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LAW REFORM COMMISSION,

ASSEMBLY CENTRE,

111, ST. STEPHEN'S GREEN,

DUBLIN 2.

The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

FOURTH REPORT (1981)

Laid by the Taoiseach before both Houses of the Oireachtas
on 1st June 1982 pursuant to section 6 of the Law Reform
Commission Act 1975.

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LAW REFORM COMMISSION

FOURTH REPORT

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PART I

INTRODUCTION

1. This Report covers the period from 1 January 1981 to 31 December 1981 and deals with the activities of the Commission under section 4 of the Law Reform Commission Act 1975 and with other matters referred to in section 6 of that Act.

Members of the Commission

2. The Law Reform Commission is a statutory body corporate, established under section 3 of the Law Reform Commission Act 1975 and consists of a President and four other members. The members are appointed by the Government.

3. One change in the membership of the Commission took place during the year. On 19 October 1981 the term of Professor Robert Heuston came to an end. Professor Heuston who is Regius Professor of Laws at Trinity College, Dublin, was a part-time member of the Commission since its inception and the Commission wishes to record its appreciation of his very valuable contribution to its work during the six years of his membership. On 25 November 1981 the Government appointed Mr Francis D. Murphy, Senior Counsel, a former Chairman of the Bar Council, as a member of the Commission. Mr Murphy was appointed for a term of one year from 1 December 1981 to serve as a part-time member of the Commission.

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4. The membership of the Commission on 31 December 1981 was therefore as follows: Mr Justice Brian Walsh, Senior Ordinary Judge of the Supreme Court, President; Professor James Casey, Professor of Law, University College Dublin; Miss Mary Finlay, Barrister-at-Law; Mr Roger Hayes, Barrister-at-Law and Mr Francis D. Murphy, Senior Counsel. Professor Casey, Miss Finlay and Mr Murphy were appointed to serve in a part-time capacity.

Staff of the Commission

5. The staff of the Commission consists of the Secretary, three Research Counsellors, an Executive Officer and three Clerical Assistants. On 10 April 1981, Mr Joseph Brosnan B.A. Barrister-at-Law, formerly Principal Officer in the Department of Justice, took up his appointment as a Research Counsellor. He has been appointed on contract for a five year term. The position had been publicly advertised and interviews were held with selected applicants. The services of Mr John McKeon, Barrister-at-Law, were again retained as draftsman for a period of some months.

Functions of the Commission

6. The Commission was set up to keep the law under review and, in accordance with the provisions of the Law Reform Commission Act 1975, to examine and conduct research with a view to reforming the law and to formulate proposals for law reform. The Commission has prepared a programme for the examination of administrative law, civil liability for animals, conflict of laws, criminal law, evidence, family law, privacy, sales, State Side orders and statute law. The

Commission is devoting its attention to these branches of the law and has published ten Working Papers and one Report.

Copies of the Commission's publications are sent to each member of the Houses of the Oireachtas and to all the law schools and the law faculties in the country. Copies are also sent on a reciprocal basis to various law reform agencies outside the State. In performance of its obligations under section 6 of the Law Reform Commission Act 1975 the Commission presented its First Report (1977) (Prl. 6961) to the Attorney General on 1 March 1978, its Second Report (1978-'79) (Prl. 8855) on 8 April 1980 and its Third Report (1980) (Prl. 9733) on 31 March 1981. These Reports were duly laid by the Taoiseach before both Houses of the Oireachtas and copies were sent to each member of the Houses of the Oireachtas.

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PART II

WORK OF THE COMMISSION IN 1981

7. Since the submission by the Commission of its Third Report to the Attorney General on 31 March 1981 the Commission has issued a Working Paper on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws. On 21 December 1981, the Commission submitted to the Taoiseach pursuant to section 4(2)(b) of the Law Reform Commission Act 1975 a draft Defective Premises Bill and a draft Animals Bill. The draft Defective Premises Bill proposes to amend and reform the law relating to the liability of builders, vendors, lessors and others for the quality and fitness of premises. The subject matter of this Bill was treated in the First Working Paper of the Commission which was published in June 1977. The draft Animals Bill makes provision with respect to civil liability for damage done by animals and amends the law relating to the impounding of animals. The subject matter of this draft Bill was treated in the Third Working Paper of the Commission, which was published in December 1977. Both bills will be published soon in Reports containing the final recommendations of the Commission.

