THE LAW REFORM COMMISSION

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REPORT ON RESTITUTION OF CONJUGAL RIGHTS, JACTITATION OF MARRIAGE AND RELATED MATTERS

IRELAND

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CHAPTER 1 THE PRESENT LAW RELATING TO RESTITUTION OF CONJUGAL RIGHTS

The Present Law

One of the primary obligations of spouses is the duty to cohabit. The wrongful failure to do so will disentitle the spouse who is in desertion to maintenance[1] and succession[2] rights and to the protection against vindictive dispositions of the family home afforded to spouses by the Family Home Protection Act 1976[3].

Nevertheless, desertion is not a ground for divorce a mensa et thoro[4]. Where one spouse deserts another, the spouse who has been deserted may avail himself or herself of the right to take proceedings for the restitution of conjugal rights[5].

Where the spouses continue to cohabit, no proceedings may be taken, even though either spouse is refusing to have marital relations with the other[6]. Conversely, where the respondent

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1 Family Law (Maintenance of Spouses and Children) Act 1976, sections 5(2), 6(2) (no. 11). See Shatter, 272-277.

2 Succession Act 1965, section 120 (No. 27). See Shatter, 355.

3 Section 4 of the Act (No. 27). See Shatter 329.

4 Cf. Duncan, Desertion and Cruelty in Irish Matrimonial Law, 7 Ir. Jur (N.S.) 213, at 218 (1972).

5 See generally, Shatter, 88-90, Kisbey, ch. 5, Browne, 261-262, Shelford, 574-582, Burn, vol. 2, 500b-500d, Rogers, 823-825, Poynter, ch. 17, Geary, 371-378, 565-566, MacQueen, 210-211.

6 Orme v Orme, 2 Add. 382, 162 E.R. 335 (1824). The Court noted (at 385 and 336, respectively) that "[m]atrimonial intercourse may be broken off on considerations (of health, for instance, and there may be other) with which it is quite incompetent to this Court to interfere". It is clear, however, that, even if there was no good reason for the refusal to have marital relations, proceedings for restitution of conjugal rights will not lie. Such conduct may be cruelty, entitling the other spouse to a divorce a mensa et thoro.

refuses to live with the petitioner, he (or she) will not be excused by supplying or offering to supply the petitioner with comfortable accommodation and financial support[7].

Before filing a petition for the restitution of conjugal rights the petitioner must have made upon the respondent a written demand[8] for cohabitation and restitution of conjugal rights, and have given the respondent a reasonable opportunity to comply with the demand[9].

At any time after the commencement of proceedings, the respondent may apply to the Court for an order to suspend proceedings by reason that he is willing to resume or to return to cohabitation with the petitioner[10].

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[7] Weldon v Weldon, 9 P.D. 52 (Sir J. Hannan, P., 1883).

[8] See The Rules of the Superior Courts, Order 70, rule 4 (S.I. No. 72 of 1962), which requires an affidavit to this effect to accompany the filing of the petition. In England, two decisions have considered the question of what type of letter should be sent and whether it must necessarily be written by the petitioner personally. In Field v Field, 14 P.D. 26 (C.A., 1888), the Court of Appeal held that a "hostile" letter written by the petitioner's solicitor, threatening the respondent with legal proceedings in default of compliance, did not come within the requirements of the equivalent English rule. Whilst the letter might be written on behalf of the petitioner, "it ought to be a conciliatory letter, such as would be likely to lead to a friendly reconciliation between husband and wife ...." (id., at 30, per Cotton, L.J.). In Smith v Smith, 15 P.D. 47 (C.A., 1890), rev'g 15 P.D. 11 (Butt, J., 1889), however, the Court of Appeal held that a somewhat similar letter fell within the rule, the Court distinguishing Field on a number of grounds that did not appear to go to the heart of the matter. In Re Sheehy, 1 P.D. 423 (Sir J. Hannan, P., 1876), substituted service of the petitioner's letter was permitted where it appeared that the respondent was wilfully keeping his whereabouts from the knowledge of the petitioner. For other procedural requirements, see Molloy v Molloy, I.R. 5 Eq. 367 (Ct. for Mat. Causes, 1871).

[9] The Rules of the Superior Courts, Order 70, rule 4 (S.I. No. 72 of 1962).

[10] Id., rule 58. See also Crothers v Crothers, L.R. 1 P. & D. 568 (1868).

If a spouse fails to comply with a decree for restitution of conjugal rights, a statute enacted in 1813 provides for committal to prison for a period not exceeding six months[11].

A point of uncertainty about the present law should be noted. One spouse may stop living with the other either by leaving the home or by excluding the other spouse from the home. In the case of a spouse who leaves the home, it could well be that the action for restitution of conjugal rights would be held to be inconsistent with one or more of several Constitutional rights, including the liberty of the person, freedom of association, the right to travel and earn a livelihood and the right to privacy. In the case of a spouse who excludes the other spouse from the home, it seems less likely that an action for restitution of conjugal rights would be held to be inconsistent with the Constitution. Indeed, as well as an action for conjugal rights the excluded spouse would in certain cases be entitled to obtain an injunction ordering the offending spouse to desist from all conduct that prevents the excluded spouse from entering the home.

There are a number of defences to the action for restitution of conjugal rights.

