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A UNIFORM LAW OF MARRIAGE? THE 1868 ROYAL COMMISSION RECONSIDERED

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2018 marks the 150th anniversary of the Report of the Royal Commission on the Laws of Marriage and its attempt to create a single law of marriage that would apply to England, Wales, Scotland, and Ireland.¹ Despite the conclusion of the Commission that such uniformity was highly desirable, and that it was ‘the duty of the State to make an earnest endeavour to overcome’² any barriers to achieving it, only limited reforms were enacted. Today, the differences between the laws of marriage in the United Kingdom and the now Republic of Ireland are greater than ever. In terms of the formalities required for a valid marriage, the law in England and Wales has remained structurally the same as it was 150 years ago while the laws of Scotland, Northern Ireland, and the Republic of Ireland have changed more radically. With demands for marriage reform in England and Wales gathering pace, and proponents of reform looking to other parts of Britain and Ireland for inspiration, it is enlightening to look back at what was proposed in 1868, and why it failed to become law.

The first part of the article accordingly sketches out the marriage laws of England and Wales, Ireland, and Scotland at the time the Royal Commission began its deliberations and discusses the case that had exposed the differences between them and generated a new desire for uniformity. The second part considers the constitution of the Commission and analyses its recommendations. The third looks at the relatively limited reforms that were enacted in response to the Report, and the fourth considers the longer-

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¹ The constitutional relationship between them had evolved over the centuries, with Wales being annexed to England in 1536, and the crowns of Scotland and England being united under James VI (who accordingly became James VI of Scotland and James I of England and Wales) in 1603. The Act of Union in 1707 (5&6 Anne, c 11) created the Kingdom of Great Britain, encompassing England, Wales, and Scotland, and a further Act of Union in 1800 (39 & 40 Geo III, c 67) created the United Kingdom of Great Britain and Ireland. See J Snape and R Probert, ‘Introduction’ in R Probert and J Snape (eds) *A Cultural History of Law in the Age of Enlightenment* (Bloomsbury, 2018).

² *Report of the Royal Commission on the Laws of Marriage* (London 1868), Cm 4059, xxiv (hereafter *Report*).

term impact of the Commission in terms of its assumptions about the principles that should underpin the law of marriage.

EXPOSING THE DISPARITIES IN MARRIAGE LAW

In the 1860s, there were fundamental differences in the way that marriages were regulated across Great Britain and Ireland. In both England and Wales, and in Ireland, there was increasing state intervention through legislation and the marriage laws had been relatively recently reformed. By contrast, the picture in Scotland was predominantly one of failure to extend state control over marriage formation.³

England and Wales

In England and Wales, the Clandestine Marriages Act of 1753 had enshrined the requirements of the canon law in statute, albeit with a new and harsher penalties for those who failed to comply with certain key requirements. All except Quakers and Jews were expected to marry according to the rites of the Church of England. With the growth of Nonconformity in the nineteenth century this requirement began to seem irksome on both sides and the 1830s had seen a sustained campaign by Nonconformists for the right to solemnise marriages.⁴ This coincided with a new interest on the part of the state in ensuring better recording of key demographic events, and with a new administrative machinery that would be able to implement it. Reforms to the Poor Law had divided the country into a number of civil districts that could be used as the basis for a new system. The resulting Marriage Act of 1836⁵ introduced the possibility of civil marriage, brought Jewish and Quaker marriages within a formal legal structure, and provided for the possibility of other non-Anglicans marrying according to their own

³ The history of marriage formation in Scotland is far from complete but for recent studies see E Gordon, 'Irregular Marriage: Myth and Reality' (2013) 47 *Journal of Social History* 507; TM Green (ed) *The Consistorial Decisions of the Commissaries of Edinburgh 1564 to 1576/7* (Stair Society, vol 61, 2014); B Dempsey 'Making the Gretna blacksmith redundant: who worried, who spoke, who was heard on the abolition of irregular marriage in Scotland?' (2009) 30 *Journal of Legal History* 23; B Dempsey, 'The Marriage (Scotland) Bill 1755' in H MacQueen (ed), *Miscellany VI* (The Stair Society, vol 54, 2009).

⁴ See R Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (CUP 2009), ch 9.

⁵ 6 & 7 Will IV c 85.

religious rites. Such was the diversity of dissent in this period, though, that simply devolving the power to conduct marriages to other religious groups was not really an option.⁶ There were many different groups of Methodists, Baptists, and Independents, and no single overarching organization that could speak for them.⁷ There were also many lay preachers within Nonconformist organisations, so making the validity of a marriage dependent upon who had conducted it would have been problematic. The compromise was to license individual buildings that were used as places of worship: if twenty householders confirmed that they used a particular building as their regular place of worship, it would be registered as a place where marriages could be celebrated.⁸

At the same time as creating greater choice, the 1836 Act also extended the power of the state in a number of respects. Authority was conferred upon a state official – the superintendent registrar – to celebrate civil marriages.⁹ All those marrying other than according to non-Anglican rites, including Jews and Quakers, had to give notice to the superintendent registrar.¹⁰ There was even an attempt to introduce universal civil preliminaries, but this was strongly resisted by the Church of England and banns and licences were retained as legal preliminaries to the Anglican service. State control was further asserted by stipulating that all marriages should be centrally registered;¹¹ responsibility for registration was devolved in the case of Anglican, Jewish, and Quaker marriages, but all other marriages, whether civil or religious, had to be attended by a civil registrar.¹²

The take-up of these new options was relatively slow. In 1838, the first full year of the new Act's operation, just 1,257 places of worship had been registered for the

⁶ While the special treatment of Quaker and Jewish weddings was to some extent a matter of historical accident (see Probert, n 4 above), its continuance may well have been influenced by the fact that the groups in question were relatively small and had a distinct identity.

⁷ A Gilbert, *Religion and Society in Industrial England: Church, Chapel and Social Change, 1740-1914* (Longman, 1976); R Currie, A Gilbert and L Horsley, *Churches and Churchgoers: Patterns of Church Growth in the British Isles since 1700* (Clarendon Press, 1997); D Rosman, *The Evolution of the English Churches, 1500-2000* (Cambridge University Press, 2003).

⁸ Marriage Act 1836, s 18.

⁹ Marriage Act 1836, s 21.

¹⁰ Marriage Act 1836, s 4.

¹¹ Births and Deaths Registration Act 1836, 6 & Will IV, c 86.

¹² Marriage Act 1836, s 20.

celebration of marriage.¹³ Independents accounted for the biggest single group, with 547 chapels, followed by Baptists with 246 and Roman Catholics with 197. The Unitarians had 73, Presbyterians 36 and the Moravians just one. That year fewer than 3,000 couples married in a non-Anglican religious ceremony, and 1,093 couples – just over 1 per cent of the total – in a civil ceremony.¹⁴

It is possible that the association with the Poor Law was off-putting to many. Notices of marriage had to read out at meetings of Poor Law Guardians. Discontent with this procedure led to a minor change in 1856: notices of marriage were no longer to be read out at such meetings but simply posted up outside the local register office.¹⁵ Yet the change did not lead to any sudden surge in popularity. By 1865, the number marrying outside the Established Church had grown to over 40,000, but this was still only 22 per cent of the total.¹⁶ Roman Catholic marriages accounted for around 5 per cent, while Jewish and Quaker marriages barely registered in statistical terms, with just 353 and 54 respectively. Civil marriages still only accounted for 8 per cent, outnumbered by marriages in dissenting chapels. Even so, the number of marriages in dissenting chapels was relatively small, both in proportion to the number of places registered for marriage and the number of dissenting places of worship more generally. With 5,352 places of worship registered for marriage, it worked out at around 3 per chapel per year. In evaluating the relatively low uptake of both civil marriage and marriage according to non-Anglican religious rites,¹⁷ it should perhaps be borne in mind that marriage according to Anglican rites was the only route to a legally binding marriage that did not entail direct contact with the state.

Ireland

In Ireland, too, state control over marriage was extended by means of formal legislation over the course of the nineteenth century. In particular, the Marriages (Ireland) Act 1844 had been modelled on the 1836 Act, introducing the option of civil marriage and

¹³ *First Annual Report of the Registrar-General of Births, Deaths, and Marriages in England* (HMSO, 1839), 6.

¹⁴ *Ibid.*, 17.

¹⁵ Marriage and Registration Act 1856, 19 & 20 Vict, c 119, s 4.

¹⁶ *Twenty-eighth Annual Report of the Registrar-General of Births, Deaths, and Marriages in England*, 1865 (HMSO, 1867), iii.

