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COMMENT

Banns of Marriage: Their Development and (Possible) Future

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INTRODUCTION

A marriage in the Church of England or the Church in Wales may take place following the publication of banns of marriage (preferably during morning service) on three Sundays,[2] by special licence of the Archbishop of Canterbury,[3] by common licence[4] or on the authority of a certificate issued by a superintendent registrar.[5] Reports of the death of the church wedding have been somewhat exaggerated: in 2014, the Church of England conducted almost 50,000 weddings,[6] while the Church in Wales conducted just over 3,000.[7]

The legal requirement to read banns for couples intending to marry in church services was considered by members of the Church of England General Synod

1 We would like to thank Norman Doe and Sharon Thompson of the School of Politics and Law at Cardiff University for their helpful comments. An earlier, and shorter, version of this comment appeared on the *Law and Religion UK* blog, edited by the authors, in February 2017.

2 Marriage Act 1949, ss 6–14; Canon B 34(1)(a); Canon B 35. In the case of an intended marriage after banns, their public announcement is obligatory even when the couple are 'celebrities': see General Synod Legal Advisory Commission, 'Celebrity marriages in Anglican cathedrals and churches' (2017), available at <https://www.churchofengland.org/media/3956663/celebrity-marriages.pdf>, accessed 4 April 2017.

3 Ecclesiastical Licences Act 1533, s IV (which declares, inter alia, that 'all Children Procreated after solempnyzacion of any mariages to be had or don by vertue of suche licences or dispensacions shal be admytted reputed and taken legittimate in all courtes as well spirituall as temporall and in all other places, and inherite the inheritaunce of their parentes and auncestours'); Canon B 34(1)(b).

4 Marriage Act 1949, ss 15 and16; Canon B 34(1)(c).

5 Marriage Act 1949, s 17; Canon B3 4(1)(d).

6 Research and Statistics Department, Archbishops' Council, *Statistics for mission 2014*, Table 12: Diocesan marriages and services of prayer and dedication after civil marriages, 2009–2014, available at <https://www.churchofengland.org/media/2432327/2014statisticsformission.pdf>, accessed 6 June 2017.

7 The Church in Wales, 'The Church in Wales: membership and finances 2014', Table 1: Participation in parish life for 2014 and 2013, available at <http://cinw.s3.amazonaws.com/wp-content/uploads/2013/09/Members-Finance-2014-English.pdf>, accessed 6 June 2017.

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on 14 February 2017; although Synod rejected moves that sought to end this ecclesiastical preliminary to marriage, important arguments were cited both for their retention and for their removal. In what follows, we attempt to summarise the development and current usage in England and Wales, Scotland and the two jurisdictions in Ireland, and examine possible future directions.

BACKGROUND

Origins

The calling of banns was first introduced to prevent clandestine or unlawful marriages from taking place between family members within the prohibited degrees of affinity.[8] Banns later became a deterrent against unscrupulous suitors seeking to take financial advantage of women in an age when, under the common law, a husband acquired his wife's property by virtue of marriage.[9] Other impediments such as attempted bigamy or marriage to a minor without the consent of a parent could also come to light because of the publication of banns. The triple calling of banns was introduced in Canterbury by Archbishop Hubert Walter in 1200 and extended to Christendom in 1215 by Pope Innocent III at the Fourth Lateran Council. Over the period between 1200 and 1342, these provisions were enshrined in over thirty sets of canons and diocesan statutes. Although practices developed whereby a licence to dispense with the banns could be obtained, such dispensations were subject to questioning regarding the eligibility and freedom to marry. Nevertheless, it was not until the Council of Florence of 1431–1446 that the Church officially accepted the view that wedlock was a sacrament conferred by the exchange of consent and gave it parity with the other sacraments.

Property issues associated with marriage were the source of tension between common and ecclesiastical law and proved problematic to the Church in its desire to control the marriage process. The Ecclesiastical Licences Act 1533 gave the Archbishop of Canterbury the power to grant licences that had formerly been exercised by the Pope: what Bob Morris describes as the 'Legatine powers'.[10] Nevertheless, there remained several forms of clandestine marriage, a common ingredient of which was the breach of the Church's rules regarding publicity.