First, the fact of a lawful marriage between the parties may be denied[12]. In such a case, the suit "assumes the shape of a suit of nullity of marriage"[13].

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[11] Ecclesiastical Courts Act 1813, sections 1, 3 (53 Geo. III c. 127). See also Shelford, 582.

[12] See, e.g., Grant v Grant, 1 Lee 592, 161 E.R. 217 (1754), Swift v Swift, 4 Hag. Ecc. 139, 162 E.R. 1399 (1832), Conran v Lowe, 1 Lee 630, 161 E.R. 230 (1754).

[13] Rogers, 823. See also Swift v Swift, supra, fn. 12, at 153 and 1403, respectively (per Sir John Nicholl).

Secondly, it may be pleaded that the petitioner is guilty of adultery[14]. Where the adultery has been condoned[15] or connived at[16] by the respondent, however, it will not afford a good defence.

Where both spouses have been guilty of adultery (and therefore neither of them ordinarily will be entitled to a decree of divorce a mensa et thoro), a decree of restitution of conjugal rights may nonetheless be made. This was held by the Court of Delegates in Seaver v Seaver. The Court considered that to hold otherwise would enable a husband guilty of adultery to abandon his wife who was also guilty of adultery with no obligation to support her or provide her with accommodation[17].

The third defence in proceedings for restitution of conjugal rights is that the petitioner was guilty of cruelty[18]. There is some authority for the view that "matters of a less aggravated character than amount to the cruelty necessary to sustain a

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[14] Owen v Owen, 4 Hag. Ecc. 261, 162 E.R. 1441 (1831), Best v Best, 1 Add 411, 162 E.R. 145 (1823). Reasonable suspicion of adultery will not afford a good defence: Burroughs v Burroughs, 2 Sw. & Tr. 303, 164 E.R. 1012 (1861).

[15] See Anichini v Anichini, 2 Curt. 210, 163 E.R. 387 (1839), Bramwell v Bramwell, 3 Hag. Ecc. 618, 162 E.R. 1285 (1831), Seaver v Seaver, 2 So. & Tr. 665, at 670-671, 164 E.R. 1156, at 1159 (1845), Westmeath v Westmeath, 2 Hag. Ecc. (Supp.) 1, at 113, 162 E.R. 992, at 1030 (1827).

[16] In Seaver v Seaver, supra, fn. 15, at 671 and 1159, respectively, Dr Radcliff, after reviewing the decisions concluded:

> "On the whole, then, it seems to me that condonation or connivance would prevent a husband relying on his wife's adultery, so condoned or connived at, as a bar to her suit for restitution."

[17] In England, the opposite position was taken in Hope v Hope, 1 Sw. & Tr. 94, 164 E.R. 644 (1858), the Court apparently not being aware of the Irish decision. See also Poynter, 224-225, 245.

[18] See Shatter, 89, D'Arcy v D'Arcy, 19 L.R.Ir. 369 (Warren J., 1887), Ruxton v Ruxton, 5 L.R.Ir. 455 (C.A., 1880).

suit for divorce a mensa et thoro"[19] may be sufficient to deprive a spouse of an order for the restitution of conjugal rights; but other authorities have laid down that "no defence is available which would not afford a foundation for a petition for a divorce a mensa et thoro"[20]. The defence of cruelty will not arise where there has been condonation of the cruelty[21].

It is not a good defence to show that the petitioner deserted the respondent. As Warren, J. stated in Manning v Manning[22], in 1873, "desertion, wilful or not, is no bar to restitution of conjugal rights, according to the law of Ireland". The question was examined again in Dunne v Dunne[23] in 1947, where Mr Justice Dixon held that the law in this country was still the same as that expressed in Manning v Manning[24].

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[19] Carnegie v Carnegie, 17 L.R.Ir. 430, at 434 (Warren, J., 1886), quoting Sopwith v Sopwith, 2 Sw. & Tr. 160, at 168, 164 E.R. 954, at 957 (1861). See also Bramwell v Bramwell, 3 Hag. Ecc. 618 at 619, 162 E.R. 1285 (1831) (respondent wife in proceedings for restitution of conjugal rights "not, according to the practice and doctrine of these Courts, held precisely to the same strictness of proof" of cruelty or adultery).

[20] Manning v Manning, I.R. 6 Eq. 417, at 422-423 (Warren, J., 1872). See also id., at 426: "Unquestionably, as a general rule, a Petitioner is entitled to restitution of conjugal rights, unless he or she has been guilty of some definite matrimonial offence, such as adultery or cruelty, which would entitle the respondent to a divorce a mensa et thoro ...." And see the subsequent proceedings reported, I.R. 7 Eq. 520 (1873), where Warren, J. stated that ".... what are called technically 'conjugal rights' .... can be defeated only by acts sufficient to found a decree for a divorce ...." Cf. Holmes v Holmes 2 Lee 116, 161 E.R. 283 (1755); Scott v Scott, 4 Sw. & Tr. 113, 164 E.R. 1458 (1865). See also Poynter, 241-242.

[21] Westmeath v Westmeath, supra, fn. 14, Ruxton v Ruxton, supra, fn. 18.

[22] I.R. 7 Eq. 520, at 523 (1873).