Working Paper No.10 - 1981. Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws

8. Following on the reservation by Mr Justice Walsh in the Supreme Court decision in Gaffney v Gaffney [1975] I.R. 133, at p. 152, in regard to the recognition in Ireland of a foreign divorce obtained by a husband domiciled abroad where the wife has never left this country, the then Attorney

General submitted to the Law Reform Commission for examination the law relating to the domicile of married women. Subsequently, in its First Programme, the Commission indicated that it proposed to examine, with a view to recommending reforms, the "concept of domicile and the concept of habitual residence".

9. The Working Paper deals in detail with the concept of domicile and the concept of habitual residence as connecting factors in what is known as the conflict of laws or private international law. This is the law that governs in cases where there is a foreign element: and the connecting factor is the link between a person and the legal system or rules that will apply to him in specific contexts, such as (1) the validity of a foreign marriage, (2) recognition of legal separations, nullity decrees and decrees of divorce obtained abroad, and (3) succession to, and taxation of, property situated abroad. Thus, for example, the law of the country of the domicile of a person will determine whether, as regards such requirements as age and capacity, he or she may validly be married abroad and whether he or she may obtain a foreign nullity or divorce decree that will be recognised here.

10. The Working Paper explains the concept of domicile, the concept of habitual residence and the concept of nationality as connecting factors. Domicile, the law of which is complex and in a number of respects uncertain, is used as the connecting factor in the Common Law jurisdictions (Ireland, England and Scotland, the British Commonwealth and the United States) and in Denmark, Norway and Brazil, whereas the concept of nationality (which was adopted in most Civil Law countries) owes its origin to the promulgation in 1803 in France of the Code Napoléon and to the spread of nationalism in Europe in the Nineteenth Century. In recent years

habitual residence (instead of domicile) is being adopted as a connecting factor, since it is perceived as being free of the difficulties (intention, origin and dependency) associated with domicile. Habitual residence is now being increasingly used in International Conventions prepared by the Hague Conference, such as the Convention on the Law Applicable to Maintenance Obligations (2 October 1973). It has been used in recent Irish legislation - the Succession Act 1965 (section 102(1)(d)) and the Air Navigation and Transport Act 1973 (section 11). It has also been used in the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments and the E.E.C. Convention on the Law Applicable to Contractual Obligations.

11. The provisional view of the Law Reform Commission is that, on balance, habitual residence constitutes a more satisfactory connecting factor than domicile. The Commission points out that, although habitual residence may have some drawbacks, it provides a more appropriate and simpler solution in most cases and is in harmony with trends in the private international law of many European countries. Moreover, in so far as the problem of the domicile of dependency of married women and of children is concerned, the adoption of habitual residence would remove any discrimination, so that husbands and wives and fathers and mothers will be treated in exactly the same fashion. The Commission also points out that the concept of domicile in Civil Law countries (e.g. France, Germany and Switzerland) is quite different from the concept of domicile in Common Law countries.

12. The Commission proposes that if the concept of habitual residence is to replace the concept of domicile, "habitual residence" should not be defined. Instead, it would be provided that the habitual residence of a person is to be a

question of fact, to be determined having regard to "the centre of his personal, social and economic interests". Habitual residence will involve no concept similar to the domicile of dependency of married women or of children. Where spouses are residing together, they would be presumed to have the same habitual residence, unless the contrary is shown. A child who has not been married would be presumed to have the habitual residence of his parents or of that parent with whom the child has his home, unless the contrary is shown or unless the circumstances indicate otherwise. A person would have his habitual residence in one country only and he would be deemed to have that residence in that country until he acquires a new habitual residence.