¹⁷ For discussion see O Anderson, 'The Incidence of Civil Marriage in Victorian England and Wales' (1975) 69 *Past & Present* 50; R Floud and P Thane, 'The Incidence of Civil Marriage in Victorian England and Wales' (1979) 84 *Past & Present* 146.

a new (but limited) system of civil registration, as well as regulating religious marriages more closely. However, in contrast to England and Wales, the vast majority of marriages in Ireland were Catholic marriages, which remained nearly entirely unregulated by the state until the mid-1990s when a universal notice requirement was imposed.¹⁸ Moreover, the association of 18th century marriage legislation with anti-Catholic provisions led to an identification of state marriage law with the interests of the Established Church and a policy of Catholic suppression.¹⁹ At the time of the Royal Commission, Ireland effectively had two regulatory systems for entry into marriage jostling for primacy, that of the Catholic Church for the Catholic majority and that of 1844 Act for the Protestant land-owning minority. The way in which people married in Ireland reinforced their sectarian cultural identity as Protestant or Catholic.

Eighteenth century legislation, designed to prevent the assimilation of Protestant English settlers with the native Irish Catholic population, recognised the validity of ‘mixed marriages’ ie marriages between a Protestant and a Catholic, only if such marriages had been carried out by a clergyman of the Established Church.²⁰ Mixed marriages carried out by Roman Catholic priests were void *ab initio*.²¹ Moreover, Roman Catholic priests who carried out ‘mixed marriages’ or tried to marry two members of the Established Church were subject to excessive penalties,²² leading Catholic emancipation campaigner, Daniel O’Connell to suggest that in 1830 such priests could be ‘hanged first and fined later’.²³ At this time, Irish MPs encountered considerable resistance to removing such criminal penalties as it was feared that such

¹⁸ Family Law Act 1995, s 32(1)(a) (Ir).

¹⁹ J Kelly ‘The historiography of the Penal Laws’ in J Bergin et al (eds), *New Perspectives on the Penal Laws* (Eighteenth Century Ireland Society, 2011).

²⁰ 32 Geo III, c 21 (Ir) s 9, s 12.

²¹ 19 Geo II, c 13 (Ir); reiterated by 23 Geo II, c 10 (Ir) s 3. Considered in *Steadman v Powell* (1822) 1 Add 58; 162 ER 21 (Prerogative Court of Canterbury); *Bruce v Burke* (1825) 2 Add 471; 162 ER 367 (Court of Arches); *O’Connor v M’Cann* (1829) Milward 204 (Prerogative Court); *In Re Darcy’s Infants* (1860) 11 ICLR 298; *Swifte v Swifte* [1910] 2 IR 140.

²² 12 Geo I, c 3 (Ir), s 1 stated that when carried out by a Popish priest, reputed Popish Priest, person pretending to be a Popish priest or a clergyman of the Church of Ireland or any degraded clergyman such marriage were felonies and the celebrant was punishable by death. The death penalty was reiterated in 23 Geo II, c 10 (Ir), s 3. 33 George III c 21 (Ir), s 1, imposed a penalty of £500 but left the existing death penalty for such marriages untouched. An unreported decision of the Irish Kings Bench, later referred to by O’Connell (*Hansard*, HC Deb, vol 18, col 1240 (26 June 1833)), apparently interpreted the penalties as cumulative. Unfortunately, law reports for the Irish Kings Bench simply do not exist for this period to verify his claim. Official reports only start in 1866 and the nominate reports are very patchy before then (EG Hall, *The Superior Courts of Law: ‘Official’ Law Reporting in Ireland 1866–2006* (Incorporated Council of Law Reporting for Ireland, 2007), 610-3 gives a comprehensive list).

²³ *Hansard*, HC Deb, vol 24, col 398 (4 May 1830).

change would give Roman Catholic priests impunity to celebrate clandestine marriages, which would be unfavourable to the Protestant community in Ireland.²⁴ The Marriages by Roman Catholics (Ireland) Act 1833²⁵ finally repealed all penalties affecting Roman Catholic clergyman who celebrated the marriage of a Protestant or reputed Protestant. However, in spite of the best attempts of Catholic emancipators in the 1830s who highlighted the plight of Catholic women seduced by Protestant men and then deserted,²⁶ mixed marriages by Catholic priests remained legally invalid.²⁷ The vexed issue of ‘mixed marriages’ continued to dominate political discourse about Irish marriage regulation throughout the 19th century and would, in due course, prove one of the points of contention in the high-profile *Yelverton* case.²⁸

The Irish legislation passed in 1844 differed from the English 1836 Act in several key respects. The primary trigger for the legislation was the legal uncertainty of marriages of members of the Established Church carried out by Presbyterians. While marriages celebrated by Presbyterian ministers had been recognised since the late eighteenth century, as long as the marriage was celebrated between two Protestant dissenters,²⁹ there was no legislative provision as to the validity of marriages where one party was not a Protestant dissenter.³⁰ From the 1830s onwards, the legal invalidity of a marriage celebrated by a Presbyterian was increasingly raised in Assizes as a defence to bigamy charges,³¹ culminating in the case of *R v Millis*³² where the requirement for marriages in England and Ireland to be carried out by ‘a priest in holy orders’³³ in order to be

²⁴ All reforming Bills were opposed on the basis that punishment of Catholic priests provided the only remaining security for the Protestants of Ireland against clandestine marriage: see eg *Hansard*, HC Deb, vol 33, col 828 (11 May 1836); Roman Catholic Marriage Bill, HC Deb, vol 28, col 859 (17 June 1835).

²⁵ 3 & 4 William IV c 102.

²⁶ *Hansard*, HC Deb, vol 28, cols 859-60 (17 June 1835); HL Deb, vol 30, col 245 (11 August 1835).

²⁷ See below.

²⁸ See below.

²⁹ 21 & 22 Geo III c 25 (Ir).

³⁰ 32 Geo III, c 21 (Ir), ss 12, 13 made it particularly unclear whether Dissenters were permitted to celebrate mixed marriages between a Protestant and a Roman Catholic.

³¹ See, eg *R v McLaughlin* (1831) 1 Crawford & Dix 170; *Mc Anerney's Case* (1841) Irish Circuit Reports 287; *Samuel Smith's Case* (1841) Crawford & Dix 287;

³² *R v Millis* (1843-44) 10 Cl & F 534; 8 ER 844, in which George Millis was acquitted of bigamy, his first marriage having been conducted by a Presbyterian minister in Ireland despite the fact that George was a member of the Established Church of Ireland and the second according to the rites of the Church of England. See further R Probert, ‘*R v Millis* reconsidered: binding contracts and bigamous marriages’ (2008) 28 *Legal Studies* 337; M Harding, ‘The Comeback of the Medieval Marriage *per verba de praesenti* in Nineteenth Century Bigamy Cases’ in N Howlin and K Costello (eds), *Law and Family in Ireland 1800-1950* (Palgrave MacMillan, 2017).

³³ Which included a clergyman of the Established Church and a Roman Catholic Priest but not a Protestant Dissenter or Presbyterian.

recognised at common law was established. Throughout the early 19th century, the Presbyterian community in Ireland repeatedly lobbied Parliament for legislation declaring their marriages to be legally valid.³⁴ As a result, the 1844 Act recognised Presbyterian marriages as a specific category of religious marriages, alongside those in the Established Church and those conducted according to Quaker or Jewish rites. Moreover, while the Act permitted both the Established Church and Presbyterians to use their own religious preliminaries as an alternative to giving notice to a state registrar, only the Presbyterians could insist on religious preliminaries as they were not required by the Act to accept the civil certificate of notice as a valid preliminary to marriage.³⁵

Catholic marriages remained outside the legal framework of the 1844 Act.³⁶ Although the internal marriage practices of the Catholic Church became more consistent and fell into line with the requirements of canon law after 1850, Archbishop Cullen objected to any contact with the structures of the Protestant state, particularly those of the Poor Law.³⁷ Between 1860 and 1863, eight Bills to extend state marriage registration to Catholic marriages were unsuccessful.³⁸ It was not until 1863 that legislation introduced by William Monsell, a future Royal Commissioner, with the prior approval of Archbishop Cullen,³⁹ required couples marrying in a Catholic ceremony to obtain a civil certificate of notice in advance of the wedding and for the completed certificate to be registered by them on pain of a fine.⁴⁰

The 1844 Act also allowed members of other religious denominations to marry according to their own rites in buildings registered for the purpose, although a state registrar had to be in attendance.⁴¹ The Marriage Law (Amendment) Act 1863 later allowed marriages to be ‘celebrated or solemnised’ by ministers of ‘Protestant

³⁴ See eg *Hansard*, HC Deb, vol 60, col 99 (7 February 1842); HL Deb, vol 60, cols 315-6 (14 February 1842).