[23] [1947] I.R. 227 (High Ct., Dixon, J.)

[24] Supra, fn. 22.

Abolition of the Action in Other Countries

(a) England

Failure to comply with a decree for restitution of conjugal rights ceased to be punishable by attachment in England in 1884[25]. Instead such failure was deemed to be desertion[26], entitling the innocent spouse to a decree for judicial separation and, if coupled with the husband's adultery, entitling the wife to an immediate divorce[27]. When legislation in 1923[28] gave the wife the right to divorce the husband for adultery alone, the latter incentive for taking restitution proceedings no longer applied. For many years restitution petitions continued to be brought by wives seeking to take advantage of the court's power to make ancillary orders, in particular orders for maintenance, but the need to invoke this machinery was largely removed by the Law Reform (Miscellaneous Provisions) Act 1949, giving spouses the right to petition for maintenance in the High Court without bringing any other proceedings[29].

In 1969, the English Law Commission published a Working Paper[30] on the subject.

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[25] Matrimonial Causes Act 1884, section 2 (47 & 48 Vict. c. 68). The Act did not apply to Ireland: id., section 7.

[26] Id., section 5.

[27] Under the Matrimonial Causes Act 1857, section 27 (20 & 21 Vict., c. 85) a husband could divorce his wife for adultery but a wife could divorce her husband for adultery only where her husband was also guilty of incest, bigamy, rape, sodomy, bestiality, cruelty or two year desertion.

[27] Matrimonial Causes Act 1923, section 1 (13 &14 Geo. 5, c. 19).

[28] Bromley, 121.

[30] The Law Commission's Published Working Paper No. 22, Family Law: Restitution of Conjugal Rights (1969).

The Paper summarised the existing law and referred to statistics relating to the incidence of proceedings for restitution of conjugal rights between 1965 and 1967[31]. It set out briefly three arguments in favour of retaining the proceedings. First, it could be argued that "[i]f recourse to [such] legal proceedings results in some marriages - however few - being saved, such proceedings should not be abolished"[32]. Secondly, the proceedings might offer better prospects regarding a maintenance order than relying on the ordinary law[33]. Thirdly, the proceedings offered a way to a sincere spouse of seeking to encourage the other spouse to return to the home without exacerbating the position by taking proceedings based on the matrimonial offence of desertion or wilful failure to maintain[34].

The Commission expressed as "answers to these arguments" five opposing arguments. First, insofar as the proceedings were brought to establish desertion, this could be effected "less artificially, more expeditiously and more cheaply"[35] by obtaining an order on the ground of desertion in the magistrates' courts. Secondly, it contended that, insofar as proceedings for restitution of conjugal rights were designed to obtain financial support not otherwise available, the solution was to reform the

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31 In the three-year period, there were 105 petitions (60 by husbands, 45 by wives) and 31 decrees made (11 to husbands, 20 to wives): id., para. 4.

32 Id., para. 5(a). The argument was based in part on the fact that certain proceedings in the period studied were dismissed by consent or at the request of the petitioner.

33 Id., para. 5(b). This argument found favour with the Morton Commission: see the Report of the Royal Commission on Marriage and Divorce, 1951-1955, paras. 320-324 (Cmd. 9678, 1956).

34 Supra, fn. 30, para. 5(c).

35 Id., para. 6(a)

general law in this area[36]. Thirdly, it argued that the fact that certain proceedings for restitution of conjugal rights were discontinued could not give rise to an inference that the parties had become reconciled[37]. Fourthly, it contended that:

> "[i]t is an intolerable interference with the freedom of individuals for the court to order adults to live together and it is hardly an appropriate method of attempting to effect a reconciliation."[38]

Finally, it argued that the order for restitution of conjugal rights had "in fact no teeth"[39] and that it accordingly brought the law into disrepute.

Having put forward these arguments the Commission stated, as its provisional view, the conclusion that the remedy of restitution of conjugal rights "is today inappropriate and ineffective and should be abolished"[40]. The remedy was abolished by statute[41] the following year.

(b) Scotland

Under Scottish law a spouse who has been deserted may raise an action of adherence, seeking a decree "ordering the defender to adhere to the pursuer and cohabit with her as his wife (or with him as her husband)"[42]. The action is "almost invariably"[43]

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[36] Id., para. 6(b).

[37] Id., para. 6(c).

[38] Id., para. 6(d).

[39] Id., para. 6(e).

[40] Id., para. 7.

[41] Matrimonial Proceedings and Property Act 1970, section 20.

[42] Rules of Court of Session, Appendix, Form 2, para. (18), quoted by the Scottish Law Commission in Family Law: Report on Outdated Rules in the Law of Husband and Wife, para. 3.1 (Scot. Law Com. No. 76, 1983).

[43] Scot. Law Com. No. 76, supra, para. 3.1.

coupled with a claim for aliment (maintenance). A decree of adherence will not be specifically enforced, and has no effect on property or succession. In an action of adherence and aliment, however, the award of aliment is conditional on the defender's failure to comply with the decree of adherence.

Earlier this year the Scottish Law Commission recommended[44] the abolition of the action of adherence. The Commission considered that the remedy had become obsolete, since aliment could be sought and awarded in separate proceedings, without the necessity of bringing an action of adherence.

