view that only a decree of the Court of Session could be regarded by a foreign court as a decree of a person's domicile is not understood. It is true that the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the former United Kingdom treaty-making practice based on that Act foster this idea by distinguishing between the decrees of superior and those of inferior courts, a distinction made internally by the Judgments Extension Act 1868 and the Inferior Courts Judgments Extension Act 1882. But the higher courts of European states do not usually have divisions exercising original jurisdiction in civil actions, so that precisely the same distinction cannot be applied to foreign courts. In most European countries jurisdiction in consistorial actions is allocated to local courts and there seems little reason to suppose that, if the sheriff court were empowered to grant decrees in matters of status, those decrees would not be accorded recognition abroad. In any event, if there is any doubt whether a sheriff court decree will be recognised abroad, the action may be raised in the Court of Session.

76. We have come to the conclusion that there is insufficient justification for limiting jurisdiction in the action of declarator of death to the Court of Session. It would be most undesirable to limit the parties to the most expensive forum where the estate, as often happens in this situation, is small in amount. Even where it is not, we continue to adhere to the view that it should be in the parties' option to select the appropriate forum. A multiplepinding is competent in the sheriff court without financial limit and in such a process it may be necessary for the court to determine the fact of death³⁵. It seems reasonable, therefore, that the sheriff court should have jurisdiction to determine the same question when raised in an action of declarator. We **recommend**, therefore, that the action of declarator of death should be competent both in the Court of Session and in the sheriff court, and that no monetary limits should be set to the competence of the sheriff court. As we suggested, however, in Memorandum No. 11³⁶, we consider and **recommend** that the sheriff should be entitled to remit the case to the Court of Session where he considers that, in view of the

³⁵*Tait's Factor v. Meikle* (1890) 17 R.1182.

³⁶Paragraph 34, *ad finem*.

importance and complexity of the matters at issue, that court is the appropriate forum. We further **recommend** that the Court of Session should be empowered to direct the sheriff to make such a remit.

77. Our recommendation that the action of declarator of death should be competent in the sheriff court raises the further question of the internal allocation of jurisdiction as between the various sheriff courts. We **recommend** that a sheriff court should have jurisdiction to entertain an action of declarator where:

- (a) the missing person—
 - (i) was domiciled in Scotland on the date on which he was last known to be alive, or had been habitually resident there throughout the period of one year ending with that date, and
 - (ii) resided in the sheriffdom on the date on which he was last known to be alive; or
- (b) the pursuer in the action—
 - (i) is the spouse of the missing person, and
 - (ii) is domiciled in Scotland at the date of raising the action or was habitually resident there throughout the period of one year ending with that date, and
 - (iii) was resident in the sheriffdom for a period of not less than forty days ending with the date of raising the action.

Powers of the court in the action of declarator

78. In Memorandum No. 11 we suggested that, in the action of declarator, the court might be clothed with powers to determine not only the date of the death or of the presumed death of a missing person but also a wide range of incidental questions which we there specified in some detail³⁷. We also suggested that, apart from the original pursuers in the general action, it should be open to other persons who had an interest, personal or patrimonial, in the result to intervene by minute in the action to add supplementary conclusions which might have been incorporated in the original action³⁸. With the exception of the Faculty of Advocates, those who offered comments upon these suggestions accepted them. The Faculty, however, opposed them on the ground that there was no need for ancillary orders since the same effect would arise naturally from a decree declaring the missing person to be dead.

79. Our suggestions in Memorandum No. 11 were made with a view to avoiding, if at all possible, the continuing need for a variety of processes following the death of a missing person. We agree, however, that as far as possible the statutory provisions following upon this Report should be based on the principle that all persons concerned will take account of the consequences which automatically follow the declaration of a person's death. We **recommend**, however, that without prejudice to their other powers in actions of declarator, the court should be formally empowered:

³⁷Paragraph 52.

³⁸Paragraph 53.

- (a) to determine the domicile of the missing person at the date of his death;
- (b) to determine, as a consequence of the death of the missing person, any question relating to any interest in property³⁹;
- (c) to appoint, where necessary, a judicial factor on the estate of the missing person and to do so, in the case of the sheriff court, whatever the value of the estate.

80. We also confirm our view that, apart from the original pursuer in the action of declarator, it should be open to any person who has an interest, personal or patrimonial, in the result to intervene by minute in the action seeking any competent determination or appointment not sought in the action as originally raised. Such a person should be treated as a pursuer *quoad* the conclusions sought by him, which the original pursuer (if so advised) might oppose. We **recommend** accordingly.

Service, intimation and advertisement

81. In paragraph 48 of Memorandum No. 11 we indicated that since in the action of declarator of death, the decree is intended not merely to affect the parties to the action but to operate *in rem*, it was particularly important to have satisfactory rules for service and intimation of the action. While we explained that it was not for the Commission to specify what these rules should be, we did make tentative suggestions in an Appendix for consideration by the appropriate authorities.

82. There was virtual unanimity among those who commented that the summons or initial writ in the action should be served upon:

- (a) the missing person's husband or wife;
- (b) the missing person's children who are not in pupillarity, including illegitimate and adopted children;
- (c) the next of kin of the missing person if not one of his children;
- (d) the Lord Advocate (i) in the public interest, and (ii) as representing the Secretary of State for Social Services;
- (e) such other persons as are known to have a personal or patrimonial interest in the conclusions of the petition.

There was general agreement that the summons or initial writ should not be served on a person such as the missing person's banker, solicitor, doctor or employer, whose position in the action would be that of a witness rather than of a party with an interest. We agree with these suggestions and **recommend** that they be taken into account by the appropriate authorities.

83. We have received conflicting advice as to the appropriate *induciae* where service is to be made upon a person abroad. In this situation we **recommend** that where, in the general action of declarator, service is to be made upon

³⁹This would meet the problem disclosed in *Dear and Lumgair, Petitioners* (1905) 12 S.L.T. 862 and (1906) 13 S.L.T. 850.

a person abroad the same *induciae* should apply as apply at present in petitions under section 5 of the Divorce (Scotland) Act 1938, namely a period of 14 days⁴⁰.

84. Under the existing procedure of the Presumption of Life Limitation (Scotland) Act 1891 and the Divorce (Scotland) Act 1938 the court's first interlocutor usually ordains the petitioner to advertise the petition in certain newspapers⁴¹. The advertisement is of limited use, however, in drawing public attention to the petition because it is usually inserted in a column of the newspaper reserved for statutory and other public notices. The Law Society of Scotland suggest that a less formal advertisement, preferably accompanied by a photograph, should appear in the news columns of the paper. The suggestion is a valuable one but practitioners, we take it, could themselves secure the adoption of such a practice except in the case of petitions brought under section 5 of the 1938 Act. Such petitions come within the ambit of section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926, thus effectively precluding the publication as news items of the averments of fact in the petitions. This, as the Society suggests, seems inconsistent with the need to secure as wide publicity as possible for the petition, so that persons with a knowledge of the facts may come forward to give evidence. They suggest, therefore, that section 1(1)(b) of the 1926 Act should not apply to such proceedings. We should have accepted this suggestion if we were proposing to advise the retention of the approach adopted in section 5 of the 1938 Act or any other approach involving a specific decree of dissolution of the marriage on the ground of presumed death. Our proposals, however, involve simply a declarator of death which is intended to have all the effects of a death vouched by an ordinary death certificate. Since they envisage no "judicial proceedings for the dissolution of marriage", they would not appear to come within the scope of section 1(1)(b) of the 1926 Act. Although, therefore, no specific exclusion of that provision would seem to be required in relation to the action of declarator, we **recommend** that, for the removal of doubt, it should be made clear in any legislation following this Report that the action does not come within the ambit of section 1(1)(b) of the 1926 Act.

85. It has been the practice, since the case of *Gilchrist*⁴², to enquire of the Registrar General for England and Wales and the Registrar General of Births, Deaths and Marriages for Scotland whether they have a record of the death of the person concerned. We would expect this practice to continue.

Duty of disclosure

86. Having regard to the wide-ranging effects of the proposed decree *in rem* we suggested in Memorandum No. 11⁴³ "that persons (including banks, solicitors, and employers) who possess relevant information should be bound to disclose it to the court". We added, however, that questions of confidentiality arose, as to which we desired to have views.

⁴⁰Rules of the Court of Session III, 170(g).

⁴¹The Rules of the Court of Session III, 170(f) provide that "In every petition for dissolution of marriage under section 5 of the Act [sc. the 1938 Act], the Court shall order such advertisement as it thinks fit".

⁴²*Gilchrist*, Petitioner 1950 S.L.T. (Notes) 6.

⁴³Paragraph 48.

87. We received valuable comments upon this suggestion. The Committee of Scottish Bank General Managers stated that: "The Banks would have no objection to such a course provided that there was written into the legislation a clear authority to disclose, thus making the disclosure a recognised exception to the duty of secrecy". So far, however, as it affected solicitors, the Law Society of Scotland and the other professional societies of solicitors were entirely opposed to the proposal: "The privilege of confidentiality enjoyed by solicitors is one which is jealously guarded and one which they would on no account contemplate being eroded. A position must never arise where a client is unable to confide in his solicitor and ask his advice, for fear that the solicitor be required at some future date to disclose what was said." The Law Society of Scotland said that the suggestion was reasonable in its relation to employers, but that there might be practical difficulties and added: "This is a case where the National Insurance Office should be obliged to give such information as they have regarding the last address and last employer of the absent person."

88. We consulted the Department of Health and Social Security, who, while agreeing that they should receive intimation of actions of declarator of death and that they should be able to intervene in proceedings and to have any declarator reduced or varied, were troubled by the suggestion that they should be obliged to disclose relevant information in their possession. The Department emphasised that assurances have been given over the years since 1911 that information in their hands would not be disclosed for other than social security purposes. If members of the public became aware that such disclosure might be made, they might be less willing to supply the Department with accurate information. The Department preferred to retain the existing procedure whereby the determining authorities under the social security legislation could, for social security purposes, make their own decisions as to whether a missing person was alive or dead and under which the Department did not necessarily have to become involved in proceedings before the courts.

89. The Commission has the greatest sympathy with those who emphasise the need to preserve the confidentiality of certain professional relationships and the individual's right of privacy. We are persuaded, however, that, because of the importance of the court being as fully informed as possible about the facts relevant to the death or survival of a missing person, every person possessing information about those facts should be bound to disclose it to the court, except where the person possessing the information, if cited as a witness in court proceedings, would be entitled under the existing law to refuse to disclose the information in those proceedings on some ground of privilege or confidentiality or withholding or non-disclosure of information on the grounds of public interest. Subject to that exception, we would propose that a person possessing information about a missing person should be obliged, on learning that an action of declarator of the death of that person has been raised, to furnish it by a written communication addressed to the clerk of the court where the action has been raised, or in such other manner as may be prescribed by act of sederunt. The obligation of disclosure, in its application to the Department of Health and Social Security, would merely constitute an extension of the existing practice of that Department. As long ago as 1957 the Government agreed to the disclosure to a court, on request, of a man's address as shown in social security records where required for the purposes of instituting maintenance proceedings

or of enforcing maintenance orders. In Scotland, the address is disclosed to the woman's solicitors or, exceptionally, if she is not legally represented, to the woman herself. We **recommend** therefore:

- (a) that any person who possesses information relating to the survival or death of a missing person and who is aware that an action of declarator of the death of that person has been raised should have a duty to disclose that information—
 - (i) by means of written communication to the Principal Clerk of Session or, as the case may require, the sheriff clerk of the appropriate sheriffdom, or
 - (ii) in such other manner as may be prescribed by act of sederunt; but
- (b) that there should be no duty to disclose the information where the person possessing the information would, if cited as a witness, have been entitled to refuse to disclose it under any rule of law or practice relating to the privilege of witnesses, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest.

90. We recognise fully the special position of the records of the Department of Health and Social Security and the desirability of maintaining, as far as possible, their confidentiality. We recognise that information contained in the Department's records which is not directly relevant to the question of survivorship should not be disclosed to the parties. We recognise, too, that there is little point in calling an officer of the Department to speak in court as to the contents of records, often computerised, whose retrieval and interpretation require special facilities and skills. We recommend, therefore, that while the duty of disclosure should extend to the Department, it should comply with it simply by furnishing a statement disclosing any information in its possession which is relevant to the action of declarator. We **recommend** that such a statement by an officer of the Department should be sufficient evidence of the facts narrated within it and that the officer furnishing it should not be required to give oral evidence relating to the Department's records. The form which such a statement might take is illustrated in Appendix II to this Report.

91. The determining authorities under social security legislation would, of course, be bound by the decree in the action of declarator. In the absence of such a decree, however, the determining authorities would not be precluded from deciding, incidentally to any question before them, whether a missing person has died or may be presumed to have died. We referred to this matter in a more general context in paragraph 73 and there made recommendations which would in effect permit determining authorities, where they think it appropriate, to proceed as if a decree of declarator of death had been pronounced.

