The Law Commission

And

The Scottish Law Commission

RECOGNITION OF FOREIGN NULLITY DECREES AND RELATED MATTERS

A Consultation Paper

This Consultation Paper embodies the considered views of the two Law Commissions. However, none of the recommendations made is necessarily final. The Law Commissions would welcome comments on this Consultation Paper by 31 July 1983.

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April 1983

378-56-04

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CONSULTATION PAPER

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PART I
INTRODUCTION

1.1 The Law Commission undertook in its First Programme of Law Reform[1] to examine, along with other matters in the field of family law, the recognition of foreign divorces, nullity decrees[2] and adoptions. These terms of reference were broadened in the Law Commission's Second Programme to embrace a complete review of family law.[3] Specific reference to recognition of foreign nullity decrees, and also to recognition of foreign marriages, is made in the Law Commission's Third Programme.[4] The Scottish Law Commission similarly included general proposals for an examination of family law in their Second Programme of Law Reform,[5] and again as part of their suggested review of Private International Law in their Third Programme.[6] It will be seen therefore that both Law Commissions have, specifically or by implication, long been committed to the

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1 Item XII.

2 The rules as to the recognition of foreign nullity decrees which are examined in this Consultation Paper may also apply to the recognition of foreign annulments other than by a decree granted at the end of a civil judicial process; see para. 2.28, below. For ease of exposition, however, we use the term "foreign nullity decree" to include all foreign annulments, however obtained, unless the context requires otherwise.

3 Item XIX: Family Law.

4 Item XXI: Private International Law.

5 Scot. Law Com. No. 8 (1968): Item No. 14 - Family Law .

6 Scot. Law Com. No. 29 (1973): Item No. 15 - Private International Law.

examination of the recognition of foreign nullity decrees in the general context of their work on the private international law rules applicable to family law.

1.2 The main reforms that have resulted from this work are as follows. The rules as to jurisdiction in matrimonial proceedings were amended by the Domicile and Matrimonial Proceedings Act 1973 as the result of proposals from the Law Commission[7] and the Scottish Law Commission.[8] The recognition of foreign divorces and legal separations was put on a statutory basis by the Recognition of Divorces and Legal Separations Act 1971 implementing proposals contained in a joint report of the two Law Commissions.[9] There has also been legislation on the question of jurisdiction over polygamous marriages,[10] again as a result of a report from the Law Commission.[11]

1.3 The two major private international law topics in the field of family law on which the two Commissions have not yet made proposals for reform are the law governing the validity of marriages and the recognition of foreign nullity decrees.[12] Preliminary work on both these topics was

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7 Law Com. No. 48 (1972).

8 Scot. Law Com. No. 25 (1972).

9 Law Com. No. 34; Scot. Law Com. No. 16 (1970).

10 Matrimonial Proceedings (Polygamous Marriages) Act 1972; for English law see now the Matrimonial Causes Act 1973, s.47. The two Commissions are at present examining whether any amendment should be made to the rule as to capacity to enter into a polygamous marriage, contained, for the law of England and Wales, in s.11(b) and (d) of the 1973 Act: see Working Paper No. 83; Consultative Memorandum No. 56 (1982).

11 Law Com. No. 42 (1971).

12 The Law Commission has published a working paper on Declarations in Family Matters (Working Paper No. 48 (1973)) and there is a joint consultative document (Working Paper No. 68/Memorandum No. 23) on Custody of Children (1976). Consideration is now being given to the preparation of reports on both topics and both Commissions have recently published Reports on the question of granting financial relief after a foreign divorce or nullity decree: Law Com. No. 117 (1982); Scot. Law Com. No. 72 (1982).

undertaken by the Law Commission as long ago as 1971.[13] By 1973 this work had been suspended because the Law Commission and the Scottish Law Commission had formed the view that satisfactory reform of these topics could best be achieved by international agreement.[14] The opportunity for the negotiation of internationally agreed solutions came with the decision that the agenda for the Thirteenth Session of The Hague Conference on Private International Law, held in 1976, should include "questions relating to the recognition abroad of decisions in respect of the existence or validity of marriages". Both Commissions played an active part in the briefing of the United Kingdom delegation to The Hague negotiations. It was hoped that the work of the Thirteenth Session would result in a convention covering the recognition not only of foreign marriages but also of foreign nullity decrees. In the event, the convention in respect of marriage which was concluded at The Hague in 1976 was confined to a Convention on Celebration and Recognition of the Validity of Marriages. The Conference decided not to extend it to the recognition of foreign nullity decrees. We understand that the Government does not propose that the United Kingdom should sign or ratify the Marriage Convention.[15]

1.4 Our courts are not frequently asked to recognise foreign annulments. In England and Wales, in 1979, 1980 and 1981, there were respectively 7, 12 and 12 petitions for declarations of validity of a foreign divorce,[16] but apparently none relating to the validity of a foreign annulment. Domestically, for every nullity petition presented, there were, in those years, 164, 154 and 161 divorce petitions,[17] and there is no reason

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13 Law Commission Sixth Annual Report (1971): Law Com. No. 47, para. 54.

14 Law Commission Eighth Annual Report (1973): Law Com. No. 58, para. 49.

15 The two commissions have decided to return to their consideration of choice of law in marriage and intend to set up a Working Party to assist in this task.

16 Judicial Statistics for those years, table D.8(b), notes.

17 Ibid, table D.8(b).

to suppose that the ratio would be greatly different in recognition cases. Consequently it may be thought that the recognition of foreign annulments does not pose any great problem. But the courts are not the only place in which a determination of the validity of a foreign annulment may have to be made. British immigration officials abroad and in the United Kingdom, and registrars of marriages, may from time to time need to determine the issue. Their task will be easier if the law can be rendered more certain and more easily ascertainable. And on the apparently few occasions on which the courts are required to decide such cases the time and expense of doing so can perhaps be very greatly reduced.[18] There seems now to be little real possibility of the recognition of foreign nullity decrees being the subject of international agreement. The choice is, therefore, to leave the law as it is or to make proposals for reform of our own private international law rules without any prospect of international agreement. We have no doubt that reform of our own rules is desirable. It has become more important with the changes made in the rules as to the jurisdiction of courts in the United Kingdom in nullity proceedings[19] and with the changes in the rules for the recognition of foreign divorces and legal separations.[20] As recognition of foreign nullity decrees has not yet been placed on a statutory basis, it is unclear whether the old common law rules for recognition have been, or should be, changed by analogy with those statutory developments and, if so, whether the analogy to be drawn is with the new statutory rules for nullity jurisdiction or the statutory rules for divorce recognition. It is because of the uncertainties in the present law,[21] and the failure of recent international initiatives to deal with the problem, that we have returned to the question of the recognition of foreign nullity decrees.

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18 Vervaeke v. Smith [1981] Fam.77 was 9 days before Waterhouse J., 7 days before the Court of Appeal and ([1982] 2 W.L.R. 855) 3 days in the House of Lords.

19 Domicile and Matrimonial Proceedings Act 1973, ss.5, 7. In Northern Ireland the jurisdiction of the court is now governed by the Matrimonial Causes (Northern Ireland) Order 1978 (S.I.1978 No.1045) (N.I.15), Article 49.

20 Recognition of Divorces and Legal Separations Act 1971.

21 See, most recently, Vervaeke v. Smith [1982] 2 W.L.R. 855 (H.L.).

1.5 The rules referred to above in relation to the jurisdiction of the courts in nullity proceedings and in relation to the recognition of foreign divorces and legal separations extend to Northern Ireland and thus apply to the whole of the United Kingdom. This had led us to consider whether our deliberations and subsequent conclusions should include the law of Northern Ireland. Section 1(5) of the Law Commissions Act 1965 precludes the Law Commission from considering "any law which the Parliament of Northern Ireland has power to amend". Read with section 40(2) of the Northern Ireland Constitution Act 1973, the Law Commission's remit is limited (in so far as Northern Ireland is concerned) to matters over which the Northern Ireland Parliament did not have legislative competence under the Government of Ireland Act 1920: that is, "excepted" and "reserved" matters. The subject-matter of recognition of foreign nullity decrees is outside the competence of the Parliament of Northern Ireland as it deals inter alia, with nationality and domicile -"excepted" and "reserved" matters respectively.

1.6 We believe, therefore, that there is no statutory bar to our dealing also with the law of Northern Ireland on the subject of recognition of foreign nullity decrees. Furthermore we believe that consideration on a United Kingdom basis rather than a Great Britain basis is the more satisfactory approach. Accordingly we include consideration of the law of Northern Ireland in this Consultation Paper.

1.7 We set up a small Working Party to assist us in our consideration of the law relating to foreign nullity decrees. The members of the Working Party are listed in Appendix B and we are very grateful to them for the assistance which they have given us. We should emphasise, however, that the views expressed in this paper are those of the two Commissions.

1.8 To conclude this introduction, we should draw attention to three matters. First, throughout this paper we make constant reference to the common law, operative until 31st December 1971, regarding the recognition of overseas divorces, because in all essentials the principles developed

mainly in relation to the recognition of divorces apply now to the recognition of annulments. We also refer frequently to the Recognition of Divorces and Legal Separations Act 1971 which, since 1st January 1972, has replaced the common law in respect of divorces and legal separations, because one option for reform - the one which, in the result, we recommend[22] - is to base new legislation for the recognition of annulments upon the principles of the 1971 Act.[23] In Part VI of this paper we take a detailed look at the 1971 Act and conclude that it is capable of improvement, both in the application of its principles to the recognition of annulments, and as it applies now to the recognition of divorces and legal separations. In recommending that such improvements be made we go beyond the simple question of the recognition of foreign annulments. Subject to the above, however, this paper is about the recognition of annulments and not the recognition of divorces.

1.9 Second, this paper does not deal with declarations regarding the validity of a marriage. While many of the principles applicable to the recognition of foreign annulments must apply equally to their converse, we are not aware that any problems arise in practice regarding such declarations. We have not considered whether and to what extent the present law in this area is deficient, or whether our proposals relating to the recognition of annulments can or should apply, as well, to the recognition of declarations of validity of marriage. If, however, any of our readers have views on this matter we would welcome their comments.

1.10 Third, some of our references, and some of our proposals, relate not only to the United Kingdom but to the British Isles. This geographical term embraces, for our purposes, the United Kingdom, the Channel Islands (Jersey and Guernsey) and the Isle of Man.

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22 See Part V, below.

23 For the convenience of readers, the Act is reproduced at Appendix A.

1.11 The rest of this paper is divided up as follows. In Part II we set out the present private international law rules relating to the recognition of foreign nullity decrees in the United Kingdom. We also consider some of the criticisms that may be made of the present state of the law. In Part III we examine in detail the case for reform. In Part IV we set out our proposals regarding the mutual recognition of the nullity decrees of courts within the British Isles, and in Part V those concerning the recognition by United Kingdom courts of annulments obtained elsewhere overseas. In Part VI, we deal with the implementation of our proposals made in Parts IV and V, and consider the best ways of doing it. Part VII contains a summary of our recommendations.

PART II

THE PRESENT LAW AND ITS DEFECTS

Introduction

2.1 Although the Recognition of Divorces and Legal Separations Act 1971 largely codified the law relating to the recognition of foreign divorces and legal separations, the rules for the recognition of foreign decrees of nullity still depend on the common law.[24] There are relatively few decisions on the subject and a number of problems still await judicial determination.

2.2 We propose to examine concurrently the English, Scottish and Northern Ireland rules on this subject, because it is believed that in relation to the recognition of foreign decrees of nullity there are no substantial differences between the three legal systems. In all three systems the starting point of the modern law is the decision of the House of Lords in a Scottish appeal, Administrator of Austrian Property v. Von Lorang,[25] where it was emphasised that a decree of nullity, even in respect of a void marriage, was as much a decree relating to status as a decree of divorce. Though it was a Scottish decision, it was unequivocably accepted, in De Reneville v. De Reneville,[26] as representing English law. Equally, in Galbraith v. Galbraith and Others[27] Lord Wheatley referred to the decision of the House of Lords in an English appeal, Indyka v. Indyka,[28] in these terms:

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24 The limited extent to which recognition of foreign nullity decrees may be governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933 is considered in paras. 2.29 to 2.31, below.

25 1926 S.C. 598; 1927 S.C. (H.L.) 80; [1927] A.C. 641.

26 [1948] P. 100, 109.

27 1971 S.C. 65.

28 [1969] 1 A.C. 33.

> "That was an English case dealing with English law, but I do not believe that different considerations and arguments would have prevailed if the case had been a Scottish one, involving as it did questions of private international law. While technically that decision is not binding on Scottish courts, the opinions expressed by their Lordships must be regarded as being of the highest standing and persuasion. While the laws of Scotland and England are separate and self-contained systems, and accordingly are capable of being different, it would be most unfortunate if the principles of recognition of foreign jurisdiction were to be different in the two countries."[29]

Similarly, as regards Northern Ireland, Lord MacDermott C.J. in Addison v. Addison,[30] citing with approval De Reneville v. De Reneville accepted that a nullity decree was a decree relating to status.

2.3 By stressing that a decree of nullity should be regarded as a decree relating to status, the House of Lords in the Von Lorang case was able to apply to annulments the general principles then relevant to the recognition of other decisions as to status, developed in the context of the recognition of foreign divorces. The rules applicable in relation to the recognition of foreign decrees of nullity are, therefore, similar to the common law rules which applied to the recognition of foreign divorces and legal separations until the coming into force of the Recognition of Divorces and Legal Separations Act 1971. These rules are thought to include such principles as may be derived from the decision of the House of Lords in Indyka v. Indyka.[31]

2.4 As a result of their common law basis, the rules governing recognition of foreign nullity decrees make no distinction between decrees obtained elsewhere in the British Isles and those obtained overseas.[32]

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29 1971 S.C. 65, 68.

30 [1955] N.I. 1, 13.

31 [1969] 1 A.C. 33.

32 Cf. Recognition of Divorces and Legal Separations Act 1971, s.1, which draws such a distinction.

Accordingly, a Scottish or a Northern Irish decree will be treated as "foreign" for the purposes of recognition by an English court and, conversely, an English decree will be treated as foreign in Scotland and in Northern Ireland.

2.5 The prime factor in determining whether or not a court in the United Kingdom will recognise a foreign decree of nullity is whether, in the eyes of that court, the foreign court which granted the decree had jurisdiction to do so.[33] Subject to considerations of public policy, the court is not concerned either with the basis upon which the foreign court actually assumed jurisdiction over the parties[34] or with the grounds upon which it granted the decree.[35] Consequently, the English courts have been prepared to recognise a foreign decree of nullity granted on grounds unknown in this country.[36] Likewise they have recognised a decree granted on grounds which would amount in English law to formal invalidity, even though the marriage had been celebrated in England and was formally valid under English law.[37]

2.6 Other than Addison v. Addison[38] there is no Northern Ireland authority on this subject. We believe, however, that the Courts in Northern Ireland would apply the same principles as those laid down by the courts in England. In addition to the Addison decision relating to the status of a nullity decree, further evidence relating to the law in Northern Ireland can be gleaned from that fact the section 6 of the Recognition of Divorces and legal

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33 Corbett v. Corbett [1957] 1 W.L.R. 486, 490, per Barnard J.

34 Corbett v. Corbett [1957] 1 W.L.R. 486; and see Galbraith v. Galbraith 1971 S.C. 65, 70-71.

35 Abate v. Abate [1961] P. 29.

36 Mitford v. Mitford [1923] P. 130 (mistake as to personal attributes); Galene v. Galene [1939] P. 237 (the clandestine nature of the marriage).

37 Galene v. Galene [1939] P. 237.

38 [1955] N.I.1.

Legal Separations Act 1971, which refers to the "common law rules" relating to the recognition of divorces and legal separations, applies in Northern Ireland. The fact that the "common law rules" relating to divorces and legal separations are recognised by statute as applying in Northern Ireland, coupled with the Northern Ireland courts' acceptance that nullity decrees affect status, lead us to conclude that the law is similar in Northern Ireland to that in England, and that English case law would be followed by the courts in Northern Ireland. Accordingly where in this paper we refer to English courts and English law, it should be taken to include also a reference to the courts and law of Northern Ireland. Where however the law of Northern Ireland differs from that of England we shall make specific reference to the Northern Ireland provisions.

The present law

A. Summary

2.7 Under existing law, the English courts will recognise a foreign decree of nullity in the following circumstances:

(a) probably, where the decree is granted in circumstances in which, mutatis mutandis, the English court would have jurisdiction to grant a decree;[39]

(b) where the decree is granted by the courts of the country with which either party has "a real and substantial connection";[40]

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39 Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P. 283; Lepre v. Lepre [1965] P. 52; Perrini v. Perrini [1979] Fam. 84: Vervaeke v. Smith [1981] Fam. 77, 109 (affirmed on other grounds [1982] 2 W.L.R. 855). See paras. 2.9 to 2.11, below.

40 Law v. Gustin [1976] Fam. 155; Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77, 109, 123. See paras. 2.13 to 2.15, below. Heads (a) and (b) cover many of the circumstances listed in more detail under (c) to (f).

(c) where the decree is granted by the courts of the parties' common domicile[41] and, probably, also where it is granted by the courts of only one party's domicile;[42]

(d) probably, where the decree is granted by the courts of the habitual residence[43] of one of the parties and possibly also where it is granted by the courts of the parties' common residence;[44]

(e) possibly, although this now seems unlikely,[45] where a decree declaring a marriage to be void is pronounced by the courts of the country where the marriage was celebrated;[46]

(f) where the decree, although not obtained in the country of the parties' common domicile, would be recognised as valid by the courts of such a country.[47]

It is believed that the Scottish courts would adopt similar rules, but there is binding authority only for the first proposition in paragraph (c) above.

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41 Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; [1927] A.C. 641. See para. 2.16, below.

42 Lepre v. Lepre [1965] P. 52. See paras. 2.17 and 2.18, below.

43 See para. 2.19, below.

44 See para. 2.20, below.

45 See para. 2.21, below.

46 Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P. 283.

47 Abate v. Abate [1961] P. 29. See para. 2.22, below.

2.8 Even if a foreign decree of nullity satisfied one, or more, of the jurisdictional bases mentioned in the previous paragraph, an English court might refuse to recognise the decree on any of the following grounds:

(a) it was obtained by fraud;[48]

(b) it offends against rules of natural justice;[49]

(c) it offends against English ideas of "substantial justice",[5045] or public policy;[51]

(d) the issue is already res judicata in England.[52]

A Scottish court, also, would be likely to refuse to recognise a decree obtained by fraud or offending against rules of natural justice. In addition, it has declined to recognise an extra-judicial decision as to nullity, although this decision was binding under the law of the domicile of one of the parties.[53]

2.9 In the paragraphs which follow we analyse each of these grounds for affording or withholding recognition. We also examine some of the situations, not mentioned above, which still await judicial determination.

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48 Administrator of Austrian Property v. Von Lorang [1927] A.C. 541. See para. 2.24, below.

49 Mitford v. Mitford [1923] P. 130, 141-142; Merker v. Merker [1963] P. 283, 296, 299. See para. 2.25, below.

50 Gray v. Formosa [1963] P. 259.

51 Vervaeke v. Smith [1982] 2 W.L.R. 855. See para. 2.26, below.

52 Vervaeke v. Smith, above. See para. 2.27, below.

53 Di Rollo v. Di Rollo 1959 S.C. 75. See para. 2.28, below.

B. Analysis of grounds for recognition

(1) Reciprocity

2.10 In Travers v. Holley[54] it was held in England that the courts must recognise foreign divorces obtained in circumstances in which, mutatis mutandis, the English court would have had jurisdiction to grant a decree. That principle has been extended in England to nullity decrees and has been applied in the past to secure the recognition of decrees granted by the courts of the parties' common residence[55] and decrees granted by the country in which the marriage was celebrated.[56] Despite its earlier rejection in Scotland in the case of Warden v. Warden,[57] the acceptance of the Travers v. Holley principle by the House of Lords in Indyka v. Indyka has entailed the acceptance of that principle in Scotland in relation to the recognition of foreign divorces.[58] Although it is no longer relevant in relation to foreign divorces,[59] the Travers v. Holley principle - as a principle of the common law - is, however, thought to be relevant in Scotland in relation to the recognition of foreign nullity decrees.

2.11 The English courts have more recently applied the reciprocity principle to the changed rules for nullity jurisdiction introduced in 1973.[60] This means that a foreign nullity decree will now be recognised in England

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54 [1953] P. 246.

55 See para. 2.20, below.

56 See para. 2.21, below.

57 1952 S.C. 508.

58 Galbraith v. Galbraith 1971 S.C. 65.

59 Recognition of Divorces and Legal Separations Act 1971., ss. 3 and 6.

60 Domicile and Matrimonial Proceedings Act 1973, s. 5. (s. 7, Scotland; Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) (N.I.15), Article 49, Northern Ireland).

where it was granted by the courts of a country in which either party was domiciled, or in which either party had been habitually resident (at least so long as the habitual residence was for one year),[61] immediately prior to the commencement of the proceedings in that country. The same approach is likely to be taken by the Court of Session.[62]

2.12 There are two features of the principle of reciprocity which ought particularly to be noted. First, the English courts have not looked to the basis upon which the foreign court actually assumed jurisdiction; "it is sufficient that facts exist which [if they related to England] would enable the English courts to assume jurisdiction".[63] Second, the comparison between the domestic jurisdictional rules in the foreign country, and those in this country, would appear to be made at the time of the recognition proceedings.[64]

(2) Real and substantial connection

2.13 In Indyka v. Indyka[65] Lord Morris of Borth-y-Gest suggested that the test of recognition of a foreign divorce was whether the spouse in question had a real and substantial connection with the country in which the decree was obtained. The same criterion was adopted by Lord Wilberforce and Lord Pearson to qualify the test of residence to ensure that the residence

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61 Vervaeke v. Smith [1981] Fam. 77, 109.