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[44] Id., para. 3.6.

CHAPTER 2 REFORM OF THE LAW RELATING TO RESTITUTION OF CONJUGAL RIGHTS

Proceedings for restitution of conjugal rights are rarely taken today[1]. We must now consider how the law should be reformed in relation to these proceedings.

Arguments in Favour of Abolishing the Remedy

First, it may be argued that it is contrary to the values of society today to place persons in the position of being required by law to live with another person under sanction of committal to prison[2]. We have already mentioned that the action for the restoration of conjugal rights may not be consistent with the Constitution - especially in cases where the respondent spouse has left the home, rather than excluded the petitioner from the home.

Secondly, it may be argued that the remedy is likely to be self-defeating in cases where the respondent chooses prison in

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[1] The last reported case was Hood v Hood, [1959] I.R. 225 (High Ct., Murnaghan, J.). A more recent decision is D. v D., High Ct., Davitt, P., 2 July 1962, where a wife sought and obtained a decree for restitution of conjugal rights against her husband. Davitt, P. ordered that the respondent spouse:

> "do within twenty eight days from the service of this Order on him return home to the [petitioner] and render to her conjugal rights and within a like time file in the Central Office of this Court a certificate that he has done so."

[2] Cf. the English Law Commission's Published Working Paper No. 22, Family Law: Restitution of Conjugal Rights, para. 6(d) (1969) [hereinafter cited as "W.P. No. 22"]:

> "It is an intolerable interference with the freedom of individuals for the court to order adults to live together ...."

preference to returning to the home. Where the respondent is the source of family support, the effect of imprisonment may be to reduce the petitioner's chances of obtaining adequate maintenance.

Thirdly, it may be argued that, since the right to a maintenance order no longer depends on proof of desertion by the respondent, the strategic advantages associated with the remedy of restitution of conjugal rights have largely disappeared. It is true that the threat of such proceedings still possibly may have some in terrorem effect, being capable of being used by a deserted spouse to extract a financial settlement from the deserting spouse in excess of what would be likely to result from legal proceedings for maintenance. It is also true that failure to comply with a decree of restitution of conjugal rights precludes a spouse from taking any share in the estate of his or her deceased partner[3]. The paucity of proceedings for restitution of conjugal rights in recent years would, however, suggest that these factors are not of particular importance.

Arguments in Favour of Retaining the Remedy

First, it may be argued that the remedy may lead to some deserting spouses coming to their senses and returning to their home[4]. If this is so, the remedy may be regarded as having some utility.

The second argument in favour of retaining proceedings for restitution of conjugal rights is that they offer a way to a

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[3] Succession Act 1965, section 120(2) (No. 27).

[4] Cf. W.P. No. 22, supra, fn. 2, para. 5(a).

sincere spouse of seeking to encourage the other spouse to come home[5] rather than forcing the deserted spouse to seek a legal separation.

As against these two arguments international experience strongly suggests that reconciliation and conciliation are more successfully encouraged where the procedures are voluntary rather than compulsory. We consider that more support for these procedures should be made available by the State through financial subsidy of existing marriage guidance and conciliation agencies, as well as through the creation of new conciliation services, by way of pilot projects, if necessary.

Conclusion

We consider that the balance of the argument lies in favour of abolition of proceedings for restitution of conjugal rights, and we so recommend.

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[5] Cf., id., para. 5(c)

CHAPTER 3 THE PRESENT LAW RELATING TO JACTITATION OF MARRIAGE AND RELATED MATTERS

Jactitation of Marriage

Proceedings by way of jactitation of marriage[1] are designed to prevent unwarrantable assertions that a marriage exists between the petitioner and the respondent. The purpose of the proceedings was described in an English decision[2] in 1820, as being

> "for the protection of persons against the extreme inconvenience of unjust claims and pretensions to a marriage which has no existence whatever. If a person pretends such a marriage, and proclaims it to others, the law considers it as a malicious act, subjecting the party against whom it is set up to various disadvantages of fortune and reputation, and imposing upon the public (which for many reasons is interested in knowing the real state and condition of the individuals who compose it) an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection."[3]

The victim of this conduct may obtain redress

> "by charging the supposed offender with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact obtaining a sentence enjoining him or her to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceedings."[4]

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[1] See generally, Shatter, 119-120, Kisbey, ch.6, Latey, 245-247, Bromley, 67-68, 113, Eversley, 290, Tolstoy, 18, 122, Rayden, vol. 1, 304-305, Jackson, 87-88, Geary, 227, 378-379, Browne, 258-259, Shelford, 582-586, Burn, vol. 2, 500a-500b.

[2] Lord Hawke v Corri, 2 Hag. Con. 280, 161 E.R. 743 (per Sir William Scott, 1820).

[3] Id., at 285 and 745, respectively.

[4] Id.

Only the person claiming to be misrepresented by the respondent's conduct may bring the suit,[5] and it may be brought only against the person claiming to be married to the petitioner. Thus, proceedings for jactitation cannot be used to restrain third parties from alleging the existence of a marriage. A decree of jactitation of marriage, being a judgment in personam , binds only the parties[6].

There are three defences to the proceedings[7]: (1) a denial of the boasting; (2) an assertion of an actual marriage between the parties; (3) the contention that the petitioner acquiesced in the boasting by the respondent.