8 See R B Outhwaite, *Clandestine Marriage in England, 1500–1850* (London, 1995).

9 Under the doctrine of coverture, a husband on marriage 'became entitled to all choses in possession belonging to his wife in her own right (including those acquired after marriage), and to the whole of the rents and profits of her lands during the continuance of the marriage, except in so far as such property was the separate estate of the wife': Daniel Greenberg (ed), *Jowitt's Dictionary of English Law* (third edition, London, 2010) vol II, p 1427. The doctrine was gradually eroded, principally by the Married Women's Property Acts 1870 and 1882.

10 R M Morris (ed), *Church and State in 21st Century Britain: the future of church establishment* (Basingstoke, 2009), p 47.

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The banns and the associated dispensations were retained after the Reformation, and enshrined in the Church of England's Canons of 1603/1604.[11] At that time, nearly all marriages in England, including the 'irregular' and 'clandestine' ones, were performed by ordained clergy. Outhwaite notes that

> people came to believe more and more that a priest's presence was necessary . . . there was no shortage of impoverished curates or chaplains willing to perform such ceremonies . . . all counties had such clerics . . . couples in many areas had access to a church specialising in such business.[12]

At the Guild Church of St Benet, Paul's Wharf – the Church of Doctors' Commons – 13,423 marriages were solemnised between 1708 and 1731. The Marriage Duty Act 1695 put an end to irregular marriages at parochial churches by penalising clergymen who married couples without banns or licence. However, a lacuna remained whereby clergymen operating in the Fleet prison could not effectively be proceeded against and the clandestine marriage business continued there. It has been estimated that during the 1740s up to 6,000 marriages a year were taking place in the Fleet prison and the adjacent area ('the Liberties of the Fleet'), compared with 47,000 in England as a whole.[13] There were between 70 and 100 clergymen working in the Fleet area between 1700 and 1753.

Lord Hardwicke's Act

The Marriage Act 1753, 'An Act for the Better Preventing of Clandestine Marriage' 26 Geo II c 33 (otherwise known as Lord Hardwicke's Act), was the first statute in England and Wales to require a formal ceremony of marriage and to make the ecclesiastical preliminaries – either banns or a marriage licence – a civil as well as an ecclesiastical requirement. Outhwaite comments that

> the established Church was given a virtual monopoly over the making of marriage: only Quakers, Jews and the Royal Family were excluded from its provisions, though the Act did not extend to Scotland or to marriages conducted overseas.[14]

11 Canons 62, 63, 101–104.

12 Outhwaite, *Clandestine Marriage in England*, p 21.

13 Approximately 11 per cent of the total. The National Archives, 'How to look for records of Nonconformists', suggests a higher figure: 'it has been estimated that in the 1740s, nearly 15% of all marriages in England were celebrated in the Fleet'; available at <http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/nonconformists/>, accessed 30 March 2017.

14 Outhwaite, *Clandestine Marriage in England*, p 85.

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It is possibly the existence of irregular marriages before the Marriage Act 1753 that gave rise to the myth of the 'common-law marriage' in England and Wales[15] – a concept that has been comprehensively debunked by Rebecca Probert, who describes it as:

> a 19th century American invention, based on a misinterpretation of English authorities; the popular assumption that 'common-law marriage' existed in England before the Clandestine Marriages Act of 1753 is unfounded. In fact, at this time known cohabitants risked punishment by the ecclesiastical courts for fornication, or sometimes for the more specific but rarer charge of 'living scandalously and suspiciously without lawful marriage'.[16]

Importantly, under the Marriage Act 1753 the banns gained statutory significance. The Act was successful in suppressing 'those forms of irregularity that had given so much concern before 1753': valid marriages conducted by Anglican clergy but not in accordance with canon law.[17] As to the validity of clandestine marriages *after* 1753, those not conducted in accordance with the requirements of the Act were void.