62 The Court of Session also has jurisdiction to reduce its own decrees of declarator of marriage or declarator of nullity of marriage notwithstanding that at the time of the commencement of the proceedings for reduction the parties have no present connections with Scotland -Domicile and Matrimonial Proceedings Act 1973, s. 8(3). See also the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s.20. The Court of Session, therefore, might well recognise a decree of reduction granted by a foreign court in similar circumstances.

63 Robinson-Scott v. Robinson-Scott [1958] P. 71, 88, cited with approval by Sir George Baker P. in Perrini v. Perrini [1979] Fam. 84.

64 Indyka v. Indyka [1969] 1 A.C. 33; Vervaeke v. Smith [1981] Fam. 77, 109.

65 [1969] 1 A.C. 33.

was effective and not fictitious. This test of real and substantial connection was accepted both in England[66] and in Scotland[67] in cases relating to the recognition of foreign divorces prior to the coming into effect of the 1971 Act. In England, it was held by Bagnall J. in Law v. Gustin[68] to be applicable to the recognition of a foreign nullity decree.[69] It seems probable that the Scottish courts would reach the same conclusion.

2.14 It is reasonable to assume that the nature of the real and substantial connection (which Bagnall J. decided was "a question of fact, to be decided ... on consideration of all the relevant circumstances")[70] may be gathered by reference to divorce recognition cases. On this basis a "real and substantial connection" for foreign nullity recognition purposes might be established, for example, by virtue of either party's[71] domicile[72] (even though less exactingly defined than by English law),[73] residence[74] or even

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66 Mayfield v. Mayfield [1969] P. 119; Welsby v. Welsby [1970] 1 W.L.R. 877.

67 Galbraith v. Galbraith and Others 1971 S.C. 65; Bain v. Bain 1971 S.C. 146.

68 [1976] Fam. 155, followed in Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77, 109, 123.

69 Although Bagnall J. indicated that the date upon which the decree was obtained is the appropriate date on which an English court should consider whether either party had a "real and substantial connection" with the country in which the decree was obtained, the point is not entirely free from doubt. See, e.g., Indyka v. Indyka [1969] 1 A.C. 33, 69, 76-77 and Blair v. Blair [1969] 1 W.L.R. 221, where it was held that a foreign divorce might be recognised even though the petitioner's connection with the country where the divorce was obtained ceased shortly before the commencement of the proceedings.

70 [1976] Fam. 155, 160.

71 Mayfield v. Mayfield [1969] P. 119.

72 Indyka v. Indyka [1969] 1 A.C. 33.

73 Ibid., at pp. 111-112.

74 Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77; and see Galbraith v. Galbraith 1971 S.C. 65.

nationality if it is reinforced by other factors.[75] It is sufficient that only one spouse has a real and substantial connection with the country of the court.[76] However, one connecting factor which may not, by itself, be sufficient to justify recognition of a foreign nullity decree is the fact that the decree was granted by the court of the country of the celebration of the marriage. Before 1974, when the Domicile and Matrimonial Proceedings Act 1973 came into force, courts in the United Kingdom would accept jurisdiction in nullity on this basis (though following Ross-Smith v. Ross-Smith[77] the English court would do so only in the case of a marriage void ab initio) and accordingly would recognise a foreign decree granted on this basis.[78] But the 1973 Act has deprived all United Kingdom courts of jurisdiction on this ground, and it is questionable whether any United Kingdom court would now extend recognition to a foreign nullity decree so obtained if there were no other substantial connecting factor.[79]

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75 Indyka v. Indyka [1969] 1 A.C. 33, 90, 104-5, 111; Mayfield v. Mayfield [1969] P. 119; Galbraith v. Galbraith 1971 S.C. 65, 70; Bain v. Bain 1971 S.C. 146, 152; Vervaeke v. Smith [1981] Fam. 77, 109; and see Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80, 97; [1927] A.C. 641, 670. However, it would appear that nationality by itself is not a sufficient ground for recognition of foreign nullity decrees. Cf. the Recognition of Divorces and Legal Separations Act 1971, s. 3(1)(b), which provides that an English court will recognise an overseas divorce obtained in the country of which either spouse is a national at the date of the institution of the foreign proceedings.

76 Mayfield v. Mayfield [1969] P. 119; Vervaeke v. Smith [1981] Fam. 77.

77 [1963] A.C. 280. This decision was followed in N. Ireland: Holden v. Holden [1968] N.I. 7.

78 Mitford v. Mitford [1923] P. 130; Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P. 283.

79 See Peters v. Peters [1968] P.275, in which recognition of a foreign divorce was refused when the only connecting factor with the country in which the divorce had been obtained was that the marriage had been celebrated there. But, of course, the English court never had jurisdiction in divorce merely on the ground that the marriage had been celebrated in England. This issue is discussed in more detail in paras. 6.30 and 6.31, below.

2.15 The application of the test of "real and substantial connection" to the recognition of foreign nullity decrees may well have the same far-reaching effects in relation to nullity decrees as it had in relation to the recognition of foreign divorces prior to the 1971 Act.[80] This necessarily colours any analysis of the grounds of recognition accepted in earlier decisions. We proceed, nevertheless, to examine these, bearing in mind, however, that most, if not all, might be decided today on the basis of the real and substantial connection test.

(3) Domicile

(a) Common domicile

2.16 It was established by the House of Lords decision in Administrator of Austrian Property v. Von Lorang[81] that the courts in both England and Scotland will recognise a decree of nullity granted by the courts of the common domicile of the parties.[82] This principle has been applied even where the marriage concerned was celebrated in England and was formally valid under English law.[83]

(b) Domicile of one party

2.17 The position as regards decrees of nullity granted by the courts of only one party's domicile is less clear. Until 1974 a woman entering into a marriage that was valid or voidable took the domicile of her husband as a matter of law and her domicile remained the same as his so long as the marriage subsisted. If, however, the marriage was void, the woman retained her own independent domicile which might or might not be the same as her

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80 See the remarks of Lord Wheatley in Galbraith v. Galbraith, 1971 S.C. 65, 70.

81 1927 S.C. (H.L.) 80; [1927] A.C.641.

82 In Lepre v. Lepre [1965] P.52, 59, Sir Jocelyn Simon P. confirmed that the relevant date for determining the domicile of the parties is the date of the commencement of the foreign proceedings. It would seem to follow from the analogous position regarding recognition of foreign divorces that a change of domicile after that date will not affect recognition of the foreign decree: Mansell v. Mansell [1967] P.306.

83 De Massa v. De Massa (1931) [1939] 2 All E.R. 150n.; Galene v. Galene [1939] P.237.

husband's. As from 1 January 1974, a married woman possesses an independent domicile in all cases, not simply where her marriage is void.[84] Accordingly, the problem of whether an English or Scottish court should recognise a foreign annulment on the basis of only one party's domicile may arise, either where it was obtained before 1974 in respect of a void marriage, or in any case where it was obtained after the end of 1973.

2.18 Although in Chapelle v. Chapelle[85] Willmer J. took the view that a decree granted by the courts of only one party's domicile ought not to be recognised, this approach was not followed by Sir Jocelyn Simon P. in Lepre v. Lepre,[86] partly on the Travers v. Holley[87] principle and partly on the ground that courts were entitled to pronounce on the status of their own domiciliaries.[88] The approval of the decision in Travers v. Holley[89] by the House of Lords in Indyka v. Indyka[90] suggests that both English and Scottish courts would now recognise foreign nullity decrees on the basis of the domicile of one party to the "marriage" in the territory of the court. All United Kingdom courts now assume jurisdiction in nullity cases on the basis of the domicile within the territory of either party to the marriage at the date when the action was begun.[91] Further, apart from the Travers v.

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84 Domicile and Matrimonial Proceedings Act 1973, s.1.

85 [1950] P.134, 144, approved by Donovan L.J. in Gray v. Formosa [1963] P.259, 270-271.

86 [1965] P.52, 61-62.

87 [1953] P.246.

88 Sir Jocelyn Simon P. pointed out that a decree granted by the courts of one party's domicile should in principle be regarded as universally conclusive as to that party's marital status. But it would be inconsistent for the court to recognise a decree and at the same time to attribute a different status to the other party. The decree must be recognised as determining the status of both parties: [1965] P.52, 62.

89 [1953] P.246.

90 [1969] 1 A.C.33.

91 Domicile and Matrimonial Proceedings Act 1973; Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No.1045)(N.I.15).

Holley principle, a decree of nullity based on the domicile of one party alone would probably be recognised under the "real and substantial connection" test laid down in Indyka v. Indyka.[92]

(4) Residence

(a) Habitual residence

2.19 The Domicile and Matrimonial Proceedings Act 1973 provides in respect of England and Wales,[93] Scotland[94] and Northern Ireland[95] that courts of these countries have jurisdiction to entertain proceedings for nullity of marriage or, in Scotland, declarator of nullity of marriage, if either of the parties to the marriage was habitually resident in the country throughout the period of one year ending with the date when the action had begun, or had died before that date and had been habitually resident in the country throughout the period of one year ending with the date of death. Applying the decision in Travers v. Holley[96] to the recognition of a foreign decree of nullity,[97] an English court has recognised a foreign decree based jurisdictionally on similar principles,[98] and it seems likely that a Scottish court would do likewise. Although under the reciprocity principle the length of the habitual residence would seem to be crucial, the later developments stemming from Indyka v. Indyka[99] indicate that all that is necessary is that the residence should be of sufficient duration and quality to constitute a real and substantial connection with the country granting the decree .[100]

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92 [1969] 1 A.C. 33; and see Vervaeke v. Smith [1981] Fam. 77, 109. See paras. 2.13 and 2.14, above, and para.6.17, below.

93 s.5(3).

94 s.7(3).

95 Sect. 13(3), replaced by Article 49(3) of the Matrimonial Causes (Northern Ireland) Order 1978 (S.I 1978 No.1045)(N.I.15).

96 [1953] P.246.

97 See para. 2.10, above.

98 Vervaeke v. Smith [1981] Fam. 77, 108; and see Perrini v. Perrini [1979] Fam. 84, 91.

99 [1969] 1 A.C. 33.

100 See Welsby v. Welsby [1970] 1 W.L.R. 877; Law v. Gustin [1976] Fam. 155; Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77.

(b) Common residence

2.20 There are three decisions[101] which suggest that an English court will recognise a foreign decree of nullity which has been obtained in the country which was the spouses' common residence at the commencement of the proceedings. In all these cases the country of the spouses' common residence was also the locus celebrationis. It is not entirely clear from the two earlier cases[102] whether each of these two factors was independently a sufficient ground for recognition, or whether they had to exist together. In Merker v. Merker,[103] however, Sir Jocelyn Simon P. made it clear that, irrespective of whether the foreign decree could be recognised on the basis of its having been granted in the country of the celebration of the marriage, common residence was a sufficient connecting factor on its own, on the ground that an English court would itself claim jurisdiction in such circumstances. The English court does not now assume domestic nullity jurisdiction merely on the basis of the parties' common residence. It is, therefore, arguable that it will no longer afford recognition on this ground.[104] However, this will be of significance only in the probably rare case in which the common residence of both parties is not of sufficient duration or character to amount in fact to the habitual residence of at least one of them.[105]

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101 Mitford v. Mitford [1923] P.130; Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P.283.

102 Mitford v. Mitford [1923] P.130; Corbett v. Corbett [1957] 1 W.L.R. 486.

103 [1963] P.283, 297.

104 This view is supported by the fact that the celebration of a voidable marriage in a foreign country was rejected as a basis for recognition once the celebration of such a marriage in this country had ceased to be a ground upon which an English court would assume domestic nullity jurisdiction; Merker v. Merker [1963] P.283, 297.

105 An English court will recognise a foreign decree on this basis, see para. 2.19, above.

(5) Place of celebration

2.21 As mentioned above,[106] in relation to the real and substantial connection test, the English courts have recognised a foreign decree of nullity of a void marriage granted by a court in the country in which the marriage was celebrated.[107] The basis for recognition appears to have been the principle of reciprocity.[108] However, neither the English nor the Scottish courts now have jurisdiction to entertain a petition for nullity on the basis that the marriage was celebrated in England or in Scotland, as the case may be, and it would therefore seem doubtful that a foreign decree granted in similar circumstances will in future be recognised in this country.[109]

(6) Decrees recognised by the courts of a country with which a party has a real and substantial connection

2.22 In Armitage v. Attorney General[110] it was held that an English court was bound to recognise a foreign divorce not obtained in the country of the domicile if it would be recognised as valid in that country. The same principle was adopted in Scotland.[111] Following Indyka v. Indyka the principle of Armitage was extended to apply to divorces recognised as valid in the country with which either spouse had a real and substantial connection.[112] In its original formulation the principle of Armitage was

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106 See para. 2.14, above.

107 Corbett v. Corbett [1957] 1 W.L.R. 486; Merker v. Merker [1963] P.283.

108 Merker v. Merker [1963] P.283.

109 It is for consideration whether specific provision should be made, in any new statutory scheme, for the recognition of annulments on this ground: see paras. 6.30 and 6.31, below.

110 [1906] P.135.

111 McKay v. Walls 1951 S.L.T. (Notes) 6.

112 Mather v. Mahoney (formerly Mather) [1968] 1 W.L.R. 1773; Messina v. Smith [1971] P.322.

extended to apply to the recognition of foreign nullity decrees in Abate v. Abate,[113] but there is at present no authority upon whether the principle as extended following Indyka v. Indyka would be applied to nullity decrees.

2.23 In relation to divorces and legal separations, the original Armitage principle was given statutory approval by the Recognition of Divorces and Legal Separations Act 1971.[114] In addition it was extended to include divorces, either obtained in the country of the domicile of one spouse and recognised as valid under the law of the domicile of the other spouse, or obtained elsewhere and recognised as valid under the law of the domicile of each of the spouses respectively.[115] There is no authority on whether this statutory analogy would be followed in relation to foreign nullity decrees. However, it has been suggested[116] that the principle of Abate v. Abate[117] should be extended so as to permit recognition where the parties are domiciled in different countries and the courts of either both parties',[118] or of only one party's,[119] domicile would recognise the decree.

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113 [1961] P.29.

114 Section 6, as amended by s.2 of the Domicile and Matrimonial Proceedings Act 1973.

115 A qualification of this principle, under s.16(2) of the Domicile and Matrimonial Proceedings Act 1973, must be noted in relation to extra-judicial divorces.

116 Cheshire and North, Private International Law, 10th ed. (1979) p.409; Morris, The Conflict of Laws, 2nd ed. (1980) p.160.

117 [1961] P.29.

118 If both domiciliary laws agree as to the parties' status it should in principle make no difference that the legal systems of two countries are involved rather than one.

119 If, as seems likely, the courts in England and Scotland will recognise a foreign nullity decree on the basis of one party's domicile, (see paras. 2.17 and 2.18 above), then it may be that, despite the statutory rules for divorce recognition, they will recognise a nullity decree which would be recognised as valid in the domicile of one of the parties but not in the domicile of the other. See paras. 6.15 to 6.21, below.

C. Analysis of grounds for withholding recognition

(1) Fraud in obtaining the foreign decree

2.24 There is no authority directly in point, although a number of cases, including Administrator of Austrian Property v. Von Lorang,[120] proceed on the assumption that courts in the United Kingdom would withhold recognition from a foreign nullity decree obtained by fraud. Lord Phillimore's examples of fraud in that case suggest that both fraud as to the foreign court's jurisdiction and fraud as to the actual merits of the petition may be relevant, but the latter was not at common law a sufficient ground for withholding recognition from a foreign divorce.[121] Mere procedural errors however, falling short of fraud, will not justify recognition being withheld.[122]

(2) Foreign decree offends against the rules of natural justice

2.25 Various dicta indicate that an English or Scottish court may withhold recognition from a foreign decree which offends against the rules of natural justice.[123] In the Scottish case of Perin v. Perin[124] Lord Moncrieff declined to recognise a Latvian decree of divorce granted in proceedings of which the defender had no notice and in which she had no opportunity to be

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120 1927 S.C. (H.L.) 80; [1927] A.C.641. See also Chapelle v. Chapelle [1950] P.134, 140; Merker v. Merker [1963] P.283, 296.

121 Bater v. Bater [1916] P.209; Perin v. Perin 1950 S.L.T. 51. See now the Recognition of Divorces and Legal Separations Act 1971, s.8.

122 Merker v. Merker [1963] P.283.

123 e.g., Mitford v. Mitford [1923] P.130, 137, 141-142; Merker v. Merker [1963] P.283, 296, 299; Law v. Gustin [1976] Fam. 155, 159. The Scottish authorities include Crabtree v. Crabtree 1929 S.L.T. 675, 676; Scott v. Scott 1937 S.L.T. 632; and Perin v. Perin 1950 S.L.T. 51, 53.

124 Above.

heard or to be represented. The courts, however, are naturally hesitant to withhold recognition on this ground[125] and the mere fact that the action was undefended is not by itself a ground of challenge.[126]

(3) Foreign decree offends against ideas of "substantial justice" or public policy

2.26 That an English court might withhold recognition from a foreign nullity decree which offends against English ideas of "substantial justice" is the least well defined and the most controversal[127] ground for denying recognition. In Gray v. Formosa,[128] the court of Appeal denied recognition to a Maltese decree on the ground that the Maltese substantive rule upon which the decree was based was offensive to English ideas of "substantial justice".[129] This decision goes against the principle that an English court will not inquire into the substantive merits of a decree pronounced by a foreign court of competent jurisdiction, and it was followed by Sir Jocelyn Simon P., in Lepre v. Lepre[130] only with reluctance. More recently,

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125 In Mitford v. Mitford the English court was still prepared to recognise a German decree, even though it was granted during wartime when the English respondent husband was unable to reach Germany, and in Law v. Gustin the court ignored the fact that the respondent had received only five days' notice in which to enter a defence.

126 Administrator of Austrian Property v. Von Lorang, per Lord Sands in 1926 S.C. 598, 627, cited with approval by Lord Hodson in Ross-Smith v. Ross-Smith [1963] A.C. 280, 341.

127 Carter (1962) 38 B.Y.B.I.L. 497; Lewis (1963) 12 I.C.L.Q. 298; Blom-Cooper (1963) 26 M.L.R. 94.

128 [1963] P. 259. In this case the court appears to have been particularly influenced by the social policy consideration arising out of the behaviour of the Maltese domiciled husband who, having deserted his English born wife and children, obtained a Maltese decree annulling his marriage, contracted in England, on the grounds that it had not been celebrated in Roman Catholic form. See in particular at pp. 268-269 per Lord Denning M.R. and p. 270 per Donovan L.J.

129 This phrase is derived from the judgment of Lindley M.R. in Pemberton v. Hughes [1899] 1 Ch. 781, 790.

130 [1965] P. 52.

in Vervaeke v. Smith,[131] despite the view that this head of non-recognition should be exercised with "extreme reserve",[132] this general approach was adopted by the House of Lords.[133] It was held that the English rule upholding the validity of an English marriage even though the parties had never intended to live together as man and wife embodies a rule of English public policy such that, in the circumstances of the case, a Belgian decree annulling such a marriage on the identical grounds was to be denied recognition. In Scots law there are dicta[134] suggesting that the court would refuse to recognise a foreign divorce when its grounds are "repugnant to the standard of morality recognised by a civilised and Christian State", but the current status of these dicta is not clear.

(4) Res judicata

2.27 In Vervaeke v. Smith,[135] the House of Lords had no hesitation in applying the doctrine of res judicata to deny recognition to a Belgian nullity decree, the matter in dispute having already been the subject of an English decision[136] upholding the validity of the marriage in question. In the particular circumstances of the case; the petitioner had sought either a declaration[137] as to the validity of the Belgian decree, or alternatively a

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131 [1982] 2 W.L.R. 855.

132 Ibid., at p. 872.

133 See especially, at pp. 864-865, per Lord Hailsham L.C., and at pp. 871-874 where Lord Simon of Glaisdale catalogues six factors in the particular case warranting, in his view, the application of a public policy ground for denial of recognition to a foreign nullity decree.

134 Humphrey v. Humphrey's Trustees (1895) 33 S.L.R. 99; cf. Luszczewska v. Luszczewska 1953 S.L.T. (Notes) 73.

135 [1982] 2 W.L.R. 855.

136 Messina v. Smith [1971] P. 322.

137 Under R.S.C. O.15 r.16.

declaration that her later marriage subsequent to the decree was valid.[138] Their Lordships held that the first matter was covered by "cause of action estoppel" and the second by "issue estoppel". In the event both matters were regarded as res judicata.[139]

(5) That the foreign annulment is extra-judicial

2.28 It is a possible ground of non-recognition of a foreign annulment that it is extra-judicial. There does not apear to be any English authority as to whether the courts will recognise an extra-judicial annulment. One Scottish decision[140] would seem to suggest that such an annulment ought not to be recognised, but this decision has been criticised.[141] Various kinds of extra-judicial divorce are capable of recognition[142] and it is not clear why at least some forms of extra-judicial annulment should not also be capable of recognition.[143]

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138 Under the Matrimonial Causes Act 1973, s.45.

139 Lord Diplock suggested ([1982] 2 W.L.R. 855, 867) that "cause of action" estoppel is itself an application of a rule of English public policy. On that basis, it might have been subsumed, for present purposes, under the previous heading to para. 2.26, above. Lord Simon, however, at p. 869, thought that res judicata and public policy should be kept separate, and that is what has been done here. Furthermore, in legislation dealing with the recognition of foreign judgments the two issues of res judicata and public policy are usually treated separately; see, e.g., the Foreign Judgments (Reciprocal Enforcement) Act 1933, s.4(1)(a)(v) and (b); Recognition of Divorces and Legal Separations Act 1971, s.8(1) and (2)(b); Civil Jurisdiction and Judgments Act 1982, Sched. 1, Art. 27(1), (3) and (5).