Reappearance of missing person—general effects

92. A decree of declarator of death, both where it proceeds upon evidence pointing to the fact that a person died at a particular time and place and where it proceeds upon a presumption based on his long absence without trace, may be inconsistent with the facts. Nevertheless, even though such inconsistency is

demonstrated by the missing person's reappearance, we consider that the decree should continue to have effect until recalled, but that an application for recall should be competent at the instance of any person with an interest. The Lord Advocate would act on behalf of the Department of Health and Social Security. The Deputy Registrar General proposes, and we agree, that intimation of recall should be given to the Registrar General of Births, Deaths and Marriages for Scotland. To give effect to these suggestions, we **recommend** that decree in an action of declarator may, on the application of any person with an interest, including the Lord Advocate in the public interest, be varied or recalled by an order (hereinafter called a "variation order") to be made by the court which granted the decree or, in a case where the Sheriff remits the application to the Court of Session in accordance with our recommendation in paragraph 93, by the Court of Session.

93. We consider that the court in disposing of an application for a variation order, should enjoy the same range of powers and the same facilities as it enjoys in relation to an action of declarator of death of a missing person, and so we **recommend** that the court, when making a variation order, should enjoy all the powers specified in paragraph 79 above. We also **recommend** that it should be open to any person who has an interest, personal or patrimonial, to intervene by minute in the application for the variation order for the purpose of seeking any competent determination or appointment not sought by the applicant for the order. An application for a variation order is likely sometimes to present greater difficulties and raise matters of greater complexity and importance than the original action of declarator. We **recommend**, therefore, that where an application for a variation order comes before the sheriff, he should be entitled to remit the application to the Court of Session, and, if so directed by that court, should be bound to do so. Finally, we **recommend** that the proposals in paragraph 89 about the disclosure of information to the courts in relation to actions of declarator should apply also to applications for variation orders.

94. The Society of Solicitors in the Supreme Courts of Scotland have suggested that "there ought in any case to be a time limit for recalling or varying the Decree" and suggest that the period of the long negative prescription should suffice. We find it difficult to accept the suggestion that after a period of time a person who is manifestly alive should continue to be regarded as dead. On the other hand, we do think that where, in consequence of a decree of declarator of death, a missing person's property has been transferred to his successors, the lapse of a period of time should put a term to his right to recover the property or its value. This property question will be considered in subsequent paragraphs. In the present context it is sufficient for us to recommend, as we do, that an application for the recall or variation of a decree of declarator of death should not be rendered incompetent by the mere duration of the absence of the missing person.

Reappearance of missing person—provisions for restitution of property

95. In Memorandum No. 11⁴⁴ we explained that the Presumption of Life Limitation (Scotland) Act 1891 made certain provisions for the restoration of

⁴⁴Paragraphs 14 and 36.

the missing person's property upon his reappearance. Section 6 provides that the missing person, or any person deriving right from him, is entitled to demand and receive from the person who has become entitled to the missing person's property in terms of the Act or "... from anyone acquiring the same from him by gratuitous title, the said estate or the price or value thereof, if the same shall have been sold or otherwise disposed of, free of any burden which did not affect the said estate at the date of the judgment of the court, subject to a claim for the value of any meliorations which may have been made upon the estate by the person from whom the demand is made, but shall not be entitled to demand or receive any income which may have accrued from the said estate before notice of the demand: Provided always, that any person denuding of the estate or any part thereof under this section shall be bound, but always at the expense of the person or persons receiving the same, to grant such deeds and instruments as may be necessary for the completion of title, but with warrantice from fact and deed only; and shall also be bound, in case the person receiving the same is the person who had disappeared, to free and relieve him of all claim and demand in name of relief, composition, or other casualty which may be competent to the superior of the subjects in respect of or consequent upon the completion of the title of the person who had disappeared; and, in the event of the estate or any part thereof having been burdened with debt since the date of the judgment of the court, the person denuding shall be bound to purge such encumbrances at his own expense, and obtain and deliver discharges thereof, unless it is shown that the money borrowed was expended on meliorations for which he is entitled to credit."

96. The language of section 6, as we pointed out⁴⁵ in Memorandum No. 11 makes it clear that it was designed mainly to deal with heritable property. We explained that the section "does not adequately deal with the situation where the absentee's property is moveable and, in present conditions, liable to become quickly inmixed with the successor's own estate. The situation, moreover, is materially altered by reason of the complexity of the law relating to estate duty, and capital gains taxes. Suppose, for example, that in 1970 A is presumed to have died leaving considerable moveable property. His executors will be liable for the estate duty on his estate. After the expenses of administration have been met, the balance of his estate falls to be divided between two sons S_1 and S_2 and a daughter D. S_1 invests his share of the estate along with his own monies in a business where much of the income is directed to capital growth. S_2 gradually squanders his share. D invests and reinvests in growth equities paying for new issues out of her own or her husband's funds, and her husband pays capital gains tax upon periodic disposals of investments. A returns when the notional value of the equities has doubled. Still more complicated problems arise where it is disclosed that the absentee has died, but at a date different from that upon which he has been held to have died, so that different persons are entitled to his estate."

97. We considered that there were a number of possible approaches to this problem, and that, inevitably, there was an arbitrary element in each. The approach, however, which commended itself most to us involved the acceptance of these principles:

⁴⁵Paragraph 37.

- (a) that a successor should not be bound to restore the income of the property he received;
- (b) that a successor should not be bound to restore that property in kind; and
- (c) that the successor should be bound only to restore the “money value” of that property.

98. The first of these principles already receives recognition in section 6 of the Presumption of Life Limitation (Scotland) Act 1891. It seems right that the revenue of the property should be at the disposal of the person who owns or manages it and that he should not be accountable for it because of the unexpected event of the return of the missing person.

99. We set out the justification for the second and third principles in Memorandum No. 11⁴⁶. The second principle is justified by the need to avoid sterilising property for long periods. This is the main disadvantage of the common law, and it was merely lessened and not removed by the 1891 Act. The terms of sections 6 and 7 of that Act seem to envisage that the property will be retained intact for a period of thirteen years against the mere contingency of the missing person's return. It seemed right to us that after a decree of declarator of death or of presumption of death, the successors should be free to deal with the property as if it were their own and employ it to best advantage without being restrained by the thought that one day the property might have to be restored more or less as it was when they received it.

100. It appeared to us that acceptance of our second principle would lead naturally to acceptance of the third principle. Once the successor deals freely with the missing person's estate, it becomes increasingly difficult to differentiate it from his own estate. The reasons for this we have explained above⁴⁷. If such differentiation were attempted, the law—as we explained—would have to decide whether the missing person should benefit from the special financial skills of his successor or suffer from his inexpertise. The law would also have to make special provision to deal with capital gains tax. It might be argued that the original capital should be deemed to increase or decrease annually on the basis of an index of share values. In a monetary situation, however, which has for long been marked by inflation such a solution would tend to increase rather than to decrease the successors' liability with the passage of years. For this reason we rejected it in favour of the solution that any person succeeding to the estate of a missing person should be bound to restore only the “money value” of that estate valued as at the date when he received it.

101. Our proposals met with the approval of nearly everyone who offered comment but the Law Society of Scotland were concerned about the possibility of the property depreciating in value through no fault of the successor while in his hands. They suggested, therefore, that “the successor should have the option of restoring the ‘money value’ as at the date at which the successor

⁴⁶Paragraph 38.

⁴⁷Paragraph 96.

received it or as at the date of reappearance of the missing person or of restoring the property itself still intact". We think that any cause for concern in that respect will be removed by the proposals set out in the following paragraphs.

102. In the light of the comments on our proposals and our own further examination of the three principles set out in paragraph 97, we recommend adherence to our first principle—that a successor should not be bound to restore the income of property received by him—but a somewhat different approach to the solution of the problem of restoration or redistribution of property rights in the event of the reappearance of a missing person. We are persuaded that because of the infinite variety of possible cases and circumstances which can arise in relation to the estate of a deceased person and the subsequent acquisition of property rights in that estate, the legislation should do no more than specify the principles of a scheme for restitution or redistribution of those rights on the return of a missing person and that the court, guided by those principles, should make such order as it considers to be fair and reasonable in all the circumstances of the case. The flexibility which such an approach allows may be essential to secure fairness to all the parties affected by a re-arrangement of property rights.

103. Our second principle—that a successor of the missing person should not be bound to restore property in kind—while desirable in the usual case where the successor holds the property for himself should, we think, suffer exception where the successor is not a beneficiary but a trustee or executor of the missing person or holds the property in some other administrative capacity e.g. as a judicial factor. Where, for example, trustees are holding the property of a missing person in respect of a life interest it would clearly be reasonable to allow that person, if he returns, to recover the property itself, as opposed to its value, from the trustees.

104. While we would have liked to give full effect to our third principle—that a successor should be bound to restore only the "money value" of the property received by him—we have reached the conclusion that it would not be practicable to devise a mandatory provision which would be fair in all possible situations. The property may so change its shape or value, or may become so inmixed with other property, that the very act of identifying it could often raise serious practical problems. Moreover, with each change of ownership, particularly where a succession by a number of persons is involved, it would become progressively more difficult to assess or to stipulate with any degree of fairness what should or should not be recoverable. In the light of those considerations we concluded that in any case where a decree of declarator of death is varied or recalled, the most satisfactory course would be for the court to make such further order (if any) for the redistribution of property rights as it considers fair and reasonable in the circumstances of the particular case. Subject to what we say in paragraphs 113 and 127, no entitlement to property rights as a consequence of a variation order would arise except under such a further order.

105. In accordance with the view which we have expressed in paragraphs 98 and 102, we consider that the court should make no order for the restoration of income accruing between the date of the decree and the date of the variation order.

106. We think it important that the legislation should provide certain guidelines or directions for the assistance of the court in the difficult task of making a further order. The first of the guide-lines (which is informed by our recognition of the need for simplicity) relates to the case of property which is being or has been administered under a trust. The word "trust" in this context is intended to signify any trust or executry for the administration of property which comes into operation, or under which property devolves upon or is transmitted to any person, by reason of decree in an action of declarator of death. We consider that in any such case responsibility for satisfaction of any claim for restoration of, or of succession to, property as a consequence of the facts to which the variation order relates should be a matter for the trustee. Moreover, we consider that the claimant should be entitled to receive only (1) the property which the altered circumstances indicate that he should have been entitled to retain or receive so far as it is still in the hands of the trustee, and (2) the value as at the date of distribution of any such property which has been distributed.

107. Our recommendation that insurers should be bound by decree in an action of declarator of death raises the question of the guidance to be given to the court concerning the right of an insurer to the recovery of monies paid out as a consequence of such a decree, on facts coming to light which are inconsistent with the decree. The general rule in Scots law is that monies paid in consequence of errors of fact may be recovered and the rule has been applied to permit a provident society to recover the amount of an annuity paid out in the erroneous belief that one of its members who had disappeared had died⁴⁸. So, as the law stands, an insurer would be permitted to recover a capital sum paid out in the erroneous belief that the insured was dead. (It is, we may say, a condition of such recovery that both parties are equally entitled to be restored to the position in which they would have been but for the error or misapprehension on which they acted so that, in the absence of fraud, the policy will be treated as a subsisting policy on payment of arrears of premiums and interest.⁴⁹) We consider that insurers should continue to enjoy the protection of the existing rule of law, although we recognise that the rule may bear hardly on persons who have to repay insurance monies. This is particularly so, as the cases show, where persons who have received annuities or other periodical payments from insurers in consequence of the assumed death of a missing person are obliged to make repayment when he reappears. The recipients of annuities could insure against such a contingency, but there are practical obstacles to such insurance which suggest that it would be better to allow the loss to lie where in the first instance it falls. Annuity payments, like the income or fruits of an estate, should be regarded, we think, as irrecoverable. Accordingly, we consider that any order for repayment to an insurer should not confer upon him any right to recovery of annuity payments made in consequence of the declared death of a missing person, even where the annuity payments contain an element of repayment of capital. We **recommend** therefore:

- (a) that, subject to what is stated in paragraphs 113 and 127, a variation order should not of itself entitle any person to recover or claim any property;
- (b) that where such an order has been pronounced, the court should make

⁴⁸*Fraternity of Masters and Seamen of Dundee v. Cockerill* (1869) 8 M.278.