The Act addressed marriage both by banns and by special licence and introduced draconian penalties for those who solemnised a marriage contrary to its provisions.[18] Probert observes:

> the Act did not state that the marriages of Jews and Quakers would be valid; it merely said that the Act did not apply to them. And this was … particularly problematic for Quaker marriages, because the validity of Jewish marriages could be tested according to Jewish law, and the church courts were willing to hear evidence of Jewish law and assess the validity of marriages accordingly, but there [were not] really any criteria by which the validity of

15 The position in Scotland was quite different. Irregular marriage continued until the Family Law (Scotland) Act 2006 abolished marriage by cohabitation with habit and repute; even then, those irregular marriages that already subsisted were unaffected by the abolition: see F Cranmer, 'Irregular marriage in Scots law', 2015, available at <https://www.academia.edu/32257157/Irregular_marriage_in_Scots_law_2015_Cardiff_LLM_>, accessed 4 April 2017.

16 R Probert, 'Cohabitation: current legal solutions', (2009) 62:1 *Current Legal Problems* 316–345 at 319. See also R Probert, 'Common-law marriage: myths and misunderstandings', (2008) 20 *Child & Family Law Quarterly* 1–22; Catherine Fairbairn, '"Common law marriage" and cohabitation', House of Commons Library Briefing Paper, 9 March 2017, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03372#fullreport>, accessed 31 March 2017.

17 Outhwaite, *Clandestine Marriage in England*, p xxii.

18 Under s VIII, the sentence for conducting a clandestine marriage was to be 'transported to some His Majesty's Plantations in *America* for the Space of fourteen Years, according to the Laws in Force for Transportation of Felons'; under s XVI, falsifying or tampering with marriage registers was deemed a felony and the perpetrator would 'suffer Death as a Felon without Benefit of Clergy'.

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Quaker marriages could be assessed and there did remain a question mark over their validity until the end of the 18th century.[19]

The geographical extent of the Act was limited to Great Britain but did not include 'that part of Great Britain called Scotland' (section XVIII). One consequence of this was an increase in 'border village weddings' – at Gretna, Coldstream Bridge, Lamberton, Mordington and Paxton Toll – since under Scots law it was possible to marry 'by declaration *de praesenti*', under which only two witnesses were required, together with assurances from the couple that they were both over the age of 16 and free to marry. It was, however, only in the 1770s, with the construction of a toll road passing through the hitherto obscure village of 'Graitney', that Gretna Green became the first easily reachable village over the Scottish border. These activities were significantly curtailed by Lord Brougham's Act, 'An Act for Amending the Law of Marriage in Scotland' 1856, which, inter alia, introduced a 'civil preliminary' requiring 21 days' residence prior to marriage.[20]

Civil marriage

Civil marriage was introduced through the Act for Marriages in England 1836, which allowed marriage in a register office in the presence of the superintendent registrar, subject to certain 'civil preliminaries': notice had to be given in writing by one of the parties, the marriage had to be solemnised within 21 days of notification and the registrar had to record the marriage. Non-Anglican couples who married in their own church also had to marry in a register office, as did those who did not want a religious ceremony. Alternatively, it was possible to marry in a Nonconformist chapel provided that the civil registrar was present at the service.[21] This state of affairs continued until the Marriage Act 1898 authorised Nonconformist ministers to conduct legal marriages in their chapels and report them to the registrar.

Specific provisions were also made for the contracting and solemnisation of marriage by Quakers and those professing the Jewish religion. Within the

19 R Probert, 'Tracing marriages in 18th century England and Wales: a reassessment of law and practice', The National Archives, 2010, <http://media.nationalarchives.gov.uk/index.php/tracing-marriages-in-18th-century-england-and-wales-a-reassessment-of-law-and-practice/>, accessed 21 February 2017.

20 19 & 20 Vict c 96. The Isle of Man provided another option for such marriages, but in 1757 Tynwald passed an Act to prevent clandestine marriages in very similar terms to the English Act of 1753. Clergy from abroad who were convicted of conducting marriages in breach of the Act's requirements would be sentenced to be pilloried and have their ears cropped, before being imprisoned, fined and deported. The Act was repealed in 1849.

21 In J B Priestley's *When We Are Married* (London, 1938), first staged in 1939 but set in 1908, three highly respectable couples, married in chapel on the same day, gather to celebrate their silver weddings. They get the shock of their lives when the new chapel organist tells them that he has recently met the minister who conducted their triple wedding ceremony – and who admitted that he had not been authorised to solemnise marriages.