The second[8] and third[9] defences have given rise to a certain amount of case-law, frequently being put forward in the alternative.

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5 Campbell v Corley, ex. p. Campbell, 31 L.J.P. & M. 60, (1862), cited in the English Law Commission's Published Working Paper No.34, Family Law: Jactitation of Marriage, p.2 (1971).

6 Bromley, 68, R. v Kingston, 20 St. Tr. 355, 573 (1776), Lord Hawke v Corri, 2 Hag. Con. 280, 161 E.R. 743 (1820).

7 The position is well set out by Sir William Scott in Lord Hawke v Corri, supra, fn.2, at 285-286 and 745, respectively, and by Dr Radcliff in the Irish decision of Bodkin v Case, Milw. 355, at 356-357 (1835).

8 Where the defence of a valid marriage is pleaded, "the proceeding assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and validity of such asserted marriage; and it will depend upon the result of that inquiry whether the party has falsely pretended, or truly asserted such a marriage. In the former case the Court would pronounce a sentence of nullity and enjoin silence in the future. In the latter the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shown that some other reason was interposed to dissolve that obligation": id. Decisions in which the defence was raised include Lord Hawke v Corri, supra, fn.2, Thompson v Rourke, /1893/ P.70 (C.A., 1892), Goldstone v Smith, 38 Times L.R. 403 (P.D.A. Div., Sir Henry Duke, P., 1922), Lindo v Belisario, 1 Hag. Con. 216, 161 E.R. 530 (1795), Schuck v Schuck, 66 (Pt. 1) Times L.R. 1179 (P.D.A. Div., Ormerod, J., 1950), Igra v Igra, /1951/ P.404 (Pearce, J.), Goldsmid v Bromer, 1 Hag. Con. 324, 161 E.R. 648 (1798), Bodkin v Case, supra, fn.7.

9 See, e.g., Lord Hawke v Corri, supra, fn.2, Thompson v Rourke, supra, fn.8, Goldstone v Smith, supra, fn.8

The basis of the third defence was described in one case as follows:

> "It is too much to expect that, if a person imposes false characters of this nature upon the world, the Ecclesiastical Court is to interpose in his behalf, as soon as the consequences of such unfortunate conduct begin to assail him. It looks in vain to find malicious boasting in language long authorized, and used by the party himself .... /T/his Court cannot indulge /the petitioner/ with a general exemption from all possible inconvenience by pronouncing a sentence of malicious jactitation against the person whom he himself has tutored to use the language of which he complains."[10]

Developments in England

In 1971, the Law Commission examined the subject in a Working Paper[11]. It noted that with the enactment of Lord Hardwickes's Act[12] in 1754, which required a formal ceremony of marriage, the necessity for jactitation proceedings largely disappeared. Moreover, the enactment of the Legitimacy Declaration Act 1858[13] and the granting to the Divorce Court of power to make declar-

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[10] Lord Hawke v Corri, supra, fn.2, at 291-292 and 747, respectively (per Sir William Scott). See also Thompson v Rourke, supra, fn.8, at 72 (per Lindley, L.J.):

> "A restraining order in such a suit is not ex debito justitiae, the Court has a judicial discretion, and it imposes on the complainant the condition that he must come with clean hands. It is of great consequence to the public that this condition should be enforced, otherwise parties might play fast and loose with matrimonial reputation. If the petitioner chooses to drop a character in which she has held herself out to the world, she cannot call upon the Court to interfere by way of assisting her to do so."

[11] Law Commission Published Working Paper No.34, Jactitation of Marriage (1971).

[12] 26 Geo. 2, c.33.

[13] Similar to the Legitimacy Declaration (Ireland) Act 1868 (31 Vict. c.20).

atory orders as to the validity of a marriage had further reduced the need for jactitation proceedings[14].

The Commission discussed the utility of the action in a passage that merits extended quotation:

> "It may be that false assertions that people are married to each other are among those embarrassing falsehoods which it should always be possible to restrain by injunction. But a suit for jactitation is not the right vehicle. What the victim needs is a remedy against any of those who are spreading the false rumour (for example, the newspaper which is repeating it in its gossip columns); not merely against the other party to the alleged marriage who is more likely to be another innocent victim of the rumour. At present he may have such a remedy if the assertion is defamatory of him; but unless he is already married to someone else it is unlikely to be defamatory, though it will generally be acutely embarrassing. It could be argued that victims of embarrassing rumour and gossip should have a better remedy, but it is clear that the matrimonial suit of jactitation is not the right remedy: it has no potential for growth as the appropriate remedy; it is limited to false assertions of marriage (other assertions are equally embarrassing and more common, for example, an allegation that the parties are engaged), and it can be used only by one party to the alleged marriage against the other. If reform is needed it must come through changes in the general law of tort or crime; not through reform of matrimonial law."[15]

Accordingly the Commission expressed the provisional conclusion that the remedy of jactitation "is to-day inappropriate"[16] and that it should be abolished.

The English Law Commission returned to the subject in its Working Paper No.48[17]. It stated that the majority of comments

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[14] Matrimonial Causes Rules 1924, Rule 97, applying R.S.C. Order 25, rule 5 (subsequently Order 15, rule 16) to proceedings in the Divorce Court.