⁴⁹*North British and Mercantile Insurance Co. v. Stewart* (1871) 9 M.534.

such further order (if any) in relation to any property acquired as a result of the decree being varied or recalled as it considers fair and reasonable in all the circumstances of the case;

(c) that such an order should not extend to income accruing between the date of the decree and the date of the variation order; and

(d) that, in considering what further order should be made, the court should (so far as practicable in the circumstances) have regard to the following considerations, namely—

(i) that in the case of property which is being or has been administered under a trust (the word “trust” being widely defined), any person who on account of the variation order would, apart from our recommendation (a) above, have been entitled to any such property should be entitled to have made over to him by the trustee in full satisfaction of these rights only such property so far as it is still in the hands of the trustee and the value, as at the date of distribution, of any such property which has been distributed;

(ii) that any capital sum paid by an insurer as a result of the decree being varied or recalled (other than a capital sum which has been paid by way of an annuity or other periodical payment) should be repaid to the insurer if that sum would not have been paid if the facts in respect of which the variation order was pronounced had been known at the date of the decree.

Protection of third parties and liability of trustees

108. We are conscious that in the case where a person is ordered to make over property to the missing person or any other person, third parties such as security holders and lessees may have acquired rights or interests to or in the property. In order to give adequate protection to those third parties we **recommend** that where a person enters into a transaction whereby he acquires in good faith and for value any right to or in any property, the transaction should not be challengeable by any other person on the ground that an order for the making over of that property has been made.

109. We would also **recommend** that a trustee should be liable to any person becoming entitled to property by virtue of an order of the court for any loss suffered by that person on account of any breach of trust by the trustee in the administration or distribution of the property except in so far as the liability of the trustee is restricted by any provision in any deed regulating the administration of the trust, or by statute.

Limitation upon right of recovery of missing person or other party entitled to property

110. We have indicated⁵⁰ that, under section 7 of the Presumption of Life Limitation (Scotland) Act 1891, the missing person's right to recover his property is limited to a period of thirteen years from the date when its holder took infetment or obtained possession of the estate. The purpose of this

⁵⁰Paragrah 16.

provision, we presume, was to avoid hardships inevitably occasioned by the disturbance of the continued enjoyment of assets, even though possessed on a precarious title, and to enable the assets to be deployed more freely for personal and commercial purposes. The provision was vulnerable to the objection that the limitation depended upon the period of possession by the holder and so took effect from different dates. On his return a missing person might find that he recovered some items of his estate, but not other items of it. A second objection was that, in cases where a person goes missing, his successors were not normally freed from risk of a claim for restitution for a period of at least twenty years from the date when the missing person was last known to be alive. This is a lengthy period of time, but it corresponded with the period of the long negative prescription. We note, however, that by section 6 of, and paragraph 1(b) of Schedule 1 to, the Prescription and Limitation (Scotland) Act 1973, obligations of restitution, repetition and recompense, subject to certain exceptions, prescribe when they have subsisted for a continuous period of five years without being acknowledged by the debtor or pursued by the creditor. It would be consistent with this approach if the obligation upon a trustee or any other person to restore property (or its money value) to the missing person or other party entitled thereto (including an insurer) in consequence of the recall or variation of a decree of declarator of death of the missing person were to be extinguished after the lapse of the period of five years beginning with the date of the decree. We accordingly **recommend** that where a decree in an action of declarator of death has been varied or recalled, it should not be competent to the court to make a further order in relation to property acquired as a result of that decree, unless application for such recall or variation has been made within the period of five years beginning with the date of the decree.

Property rights may be declared irrecoverable

111. We did not consider in Memorandum No. 11 whether a missing person who has been declared dead and subsequently reappears should be precluded from recovering the value of property which belonged to him and which has been or is being used for the maintenance of his dependants. Although no suggestion to that effect was made by those who offered us comments, there was some feeling that our proposals still gave excessive protection to the missing person's interest. Our proposed scheme for rearrangement of property rights in the event of the missing person's return does, of course, envisage that in the usual case only that person's trustee will be accountable for the value of property. But the trustee and dependent relative may often be the same person e.g. a widow who is both an executor and universal legatee. We **recommend**, therefore, that where a decree of declarator of death has been granted, the court may, on the application of a person whom the missing person would have had a non-contractual duty to aliment or of a trustee, make an order directing that the value of any property acquired as a consequence of the decree shall not be recoverable by virtue of an order in relation to property made as a result of a variation order having been pronounced.

Insurance against claims

112. In view of the liability of a trustee who distributes property as a result of a decree in an action of declarator of death to account for the value of that property during the period of five years beginning with the date of the decree,

we **recommend** that, unless the court otherwise directs, the trustee must effect a policy of insurance to enable any claim which may arise to be met in full. Any premium in respect of such a policy of insurance should be a proper charge on the estate being administered by the trustee. We also **recommend** that an insurer making payment of a capital sum (other than in respect of an annuity) as a result of such a decree should be entitled to require the payee to effect a policy of insurance which would ensure the satisfaction of any claim competent to the insurer in the event of application for recall or variation of the decree being made within the period of five years beginning with the date of the decree.

Reappearance of missing person—estate duty matters

113. If, following a declarator of death of a missing person, estate duty has been paid by his executors or successors, on the reappearance of the missing person, the question of repayment of that estate duty would arise. There is no express statutory provision dealing with this matter, although section 8(12) of the Finance Act 1894 provides that, where it is proved to the satisfaction of the Commissioners that too much estate duty has been paid, the excess shall be repaid by them. The Finance Acts prescribe no limit of time to such repayment. It would appear, therefore, though we know of no cases where the matter has been discussed, that the Inland Revenue would require to repay estate duty paid in consequence of a mistaken assumption that a person has died, and that, apart from the rules of negative prescription, without limitation of time. We think that this is appropriate, and that the proposed general limitation in relation to the rearrangement of property rights as a consequence of a variation order should have no application to a claim for repayment of estate duty. The reasons which might explain the existence of such a limitation, to which we refer in paragraph 110, do not seem to us to be applicable to the Inland Revenue. If, moreover, a limitation upon an absentee's right to recover estate duty were imposed, it would be necessary to provide against the imposition of additional estate duty on that portion of his estate on his actual death. The legislative provision required would be complicated and hardly justified in view of the rarity of the situation envisaged. The practical problem here is to identify to whom the duty should be repaid. Duties overpaid or paid in error are normally repaid to the person who paid them. In our view this practice should continue, unless in the particular circumstances the court makes an order to the contrary, but it should be made clear that the person to whom repayment is made is under a duty to account to the missing person or to any other person. We **recommend** therefore:

- (a) that it is unnecessary to make specific legislative provision clarifying the duty of the Inland Revenue to repay estate duty paid in consequence of an erroneous declarator of death;
- (b) that no limitation upon the duty of repayment should be imposed;
- (c) that the court recalling or varying a decree of declarator of death should be specifically empowered, where estate duty has been paid in error, to order its repayment direct to the person entitled to receive payment; and

- (d) that it should be provided, for the avoidance of doubt, that nothing in the legislation will affect the obligation of any person to whom the estate duty is repaid to account for the amount of that duty to any other person.

Reappearance of missing person—effect upon dissolved marriage

114. In Memorandum No. 11 we argued⁵¹ that it was a defect of the Divorce (Scotland) Act 1938 that it does not provide expressly for the reappearance of the missing spouse. We went on to say: "It is suggested in Walton, *Husband and Wife* that the validity of any second marriage would not be affected by the mere fact of the absent spouse's reappearance but that such reappearance would found a reduction of the decree of dissolution of the marriage on the ground of presumed death, 'as the whole basis of the decree is then destroyed'⁵²." On such reduction the second marriage would *ipso facto* be null and void⁵². This suggestion, however, is not accepted by all authorities⁵³. Whatever the legal position, both from a moral and from a social point of view it seems undesirable that the second marriage should be contingent upon the failure of the missing spouse to reappear. We are fortified in this conclusion by the opinion of the Royal Commission on Marriage and Divorce that "the real purpose of the proceedings is to obtain a declaration of presumption of death and the provision for the dissolution of the marriage by decree of the court is really a safeguard for the applicant in case the facts belie the presumption"⁵⁴. We accept this opinion and suggest that effect should be given to it by providing that where a marriage is dissolved as a consequence of a decree of declarator of death, the reappearance of the missing person, or the discovery of evidence that he did not die on the date specified in the decree, should have no effect upon the marital status of his former spouse.

115. All those who offered us comments approved of this suggestion, though the Royal Faculty of Procurators in Glasgow added the proposal that "the reappearance of a first husband should found an action for dissolution of the second marriage at the instance of the wife". We are not persuaded that it is desirable that the mere reappearance of a former spouse should be an optional ground for the dissolution of a second marriage. This should be regarded as a marriage valid and complete in every sense and dissoluble only where the current law so allows. We **recommend**, then, that the fact that a person declared to be dead is alive, or was alive at the time of the remarriage of his or her spouse, should not be a ground for declaring the invalidity of any marriage contracted by his or her spouse after the date when the missing person was judicially declared to be dead. This would leave it open for that marriage to be dissolved, if appropriate, on other grounds.

116. A problem of a different kind arises where the missing person's spouse has not remarried. Should the reappearance of the missing person by itself restore the *status quo ante*? Our proposed decree is itself tantamount to a declaration of death and, upon the reappearance of the missing person, it

⁵¹Paragraph 17.

⁵²3rd edn. (1951) p. 122.

⁵³See T. B. Smith, *Short Commentary on the Law of Scotland*, p. 336.

⁵⁴Cmd. 9678 (1956), paragraph 1197.

should clearly be recallable at the instance of any interested party. Should this automatically revivify a marriage which one of the parties thought to be dead? We do not think so. The spouses who have lived apart for seven years or more may well have acquired different habits of life, different dispositions and responsibilities incompatible with an easy resumption of married life. The Sheriffs-Substitute Association, considering the situation where the spouses did in fact wish to resume life together, were concerned about what they described as “the rather farcical need for them to remarry”. They suggested, therefore, that provision might be made for the recall of the decree of dissolution of the marriage on the joint application of the spouses. Though at first sight attractive, we do not recommend adoption of this suggestion. Legislation to implement it would require to take account of intervening changes, if any, in the status of both parties. Applications, moreover, would be few having regard to the rarity of the situation, the simplicity of remarriage, and the expense of the application itself. We **recommend** that no legislative provision be made for the revival of the missing person’s marriage at the joint instance of that person and of his spouse in cases where the original decree of declarator of death has been recalled.

The presumption of limitation of life as a defence to a charge of bigamy

117. In Memorandum No. 11 we referred to the English rule by which an accused escapes the penalties of bigamy “whose husband or wife shall have been continually absent from such person for the space of seven years then last past and shall not have been known by that person to be living within that time . . .”⁵⁵. We raised the question whether a similar rule should be enacted in Scotland and suggested that two different chains of reasoning led to different results.

118. “One view”, we said⁵⁶, “is that, if the presumption that a missing person lives for the ordinary duration of human life is replaced by a presumption that he lives only for a period of (as we recommend) seven years, it would be unduly harsh to punish his spouse for anticipating a finding of death which, in the circumstances at the time of the second marriage, the court might have been bound to make. Another view is that a person who has once married should not marry again until he has regularised his position by obtaining a judicial decree dissolving his first marriage. If, indeed, the recommendations of the Committee on the Marriage Law of Scotland are accepted, the form of notice to be completed by the parties to a prospective marriage will require them to disclose the existence of any previous marriage, and to say how and when it was terminated⁵⁷. The spouse of a missing person, therefore, who remarries without a decree dissolving the marriage could only do so, if the Committee’s recommendations are accepted, by defying the formal requirements of the law relating to the constitution of marriage.” We added that we had not reached a concluded view on the matter and would welcome advice.

119. The majority of those who offered us comments, including the Faculty of Advocates, the Society of Writers to H.M. Signet, the Royal Faculty of Procurators in Glasgow and the Deputy Registrar General of Births, Deaths and

⁵⁵Offences against the Person Act 1861, section 57.

⁵⁶Paragraph 32.

⁵⁷Cmnd. 4011 (1969), paragraph 64.

Marriages for Scotland were against the introduction of a defence similar to section 57 of the Offences against the Person Act 1861, mainly on the ground that—to use the language of the Deputy Registrar General—persons “cannot be allowed to decide of their own volition that their marriage has ended”. A substantial minority, however, favoured the introduction of such a defence and an experienced judge spoke of his dislike of prosecutions for bigamy where a spouse through ignorance has failed to have his marriage with the missing person dissolved.

120. Our own conclusion is that such a defence should be introduced. It is, we think, hardly to the point to argue that the abandoned spouse should have regularised his position by obtaining a decree of dissolution of the marriage. *Ex hypothesi* he has not done so, and the real question is one as to *mens rea*. Under the present law of Scotland it is a defence to a charge of bigamy that an accused had reasonable grounds for believing that his or her spouse was dead, but at present the mere absence of the spouse for a long period of time does not in law point to his or her death because he or she is presumed to live for the ordinary duration of human life. If the law were altered, however, and the period of presumption of duration of life limited to seven years, it would seem appropriate to concede that a person whose spouse has been absent for seven years or more and who has no evidence suggesting that the missing spouse was alive during that period has reasonable grounds for believing—as the law indeed will presume—that his spouse is dead. That person, therefore, ought not to be convicted of bigamy. We **recommend**, therefore, that a defence to a charge of bigamy should be introduced into Scots law analogous to section 57 of the Offences against the Person Act 1861.