140 Di Rollo v. Di Rollo 1959 S.C. 75; contrast Radoyevitch v. Radoyevitch 1930 S.C. 619.

141 Anton, Private International Law (1967) pp. 306-307.

142 Cheshire and North, Private Internaitonal Law, 10th ed., (1979), pp. 378-383. See also Quazi v. Quazi [1980] A.C. 744 in relation to the recognition of extra-judicial divorces under the 1971 Act, and Qureshi v. Qureshi [1972] Fam. 173 regarding the recognition of extra-judicial divorces prior to 1972.

143 We propose that they should. See paras. 6.7 to 6.9, below.

D. Foreign Judgments (Reciprocal Enforcement) Act 1933 and the recognition of foreign nullity decrees

2.29 So far it has been assumed throughout this account of the rules for the recognition of foreign nullity decrees that they are the creatures of, and are to be determined solely by reference to, the common law. It is, however, a matter of controversy as to how far judgments relating to status, including foreign nullity decrees,fall within the recognition provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933. The main provisions of that Act are concerned with the registration and enforcement in the United Kingdom of final and conclusive money judgments given in the courts of countries to which the Act has been extended by Order in Council. However, section 8(1) goes further and deals with the question of the recognition of foreign judgments in the following terms:

> Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kindgom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

2.30 It will be seen that section 8(1) is not limited in terms to money judgments but applies also to judgments to which the main provisions of the Act would have applied if a sum of money had been payable thereunder. Does this mean that section 8(1) extends to judgments relating to status such as divorce[144] and nullity? In 1975, Lord Reid clearly thought that the section did not extend to "judgments on status and family matters."[145] However, it is

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144 And thus falling within s.6(5) of the Recognition of Divorces and Legal Separations Act 1971.

145 Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591, 617.

undoubtedly the case that some of the Conventions between the United Kingdom and countries to which the 1933 Act has been extended by Order in Council do include reference to "judgments in matters of family law or status (including divorces or other judgments in matrimonial causes)",[146] others specifically exclude such judgments,[147] while still others[148] make no reference to such judgments but appear to be drafted in terms which would exclude them.[149] The question whether the inclusion of judgments in matrimonial causes within a relevant convention meant that recognition of foreign nullity decrees fell to be governed by the rules of the 1933 Act was discussed in Vervaeke v. Smith which concerned the recognition in England of a Belgian nullity decree, Belgium being a country whose convention with the United Kingdom includes a specific reference to matrimonial causes.[150] No clear view on this issue emerges. At first instance, Waterhouse J. proceeded on the basis, agreed by the parties, that recognition of the Belgian decree was governed by the 1933 Act and the convention between Belgium and the United Kingdom.[151] In argument before the Court of Appeal, there was some resiling from this view, but Sir John Arnold P. had little doubt that the question of recognition of the Belgian decree did properly fall within the

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146 See, e.g., the Conventions with Belgium (S.R. & O 1936 No. 1169, Sched. Art. 4(3)(a)), Italy (S.I. 1973 No. 1894, Sched. Art. 2(3)(a)), Austria (S.I. 1962 No. 1339, Sched. Art 4(5)(a)), Germany (S.I. 1961 No. 1199, Sched. Art. 4(1)(c), Israel (S.I. 1971 No. 1039, Sched. Art. 4(5)).

147 See, e.g., the Conventions with France (S.R. & O. 1936 No. 609, Sched. Art. 2(3)(b)), Norway (S.I. 1962 No. 626, Sched. Art. 2(3)(b)), The Netherlands (S.I. 1969 No. 1963, Sched. Art. 2(2)(c)) and Surinam (S.I. 1981 No. 735).

148 See e.g., the Conventions with India (S.I. 1958 No. 425), Pakistan (S.I. 1958 No. 141), the Australian Capital Territory (S.I. 1955 No. 558), Guernsey (S.I. 1973 No. 610), Isle of Man (S.I. 1973 No. 611), Jersey (S.I. 1973 No. 612).

149 By referring to Part I of the 1933 Act which is limited to money judgments. There is one Convention where it is quite unclear whether it is intended to apply to the enforcement of status judgments; see Tonga (S.I. 1980 No. 1523).

150 See fn. 146, above.

151 [1981] Fam. 77, 103.

Act and the convention,[152] but the other two judges[153] were doubtful whether the Act and convention did properly apply to matrimonial cases such as the instant one and suggested that only money judgments in matrimonial cases fell within them. In the House of Lords, it was considered by Lord Hailsham L.C. that recognition of the Belgian decree should be denied, whether the relevant rules were those at common law, or under the 1933 Act and the convention with Belgium;[154] while Lord Diplock[155] found it unnecessary to decide whether the Belgium decree could be recognised under section 8(1) of the 1933 Act because, even if it could, other provisions of that Act[156] would lead him to deny recongition. The other judges did not express a view on this matter.

2.31 While there is no decisive authority on the issue, some of the conventions to which the 1933 Act applies do specifically include matrimonial causes within their ambit and there seems little doubt that section 8(1) of the 1933 Act can, despite the fact that it "is not framed so as to yield up its meaning easily or quickly",[157] be reasonably interpreted as applying to the recognition of foreign nullity decrees. It must be asked, however, if it matters whether the rules for recognition of foreign decrees are to be sought from the common law or from the 1933 Act and its attendant conventions. The issue as to whether the foreign court granted the decree in such jurisdictional circumstances as will justify recognition here will be decided according to the common law rules discussed already,[158] whether or not the matter falls within the 1933 Act, because that Act and the relevant

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152 Ibid., at pp. 125-126.

153 Ibid., at pp. 126-127.

154 [1982] 2 W.L.R. 855, 864.

155 Ibid., at p. 867.

156 Sections 4(1) and 8(2)(b).

157 [1981] Fam. 77, 125.

158 See paras. 2.10 to 2.23, above.

conventions refer such jurisdictional issues to the common law.[159] The grounds on which recognition may be denied to a jurisdictionally satisfactory foreign decree may, perhaps, differ slightly, depending on whether one is looking at the common law heads for withholding recognition[160] or those listed in the 1933 Act.[161] For example, a decree must be denied recognition under the 1933 Act if it was obtained by fraud[162] whereas this would appear to be a matter of discretion at common law.[163] Nevertheless, the general approach of the common law and the 1933 Act is similar on this issue of grounds for withholding recognition. We consider later[164] whether, in the light of the fact that the 1933 Act may well apply to the recognition of some foreign nullity decrees and that there may be some, albeit minor, differences between the common law and statutory rules, it would be necessary in any reformed system of nullity recognition to allow for the preservation of recognition under the Foreign Judgments (Reciprocal Enforcement) Act 1933.[165]

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159 Foreign Judgments (Reciprocal Enforcement) Act 1933, s.4(2)(c) and see, e.g., the Belgian convention: (S.R. & O. 1936 No. 609, Sched. Art. 4(3)); and Vervaeke v. Smith [1981] Fam. 77. (The jurisdictional issue was not examined in the House of Lords: [1982] 2 W.L.R. 855.)

160 See paras. 2.24 to 2.28, above.

161 Section 8(2)(b) applies s.4(1) to this issue.

162 Section 4(1)(a)(iv).

163 See para. 2.24, above. It might also be noted, by way of analogy, that some matters which are mandatory under the 1933 Act are discretionary under the equivalent provisions in the Recognition of Divorces and Legal Separations Act 1971, s.8(2).

164 See paras. 6.37 to 6.39, below.

165 It is perhaps worth noting that, when the Civil Jurisdiction and Judgments Act 1982, Sched. 1, Art. 55, is brought into force, all the existing Conventions made under the 1933 Act between the United Kingdom and Member States of the E.E.C. (i.e. those with France, Belgium, Germany, Italy and the Netherlands) will be superseded by the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. But that Convention does not apply to "the status or legal capacity of natural persons" (Art. 1(1)). Recognition of foreign nullity decrees under bilateral Conventions made under the 1933 Act therefore remains unaffected.

E. The effect of a foreign nullity decree

(1) Where the decree is recognised

2.32 A decree of nullity pronounced by a court of competent jurisdiction is a judgment in rem determining status, and thus demands recognition by all other courts wherever situated.[166] But the effect of the decree is not inevitably the same in the country in which it is recognised as it is in the country in which it is pronounced. Different legal systems may assign different consequences to the same set of circumstances. Where such differences exist on the recognition of a foreign decree, the question is, which consequences are to follow? There is little authority on the effect in this country of a foreign nullity decree, either where it will be recognised here or where it will not. Such authority as there is suggests that the position is as follows.

(a) Retrospective effect of foreign decree of nullity

2.33 Under English law a decree pronouncing a marriage void ab initio is retrospective in its operation, while a decree annulling a voidable marriage affects the parties' status only prospectively.[167] Where the effect of a foreign nullity decree is the same as under English law, no problem is likely to arise.[168] Where, however, an English court recognises a foreign decree which, although it annuls only what amounts in English law to a voidable

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166 Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; [1927] A.C. 641.

167 Matrimonial Causes Act 1973, s.16. Northern Ireland - Article 18 of the Matrimonial Causes (Northern Ireland) Order 1978 (S.I.1978 No.1045) (N.I.15). In Scotland all declarators of nullity have retrospective effect.

168 e.g., Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; [1927] A.C. 641.

marriage, operates retrospectively in the country in which it is granted, difficulties might arise if the English court were to treat the decree in the same way as a comparable English decree, i.e., as only prospective in effect. For instance it would mean that a second marriage, contracted during the currency of the first, voidable, marriage, would in English law be void for bigamy. The cases give no firm guidance on this problem, although a dictum of Viscount Haldane in the Von Lorang case might be taken to indicate that the foreign effect of a foreign decree should be recognised.[169]

2.34 The internal law of Scotland does not admit that a declarator of nullity of marriage may be only prospective in effect but would, it is thought, recognise that this distinction may be admitted by other systems.[170] The cases do not give clear guidance on the question which system of law determines the effect to be given to the decree. It is thought, however, that the Scottish courts would attribute to any foreign decree of nullity falling to be recognised as a decree in rem in this respect the same effect which it has by virtue of the legal system under which the decree was pronounced.[171]

(b) Capacity to remarry after a foreign nullity decree

2.35 It follows from the decision of the House of Lords in Administrator of Austrian Property v. Von Lorang[172] that where the parties have obtained a valid nullity decree the courts in this country will regard them as unmarried and prima facie as free to remarry. However it is a generally accepted rule of English and of Scottish private international law that a person's capacity to marry is determined by the law of his pre-marital

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169 Ibid., at pp. 87 and 654-655 respectively. See also North, Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977), p.267.

170 See Balshaw v. Kelly (or Balshaw) 1966 S.L.T. (Notes) 48.

171 Administrator of Austrian Property v. Von Lorang, 1927 S.C. (H.L.) 80, 87-88, 97; [1927] A.C. 641, 655-656, 670.

172 Above.

domicile.[173] Consequently, a conflict of rules might arise if a foreign nullity decree is recognised in this country but not in the country of the domicile of one of the spouses. This problem, which also applies to the recognition of foreign divorces, was resolved in England at common law by the decision of the Divisional Court in R. v. Brentwood Superintendent Registrar of Marriages ex parte Arias,[174] where it was held that the rule relating to the parties' capacity to marry should prevail over that for divorce recognition, with the result that, although the English court might recognise a foreign divorce, the parties would not be regarded in England as free to remarry unless the divorce was recognised by the law of their domiciles. The decision in the Arias case was reversed by section 7 of the Recognition of Divorces and Legal Separations Act 1971, as amended by section 15(2) of the Domicile and Matrimonial Proceedings Act 1973, but only as to remarriage in the United Kingdom after a valid foreign divorce (not nullity decree). In Perrini v. Perrini[175] Sir George Baker P., having decided that a foreign nullity decree should be recognised in this country, went on to hold that "the fact that [the husband] could not marry in Italy, the country of his domicile ... is, in my opinion, no bar to his marrying in England where by the New Jersey decree he was free to marry. No incapacity existed in English law." No reference was made either to section 7 of the 1971 Act or to the Arias case in reaching this conclusion. Moreover the decision leaves in doubt what will happen where an English court recognises a foreign decree of nullity and the remarriage of one of the parties take place abroad. Similar problems arise under Scots Law.[176]

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173 Though see Radwan v. Radwan (No. 2) [1973] Fam. 35, examined in Working Paper No. 83/Consultative Memorandum No. 56 (1982), paras. 3.1 to 3.10, 4.2.

174 [1968] Q.B. 956.

175 [1979] Fam. 84, 92.

176 See E.M. Clive, Husband and Wife, 2nd ed., (1982), pp.149-152.

(c) Ancillary relief

2.36 There does not appear to be any authority dealing with the effect of the recognition of a foreign nullity decree upon proceedings, taken either abroad or in this country, for ancillary relief. However it seems likely that the divorce analogy would be followed, with the result that a foreign order for financial relief would be recognised only if it were final and conclusive, or fell within the statutory rules for the recognition of maintenance orders. In the converse case, where one of the parties wishes to seek financial relief in this country following a foreign decree of nullity, the English courts will decline jurisdiction on the ground that there is no subsisting marriage.[177] The position is effectively the same in Scotland. The Law Commission has recently recommended that financial relief should be available in the English courts after a foreign divorce, legal separation or annulment,[178] and the Scottish Law Commission has made recommendations to similar (though more limited) effect.[179]

2.37 The point should be made that a petitioner for a declarator of nullity of marriage in Scotland can obtain no financial provision of any kind, since the Scottish courts have no power to award it, even on their own declarators of nullity. The respective proposals of the two Law Commissions, mentioned in the previous paragraph, do not extend to cover cases in which the decree to be recognised is that of another court within the British Isles, it being thought that it would be inappropriate to do so where the party concerned can apply to the originating court itself with a minimum of inconvenience. The Law Commission's proposals in this field would therefore be of no assistance to an English applicant after a Scottish declarator. Nor could such an applicant obtain relief in Scotland. However, the Scottish Law Commission has made proposals in this connection also,

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177 Quazi v. Quazi [1980] A.C. 744 (Divorce).

178 Financial Relief after Foreign Divorce (1981) Law Com. No. 117.

179 Report on Financial Provision after Foreign Divorce (1982) Scot. Law Com. No. 72.

recommending that a court granting a declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce.[180] All other courts within the British Isles have power to award financial relief on granting a decree of nullity, and this difficulty which arises at present in relation to Scotland exists nowhere else in the British Isles.

(2) Where the decree is not recognised

2.38 Although there is no direct authority, it would appear that the position where a foreign nullity decree is not recognised is the same as with an unrecognised divorce.[181] Thus the parties will still be regarded as married in this country unless, under the domestic marriage law of England or Scotland, the marriage is regarded as void. However if the parties have remarried and the foreign nullity decree was recognised by the courts of their domicile at the time of their remarriage a similar conflict to that described in paragraph 2.35, above, between the English or Scottish rules for recognition and those determining the parties' capacity to marry, will arise. In this situation there is Canadian authority[182] to the effect that the capacity rule should prevail and that the parties should be regarded as free to marry. It has also been suggested that the existence of an unrecognised foreign decree of nullity should not create an estoppel against either party in this country.[183]

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180 Report on Aliment and Financial Provision (1981) Scot. Law Com. No. 67, paras. 3.201 to 3.203.

181 North, Private International Law of Matrimonial Causes in the British Isles and Republic of Ireland, (1977), p. 268.

182 Schwebel v. Schwebel (1970) 10 D.L.R. (3d) 742.

183 North, Private International Law of Matrimonial Causes in the British Isles and Republic of Ireland, (1977), p. 269; but cf. two Canadian cases, Schwebel v. Schwebel (1970) 10 D.L.R. (3d) 742 and Downton v. Royal Trust Co. (1973) 34 D.L.R. (3d) 403, 413, which suggest otherwise in the case of matters not central to the parties' marital status.

F. Classification of foreign decrees

2.39 Because the rules for the recognition of foreign decrees of divorce and nullity differ, it might occasionally be necessary for an English court to classify the foreign decree. For instance in New Zealand the courts used to grant decrees of dissolution of a voidable marriage on grounds that were similar to those upon which an English court would grant a decree of nullity.[184] Although there is no direct authority, it has been suggested that any such classification should be made according to English law.[185]

Criticisms of the present law

2.40 The present rules for the recognition of foreign annulments appear to be unsatisfactory in a number of important respects:

(a) They are, in many respects, uncertain. In particular:

(i) it is not clear whether there is an underlying principle of recognition, namely the "real and substantial connection" rule stated in Indyka v. Indyka, or whether the law should merely be regarded as a set of ad hoc rules developed by case law.

(ii) The "real and substantial connection" test[186] has the advantage of widening the basis of recognition of foreign decrees thus reducing the number of "limping" marriages. However it is an inherently vague test which in some cases may be unpredictable in its application.

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184 Matrimonial Proceedings Act 1963 (New Zealand), s.18. Under the Family Proceedings Act 1980 (New Zealand) this type of matrimonial relief has been abolished and the courts may either make an order declaring that a marriage is void ab initio (ss.29-31) or make an order dissolving a marriage (ss. 37-43).

185 Cheshire and North, Private International Law, 10th ed., (1979) p.412; and see Turner v. Thompson (1888) 13 P.D. 36.

186 See paras. 2.13 to 2.15, above.

(iii) Authority is both limited and speculative and it is unclear what impact the statutory rules for the recognition of foreign divorces[187] would have in the sphere of recognition of foreign annulments.[188]

(iv) The exact scope of the grounds for withholding recognition is unclear.[189] In particular, the principle of "substantial justice" as a ground for withholding recognition has been criticised as having the undesirable effect that people would not be able to adjust their lives according to the ostensible effect of the judgment as to their status pronounced by a competent court.[190]

(v) The precise effect of the recognition of a foreign nullity decree is also less than clear.[191]

(b) Because of the uncertainty which surrounds a number of the bases upon which an English or Scottish court might grant recognition to, or withhold it from, a foreign decree, the precise status of parties will, in many cases, be uncertain. It is highly undesirable as a matter of policy that, when so many issues depend upon whether persons are married or unmarried, their status should not be as certain as possible at all times. It is not a wholly satisfactory answer that either party may obtain a declaration or

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187 Recognition of Divorces and Legal Separations Act 1971.

188 The introduction of new statutory rules for the assumption of jurisdiction in domestic proceedings for nullity of marriage (Domicile and Matrimonial Proceedings Act 1973) does seem to have affected the recognition rules; see Vervaeke v. Smith [1981] Fam. 77, 109.

189 See paras. 2.24 to 2.28, above.

190 Merker v. Merker [1963] P. 283, 301.

191 See paras. 2.32 to 2.37, above.

declarator as to the validity of the foreign decree.[192] These procedures are troublesome and expensive for the people concerned.

(c) Uncertainty in the rules governing the recognition of foreign annulments is primarily the result of their haphazard development at common law. For many years this development was part of the parallel evolution of the rules governing the recognition of foreign divorces, which themselves were affected by the rules dealing with the assumption of domestic jurisdiction in nullity and divorce. Now, however, the law on both these subjects is stated comprehensively in statutory form, by the Recognition of Divorces and Legal Separations Act 1971, and the Domicile and Matrimonial Proceedings Act 1973, respectively. We believe that present criticisms of the rules regarding the recognition of foreign decrees of nullity would best be met by rationalising them and embodying them in statutory form.

192 In England, under R.S.C. Order 15, rule 16; in Northern Ireland, under R.S.C. (N.I) Order 1, rule 12(c); in Scotland by a decree of declarator of status: Makouipour v. Makouipour 1967 S.C. 116, Galbraith v. Galbraith 1971 S.L.T. 139, Bain v. Bain 1971 S.L.T. 141, Broit v. Broit 1972 S.L.T. Notes 32.

PART III

THE CASE FOR REFORM

3.1 The recognition of foreign divorces and legal separations, as distinct from foreign decrees of nullity, is now governed by a comprehensive scheme of statutory rules contained in the Recognition of Divorces and Legal Separations Act 1971.[193] This Act enabled the United Kingdom to accede to the Convention on the Recognition of Divorces and Legal Separations adopted in 1968 by the Hague Conference on Private International Law.[194] This Convention sets out the grounds upon which Contracting States are required to recognise each other's divorces and legal separations. The 1971 Act, however, goes further than the terms of the Convention.[195] First, it applies to the recognition in any part of the United Kingdom of decrees of divorce and judicial separation granted by courts in the various different parts of the British Isles, such recognition rules lying outside the ambit of the Convention. Secondly, it applies the same jurisdictional bases for the recognition of all divorces and legal separations obtained abroad, whether or not in countries which are parties to the Convention. These jurisdictional bases are: habitual residence of either spouse in the country in which the divorce or legal separation was obtained (and habitual residence, for these purposes, includes domicile where the state of origin uses this concept); and the fact that the divorce or legal separation was obtained in a country of which either spouse was a national.[196] Thirdly, the Act provides further grounds of

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193 As amended by the Domicile and Matrimonial Proceedings Act 1973.

194 The Convention was opened for signature on 1 June 1970 and was signed on behalf of the United Kingdom on that date. It is hereafter referred to as "the 1970 Hague Convention". For the complete text of the Convention, see Conférence de la Haye de droit Internationale Privé: Actes et documents de la Onzième session (1968), Vol. 1. The English text is reproduced as Appendix A in the Law Commissions' Report on the Convention (1970), Law Com. No.34; Scot. Law Com. No.16; Cmnd. 4542.

195 Article 17 specifically provides that rules of law more favourable to the recognition of foreign divorces and legal separations are permissible.