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Church of England, including the dioceses in Wales, calling the banns was retained.

ENGLAND AND WALES

The Marriage Act 1949 forms the basis for the present-day regulation of marriage and it consolidated several earlier statutes which regulated many of the practical aspects of marriage both by civil registrars and by the clergy acting as registrars.[22]

England

In his paper for General Synod, Preliminaries to Marriage, GS 2045A, the Revd Stephen Trott notes that 'There is a kind of folk memory concerning Banns of Marriage in which it is assumed that everyone who is married in Church first has their Banns published'.[23] As the paper indicates, this commonly held viewpoint often obscures the fact that the *raison d'être* underpinning the banns has changed over their long usage, as has the legislative regime requiring them to be published. Furthermore, as noted above, 'marriage by banns' relates to only one form by which, traditionally, marriage has been solemnised in the Church of England. Currently, four such routes are permissible under section 5 (Methods of authorising marriages) of the Marriage Act 1949, as follows:

> A marriage according to the rites of the Church of England may be solemnized—
>
> (a) after the publication of banns of matrimony;
>
> (b) on the authority of a special licence of marriage granted by the Archbishop of Canterbury or any other person by virtue of the Ecclesiastical Licences Act, 1533 (in this Act referred to as a 'special licence');
>
> (c) on the authority of a licence of marriage (other than a special licence) granted by an ecclesiastical authority having power to grant such a licence (in this Act referred to as a 'common licence'); or
>
> (d) on the authority of certificates issued by a superintendent registrar under Part III of this Act,

22 The exclusion of the Royal Family from the provisions of Lord Hardwicke's Act was carried over into the civil marriage provisions of the 1836 Act: see s 45. This gave rise to questions regarding the marriage of Prince Charles to Camilla Parker Bowles in Windsor Guildhall on 9 April 2005 – which were addressed by a written ministerial statement by the Secretary of State for Constitutional Affairs and Lord Chancellor (Lord Falconer of Thoroton): HL Deb 24 February 2005, col WS87. But see also R Probert, 'The wedding of the Prince of Wales: royal privileges and human rights', (2005) 17:3 *Child & Family Law Quarterly* 363–382.

23 S Trott, 'General Synod: preliminaries to marriage', para 10, available at <https://www.churchofengland.org/media/3863407/gs-2045a-preliminaries-to-marriage.pdf>, accessed 21 February 2017.

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> except that paragraph (a) of this section shall not apply in relation to the solemnization of any marriage mentioned in subsection (2) of section 1 of this Act, which concerns marriages within prohibited degrees.

Banns, special licences and common licences are usually referred to as 'ecclesiastical preliminaries' because they are methods for authorising a marriage for which persons holding office in the Church of England are responsible. Authorisations in the form of superintendent registrars' certificates are usually referred to as 'civil preliminaries' because granting the certificate is a function of a civil secular official.

Approved form of the banns

The Church of England Marriage Measure 2008 and the Church of England Marriage (Amendment) Measure 2012 increased the range of churches in which a couple might choose to marry, through the introduction of the 'qualifying connection' provision and increased flexibility regarding the service at which the banns are to be published, respectively. The latter provision provided statutory authority for the alternative form of words for the publication of banns of marriage contained in *Common Worship*, in addition to those in the *1662 Book of Common Prayer*.

The booklet *Anglican Marriage in England and Wales: a guide to the law for the clergy* is a comprehensive statement of the law of Anglican marriage but is only available in hard copy from the Faculty Office.[24] Since its publication, the Church has published online supplements in July 2013 and April 2015. These and other online updates to the relevant legislation are published by the Faculty Office in *Marriage Law News*.[25] It should be noted that the 2013 guidance states that 'none of the forms requires the parties' current marital status to be stated'.

'Sham marriage'

Involvement in 'sham marriages' is not restricted to the Church of England. However, the Church's common-law duty to conduct marriage, combined with a former exemption from the 'civil preliminaries', has made it particularly susceptible to abuses such as those reported in the media.[26] A 'sham marriage' is defined in section 24(5) of the Immigration and Asylum Act 1999 as meaning a marriage (whether or not void)

24 Faculty Office of the Church of England, *Anglican Marriage in England and Wales: a guide to the law for the clergy* (London, 2010).