[15] Supra, fn.11, pp. 7-8.

[16] Id., p.8.

[17] Law Commission Working Paper No.48, Family Law: Declarations in Family Matters (1973).

it had received had advocated abolition of the remedy, but that there had also been a number of commentators who were anxious to see it retained or, at all events, not abolished unless an alternative remedy was provided to take its place. The gravamen of their arguments, the Commission stated, was that there were, albeit rarely, cases in which a person found himself or herself in an intolerable situation because someone falsely claimed to be married to him or her and was giving publicity to the false claim, but since the claim did not of itself necessarily amount to defamation, it could not be silenced except through the medium of a jactitation suit.

These commentators had also pointed out that the threat of instituting jactitation proceedings was, in their experience, at times sufficient to put an end to the false claim. Accordingly, the Commission considered that, if the suit was to be abolished, "it should only be done after a general review of civil remedies available in respect of injurious statements".[18]

The Commission made two interim proposals. One related to the jurisdictional requirements for the action. The Commission pointed[19] to the present uncertainty on this question and stated:

> "Whatever may be the true basis of jurisdiction in jactitation, our view is that this jurisdiction should be the same as in tort[20]. The suit is in effect an action in tort but for historical reasons and because of its

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[18] Id., para. 63.

[19] Id., para. 66.

[20] The Commission noted that the action by a husband for damages against an adulterer (abolished by the Law Reform (Miscellaneous Provisions) Act 1970, section 4) had been treated as an action in tort and that jurisdiction had been the same as jurisdiction in tort (quoting Jacobs v Jacobs [1950] P.146 (Pilcher, J., 1949)).

> special nature it is tried in the Family Division, first, because relief generally depends on a determination as to the validity of a marriage and, secondly, because the respondent to the jactitation suit may want to ask the court for a declaration that the marriage in question is valid."[21]

The second proposal made by the Commission was that, where the respondent in jactitation proceedings asserted that there was a valid marriage between himself or herself and the petitioner and the Court so found, the Court should be able to make a declaration to this effect which would operate in rem[22]. This power should exist, according to the Commission's proposal, only where the necessary jurisdictional criteria were satisfied and where the procedural safeguards proposed by the Commission elsewhere in the Working Paper[23] had been observed.

No further action has been taken on the subject so far.

Related Matters

The question of the validity of a marriage may arise outside the scope of ordinary judicial proceedings, by means of a judicial declaration.

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[21] Supra, fn.17, para. 66.

[22] Id., para. 65.

[23] Cf. the Appendix to the Working Paper, at pp. 60-64. The Commission proposed that the Attorney General should no longer automatically be made a party to the proceedings, but that the Registrar could direct notice to be given to the Treasury Solicitor (who acts on his behalf) in certain appropriate cases, the Treasury Solicitor also to be permitted to apply for leave to intervene where this was considered necessary or desirable. The Commission also proposed that on every application for a declaration the applicant should be required to give particulars of any previous or pending proceedings with reference to any marriage in question or to the matrimonial status of either party.

(i) The Legitimacy Declaration (Ireland) Act 1868[24]

By this Act "any Natural-born Subject of the Queen[25], or any Person whose Right to be deemed a Natural-born Subject depends wholly or in part on his Legitimacy, being domiciled in England or Ireland, or claiming any Real or Personal Estate situate in Ireland"[26] may apply by petition to the High Court praying for a decree declaring that his marriage (or that of his parents) was or is a valid marriage.[27] The Court has jurisdiction to determine the application and "to make such Decree declaratory of the Legitimacy or Illegitimacy of such Person, or of the Validity or Invalidity of such Marriage, as to the Court may seem just ...."[28]

The Act provides that a copy of the petition is to be delivered to the Attorney General, who is a respondent in the hearing of that petition and on every subsequent proceeding relating thereto[29]. The Court is empowered to direct that such persons as it "shall think fit" are to be joined as parties to the proceedings[30].

A decree made by the Court declaratory of the validity or invalidity of the marriage is binding[31] to all intents and

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[24] 31 Vict. c.20. See Shatter, 120.

[25] Cf. North, 368.

[26] Section 1.

[27] Id.

[28] Id.

[29] Id., section 6.

[30] Id., section 7.

[31] Id., section 1.

purposes on the State and on all other persons, subject to three qualifications. First, it does not prejudice any person[32] who has not been cited or made a party to the proceedings[33]. Secondly, it does not prejudice any person where the decree is subsequently proved to have been obtained by fraud or collusion[34]. Thirdly, section 9 of the Act provides that no proceeding under the Act is to effect any final judgment or decree already pronounced or made by any Court of competent jurisdiction.

(ii) Order 19, Rule 29 of the Rules of the Superior Courts[35]

Order 19, Rule 29 of the Rules of the Superior Courts provides that

> "No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."

The broad effect of this provision would appear to be reasonably clear. In England, however, there was considerable uncertainty for a time regarding this question in relation to an identically

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[32] Or the heirs of that person or those persons deriving title through him (section 8) or "all of a Class claiming or devising in the same Right, who would as Children or Grandchildren or in their own Persons be comprehended within the Term 'Issue'" (section 10).

[33] Section 8.

[34] Id.