196 These grounds for recognition are more favourable than those of the Convention: see Articles 2 and 3.

recognition, in addition to those contained in the Convention, by preserving the common law rule that a divorce or legal separation will be recognised in the United Kingdom if it is valid according to the law of the domicile of each spouse.[197]

3.2 Moving the second reading of the Bill that led to the 1971 Act, the Lord Chancellor said that it was a measure whose principal object was to reduce the number of "limping" marriages,[198] and to alleviate their unsatisfactory consequences. It was designed to achieve "greater liberality" while "restoring certainty" to the rules of recognition. The inconsistencies caused by the operation of different recognition criteria in different legal systems, and "the acute misery and frustration" to which these gave rise were, however, considered only in the context of the recognition of foreign divorces and legal separations. The opportunity to make similar provision for the statutory codification of the rules relating to the recognition of foreign nullity decrees was not taken.

3.3 As we have already stated,[199] it was hoped that the development of the rules for the recognition of foreign decrees of nullity would, like those applicable to divorces and legal separation, be the subject of international agreement. In the event the Conventions which resulted from both the Eleventh and Thirteenth Sessions of the Hague Conference, in 1968 and 1976 respectively, failed to deal with the question of foreign nullity recognition. It is important to be clear why this was so.

3.4 The proposal made at the Tenth Session of the Hague Conference (1964), for the examination in the Eleventh Session of a draft convention on the recognition of foreign matrimonial decisions[200] was cast in much wider

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197 1971 Act, s.6, as amended by s.2 of the Domicile and Matrimonial Proceedings Act 1973. The amendments were required because the 1973 Act (s.1) provides that a wife shall retain her own domicile after marriage, and may preserve or change it independently of her husband.

198 Hansard (H.L.) 16 April 1971, Vol. 315, col. 483.

199 See para. 1.3, above.

200 Actes et Documents de la dixième session, Vol. 1, p.77.

terms than the subjects with which the Convention eventually dealt. In the four years which elapsed before the Convention on the Recognition of Foreign Divorces and Legal Separations was finally agreed, the question of recognition of foreign nullity decrees, although not formally abandoned by the Conference was, in the words of one commentator, "tacitly left aside".[201] The Conference considered that there were formidable obstacles to international agreement on this topic, in particular the differences in social and religious philosophies of the participating states, their different jurisdictional criteria, very different methods of assuring recognition, and difference in conflicts theory and substantive law. Furthermore, the Conference considered that the recognition of foreign nullity decrees did not constitute a sufficiently serious problem to warrant consideration for inclusion in the Convention.

3.5 Three specific reasons for this attitude can be identified. First, it was thought that, statistically, the number of nullity decrees was relatively small even in those countries where divorce is not permitted. Second, the view was put forward by several states that an important conceptual distinction can and should be drawn between nullity, which deals with the validity and substance of marriage, on the one hand, and divorce, which brings about changes in the relations between the spouses when it is terminated, on the other. The third reason related to the choice of law rule for nullity decisions and declaratory judgments as to status. It was thought to be a principle of general application that the law of the place of celebration of marriage governed not only the formalities of marriage and what constitutes failure to comply with them but also determines the legal consequences of such failure to comply and their effect on the validity or invalidity of the marriage. Thus, on this approach, the same law determines the causes as well as the effect of nullity of marriage. On this basis, the analogy often drawn between decisions of nullity and those of divorce and legal separation, in the light of their respective effect on the property and

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201 Anton, "The Recognition of Divorces and Legal Separations" (1969) 18 I.C.L.Q. 620, at p.623.

maintenance rights of the former or purported spouse, and on the legitimacy, custody and support of any children of the relationship, was thought to be weakened.[202] As Rabel has observed,[203] the law of the forum, so significant for divorce, in principle is immaterial for annulment.

3.6 At the Thirteenth Session of the Hague Conference in 1976[204] the question was posed whether the Convention on the Celebration and Recognition of the Validity of Marriages, which was concluded at the end of that Session, should deal with the recognition of decisions as to marital status other than those covered by the Hague Convention on the Recognition of Divorces and Legal Separations of 1970. This would have included nullity decisions. Although there was agreement among the Contracting States that such decisions could be included in the Convention, in the event once again nothing was done to ensure that they were. The same reasons which persuaded the Eleventh Session to omit the recognition of foreign nullity decisions from the Convention which emerged at the conclusion of that Session, suggested to the delegates at the Thirteenth Session that it would be inappropriate to deal with them in the 1976 Convention.

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202 See Conférence de la Haye de droit International Privé: Actes et documents de la Dixième session (1965), Vol. I Questionnaire et Explications du Bureau Permanent, with respect to divorce, legal separation and nullity of marriage, Preliminary Document No.1 ofJanuary 1964, p.116, and Réponses des Gouvernments au Questionnaire, Preliminary Document No.2 of September-October 1964, responses to Question 1, pp.169-233; see also Rabel, The Conflict of Laws: A Comparative Study (2nd ed., 1958) vol.1, pp.247, 309, 581. Similar grounds had been advanced by the Hague Conference in the course of fromulating the Convention on Divorce in 1902. See Actes et documents de la Deuxième Session (1894) p.81.

203 The Conflict of Laws: A Comparative Study, 2nd ed. (1958) Vol.1, p.582.

204 See Conférence de la Haye de droit International Privé: Actes et documents de la Treizième session (1978), Vol. III. Questionnaire sur les conflicts de lois en matière de marriage. Preliminary Document No.1 of July 1974, pp.9-13 [Part IV], Réponses des Gouvernments au Questionnaire, Preliminary Document No.2 of April 1975, [replies to Part IV], pp.67-102.

3.7 The reluctance of the 1976 Session of the Hague Conference to meet the challenge of nullity recognition is disappointing. The initiative now rests with individual states. As we have suggested earlier,[205] the present English and Scottish rules of recognition are unsatisfactory in several respects. In particular, we believe that the hardship, whether actual or potential, caused to those persons whose status is rendered uncertain through no fault of their own should be removed. This problem is of more than merely academic interest. The displacement of populations since the last war and the increase in mobility of people, especially manifested in their desire to obtain employment outside their country of origin, has given matrimonial law a more significant international element.

3.8 The first major question which must be considered is whether, notwithstanding the criticisms outlined in Part II, the need for reform and restatement of the law relating to recognition of foreign nullity decrees has been made out. We believe that it is difficult to make any convincing argument for the preservation of the present system of common law rules for the recognition of foreign annulments. There are, of course, important theoretical and jurisdictional differences between divorce and nullity: the former puts an end to a valid marriage, the latter declares that some fundamental bar has prevented the contracting of a marriage at all. But the end results of both divorce and nullity are not dissimilar, in that two people, ostensibly joined together by certain legal and moral obligations, are separated and released - though possibly on terms - from the claims which formerly bound them. The practical consequences of this separation are not likely to differ much whether the bonds which previously joined them were, in law, real or illusory; and it therefore seems to us that so far as possible the legal principles upon which they are separated should constitute a consistent and coherent system. To put it bluntly, they should be the same, so far as the nature of the case allows. In some jurisdictions[206] the consequences of

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205 See para. 2.40, above.

206 See, for example, Matrimonial Causes Act 1973, s.16 (voidable marriages in English law); Aufhebung under German and Austrian law; Uniform Marriage and Divorce Act, s.208(e).

a nullity decree are, even in theory, difficult to distinguish from those of divorce; and the fundamental correspondence between the two, at least in the case of voidable marriages, is increasingly recognised.[207] Some of the grounds on which a marriage may be annulled reflect the presence of factors which become relevant only after the marriage has taken place. The significance of this point is two-fold. First, again it blurs the distinction between dissolution and annulment. Secondly, and more pertinently, the law to determine the grounds for annulment will not necessarily be that of the personal law of the parties as at the time of their marriage, but rather as at some later date. Indeed, in an appropriate case the law of the forum might even be applied - for example, where impotence or wilful refusal to consummate the marriage is alleged.

3.9 The case for doing nothing is easy to state. The reluctance of those concerned with the negotiation of Hague Conventions in the matrimonial field to include reform of the rules of recognition of nullity decrees has already been referred to.[208] It may be reasonably argued that, in view of the relatively few cases in which foreign nullity decisions appear to have given rise to problems of recognition in courts in the United Kingdom, the existing rules are adequate and could with some justification be preserved. Indeed, at the time when Parliament had an opportunity to reform the existing rules of recognition, during its consideration of what became the Recognition of Divorces and Legal Separations Act 1971, it eschewed that

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207 Thus the fact that in Scotland no financial provision is available on a declarator of nullity of marriage has a theoretical justification. Nevertheless the Scottish Law Commission recommends on practical grounds the abandonment of this rule. Scot. Law Com. No.67 (1981), paras. 3.201 to 3.203.

208 See paras. 3.4 to 3.6, above.

opportunity, and chose instead simply to ratify the Convention on the Recognition of Divorces and Legal Separations adopted by the Hague Conference on Private International Law in 1968.[209]

3.10 We have no hesitation in rejecting the argument in favour of preserving the status quo in nullity recognition. We believe that a positive response is required to what has been described[210] as the imperfect state of development of the law in this area, the many unsatisfactory consequences of which we have already identified.[211] We share the view of those who have suggested[212] that the statutory reform of the law relating to the recognition and effects of foreign nullity decrees is long overdue.

3.11 In our view it is undesirable that the principles governing the recognition of foreign decrees of nullity should remain uncertain, and should be, arguably, less favourable towards recognition than those applicable to foreign divorces and legal separations. We think that the rules for the recognition of foreign annulments should be placed on a clear statutory basis.

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209 There may, of course, be many reasons why a particular statute is confined within certain limits, and not broadened to embrace other matters which could conveniently be incorporated in it. Exclusion of material does not necessarily argue that Parliament deemed it unworthy of inclusion, or that there are no good reasons for legislation in that field. Shortage of parliamentary time, or pressure on drafting resources, is frequently a more likely explanation for failure to grasp the opportunity of a wider ranging measure.

210 Dicey & Morris, The Conflict of Laws 10th ed. (1980) vol. 1, p.380; Morris, The Conflict of Laws, 2nd ed. (1980) p.158.

211 See para. 2.40, above.

212 Carter (1979) B.Y.B.I.L. at p.252; Collier [1979] C.L.J. 286.

PART IV

RECOGNITION OF DECREES OF OTHER BRITISH COURTS

(1) Introduction

4.1 We are concerned in this Part with the question of determining the most appropriate rules for the recognition of nullity decrees granted by other courts in the British Isles. Under the statutory provisions[213] for the recognition of divorces and legal separations by United Kingdom courts a distinction is made between, on the one hand, decrees of divorce or judicial separation granted by courts in any part of the British Isles,[214] and, on the other, divorces and legal separations obtained overseas, that is to say outside the British Isles.[215] No such distinction is made in the common law rules applicable to the recognition of foreign decrees of nullity (or their equivalent). All such decrees which have been granted or obtained outside the jurisdiction of the recognition forum are treated as being foreign, even though they may have been granted elsewhere in the United Kingdom or in any other part of the British Isles.

4.2 It seems to us appropriate to divide the examination of the recognition of nullity decrees of other British courts into two sections. First we shall consider the recognition in one part of the United Kingdom of nullity decrees granted in another part of the United Kingdom. Secondly, we shall consider the recognition of decrees granted elsewhere in the British Isles.

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213 Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973.

214 Recognition of Divorces and Legal Separations Act 1971, s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15.

215 Recognition of Divorces and Legal Separations Act 1971, ss.2 and 6, as amended.

(2) Recognition of decrees granted within the United Kingdom

4.3 Before 1974 the jurisdiction of the English courts to entertain petitions for nullity was, it has been claimed,[216] one of the most vexed and difficult questions in the whole of the English conflict of laws.[217] Since 1974, the jurisdictional rules in matrimonial proceedings within the United Kingdom have been placed on an exclusively statutory basis by the Domicile and Matrimonial Proceedings Act 1973.[218] The pre-existing common law and statutory[219] grounds of jurisdiction have been abolished. The 1973 Act brought about a notable simplification of the law. Section 5(3) lays down the sole jurisdictional bases for petitions of nullity of marriage before courts in

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216 Morris, The Conflict of Laws, 2nd ed. (1980), pp.155-156.

217 For an account of the jurisdictional rules prior to 1974 see Dicey and Morris, The Conflict of Laws, 9th ed. (1973) pp.344-359. These rules are summarised in North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977) pp.59-61; Cheshire and North, Private International Law, 10th ed. (1979) pp.394-395; Law Com. No.48 (1972): Report on Jurisdiction in Matrimonial Causes, paras. 50-53.

218 Part II (England and Wales), Part III (Scotland). Matrimonial Proceedings in England and Wales cover proceedings for divorce, judicial separation, nullity of marriage and for presumption of death and dissolution of marriage under s.19 of the Matrimonial Causes Act 1973: s.5(1)(a) Domicile and Matrimonial Proceedings Act 1973. In Scotland, the consistorial causes to which the statutory jurisdictional rules apply are actions for divorce, separation, declarator of nullity of marriage, declarator of marriage and declarator of freedom and putting to silence: s.7(1)(a) Domicile and Matrimonial Proceedings Act 1973. In Northern Ireland, the matrimonial jurisdiction of the court covers proceedings for divorce, judicial separation or nullity and presumption of death and dissolution of marriage, under Article 49 of the Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) (N.I.15).

219 See s.17(2); and Sched. 6, repealing the relevant statutory provisions.

England and Wales, regardless of whether the marriage was void or voidable. It provides that those courts -

> shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if)[220] either of the parties to the marriage -
>
> (a)is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (b) was habitually resident in England and Wales throughout the period of one year ending with that date; or
>
> (c) died before that date and either -
>
> (1) was at death domiciled in England and Wales, or
>
> (2) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

This provision also applies, mutatis mutandis, in relation to the assumption of jurisdiction by the Court of Session in an action for declarator of nullity of marriage in Scotland[221] and with respect to the jurisdiction of the High Court in Northern Ireland in analogous proceedings.[222]

4.4 The scope of the statutory provisions concerning jurisdiction in nullity proceedings is, in fact, narrower than the previous jurisdictional

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220 But this is subject to s.5(5) which provides that the court also has jurisdiction to entertain proceedings for divorce, judicial separation or nullity of marriage, notwithstanding that the jurisdictional requirements of s.5(3) are not satisfied, if those proceedings are instituted at the time when the proceedings which the court does have jurisdiction to entertain under s.5(3) are pending in respect of the same "marriage". Thus, provided that the court has jurisdiction to entertain the original petition and that petition is still pending, the court will have jurisdiction to entertain subsequent proceedings even though there has been a change in the domicile or habitual residence of one or both of the parties to the marriage.

221 Domicile and Matrimonial Proceedings Act 1973, s.7(1), (3).

222 See now, Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No.1045)(N.I.15), Article 49(1), (3).

rules.[223] On the other hand, the effect of the new rules has been to render identical the grounds upon which jurisdiction is assumed in nullity proceedings throughout the United Kingdom,[224] and to remove the anomalous consequences of there being quite different grounds of jurisdiction in nullity and divorce, both of which, despite their theoretical differences, determine or change the status of the parties and now afford to them (in England and Wales and Northern Ireland, but not in Scotland)[225] the same opportunities for obtaining ancillary relief.

4.5 As the grounds on which courts in the United Kingdom assume jurisdiction in nullity proceedings are the same as those for divorce, it is instructive to consider the rules applicable to the recognition of divorces when trying to determine the appropriate recognition rules in respect of nullity decrees of other United Kingdom courts. Section 1 of the Recognition of Divorces and Legal Separations Act 1971, as amended, grants automatic recognition[226] to decrees of divorce and judicial separation granted by courts elsewhere within the United Kingdom. It is interesting to note that this regime of automatic recognition was introduced in 1971, that is to say, before the grounds of divorce jurisdiction were harmonised throughout

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223 Because s.5(3) abolished the common law jurisdictional base of the celebration of the marriage in the forum in the case of a void marriage (Simonin v. Mallac (1860) 2 Sw. & Tr.67; Ross Smith v. Ross Smith [1963] A.C. 280; Padolecchia v. Padolecchia [1968] P. 314). There is a further difference in that jurisdiction at common law could be based on the residence of the respondent within the jurisdiction: Russ v. Russ (No.2)(1962) 106 S.J. 632; Magnier v. Magnier (1968) 112 S.J. 233; though not on the residence of the petitioner alone: De Reneville v. De Reneville [1948] P.100; Kern v. Kern [1972] 1 W.L.R. 1224. Although under the 1973 Act, the habitual residence of either spouse founds jurisdiction, the residence must be habitual and must have lasted for the year immediately preceding the institution of the proceedings.

224 The jurisdictional differences between judicial separation, presumption of death and dissolution of marriage have also been removed by the 1973 Act.

225 See paras. 2.37, above, and 4.8, below.

226 Subject, however, to the provision in s.8(1)(a) of the Recognition of Divorces and Legal Separations Act 1971, with which we deal in para. 4.6, below.

the United Kingdom by the Domicile and Matrimonial Proceedings Act 1973. The Law Commissions thought in 1970 that it was unsatisfactory for recognition not to be afforded automatically by one United Kingdom court to the divorce decrees of another.[227] We think that it is similarly unsatisfactory that there is no automatic recognition of nullity decrees. We, therefore, recommend that decrees of nullity granted in any part of the United Kingdom should be accorded automatic recognition in every other part.

4.6 Although decrees of divorce and legal separation cannot now be denied recognition on jurisdictional grounds, under section 8(1)(a) of the Recognition of Divorces and Legal Separations Act 1971, as amended, it is provided that the validity of a decree of divorce or judicial separation granted under the law of any part of the British Isles shall not be recognised in any part of the United Kingdom if it was granted at a time when there was no subsisting marriage between the parties. On the face of it, this ground for withholding recognition is unsuitable in the context of the recognition of a decree annulling a marriage when there is no doubt that, under the law applicable in both the jurisdictions involved, the marriage is void ab initio. However, the purpose of section 8(1)(a) would appear to be the more general one of applying a rule of res judicata to the question of the recognition of divorce decrees. It is intended to implement Article 9 of the 1970 Hague Convention. The policy behind Article 9 is that a State shall not be required to recognise a foreign divorce or legal separation if to do so would be inconsistent with a previous decision of a court of that State.[228] Section 8(1)(a) of the 1971 Act uses rather different language. The reasons for

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227 Law Com. No.34; Scot. Law Com. No. 16 (1970), para. 51.

228 Article 9 provides that: "Contracting States may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision was either rendered in the State in which recognition is sought, or is recognised, or fulfils the conditions required for recognition, in that State."

this are discussed below,[229] where we conclude that in its present form section 8(1)(a) is not appropriate to annulments. There is no doubt, however, that the principle of res judicata is applicable to the recognition of annulments[230] and we recommend that res judicata should continue to be a ground for the denial of recognition to a nullity decree of another United Kingdom court.

4.7 We have given consideration to the question whether there should be any other circumstances in which one court in the United Kingdom should be able to deny recognition to a nullity decree of another United Kingdom court. Possible further grounds would be breach of natural justice, and public policy. In the case of divorce decrees, however, it was thought inappropriate to provide for such grounds of non-recognition. The reason given was that "in such circumstances the complaining party should seek to have the decree set aside by the court which granted it, or on appeal from that court, and that it would be objectionable to allow a court in another part of the British Isles to refuse to recognise the decree."[231] This argument, in our view, holds good equally for nullity recognition and we recommend that there should be no grounds for the denial of recognition to a nullity decree of another United Kingdom court other than res judicata.[232]

4.8 In paragraphs 2.36 and 2.37, above, we made the point that financial provision cannot be awarded in Scotland on a declarator of nullity, and that both Law Commissions' proposals for financial relief after foreign divorce do not cover divorce elsewhere in the United Kingdom. The result could be that the automatic recognition of a Scottish declarator of nullity in other United Kingdom courts could leave a party to the marriage devoid of any hope of financial provision though she (or, perhaps, he) could have

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229 See paras. 6.53 to 6.57, below, where this question is discussed in greater detail.

230 Vervaeke v. Smith [1982] 2 W.L.R. 855, see para. 2.27, above.

231 Law Com. No. 34; Scot. Law Com. No. 16 (1970), p.43.

232 See para. 6.58, and fn.372, below.

obtained such relief if - as may have been possible in the circumstances - proceedings had been brought in England or Northern Ireland.[233] This problem, which arises only in respect of Scotland, will disappear as and when the Scottish Law Commission's proposals[234] for financial provision in nullity cases are implemented.

(3) Recognition of decrees granted in other parts of the British Isles

4.9 As we have seen, the grounds of jurisdiction in nullity proceedings are the same throughout the United Kingdom. With regard to the three other jurisdictions within the British Isles, the jurisdictional rules in the Isle of Man are, mutatis mutandis, the same as those found in the United Kingdom, namely domicile or one year's habitual residence of either spouse.[235] But the rules are different in the Channel Islands. In Jersey, where husband and wife still share a common domicile, the grounds of nullity jurisdiction are more restricted than in the United Kingdom. Jurisdiction depends on the domicile of the husband at the time of the desertion of the wife or his deportation, or, in the case of a petition by the wife, her three years' ordinary residence in Jersey.[236] In Guernsey, the principal basis of jurisdiction is that of domicile, but then jurisdiction varies according to the substantive ground on which the nullity petition is based.[237]

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233 See Balshaw v. Kelly (or Balshaw) 1966 S.L.T. (Notes) 48.

234 Scot. Law Com. No. 67 (1981).

235 Domicile and Matrimonial Proceedings Act 1974, s.5(3).

236 Matrimonial Causes (Jersey) Law 1949, as amended, Art.6. The last two grounds are the equivalent of the provisions last found in English law in the Matrimonial Causes Act 1973, s.46, but repealed by the Domicile and Matrimonial Proceedings Act 1973.

237 Matrimonial Causes (Guernsey) Law 1939, Arts. 34 and 35. For fuller discussion of the jurisdictional rules in both Jersey and Guernsey, see North, Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland, pp.315-319 (Jersey), 334-338 (Guernsey).