13. The Commission does not come to a final view as to the solution that this country should adopt as the more appropriate the alternative solutions (1) of abolishing the domicile of dependency of married women (with consequential amendments of the law relating to the domicile of children) and making such other substantial changes in the existing law of domicile as appear to the Commission to be desirable, and (2) of replacing domicile by habitual residence as a connecting factor. In order to show exactly what is involved and to facilitate discussion the Commission has prepared two detailed Schemes. The first is for a Bill to Reform the Law of Domicile, and the second is for a Conflict of Laws (Habitual Residence) Bill to Reform the Law by Substituting "Habitual Residence" for "Domicile" as a Connecting Factor for the Purpose of the Conflict of Laws.

14. The Common Law rule is that a woman's domicile on marriage becomes that of her husband. However, in Britain, Canada, Australia and New Zealand recent legislation has conferred an independent domicile on married women. In

Ireland the law on the subject is far from certain because, as Mr Justice Walsh stated in the Gaffney case (referred to above), "it is possible that some day it [i.e. the view that a woman's domicile remains the same as, and changes with that of her husband] may be challenged on constitutional grounds in a case where the wife has never physically left her domicile of origin while her deserting husband may have established a domicile in another jurisdiction". In the United States many of the States have passed Equal Rights Amendments, which, in effect, abolish the concept of the wife's dependent domicile. In addition, the Equal Rights Amendment to the U.S. Constitution will, if ratified, require all States within two years to remove distinctions between the sexes from their legislative provisions, thus abolishing the concept of the wife's domicile of dependency (where it still operates).

15. The Working Paper sets out the policy arguments regarding the domicile of married women and points out that, apart from anything else, the Common Law rule as to the wife's domicile of dependency may offend against the Constitution, as indeed also may the rule as to the dependent domicile of a child (in so far as his domicile follows that of his father while his father is alive). In this latter respect, the Commission draws attention to the judgment of the former Supreme Court in the Tilson case [1951] I.R. 1.

16. The Commission examines the implications of the abolition of domicile of dependency in certain areas of the law, i.e. in the recognition of foreign divorces and foreign legal separations, in the jurisdiction of the Courts in the case of maintenance proceedings, in the law that is to govern matrimonial property, testamentary capacity, legitimacy and taxation. The Working Paper discusses the Hague Convention on the Recognition of Divorces and Legal Separations (1 June 1970),

and two Hague Conventions (2 October 1973), which deal, respectively, with (1) the Recognition and Enforcement of, and (2) the Law Applicable to, Maintenance Obligations and the Hague Convention on the Law Applicable to Matrimonial Property Regimes (14 March 1978).

17. The law as to the domicile of children is examined in some detail in the Working Paper. Generally it may be said that, subject to the rules that may be derived from the judgments of the Supreme Court in the Tilson case (referred to above), the domicile of a legitimate child follows that of the child's father until the father's death, and that after that it follows that of the mother until the child reaches the age of twenty-one. The most desirable law would, in the Commission's view, be one that (1) harmonises the child's legal position with his factual circumstances, (2) takes account of the child's interests, and (3) does not discriminate between the mother and the father, except, possibly, in the case of an illegitimate child (whose domicile could continue to be that of the mother). The Commission points out that in order to achieve these objectives some radical amendments of the existing law are required. As regards a proposal that has been made that minor children of all ages should be capable of having a domicile independent of that of their parents, the Commission formally requests the submission to it by interested persons or groups of their views.

18. A question that in the Commission's view merits consideration is whether the law should provide that any person with a genuine interest in the matter (or, indeed, the child himself) should, in the interest of the child, be permitted in certain circumstances (death of, or desertion by one parent of the other) to apply to the Court for an order changing the child's domicile to that of a different country.

The Court would not, of course, be empowered to confer a new domicile on a child unless the child had a genuine connection with the country of the proposed domicile.

19. There are certain other aspects of the law that should, in the Law Reform Commission's opinion, be dealt with in new legislation to reform the law of domicile. It is suggested that, in order to achieve clarity, the intention required to acquire the domicile of a particular country should be an intention to reside in that country indefinitely rather than an intention to reside there permanently. If this change - and, indeed, many of the other changes recommended - were made in the law, the concept of domicile would approximate more closely to that of habitual residence.