[35] S.I. No.72 of 1962. See Shatter, 120.

worded Order in the English Rules of the Supreme Court[36]. In Countess de Gasquet James v Duke of Mecklenburg-Schwerin,[37] Sir Samuel Evans, P., considered that the Rule could not give a right to petition for a declaration "so as to create a jurisdiction in the Court which otherwise did not exist ...."[38] In Har-Shefi v Har-Shefi[39], however, the Court of Appeal held that the Divorce Court had jurisdiction to make declaratory orders under the rule even though no other relief was sought[40]. The Court stressed, however, that any claim for a declaratory order would "be carefully watched. The court will not grant a declaration in the air"[41]. Hodson, L.J., warned that nothing that he had said was "intended to encourage applications for

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[36] R.S.C. Ord. 25, r.5.

[37] /1914/ P.53 (Sir Samuel Evans, P.).

[38] Id., at 71, citing Barraclough v Brown, /1897/ A.C. 615, at 623 (H.L. (Eng.), per Lord Davey).

[39] /1953/ P.161 (C.A.).

[40] Reliance was placed on the decision of Guaranty Trust Company of New York v Hannay & Co., /1915/ 2 K.B. 536 (C.A.). Lord Denning, L.J. conceded that the Ecclesiastical Courts would not entertain a suit for a declaration as to the validity of a marriage but he argued that those Courts, in making orders as to nullity of marriage and in other respects, exercised what in effect was "a general jurisdiction to make declaratory orders as to the existence or non-existence or nullity of a marriage, even though no other relief was sought": /1953/ P., at 169. Even if the Ecclesiastical Courts had not had this jurisdiction, Lord Denning, L.J., considered that the Divorce Courts, by reason of the change in the Rules in 1924, had "outgrown the disability": id.

[41] Id., at 166 (per Singleton, L.J.).

what may be called naked declarations, where no sensible purpose is served thereby ...."[42]

It would appear that the former uncertainty in England should not undermine the view that in this country the High Court has a broad discretionary jurisdiction under Order 19, Rule 29 of the Superior Courts to make a declaratory order regarding the validity of a marriage.

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[42] Id., at 172. See also Aldrich v A.G., /1968/ P.281, Vervaeke v Smith (Messina and A.G. intervening), /1981/ Fam. 77, at 121-122 (C.A., per Sir John Arnold, P.), affirmed by H.L., /1982/ 2 All E.R. 144. See in particular id., at 160 (per Lord Simon).

CHAPTER 4 REFORM OF THE LAW RELATING TO JACTITATION OF MARRIAGE AND RELATED MATTERS

We must now consider what changes if any should be made in relation to jactitation of marriage and declarations as to status. The law[1] of jactitation of marriage suffers from the important deficiency that proceedings may be taken only against the other party to the alleged marriage and not against those who are spreading the rumour - the newspapers or the radio, for example[2]. The law also suffers from a general aura of antiquity, which is perhaps unfortunate, since it affords protection against a form of invasion of privacy, which is quite consistent with the spirit of the times[3].

We consider that the best solution would be to abolish the remedy of jactitation but to replace it by a new remedy which would have the following features:

1. The remedy would consist of an action for an injunction and, in appropriate cases, damages, against persons falsely claiming to be married to the plaintiff or falsely stating (with knowledge of the falsity of such statement or reckless indifference as to its truth) that another person[4] is married to the plaintiff.

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1 See supra, ch.3.

2 Cf. the English Law Commission's Published Working Paper No.34, Jactitation of Marriage, pp. 7-8 (1971).

3 It is interesting to note that the English Law Commission, having provisionally concluded that the remedy should be abolished, had second thoughts on the matter. See supra, pp. 16-18.

4 Cf. Shatter, 120.

2. The defences at present available in jactitation proceedings[5] should apply in relation to the proposed new action. The only amendment that would appear to be necessary is that in a case where a person other than the alleged party to the marriage is the defendant the defence of acquiescence should extend to acquiescence by the plaintiff either in the claim of the alleged party to the marriage or in the claim of the defendant. This extension would seem necessary out of considerations of fairness towards the "third party" defendant.

3. The decree of the Court should bind only the parties to it. This is the present law[6].

4. Where an alleged party to a marriage is the defendant in the proceedings and he or she alleges that there is a valid marriage between the plaintiff and himself or herself, the proceedings should be suspended pending the disposition of of this question in nullity proceedings[7].

We consider that the present law regarding declarations as to status would benefit from restatement in clear terms in modern legislation. The legislation should enable a person to apply to the High Court for a decree declaring that his or her marriage was or is a valid marriage[8]. The alleged other party to the

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[5] Namely: (1) a denial of the boasting; (2) an assertion of an actual marriage between the parties; (3) the contention that the petitioner acquiesced in the boasting. See supra, p.14.

[6] See supra, p.14.

[7] This is in effect the present position: supra, p.14.

[8] The proposed legislation should replace the provisions of the Legitimacy Declaration (Ireland) Act 1868 (31 Vict., c.20) to the extent that they relate to the validity of the marriage of the petitioner, but it would not affect the provisions of that act relating to declarations as to the validity of the marriage of the parents of the petitioner. The law

marriage and the Attorney General should be joined in such proceedings, it being possible for the former to allege that he or she was not married to the petitioner or that, although he or she went through a ceremony of marriage with the petitioner, the marriage was void or voidable. If he or she - or any other party to the proceedings - alleges that the marriage was void or voidable, the proceedings for a declaration should be suspended until proceedings for nullity have been determined.