4.10 Differences between the jurisdictional rules applicable in the United Kingdom and those applicable in the rest of the British Isles are similarly to be found in relation to divorce but they did not inhibit the Law Commissions from recommending in 1970 that divorce decrees granted in the Isle of Man and the Channel Islands should receive automatic recognition in the United Kingdom.[238] In our view, a similar approach should be adopted in relation to nullity decrees granted anywhere in the British Isles and we so recommend.

4.11 It is interesting to note that in 1970 the Law Commissions expressed the view that divorce decrees granted anywhere in the British Isles should be valid throughout the British Isles, and hoped that such a proposal would be acceptable to the authorities in Northern Ireland, the Channel Islands and the Isle of Man.[239] The Recognition of Divorces and Legal Separations Act 1971 was extended to Northern Ireland in 1973[240] and similar legislation has been introduced in the Isle of Man,[241] Jersey[242] and Guernsey,[243] so the hope expressed by the Law Commissions has been fulfilled. If our recommendation for the automatic recognition throughout the United Kingdom of nullity decrees obtained anywhere in the British Isles is acceptable, then we hope that it may also prove acceptable to the authorities elsewhere in the British Isles.

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238 Law Com. No.34, Scot. Law Com. No.16 (1970), para. 51.

239 Ibid.

240 Domicile and Matrimonial Proceedings Act 1973, s.15.

241 Recognition of Divorces and Legal Separations (Isle of Man) Act 1972.

242 Recognition of Divorces and Legal Separations (Jersey) Law 1973.

243 Recognition of Divorces and Legal Separations (Bailiwick of Guernsey) Law 1972.

PART V

RECOGNITION OF NULLITY DECREES OBTAINED OUTSIDE THE BRITISH ISLES

Introduction

5.1 We must now consider the recognition by United Kingdom courts of decrees of nullity which have been obtained overseas, that is to say, outside the British Isles. Here there would seem to be two possibilities. The first is to grant recognition to the foreign decree if the court pronouncing it had assumed jurisdiction in circumstances which, had they applied in relation to the United Kingdom, would have entitled a United Kingdom court to assume jurisdiction. Following the Domicile and Matrimonial Proceedings Act 1973 the effect of this approach would be that a United Kingdom court would recognise the nullity decree of a foreign court if either of the parties to the marriage in question had been domiciled within the jurisdiction of the foreign court on the date when the action had been commenced; or had been habitually resident within the jurisdiction for one year immediately before that date; or had died, and had either been domiciled within that jurisdiction at the date of death or had been habitually resident within that jurisdiction for one year immediately before the death.[244] This approach to the problem is along the same lines as those developed for divorce recognition by English common law before 1974,[245] but modified by the statutory rules of jurisdiction prevailing after the 1973 Act came into force.[246]

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244 See Domicile and Matrimonial Proceedings Act 1973, ss.5(3), 7(3), and the Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045)(N.I.15), Article 49.

245 See e.g., Indyka v. Indyka [1969] 1 A.C. 33; Robinson-Scott v. Robinson-Scott [1958] P. 71; Travers v. Holley [1953] P. 246. Although this approach of English law was developed in relation to divorce, the same view has since been taken in relation to nullity proceedings: Law v. Gustin [1976] Fam. 155; Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77; see paras. 2.10 to 2.14, above.

246 See Vervaeke v. Smith [1981] Fam. 77, 109.

5.2 The second possibility is to base the recognition of foreign nullity decrees on the same principles as now apply to the recognition of foreign divorces and legal separations. These principles are codified by the Recognition of Divorces and Legal Separations Act 1971, which gives effect within the United Kingdom to the provisions of the 1970 Hague Convention. We have mentioned the reasons why the Convention (and thus the 1971 Act) did not extend to the recognition of nullity decrees.[247] These considerations, of course, need not inhibit action by the United Kingdom to bring nullity decrees within the same system as obtains for divorce and legal separation if it should seem expedient to do so.

5.3 Each of these two possibilities must now be examined in more detail.

B Recognition of foreign nullity decrees based on United Kingdom jurisdictional rules

5.4 The English common law developed rules of recognition of foreign matrimonial decrees based on reciprocity of jurisdiction. These rules were developed primarily in the field of divorce recognition, though they have in recent years been extended to the recognition of foreign nullity decrees.[248] The foreign decree would be recognised by the English court if the foreign court had assumed jurisdiction in circumstances in which, had they applied in respect of England and Wales, the English court would have been entitled to assume jurisdiction.[249] Though frequently, and conveniently, referred to as a rule of jurisdictional reciprocity, there was in fact no true reciprocity about it. It was, as the late Professor Sir Otto Kahn-Freund pointed out,[250]

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247 See paras. 3.3 to 3.6, above.

248 Paras. 2.10 to 2.12, and 2.19, above.

249 Travers v. Holley [1953] P.246.

250 The Growth of Internationalism in English Private International Law (1960) p.29.

a case of "I will accept what you do as long as you act as I act", and not "I will accept what you do as long as you accept what I do". This was made particularly clear in Robinson-Scott v. Robinson-Scott[251] in which the question arose whether recognition should be given to a Swiss decree of divorce where the jurisdiction of the Swiss court had been based on the concept that a wife could maintain her own domicile, separate from that of her husband. The wife had resided within the area of the Swiss court for at least eight years before the commencement of proceedings, and the court had assumed jurisdiction on the basis that she possessed a Swiss domicile. Karminski J. held that the actual grounds on which the foreign court had assumed jurisdiction were immaterial if the factual situation was such that the English court would have been entitled to exercise jurisdiction in equivalent circumstances. On this basis the Swiss decree was to be recognised.

5.5 Reciprocity as a basis for recognition of a foreign divorce was considered by the House of Lords in Indyka v. Indyka.[252] Their Lordships did not think that reciprocity of jurisdiction was, by itself, a wholly satisfactory ground of recognition. The jurisdiction of the English court had been extended by Parliament for reasons which had no necessary application to the question of recognition of decrees of foreign courts. With the minor exception of the Matrimonial Causes (War Marriages) Act 1944, Parliament had not legislated for recognition of foreign decrees, and "... the courts' decisions as regards recognition are shaped by considerations of policy which may differ from those which influence Parliament in shaping the domestic law".[253] Moreover, there were many possible bases on which a foreign court might reasonably exercise jurisdiction: the English rules were neither the

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251 [1958] P. 71.

252 [1969] 1 A.C. 33.

253 [1969] 1 A.C. 33, 106 per Lord Wilberforce.

only reasonable ones nor necessarily the best.[254] Their Lordships were accordingly "unwilling to accept either that the law as to recognition of foreign divorce (still less other) jurisdiction must be a mirror image of our own law or that the pace of recognition must be geared to the haphazard movement of our legislative process."[255] Our own jurisdiction in a similar matter should be regarded "as only an approximate test of recognition with a right in our courts to go further when this is justified by special circumstances in the petitioner's connection with the country granting the decree."[256] The decree of a foreign court should accordingly be recognised wherever there was a "real and substantial connection"[257] between the petitioner[258] and the country or territory in which that court was exercising jurisdiction.

5.6 Following Indyka, what has come to be known as the "real and substantial connection" test replaced that of simple reciprocity in the recognition of foreign decrees. But shortly afterwards the legislature intervened for the first time on a comprehensive basis. The law on the recognition of divorces and judicial separations was restated and codified by the Recognition of Divorces and Legal Separations Act 1971, leaving the common law, as propounded in Indyka, to continue to apply to nullity decrees.

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254 Ibid., per Lord Morris-of Borth-y-Gest at p. 76, per Lord Pearson at p. 111.

255 Ibid., per Lord Wilberforce at p. 106.

256 Ibid., per Lord Pearce at p.87.

257 Ibid., per Lord Wilberforce at p.105; per Lord Pearson, at p.111.

258 Or respondent, see Mayfield v. Mayfield [1969] P. 119.

5.7 It is clear from a number of cases[259] that the law as developed in relation to divorces does also apply to annulments. Law v. Gustin[260] is of particular interest in the present connection. The petitioner there had resided in the country exercising jurisdiction (the state of Kansas) for a mere ten months at the time of commencement of the proceedings. Even under the Domicile and Matrimonial Proceedings Act 1973 the English court would not have had jurisdiction to hear the matter in similar circumstances, and therefore on the application of a reciprocity test the court could not have recognised the foreign decree. Nevertheless Bagnall J., having reviewed all the circumstances, after as well as before the granting of the decree, felt able to hold that there was a sufficiently real and substantial connection between the petitioner and the State of Kansas to warrant recognition of the decree by the English court.

5.8 Law v. Gustin,[261] therefore shows that a statutory rule based on strict reciprocity of jurisdiction would be narrower in its application than the present common law.[262] The facts in that case were no doubt unusual, and, because the jurisdiction of United Kingdom courts is now, following the 1973 Act, a liberal one, there would probably be very few cases in which such a rule proved by comparison with the existing common law to be disadvantageous to a petitioner. Nevertheless there seems to be no good reason for taking a step backwards from the present state of the law to an earlier one. Moreover the principles on which such a step would have to be

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259 E.g. Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; [1927] A.C. 641; Merker v. Merker [1963] P. 283; Law v. Gustin [1976] Fam. 155; Perrini v. Perrini [1979] Fam. 84; Vervaeke v. Smith [1981] Fam. 77.

260 [1976] Fam. 155.

260 [1976] Fam. 155.

261 Above.

262 But see Morris, The Conflict of Laws, 2nd ed., (1980), p. 160, where it is suggested that the case would today be decided in the same way, but on the ground that the petitioner had acquired her own domicile in the State of Kansas.

taken were considered at length and rejected in Indyka.[263] The mirror-image idea was there held to be insufficient. Nothing has happened since which could be held to justify a change of mind. To revert to straight jurisdictional reciprocity as a basis for the recognition of foreign annulments would therefore be to adopt a solution which has already been found wanting.

C Recognition of foreign nullity decrees based on existing principles applicable to the recognition of foreign divorces and legal separations

5.9 The alternative possibility is to bring foreign nullity decrees within the same system as has applied to divorces and legal separations since the Recognition of Divorces and Legal Separations Act 1971. Under this Act a foreign divorce (or legal separation) is to be recognised if at the time of commencement of the proceedings either party to the marriage was

(a) habitually resident in,[264] or

(b) a national of,

the country or territory in which the divorce was obtained.[265] The common law rules, as developed in Travers v. Holley[266] and Indyka,[267] are abolished.[268] However, the other common law principle , that the country of domicile has jurisdiction to determine matters of status,[269] is preserved as a requirement of recognition where the foreign divorce would not

263 [1969] 1 A.C. 33; see para. 5.5, above.

264 "Habitual residence" includes "domicile" where the country concerned bases its jurisdiction on the concept of domicile (s.3(2) of the 1971 Act).

265 Sect. 3.

266 [1953] P. 246.

267 [1969] 1 A.C. 33.

268 This is the effect of s.6(5) of the 1971 Act.

269 See paras.2.16 to 2.18, and 2.22 to 2.23, above.

otherwise fall to be recognised under the Act.[270] Accordingly, in addition to the grounds mentioned above, a foreign divorce is to be recognised if it was obtained in the country in which the parties were domiciled when the proceedings were commenced, or would have been recognised as valid under the law of the parties' domicile, or respective domiciles.[271]

5.10 A point needs to be made about this additional, or preserved, ground of recognition because it raises matters for consideration to which reference will be made later.[272] Since the coming into force of the Domicile and Matrimonial Proceedings Act 1973, on 1 January 1974, a wife's domicile has ceased to depend on that of her husband.[273] A wife now possesses her own domicile and may preserve or change it independently of anything done by her husband. This has required an amendment to the original section 6 of the Recognition of Divorces and Legal Separations Act 1971, which section was, of course, drafted with regard to the old law of the wife's domicile of dependence. Where the respective domiciles of husband and wife were, at the time of the foreign proceedings, the same, a divorce obtained in, or recognised by the law of, the country of domicile must be recognised in the United Kingdom. Where the domicile of husband and wife were not the same the amended section 6 provides that the foreign divorce must be recognised if it was obtained in the country of the domicile of one of the two and was recognised as valid by the law of the country of domicile of the other. If the divorce was obtained in a country in which neither of the parties was domiciled, the divorce must be recognised in the United Kingdom if it was regarded as valid by the law of the countries in which husband and wife were each respectively domiciled. In order that the foreign divorce shall be recognised by a United Kingdom court it must, therefore, have been

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270 Recognition of Divorces and Legal Separations Act 1971, s.6.

271 Ibid.

272 See paras. 6.16 to 6.21, below.

273 Sect. 1 of the Act.

valid by the law of the domicile of each of the parties: it is insufficient that the divorce is regarded as valid by the law of the domicile of one of the parties only. Thus the requirement of the old common law has been precisely preserved notwithstanding the changed circumstances under which a wife retains a domicile of her own.

5.11 Inclusion of nullity decrees within a statutory framework similar to that which now obtains for divorce and legal separations would give rise to no problems that we can see. To examine in detail, for the purposes of this Consultation Paper, the merits of the divorce framework would, however be superfluous, since it already exists and will continue to exist, by virtue of international agreement, for by far the greater number of foreign matrimonial decrees requiring to be recognised by United Kingdom courts. Nullity decrees form only a small proportion of the whole.[274] In the circumstances it seems to us that the main consideration must be: is there any reason why annulments should not be governed by a similar statutory regime to that which applies at present in respect of divorces and legal separations?

5.12 We can see no such reason. A decree of nullity is a decree in rem, affecting the status of the parties, their situation both as between themselves individually and as between them on the one hand and the world on the other, in much the same way as a divorce.[275] To the question of recognition of foreign annulments, the common law applied (and continues to apply) similar rules to those which were developed before 1972 in respect of the recognition of foreign divorces. When the common law made no real distinction between the rules for the recognition of foreign annulments and those for the recognition of foreign divorces, it is hard to see any objection in principle to their inclusion within the same general statutory framework.

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274 See para. 1.4, above.

275 Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; [1927] A.C. 641, and see para. 3.8, above.

Nor are there any major provisions in the Recognition of Divorces and Legal Separations Act 1971 which would be incompatible with its extension to annulments. It might, for example, be possible to effect such extension merely by inserting the words "and nullity of marriage" in appropriate places in the statute,[276] although some further additions and consequential amendments would also be required.[277] The result would be a single regime for divorce, nullity and judicial separation. It would make no arbitrary distinction between decisions in matrimonial causes which, whatever their basis in legal theory, are allied in their relation to a common subject matter, and, at least in England and Wales and Northern Ireland,[278] hardly differ in their practical consequences. We can see no reason for continuation of the distinction in treatment which does exist at present. It has come about more casually than by intention, and it serves no purpose. To perpetuate it, by providing a quite different statutory regime for the recognition of foreign annulments, would, it seems to us, be equally pointless.

5.13 It is also worth pointing out that the policy of the Recognition of Divorces and Legal Separations Act 1971 is very close to Indyka v. Indyka,[279] though stated with the greater precision of a statute. The grounds of recognition set out by the 1971 Act are very wide. Nationality of, or habitual residence in, the country in which the divorce was obtained, or domicile (in the United Kingdom sense) of both spouses in that country (or of one spouse where the divorce would be recognised in the domicile of the other), or the recognition of the foreign divorce by the court of the domicile

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276 We do not think, however, that this would be the best method of achieving the objective. See paras. 6.61 to 6.63, below.

277 See, generally Part VI, below.

278 Though not at present in Scotland; see para. 2.37, above.

279 [1969] 1 A.C. 33. See para. 5.5, above.

of each spouse respectively, will ensure[280] recognition of the foreign divorce in the United Kingdom. It is unlikely that a "real and substantial connection"[281] with the country in which the divorce was obtained would not in practice fall within one or more of those grounds. It is possible to envisage circumstances in which some such connection may have ceased shortly before the commencement of the proceedings which resulted in the decree, thereby removing the case from the ambit of the Act, yet in which the same connection might have been enough for recognition under the common law. But we think that such a situation will be rare, and if it exists may be regarded as a reasonable price to pay for the greater certainty of a statute. There is also a problem posed, in this connection, by the domicile requirements of section 6 of the Act, which we discuss below.[282] On balance, however, we believe that the statutory framework for divorce reflects the common law sufficiently closely to meet any charge of going backwards, such as may in our view be levelled at the reciprocity of jurisdiction test.[283]

5.14 In our view, therefore, there is really no suitable alternative policy to the inclusion of annulments within a framework based upon that of the Recognition of Divorces and Legal Separations Act 1971. We recommend, therefore, that this course be adopted. The means by which it is to be achieved, and matters arising as a consequence of doing it, must now be separately considered.

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280 Subject to s.8 of the Act.

281 See para. 5.5, above.

282 See paras. 6.16 to 6.21, below.

283 See para. 5.8, above.

PART VI

IMPLEMENTING OUR CONCLUSIONS: CONSEQUENTAL CONSIDERATIONS

Introduction

6.1 Several issues arise out of our recommendation that a new system of recognition of foreign annulments should be based on that now in force in respect of foreign divorces and legal separations. These issues mostly fall under the head of one or other of two questions: which, if not all, of the provisions of the Recognition of Divorces and Legal Separations Act 1971 are equally applicable to the recognition of annulments; and what, if any, additional provision needs to be made for annulments? On the answers to these questions depends, in our view, the answer to a further one: can our recommendation be implemented simply by appropriate amendment of the 1971 Act, or is it better done by a new and separate Act? A consideration, section by section, of the 1971 Act is perhaps the most sensible way of considering these issues. For convenience, the Act is printed in its entirety in Appendix A.

Recognition of nullity decrees granted in the British Isles

6.2 Section 1 of the 1971 Act provides for the recognition within the United Kingdom of decrees of divorce and judicial separation granted under the law of any part of the British Isles. We have proposed that the same rules should apply in respect of nullity decrees[284] and in our view this could be accomplished by the addition of nullity decrees to section 1 as it stands. Automatic recognition of decrees is made subject to section 8 of the Act. We shall have something to say about this later.[285]

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284 See para. 4.5, above.

285 See paras. 6.53 to 6.58, below.

Classification of annulments

A."Overseas" decrees; and decrees obtained outside the British Isles

6.3 The 1971 Act divides foreign divorces and legal separations into two categories: "overseas" divorces and legal separations, and divorces and legal separations "obtained in a country outside the British Isles".[286] This dichotomy is at first sight obscure, and its basis unclear. To the uninitiated they may both appear to be the same thing. But this is far from being the case. An "overseas" divorce[287] is necessarily one obtained in a country outside the British Isles, but not all divorces so obtained will qualify as an "overseas" divorce. In order to be so described a divorce must have been obtained in a country outside the British Isles -

(a) by means of judicial or other proceedings; and

(b) it must be effective under the law of the country in which it was obtained.[288]

A divorce not complying with both of these requirements is not an "overseas" divorce, and cannot be recognised as valid under sections 2 to 5 of the Act. Nevertheless such a decree, though not an "overseas" divorce, might be recognised under section 6 as a divorce obtained in a country outside the British Isles.

6.4 This dichotomy results from the requirements of the 1970 Hague Convention to which the Act gives effect. The Convention sets minimum standards of recognition, but does not forbid the more favourable treatment of foreign divorces should any signatory state wish to accord it. Section 6 of the 1971 Act provides more favourable treatment within the United Kingdom

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286 See, respectively, s.2 and s.6(2) of the Act.

287 For convenience we shall throughout this discussion refer only to "divorces" but the same points apply also to legal separations.

288 A divorce may be recognised in the United Kingdom even though it is not effective under the law of the country in which it was obtained: see para. 6.4, below. But in such case it will not be recognisable as an "overseas" divorce.

by preserving the old common law rule[289] that a divorce obtained in the country of the parties' domicile at the time it was obtained, or one which is recognised in that country, should be recognised also by a United Kingdom court. Such a divorce may not be capable of recognition under sections 2 to 5 of the Act, either because it fails to comply with the defining characteristics of an "overseas" divorce as laid down by section 2, or because it fails to satisfy the jurisdictional requirements of section 3. For example, a divorce may not be "effective under the law of [the country in which it was obtained]", as required by section 2(b), and yet it may be recognised by the law of the parties' domicile in another country. In Har-Shefi v. Har-Shefi (No. 2)[290] an Englishwoman married, in Israel, a man domiciled in that country. They came to England for a short while and the wife there received a get, or bill of divorcement, at the Beth Din, the court of the Chief Rabbi in London. A get is not effective in English law to dissolve a marriage. It is however valid under Israeli law, no matter where the get is pronounced. The English court therefore recognised the divorce as valid, since it was valid according to the law of the husband's domicile.[291]

6.5 In our view new rules for the recognition of foreign annulments should preserve the policy of the existing common law rule that the decree of the court of the domicile, or a decree recognised as valid by the court of the domicile, will be recognised here.[292] But we do not think that a provision modelled on section 6 of the 1971 Act is the only, or necessarily the best,

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289 Le Mesurier v. Le Mesurier [1895] A.C. 517; Armitage v. Attorney-General [1906] P. 135; McKay v. Walls 1951 S.L.T. (Notes) 6.

290 [1953] P. 220.

291 By reason of the Domicile and Matrimonial Proceedings Act 1973, s.16(1) such a divorce would not now be recognised as valid in England.

292 See fn. 289, above.

way to do this. As originally drafted section 6 achieved its purpose simply by providing that the Act was "without prejudice" to the recognition of divorces under the common law rule. The amendments made by the Domicile and Matrimonial Proceedings Act 1973 greatly extended, and complicated, the section. Neither the original wording, nor the amended wording, could employ the term "overseas divorces and legal separations", because this term was defined in section 2 in connection with the application of the Convention rules of recognition embodied in section 3, and the common law rule was wider than the Convention rules.[293] Thus it was necessary to create a second category of divorce and legal separation.