³⁵ Marriages (Ireland) Act 1844, s 4 and s 13 limited the preliminaries to ordinary licence and banns only.

³⁶ Marriages (Ireland) Act 1844, s 3.

³⁷ ER Norman, *The Catholic Church in Ireland and the Age of Rebellion 1859-1873* (Longmans, 1965), 73-74.

³⁸ Outlined by Robert Peel: *Hansard*, HC Deb, vol 169, cols 547-56 (19 February 1863).

³⁹ Who later issued a pastoral urging compliance with the system: JA Robins ‘The background to the first Irish Registration Acts’ (1963) 11 *Administration* 282.

⁴⁰ Registration of Marriages (Ireland) Act 1863 26 & 27 Vict, c 90, s 11 imposed a £10 fine on the husband for non-compliance.

⁴¹ Marriages (Ireland) Act 1844, ss 27-28.

Christian' bodies according to the usages of the body without the need for a registrar in attendance, some three decades before this requirement was lifted in England.⁴²

Scotland

Despite the union of England and Wales with Scotland in 1707, both countries retained their own, quite distinctive private law. At the start of the nineteenth century, there were two routes to becoming married in Scotland, either by a regular or by an irregular process. Regular marriages were those celebrated before a minister of the (presbyterian) Church of Scotland after banns had been called or, somewhat exceptionally, by a priest of the Scottish Episcopalian Church.⁴³

Irregular marriage has its roots in the medieval canon law of the Catholic Church. Although the Church, and later the state, frowned upon and indeed punished those who entered an irregular marriage, the view that it was the free interchange of consent to marriage that formed marriage between the parties meant that formalities were not required for the marriage to be valid. The three forms of irregular marriage were marriage by present consent to marriage (declaration *per verba de praesenti*), by promise of future marriage followed by sexual intercourse (*per verba de futuro subsequente copula*) and by cohabitation with habit and repute.⁴⁴ While there remains a lack of clarity over whether these were forms of irregular marriage, rather than merely the three permissible ways of proving the parties' intentions, there is no doubt but that, if proved, then the parties were just as married as if they had undergone all the requirements of regular marriage.⁴⁵

One reason, perhaps the main reason, that Scots' retention of pre-Reformation irregular marriage was controversial was the possibility of English 'runaway' brides and grooms crossing the border and marrying in a manner that was unavailable to them in England.

⁴² On which see R Probert, 'A Uniform Marriage Law for England and Wales?' [2018] CFLQ (forthcoming).

⁴³ The Toleration Act 1711, 10 Ann c 6.

⁴⁴ See E Clive *The law of husband and wife in Scotland* (Green, 1st ed 1974), 107-122 and J Fergusson, *A Treatise on the Present State of the Consistorial Law in Scotland* (Bell & Bradfute, 1829), 112-116.

⁴⁵ J Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland* (2nd revised edition) (Heir of Andrew Anderson 1693, reprinted 1981), I IV 6.

As Scots law required neither parental consent⁴⁶ nor any period of residence for the formation of marriage *de praesenti* and English law recognised marriages of its subjects if valid by the *lex loci celebrationis* (the place of celebration),⁴⁷ English couples with the means to travel could enter into a legally binding irregular marriage in Scotland which, if proved, would be recognised by the law of England.⁴⁸

Attempts were made in 1755 and again between 1847 and 1849 to abolish irregular marriage in Scotland. The first, an attempt by Lord Hardwicke to impose the terms of his 1753 Act upon Scotland, failed, largely due to political happenstance.⁴⁹ The failure of the various bills in the late 1840s appears to be due to two related factors. The first was that each of the marriage bills was linked to a separate bill that sought to establish the office of Registrar in Scotland for the first time, thereby complicating matters and increasing the potential for opposition. The second factor was the very strong, organised opposition from both the Church of Scotland and the Free Church of Scotland.⁵⁰ The Attorney General, Lord Campbell, who introduced the first pair of bills, complained that ‘both these measures had been greatly misunderstood or greatly misrepresented in Scotland’ and stated that ‘he was utterly unable to understand and to account for the number of petitions [largely from Church of Scotland and Free Church presbyteries] which had been presented against the present Bills from the northern part of the kingdom’.⁵¹ As a result of the failure of these interdependent bills, civil registration

⁴⁶ Marriage in Scotland was not the only way of avoiding the requirement of parental consent: under the Clandestine Marriages Act 1753 it was only marriages by licence that needed positive parental consent, while marriages by banns were valid in the absence of parental *dissent*. After 1823, lack of parental consent ceased to be a basis for invalidating a marriage, even if the parties had knowingly and wilfully married without it. When new modes of marrying were introduced by the Marriage Act 1836 similar provisions were included: see R Probert, ‘Parental Responsibility and Children’s Partnership Choices’ in R Probert, S Gilmore and J Herring (eds) *Responsible Parents and Parental Responsibility* (Hart, 2009).

⁴⁷ Assuming that they had capacity to marry by the *lex loci domicilii*, ie English law.

⁴⁸ In the event of a dispute over a purported marriage, proof required either ‘writ’ (that is a written document) or ‘oath’ that is the other party would be required to confirm or deny, on oath before God, whether they had consented to marriage. One method of securing written evidence was for the parties to present themselves to the local court and admit that they had entered into a clandestine marriage, pay the nominal fine and hold the court papers as proof, see Clive, n 41 above, 10.

⁴⁹ B Dempsey ‘The Marriage (Scotland) Bill 1755’ in H MacQueen (ed), *Miscellany VI* (The Stair Society, vol 54, 2009).

⁵⁰ There is very little commentary on the attempts to abolish irregular marriage in the 1840s but for some brief references see KM Boyd *Scottish Church Attitudes to Sex, Marriage and the Family 1850-1914* (John Donald, 1980), 52.

⁵¹ *Hansard’s Parliamentary Debates* (3rd Series), vol 100, col 568.

was not introduced until 1855, almost two decades after its advent in England and Wales.⁵²

A further consequence was that ‘runaways’ from south of the border could continue to make use of the facility of Scottish irregular marriage at a time when improvements in travel made the journey less arduous and a realistic option for English couples living farther from the Scottish border. To counter this, the Marriage (Scotland) Act 1856 (usually known as Lord Brougham’s Act) was passed to put an end to such impulsive matches by stipulating that:

‘no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.’⁵³

Reliable numbers of irregular marriages are impossible to establish and while there appeared to be something of a ‘fad’ for Scots irregular marriages among English couples in consequence of the restrictions within the 1753 Hardwicke Act and again in the early decades of the 20th century, the numbers of such marriages is likely to have been very small.⁵⁴

In his evidence to the Committee, James Stark, Superintendent of Statistics and Assistant Census Commissioner for Scotland, was of the view that most irregular marriage was between Scottish couples who were unable to access regular marriage due to changing sectarian restrictions on which Protestant denominations were recognised as being able to conduct marriage.⁵⁵ This issue was settled by the Marriage (Scotland) Act 1834 which provided that clergy of any denomination could celebrate a

⁵² Registration of Births, Deaths, and Marriages (Scotland) Act 1854, 17 & 18 Vict c 80. Civil marriage was not to be introduced in Scotland until as late as 1940 with marriage *de praesenti* and *subsequente copula* being abolished at the same time: Marriage (Scotland) Act 1939, s 1 and s 5 respectively. No claim to be married by cohabitation with habit and repute can now be raised based on cohabitation that commenced after 4 May 2006: Family Law (Scotland) Act 2006, s 3. This is subject to a very narrow exception where Scots domiciled parties undergo a marriage ceremony furth – ie outside – of Scotland which ceremony is subsequently found to have been invalid under the law of the place where the purported marriage was entered into: s 3(4). Proclamation of banns as the alternative to notice given to the registrar remained the exclusive privilege of the Church of Scotland until the abolition of that process by s 3 of the Marriage (Scotland) Act 1977.

⁵³ Marriage (Scotland) Act 1856, s 1.

⁵⁴ Gordon, n 2 above, 511.