We recommend that the Court be empowered to direct such persons as it considers fit to be joined as parties to the declaration proceedings. A decree made by the Court should be binding on all parties to the proceedings, but should be capable of subsequent attack on the basis that the decree had been obtained by fraud or collusion. Moreover, we recommend that the decree should not be effective to the extent that it was inconsistent with a previous decree regarding the status of the petitioner in either annulment proceedings or proceedings for a declaration as to the validity of the petitioner's marriage.

As will be readily apparent, the proposed legislation is similar in many respects to the provisions of the Legitimacy Declaration (Ireland) Act 1868[9]. The main difference would be to ensure that where the validity of a marriage is to be impugned, proceedings for annulment should take place. This could be achieved by amendment of the Act of 1868 but it is considered preferable to reconstitute the proceedings on a new statutory base since they do not relate directly to legitimacy but rather to declarations as to the validity of the marriage of the petitioner.

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fn.8 Cont'd

relating to illegitimacy was the subject of a Report published by the Law Reform Commission in 1982: Report on Illegitimacy (LRC4-1982). If our proposals are given legislative effect it may be predicted that the matters covered in the Legitimacy Declaration (Ireland) Act 1868 will be the subject of specific provisions in the new legislation.

9 See fn. 8, supra.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

1. Proceedings for restitution of conjugal rights should be abolished: p. 12.

2. Proceedings for jactitation of of marriage should be abolished: p. 23.

3. A new remedy should be created by legislation, consisting of an action for an injunction and, in appropriate cases, damages, against a person falsely claiming to be married to the plaintiff or falsely stating (with knowledge of the falsity of such statement or reckless indifference as to its truth) that another person is married to the plaintiff: p. 23.

4. The defences at present available in jactitation proceedings should apply in relation to the proposed new action, provided that, in a case where a person other than the alleged party to the marriage is the defendant, the defence of acquiescence should extend to acquiescence by theplaintiff either in the claim of the alleged party to the marriage or in the claim of the defendant: p. 24.

5. The decree of the Court should bind only the parties to it: p. 24.

6. Where an alleged party to a marriage is the defendant in the proceedings and he or she alleges that there is a valid marriage between the plaintiff and himself or herself, the proceedings shall be suspended pending the disposition of this question in nullity proceedings: p. 24.

7. The present law regarding declarations as to status should

be restated clearly in the legislation: p. 24.

8. The legislation should enable a person to apply to the High Court for a decree declaring that his or her marriage was or is a valid marriage. The alleged other party to the marriage and the Attorney General should be joined in such proceedings, it being possible for the former to allege that he or she was not married to the petitioner or that, although he or she went through a ceremony of marriage with the petitioner that the marriage was void or voidable. If he or she - or any other party to the proceedings - alleges that the marriage was void or voidable, the proceedings for a declaration should be suspended until proceedings for nullity have been determined: pp. 24-25.

9. The Court should be empowered to direct such persons as it considers fit to be joined as parties to the declaration proceedings. A decree made by the Court should be binding on all parties to the proceedings, but should be capable of subsequent attack on the basis that the decree had been obtained by fraud or collusion. Moreover, we recommend that the decree should not be effective to the extent that it was inconsistent with a previous decree regarding the status of the petitioner in either annulment proceedings or proceedings for a declaration as to the validity of the petitioner's marriage: p. 25.

APPENDIX TABLE OF ABBREVIATIONS

BROMLEY	P. Bromley, Family Law (6th ed., 1981).
BROWNE	A. Browne, A Compendious View of the Ecclesiastical Law of Ireland (2nd ed., 1803).
BURN	R. Burn, The Ecclesiastical Law (9th ed., by R. Phillimore, 1842).
EVERSLEY	W. Eversley, Law of Domestic Relations (6th ed., by R. Stranger-Jones, 1951).
GEARY	N. Geary, The Law of Marriage and Family Relations (1892).
JACKSON	J. Jackson, The Formation and Annulment of Marriage, (2nd ed., 1969).
KISBEY	W. Kisbey, The Law of the Court for Matrimonial Causes and Matters (1871).
LATEY	W. Latey, The Law and Practice of Divorce and Matrimonial Causes (15th ed., 1973).
McQUEEN	J. McQueen, Husband and Wife (4th ed., by W. Paine, 1905).
NORTH	P. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977).
POYNTER	T. Poynter, Marriage and Divorce (2nd ed., 1824).

RAYDEN — W. Rayden, Law and Practice in Divorce and Family Matters in All Courts (12th ed., J. Jackson ed., in Chief, 1974).

ROGERS — F. Rogers, A Practical Arrangement of Ecclesiastical Law (1840).

SHATTER — A. Shatter, Family Law in the Republic of Ireland (2nd ed., 1981).

SHELFORD — L. Shelford, A Practical Treatise of the Law of Marriage and Divorce and Registration (1841).

TOLSTOY — D. Tolstoy, The Law and Practice of Divorce and Matrimonial Causes (6th ed., 1967).

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