6.6 In our view it would in principle be desirable not to reproduce in new legislation relating to annulments the two-fold classification of the 1971 Act. The 1971 Act is not easy to understand, particularly for those who do not know the background. To them, the distinction between "overseas divorces" and "divorces obtained in a country outside the British Isles" is not immediately apparent and is apt to be confusing. We do not think that the amended section 6 of the 1971 Act is an altogether happy piece of drafting, and we would be reluctant to see it perpetuated in a new statute. Moreover it is questionable whether the present form of section 6, and the policy behind it, accords well with the policy of the rest of the Act, and whether it ought not to be amended. This question we consider in detail below.[294] We propose there certain alterations to the policy of the section, which will have the effect of amending the common law rule of recognition to the point at which it can no longer be preserved as such. Instead a new and more specific provision would be required, keeping the spirit but not the present letter of the rule. We would hope that in drafting such provisions it would be possible to avoid reference to "the common law rules", which expression, in what is intended to be a self-contained code, we think is undesirable. We

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293 But compare clauses 2 and 6 of the draft Bill appended to Law Com. No. 34, Scot. Law Com. No. 16 (1970), on which the 1971 Act was based. These clauses would have been marginally more restrictive than the 1971 Act.

294 See paras. 6.16 to 6.28, below.

also think that the provision could and should be so drafted as to avoid the creation of a second category of annulment, and to treat all annulments as a single class to which different rules of recognition may be applied according to circumstances.[295] We recommend therefore that a two-fold classification of foreign annulments should be avoided.

B. Decrees obtained "by means of judicial or other proceedings"

6.7 Section 2 of the 1971 Act sets out two conditions with which a divorce must comply in order that it may be capable of recognition as an overseas divorce. One of these, in paragraph (a), is that it shall have been obtained "by means of judicial or other proceedings" in any country outside the British Isles. This provision is necessary because not all divorces are obtained by judicial proceedings. In Israel, for example, the civil courts have no matrimonial jurisdiction: questions of family law are determined by the personal religious law of the parties. In the case of Jews, this means the Rabbinical Courts, and here, in connection with divorce, there may be no judicial enquiry into the facts such as is familiar in our domestic jurisdiction. In some Moslem countries there need be no proceedings before a court at all. But it is desirable that such divorces should be recognised in other countries, provided they satisfy the relevant conditions. The words "... or other proceedings" are necessary to this end.[296]

6.8 An overseas divorce or legal separation can therefore be recognised under the 1971 Act if, among other requirements, it has been obtained by means of some "proceedings", whether or not those proceedings were, in form or substance, judicial. It is necessary only that there shall have been some formal procedure which, if complied with, will result in a divorce according to the law by which that procedure is established.[297] (That is not to say that it would necessarily thereby be an effective divorce

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295 See para. 6.33, below, for our suggested formulation.

296 See Quazi v. Quazi [1980] A.C. 744.

297 Quazi v. Quazi, above, and see also Zaal v. Zaal (1982) 12 Fam. Law 173.

according to the law of the country in which it was obtained.)[298] Inasmuch as nullity of marriage is a question of law, the legal effect of particular facts which must be alleged and proved, it is difficult to conceive of an annulment being obtainable except after an inquiry of some kind, by a tribunal established for that purpose. An annulment is therefore unlikely to be obtainable without "proceedings" designed to that end. But such proceedings need not necessarily be judicial, that is to say, carried out by the judicial organs of the state. They might easily be extra-judicial, for example in an ecclesiastical tribunal; or they could conceivably be administrative, conducted by an official of the state administration. In our view there is no reason to exclude from recognition by United Kingdom courts annulments obtained otherwise than through the ordinary judicial processes of the foreign country in question, merely on that ground. If other criteria of recognition are satisfied an annulment extra-judicially obtained should be as capable of recognition as a divorce similarly obtained.[299]

6.9 In our view, therefore, the words "by judicial or other proceedings" are as pertinent to the recognition of foreign annulments as they are to foreign divorces and judicial separations. Under some systems of law divorce is obtainable as of right, without the intervention of any court or official, and this has given rise to questions about the meaning of the word "proceedings" in this connection,[300] and what is needed to constitute them. Because some kind of formal inquiry would seem to be a prerequisite of an annulment it is unlikely that similar questions could arise in relation to nullity. Essentially, however, such questions are a sidetrack. The real

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298 See, for example, Har-Shefi v. Har-Shefi (No.2) [1953] P. 220, the facts of which are set out in para. 6.4, above.

299 Cf. Di Rollo v. Di Rollo 1959 S.C. 75. Here an annulment pronounced by an ecclesiastical court was not recognised though it appears to have been valid by the law of the domicile. Our proposals would involve the statutory reversal of this decision.

300 See Quazi v. Quazi, above; Zaal v. Zaal, above.

significance of the words "judicial or other proceedings" is the indication they provide that proceedings which are not in form or substance judicial are nevertheless capable of resulting in a recognisable divorce. This is also the message we would wish to convey in relation to nullity.

C. Decrees "effective under the law" of the country in which obtained

6.10 The second condition laid down by section 2 of the 1971 Act, with which a foreign divorce must comply if it is to be capable of recognition, is that it must be "effective under the law of [the] country [in which it is obtained]".[301] The words are required by the terms of the 1970 Hague Convention, to which the Act gives effect in the United Kingdom. This condition of recognition is a reasonable one: a divorce which was not effective under the law of the state in which it was obtained - if, for example, it was vitiated by fraud, or if there was some irregularity in the proceedings - ought not to be recognised by another state as a divorce obtained under the law. But, as has already been pointed out,[302] an extra-judicial divorce, which might not be effective under the law of the state within the boundaries of which it was obtained, might nevertheless be deserving of recognition as a valid divorce. Such a divorce is not capable of recognition under the 1970 Hague Convention, or under sections 2 to 5 of the 1971 Act, because it would fail to comply with the condition as to effectiveness. It might however be recognisable under section 6 of the Act which provides a wholly different basis of recognition.

6.11 In relation to annulments which are to be recognised on the analogy of overseas divorces under sections 2 to 5 of the 1971 Act, the condition that the annulment shall be effective under the law of the country in which it was obtained, should in our view, apply. Only in this way can annulments be placed on the same footing as divorces and legal separations,

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301 1971 Act, s.2(b).

302 See para. 6.4, above.

which we believe it should be the policy to achieve. Annulments which do not comply with this condition may nevertheless be recognisable under other provisions, similar to section 6 of the 1971 Act.

6.12 On the other hand, we have also said[303] that the dichotomy between "overseas divorces" and "divorces obtained in a country outside the British Isles", which the different provisions of sections 2 to 5, and section 6, establish, is confusing and ought not to be perpetuated in relation to annulments. However, the desire to avoid two categories of annulment is not incompatible with an acceptance that there may be different conditions of recognition applicable to annulments generally, according to the circumstances in which they are obtained. Different conditions of recognition may be applied without creating correspondingly different categories of annulment. The answer, it seems to us, is primarily a question of drafting, and lies in the treatment of the grounds on which recognition is to be accorded. To this matter we now turn.

Grounds of recognition

A. Grounds contained in the 1971 Act

6.13 Under section 3 of the 1971 Act an "overseas divorce" (one which satisfies the criteria set out in section 2) is to be recognised if, at the date of institution of the proceedings,

(a) either spouse was habitually resident in the country in which the divorce was obtained;[304] or

(b) either spouse was a national of that country.

This is the central part of the entire scheme of recognition of "overseas divorces". It follows that the same grounds must apply to the recognition of

303 See para. 6.6, above.

304 See fn. 308, below.

annulments. But what of annulments that do not satisfy the criteria, discussed above, which the 1971 Act requires for categorisation as "overseas divorces"? As we have pointed out,[305] divorces which cannot qualify as "overseas divorces" may nevertheless be recognisable under section 6 of the Act: and "overseas divorces" which do not provide grounds for recognition under section 3 of the Act (because, for example, neither spouse was a national of, or had been habitually resident in, the country in which the divorce was obtained) might also be recognised under section 6. At this point therefore we should look ahead to section 6 of the Act and consider whether, and to what extent, such provisions should apply to annulments.

6.14 In section 6, the 1971 Act expressly preserves the old common law rule that a matrimonial decree affecting the status of the parties will be recognised in England if it was obtained in the country of the parties' domicile; or, if not obtained in the country of the parties' domicile, would be recognised there. With effect from 1 January 1974 a wife has maintained her own domicile on marriage, and can preserve or change it independently of her husband.[306] The wife's domicile of dependence is abolished. This enactment necessitated amendments to section 6 of the 1971 Act, which was drafted on the premise that the domicile of a married couple was the domicile of the husband. The effect of the amendment is that, where the parties' domiciles are not the same, a divorce which was obtained in the country of the domicile of one of them will be recognised in the United Kingdom if it is also recognised in the country of the domicile of the other. Similarly, where the divorce was obtained in a country which was not the domicile of either party, it will be recognised in the United Kingdom if it would also be recognised in the country of the domicile of each of the parties respectively. It is of course possible that the circumstances of any particular case may enable a divorce to be recognised both under sections 2

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305 See paras. 6.3 and 6.4, above.

306 Domicile and Matrimonial Proceedings Act 1973, ss.1, 17(5).

to 5 of the Act and under section 6, but it seems to be the intention[307] that section 6 shall apply only where the necessary conditions for recognition under sections 2 to 5 are not satisfied.

6.15 Taking together the provisions of sections 2 and 3 on the one hand, and of section 6 on the other, the grounds of recognition of a foreign divorce can be stated as follows:

(1) Where a divorce is valid according to the law of the country in which it has been obtained it will be recognised by a United Kingdom court if either spouse was:

(a) a national of, or

(b) habitually resident in,[308] that country at the time the proceedings were begun.

(2) Where a divorce cannot be recognised because condition (1), above, is not fulfilled, or because neither of the grounds 1(a) or 1(b) is available, it will nevertheless be recognised by a United Kingdom court if:

(a) it was obtained in the country of the domicile[309] of both spouses, or

(b) it was obtained in the country of the domicile of one spouse and would be recognised as valid in the country of the domicile of the other, or

(c) though not obtained in the country of the domicile of either spouse, it would be recognised as valid in the country of the domicile of each of them.

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307 See s.6(2).

308 Where the law of the country in which the divorce was obtained uses a concept of domicile as a ground of jurisdiction, habitual residence includes domicile as so conceived: 1971 Act, s.3(2).

309 In s.6 the concept of domicile is that understood by a United Kingdom court.

6.16 It emerges clearly from this juxtaposition of these sections that the recognition requirements of section 3 may be satisfied by the personal circumstances of only one of the spouses, but those of section 6 must be satisfied by those of both of them. Section 3, of course, implements the 1970 Hague Convention (though in fact provides more favourable treatment than the Convention demands). Section 6 applies the common law rule of recognition based on domicile, and at the time when it was drafted the domicile of husband and wife was the same and inseparable. It would therefore have been meaningless to have drafted the section in terms of one domicile only. This would not have been the case after 1 January 1974, when the Domicile and Matrimonial Proceedings Act 1973 came into force. The amendments made by that Act to section 6 were the minimum necessary to meet the new circumstances in which a wife possessed her own domicile independent of that of her husband, without, it seems, giving any thought to whether the new circumstances warranted a change in the policy of the section. But there are three reasons why a change of policy might be desirable, and these should be considered.

6.17 This first reason is that under the rule in Indyka v. Indyka,[310] which would have applied to a divorce before the 1971 Act came into force, and applies now to annulments, it seems unlikely that a United Kingdom court would refuse to recognise an annulment obtained in the court of the domicile of one of the parties.[311] Suppose, for example, that H and W were married in France, and are now living in England. H is English. W and her family were refugees from Poland and had for many years before W's marriage been living in France, without, it is assumed, acquiring French citizenship. After three years of marriage W leaves H and returns to France with the announced intention of remaining there permanently, and shortly after her return successfully petitions the French court for an annulment. Assuming that the

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310 [1969] 1 A.C. 33, see para. 5.5, above.

311 See Lepre v. Lepre [1965] P. 52, 61-62.

English court would on these facts find that W had re-established for herself a French domicile, we think it hardly conceivable that the court would not hold that there was a sufficiently real and substantial connection between W and France to warrant the recognition of the French decree. And certainly under the rule in Travers v. Holley[312] a foreign nullity decree granted in circumstances in which one spouse was domiciled in the jurisdiction of the foreign court would, since 1 January 1974, be recognised in England.[313] Section 6 of the 1971 Act would however require that the decree be recognised not only by the law of the domicile of W but also by that of H and the decree could not be recognised anywhere in the United Kingdom unless this were established. This requirement seems in itself to be a backward step and an unnecessary narrowing of the provisions of the existing law.[314] In 1971, of course, this criticism could not have been made because W could not have established a separate domicile in France.

6.18 The second reason lies in the results of the application of the section 6 provisions to the facts of this example. The decree obtained in the country of the domicile of one spouse must be regarded as valid under the law of the domicile of the other in order that it may be recognised in England. But the law of the domicile of H is English law and whether or not English law will recognise the decree is the very question under examination. There is a circuity of reasoning here which cannot be resolved, and it is generally thought[315] that in such circumstances the decree could not be recognised in England under section 6. It is, in our view, wrong that in this by no means inconceivable situation the recognition of the decree should be precluded simply by a logical conundrum. Moreover, it is possible that in the particular

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312 [1953] P. 246.

313 See the judgment of Waterhouse J. in Vervaeke v. Smith [1981] Fam. 77.

314 See paras. 2.17 and 2.18, above, for a discussion of the present law on this point.

315 See Cheshire & North, Private International Law, 10th ed., (1979) p. 373: Morris, Conflict of Laws, 2nd ed., (1980) p. 149.

circumstances mentioned the decree could not be recognised under a nullity equivalent of section 3 of the 1971 Act either, since W is not a French national and could not be said to be habitually resident in France. If this were so the annulment could not be recognised at all under an Act which would be intended to facilitate the recognition of foreign annulments, though it would undoubtedly be recognised under the existing common law.

6.19 Thirdly, it is simply anomalous that a divorce or annulment is to be recognised if it is valid according to the law of the nationality of one spouse, or the law of the habitual residence of one spouse, but cannot be recognised on the basis of domicile unless it is valid according to the law of the domicile of both spouses. The United Kingdom concept of domicile normally requires a high decree of association between a person and the country in which he is said to be domiciled. A domicile of choice requires a connection more substantial than mere nationality or habitual residence; while a domicile of origin will frequently involve both nationality and habitual residence. It is true that a domicile of origin can be the relic of a fortuitous or fleeting connection which has long since ceased to have substance. But the same is true of nationality; and habitual residence may easily be the product of a temporary expediency. It seems to us that neither nationality nor habitual residence is a stronger connecting factor between a person and his personal law than the United Kingdom concept of domicile. Accordingly, if it is sufficient for purposes of recognition that a divorce or annulment be obtained in the country of nationality or habitual residence of one spouse, it should in our view be sufficient that it be obtained in the country of the domicile of one spouse, or be recognised as valid in that country.

6.20 Against all this it might be said that if a divorce, or an annulment, is regarded as valid in the country of the domicile of one spouse, but not in that of the other, the marriage is already a "limping marriage". Recognition of the divorce or annulment in the United Kingdom cannot alter that. The object of any system of recognition of foreign matrimonial decrees is to avoid inconsistencies of status from one country to another, and since this cannot be achieved in the particular circumstance there is no

logical reason why a United Kingdom court should afford recognition. But if there is no logical reason for a United Kingdom court to recognise a foreign decree in the circumstances envisaged, there is equally no logical reason for such a court not to recognise it. The current tendency is to recognise matrimonial decrees where they have been validly pronounced by the court of the personal law, even where the recognition court would not itself have granted a decree in the same circumstances. We think this tendency is beneficial, since it keeps to a minimum uncertainties and inconsistencies of status as between different countries. In our view, if the country of the domicile of one party regards the divorce or annulment as valid, that decision should have, in the United Kingdom, the benefit of any doubt there might be concerning it. If the decision offends our public policy or ideas of justice its recognition can be refused under section 8(2) of the 1971 Act.

6.21 We think therefore that there are convincing arguments for changing the provisions of section 6, so that, if the law of the domicile of one spouse alone would recognise the divorce or annulment, that should be sufficient to determine the issue of recognition in the United Kingdom.

6.22 There is another change which might also be made. This relates to the time at which, for the purpose of recognition in the United Kingdom under sub-sections (2)(b) and (3) of section 6, the law of the domicile would need to recognise as valid an annulment obtained in some other country. Thus if the annulment is obtained in country A, at a time when the spouse who obtained it is domiciled in country B, what is the relevant time at which the law of country B should recognise the annulment for the purposes of its recognition in the United Kingdom? Is it the time at which the annulment was actually obtained, or is it the time at which the question of recognition arises in the United Kingdom? This point could be important. The spouse concerned may have obtained the annulment in country A precisely because at that time it would have been unobtainable in country B, and would not have been recognised there either; but since that time the law of country B may have changed so that it would be recognised there at the time the issue

needs to be determined in the United Kingdom. Another possibility is that when the question arises in the United Kingdom the spouse concerned may have acquired a new domicile in country C, which would regard the annulment as valid.

6.23 The existing section 6 is ambiguous on this point. The fact of being, or of not being, domiciled in the country in which the divorce (or legal separation) is obtained is to be determined as at the commencement of the divorce proceedings. This is dubbed "the material time". But the time at which the divorce is to be recognised in the country of the domicile, in the case where where the divorce has not been obtained in that country, cannot be "the material time" because the divorce is obtained at the conclusion of the proceedings, not at their commencement, and obviously cannot be recognised until it is obtained. Section 6(3) states merely that the divorce or separation is to be recognised in the United Kingdom if it "was recognised" in the country of domicile. But what precisely is meant by this? The words "was recognised" cannot refer to actual recognition proceedings brought in the country of the domicile, because probably in most cases no such proceedings will have been brought, and this interpretation would therefore deprive the section of much of its efficacy. In our view the words "was recognised" must refer to the state of the law in the country of the domicile at the time when the divorce or separation was obtained. If the law of the domicile was at that time such that a court in that country would have recognised the divorce or separation if it had been called upon to do so, the condition for recognition in the United Kingdom is satisfied. In our view this is unexceptionable. But what of the case where the law of the domicile has changed, so that it would not have recognised the divorce or separation when it was obtained, but would do so by the time it falls to be recognised in the United Kingdom?

6.24 We understand that the amendments to section 6 of the 1971 Act consequent on the Domicile and Matrimonial Proceedings Act 1973 were intended to leave the old common law rule of divorce recognition unaltered in every particular, save that a wife was thenceforward to possess an

independent domicile of her own. We might therefore ask what was the old common law on this question of the time of recognition by the law of the domicile? Unfortunately the answer is not at all clear. In Armitage v. Attorney-General,[316] the case in which the rule was formulated, the point was not specifically considered. There is some suggestion that the court is looking at the law of the domicile as at the time of the English recognition proceedings.[317] On the other hand there is other indication that the court was looking to the date of the foreign decree.[318] In fact, of course, the question was not presented to the court in the way in which it has been presented here: there was no reason to do do since neither the law of the domicile nor the country of domicile had changed between the two relevant times. Nor does the point seem to have arisen in any of the reported cases that have followed Armitage.[319] But the likelihood is that sooner or later it will, and it might be helpful if the ambiguity were resolved before it does.

6.25 It seems to us that if the court of the domicile would have recognised the divorce when it was obtained, that certainly ought to be conclusive. At that time, if recognition proceedings had been brought in the United Kingdom, the court here would also have recognised the divorce, and the parties' status would have been determined here. We do not think the parties

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316 [1906] P. 135.

317 "The evidence, in the present case, shows that in the state of New York the decision of the court of South Dakota would be recognised as valid." (emphasis added) ibid., p. 141.

318 "That being so, Gillig and his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree": ibid.

319 But see the Canadian case of Schwebel v. Ungar (1964) 48 D.L.R. (2d) 644, 649 per Ritchie J.: "... under Ontario law a divorce is not recognised as valid unless it was so recognised in the country where the husband was domiciled at the time when it was obtained ...". This case is decided on the basis that both the fact of domicile, and recognition by the law of the domicile, are to be determined as at the time the divorce was obtained.

should subsequently be deprived of what they might then have obtained, even if the law of the domicile, or the domicile itself, has since been changed, so that the court of the domicile would not now recognise the divorce. Thus far the existing provisions of section 6(3) of the 1971 Act are, in our view, satisfactory.

6.26 On the other hand a court of the personal law, whether that law is the law of the domicile, the law of the nationality, the law of the habitual residence, the religious law - or any other - asked to make a determination of status, will necessarily consider the facts and the law as they are at the time of the determination. The court may of course look back at what has happened in the past, and it may take into account an earlier state of the law, but, whatever the basis of its decision, the determination of the court will be a present determination. Where a United Kingdom court is required to examine the law of the domicile for the purpose of recognising status it cannot, in our view, be logically inconsistent for it to do what the court of the domicile would itself do, if asked, and make a present determination. This involves the United Kingdom court in asking: would the law of the domicile now recognise this divorce? Support for this approach is to be found both in the rule in Travers v. Holley[320] and in the rule in Indyka,[321] under which the court will look at the circumstances as they exist at the date of the recognition proceedings. It will take into account changes in English law since the divorce or annulment was obtained,[322] and also things that have happened elsewhere since that time.[323] These rules of course apply

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320 [1953] P. 246.

321 [1969] 1 A.C. 33.

322 Indyka v. Indyka [1969] 1 A.C. 33; Vervaeke v. Smith [1981] Fam. 77 (Waterhouse J.).

323 Law v. Gustin [1976] Fam. 155.

where the domicile rule is not available, and it does not necessarily follow that their principle is equally applicable where the domicile rule is available. But we think that if it is sensible to recognise a divorce under the Indyka rule because it was obtained in a country with which one party has[324] a real and substantial connection, it is not less sensible to recognise a decree which the court of the domicile would now recognise if it were asked to do so.