25 Available at <http://www.facultyoffice.org.uk/special-licences/marriage-law-news/>, accessed 21 February 2017.

26 See D Pocklington, 'Sham marriage, the church and the law', *Law & Religion UK*, 15 September 2014, <http://www.lawandreligionuk.com/2014/09/15/sham-marriage-the-church-and-the-law/>, accessed 21 February 2017.

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> (a) entered into between a person ('A') who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and
> (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules.

The term 'sham' is confusing because there is the possibility that a marriage may be legally valid (that is to say, not void or voidable) and remain so despite being labelled as 'sham'. The problem relates to the *purpose* of the marriage – to circumvent immigration legislation as a means of gaining long-term residency and the right to work and claim benefits in this country – rather than its *substance*.[27] In such a case, any offence committed is against immigration law rather than against marriage law.

Under section 24 of the 1999 Act, civil registrars were required to report all suspicions of sham marriage to the Home Office (via 'section 24 reports') and in February 2005 the 'Certificate of Approval' scheme was introduced, which required non-EEA nationals to obtain permission to marry, subject to a fee of £135 for applications. However, following the judgment in *Baiai*, the scheme was formally abolished on 9 May 2011 because it breached Article 14 (discrimination) of the European Convention on Human Rights.[28] During the operation of the scheme, the number of 'section 24' reports decreased significantly.

The Church of England was not required by law to report suspicions about non-EEA and EEA nationals marrying in its churches. However, it tightened its procedures after cases such as that of the vicar in East Sussex who was found guilty of conducting 370 sham marriages and jailed for four years in September 2010.[29] On 1 April 2011 the House of Bishops issued its quasi-legislative guidance, 'Marriage of persons from outside the European Economic Area'.[30]

The Immigration Act 2014 introduced further restrictions aimed at minimising sham marriage. Most are generally applicable; in relation to the Church, section 57 (Solemnization of marriage according to rites of Church of England) contains measures which, when brought into force, will exclude marriage by banns or common licence where one party or both is not a British citizen or an EEA or Swiss national, thereby making the bishops' guidance mandatory, and additionally restricting the use of the common licence. The accompanying Explanatory Notes say this:

27 By contrast, Directive 2004/58/EC, refers to 'marriages of convenience': Recital 28 and Article 35.
28 *R (Baiai & Ors) v Secretary of State for the Home Department* [2008] UKHL 53.
29 T Pugh, 'Vicar jailed over sham marriages', *The Independent*, 6 September 2010.
30 Available at <https://www.churchofengland.org/media/1733980/marriage%20of%20persons%20from%20outside%20the%20eea.pdf> accessed 21 February 2017.

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> This section amends the 1949 Act.
> *Subsection (2)* amends section 5 of the 1949 Act so that, where a couple wish to get married in the Anglican Church and one or both of them is not a relevant national (British citizen, EEA national or Swiss national), the *banns process and the common licence process will not be available*. In order to get married in the Anglican Church, they will have to obtain superintendent registrar's certificates (subject to the referral and investigation scheme where applicable), unless the provisions for the Archbishop of Canterbury's Special Licence or for Anglican preliminaries on board one of HM ships at sea apply.[31]
> *Subsections (3) and (4)* amend sections 8 and 16 of the 1949 Act so that, where a couple wish to get married in the Anglican Church following the publication of banns, or following the issue of a common licence, they will have to provide the minister (in the case of banns), or the person granting the common licence, with specified evidence that they are British citizens, EEA nationals or Swiss nationals.

While a special licence remains an option for a small number of cases (for example, death-bed marriages), marriages involving non-UK/EEA/Swiss nationals must now normally take place following civil preliminaries. The couple is required to give notice at a designated register office. The Home Office may increase the notice period from the usual 28 days to 70 days if it decides to investigate the marriage to discover whether it is a sham. After the expiry of the notice period, the superintendent registrar issues the certificate and the marriage may take place. As in the case of any other marriage on the authority of a superintendent registrar's certificate, the incumbent has a discretion as to whether to permit the marriage to take place.