Recognition of foreign decrees and presumptions

121. In paragraph 31 above we explained that at present there is no statutory provision in Scotland for the recognition of foreign decrees declaring or presuming a person to have died. We also suggested that such provision would be desirable to clear up doubts left by the decision in *Simpson's Trustees v. Fox and Others*⁵⁸. We understand that in England, where the courts of the domicile of a missing person have granted a declaration of death and made an order vesting that person's estate in the persons entitled to it, the High Court is prepared to presume his death without further evidence being adduced, though such evidence must be adduced where there is merely a declaration of death⁵⁹. In Memorandum No. 11 we stated that, “While proof of questions of fact is in principle a matter for the *lex fori*, it may well be inconvenient for the Scottish courts to determine whether a person living in a distant foreign country should be presumed to have died. It may also be unjustifiably expensive to take such proceedings in Scotland to determine the devolution of a trivial amount of property here. There is, it is thought, a case for providing that where the death of a person, or the time of a person's death, has been established by evidence or by presumptions of law in the courts of that person's domicile, then, in any judicial proceedings in Scotland, including proceedings for confirmation of executors, that person shall be presumed to have died or to have died at the time so established until evidence to the contrary is adduced”⁶⁰.

⁵⁸1951 S.L.T. 412.

⁵⁹*In the goods of Schulhof* [1948] P. 66; *In the goods of Dowds* [1948] P. 256.

⁶⁰Paragraph 35.

122. The comments which we received have all supported the general principle that a measure of recognition should be given to foreign decrees declaring or presuming a person to have died. None have suggested that anything in the nature of a vesting order consequent upon the declaration of death should be required. It was suggested by the Law Society of Scotland and by Professor Meston, in the context of our suggestion to limit recognition to decrees of the courts of the domicile of the missing person that "it would be preferable to recognise decrees emanating from the country of the *lex causae* rather than those of the domicile as such. For example, so long as special rules for solving conflicts are applied to the succession to immoveables, the suggested approach would permit effect to be given to the decree of the appropriate court of a foreign country in the succession to immoveable property situated there, irrespective of the owner's domicile." Our courts, however, already recognise the decrees of the foreign court of the *situs* of immoveables in questions relating to the immoveables, and that, it is thought, even if the decree contained a finding relating to the owner's death which was transparently erroneous. In a case concerned with the devolution of the moveable estate of a person domiciled in a foreign country, under the present law the Scottish courts would give effect to a decree of the courts of the domicile, even where it proceeded upon a finding relating to the death of another person not domiciled in that country. What the present law does not provide for, though arguably it should, is the recognition of a foreign decree simply declaring or presuming a person to have died.

123. Other commentators have suggested in this connection that recognition should be given not merely to decrees of the courts of the domicile of the missing person, but to those of the courts of any country with which he has substantial ties. We accept that some extension is desirable and it seems to us to be reasonable, and consistent with our proposals for the jurisdictional bases of actions of declarator of death in the Scottish courts, that a missing person should be regarded as having "substantial ties" with a country if it was the country of his domicile or habitual residence on the date on which he was last known to be alive. However, since a foreign decree may be pronounced in *ex parte* proceedings we think it right to suggest that it should be *prima facie* but not conclusive evidence of the fact of death. We **recommend**, therefore, that where the court of any foreign country—including in this expression other parts of the United Kingdom—in which the missing person was domiciled or habitually resident on the date on which he was last known to be alive has declared that he has died or is presumed to have died, or has died or is presumed to have died on a specified date or within a specified period, the decree should be sufficient evidence of the declared facts in any judicial proceedings in Scotland. It should be open, however, to any interested person to lead evidence to rebut the findings in the foreign decree.

The position of entails

124. We explained in paragraphs 23 to 26 the nature of the provision made by sections 14 to 16 inclusive of the Entail (Scotland) Act 1882 to deal with the disappearance of an heir of entail. They do not provide for any formal presumption of the death of such an heir, but in effect, after the lapse of specified periods, treat him very much as if he were dead. The practical dimensions of the problems dealt with by these sections are now small and, in consequence,

we **recommend** amendment of the sections only in so far as necessary for consistency with the basic principles of this Report.

125. Paragraphs 1 and 2 of section 14 envisage a procedure for disentailing and selling the entailed estate of an heir in possession who has been absent for a period of seven years and cannot be found. It is not clear whether, if the necessary conditions are fulfilled, the court has a duty or a discretion to ordain the execution of an instrument of disentail. These provisions, though not inconsistent with this Report, would be largely superseded if its recommendations were implemented since, under those recommendations, the absent heir may be declared to be dead for all purposes after the lapse of seven years. We think, however, that in some circumstances, admittedly unusual, it may be desirable for an estate to be disentailed notwithstanding the recent disappearance of an heir in possession, and that the law should not preclude this. We **recommend**, therefore, that in section 14, paragraph 1, the words “for a period of seven years” should be deleted with any consequential verbal amendments, and that it should be made clear that the court has a discretion whether or not to ordain the execution of an instrument of disentail.

126. Section 14, paragraph 3, enables a factor *loco absentis* appointed under the provisions of the Presumption of Life Limitation (Scotland) Act 1891 or otherwise, to an heir in possession who has been absent for any shorter period than seven years to apply to the Court for authority to feu, lease, borrow, or charge for improvement expenditure in the same manner as the heir in possession himself might have done. The principle is entirely satisfactory, but attention may be drawn to two minor points. The limitation to a period of less than seven years may have been inserted because it was originally envisaged that under section 14, paragraph 1, the estate would thereafter be disentailed. Whatever the previous law, our proposal is merely that the court should have a discretion to disentail. The reference to “any shorter period than seven years”, therefore, seems inappropriate and we **recommend** its deletion. We also consider that the inclusion of the words “under the provisions of the Presumption of Life Limitation (Scotland) Act 1891, or otherwise” is unnecessary and **recommend** that they be deleted.

127. Section 14 does not deal with the situation where there is a declarator that the heir in possession has died or must be presumed to have died on a specified date. We envisage, in accordance with the general policy advocated in this Report, that in such a case the possession of the entailed estate should pass direct to the next heir with effect from the specified date. If the absent heir should reappear within a period of five years beginning with the date of the decree of declarator of death and if in consequence of such reappearance a variation order is pronounced on an application made within the said period, that heir should be entitled to resume possession of the estate, but should have no right to its income or fruits during the period when the next heir enjoyed possession. The next heir should not be precluded, even during the five year period, from disentailing the estate, but should be able to do so only on giving security (to be fixed by the court) to meet the contingent interest of the heir who has disappeared, and has been declared to have died, against the possibility

of his reappearance and the consequential pronouncement of a variation order on an application made within the said period. If the absent heir should reappear after the lapse of the foregoing period of five years he should have no right either to the possession of the estate or, where it has been disentailed, to payment of any sum in respect of his contingent interest in the estate as at the date of disentail. We so **recommend**.

128. Section 15 in terms deals with situations where it has not been declared and need not be presumed that the missing person is dead. It deals, therefore, with matters which, strictly speaking, are outwith the scope of this Report and, even if it were competent for us to suggest amendment, does not appear to require it.

129. Section 16, on the other hand, does deal with a situation within the scope of this Report. It virtually presumes, after fourteen years from the date when he was last heard of as being alive, that the heir whose consent to disentail has been dispensed with under section 15 was in fact dead at the date of the original application for disentail, and enables the court to reallocate the value in money set aside for him in respect of that interest on that basis. The principles adopted in this section are out of line with the proposals in this Report. We **recommend** that where, subsequently to an application for disentail, the court has declared that a person whose consent to disentail has been dispensed with was dead at a date which is before the date of the disentail, the money with accumulated interest set aside for him in respect of his interest should be paid to the heir or heirs (in this case rateably according to their respective interests) whose consent would otherwise have been required at the date of the disentail. If the person is declared to have died on or after the date of the disentail, then the money set aside should fall into his own estate.

Matters connected with registration of death

130. It is a feature of accidents to both ships and aircraft that a number of persons are likely to be involved and that official inquiries, frequently of an exhaustive nature, will have been conducted into the accident. Official certificates of death or of supposed death are issued with greatest caution. Yet the present practice of the Commissary Courts in Scotland is that: "In all cases the fact of death must be distinctly averred A statement that the person to whose estate confirmation is wanted has disappeared, and is believed to be dead, is not sufficient In cases of disappearance the application must be preceded by a decree under the Presumption of Life Limitation (Scotland) Act 1891.⁶¹" We believe that the rigid insistence upon the requirement in the case of persons who are believed to have died in the course of disasters at sea or of aircraft accidents adds unnecessarily to the cost of obtaining confirmation. The Confirmation of Executors (War Service) (Scotland) Act 1940 contemplated the situation where a competent authority had issued a certificate to the effect that a person engaged on war service was missing on a specified date and had been presumed or concluded for official purposes to be dead. The Act provided

⁶¹Currie, *Confirmation of Executors in Scotland*, 7th edn. (1973) p. 124. The position in England is different. We understand that a decree of presumption of death is not a necessary condition of the grant of probate, and where the estate is under £3,000 even a registrar of the principal probate registry may accept an oath of credulity—Gibson's *Probate* 16th edn. p. 109.

that the production of such a certificate should permit a person to aver or to depone to belief of death rather than death for the purposes of appointment or confirmation as executor of the missing person. The Act ceased to have effect in 1959, but it embodied a valuable principle. We **recommend** that the issue by a competent authority within the United Kingdom of a certificate or intimation that a person has died or is presumed to have died, or is lost or missing in circumstances affording reasonable ground for the belief that he has died, as a result of an incident in or in connection with a ship or aircraft should permit a person to aver or to depone to belief that the missing person has died, rather than the fact of his death, for the purposes of appointment or confirmation as executor of the missing person.

131. The Society of Solicitors in the Supreme Courts of Scotland and the Registrar General of Shipping and Seamen have suggested that our recommendations in the preceding paragraph should apply also to certificates issued under statutory authority following deaths or presumed deaths occurring on, or in connection with the use of, hovercraft or offshore installations. We endorse this suggestion, and so **recommend**.

132. A decree declaring a person to have died is for practical purposes an attestation of the death of the person involved. For this reason we think it appropriate that the terms of the decree, or such as are relevant, should be intimated to the Registrar General of Births, Deaths and Marriages for Scotland. It is equally appropriate that the terms of orders varying or recalling decrees of declarator of death should be so intimated. A convenient method of securing this result would be to provide that decrees declaring a person to have died and orders varying or recalling such decrees should be treated as decrees altering status for the purposes of section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965. We so **recommend**.

Form of legislation required

133. The recommendations made above cumulatively represent the advocacy of a new and radically different approach on the part of Scots law to questions of limitation of life. So little of the existing common and enacted law would be retained that a clear case exists for its replacement by a single comprehensive statute constituting the unique source of law in this field, and we so **recommend**. The draft of a Bill giving effect to the recommendations is contained in Appendix III to this Report.

PART IV: SUMMARY OF RECOMMENDATIONS

1. The court, after proof and on being satisfied on a reasonable balance of probabilities that a person is missing and has not been known to be alive for a period of at least seven years, should presume that he died at midnight on the date seven years after the date on which he was last known to be alive. The presumption should take effect for all legal purposes except in relation to criminal responsibility (paragraphs 43 and 44).

2. Insurers should be bound by a judicial presumption of limitation of life, but no attempt should be made to strike at the possible avoidance by insurers of the effect of the presumption (paragraph 52).

3. It is unnecessary to make specific provision for the application, in appropriate cases, of foreign presumptions relating to limitation of life. The court, in deciding an action of declarator, should not determine a substantive question referable to foreign law otherwise than in accordance with that law (paragraph 57).

4. An action of declarator of death should be competent not only where a missing person has disappeared and has not been known to be alive for a period of at least seven years but in any case where he is with reason thought to have died. In such a case the court, after proof and on being satisfied on a reasonable balance of probabilities that the missing person has died, should so determine and should make a finding as to the date and time of his death; and where it is uncertain when, within any period of time, the missing person died, the court should find that he died at the end of that period (paragraph 60).

5. Decree in an action of declarator of death of a missing person should be conclusive of the fact of death for all purposes, including the dissolution of the marriage of that person, and this dissolution should not be affected by the return of the missing person (paragraphs 65, 115 and 116).

6. An action for declarator of the death of a missing person should be competent at the instance of any person with a personal or patrimonial interest (paragraph 67).

7. The Scottish courts should have jurisdiction in the action of declarator only where—

(a) the missing person was domiciled in Scotland on the date on which he was last known to be alive or had been habitually resident there throughout the period of one year ending with that date; or

(b) the pursuer in the action is the spouse of the missing person and is domiciled in Scotland at the date of raising of the action or was habitually resident there throughout the period of one year ending with that date (paragraph 72).