20. The Commission also suggests that certain reforms be made in the law as to a person's domicile of origin where he proposes to abandon his existing domicile and to acquire a new domicile. The Commission favours the solution adopted in New Zealand and in the United States, namely, that the law of the domicile just abandoned should continue until a new domicile is acquired. The present law is that the domicile of origin (the domicile acquired at birth) revives until another one (the domicile of choice) has been acquired.

21. The Commission in dealing with the domicile of mentally ill persons suggests that the present uncertainty should be removed from the law. It is suggested that the Court should, on application to it by an interested person, be able to change the domicile of a mentally ill person where it appears to the Court to be in the interest of that person proper to do so, having regard to the interests of other persons concerned. Under existing law, it seems that the domicile of a person who becomes mentally ill in adulthood does not change until he regains his health. In the case of a person who becomes

mentally ill before adulthood, the law appears to be that, so long as that person remains ill, his domicile is determined as if he continued to be a dependent person.

22. The Law Reform Commission makes, in all, eighteen recommendations for the reform of the law of domicile. These recommendations have, of course, been made on the assumption that domicile is to be retained as a connecting factor in private international law. The recommendations are implemented in the General Scheme of the Bill of a proposed Domicile Act to Reform the Law of Domicile.

23. The Working Paper, which has been circulated for comment and criticism, does not represent the final views of the Law Reform Commission. The Commission requested that observations on the Working Paper should be submitted before 1 January 1982. The only observations so far received are from two groups of students in Trinity College, Dublin, forwarded to the Commission by Miss Yvonne Scannell, lecturer in law at Trinity College Dublin; so the Commission takes this opportunity to renew its request for observations.

PART III

WORK IN PROGRESS

Subjects from the Commission's First Law Reform Programme and
Matters referred by the Attorney General

(1) The Law Relating to the Age of Majority, the Age for
Marriage and Some Connected Subjects

24. The Law Reform Commission's Working Paper No.2 published in December 1977 dealt with the law relating to the Age of Majority, the Age for Marriage and Some Connected Subjects. Observations on the Working Paper were invited to be made before 1 March 1978. The Commission has considered the submissions received by it and a draft Bill has been prepared which is being examined by the Commission and will be included in the Report on the subject. Further studies will be undertaken on minors' contracts and the liability of minors in tort, which were touched upon in Working Paper No.2.

(2) Family Law

25. A draft Report on illegitimacy has been completed and submitted to the Commission. The draft Working Paper on the law of nullity has been further considered by the Commission during the year. But the intractable nature of some of the issues raised has delayed agreement on the final recommendations.

26. A draft Working Paper has been submitted to the Commission on the legislation necessary to become party to the Hague Convention on the Civil Aspects of International Child Abduction (1980). The object of this Convention is to secure the immediate return of children who have been wrongfully removed from the country where they are habitually resident. The draft Paper also treats the more general question of the legal measures which might be adopted to prevent the kidnapping of children out of the jurisdiction.

27. Other areas of family law upon which work is proceeding are divorce a mensa et thoro, restitution of conjugal rights, jactitation of marriage, the recognition of foreign divorces and legal separations, the recognition of foreign nullity and foreign annulment decrees, the recognition and enforcement of foreign decisions relating to maintenance obligations, the law applicable to maintenance obligations in the Conflict of Laws, and the law applicable to matrimonial property regimes in the Conflict of Laws.

(3) Evidence

28. The Law Reform Commission Working Paper No.9 on the Rule against Hearsay was published in May 1980 and the Commission requested that observations be submitted before 2 August 1980. This request was renewed in last year's Annual Report. In the light of these observations the Commission had hoped to proceed with the preparation of the necessary draft Bill and Report. Unfortunately no observations whatsoever have been received despite the fact that specific requests have been made to interested parties and observations promised by these parties.