⁵⁵ *Report*, Evidence of Dr James Stark, Appendix, 3. See also Clive, n 41 above, 56.

regular marriage, though its effect might have been limited by the fact that banns of all regular marriages had to be read in the parish (Church of Scotland) church.⁵⁶

Whilst no doubt giving some indication of the prevalence of irregular marriages, Stark's claim that during the eighteenth century 'regular marriages in many parishes and districts became the exception ... that it may be safely assumed that during the whole of the eighteenth century, a third of the marriages in Scotland were contracted irregularly' and that the numbers up to the 1834 Act remained 'very great'⁵⁷ was, as Gordon concludes, 'almost certainly a guess'.⁵⁸ Equally suspect at the level of precise detail, though again presumably reflecting a certain reality, Stark reckoned that following the 1834 Act, irregular marriages accounted for not more than 1 in a thousand marriages in Scotland.⁵⁹

The Yelverton case

In the mid-nineteenth century, the marital misfortunes of Theresa Longworth hit the headlines and drew attention to the differences in marriage law across the United Kingdom of Great Britain and Ireland. Theresa claimed that she had gone through two ceremonies of marriage with Major Yelverton and that they had subsequently lived together as husband and wife in Ireland, Scotland, England and France until he left her in April 1858. The first ceremony, Theresa stated, had taken place in Edinburgh on 13 April 1857, by a private exchange of consent. The Major, however, denied the existence of this ceremony. The second ceremony claimed by Theresa had taken place on 15 August 1857 before a Catholic priest in Killowen in Ireland. The Major acknowledged that this had taken place but challenged the validity of the marriage, on the basis that he was a Protestant at the time that it was celebrated. In June 1858, he went through a ceremony of marriage with another woman in Edinburgh, and a decade's-worth of litigation began.

⁵⁶ 4 & 5 Will 4 c 28. As noted above, broadly similar legislation would be enacted in England in 1836 and in Ireland in 1844.

⁵⁷ *Report*, Evidence of Dr James Stark, Appendix, 3.

⁵⁸ Gordon, n 2 above, 511.

⁵⁹ *Report*, Evidence of Dr James Stark, Appendix, 3.

Each sought to litigate the issue of whether they were married to each other in almost every court in England, Scotland and Ireland. He was initially arrested for bigamy,⁶⁰ but the prosecution was subsequently abandoned.⁶¹ She instituted a suit in the new Court for Divorce and Matrimonial Causes in England, seeking a decree of restitution of conjugal rights, but the court held that as Major Yelverton was not domiciled in England – and that if she was his wife, neither was she – it did not have jurisdiction to entertain her suit.⁶² Meanwhile, she had also instituted proceedings in Scotland seeking a declaration that they were lawfully married; he in return sought a declaration that he was free of any marriage with her. At the same time there were proceedings before the Court of Common Pleas in Dublin.⁶³

Under Irish law, even circumstantial evidence that someone had professed Protestantism within 12 months prior to a marriage was enough to invalidate a marriage carried out by a Catholic priest.⁶⁴ Yet, in July 1862, the verdict of the Irish court went against the Major when the Irish jury returned a perverse verdict that the Major was a Catholic at the time of his marriage in Ireland, and affirmed both the Scottish and Irish marriages.⁶⁵ Media coverage of the Yelverton case was extensive.⁶⁶ Irish papers portrayed Longworth as an innocent victim of an unfair imperial law.⁶⁷ Her victory in the Irish courts was celebrated as a victory for Irish Justice and the Catholic Church.⁶⁸ The resulting publicity, and a subsequent high profile bigamy case,⁶⁹ changed

⁶⁰ *Birmingham Daily Post*, 16 August 1858. See further *The Morning Post*, 25 August 1858; *The Morning Chronicle*, 26 August 1858; *North Wales Chronicle*, August 28, 1858; and *Liverpool Mercury etc.*, 13 September 1858 for debate in the press as to status of his first marriage and condemnation of his attempt to repudiate it.

⁶¹ *The Era*, 19 December 1858.

⁶² *Yelverton v Yelverton* (1859) 1 Sw & Tr 574; 164 ER 866.

⁶³ The Irish Courts heard a claim by Longworth's creditor for repayment of debts from Yelverton, on the basis that he had not provided maintenance to his wife. *Thelwall v Yelverton* (1862) 14 ICLR 188.

⁶⁴ *Lessee of Kirwan v Kirwan* (1826) Batty 712; *O'Connor v M'Cann* (1829) Milward 204 (Prerogative Court); *In Re Darcy's Infants* (1860) 11 ICLR 289.

⁶⁵ *The Times*, 9 July 1862.

⁶⁶ C Schama, *Wild romance: the true story of a Victorian scandal* (Bloomsbury, 2011); R Gill, 'Imperial Anxieties of a Nineteenth Century Bigamy Case' (2004) 57 *History Workshop Journal* 58.

⁶⁷ *Ibid.*, 69.

⁶⁸ *Ibid.* See also H Kelleher Kahn, 'The Yelverton Affair: A nineteenth century sensation' (2005) 13 *History Ireland* 21.

⁶⁹ *The Queen v Thomas Fanning* (1866) 17 Irish Common Law Reports 289. See *Hansard*, HC Deb, vol 186, col 1335 (9 April 1867).

Parliamentary debate,⁷⁰ reframing the existing legislation as a discriminatory measure against Catholics rather than a protective measure for Protestants.

In Scotland, however, the court of first instance, the Outer House of the Court of Session, decided in the Major's favour on the basis that there had been no such ceremony in Scotland as Theresa had claimed. Theresa appealed against this decision and in December the Inner House reversed that decision and declared that the couple were married by the law of Scotland.⁷¹ The Major then appealed to the House of Lords, which in 1864 decided that there was insufficient evidence of a marriage having taken place in Scotland by words of present consent.⁷²

The Scottish courts did not directly address the validity of the ceremony that had taken place in Ireland. As Lord Westbury, the then Lord Chancellor, noted when the case reached the House of Lords, Theresa had been 'content in the Court below to have it assumed that this ceremony did not, per se, constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal.'⁷³ She would, after all, have had to plead it as a matter of foreign law in order for the Scottish courts to decide whether the Irish ceremony constituted a legally binding marriage. Consideration was, however, given to the impact of that ceremony on the inferences that could be drawn from the sexual relationship between Theresa and the Major in deciding whether there had been a marriage by means of a promise to marry followed by sexual intercourse. Lord Westbury disagreed with the interpretation of the Lord President in the court below that the Irish ceremony broke any link between the promise of marriage in Scotland and the sexual relationship that subsequently occurred between the parties in Scotland after their return from Ireland, and also took the view that the sexual relationship that had taken place in Ireland could also be attributed to the promise in Scotland. However, Lords Chelmsford, Wensleydale and Kingsdown all held that there was in any case insufficient evidence of any promise

⁷⁰ *Hansard*, HC Deb, vol 161, cols 935-6 (26 February 1861); HL Deb vol 162, col 972 (23 April 1861); HC Deb vol 168 cols 1199-204 (4 August 1862).

⁷¹ *Longworth v Yelverton* (1862) 1 M (HL) 161

⁷² The Lord Chancellor (Westbury) and Lord Brougham found that there was sufficient proof of a marriage (although the latter was absent and his view was advisory only) but Lords Chelmsford, Wensleydale and Kingsdown ruled that there was no such sufficient proof, *Yelverton v Longworth* (1864) 2 M (HL) 49. A final attempt by Maria Theresa to adduce new evidence occasioned a further equally unsuccessful appeal to the House of Lords: *Maria Theresa Longworth, Or Yelverton v The Hon. Major Yelverton* (1866-69) LR 1 Sc 218.

⁷³ *Yelverton v Longworth* (1864) 2 M (HL) 49, 58.

to marry, and that, even if there had been such a promise, the sexual intercourse that would transform a promise into a marriage also had to take place in Scotland.

These divergent decisions exposed how an individual's marital status might be different depending on the court deciding the case. The English ecclesiastical courts disclaimed jurisdiction. The Irish court held that the couple were definitely married in both Irish law and possibly under Scottish law as well and, by implication, that Yelverton was a bigamist. The Scottish courts came to different conclusions about the status of the Scottish marriage, while the House of Lords was divided. The case understandably generated a considerable outcry, and questions were asked in Parliament as to 'whether the Government intended to take any steps to remedy the extraordinary contradictions in the marriage law of different parts of the kingdom'.⁷⁴

THE RECOMMENDATIONS OF THE ROYAL COMMISSION

A Royal Commission was duly set up under the chairmanship of Lord Chelmsford, the then Lord Chancellor, with the task of considering the state and operation of the marriage laws in operation in different parts of the United Kingdom. The 14 Commissioners were chosen to reflect different parts of the UK, as well as a range of different political and religious views. Nonetheless, the balance within the Commission was significant in influencing its recommendations, reception and ultimate fate, and so it is worth giving some consideration to its composition before analysing what it recommended.