8. Any court or statutory tribunal should have the power to determine the fact or time of death of any person in accordance with the principles above-stated where this is necessary for the decision of any issue before the court or tribunal (paragraph 73).

9. The action of declarator should be competent both in the Court of Session and in the sheriff court and no financial limitation should be placed on the competence of the sheriff court. The sheriff should, however, be entitled to remit the case to the Court of Session, and the Court of Session should be empowered to direct the sheriff to do so, where this is desirable because of the importance or complexity of the matters at issue (paragraph 76).

10. The sheriff court should have jurisdiction where the requirements specified in recommendation 7 above are fulfilled and where in addition—

- (a) in a case where jurisdiction is founded on the domicile or habitual residence of the missing person, he resided in the sheriffdom on the date on which he was last known to be alive; and
 - (b) in a case where jurisdiction is founded on the domicile or habitual residence of the pursuer (being the spouse of the missing person), the pursuer was resident in the sheriffdom for a period of not less than forty days ending with the date of raising of the action (paragraph 77).
11. The court should be formally empowered—
- (a) to determine the domicile of the missing person at the date of his death;
 - (b) to determine, as a consequence of the death of the missing person, any question relating to any interest in property;
 - (c) to appoint, where necessary, a judicial factor on the estate of the missing person and to do so, in the case of the sheriff court, whatever the value of the estate (paragraph 79).
12. It should be open to any person who has an interest, personal or patrimonial, to intervene by minute in an action of declarator seeking any determination or appointment not sought by the pursuer (paragraph 80).
13. Where service is to be made upon a person abroad, the *induciae* in the action should be the same as apply in petitions under section 5 of the Divorce (Scotland) Act 1938 (paragraph 83).
14. For the avoidance of doubt, it should be stated that the action of declarator does not come within the ambit of section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 (paragraph 84).
15. Any person who possesses information relating to the survival or death of a missing person and who knows that an action of declarator of the death of that person has been raised or that application for a variation order has been made should have a duty to disclose the information by means of written communication (or in such other manner as may be prescribed by act of sederunt) to the appropriate clerk of court; but there should be no duty to disclose the information where the person possessing it would, if cited as a witness, be entitled to refuse to disclose the information on some ground of privilege, confidentiality etc (paragraphs 89 and 93).
16. A statement by an officer of the Department of Health and Social Security disclosing any facts relevant to an action of declarator should be sufficient evidence of those facts (paragraph 90).
17. Decree in an action of declarator may be varied or recalled by order of the court, on the application of any person with an interest (including the Lord Advocate in the public interest) (paragraph 92).
18. The court should have the same powers in an application for a variation order as in an action of declarator. It should be open to any person with an interest to intervene by minute in the application. Where application is made to the sheriff, he should be entitled to remit the application to the Court of Session, and if so directed by that court should be bound to do so (paragraph 93).

19. A variation order should not of itself entitle any person to recover or claim any property but where such an order has been pronounced, the court should make such further order (if any) in relation to property as it considers fair and reasonable (paragraph 107).
20. Any further order should not extend to income accruing between the date of the decree and the date of the variation order (paragraph 107).
21. The court, in considering what further order should be made, should have regard to the following considerations—
- (a) that in the case of property which is being or has been administered under a trust (as defined), a person claiming right to any such property because of the altered circumstances should be entitled to receive from the trustee in full satisfaction of his claim only such property so far as still in the hands of the trustee and the value of any such property which has been distributed; and
 - (b) that any capital sum paid by an insurer (other than a capital sum paid by way of an annuity) should be repaid to the insurer if it would not have been paid had the facts in respect of which the variation order was pronounced been known at the date of payment (paragraph 107).
22. Where a person enters into a transaction whereby he acquires in good faith and for value any right to or in any property, the transaction is not to be challengeable by any other person on the ground that an order for restoration of that property has been made (paragraph 108).
23. A trustee is to be liable to any person becoming entitled to property by virtue of a court order for any loss suffered by that person on account of breach of trust by the trustee, except in so far as such liability is restricted by the trust deed or statute (paragraph 109).
24. It should not be competent to the court to make an order for the restoration of property (or its value) in consequence of a variation order having been pronounced unless application for recall or variation is made within the period of five years beginning with the date of the decree of declarator of death (paragraph 110).
25. The court may, on application made, direct that the value of any property acquired as a result of a decree of declarator of death shall not be recoverable by virtue of such an order as is referred to in recommendation 19 (paragraph 111).
26. A trustee or other person who has distributed property of the missing person, or property whose transmissibility is affected by his death, must, unless the court otherwise directs, effect a policy of insurance for the satisfaction of any claims which may arise in relation to that property. An insurer making payment of a capital sum as a result of a decree of declarator of death should be entitled to require the payee to effect a policy of insurance to safeguard any claim which may become competent to the insurer (paragraph 112).
27. It is unnecessary to clarify by statute the duty of the Inland Revenue to repay estate duty paid in consequence of a decree of declarator of death proceeding upon erroneous conclusions of fact (paragraph 113).
28. No prescription or limitation of such duty of repayment should be introduced (paragraph 113).

29. A court which recalls or varies a decree of declarator of death should be empowered, where estate duty has been paid in error, to order its repayment to the person entitled to receive repayment (paragraph 113).
30. It should be provided, for the avoidance of doubt, that nothing in the legislation will affect the obligation of any person to whom estate duty is repaid by reason of the reappearance of the missing person to account for the amount of that duty to any other person (paragraph 113).
31. A defence to a charge of bigamy analogous to section 57 of the Offences Against the Person Act 1861 should be introduced into Scots law (paragraph 120).
32. Where a court in any foreign country in which a missing person was domiciled or habitually resident on the date on which he was last known to be alive has declared that he has died or is presumed to have died on a particular day or within a specified period, the decree of that court should be sufficient evidence of these facts in any judicial proceedings in Scotland (paragraph 123).
33. Section 14 of the Entail (Scotland) Act 1882 should be amended to allow application for authority to disentail an entailed estate to be made at any time after the disappearance of the heir in possession. It should also be made clear that the court has a discretion whether or not to authorise the execution of an instrument of disentail, and consequential adjustments should be made to the section (paragraphs 125 and 126).
34. Where the heir in possession of an entailed estate has been declared to be dead, the next heir should be entitled to apply for authority to disentail the estate subject to his giving security to meet any contingent interest of the absent heir in the event of his reappearance within the period of five years beginning with the date of the decree of declarator of death (paragraph 127).
35. If the estate is not disentailed and the absent heir reappears and successfully applies for a variation order within the said period of five years, he should be entitled to resume possession of the estate (paragraph 127).
36. Section 16 of the Entail (Scotland) Act 1882 (which makes provision for the disposal of monies deposited or invested on behalf of an absent heir whose consent to disentail has been dispensed with) should be amended to provide for the destination of the monies being determined according to whether the absent heir is declared to have died before, or on or after, the date of disentail (paragraph 129).
37. The issue by a competent authority within the United Kingdom of a certificate or intimation that a person has died or is presumed to have died or is lost or missing as a result of an incident in connection with a ship or aircraft should allow a person to aver or to depone to belief that the missing person is dead in connection with proceedings for appointment or confirmation as executor of the missing person. This recommendation should apply also in relation to hovercraft and offshore installations (paragraphs 130 and 131).
38. Decrees of declarator of death and variation orders should be treated as decrees altering status for the purposes of section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (paragraph 132).
39. The law on this subject should be embodied in a single comprehensive statute (paragraph 133).

APPENDICES

APPENDIX I

ORGANISATIONS AND INDIVIDUALS WHO COMMENTED ON MEMORANDUM No. 11

Associated Scottish Life Offices
British Insurance Association
Building Societies Association
Committee of Scottish Bank General Managers
Department of Health and Social Security
Faculty of Advocates
General Council of the Bar of England and Wales
Professor G. H. Gordon, University of Edinburgh
Mr H. McN. Henderson, University of Edinburgh
Law Commission
Law Society of Scotland
Sheriff J. A. Lillie
Lloyds
Lord Chancellor's Office
Professor F. MacRitchie, University of Aberdeen
Professor M. C. Meston, University of Aberdeen
New Zealand Law Revision Commission
Registrar General of Births, Deaths and Marriages for Scotland
Registrar General of Shipping and Seamen
The Rt. Hon. Lord Reid of Drem
Royal Faculty of Procurators in Glasgow
Scottish Landowners' Federation
Scottish Law Agents Society
The Sheriffs
Sheriffs-Substitute Association
Society of Solicitors in the Supreme Courts of Scotland
Society of Writers to H.M. Signet

APPENDIX III

PRESUMPTION OF DEATH (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. Action of declarator.
2. Decree in action of declarator.
3. Effect of decree.
4. Recall or variation of decree.
5. Effect on property rights of recall or variation of decree.
6. Insurance against claims.
7. Value of certain rights may be declared irrecoverable.
8. Repayment of estate duty.
9. Disclosure of information.
10. Decree of court furth of Scotland to be sufficient evidence.
11. Appointment or confirmation of executor.
12. Decree alters status.
13. Defence to charge of bigamy.
14. Report of proceedings.
15. Rules of procedure.
16. Entailed estates.
17. Interpretation.
18. Amendment of other enactments.
19. Repeals.
20. Short title and extent.

Schedules

- Schedule 1—Amendment of other enactments.
Schedule 2—Enactments repealed.

Presumption of Death (Scotland) Bill

DRAFT

O F A

BILL

TO

Make fresh provision in the law of Scotland in relation to the presumed death of missing persons; and for purposes connected therewith.

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

Action of
declarator.

1.—(1) Where a person who is missing is with reason thought to have died or has not been known to be alive for a period of at least seven years, any person having an interest may raise an action of declarator of the death of that person (hereafter in this Act referred to as the “missing person”) in the Court of Session or the sheriff court in accordance with the provisions of this section.

(2) An action such as is mentioned in subsection (1) of this section shall in this Act be referred to as an “action of declarator”.

(3) The Court of Session shall have jurisdiction to entertain an action of declarator if and only if—

- (a) the missing person was domiciled in Scotland on the date on which he was last known to be alive or had been habitually resident there throughout the period of one year ending with that date; or
- (b) the pursuer in the action—
 - (i) is the spouse of the missing person, and
 - (ii) is domiciled in Scotland at the date of raising the action or was habitually resident there throughout the period of one year ending with that date.

EXPLANATORY NOTES

Clause 1

1. Clause 1 implements in whole or in part the recommendations (1, 4, 6, 7, 9, 10 and 12) concerning (a) the circumstances in which the Court of Session and the sheriff court may entertain actions of declarator of death, (b) the jurisdictional requirements which must be satisfied, and (c) procedural matters such as the seeking by any interested person of additional findings in an action of declarator and the remission of such an action from the sheriff court to the Court of Session, where issues of importance or complexity arise.

Subsection (1)

2. Subsection (1) sets out the two different sets of circumstances where an action of declarator of death of a missing person may be raised in the Court of Session or in the sheriff court. The first case is where the missing person is with reason thought to have died, and the second where he has not been known to be alive for a period of at least seven years. The first case is discussed in paragraph 60 of the Report. The second case (discussed in paragraphs 35 to 43 of the Report) relates to the circumstances for which provision is at present made by section 3 of the Presumption of Life Limitation (Scotland) Act 1891. The action may be raised by any person having an interest. Any kind of interest, personal or patrimonial, suffices to confer a title to raise the action.

Subsection (2)

3. An action of declarator of death is referred to in the Bill as an “action of declarator”.

Subsection (3)

4. Subsection (3) makes provision for the Court of Session’s jurisdiction to entertain actions of declarator. Jurisdiction may be founded on either (a) the domicile in Scotland of the missing person, or his habitual residence there for a year, at the date on which he was last known to be alive, or (b) in a case where the pursuer in the action is the spouse of the missing person, the pursuer’s domicile in Scotland, or his or her habitual residence there during the year preceding the raising of the action (by service of the summons). These jurisdictional criteria are the same as those now governing petitions for decree of presumption of death and dissolution of marriage in the Court of Session—see section 7(4) of the Domicile and Matrimonial Proceedings Act 1973 and paragraph 2 of Schedule 4 thereto. The reasons for the choice of grounds of jurisdiction in an action of declarator are explained in paragraphs 68 to 72 of the Report.

Presumption of Death (Scotland) Bill

(4) The sheriff court shall have jurisdiction to entertain an action of declarator if and only if—

(a) the provisions of paragraph (a) of subsection (3) of this section are satisfied and the missing person resided in the sheriffdom on the date on which he was last known to be alive; or

(b) the provisions of paragraph (b) of subsection (3) of this section are satisfied and the pursuer was resident in the sheriffdom for a period of not less than forty days ending with the date of raising the action.

(5) Any person having an interest may in an action of declarator lodge a minute seeking the making by the court under section 2 of this Act of any determination or appointment not sought by the person raising the action.