The paper for General Synod from the Secretary General, GS 2045B, states:

> As the large majority of marriages according to the rites of the Church of England do not involve non-UK/EEA/Swiss nationals, most marriages in church continue to take place after the publication of banns of matrimony. Most couples are able to demonstrate their entitlement to have banns published by the production of passports. The *Guidebook for the Clergy* issued by the General Register Office provides information as to how a couple who are unable to produce passports can establish their UK, EEA or Swiss nationality by other means.[32]

31 Emphasis added.

32 W Nye, 'General Synod: preliminaries to marriage – a background paper', para 9, available at <https://www.churchofengland.org/media/3863420/gs-2045b-preliminaries-to-marriage-a-note-from-the-secretary-general.pdf>, accessed 21 February 2017.

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Wales

Section 13 of the Marriage Act 1949 applies in Wales as it does in England by virtue of section 78 (Interpretation): 'Any reference in this Act to the Church of England shall, unless the context otherwise requires, be construed as including a reference to the Church in Wales.' Moreover, section 6 of the Welsh Church (Temporalities) Act 1919 (Saving provisions as to marriages in churches) provides that:

> Nothing in this Act or in the Welsh Church Act 1914, shall affect—
> (a) the law with respect to marriages in Wales or Monmouthshire; or
> (b) the right of bishops of the Church in Wales to license churches for the solemnization of marriages or to grant licences to marry.

Under the Marriage Act 1949, therefore, the law in England applies to Wales by analogy and the Church in Wales regulates marriage preliminaries under its canon law: the detailed provisions on marriage preliminaries are set out in the *Book of Common Prayer 1984*.[33] However, section 3(1) of the Welsh Church Act 1914 declared that 'As from the date of disestablishment … the ecclesiastical law of the Church in Wales shall cease to exist as law', which means that the canon law of the Church is a set of internal rules by which its members agree to be bound in contract. But you cannot make public, secular law by internal, private contractual agreement. The Westminster Government could, of course, legislate separately for the Church as was the case with the Marriage (Wales) Act 2010 – but that Act began life as a private Peer's bill introduced by Lord Rowe-Beddoe rather than by the Government.[34]

So would the abolition of the English provisions about banns have a knock-on effect for the Church in Wales? We would not presume to attempt a definitive answer to that question; but we would think that, at the very least, there should be no change in the current law in England without prior consultation with the bishops of the Church in Wales. In any event, the Governing Body of the Church in Wales would have to change the Church's internal norms on the matter.

The issue also raises the wider issue of the propriety of Westminster legislating for the Church in Wales more generally. In its report in 2013, the Constitutional and Legislative Affairs Committee of the National Assembly for Wales recommended that the Church in Wales should be fully disestablished but that, in the interim,

33 For the detail, see Norman Doe: *The Law of The Church in Wales* (Cardiff, 2002) 258–263.

34 The Act introduced similar 'qualifying connections' for Church in Wales weddings as had been established for England by the Marriage Measure 2008. For the background, see F Cranmer 'Disestablishing the Church in Wales – at last?', *Law & Religion UK*, 15 June 2013, <http://www.lawandreligionuk.com/2013/06/15/disestablishing-the-church-in-wales-at-last/>, accessed 5 April 2017.

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> the Church in Wales and the relevant UK Government departments explore the possibility of putting in place an appropriate constitutional convention such that the UK Parliament does not legislate in policy areas uniquely affecting the Church in Wales without its consent.[35]

If the point was ever taken up, it does not appear to have come to fruition.

SCOTLAND, NORTHERN IRELAND AND THE REPUBLIC OF IRELAND

Generally

Section 13 (Publication of banns in Scotland, Northern Ireland or Republic of Ireland) of the Marriage Act 1949 reads as follows:

> Where a marriage is intended to be solemnized in England, after the publication of banns of matrimony, between parties of whom one is residing in England and the other is residing in Scotland, Northern Ireland or the Republic of Ireland, then, if banns have been published or proclaimed in any church of the parish or place in which that other party is residing according to the law or custom there prevailing, a certificate given in accordance with that law or custom that the banns have been so published or proclaimed shall as respects that party be sufficient for the purposes of section eleven of this Act, and the marriage shall not be void by reason only that the banns have not been published in the manner required for the publication of banns in England.