6.27 Allowing the present state of the law of the domicile to determine the status of the parties in the United Kingdom could, however, give rise to one practical difficulty. If the provisions of section 6 of the 1971 Act were to be amended as we have suggested, to render the domicile of one party only a sufficient determining factor, a change in the law of the domicile of one party could change the status of both parties in the United Kingdom. Thus, if H obtains a divorce in country A, which is not recognised as valid by the law of country B, in which both H and W are domiciled, the divorce would not be recognised in the United Kingdom. But if H acquires a new domicile in country C, which does recognise the divorce (or if the law of country B changes so as to recognise the divorce), the divorce would be recognised in the United Kingdom.[325] If W were resident in the United Kingdom she could therefore find herself divorced here merely by a change in the domicile (or in the law of the domicile) of H, of which fact she might be quite unaware. This in itself does not cause us any great concern. What does concern us is, that as the law stands at present, W, finding herself suddenly divorced, even while thinking herself protected by her married status, would not be able to obtain any financial provision from a United Kingdom court. If the facts were such that, before the divorce became

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324 This is the effect of Law v. Gustin [1976] Fam. 155.

325 Provided there had not been previous recognition proceedings in the United Kingdom which resulted in a refusal to recognise the divorce - in which case the principle of Vervaeke v. Smith [1982] 2 W.L.R. 855 might preclude subsequent recognition. See para. 2.27, above.

entitled to recognition in the United Kingdom, W might have obtained her own divorce in the United Kingdom, in which case, of course, adequate financial provision could have been made for her, she might be most adversely affected. We do not think that this situation is likely to occur frequently, but it could happen. A rule that a divorce could be recognised in the United Kingdom only if it would have been recognised in the country of the domicile at the time it was obtained would fix W's position unalterably at that time, and prevent the situation envisaged from arising at all. Unfortunately such a rule would have drawbacks of its own[326] which in our view are more fundamental and even less desirable than the one we have mentioned.[327] If the recent respective recommendations of the two Law Commissions[328] are implemented, and United Kingdom courts given power to award financial relief after a foreign divorce, the problem is, in practice, solved. We should add that of course the problem, couched here in terms of divorce, is the same in relation to annulment and legal separation.

6.28 In our view therefore there are good arguments for asking both questions: what view the law of the domicile would have taken at the time of the divorce; and also what view it would now take. We think that no conflict or inconsistency arises here. If the answer to either question produces a result favourable to recognition, that should conclude the matter, and the United Kingdom court should recognise the divorce. It follows that we would like to see any statutory application of the common law rules to annulment, along the lines of section 6 of the 1971 Act, and, indeed, section 6 of the Act itself as it applies to divorce and legal separation, modified, so as to provide

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326 According to the law of his domicile H would be free to remarry: according to the law of her domicile, W would not. English and Scots law would, under this alternative rule, refuse to recognise the divorce; yet each law might also regard H as free to remarry - W, as not (see para. 2.35, above).

327 See paras. 6.40 to 6.51, below.

328 Law Com. No. 117 (1982); Scot. Law Com. No. 72 (1982). See para. 2.36, above.

that a foreign divorce, annulment or legal separation is to be recognised by a United Kingdom court if:

(a) it was obtained under the law of the domicile of either party to the marriage, or

(b) if it was not obtained under the law of the domicile of either party, it would have been at the time it was obtained, or would now be, recognised as valid under the law of the domicile of either party.

6.29 We realise that, to the extent that sub-paragraph (b) in paragraph 6.28, above, will result in recognition of a divorce or annulment when by the time of the recognition proceedings a party has acquired a new domicile under which the divorce or annulment would be recognised, but the law of the domicile of neither party would have recognised it at the time it was obtained, an element of forum shopping is encouraged. It has however to be borne in mind that we are considering here the United Kingdom concept of domicile which requires a high decree of connection between a person and the country of a new domicile of choice (or, in the case of a re-acquiring of a domicile of origin, a total severance of links with the former domicile of choice). It is not so easy to acquire a new domicile that we are persuaded that there would be any risk of abuse if our proposal were adopted.

B. Grounds of recognition apart from the 1971 Act

6.30 Are there any other grounds on which a foreign annulment - as opposed to a foreign divorce - deserves recognition? Before the Domicile and Matrimonial Proceedings Act 1973 came into force, the common law, in England,[329] Scotland[330] and Northern Ireland[331] had previously allowed the

329 Simonin v. Mallac (1860) 2 Sw. & Tr. 67.

330 Miller v. Deakin 1912 1 S.L.T. 252; MacDougall v. Chitnavis 1937 S.C. 390; Prawdic-Lazarska v. Prawdic-Lazarski 1954 S.C. 98.

331 Addison v. Addison [1955] N.I. 1.

assumption of jurisdiction on the sole ground that the marriage had been celebrated there (but, at least in England[332] and Northern Ireland,[333] only where the marriage was alleged to be void and not where it was said to be merely voidable). In Merker v. Merker[334] the reciprocity principle based on Travers v. Holley[335] was applied so as to require the recognition of a foreign decree annulling a void marriage where the only ground of jurisdiction was that the marriage had been celebrated within the forum. Following the Domicile and Matrimonial Proceedings Act 1973 it is doubtful whether a foreign annulment of a void marriage would now be recognised here if the foreign court had assumed jurisdiction solely on this basis. But the question arises whether, in a new statutory scheme for the recognition of foreign nullity decrees, there should be specific provision made for recognition on this ground.

6.31 There are arguments for the view that a court of the country of the celebration of the marriage is well placed to pronounce upon its validity. Where the defect in the marriage consists in a failure to observe the necessary forms it is difficult to contest that that court is indeed the most appropriate to determine that issue. And where other questions arise relating to capacity or consent the court of the place of celebration may be no less fitted than others to decide the matter. It is not suggested under such arguments that that court should, in any case, have exclusive jurisdiction, but only that it might equally with others be competent to determine these issues, and may in some cases be more convenient. Nevertheless, in our view there should be no such ground of recognition in a new statutory scheme. Although there is no logical reason why grounds of recognition of foreign decrees should not be wider than the rules of domestic

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332 Ross Smith v. Ross Smith [1963] A.C. 280.

333 Holden v. Holden [1968] N.I. 7.

334 [1963] P. 283. See also Corbett v. Corbett [1957] 1 W.L.R. 486.

335 [1953] P. 246. See paras. 2.10 to 2.12, above.

jurisdiction, it would in our view be anomalous to recognise a foreign nullity decree solely because it is the decree of the court of the country of the celebration of the marriage, while denying to our own courts jurisdiction on that ground. Except in cases of formal invalidity, which are probably a small proportion of all cases of nullity, there is no obvious reason why the court of the place of celebration should, as such, have any jurisdiction to pronounce upon the question of nullity, though it may be no less actually competent to do so than other courts. And of course the law of the place of celebration can be applied by any other court where it is requisite to do so. The court of the domicile and the court of the habitual residence have evident claims to jurisdiction which the, possibly fortuitous, court of the place of celebration has not. An alteration of our own jurisdictional rules should not now, we think, be lightly undertaken, and should depend on there being shown to exist some genuine mischief which can only thus be remedied. We believe that there is no evidence of any such mischief, and, in its absence, no adequate reason to alter our domestic rules of jurisdiction in this regard. Equally there is no reason to afford recognition to foreign decrees solely on this basis.

C. Formulation of grounds of recognition

6.32 The arguments we have made in the foregoing paragraphs, concerning the classification of annulments and the policy of section 6 of the 1971 Act, have frequently been framed in terms of divorce and legal separation. The conclusions we have reached in respect of annulment, based on these arguments, must therefore be equally as applicable to divorce and legal separation. We do not think it sensible that there should be different statutory provision for divorce and legal separation on the one hand, and nullity on the other. It is indeed the desire to avoid this that leads us to recommend in the first place the application of the 1971 Act scheme to annulments. If particular provisions of the 1971 Act require, on general grounds, modification in their application to annulments, it must follow that so ought they to be modified as they apply to divorces and legal separations. We therefore recommend that the 1971 Act itself be amended so as to give effect, for divorce and legal separation, to the same recommendations as we have made for nullity.

6.33 Our recommendations would have the result that a foreign divorce, annulment or legal separation obtained outside the British Isles would be recognised in the United Kingdom if:

(1) it was valid under the law of the country in which it was obtained, and either party to the marriage[336] was at the time of the institution of the proceedings in that country

(a) a national of, or

(b) habitually resident[337] in,

that country;

or

(2) it was obtained in the country in which, at the time of the institution of the proceedings, either party to the marriage was domiciled;

or

(3) it would have been, at the time it was obtained, or would be, at the time the question of recognition arises in the United Kingdom, recognised as valid by the law of the domicile of either party to the marriage.

In paragraphs 6.5 to 6.7, above we discussed the classification of divorces and legal separations, effected by the 1971 Act, into (i) overseas divorces and legal separations and (ii) divorces and legal separations obtained in a country

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336 I.e., to the marriage proceedings, which may have had no legal effect.

337 Where the foreign court accepts domicile as a ground of jurisdiction, "habitual residence" will include domicile as understood by that court.

outside the British Isles. We concluded that this dichotomy was in principle undesirable and should, if possible, be avoided in the application of the 1971 Act scheme to annulments. In paragraph 6.6, and again in paragraph 6.12, we expressed the view that the problem was really one of drafting. If it were possible to present the grounds of recognition in something resembling the above formulation, we think this would enable all foreign divorces, annulments and legal separations to be treated as a single category for the purposes of recognition in the United Kingdom. Such a reformulation would obviously involve substantial amendment not only of the provisions of section 6 of the 1971 Act, but also of those of sections 2 and 3.

Cross-proceedings and proof of facts

6.34 Sections 4 and 5 of the 1971 Act deal with matters of subsidiary importance. Section 4 is divided into two sub-sections. The first provides that where cross-proceedings are instituted the fact of habitual residence (or domicile, as understood by the foreign court) or nationality may be determined either at the time of the original proceedings or at the time of the cross-proceedings, in order that the recognition requirements of section 3 may be satisfied. This provision has equal relevance to annulments. The second sub-section deals with the conversion of legal separations into divorces. Clearly this sub-section is not relevant to annulments.

6.35 Section 5 provides that findings of fact made in the proceedings in which the divorce was obtained shall in subsequent recognition proceedings be conclusive evidence of those facts if both parties took part in the original proceedings. If only one party was involved in the original proceedings, such findings of fact shall be accepted by the United Kingdom court unless the contrary is shown. A party who appears in any judicial proceedings is to be treated as having taken part in them. A finding of fact includes those on which jurisdiction was assumed in the original proceedings, and specifically extends also to the recognition criteria of habitual residence, domicile or nationality. We think that all these provisions are equally applicable to annulments.

6.36 The structure of the 1971 Act, with its two-fold classification of divorces, has resulted in the application of sections 4 and 5 to "overseas divorces" only. They do not apply to divorces recognised under the common law rules. We can see no reason why they should not. One effect of our proposal that there should be no two-fold classification of divorces and annulments, as in the 1971 Act at present, would be to give sections 4 and 5 a general application. It seems unlikely that there would be many cross-proceedings in purely nullity matters (though a cross-proceeding for divorce on a nullity petition, or vice versa, is not uncommon). But where the provisions of section 4(1) are applicable we cannot see why all annulments should not be subject to them. Similarly with section 5. We see no reason why the conclusive establishment of matters of fact should not be equally desirable in cases of recognition under the common law principle as it is under the 1970 Hague Convention rules. Section 5 refers, among other things, to findings as to domicile. This is not a reference to domicile as understood in the legal systems of the United Kingdom, but to domicile within the contemplation of section 3 of the Act, that is to say, where it is used by the foreign court as a ground of jurisdiction. The United Kingdom concept of domicile is a question of law, and would not come within the provisions of section 5.

Saving for other legislation

6.37 Section 6 of the 1971 Act, which we have discussed at length above,[338] preserves the common law rules for the recognition of foreign divorces and legal separations. It also preserves, by the use of general words in sub-section 6(5), any other enactments under which foreign divorces and legal separations may be required to be recognised. In Part II of this paper we considered the effect of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in this field.[339] We concluded that, though the matter is not

338 See paras. 6.14 to 6.29, above.

339 See paras. 2.29 to 2.31, above.

entirely free from doubt, that Act, and some of the various Conventions made under it, do extend to judgments in matters of family law or status. The operation of the 1933 Act, and any other legislation relevant in this field, is preserved by section 6(5). The question arises whether there is a continued need for sub-section 6(5) and whether it should be repeated in any enactment relating to annulments.

6.38 It seems likely that as a result of the 1971 Act, and of any new statute applicable to the recognition of foreign annulments, there will be increasingly less need to refer in the future to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in connection with the recognition of foreign divorces, legal separations and annulments. The effect of the 1933 Act in this field is almost the same as that of the 1971 Act. It is difficult to envisage a case in which a divorce would be recognised under the 1933 Act but could not be under the 1971 Act. In contrast to this, it would seem that if a divorce is not recognisable under the 1933 Act, because, for example, it was procurred by fraud, it might nevertheless be recognisable under the 1971 Act.[340] In these circumstances it is questionable whether there is any need for the 1933 Act to continue to apply (in so far as it does apply) in this field. In our view there probably is not, but any attempt expressly to disapply the Act would involve the re-consideration of those of the conventions entered into under the Act which make specific provision for the enforcement of judgments in matrimonial causes. We doubt that this would prove a worthwhile exercise. In so far as the ground covered by the two statutes is not identical, the 1971 Act appears to be the wider of the two, and therefore to preserve the operation of the 1933 Act in this field will do no harm, even if it achieves no actual good. Moreover there is other

340 By virtue of sections 4(1)(a)(iv) and 8(2)(b) of the 1933 Act, fraud will preclude recognition of the divorce under that Act, but those provisions do not state that the divorce shall therefore not be recognised. Accordingly, the 1971 Act, under which fraud is not a mandatory bar to recognition, may still permit the divorce to be recognised in the United Kingdom.

legislation, notably the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950, which is still operative, and is preserved by sub-section 6(5) of the 1971 Act. In our view therefore sub-section 6(5) should continue to apply.

6.39 The foregoing observations apply equally to the recognition of foreign annulments under a new recognition statute based on the 1971 Act (save that the Colonial and Other Territories (Divorce Jurisdiction) Acts have no application to nullity). We have, however, proposed that section 6 of the 1971 Act, in so far as it relates to the common law rules, should, be recast both in substance and in form.[341] This may render impracticable the straight repetition of sub-section 6(5) in the new legislation. In which case, we recommend that some new provision should be made to the same effect.

Capacity to marry

6.40 Section 7 of the 1971 Act deals with the capacity to marry in the United Kingdom after recognition of a foreign divorce in accordance with the Act. It is provided that, where the validity of a divorce obtained in any country is entitled to recognition, neither spouse shall be precluded from re-marrying in the United Kingdom on the ground that the validity of the divorce would not be recognised in any other country. The question is whether a similar provision is desirable in relation to annulments, and to what extent, if any, modifications to it, in respect both of annulments and of divorces, are required. This is a complicated matter because it involves consideration of the effect of foreign divorces and annulments on capacity to marry, both in this country and abroad; the effect of United Kingdom divorces and nullity decrees on such capacity to marry; and the effect of the non-recognition of foreign divorces and annulments on capacity to marry.

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341 See paras. 6.16 to 6.33, above.

6.41 The common law position in England before the coming into force of the 1971 Act, is exemplified by the decision in R. v. Brentwood Superintendent Registrar of Marriages Ex parte Arias.[342] The facts of this case were as follows:

> H was an Italian national domiciled in Switzerland. W was domiciled in, and a national of, Switzerland, and obtained a divorce from H in Switzerland. Under Swiss law, capacity to marry was governed by the law of the nationality. W, now a single woman under Swiss law, had remarried in Switzerland. H wished to remarry but the law of his nationality, Italy, did not recognise the Swiss divorce. H and his fiancee, a Spanish national domiciled in Switzerland, therefore came to England to marry, planning to return to Switzerland. The marriage registrar refused a licence on the ground that H lacked capacity to marry according to Swiss law, the law of his domicile; whereupon H's fiancee applied for an order of mandamus to compel the issue of the licence.

The Divisional Court held that it had long been settled in English law that a person's capacity to marry was governed by the law of his domicile. Although English law might well recognise the Swiss divorce, since it was a decree of the common domicile, the issue before the court was one of capacity to marry. As the law of the domicile regarded H as incapable, the registrar had rightly refused to issue a licence.

6.42 This rule was reversed by section 7 of the 1971 Act with regard to persons re-marrying within the United Kingdom after having obtained a divorce abroad. Where the divorce is entitled to recognition under the Act, neither spouse is to be precluded from re-marrying in the United Kingdom merely because the divorce would not be recognised in some other country - even if that other country happens to be the domicile of the spouse concerned. The 1971 Act does not, however, apply to divorces and legal separations obtained in the United Kingdom before 1st January 1972, when the Act came into force. Suppose, for example, that H and W are domiciled

342 [1968] 2 Q.B. 956.

in Ireland, but W had been resident in Scotland for three years when in 1970, she successfully raised an action for divorce. That divorce will be recognised in England under the common law, not under the 1971 Act. Accordingly section 7 of the Act would be inapplicable, and the English court might apply the pre-existing common law rule to any question regarding the right of H or W to re-marry in England. W, if by now she has acquired a domicile in Scotland, or in England, would be free to marry. H, still domiciled in Ireland, would not. It is, on the other hand, possible (and perhaps more likely) that the court would apply the principle of section 7 of the 1971 Act by analogy, and hold that H, too, was free to re-marry in England. The position is uncertain.

6.43 Where a spouse whose divorce is required to be recognised in the United Kingdom re-marries abroad, any question concerning the validity of the re-marriage will fall to be determined under the common law and not under the 1971 Act, because section 7 of the Act applies only to re-marriage in the United Kingdom. Again, it is not certain whether a United Kingdom court would apply the principle of the Arias Case,[343] or section 7 of the 1971 Act by analogy. In the former case the court would hold that if the divorce would not be recognised by the law of their respective domiciles neither H nor W could validly contract a subsequent marriage, notwithstanding the recognition of the divorce in the United Kingdom. In the latter case the subsequent marriage would be regarded as valid. For the sake of consistency, it is to be hoped that the court would adopt the latter course.

6.44 Recognition of all foreign nullity decrees is at the moment a matter for the common law. There is no equivalent of the 1971 Act. There was no direct authority on the effect of recognition of a foreign nullity decree on capacity to remarry until the recent decision of Sir George Baker P. in Perrini v. Perrini[344] which was decided without reference either to the

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343 [1968] 2 Q.B. 956. See para. 6.41, above.

344 [1979] Fam. 84.

analogy of section 7 of the 1971 Act or, more significantly, to the Arias Case. In Perrini H was domiciled in Italy where he married W^1 in 1957. In 1961 W^1 obtained a decree of nullity from a court in New Jersey, where she had lived for some years. This decree was not recognised in Italy. H, still domiciled in Italy, then married W^2 in England. W^2 sought a nullity decree on the ground of H's bigamy. The petition was refused. The President decided that the American nullity decree should be recognised in England because at the time of the American proceedings, W^1 had a "real and substantial connection" with New Jersey. In so doing he was following earlier authority on the recognition at common law of foreign divorce[345] and nullity[346] decrees. He then went on to say, without reference to any authority, "once recognised [the decree] must be taken to have declared the pretended marriage a nullity, with each party free to remarry." This answer is consistent with the approach of section 7 of the 1971 Act (which is restricted to foreign divorces) but inconsistent with the Arias Case which is the only other common law authority directly in point.

6.45 Section 7 of the 1971 Act in relation to divorce, and Perrini v. Perrini relation to nullity decrees, provide authority for the proposition that, if the foreign divorce or annulment is recognised in England, the spouses are free to remarry here notwithstanding any incapacity based on non-recognition of the divorce or annulment in the country of the domicile. Is there any reason why this rule should not also apply, in statutory form, to the recognition of all divorces and annulments, whether under statutory recognition rules or under common law rules, or whether followed by a marriage in England or abroad?

6.46 The first question to ask is: why was the 1971 Act restricted to marriage in the United Kingdom? The 1971 Act was preceded by a joint

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345 Indyka v. Indyka [1969] 1 A.C. 33.

346 Law v. Gustin [1976] Fam. 155; and see now Vervaeke v. Smith [1981] Fam. 77, 109, 123 (this issue was not discussed in the House of Lords: [1982] 2 W.L.R. 855).

Report of the two Law Commissions in which the substance of what is now section 7 is discussed.[347] Section 7 is intended to implement Article 11 of the 1970 Hague Convention, which provides as follows:

> ARTICLE 11. A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise that divorce.

It was accepted by the Law Commissions that Article 11 was incompatible with English law in the form of the Arias Case, and with what was perceived to be Scots law also.[348] Section 7 was the legislation proposed to ensure that our law was consistent with the 1970 Hague Convention. However, the draft clause 7 proposed by the Law Commissions was not limited to remarriage in the United Kingdom; it contained no reference to where the later marriage took place.[349] It is, perhaps, unfortunate that the Bill ultimately submitted to Parliament contained the limiting words, but the wording of section 7 would nevertheless appear to be justified by the Convention. On the other hand there is a possible ambiguity in Article 11. Does it mean only that a State is not to preclude a spouse from re-marrying in that State; or does it extend to precluding recognition of a subsequent marriage wherever it takes place?

6.47 There would seem, in the past, to have been general agreement as to the policy that where a divorce or annulment is recognised in this country, the parties should be free to remarry, whether here or abroad, even though regarded as incapable by the law of their domicile because of non-recognition

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347 Law Com. No. 34; Scot. Law Com. No. 16, (1970), para. 13.