In view of the ultimate recommendations of the *Report*, and how it was perceived in Scotland and Ireland, it is significant that half of the 14 Commissioners had practised law in England and Wales. In addition to Lord Chelmsford, there was the Attorney General, Sir Roundell Palmer,⁷⁵ two judges, Sir James Plaisted Wilde and Page Wood VC, Spencer Walpole, who had practised in the Chancery Division before embracing a political career,⁷⁶ and Travers Twiss, who, as well as being appointed to a number of university chairs, had had a considerable practice in the ecclesiastical courts before their matrimonial and testamentary jurisdiction was transferred to new courts in 1858. The seventh, Sir Hugh McCalmont Cairns, had studied law in Dublin and been elected as

⁷⁴ *Hansard*, HC Deb, vol 168 col 1199 (4 August 1862), Mr Hennessy.

⁷⁵ Later Lord Selbourne.

⁷⁶ D Beales, 'Walpole, Spencer Horatio', ODNB 2004.

MP for Belfast but developed his practice in London, and by this time was Solicitor General and a Lord Justice of the Court of Appeal.⁷⁷ An eighth individual, Baron Lyvedon, had been called to the Bar but never practised. Of these eight, four had also been directly involved in the Yelverton litigation. Cairns and Palmer had acted for the Major and Maria Theresa respectively in *Yelverton v Longworth*, in which Chelmsford had sat as a judge, and Twiss had provided assistance to the court in the 1859 suit for restitution of conjugal rights.

Equally significant, however, in terms of the ultimate fate of the *Report* were those chosen to represent Scotland and Ireland. Alongside George Young, the Solicitor General, later elevated to the bench as Lord Young,⁷⁸ and Alexander Murray Dunlop, an advocate, and later legal advisor to the Free Church of Scotland, was John Inglis, later Lord Glencorse. He was Lord Justice Clerk at the time of his appointment and Lord President of the Court of Session and Lord Justice-General of Scotland by the time the *Report* was published. As one biographer has noted, his reputation as ‘one of the great holders of that office’ was founded in large part on ‘his defence of the independence of Scottish jurisprudence’⁷⁹ and it is therefore unsurprising that he was to be resistant to changing what he saw as a fundamental principle of Scots law.

For Ireland, there was Thomas O’Hagan, one of the Justices of the Court of Common Pleas in Ireland.⁸⁰ As a supporter of codification, his influence on the Commission’s desire for a unified law can be seen. There were also two politicians who had had direct involvement in marriage law reform. William Monsell, the Roman Catholic MP for Limerick, and Richard Southwell Bourke,⁸¹ the MP for Kildare, had both introduced bills to register Irish marriages in the 1860s and clashed with each other – and with Lord Cairns, their future fellow Commissioner – in so doing. Monsell had presented a petition signed by 27 of the Roman Catholic hierarchy⁸² against the 1862 bill proposed by Cairns, which had favoured using the infrastructure of the Poor Law as a basis for

⁷⁷ He was to succeed Chelmsford as LC in 1868.

⁷⁸ GF Millar, ‘Young, George’, ODBN 2004.

⁷⁹ GF Millar, ‘Inglis, John, Lord Glencorse’, ODBN 2004.

⁸⁰ JF McEldowney, ‘O’Hagan, Thomas, first Baron O’Hagan’ ODNB 2008. He was later Baron O’Hagan, and the first Roman Catholic to hold the Lord Chancellorship of Ireland after 30 & 31 Vict c 75 opened it up to Catholics.

⁸¹ Otherwise known as Lord Naas, in 1867 he became the 6th Earl of Mayo.

⁸² See discussion *Hansard*, HC Deb, vol 169 cols 553-554 (19 February 1863).

registration,⁸³ and the 1863 Bill that made it onto the statute book was colloquially known as Mr Monsell's Act. They were thus all knowledgeable about Irish marriage law, had experienced first-hand the difficulties of legislating for Ireland, and were keenly aware of the tensions between the Protestant and Catholic communities and the importance of obtaining the approval of the Catholic hierarchy to secure the passage of legislation.

In the light of the differential treatment of different religious groups in the context of marriage that had to a great extent precipitated the *Report*, it was crucial that the Commissioners should also reflect different denominations, and some of the Commissioners were particularly well known for their religious advocacy. Dunlop, for example, 'was elected to the general assembly of the Church of Scotland as a representative elder for the presbytery of Lochcarron in Ross-shire' and later carried out a similar role within Free Church assemblies.⁸⁴ Monsell, later Baron Emly, was very aware of the tensions surrounding mixed marriages. He had been born into a wealthy Protestant family and married his first wife, Lady Wyndham-Quin, in 1836 in a parish church in Adare, Co Limerick. By 1850, however, he had converted to Catholicism under the influence of John Henry Cardinal Newman and as a reaction to the horror he saw as a resident landlord during the Irish Great Famine. This was quite unusual for a Protestant landowner. He subsequently took a prominent role representing the Catholic hierarchy in Ireland but his wife never became a Catholic.⁸⁵ O'Hagan was also a prominent Catholic and supporter of O'Connell and of Catholic emancipation, who worked for fairer laws to give Catholics greater rights.⁸⁶

Having reviewed the marriage laws in operation in the different parts of the UK, the Commission concluded that having one uniform system would be both desirable and feasible. Since none of the systems in operation were regarded as ideal, reform could not be achieved simply by extending the laws of England and Ireland to Scotland, or vice versa. The Commission thus articulated a number of principles that should underpin a 'sound marriage law'. First, it should be both as simple and as certain as

⁸³ *Hansard*, HC Deb, vol 165 cols 489-91 (19 February 1862).

⁸⁴ GF Millar, 'Dunlop, Alexander Colquhoun-Stirling-Murray', ODNB 2004.

⁸⁵ See M Potter, *William Monsell of Tervoe 1812-1894 Catholic Unionist, Anglo-Irishman, Foreword by Gearóid O Tuathaigh* (Irish Academic Press, 2009)

⁸⁶ McEldowney, n 77 above.

possible. Second, the State ‘should be absolutely impartial and indifferent as between the members of different religious denominations’.⁸⁷ Third, while ‘every proper and reasonable facility’ should be given for celebrating marriage, the state also had a duty ‘to discourage, and place obstacles in the way of sudden and clandestine marriages’, to ensure that the parties were both eligible and suitable.

The solution that they proposed would have required a significant change in the core of the marriage law of Scotland. The proposals would have seen the end of marriage based solely on the consent of the parties. Whatever practical implications this might have, it would be a shift in the fundamental principle of more than 300 years of Scots law, one which, as the Committee was aware, would not be universally welcomed. It would also see the introduction of the English and Irish scheme of civil marriages into Scotland,⁸⁸ a move that was vigorously opposed by the two main Scottish churches less than twenty years earlier.⁸⁹ Additionally, the requirement that churches be certified ‘by proper authority to the Registrar-General, and to be registered by him’ would surely have been a most unwelcome innovation in the eyes of both the Church of Scotland and the Free Church of Scotland.⁹⁰

For marriages in England, Wales and Ireland, the impact of the Report would have been less dramatic, requiring marriages to be conducted with a little less formality rather than imposing new requirements. It shifted the focus from the place of marriage, proposing instead that ‘the interchange or declaration of matrimonial consent necessary to constitute a legal marriage should for the future take place, in all parts of the United Kingdom, in the presence of a duly authorised official celebrant or witness;⁹¹ and that no other mode of constituting marriage should be recognised by law.’⁹² It was envisaged that the official in question could be either an authorised minister of religion

⁸⁷ *Report*, xxv.

⁸⁸ ‘... a law corresponding (in substance) with the present laws of England and Ireland on [marriage without any religious ceremony], and enabling a formal and regular marriage to be contracted by the solemn interchange or declaration of matrimonial consent between or by the parties, in the office and in the presence of a superintendent or district registrar, should be incorporated into and from part of the future marriage law of the United Kingdom’: *Report*, xxxviii.

⁸⁹ See the discussion of the 1840s Bill above.

⁹⁰ See Boyd, n 47 above, 50-52.

⁹¹ The reference to a ‘witness’ ensured that the proposed scheme was broad enough to encompass the practice of the Quakers. It was noted that Quaker registering officers ‘although not celebrating marriages as ministers of religion, fulfil... functions practically equivalent’ and that marriages solemnised in their presence should continue to be recognised (*Report*, xxxvi).