Scotland

The calling of banns as a necessary prerequisite to marriage was abolished by section 27 of the Marriage (Scotland) Act 1977, which came into force on 1 January 1978.[36] The Church of Scotland abolished any internal canonical requirement for banns by passing a reciprocal Act of Assembly: Act III 1978 Anent Proclamation of Banns; but section 2 of the Act of Assembly contains the saving that: 'any person usually resident in Scotland and requiring proclamation of banns in order to be married furth of Scotland may have banns proclaimed in any parish church within the registration district within which he or she usually resides'.[37] So after 1 January 1978:

35 National Assembly for Wales Constitutional and Legislative Affairs Committee, *Report of the Inquiry into Law-making and the Church in Wales* (Cardiff, 2013), para 82.

36 The Faculty Office's booklet, *Anglican Marriage in England and Wales* (see note 24), para 7(5) states that 'In Scotland the Episcopal Church has never published banns'.

37 Available at <http://www.churchofscotland.org.uk/__data/assets/pdf_file/0017/1817/1978_act_03.pdf>, accessed 21 February.

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i. Banns ceased to be called for Church of Scotland religious marriages as a legal preliminary to marriage;
ii. For religious as for civil marriages, both parties were henceforward required to lodge marriage notices with the district registrar of the district where the marriage was to take place; and
iii. At least in principle, banns might still be called in the Church of Scotland parish church for marriages taking place outside Scotland where banns were a requirement in the place of marriage – for example, where someone resident in Scotland was to be married in the Church of England.

The Church of Scotland has issued the following instruction as to the procedure where the banns need to be called in such circumstances:

> Proclamation should be made at the principal service of worship in this form:
>
> There is a purpose of marriage between AB (Bachelor/Widower/Divorced), residing at … in this Registration District, and CD (Spinster/Widow/Divorced), residing at … in the Registration District of …, of which proclamation is hereby made for the first and only (second and last) time.
>
> Immediately after the second reading, or not less than forty-eight hours after the first and only reading, a Certificate of Proclamation signed by either the minister or the Session Clerk should be issued in the following terms:
>
> > At … the … day of … 20..
> > It is hereby certified that AB, residing at …, and CD, residing at …, have been duly proclaimed in order to marriage [*sic*] in the Church of … according to the custom of the Church of Scotland, and that no objections have been offered.
> > Signed ………… Minister or
> > Signed ………… Session Clerk[38]

Whether or not the abolition of banns had any adverse effect on the number of weddings in the Church of Scotland is difficult to determine. The relevant extract from the National Records of Scotland's 'Vital Events Reference Tables 2001' shows a fairly steady decline over time (see Table 1).

It would appear, however, that the decline between 1976–80 (banns having been abolished as from 1 January 1978) and 1981–85 was not as great as the

38 Available at <http://www.churchofscotland.org.uk/__data/assets/pdf_file/0005/29777/Section_3B.pdf> accessed 21 February 2017.

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Table 1.

Marriages in the Church of Scotland compared to the total number of marriages in Scotland, 1971–2001. Source: National Records of Scotland, *Vital Events Reference Tables 2001*, Table 7.6, 'Marriages, numbers and percentages, by method of celebration, Scotland, 1946 to 2001', available at < https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/archive/2001>, accessed 21 February 2017.

	All marriages	Church of Scotland
1971–75	41,404	18,279
1976–80	37,801	15,370
1981–85	35,756	14,177
1986–90	35,440	14,093
1991	33,762	13,124
1992	35,057	13,195
1993	33,366	12,711
1994	31,480	11,767
1995	30,663	11,185
1996	30,242	10,649
1997	29,611	10,291
1998	29,668	10,357
1999	29,940	10,393
2000	30,367	11,267
2001	29,621	11,396

decline between 1971–75 and 1976–80. It is therefore not at all clear whether the loss of the pastoral opportunity occasioned by non-church couples going along to the manse to make casual enquiries about having their banns called had any impact on the number who subsequently opted for a church wedding.