(6) At any stage of the proceedings the sheriff may, of his own accord or on the application of any party to the action, and shall, if so directed by the Court of Session (which direction may be given on the application of any party to the action), remit to the Court of Session an action of declarator raised in the sheriff court where he or, as the case may be, the Court of Session considers such remit desirable because of the importance or complexity of the matters at issue.

EXPLANATORY NOTES

Subsection (4)

5. This subsection makes provision for the jurisdiction of the sheriff court in relation to actions of declarator. The grounds of jurisdiction are the same as those for the Court of Session but, in addition, the missing person must have resided in the sheriffdom on the date on which he was last known to be alive or, in a case where the spouse of the missing person finds upon his or her own domicile or habitual residence, he or she must have been resident in the sheriffdom for a period of not less than forty days ending with the date when the action is raised.

Subsection (5)

6. This subsection enables a person interested in the outcome of an action of declarator to lodge a minute asking the court to make a finding or appointment not sought by the pursuer in the action.

Subsection (6)

7. This subsection makes provision for the remission from the sheriff court to the Court of Session of actions of declarator which raise issues of importance or complexity. The subsection is framed so as to give wide latitude. The action may be remitted from the sheriff court to the Court of Session at any stage of the proceedings and provision is made for it to be remitted by the sheriff on his own initiative, on the application of any party to the action, or on being directed to do so by the Court of Session following an application to that Court by any party to the action.

Presumption of Death (Scotland) Bill

Decree in action
of declarator.

2.—(1) In an action of declarator, the court having heard proof and being satisfied on a reasonable balance of probabilities that the missing person—

(a) has died, shall grant decree accordingly and shall include in the decree a finding as to the date and time of death:

Provided that where it is uncertain when, within any period of time, the missing person died, the court shall find that he died at the end of that period;

(b) has not been known to be alive for a period of at least seven years, shall find that the missing person died at the end of the day occurring seven years after the date on which he was last known to be alive and shall grant decree accordingly.

EXPLANATORY NOTES

Clause 2

1. Clause 2 deals with the standard of proof in an action of declarator; enables and requires the court (that is, the Court of Session or, as the case may be, the sheriff court) to find, where it is satisfied that a person has died or has not been known to be alive for at least seven years, that the person died at a precise time upon a specified date; and confers certain powers upon the court to deal with consequential and ancillary questions arising from the granting of a decree of declarator of death. It also empowers courts generally and statutory tribunals to apply the criteria specified in subsection (1) where the determination of the question whether a person has died is necessary for the decision of any issue before the court or tribunal. The clause implements recommendations 1, 4, 8 and 11.

Subsection (1)

2. Subsection (1) requires the court to grant decree of declarator of death of a missing person where, after hearing proof, it is satisfied on a reasonable balance of probabilities that the missing person (a) has died, or (b) has not been known to be alive for a period of at least seven years. In relation to actions of declarator this effects a significant change in the law. An action of declarator of death is at present competent at common law where a person goes missing in circumstances pointing to his death but the law requires proof of death beyond reasonable doubt. The standard of proof under the Bill is apparently similar to that required in petitions under section 3 of the Presumption of Life Limitation (Scotland) Act 1891—see *Tait v. Sleigh and Others* 1969 S.L.T. 227, per Lord Stott at p. 229.

Paragraph (a) of the subsection makes provision for the case where the court is satisfied as above that a missing person has died. The decree must include a finding as to the date and time of death of the missing person. Where it is uncertain when, within any period of time, the missing person died, the court is required by the proviso to paragraph (a) to find that he died at the end of the period. This is intended to deal with the situation where it is apparent that a person has not survived some hazardous enterprise, but it is difficult or impossible to say exactly when he died.

Paragraph (b) of the subsection relates to the case where the court is satisfied as above that a missing person has not been known to be alive for a period of at least seven years. Here the court is required to find that he died at the end of the day occurring seven years after the date on which he was last known to be alive. The corresponding provision in section 3 of the 1891 Act is that the court should find that the missing person died on the day occurring seven years after the date on which he was last known to be alive, but paragraph (b), by providing that the person should be found to have died at the end of that day, may serve to avoid difficulties in the exceptional case where the exact time of death is material.

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(2) The court, in granting decree under subsection (1) of this section, shall have power to—

- (a) determine the domicile of the missing person at the date of his death;
- (b) determine, as a consequence of the death of the missing person, any question relating to any interest in property;
- (c) appoint a judicial factor on the estate of the missing person notwithstanding (in relation to such an appointment by the sheriff) what the value of the estate may be.

(3) Where, for the purpose of deciding any issue before it, a court or statutory tribunal has to determine any incidental question as to the death of a person, the court or tribunal may, if it thinks fit, determine that question (but for the purpose only of deciding that issue); and in the determination of that question the court or tribunal shall apply the criteria set out in subsection (1) of this section.

**Effect of
decree.**

3.—(1) Where an appeal against decree in an action of declarator has been withdrawn or refused, or where no such appeal has been made within the time allowed for appeal, then, subject to the provisions of this section and sections 4 and 5 of this Act, the decree shall be conclusive of the matters contained in the decree and shall, without any special form of words, be effective against any person and for all purposes including the dissolution of a marriage to which the missing person is a party and the acquisition of rights to or in property belonging to any person.

(2) Decree in an action of declarator shall not determine a substantive question which is properly referable to a foreign law otherwise than in accordance with that law.

EXPLANATORY NOTES

Subsection (2)

3. Subsection (2) confers upon the court power to determine questions relating to rights of succession to property resulting from the death of a missing person and to appoint a judicial factor for the protection of his estate. (The sheriff may appoint a judicial factor whatever the value of the estate.) The purpose of these provisions is to allow all the consequential issues arising from the death of a missing person to be determined in a single action and avoid the necessity of further litigation after the decree of declarator of death has been granted.

Subsection (3)

4. Subsection (3) empowers any court or statutory tribunal to determine by application of the criteria specified in subsection (1) the question whether or not a person is dead, where this is necessary for the decision of any issue before the court or tribunal. The determination is, of course, effective only for decision of that particular issue.

Clause 3

1. The broad effect of clause 3 (which implements recommendations 1, 3 and 5) is to make a decree of declarator of death, subject to certain exceptions, effective against all persons and for all legal purposes, for example, as regards the dissolution of any marriage of the missing person, succession to his estate and the right to pensions and annuities arising in consequence of his death. This is markedly different from the present law. Decree under section 3 of the Presumption of Life Limitation (Scotland) Act 1891 is effective only for purposes of succession, and decree under section 5 of the Divorce (Scotland) Act 1938 only for dissolution of marriage. The provision made by clause 3 is subject to the later provisions of the Bill relating to recall or variation of a decree of declarator of death and the consequences of such recall or variation.

Subsection (1)

2. Subsection (1) provides that where decree in an action of declarator has become final it will "be effective against any person and for all purposes". For the avoidance, however, of any doubt there is specific mention of the dissolution of any marriage of the missing person and the acquisition of property rights. The subsection refers to the acquisition of rights to or in property belonging to any person to cater for all cases where the transmission of property rights is affected by the death or date of death of the missing person. The effects of the subsection are qualified by clause 4 (which provides for variation or recall of decrees) and clause 5 (which provides for the adjustment of property rights where a decree of declarator of death has been varied or recalled within five years of the date when it was granted). Moreover, subsections (2) and (4) of clause 3 make particular exceptions to the universal effect of a decree of declarator of death.

Subsection (2)

3. This subsection is directed at the problem discussed in paragraphs 55 to 57 of the Report, that is, the effect of a decree of declarator of death where the question at issue is governed by the law of a foreign system. The conclusion in the Report is that the proposed rules of law in relation to presumption of death should be applicable where (and only where) an issue is governed by the law of Scotland. Accordingly, where an issue is governed by the law of a foreign system, no finding of death (or finding consequential thereon) is to receive effect in relation to the determination of that issue if to do so would conflict with the proper law.

Presumption of Death (Scotland) Bill

(3) Where a marriage to which the missing person is a party has been dissolved by virtue of decree in an action of declarator, the dissolution of the marriage shall not be invalidated by the circumstance that the missing person was in fact alive at the date specified in the decree as the date of death.

(4) Where the missing person or any other person has committed any crime or offence, the responsibility of that person therefor shall not be affected by the circumstance that decree in an action of declarator has been granted if the missing person was in fact alive at the date specified in the decree as the date of death.

EXPLANATORY NOTES

Subsection (3)

4. Subsection (3) provides that the fact that the missing person was alive at the date specified in the decree in an action of declarator will not invalidate the dissolution of any marriage of the missing person by virtue of the decree. The dissolution is thus irreversible and will be unaffected by the subsequent return of the missing person. In such a case, however, it would be possible for the person who was previously missing and his former spouse (if still unmarried) to remarry. The reasons for the provision are discussed in paragraphs 114 to 116 of the Report.

Subsection (4)

5. This subsection qualifies the general operation of the decree in an action of declarator in relation to the criminal responsibility of the missing person, if he should in fact be alive, or of any other person. The provision ensures that the decree can afford no defence to a missing person for crimes committed by him either before or after the declared date of his death or to any other person for crimes committed by him against the missing person after that date.

Presumption of Death (Scotland) Bill

Recall or
variation
of decree.

4.—(1) Decree in an action of declarator may, on application made at any time by any person having an interest (including the Lord Advocate for the public interest), be varied or recalled by an order of the court which granted the decree or, in a case to which subsection (4) of this section applies, by an order of the Court of Session.

An order of the court pronounced under this subsection is hereafter in this Act referred to as a “variation order”.

(2) By a variation order the court may make any determination or appointment referred to in section 2 of this Act.

(3) Any person having an interest may in an application for a variation order lodge a minute seeking the making by the court of any determination or appointment referred to in section 2 of this Act which has not been sought by the person making the application for the variation order.

(4) At any stage of the proceedings the sheriff may, of his own accord or on the application of any party to the proceedings, and shall, if so directed by the Court of Session (which direction may be given on the application of any party to the proceedings), remit to the Court of Session an application made in the sheriff court for a variation order where he or, as the case may be, the Court of Session considers such remit desirable because of the importance or complexity of the matters at issue.

(5) Nothing in this section shall operate so as to revive a marriage of the missing person dissolved by virtue of decree in an action of declarator.

EXPLANATORY NOTES

Clause 4

1. Clause 4 deals with the machinery for recall or variation of a decree of declarator of death. It implements recommendations 17 and 18, and its usual application would be where, subsequent to the date of the decree, the missing person is found either to be alive or to have died at a later date than that specified in the decree. Application for an order varying or recalling a decree may be made by any person having an interest (that is, a person belonging to the class empowered to raise actions of declarator) including the Lord Advocate for the public interest. The court is given the same range of powers as it enjoys in relation to an action of declarator. (It is thought that an application for an order varying or recalling a decree may sometimes raise matters of greater importance or complexity than the original action of declarator.) An order varying or recalling a decree of declarator of death is referred to in the Bill as a variation order.

Subsection (1)

2. This subsection makes provision for application for a variation order being made by any person having an interest (including the Lord Advocate for the public interest). Application must be made to the court which granted the decree as (except in a case where subsection (4) applies) it is that court alone which has power to vary or recall it.

Subsections (2), (3) and (4)

3. These subsections simply confer upon the court the same powers as it enjoys under clause 1(5) and (6) and clause 2(2) in relation to an action of declarator. The reason for the provisions is referred to in paragraph 93 of the Report.

Subsection (5)

4. This subsection is complementary to clause 3(3) and makes clear that even where a decree of declarator of death has been varied or recalled, this will have no effect upon the dissolution by the decree of any marriage.

Presumption of Death (Scotland) Bill

Effect on
property rights
of recall or
variation of
decree.

5.—(1) Subject to the following provisions of this section, a variation order shall have no effect on rights to or in any property acquired as a result of a decree under section 2 of this Act.

(2) Notwithstanding the generality of subsection (1) of this section, where a decree under section 2 of this Act has been varied or recalled by a variation order, the court shall make such further order, if any, in relation to any rights to or in any property acquired as a result of that decree as it considers fair and reasonable in all the circumstances of the case; but no such further order shall affect any income accruing between the date of that decree and the date of the variation order.

(3) In considering what further order shall be made in accordance with the provisions of subsection (2) of this section, the court shall, so far as practicable in the circumstances, have regard to the following considerations, namely:—

- (a) that, in the case of any property which is being or has been administered under a trust, any person who on account of the variation order would, apart from subsection (1) of this section, have been entitled to rights to or in any such property, or any person deriving right from him, shall be entitled to have made over to him by the trustee in full satisfaction of these rights only—
 - (i) the said rights to or in any such property or other property for the time being representing it which is still in the hands of the trustee at the date of the variation order, and
 - (ii) the value, as at the date of distribution, of the said rights to or in any such property which has been distributed;
- (b) that any capital sum paid by an insurer as a result of the said decree (other than a capital sum which has been distributed by way of an annuity or other periodical payment) shall be repaid to the insurer if that sum would not have been paid if the facts in respect of which the variation order was pronounced had been known at the date of the said decree.