⁹² *Report*, xxxiv.

or a duly appointed civil officer. The authorisation of the former would be the responsibility of each religious community;⁹³ at the same time, state oversight of different religious groups would be ensured by the requirement that churches and chapels be certified ‘by proper authority to the Registrar-General, and to be registered by him.’⁹⁴ This was, however, no more than a cross-check to ensure that the religious group in question had some degree of recognition and that ministers were anchored in their local community. There was to be no legal requirement that marriages be solemnized at any particular church or place, in a particular form,⁹⁵ or with the presence of a civil registrar.⁹⁶

For England and Wales, perhaps the most radical suggestion of all was that any requirements as to the formalities preceding a marriage should be directory rather than mandatory. Notice would be given to the minister or civil officer who was to be responsible for celebrating or witnessing the marriage.⁹⁷ The role of the state was to be reduced, with more trust being placed on personal knowledge. Thus it was recommended the necessary waiting period should be shortened from 21 to 15 days if the person giving notice was personally known to the minister or officer and the parties both professed themselves to be of the same religious persuasion. While the notice would be kept in a book that would be available for public inspection, the Commission did not recommend any attempt ‘at any kind of general publication’, describing the existing process of exhibiting notices in the register office as ‘nugatory’ and that of

⁹³ It was recommended that authority should be limited to ‘such ministers of religion as are in the active exercise of official duties in their several churches or denominations, and occupy positions which make them amenable to public responsibility, and to the censure and discipline of their own religious communities.’ (*Report*, xxxv)

⁹⁴ *Report*, xxxv. Exactly who would have authority to certify the church or chapel would depend on the nature of the religious denomination: the episcopal would be registered under the certificates of their bishops, Presbyterians under the certificates of their presbyteries, and other Nonconformist places of worship under the certificates of the officiating minister for the time being, and not less than 10 householders, ‘members of the congregation who have frequented the place in question, as their ordinary place of worship, for the period of one year next before the date of the certificate.’ (xxxvi). Jewish marriages would be treated in the same way as Nonconformist ones for the purpose of their synagogues being certified: this, it should be noted, was presented as a desirable liberalization rather than a new hurdle, since it would liberate synagogues from the control of the Board of Deputies, which was responsible for authorizing the secretaries responsible for registering the marriage.

⁹⁵ [T]he State ought not in any case to take notice of or enforce compliance with [any] ceremonies or usages, as necessary to the validity of any marriage, in other respects duly solemnized’ (*Report*, xxxvii)

⁹⁶ ‘When the duty of registrars *quoad hoc* is performed by the officiating ministers or other official witnesses of any religious denomination... the further security of the attendance of the civil registrar does not seem to be important, still less to be a condition upon which it can be necessary to make the validity of a marriage depend.’ (*Report*, xxxvii)

⁹⁷ *Report*, xliii.

displaying them on church or chapel doors as ‘rather offensive than useful.’⁹⁸ Only if the parties were unknown to the person to whom notice was given was there to be the further precaution of requiring copies to be sent to the registrar of the district and to the minister of the place of worship usually attended by each of the parties.

The proposed reforms would not only have achieved parity between different religions but also, at least within England and Wales, have transferred power from the state to religious groups. All priests and ministers, whatever their religious affiliation, would be able to conduct marriages in the same way as clergy of the Established Church. In Ireland, however, the proposals would have amounted to increased state regulation of Catholic marriages. State registration of Roman Catholic churches and the recognition of Catholic priests as duly authorized celebrants risked inflaming the same objections that had plagued attempts to introduce universal marriage registration in the 1860s. However, the Commission were careful to deny imposing ‘the name or character of State functionaries’ on duly authorised ministers of religion.⁹⁹ Perhaps combined with the incentive of the promised repeal of the Irish Statutes to allow Catholic priests to carry out ‘mixed marriages’,¹⁰⁰ and the placing of Catholic priests on an equal footing to Church of Ireland clergymen, this proposal would have been acceptable to the Irish hierarchy. Certainly there is nothing on the face of the Report to suggest that those most closely associated with the interests of Catholics in Ireland dissented from the proposals.

There was, however, a powerful dissent from Lord President Inglis. More important than uniformity,¹⁰¹ he felt, was that the law of marriage ‘should be not only agreeable to the population at large, but should command their cordial sympathy and respect’.¹⁰² This, he thought, was already the position in Scotland. He therefore argued that the ‘essential principle’ that present consent alone made a marriage should be retained, not because it allowed marriages to be celebrated without formalities but rather because it

⁹⁸ *Report*, xli.

⁹⁹ *Report*, xxxv.

¹⁰⁰ *Report*, xxxviii- xxxix.

¹⁰¹ He was clearly concerned about the prospect of the Scottish rule of legitimation *per subsequens matrimonium* being abolished in the interests of uniformity, since this would ‘subject Scotland to ... the unnatural and pernicious rule of the English Marriage Law, merely because it is the law of England, though opposed alike to the sound philosophical principles and to the practical experience which have dictated the legislation of other European States.’ (lv)

¹⁰² *Report*, liv.

provided ‘absolute certainty that every regular marriage shall be unimpeachably valid.’¹⁰³ Irregular marriages, on the other hand, were already rare, and should be discouraged further through a system of penalties.

In addition to Lord Justice Inglis’ firm dissent to the Committee’s recommendations, the Committee had been presented with fundamentally conflicting views of the desirability of abolishing irregular marriage in Scotland. At one extreme, James Anderson QC,¹⁰⁴ who was strongly in support of abolition of irregular marriage, cited Lord Hailes’ oft quoted dicta in *Scruton v Gray* in his oral evidence:

‘In a word, all the European nations, Scotland only excluded, have departed from the more ancient canon law, and have required the interposition either of Church or of State, or of both, to validate a marriage. Thus, what was the law of all Europe, while Europe was barbarous, is now the law of Scotland only, when Europe has become civilised.’¹⁰⁵

At the other extreme was the written submission of the Free Church to the effect that:

‘the present state of the law is favourable to the morality and well-being of the people, and that any radical change in the law affecting the constitution of the contract would be injurious, the Committee [of the Free Church] are convinced that the immorality and illegitimacy which exist in Scotland, although not in a greater proportion to the population than in other countries, have no connexion with the Marriage Law. They believe that if an artificial formal system were substituted for the present law both immorality and illegitimacy would be increased.’¹⁰⁶

THE IMMEDIATE IMPACT OF THE COMMISSION

¹⁰³ *Report*, liii.

¹⁰⁴ *Report*, Appendix Examination of Witnesses, 71-83

¹⁰⁵ 1 December 1772; *Hailes’ Decisions* 499

¹⁰⁶ *Report*, Evidence of the Free Church of Scotland, Appendix, 42/3. The Church of Scotland’s much more laconic submission also stated that they were not aware of any ‘practical evils’ arising from the present law (*Report*, Evidence of the Church of Scotland, Appendix, 36).

The Commission's report, eventually published in September 1868, met with a favourable reaction from the press, both in terms of the thoroughness of the investigation and the substantive proposals. As *The Morning Post* noted, 'nothing previously published on this important subject has succeeded in showing with such distinctness how varied in method, how complex and multiplied in particulars, how anomalous in application, and how inefficient and unsatisfactory are our present marriage laws.'¹⁰⁷ The Dublin-based *Freeman's Journal and Daily Commercial Advertiser* similarly praised the Report as 'a most able and valuable document',¹⁰⁸ although it refrained from commenting on the desirability of the reforms proposed. Most commentators took the view that the laws of all parts of the United Kingdom were in need of reform, but *The Standard*, reviewing the principles that the Commission had laid down, noted with unjustified smugness its 'satisfaction at finding that the law of England, on the whole, comes pretty near to the ideal.'¹⁰⁹ The laws of Ireland, it added, 'come very near our own, and there will, consequently, be little objection to their complete assimilation'. This was to prove overly optimistic in the light of the groundswell of support for the Fenian movement and attaining independence for Ireland. It also rightly anticipated that the 'more sweeping' changes proposed to the law of Scotland 'appear likely to provoke a greater amount of opposition'.¹¹⁰

The opposition of the main Scottish churches to reform voiced in the *Report* was certainly echoed by at least some commentators once the *Report* was published. For example, John Boyd Kinnear, advocate and sometime political secretary to the Lord Advocate, stated that:

'For myself, having laboured as earnestly as any to promote assimilation of law where it is possible ... I am yet obliged to say that I would far rather see the divergence in the marriage law maintained, with all its concomitant evils, than removed by the substitution in Scotland of any ensnaring legal technicalities in room of the broad and simple doctrine that marriage shall be as free as God has

¹⁰⁷ *The Morning Post*, 10 September 1868. See also *The Huddersfield Chronicle*, 3 October 1868.

¹⁰⁸ *Freeman's Journal and Daily Commercial Advertiser*, 11 September 1868.

¹⁰⁹ *The Standard*, 9 September 1868.