Northern Ireland and the Republic

The marriage laws of both Irish jurisdictions are very like those of Scotland: both provide for marriage schedules as a preliminary to marriage rather than the calling of banns.[39] As we have seen, it remains at least theoretically possible under the Marriage Act 1949 for a couple to ask for their banns to be called in a parish church in the Republic of Ireland. Somewhat bizarrely, however, the Ireland Act 1949 – which recognised the new status of the Republic and its withdrawal from the Commonwealth – was deemed to have come into effect on 18 April of that year, while the Marriage Act 1949 did not come into

39 See the Marriage (Northern Ireland) Order 2003 and the (Irish) Civil Registration Act 2004 (especially s 51 (Solemnisation of marriages) and s 52 (Places and times for the solemnisation of marriages)).

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effect until 1 January 1950. So it appears that the Attlee Government, having just recognised the newly proclaimed sovereign status of the Republic, merely assumed that the Church of Ireland south of the border would be prepared to continue reading the banns for marriages in England or Wales.

Current practice in the Church of Ireland is explained in the first note appended to the Church's guidance note for the Marriage Regulations (NI) 2004:

> Since the former practices of the reading of Banns or the issuing of Licenses [*sic*] have been superseded, the reading of Banns will have no legal effect, unless required for the purposes of solemnising of matrimony in the Church of England or the Church in Wales.[40]

CONCLUSIONS

Ecclesiastical preliminaries

Synod's rejection of Stephen Trott's private member's motion means that changes in the ecclesiastical preliminaries will not be initiated by the Church of England during the life of the present General Synod. However, as noted in GS 2045B, at paragraph 10,

> Between 2001 and 2004, as part of a wider plan for a complete reform of the law relating to marriage (which was itself part of a total reform of the civil registration system), the Government developed proposals which would have involved abolishing ecclesiastical preliminaries to marriage and replacing them with civil preliminaries in all cases.

The House of Bishops and the General Synod made it clear on that occasion that they were only prepared to support the principle of abolishing ecclesiastical preliminaries on condition that what replaced them would retain the 'one-stop shop', under which the couple would normally need only to see the parish priest to make all the arrangements for their wedding. The Government's proposals were ultimately not proceeded with after they encountered procedural difficulties in Parliament.

Civil preliminaries

At the time of writing, the Law Commission for England and Wales – which had been asked by the then Prime Minister, David Cameron, to look at marriage

40 Available at <https://www.ireland.anglican.org/cmsfiles/pdf/Information/Resources/regs/marr_reg_ni_2004.pdf>, accessed 21 February 2017.

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law – had published 'Getting married: a scoping paper', in which the authors provided an initial analysis of the issues that needed to be addressed to develop proposals for the reform of marriage law but, intentionally, did not make any specific recommendations.[41] Instead, the paper set out a list of the questions covering each of the stages of getting married that would need to be considered in any review.

In paragraph 2.20 of the paper, the Commission described the legal provisions relating to banns as 'particularly complex'. The same might be said of the law governing marriage and civil partnership generally: the Marriage Act 1949 was itself a consolidation measure that has been the subject of numerous subsequent amendments, while the landscape in England and Wales has been changed irrevocably by the Civil Partnerships Act 2004 and the Marriage (Same Sex Couples) Act 2013. There have also been calls for marriage law to be devolved to the National Assembly for Wales.[42]

We cannot help wondering whether the current law on the formation of marriage would survive another full-scale review more or less intact, or whether the Law Commission would recommend moving to a regime of marriage schedules along the lines of those in Scotland and both parts of Ireland. But, although the scoping paper was published in December 2015, at the time of writing the Government had not responded: possibly the present prime minister does not share her predecessor's interest in reform of marriage law – or maybe she just has other fish to fry.

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41 Law Commission, 'Getting married: a scoping paper', 17 December 2015, available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting_Married_scoping_paper.pdf>, accessed 21 February. The Representative Body of the Church in Wales was consulted during the preparatory work for the paper.

42 Though the Commission on Devolution in Wales, chaired by Paul Silk, which published its second (and final) report, *Empowerment and Responsibility: legislative powers to strengthen Wales*, in March 2014, stated at paragraph 12(11)(1) that it made no recommendation on 'the law of marriage and burials, licensing and Sunday trading'. See also F Cranmer, 'Wales and the law of marriage: "vestiges of establishment" revisited', (2015) 174 *Law & Justice* 96–108.

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