EXPLANATORY NOTES

Clause 5

1. Clause 5 deals with the effect on property rights of the recall or variation of a decree of declarator of death. It implements recommendations 19 to 24. The general scheme of the clause is to provide that a variation order will, in itself, have no effect on property rights acquired as a result of the decree, and to empower the court to make a further order for the redistribution of property rights in the light of the altered situation. The clause also deals with consequential matters such as protection of the rights of third parties and the liability of trustees for negligent administration of an estate in a question with any person becoming entitled to any part of the estate by virtue of an order under the clause.

Subsection (1)

2. Subsection (1) provides that subject to the provisions of the clause a variation order will have no effect on property rights acquired as a result of a decree of declarator of death.

Subsection (2)

3. This subsection and subsection (3) form the main part of the clause and give effect to the conclusions in paragraph 107 of the Report on the matters discussed in paragraphs 95 to 107. Subsection (2) directs the court, in a case where there has been a variation or recall of a decree of declarator of death, to make any further order which it considers fair and reasonable in all the circumstances of the case for the redistribution of property rights. Income which has accrued between the date of the decree of declarator and the date of the variation order cannot be the subject of an order under the subsection.

Subsection (3)

4. Subsection (3) directs the court to have regard to two considerations in considering what further order should be made under subsection (2). The first of those considerations is that in the case of any property which is being or has been administered under a trust (and as trust is widely defined in subsection (8) this consideration will apply to the great majority of cases) any entitlement to property which is to receive recognition in an order under subsection (2) should be fully satisfied by (a) the surrender by the trustee of the property to the entitled party (where it is still in the trustee's possession), or (b) the payment by the trustee of the value as at the date of distribution of the property, if it has been distributed. The second consideration to which the court is to have regard is that any sum (other than an annuity) paid by an insurer as a result of the decree of declarator of death should be repaid to the insurer if the sum would not have been paid if the facts on which the variation order proceeded had been known at the date of the decree.

Presumption of Death (Scotland) Bill

(4) The court shall not make a further order under subsection (2) of this section unless application for the variation order has been made to the court within the period of five years beginning with the date of the decree under section 2 of this Act.

(5) Where any person who has acquired rights to or in any property as a result of a decree under section 2 of this Act, or any person deriving right from him, enters into a transaction with another person whereby that other person acquires in good faith and for value any right to or in that property or any part of it, the transaction and any title acquired under it by that other person shall not be challengeable on the ground that an order under subsection (2) of this section has been made in relation to that property.

(6) The trustee shall be liable to any person having entitlement by virtue of an order under subsection (2) of this section for any loss suffered by that person on account of any breach of trust by the trustee in the administration or distribution of the whole or any part of the property except in so far as the liability of the trustee may be restricted under any enactment or by any provision in any deed regulating the administration of the trust.

(7) In this and the next following section, "insurer" includes a society registered under the Acts relating to friendly and industrial and provident societies and any person or body which provides for the payment of benefits on the death of another person.

(8) In this section, "trust" means—

(a) any trust or executry for the administration of property which comes into operation as a result of a decree under section 2 of this Act, or

(b) any trust under which property devolves upon or is transmitted to any person by reason of the death of the missing person;

and in this and the two next following sections, "trustee" means the trustee, executor, judicial factor or other person administering any such property.

(9) Nothing in this section shall apply to estate duty which falls to be repaid as a result of a variation order having been pronounced.

EXPLANATORY NOTES

Subsection (4)

5. This subsection permits the court to make an order under the clause in consequence of a variation order having been pronounced only where application for the variation order has been made within the period of five years beginning with the date of the decree of declarator sought to be varied or recalled. The reasons for the choice of a five year period are discussed in paragraph 110 of the Report.

Subsection (5)

6. The purpose of this subsection is to protect persons (such as security holders and lessees) who have acquired in good faith rights in property from a person succeeding to the property in consequence of a decree of declarator of death. If there is a subsequent transfer of the property as a result of an order under the clause, the missing person or other person succeeding to the property in consequence of the order will be prevented by the subsection from challenging the validity of the title of the security holder or lessee (or otherwise as the case may be).

Subsection (6)

7. This subsection ensures that a person acquiring right to property by an order under the clause will have the remedies of a beneficiary for any loss caused by any unauthorised or negligent act or omission on the part of a trustee in his intromissions with the property. In a case where the trustee's liability is qualified by any provision in the trust deed, the trustee's right to the protection afforded by the provision is preserved. The protection afforded to trustees by enactments such as sections 32 and 33 of the Trusts (Scotland) Act 1921 is also preserved.

Subsections (7) and (8)

8. These subsections simply define three expressions used in the Bill—"insurer", "trust" and "trustee". It may be noted that "trust" is defined widely to include any trust or executry which comes into being as a result of, or which is affected by, a decree of declarator of death, and that "trustee" is correspondingly widely defined.

Subsection (9)

9. This subsection disapplies the whole provisions of the clause as regards claims for recovery of estate duty arising from a variation order having been pronounced.

Presumption of Death (Scotland) Bill

Insurance
against claims.

6.—(1) Where decree has been granted under section 2 of this Act then, unless the court otherwise directs, the trustee shall as soon as may be effect a policy of insurance in respect of any claim which may arise by virtue of an order under section 5(2) of this Act.

(2) Any premium payable by the trustee in respect of a policy of insurance effected under subsection (1) of this section shall be a proper charge on the estate being administered by the trustee.

(3) Where decree has been granted under section 2 of this Act, an insurer may, before making payment of any capital sum (other than in respect of an annuity or other periodical payment) to any person as a result of that decree, require that person to effect in his own name for the benefit of that insurer a policy of insurance to satisfy any claim which that insurer may establish against that person in the event of a variation order being pronounced.

Value of
certain rights
may be declared
irrecoverable.

7. Where decree has been granted under section 2 of this Act, the court may—

(a) on the application of—

(i) any person whom the missing person would at the time of the making of the said application (apart from the said decree) have had a duty (other than a contractual duty) to aliment, or

(ii) the trustee, and

(b) subject to such conditions, if any, as it thinks fit,

then or at any time thereafter make an order directing that the value of any rights to or in any property acquired as a result of the said decree shall not be recoverable by virtue of an order of the court under section 5(2) of this Act.

EXPLANATORY NOTES

Clause 6

1. This clause implements recommendation 26.

Subsection (1)

2. Subsection (1) requires that where a decree of declarator of death has been granted the trustee administering any trust which comes into being as a result of, or which is affected by, the decree must (unless the court otherwise directs) effect a policy of insurance to meet any claim which may arise by virtue of an order under clause 5. The power of the court to dispense with insurance is intended chiefly to safeguard against the exceptional case where for one reason or another the trustee is unable to comply with the requirement.

Subsection (2)

3. This subsection permits the premium for the insurance policy taken out by the trustee to be chargeable against the estate being administered by him.

Subsection (3)

4. This subsection empowers an insurer, before making payment of a capital sum as a result of a decree of declarator of death, to require the prospective payee to effect a policy of insurance to protect any claim which the insurer may have in the event of a variation order being pronounced. Such a claim can, of course, arise only where application for the variation order is made within the period of five years specified in clause 5(4).

Clause 7

This clause implements recommendation 25 and empowers the court to make at any time an order directing that the value of any property rights acquired as a result of a decree of declarator of death shall not be recoverable by virtue of an order under clause 5. An order under the clause may be made on the application of any person whom the missing person would have been under a non-contractual obligation to aliment or of the trustee. It is doubtful whether the provision will often be invoked but the case for its inclusion is set out in paragraph 111 of the Report.

Presumption of Death (Scotland) Bill

Repayment of
estate duty.

8. Where estate duty falls to be repaid as a result of a variation order having been pronounced—

- (a) the court which pronounced the variation order may order the estate duty to be repaid to the person entitled to receive repayment;
- (b) nothing in this Act shall affect the obligation of any person to whom the duty is repaid to account for the amount of the duty to any other person.

Disclosure of
information.

9.—(1) Any person who possesses information relating to the survival or death of the missing person and who is aware that an action of declarator has been raised or an application for a variation order has been made shall have a duty to disclose that information—

- (a) by means of written communication to the Principal Clerk of Session or, as the case may require, the sheriff clerk of the appropriate sheriffdom, or
- (b) in such other manner as may be prescribed by act of sederunt.

(2) Nothing in this section shall impose any duty to disclose information where the person possessing the information would, if cited as a witness or haver, have been entitled to refuse to disclose such information under any rule of law or practice relating to the privilege of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest.

(3) A statement purporting to be an instrument made or issued by or on behalf of the Secretary of State for Social Services and disclosing to the court facts relating to an action of declarator which has been raised or an application for a variation order which has been made in that court shall be sufficient evidence of those facts.

EXPLANATORY NOTES

Clause 8

This clause, which implements recommendations 29 and 30, empowers the court which pronounced a variation order to order estate duty falling to be repaid in consequence thereof to be repaid "to the person entitled to receive repayment". That person is placed under obligation to account for the sum repaid to any other person e.g. a beneficiary under a trust.

Clause 9

1. This clause is concerned with the duty of disclosure of information relating to the survival or death of a missing person in respect of whom an action of declarator has been raised, or an application for a variation order made. The clause is general in its terms and requires any person who has such information to disclose it to the Court of Session or (as the case may be) to the sheriff court in which the action has been raised or the application made. Subsection (2) preserves pleas of privilege and confidentiality etc., and subsection (3) deals with the sufficiency of evidence of a statement made by or on behalf of the Secretary of State for Social Services. The clause implements recommendations 15 and 16 and is based upon the conclusions in paragraphs 86 to 90 of the Report.

Subsection (1)

2. This subsection imposes a duty upon any person who possesses information relating to the survival or death of a missing person and who knows that an action of declarator relating to that person has been raised or an application for a variation order relating to him made, to communicate the information in writing to the court in which the action has been raised or the application made. There is provision for altering by act of sederunt the method by which the information is to be communicated to the court.

Subsection (2)

3. This subsection releases from the obligation of disclosure any person who, if he had been cited as a witness or a haver in court proceedings, would have been entitled to resist disclosure of the information on some ground of privilege or confidentiality or public interest. Accordingly, there can be no higher duty of disclosure than that which would arise if the person were cited in a court action.

Subsection (3)

4. This subsection provides that a statement bearing to be issued by or on behalf of the Secretary of State for Social Services (that is, a statement issuing from the Department of Health and Social Security) disclosing to the court facts relating to an action of declarator or to an application for a variation order will be sufficient (but not conclusive) evidence of those facts. The statement will accordingly constitute proof of its authenticity and contents without oral evidence or corroboration although it may, of course, be challenged.

Presumption of Death (Scotland) Bill

Decree of court
furth of
Scotland to
be sufficient
evidence.

10. Where a court in any country furth of Scotland in which a person was domiciled or habitually resident on the date on which he was last known to be alive issues a decree or judgment declaring that that person has died or is presumed to have died, or has died or is presumed to have died on a specified date or within a specified period, that decree or judgment shall, in any proceedings in Scotland, be sufficient evidence of the facts so declared.

Appointment
or confirmation
of executor.

11.—(1) Where, in proceedings for the appointment or confirmation of an executor of any person, a document to which subsection (2) of this section refers is produced, an oath or affirmation that to the best of the deponent's knowledge and belief that person is dead shall, for the purposes of those proceedings, be equivalent to an oath or affirmation that that person has died or died at any place or on any date appearing in such document as the place or date at or on which he died or was presumed to have died or was lost or missing.

(2) This subsection refers to the following documents, that is to say—

- (a) a duly certified copy of a decree or judgment such as is referred to in section 10 of this Act;
- (b) a certificate or intimation issued by or on behalf of a competent authority within the United Kingdom that the person—
 - (i) has died,
 - (ii) is presumed to have died, or
 - (iii) is lost or missing in circumstances affording reasonable ground for the belief that he has died,

as a result of an incident in or in connection with a ship, aircraft, hovercraft or off-shore installation.

(3) Notwithstanding any provision in or under any enactment, it shall not be necessary, in any petition for appointment as executor of any person in regard to whom a duly certified copy of such a decree or judgment as aforesaid or such a certificate or intimation as aforesaid is produced with the petition, to aver that the person died at any specified place or on any specified date, but it shall be sufficient to aver that the duly certified copy of the decree or judgment or (as the case may be) the certificate or intimation is produced and that to the best of the petitioner's knowledge and belief the person is dead.