29. A draft Working Paper has been submitted to the Commission containing a General Scheme of a Bill to implement

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the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970). The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) are also being examined.

30. Work has also commenced on a Working Paper dealing with the competence and compellability of spouses as witnesses for the prosecution in criminal cases. This topic was foreshadowed in the Working Paper on the Rule against Hearsay.

(4) Review of the Vagrancy Acts and the Dublin Police Acts

31. Following consideration of this subject by the Commission a revised draft Working Paper on the Vagrancy Acts has been prepared and submitted to the Commission and a revised draft Working Paper on the Dublin Police Acts is in preparation.

(5) Judicial Review of Administrative Action: The Problem of Remedies

32. The Law Reform Commission Working Paper No.8 published in December 1979 dealt with this topic. Observations were invited before 1 April 1980, but as indicated, this was not a final date. The Commission has been disappointed by the lack of comments it has received on this Paper and takes this opportunity to renew its request for observations. Work on the Report must commence in the near future.

PART IV

GENERAL(1) Family Law Act 1981

33. The Family Law Act 1981 was enacted into law before the dissolution of the 21st Dail in May 1981. It followed the recommendations of the Commission's First Report on Family Law (LRC 1-1981) in abolishing the actions for criminal conversation, harbouring of a spouse and breach of promise of marriage. The provisions in the Family Law Act 1981 consequential upon the abolition of the action of breach of promise of marriage follow, generally, the recommendations of the Law Reform Commission's Report. However the Government did not accept the Commission's recommendations that the actions for criminal conversation and harbouring of a spouse should be replaced by a family action for adultery. The Act abolished the action for enticement of a spouse, which the Commission had recommended should be made a family action. No action was taken on the Commission's recommendations relating to the actions for loss of consortium, personal injury to a child, seduction of a child, enticement of a child, harbouring of a child and the recommendations relating to the determination of questions as to property between spouses. It was stated officially that the Minister for Justice has all these recommendations under consideration.

(2) Offices of the Commission

34. In previous reports reference has been made to the difficulties that the Commission has experienced resulting

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from the lack of proper accommodation. Efforts to obtain alternative accommodation have, however, been unsuccessful to date but it is proposed to continue to search for suitable premises.

(3) Superannuation of Certain Officers of the Commission

35. The Superannuation scheme prepared by the Commission in collaboration with the Department of the Public Service pursuant to section 12 of the Law Reform Commission Act 1975 was submitted to the Attorney General for his approval as required by that section. The scheme must be approved by the Attorney General with the concurrence of the Minister for the Public Service before it can be brought into operation. It must then be laid before each House of the Oireachtas.

(4) Examination of Other Legal Systems

36. The laws in other common law jurisdictions and in civil law jurisdictions are examined by the Commission in its publications. The Commission is grateful for the continuing assistance in this research provided by foreign embassies and legal authorities in foreign countries.

(5) Assistance from Departments of State

37. The Commission wishes to record its appreciation of those Departments of the State that have been of assistance to the Commission in carrying out its functions. The Commission wishes to thank especially the Department of Justice. It also wishes to thank the Office of Law Reform at Stormont, Belfast, with which it continues to have excellent and fruitful relations.

(6) Observations on Working Papers

38. The process of law reform is dependent on an interaction between the Commission and interested and informed persons. The Commission has been disappointed by the response to its invitation for observations on its various Working Papers. Last year the Commission appealed for a better response especially from bodies representing the various branches of the legal profession. Sad to relate, no such response has materialised and the Commission takes this opportunity to renew its appeal. From time to time public representatives, interested organisations and persons, members of professional bodies as well as practising and academic lawyers call for particular changes in the law. However, when the Commission publishes working papers or reports advocating specific amendments of the law few if any observations or suggestions are forthcoming. The Commission, as has often been indicated in its published documents, is always ready to receive (and, indeed, welcomes) oral or written representations from those interested in reforms in those branches of the law dealt with in the Commission's First Programme, which was laid by the Taoiseach before both Houses of the Oireachtas on 4 January 1977 (Prl. 5984).

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