¹¹⁰ *Ibid.*

made it, and shall be proved, when doubted, by any evidence which can show what the parties really meant.’¹¹¹

Correspondence in the *Glasgow Herald* debated the efficacy of banns in Scotland,¹¹² while an anonymous commentator in *The Edinburgh Review* also expressed concern about the ‘intricate and severe’ preliminaries to marriage proposed by the Committee despite being overall in support of reform.¹¹³

The *Report* also provided inspiration for Wilkie Collins’ 1870 novel *Man and Wife*,¹¹⁴ which combined scathing but not always accurate criticism of both Irish and Scottish rules on entry into marriage and the laws denying women control over their property. It was, as reviewers noted, a novel with a purpose. Barely a few pages into the Prologue, Anne Silvester’s mother is spurned by her supposed husband on the basis that he had been a professing Protestant in the 12 months before their marriage, having converted to Catholicism only six weeks before their marriage ceremony was conducted by a Catholic priest in Ireland. Thirteen years later, Anne almost finds herself unwittingly married to her best friend’s fiancé Arnold, simply on the basis that they have passed as husband and wife at an inn for the sake of appearances. However, an earlier note scribbled by Geoffrey – the person that she was intending to meet and marry at the inn – establishes that she was already married to him at that time. By the time that this is established, Geoffrey’s villainous character has become apparent, so this is not exactly a happy ending. In true sensation novel fashion, the location then shifts to a deserted house where Geoffrey plots to murder his unwanted wife. In the event, it is Anne who is freed from the bonds of matrimony when Geoffrey is strangled by the landlady of the house, who suffered violence at the hands of her husband and recognises the same tendency in Geoffrey.

Yet while, as one reviewer noted, the novel clearly intended to ‘expose the scandalous condition of the marriage law of Scotland’,¹¹⁵ the case for reform was probably hindered rather than helped by the fact that Collins grossly misrepresented the ease with

¹¹¹ JB Kinnear, ‘The Marriage Laws of England and Scotland’ *The Contemporary Review*, February 1868 208, 227.

¹¹² *Glasgow Herald*, 12 September 1868.

¹¹³ Anon, ‘The Marriage Law of the Empire’ *The Edinburgh Review* July 1869 254, 294.

¹¹⁴ Collins included a lengthy footnote explaining that he had drawn on the *Report* for inspiration.

¹¹⁵ *The Essex Standard, and General Advertiser for the Eastern Counties*, 9 September 1870.

which a marriage could be formed in Scotland. As a later commentator noted, '[t]he law of Scotland is not going about like a raging lion seeking to marry people unawares'.¹¹⁶ Even if he had got the law right, the very ingenuity of the plot – verging, as another reviewer commented, on 'improbability' in places,¹¹⁷ would have undermined the case for reform. As *The Dundee Courier & Argus* noted, Collins was 'working out the story well, but it is very doubtful if it will have the effect of altering the Scotch marriage law'.¹¹⁸

In Ireland, the desirability of the recommendations of the Royal Commission was short-lived. As part of Gladstone's mission to 'pacify' Ireland following Fenian revolt,¹¹⁹ the Irish Church Act 1869¹²⁰ was pushed through the House of Lords.¹²¹ The union between Church and State in Ireland was dissolved, the obligation of tithes on Catholic farmers was removed and the Church of Ireland was partially disendowed. New marriage legislation was now required to re-authorize Protestant chapels and parish churches for the purposes of marriage. The resulting Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870¹²² also finally allowed 'mixed marriages' to be celebrated either in a Catholic Church or in an Episcopalian Church as long as notice was given to the registrar, the marriage took place in a religious building, and the ceremony took place between 8am and 2pm in the presence of two or more witnesses.¹²³ With this reform, the most egregious aspect of the Yelverton case had been addressed. Following the enactment of the 1870, Act the Catholic Church in Ireland continued to enjoy the freedom to regulate Catholic marriages according to its own rules while enjoying the same powers as the Church of Ireland to celebrate mixed marriages. This

¹¹⁶ FW Walton *Scotch Marriages: Regular and Irregular* (Wm Green & Sons, 1893), 42.

¹¹⁷ *The Morning Post*, 12 August 1870.

¹¹⁸ *The Dundee Courier & Argus*, 7 July 1870.

¹¹⁹ HCG Matthew, *Gladstone, 1809–1874* (Clarendon Press, 1988), 147.

¹²⁰ 32 & 33 Vict c 42.

¹²¹ For more detail on the drive towards Disestablishment under Gladstone see A Megahy, 'Gladstone, Church and State' in DG Boyce & A O'Day, *Gladstone and Ireland: Politics, Religion and Nationality in the Victorian Age* (Palgrave MacMillan, 2010); GIT Machin, 'Gladstone and Nonconformity in the 1860s: The Formation of an Alliance' (1974) 17 *The Historical Journal* 347; JC Beckett, 'Gladstone, Queen Victoria and the Disestablishment of the Irish Church, 1868-9' (1962) 13 *Irish Historical Studies* 38; M Tierney, 'Correspondence concerning the Disestablishment of the Church of Ireland 1862-1869' (1969) *Collectanea Hibernica* 102.

¹²² 33 & 34 Vict c 110.

¹²³ Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870, s 38.

was surely a better solution to the Catholic hierarchy than that suggested by the Royal Commission, avoiding any contact with the structures of the Protestant state.

It is thus unsurprising that no move was made to legislate for the more fundamental reforms proposed by the Commission. Five years after the publication of the Report, Lord Chelmsford asked the new Lord Chancellor whether there was any likelihood of the Government introducing reform, noting the eminence of those who had served on the Commission, the number of persons who had given evidence or information, and that the ‘able and carefully prepared’¹²⁴ *Report* was in fact entirely Selbourne’s own work. However, while agreeing that the issue was an important one that he hoped would ‘one day’ be embodied in law, Selbourne refused to give any pledge ‘as to the time or manner in which the Government would deal with this subject, if indeed during their tenure of office, it would be possible to deal with it at all’.¹²⁵

THE LONGER-TERM IMPACT OF THE COMMISSION

In England and Wales, the most blatant example of discrimination between different religious faiths – the requirement that a registrar be present at any religious marriage other than one conducted according to Anglican, Jewish or Quaker rites – was finally removed in 1898, by allowing the trustees of any place of worship that had been registered for marriage to nominate an authorised person to register the marriage. Since this person did not have to be a religious figure, or conduct the ceremony, the 1898 Act bore little resemblance to the scheme proposed by the Commission.

In the long term, the most significant impact of the Commission was perhaps its view that the State should ‘associate its legislation... with the religious habits and sentiments of the people, and ... obtain, as far as possible, the religious sanction for the marriage contract’. The option of mandatory civil marriage received very cursory attention, to the extent that it was never even canvassed as a possible option.¹²⁶ This final section considers whether such a proposal might have succeeded in becoming law, and the longer-term implications of permitting a range of religious organisations to conduct marriages.

¹²⁴ *Hansard*, HL Deb, vol 216 col 1699 (3 July 1873).

¹²⁵ *Ibid*, col 1700.

¹²⁶ See eg S Cretney, *Family Law in the Twentieth Century: A History* (OUP, 2005), 17.

A proposal to introduce mandatory civil marriage would at least have had the benefit that it would not have been seen as imposing the law of England and Wales upon Scotland and Ireland. Across Europe, a number of new nation-states had adopted mandatory civil marriage in their new civil codes as they either asserted their independence or brought together formerly separate states. Thus the newly independent Belgium introduced civil marriage in 1830,¹²⁷ and The Netherlands, from which Belgium had separated, in 1838.¹²⁸ Italy opted for civil marriage upon its unification in 1865.¹²⁹ At the time of the Commission's deliberations, German states variously permitted marriage according to Protestant, Catholic or civil rites, but it too introduced civil marriage in 1875 after its unification.¹³⁰

Yet despite these models for reform, there were simply not the same political motivations as had existed in other jurisdictions. In France, mandatory civil marriage had been a means of proclaiming a definite break with the past in the wake of a revolution.¹³¹ In others, it formed part of a strategy for signalling the unity and independence of the nation, whether in bringing together formerly disparate states, carving out a new identity for newly separate ones, or asserting the primacy of the nation-state over transnational influences. Italy, for example, had prescribed civil marriage not only as a means of ensuring uniformity across different states but also to signal its 'liberty from foreign influence and Church domination'.¹³² These considerations simply did not have the same traction in the UK at this point in time. Union between first England and Scotland and then Britain and Ireland had been achieved without any perceived need to harmonise the legal rules applicable in different parts of the UK, and by the 1860s any attempts to impose a solution might well have tended to divide rather than unify. Nor indeed was it inevitable that countries would adopt civil marriage even when they had undergone political upheaval: in Greece,

¹²⁷ R Torfs, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Belgium' (2005) 19 *Emory International Law Review* 637.