EXPLANATORY NOTES

Clause 10

This clause, which implements recommendation 32, provides that certain foreign decrees declaring that a person has died or is presumed to have died shall be sufficient evidence of the facts so declared. Accordingly any such decree will, in the absence of successful challenge, constitute proof of the findings therein. A foreign decree is given recognition under clause 10 if it is pronounced by the court of the domicile or habitual residence of the person to whom the decree relates on the date on which he was last known to be alive. These jurisdictional requirements are comparable to those specified in clause 1(3)(a) in relation to actions of declarator in the Court of Session.

Clause 11

Clause 11 implements recommendation 37. It makes provision for the situation where a person wishes to apply for appointment or confirmation as executor of another person who is reported or presumed to be dead, or is lost or missing in circumstances from which death can be inferred. As there would be no absolute certainty of death the person applying for appointment or confirmation as executor would or might be unable to aver or to affirm (as he is required to do) the fact, place and time of death—see Currie, *Confirmation of Executors in Scotland*, 7th edition (1973) at p. 124; Act of Sederunt (Confirmation of Executors) 1964 (S.I. 1964/1143), Schedule 2. The clause makes it sufficient in such a case for the applicant to aver or to affirm that he believes the missing person to be dead, provided that there is produced with the application (or petition) a certified copy of a decree or judgment to which clause 10 applies or a certificate or intimation issued by a competent authority within the United Kingdom that the missing person has died, is presumed to have died, or is lost or missing in circumstances affording reasonable ground for belief in his death, because of some happening in connection with a ship, aircraft, hovercraft or off-shore installation. The expression “a competent authority within the United Kingdom” is not defined, but the expression is readily intelligible by reference to the statutory provisions relating to ships, aircraft etc. For example, a “competent authority” in relation to deaths or losses from ships would be the Registrar General of Shipping and Seamen—see the Merchant Shipping Act 1970, sections 72 and 92, and the Merchant Shipping (Returns of Births and Deaths) Regulations 1972 (S.I. 1972/1523).

Presumption of Death (Scotland) Bill

Decree alters
status.

1965 c.49.

12. A decree under section 2 of this Act and a variation order shall each be treated as a decree altering the status of a person for the purposes of section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

Defence to
charge of
bigamy.

13. It shall be a defence against a charge of bigamy for the accused to prove that at no time within the period of seven years immediately preceding the date of the purported marriage forming the substance of the charge had he any reason to believe that his spouse was alive.

Report of
proceedings.
1926 c.61.

14. For the avoidance of doubt, it is hereby declared that section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 does not apply to an action of declarator.

Rules of
procedure.
1933 c.41.
1971 c.58.

15.—(1) The powers conferred on the Court of Session by section 16 of the Administration of Justice (Scotland) Act 1933 and section 32 of the Sheriff Courts (Scotland) Act 1971 shall include power to make rules of procedure for the purpose of giving effect to the provisions of this Act.

(2) Such rules of procedure shall include provisions—

- (a) specifying the persons upon or to whom service or intimation of the summons or initial writ in an action of declarator or of an application for a variation order is to be made; and
- (b) relating to advertisement of the said action or application.

EXPLANATORY NOTES

Clause 12

Section 48 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides that where a court has granted a decree altering the status of any person, the clerk of court must notify the import of the decree to the Registrar General of Births, Deaths and Marriages. By providing that a decree in an action of declarator and a variation order will each be treated as a decree altering status for the purposes of section 48 of the 1965 Act, clause 12 secures the result that every such decree and order will be notified to the Registrar General of Births, Deaths and Marriages. The clause implements recommendation 38.

Clause 13

This clause implements recommendation 31. It creates a defence to a charge of bigamy where, at the time of the bigamous marriage, seven years or more had elapsed since the accused had any reason to believe that his spouse was alive. The defence is in substance the same as that provided by section 57 of the Offences against the Person Act 1861 (which does not apply to Scotland).

Clause 14

Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 places restrictions on the publication of particulars in relation to *inter alia* "judicial proceedings for dissolution of marriage". The policy is that actions of declarator should be given as wide publicity as possible, and the purpose of the clause is to exclude any possibility, in a case where the action relates to a missing person who is married, of the proceedings being subject to the restrictions imposed by section 1(1)(b) of the 1926 Act. The clause implements recommendation 14.

Clause 15

This clause applies section 16 of the Administration of Justice (Scotland) Act 1933 (power of the Court of Session to regulate its own procedure) and section 32 of the Sheriff Courts (Scotland) Act 1971 (power of the Court of Session to regulate civil procedure in the sheriff court) for the purpose of giving effect to the provisions of the Bill. The court is specifically directed to make provision as regards (a) service and intimation of actions of declarator and applications for variation orders, and (b) advertisement of actions and applications. The Commission's views on service, intimation and advertisement are contained in paragraphs 81 to 84 of the Report.

Presumption of Death (Scotland) Bill

Entailed
estates.

16.—(1) The following provisions of this section shall apply where decree has been granted under section 2 of this Act declaring the death of the missing person who is the absent heir in possession of an entailed estate.

(2) In the circumstances set out in subsection (1) of this section, the next heir may apply to the court for authority to disentail the estate and the court may make it a condition of granting such authority that the next heir gives security of such amount and in such manner as the court may direct to meet any contingent interest of the absent heir if he shall reappear and, within the period of five years beginning with the date of the said decree, application for the relative variation order shall be made.

(3) Where, in the circumstances set out in subsection (1) of this section—

(a) the estate has not been disentailed,

(b) the absent heir reappears,

(c) application for the relative variation order is made within the period of five years beginning with the date of the said decree, and

(d) the relative variation order is pronounced,

then, notwithstanding section 5 of this Act, the absent heir who reappears shall be entitled to resume possession of the estate but shall not be entitled to recover the fruits or income of the estate from any following heir in respect of the period of that heir's possession.

(4) In this section, "the court" means the Court of Session.

EXPLANATORY NOTES

Clause 16

Clause 16 implements recommendations 34 and 35. It is concerned with the case where the missing person who is declared to be dead is the absent heir in possession of an entailed estate. First, the clause provides (in subsection (2)) that the next heir may at any time after the granting of the decree apply to the court—the Court of Session—for authority to disentail the estate. If, however, the application is made within the period of five years immediately following the date of the decree, the court may make it a condition of granting authority to disentail that the applicant give security (of such amount and in such manner as the court may direct) to meet any contingent interest of the absent heir. (This interest will emerge only if the absent heir reappears and applies for a variation order within the above-mentioned period of five years.) Second, the clause provides that where the estate has not been disentailed and the absent heir reappears and successfully applies for a variation order within the period of five years beginning with the date of the decree of declarator of his death, he may resume possession of the estate. He has, however, no claim against any other heir for income of the estate in respect of the period of that heir's possession.

Presumption of Death (Scotland) Bill

- Interpretation. 17. In this Act, the following expressions shall, unless the context otherwise requires, have the meanings hereby respectively assigned to them—
- “action of declarator” has the meaning assigned to it by section 1 of this Act;
 - “the court” means the Court of Session or the sheriff;
 - “missing person” has the meaning assigned to it by section 1(1) of this Act;
 - “statutory tribunal” means a tribunal established under any enactment;
 - “variation order” has the meaning assigned to it by section 4(1) of this Act.
- Amendment of other enactments. 18. The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments specified in that Schedule.
- Repeals. 19. The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.
- Short title and extent. 20.—(1) This Act may be cited as the Presumption of Death (Scotland) Act 1974.
- (2) This Act shall extend to Scotland only.

EXPLANATORY NOTES

Clause 17

Clause 17 contains definitions of certain expressions used in the Bill. Reference has already been made to almost all those expressions in these explanatory notes.

Clause 18

Clause 18 introduces Schedule 1 to the Bill. That Schedule amends sections 14 and 16 of the Entail (Scotland) Act 1882 and section 5 of the Sheriff Courts (Scotland) Act 1907. The purpose and effect of the amendments are explained in the notes to the Schedule.

Clause 19

This clause introduces Schedule 2 to the Bill. That Schedule specifies the enactments repealed. The enactments are in the main those which have been superseded by the Bill.

Clause 20

Subsection (1) contains a provision in common form as to short title. Subsection (2) deals with the territorial application of the Bill.

Presumption of Death (Scotland) Bill

SCHEDULES

Section 18.

SCHEDULE 1

AMENDMENT OF OTHER ENACTMENTS
THE ENTAIL (SCOTLAND) ACT 1882 (c.53)

In section 14, after the words “possession, and may” there shall be inserted the words “if it thinks fit”.

For section 16 there shall be substituted the following section:—

“Provision for disposal of fund deposited or invested.

16. Where an heir whose consent to an application for disentail has been dispensed with under section 15 of this Act is by virtue of a decree under section 2 of the Presumption of Death (Scotland) Act 1974 declared to have died then, if the date of death is declared to have been—

- (a) prior to the date of disentail, the sum deposited or invested under the said section 15 together with accrued interest shall be paid to the heir or to the heirs according to their respective interests (or to his or their representatives) whose consent to the application for disentail would have been required if that application had been made at the date of disentail and if at that date the death of the heir whose consent has been dispensed with as aforesaid had been legally established;
- (b) on or after the date of disentail, the said sum and interest shall form part of his estate.”

THE SHERIFF COURTS (SCOTLAND) ACT 1907 (c.51).

In section 5, after subsection (1) there shall be inserted the following subsection—

“(1A) actions of declarator under section 1 of the Presumption of Death (Scotland) Act 1974.”

EXPLANATORY NOTES

Schedule 1

Schedule 1 amends sections 14 and 16 of the Entail (Scotland) Act 1882 and section 5 of the Sheriff Courts (Scotland) Act 1907.

The insertion in the first paragraph of section 14 of the 1882 Act of the words "if it thinks fit" is intended to make clear that the power of the court under that section to authorise the execution of an instrument of disentail may be exercised at its discretion. (See paragraph 125 and recommendation 33.)

Section 16 of the 1882 Act deals with the disposal of any deposited or invested fund representing the value of the interest or expectancy of an absent heir whose consent to the disentail of an estate has been dispensed with under section 15 of the Act. The principles on which section 16 is framed do not accord with the recommendations in the Report, and the Schedule substitutes a new section 16. The new section presupposes that a decree of declarator of death of the absent heir will be obtained. If the date of death specified in the decree is earlier than the date of disentail, the fund is to be paid to the heir or heirs whose consent to the disentail would have been required if the application for disentail had been made at the date of disentail and if at that date it had been known that the absent heir was dead. If, on the other hand, death has been found to occur on or after the date of disentail, the fund is to be paid into the estate of the heir declared to be dead. (See paragraph 129 and recommendation 36.)

In terms of section 5 of the Sheriff Courts (Scotland) Act 1907 (which relates to the jurisdiction of the sheriff court), there are excluded from the jurisdiction of the sheriff court "actions the direct or main object of which is to determine the personal status of individuals". The insertion of a reference to actions of declarator in section 5 ensures that such actions are formally brought within the jurisdiction of the sheriff court.

Presumption of Death (Scotland) Bill

SCHEDULE 2

Section 19.

ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
45 & 46 Vict. c.53	The Entail (Scotland) Act 1882.	In section 14, the words "for a period of seven years", "and that there is no evidence that such heir in possession has been in life during the preceding seven years", "subject to the provisions of the Presumption of Life Limitation (Scotland) Act 1891", "for any shorter period than seven years" and "under the provisions of the Presumption of Life Limitation (Scotland) Act 1891, or otherwise".
54 & 55 Vict. c.29	The Presumption of Life Limitation (Scotland) Act 1891.	The whole Act.
1 & 2 Geo. 6. c.50.	The Divorce (Scotland) Act 1938.	Section 5.
1973 c.45.	The Domicile and Matrimonial Proceedings Act 1973.	Section 7(1) (b) and (4). In Schedule 4, paragraph 2.

EXPLANATORY NOTES

Schedule 2

Schedule 2 repeals certain enactments. Except for the repeal of certain words in section 14 of the Entail (Scotland) Act 1882, the repeals are of enactments which are superseded by the Bill. Section 14 of the 1882 Act creates a procedure for the appointment of a factor *loco absentis* to the absent heir in possession of an entailed estate and for the disentail and sale of the estate. The section cannot operate, however, until the absent heir has been absent or has disappeared "for a period of seven years". The effect of the amendments to the first paragraph of section 14 is to enable application for the appointment of a factor and for disentail and sale of the estate to take place at any time after the disappearance of the absent heir. Certain consequential amendments are made to the second and third paragraphs of the section. (See paragraphs 125 and 126 and recommendation 33.)

Decree in an action of declarator is to have effect (subject to certain specified exceptions) for all legal purposes including rights of succession to any property and the dissolution of any marriage of the person declared to be dead. Accordingly, the Presumption of Life Limitation (Scotland) Act 1891 and section 5 of the Divorce (Scotland) Act 1938 (which relates to dissolution of marriage on the ground of presumed death), including that section as amended by section 7 of, and paragraph 2 of Schedule 4 to, the Domicile and Matrimonial Proceedings Act 1973, are entirely superseded and are therefore repealed.

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