¹²⁸ P Vlaardingerbroek, 'Marriage, Divorce, and Living Arrangements in the Netherlands' (1995-96) 29 *Family Law Quarterly* 635.

¹²⁹ M Seymour, *Debating divorce in Italy: marriage and the making of modern Italians, 1860-1974* (Macmillan, 2006).

¹³⁰ L Bonfield, 'European Family Law' in D Kertzer and M Barbagli (eds) *Family Life in the Long Nineteenth Century, 1789-1913* (Yale University Press, 2002).

¹³¹ S Desan, *The Family on Trial in Revolutionary France* (University of California Press, 2004).

¹³² Seymour, n 124 above, 13.

which had gained its independence from the Ottoman Empire in 1832, the state preferred to forge a partnership with the newly independent Church of Greece.¹³³

In any case, the slow uptake of the option of civil marriage in all of the constituent parts of the UK may have made the Commissioners wary of the consequences of making it the only option. In 1865, just 8 per cent of marriages in England and Wales were conducted according to civil rites, while in Ireland it was under 3.5 per cent. Scotland, of course, had no official form of civil marriage at this time, and even the irregular marriages that were regarded as providing a substitute were rare.¹³⁴ This was not necessarily a bar to reform: other states had moved far more abruptly from permitting only religious marriages to requiring a civil rite. Nonetheless, in concluding their recommendations, the Commissioners noted their conviction that it was important ‘to interfere no further with the general sentiments and habits of the people ... than is absolutely necessary for the purpose of constructing a safe and consistent marriage code’.¹³⁵

Yet the very depth of the conviction of the Commissioners that marriage should be linked to religious rites meant that they did not feel the need to justify this link. And this remains one of the key issues for marriage law today. It is accepted that linking marriage vows to recognition by religious communities adds to the commitment and adds the necessary publicity but it is difficult to articulate why, or why some other forms of community recognition are acceptable substitutes but others are not. Despite the increased popularity of civil marriage in all parts of the UK and Ireland, the option of marrying in a religious ceremony remains. In both Scotland and the Republic of Ireland, there is now the additional possibility of a non-religious belief organisation conducting the marriage,¹³⁶ while the rules restricting this possibility are being

¹³³ P Tsoukala, ‘Marrying Family Law to the Nation’ (2010) 58 *American Journal of Comparative Law* 873.

¹³⁴ As noted above, the Assistant Census Commissioner for Scotland was of the view that fewer than 1 in one thousand marriages in Scotland were irregular by this time: *Report*, Evidence of Dr James Stark, Appendix, 3.

¹³⁵ *Report*, xlv.

¹³⁶ For Scotland see Marriage (Scotland) Act 1977, s 9, as amended by the Marriage and Civil Partnership (Scotland) Act 2014, s 13(2)(a)(i); for Ireland see the Civil Registration Act 2004 s 54(1) as amended by the Civil Registration (Amendment) Act, 2012.

considered by the courts in Northern Ireland and by an All-Party Parliamentary Group in England and Wales.¹³⁷

In thinking about how the state should regulate marriage in the twenty-first century, we need to think about the role played by belief organisations – religious or otherwise – a little more deeply in order to understand whether there is anything unique about them that justifies them playing a special role in the formation of marriage. For those with deeply-held religious beliefs it is self-evident that their expression of commitment to each other will only be meaningful if expressed in the form laid down by their faith. That faith may also be a source of guidance and inspiration during their married lives, whether as individuals with a particular relationship to a god or gods, as a couple with a shared faith, or as members of a community that supports and sustains them.

But in an age of both religious plurality and religious scepticism, it becomes more challenging to come up with a concept of religion in anything but the broadest of terms and without making any claims to its truth. In *R (ota Hodkin) v Registrar General of Births, Deaths and Marriages*,¹³⁸ Lord Toulson described religion as ‘a spiritual or non-secular belief system’ – ie one that ‘goes beyond that which can be perceived by the senses or ascertained by the application of science’ – that is ‘held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.’¹³⁹ As a description of religion, this definition is both subtle and flexible; yet its use of the word ‘claims’ provides no justification for religious organisations playing a specific role in society. The European Court of Human Rights has similarly held that the right to freedom of thought, conscience and religion ‘denotes views that attain a certain level of cogency, seriousness, cohesion and importance’ but that, as long as this is established, ‘the State’s duty of neutrality and impartiality is incompatible with any power on the State’s

¹³⁷ See further F Cranmer and S Thompson, ‘The Changing Landscape of Marriage and Civil Partnership in Northern Ireland’ [2018] CFLQ (forthcoming).

¹³⁸ [2013] UKSC 77.

¹³⁹ At para 57.

part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'.¹⁴⁰

There has, in other words, been a shift from the role played by religion and belief, from the institutional to the individual. This is also reflected in the way that various scholars have criticised the current restrictions. Cretny, for example, has suggested that couples may well 'feel the need for some "numinous" element'¹⁴¹ to their marriage, while Eekelaar has noted the importance of ensuring that a marriage is 'brought about in a manner in accordance with a deeply held belief, or in a way that holds strong meaning for them'.¹⁴² But once we justify according weight to a belief system because of its meaning to the parties themselves, is it logical to continue to regulate the celebration of marriages through organisations? Perhaps the focus of reform should instead be upon finding a pared-down framework that enables couples to marry in any form they chose as long as the state is informed of their intention to marry and the fact that they have done so.

CONCLUSION

As Gillian Douglas has noted, all societies have rules governing entry into and exit from marriage, 'and the question of who has the power to set and apply these rules has always been the subject of dispute'.¹⁴³ The Commission accepted the state's right to set the rules and the need for an officiant of some kind to be present. At the same time, it accepted that the decision as to who should be appointed to officiate could be delegated to religious groups, and that all religions should be treated the same across the United Kingdom. That this should have been its focus was understandable, given the way in which religious and jurisdictional differences were at the heart of the Irish marriage in the Yelverton case and the tensions between different religions at the time.

¹⁴⁰ *Eweida and others v UK* [2013] 57 EHRR 2113, [81]. See also *Re an application by Laura Smyth for Judicial Review* [2017] NIQB 55.

¹⁴¹ S Cretny, 'Relationships: Law Content and Form' in J Trowell and C Thorpe (eds) *Re-Rooted Lives* (Jordans, 2007), 164.

¹⁴² J Eekelaar, 'Marriage: A Modest Proposal' [2013] Fam Law 83, 84.

¹⁴³ G Douglas, 'Who Regulates Marriage? The Case of Religious Marriage and Divorce' in R Sandberg (ed) *Religion and Legal Pluralism* (Ashgate, 2015), 53.

We can thus identify three legacies from the Royal Commission that continue to dog the question of reform. First, there is the perceived need for marriages to have some public element. Second, there is the acceptance, for reasons that are never clearly articulated, that religious bodies are appropriate to carry out that public element. And third, there is the tension between the rhetoric of religious equality and the fear that religion may in some cases be used as a cloak for various unacceptable purposes, whether clandestine marriages in the nineteenth century or coercion and immigration fraud in the twenty-first. While it is far from our intention here to downplay the importance of belief or to suggest that religious organisations should no longer be involved in the ‘co-production’ of marriage,¹⁴⁴ we do need to question what it is about public affirmation by a close-knit community – or, in its absence, the state – that makes a marriage. This articulation was certainly missing in the recent Irish reforms,¹⁴⁵ while Scotland has yet to set out the qualifying requirements for religious and belief bodies beyond requiring that they must ‘meet regularly’.¹⁴⁶ England and Wales may yet have the opportunity to lead the debate on these issues in devising a marriage law fit for the twenty-first century.

¹⁴⁴ P Edge, ‘Let’s Talk About a Divorce: Religious and Legal Wedding’ in J Miles, P Mody and R Probert (eds) *Marriage Rites and Rights* (Hart, 2105).

¹⁴⁵ See further, M Harding, *From Catholic Outlook to Modern State Regulation: Developing understandings of marriage in Ireland* (Intersentia, forthcoming 2019).

¹⁴⁶ The Marriage (Scotland) Act 1977, s 26(2), as amended by the Marriage and Civil Partnership (Scotland) Act 2014, s 12(4)(a), provides simply that a “*religious or belief body*” means an organised group of people— (a) which meets regularly for religious worship; or (b) the principal object (or one of the principal objects) of which is to uphold or promote philosophical beliefs and which meets regularly for that purpose.’