348 Kilbrandon Report on the Marriage Law of Scotland (1969) Cmnd. 4011, p.27, Case (f).

349 Law Com. No. 34, Scot. Law Com. No. 16 (1970), p.40.

there of the divorce or annulment. In our view that is the right policy to adopt. This area of the law would be clearer if there were a statutory provision to the effect that:

> Where the validity of a divorce or annulment is entitled to recognition in the United Kingdom neither spouse shall be regarded in the United Kingdom as incapable of re-marrying, whether in the United Kingdom or elsewhere, on the ground that the validity of the divorce or annulment would not be recognised in any other country.

We recommend accordingly.

6.48 A further problem might arise if a divorce or annulment granted in the United Kingdom were not to be recognised by the law of the domicile of one or both of the spouses. Should the spouse, the law of whose domicile did not recognise the divorce, be regarded in the United Kingdom as being free to re-marry? We have no hesitation in answering that question in the affirmative, and it would, in our view, be desirable to provide expressly to this effect. Indeed, it is quite possible that this approach might have been adopted in relation to English divorce decrees under the Matrimonial Causes Act 1965, section 8(1) of which provided that "where a decree of divorce has been made absolute ... either party to the former marriage may marry again." This provision was, however, repealed without re-enactment in the Matrimonial Causes Act 1973, though there was no intention in that repeal adversely to affect the right to re-marry after an English divorce.[350]

6.49 Finally, there is the question of what effect the non-recognition in the United Kingdom of a foreign divorce or annulment should have on the capacity to re-marry of either spouse, if the divorce or annulment is recognised as valid by the law of the domicile. This question can arise, not only on a refusal of recognition under the 1971 Act, but also under section 16 of the Domicile and Matrimonial Proceedings Act 1973, which sets out

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350 Reasons for this decision are to be found in Law Com. No. 51 (1972), pp. 17-19.

particular circumstances in which a divorce is not to be recognised. These circumstances could include those in which the law of the domicile would recognise the divorce. Given the generous nature of United Kingdom recognition rules, the question is not likely to occur frequently, but it should be considered.

6.50 The rule in the Arias Case[351] would render the spouses capable of contracting a subsequent marriage in the United Kingdom if their divorce was valid according to the law of their domicile, notwithstanding that the divorce would not be recognised here. It seems, on the face of it, anomolous that the same law should at once refuse recognition to the divorce and yet hold the spouses capable of a subsequent marriage. Nevertheless such authority as there is suggests that this may be the true legal situation.[352] Moreover it is consistent with much academic opinion. The academic answer is to divide the problem into the "incidental" and the "main" question, and to prefer the law governing the latter. It is not easy to say which question is which, but most commentators have viewed the capacity to marry as the main one. Thus the law of the domicile - which governs capacity to marry -prevails over the rules of recognition of the divorce or annulment, despite the apparent absurdity of the result. But this result is inconsistent with the policy behind secion 7 of the 1971 Act and the principles on which we have suggested that section 7 should be extended.[353] In our view, if a foreign divorce or annulment is refused recognition in the United Kingdom, and the marriage is otherwise valid and subsisting, the spouses should not be regarded here as capable of re-marrying, whatever the view taken by the law of their domicile. This would seem to accord with common sense, even if it is not the traditional view. It is not unreasonable that the law of the place of intended celebration of the marriage should prevail over the law of the

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351 [1968] 2 Q.B. 956; see para. 6.40, above.

352 Schwebel v. Ungar (1964) 48 D.L.R. (2d) 644.

353 See paras. 6.40 to 6.47, above.

domicile in case of conflict between them.[354] A statutory rule to this effect, for both divorce and annulment, is, in our view, required.

6.51 These proposals would make recognition or non-recognition in the United Kingdom of a foreign divorce or annulment the conclusive factor in determining the capacity of the spouses to contract a subsequent marriage. Where the divorce or annulment was recognised in the United Kingdom each spouse would be free to remarry in the United Kingdom, and a United Kingdom court would recognise and accept a marriage outside the United Kingdom regardless of whether the law of the domicile of either spouse recognised the divorce or annulment. Where the divorce or annulment was obtained in the United Kingdom, either spouse could remarry in the United Kingdom, and a United Kingdom court would recognise and accept a marriage elsewhere, regardless of the view taken of the divorce or annulment by the law of the domicile of either spouse. Finally, if the foreign divorce or annulment were refused recognition by a United Kingdom court, no United Kingdom court would regard the spouses as free thereafter to remarry, in the United Kingdom or elsewhere, even if the divorce or annulment would be regarded as valid by the law of the domicile of one or both of the spouses. In our view this rule has the merits of simplicity, certainty and consistency, though it marks a further departure from the tradition of the common law that status is exclusively to be determined by the law of the domicile.

The effect of the foreign decree

6.52 We discussed in Part II, above,[355] the effect of a foreign nullity decree when recognised in this country. Such authority as there is suggests that the decree should be given the same effect in this country as it had in the country in which it was obtained. In our view this is a desirable policy.

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354 Our proposals in relation to section 6 of the 1971 Act (see paras. 6.16 to 6.28, above) would help to reduce any conflict, by ensuring that where the law of the domicile of one spouse recognised the divorce, the divorce would normally be recognised in the United Kingdom.

355 See paras. 2.32 to 2.34, above.

If the decree is to be recognised on the basis that it has been granted by a court of competent jurisdiction it follows, we think, that the same law as granted the decree should determine its consequences. We recommend, for the avoidance of doubt, specific provision to this effect.

Exceptions to recognition

6.53 The scheme of the 1971 Act is one for the mandatory recognition of foreign divorces and legal separations. There is nothing discretionary about it. If the necessary criteria for recognition are satisfied, the divorce or legal separation must be recognised. Yet clearly there will be circumstances in which, on grounds of natural justice or public policy, the divorce or legal separation ought not to be recognised, notwithstanding that the rules would otherwise require it. Section 8 of the 1971 Act prescribes those circumstances and so sets out the only permitted exceptions to the mandatory scheme.

6.54 There are in effect three situations in which recognition must, or may, be withheld:

(1) it must be withheld where, according to the law of that part of the United Kingdom in which recognition is sought, there was, at the time the divorce or separation was obtained, no subsisting marriage between the parties;

(2) it may be withheld where one spouse did not participate in the proceedings in which the divorce or legal separation was obtained, either because that spouse received no, or no adequate, notice of the proceedings or because for other reasons that spouse was given no reasonable opportunity to take part in the proceedings;

(3) it may be withheld where it would manifestly be contrary to public policy to recognise the divorce or legal separation.

The first ground applies to divorces and legal separations obtained both in the British Isles and in a country outside the British Isles. The second and third grounds apply only to divorces and legal separations obtained outside the British Isles. To what extent are these provisions applicable to annulment?

6.55 The first ground, which is set out in sub-section 8(1), is obviously inappropriate to annulment, since an annulment is a confirmation of the fact that the marriage bond never did, or has ceased to, exist. But, as we have pointed out earlier,[356] subsection 8(1) is intended to give effect to Article 9 of the 1970 Hague Convention, which is drafted in rather different terms:

> ARTICLE 9. Contracting States may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition is sought, or is recognised, or fulfils the conditions required for recognition, in that State.

The words "incompatible with a previous decision determining the matrimonial status of the spouses" were thought by the two Law Commissions, reporting on the Convention, to be liable to give rise to difficulties.[357] Accordingly what was considered to be a narrower, but more precise, formulation of the Convention principle,[358] was adopted for the Act. Since the only previous decision incompatible with a subsequent divorce is likely to be prior divorce or an annulment, the reformulation would seem to be justified.

6.56 The broad concept behind Article 9 of the 1970 Hague Convention is fully applicable to annulments. An example directly in point is to be found in the recent case of Vervaeke v. Smith.[359] The petitioner sought

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356 See para. 4.6, above.

357 Hague Convention on Recognition of Divorces and Legal Separations (1970) Law Com. No. 34, Scot. Law Com. No. 16, para. 12, and App.B, para.1 of Notes on clause 8.

358 Ibid.

359 [1982] 2 W.L.R. 855 (H.L).

recognition in England of a Belgian decree of nullity obtained in 1972. Unfortunately for her she had previously tried, and failed, to obtain an annulment in England of the same marriage.[360] The Belgian decree had been granted on facts which in the earlier English proceedings had been held insufficient to annul the marriage. Recognition of the Belgian decree was refused at first instance,[361] again by the Court of Appeal[362] and finally by the House of Lords.[363] Among the various grounds advanced by the three courts for refusing recognition to the Belgian decree, that of res judicata was common to them all. The case is a clear application of the principle of Article 9 of the Convention, and we think that specific provision should be made, in any new enactment relating to annulments, for refusal of recognition on this ground. It is arguable that the doctrine of res judicata is but a special instance of public policy,[364] for which provision is in fact already made in sub-section 8(2)(b) of the 1971 Act. It may be so; but in our view, having been provided with the model in Article 9 of the Convention, it would be sensible to follow it, if only for the avoidance of doubt. Any such new provision should apply also to divorces and legal separations, in place of section 8(1) of the 1971 Act.

6.57 We have proposed in Part IV above that the same prohibition, based on res judicata, should apply to the recognition by a United Kingdom court of the nullity decrees of other courts in the British Isles.[365] We have not however considered whether the previous decisions of other such courts should also constitute a bar to the recognition by another court within the

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360 Messina (formerly Smith, otherwise Vervaeke) v. Smith (Messina intervening) [1971] P.322.

361 [1981] Fam. 77.

362 Ibid.

363 [1982] 2 W.L.R. 855.

364 Ibid., 867 per Lord Diplock.

365 Para. 4.6, above.

United Kingdom of an annulment (or of a divorce or legal separation) obtained outside the British Isles. Suppose, for example, that in the case of Vervaeke v. Smith,[366] the earlier nullity proceedings had been brought, not in England, but in Scotland. Should the decision of the Court of Session, that the marriage was not a nullity, preclude recognition of the Belgian decree by the English court, in the same way that, in fact, the earlier decision of the High Court precluded it? We think the answer to this question should be yes. If the decrees of all courts within the British Isles are to be given automatic recognition by a United Kingdom court,[367] it would be consistent to allow the same effect to the previous decisions of such courts where they are incompatible with the later foreign decision. Indeed, not to do so, could create a situation in which the foreign divorce or annulment is recognised in one part of the United Kingdom, but not in another: in the example above, recognised in England but not in Scotland. This would clearly be absurd. This problem seems not to have been faced in section 8(1) of the 1971 Act, though because of the different approach adopted there the problem appears in a different guise, and is also rendered less acute. It is however provided in section 10(4)(b) (transitional provisions) that where, before the commencement of the 1971 Act, the question of the validity of a divorce or legal separation has been decided by any competent court in the British Isles, the Act shall not apply. It is difficult to see why this principle should not hold good after the Act comes into force. We therefore recommend that a United Kingdom court shall not recognise a foreign divorce, annulment or legal separation where to do so would be incompatible with a previous decision of another court in the British Isles.

6.58 Section 8(2)(a), which permits non-recognition on the ground that one spouse was not given proper notice of, or permitted to take part in, the original proceedings, appears to conform to the existing common law as it

366 [1981] Fam. 77, [1982] 2 W.L.R. 855 (H.L.); see para. 6.56, above.

367 1971 Act, s.1; and see Part IV of this Consultation Paper.

relates to annulments.[368] The reported cases nearly all concern divorce rather than nullity, but here, as elsewhere, the same general principles are likely to apply to all matrimonial causes.[369] Section 8(2)(b) permits refusal of recognition on the ground of public policy. Here there is clear authority - if any were needed - that this is the present law relating to nullity.[370] We think that public policy is a sufficiently wide concept to include non-recognition on the ground of fraud, at any rate where the fraud is substantial.[371] Accordingly, in our view, section 8(2) of the 1971 Act is in principle as applicable to annulments as to divorces and similar provision should be made in any new recognition scheme for annulments. We do not think that any additional grounds of non-recognition are required. It should be noted that section 8(2), unlike section 8(1), applies only to divorces obtained outside the British Isles; and so it should be with annulments. Within the British Isles, questions of breach of natural justice are best dealt with by the court in which the original proceedings are brought: and since public policy will generally be the same throughout the British Isles,[372] it is not an appropriate ground for refusing recognition in one part of the United Kingdom to a decree obtained elsewhere in the British Isles.

6.59 Section 8(3) of the 1971 Act provides that in recognising a foreign divorce or legal separation the United Kingdom court shall not be required to recognise findings of fault made in the original proceedings, or any maintenance, custody or other ancilliary order made in such proceedings. The first part of this provision may not be applicable to annulments, where

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368 See para. 2.25, above.

369 See, for example, Mitford v. Mitford [1923] P.130.

370 Vervaeke v. Smith [1982] 2 W.L.R. 855.

371 See para. 2.24, above.

372 But perhaps not always. Compare the different approaches of the English and Scottish courts towards marriages of convenience, as exemplified in Vervaeke v. Smith [1982] 2 W.L.R. 855, (England) and Orlandi v. Castelli 1961 S.C 113, Mahmud v. Mahmud 1977 S.L.T. (Notes) 17 and Akram v. Akram 1979 S.L.T. (Notes) 87, (Scotland).

questions of fault do not usually arise. Nevertheless, there is clearly no harm in retaining this provision for annulments in case it might, in particular circumstances, be relevant. The second part of section 8(3) is applicable to annulments, and should be repeated in any new legislation relating to their recognition. The Law Commission, and the Scottish Law Commission, have recently made recommendations in this field which, if implemented, would enable financial orders to be made by courts in Great Britain on the recognition of divorces, annulments or legal separations made in countries overseas.[373]

Retrospective effect

6.60 The final section of the 1971 Act, section 10,[374] deals, as is normal, with citation, some definitions and commencement. It also contains transitional provisions. These relate to the effect of the Act on divorces and legal separations obtained before the Act came into force. Sub-section 10(4) states generally that the Act applies to all divorces and legal separations, obtained before as well as after the commencement date. Then, in paragraph (a) the sub-section provides that recognition of, or a refusal to recognise, a divorce or legal separation has effect in relation to any time, whether before or after the Act came into force. Paragraph (b) of the sub-section provides, however, that the provisions of the Act do not affect any property rights to which a person became entitled before the commencement date; and do not apply where the validity of the divorce or legal separation has already been the subject of a decision by a competent court in the British Isles before that date. Similar provision would need to be made in respect of annulments.

Legislation: one Act or two?

6.61 There remains the question how best to give effect to our recommendations. We began by proposing that the recognition of foreign

373 Law Com. No. 117 (1982); Scot. Law Com. No. 72 (1982).

374 Section 9 of the 1971 Act related to Northern Ireland, and was repealed by the Northern Ireland Constitution Act 1973, s.41(1), Sched. 6, Pt. 1.

annulments should be governed by rules modelled on the Recognition of Divorces and Legal Separations Act 1971. In this Part of this Consultation Paper we have examined in detail the separate provisions of the 1971 Act to determine whether and to what extent they were appropriate to the recognition of annulments. We have concluded that in many cases they are appropriate as they stand; and in other cases that on grounds of general policy, rather than by reason of any quality peculiar to annulments, they should be altered in the preparation of new legislation. In the latter cases we have suggested that the 1971 Act itself ought also to be amended in relation to divorces (and, where appropriate, legal separations). Behind our observations lies our belief that the recognition of divorces, annulments and legal separations should be governed by the same rules. In our view, none of the amendments we have proposed to the 1971 Act is inconsistent with our obligations arising out of the 1970 Hague Convention.

6.62 We closed the last Part of this Consultation Paper with the thought that it might be possible to effect our principal reform simply by inserting the words "and nullity of marriage" in appropriate places in the 1971 Act.[375] It should by now be clear that we could not support this course. It would, it is true, result in the single statutory regime which we have advocated, but it would leave unchanged the defects of the 1971 Act. It seems to us that the 1971 Act requires amendment, and therefore we could not be satisfied with any course which leaves it substantially as it is today. There remain two possibilities. One is a new statute dealing primarily with annulments, applying to the recognition of annulments all the principles of the 1971 Act amended as we have proposed in this paper, but at the same time similarly amending the 1971 Act itself. The other is to repeal the 1971 Act and replace it with a single statute dealing with divorce, annulment and legal separation, applying to all those matrimonial decrees alike the general scheme of the 1971 Act, but amended in detail as we have recommended above.

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375 We did however acknowledge that this might not be the best way of achieving the objective: see para. 5.12 and fn. 276, above.

6.63 All our arguments compel us towards the second possibility. We recommend that this course be taken. We recognise however that for several reasons it might not be possible to procede directly to this desired end. It is a matter on which, among other things, the views of parliamentary counsel would need to be taken into account. We would accept for the time being the first possibility, that there should be two similar statutes, one for divorce and legal separation and the other for annulment. We would however hope that as soon as possible thereafter the two statutes could be consolidated. As we have many times repeated in this paper, a single statutory regime for the recognition of these three matrimonial decrees is sensible, practical and convenient, and therefore required.

PART VII

SUMMARY OF RECOMMENDATIONS

7.1 We conclude with a summary of the recommendations we have made and the main questions we have raised in this Consultation Paper, on which we invite views and comments.

7.2 We believe it is difficult to make any convincing argument for the preservation of the existing system of common law rules for the recognition of foreign annulments. The present common law rules are uncertain, and should be abolished and replaced by a comprehensive statutory scheme.

(paragraphs 3.8, 3.10 and 3.11)

7.3 Decrees of nullity granted in any part of the United Kingdom should be accorded automatic recognition in every other part.

(paragraph 4.5)

7.4 A united Kingdom court should be entitled to refuse to recognise the decree of another United Kingdom court on the ground of res judicata, i.e., that that matter has already been the subject matter of a decision by the court asked to recognise the decree.

(paragraph 4.6)

7.5 There should be no other ground for refusing automatic recognition to the decree of another United Kingdom court.

(paragraph 4.7)

7.6 Decrees of nullity granted in the Isle of Man and the Channel Islands should similarly receive automatic recognition in the United Kingdom.

(paragraph 4.10)

7.7 The basis for recognition of foreign nullity decrees in the United Kingdom should not be reciprocity of jurisdiction in the foreign court.

(paragraph 5.8)

7.8 The statutory rules for recognition of foreign nullity decrees in the United Kingdom should be modelled on those applicable to the recognition of foreign divorces and legal separations, contained in the Recognition of Divorces and Legal Separations Act 1971 ("the 1971Act").

(paragraphs 5.11 to 5.14)

7.9 The dichotomy between "overseas divorces" and "divorces obtained in a country outside the British Isles" contained in the 1971 Act is confusing. A two-fold classification of foreign annulments should, if possible, be avoided.

(paragraphs 6.3 to 6.6)

7.10 A foreign annulment should be capable of recognition by a United Kingdom court even if it is not obtained by means of judicial proceedings. An annulment obtained, for example, from a religious authority should not be refused recognition simply on that account.

(paragraphs 6.7 to 6.9)

7.11 Effectiveness under the law of the country in which it was obtained should be one criterion for the recognition of a foreign annulment, but not an essential one. If there are other circumstances which render the annulment deserving of recognition it should be recognised, even though it is not effective under the law of the country in which it was obtained.

(paragraphs 6.10 to 6.12)

7.12 The grounds for recognition of foreign divorces or legal separations, set out in section 3 of the 1971 Act, should apply also to the recognition of foreign annulments.

(paragraph 6.13)

7.13 In addition, the principle of the common law, that the law of the domicile is appropriate to determine a person's status, should be preserved, and recognition afforded to an annulment granted, or recognised as valid, by the court of the domicile.

(paragraphs 6.5, 6.14 to 6.28)

7.14 However, section 6 of the 1971 Act, which purports to apply to the recognition of foreign divorces and legal separations the common law rule concerning domicile, errs in principle in requiring that the divorce or legal separation should be granted, or recognised as valid (as the case may be), by the law of the domicile of each of the spouses respectively. The Domicile and Matrimonial Proceedings Act 1973, which, among other things, provides that a wife shall possess her own domicile independent of that of her husband, has altered the basis of the common law rule. Section 6 of the 1971 Act should not be applied as it stands to annulments. It should be sufficient for the recognition of a foreign annulment that it was granted, or is recognised as valid, by the law of the domicile of only one of the spouses.

(paragraphs 6.14 to 6.21)

7.15 The same rule should also apply to divorces and legal separations, and section 6 of the 1971 Act should be amended accordingly.

(paragraph 6.32)

7.16 Where an annulment is not granted by the court of the domicile, it should be recognised in the United Kingdom according to the common law principle either if the law of the domicile would have recognised it as valid at the time it was granted, or if the law of the domicile would recognise it as valid at the time the question of recognition arises in the United Kingdom.

(paragraphs 6.22 to 6.28)

7.17 Again, the same rule should also apply to divorces and legal separations, and section 6 of the 1971 Act should be amended accordingly.

(paragraph 6.32)

7.18 The fact that an annulment has been granted by the court of the country in which the marriage was celebrated should not be a ground for recognition of the annulment in the United Kingdom.

(paragraphs 6.30 and 6.31)

7.19 The grounds for recognition of foreign divorces, annulments and legal separations could be expressed as follows:

A divorce, annulment or legal separation obtained outside the British Isles will be recognised in the United Kingdom if:

(1) it is valid under the law of the country in which it was obtained, and either party to the marriage was at the time of the institution of the proceedings in that country

(a) a national of, or

(b) habitually resident in,

that country;

or

(2) it was obtained in the country in which at the time of the institution of the proceedings, either party to the marriage was domiciled;

or

(3) it would have been, at the time it was obtained, or would be, at the time the question of recognition arises in the United Kingdom, recognised as valid by the law of the domicile of either party to the marriage.

(paragraph 6.33)

7.20 Sections 4 and 5 of the 1971 Act, dealing with cross-proceedings and proof of facts, are equally applicable to annulments. In the 1971 Act these sections are applicable only to "overseas" divorces. In our view they are equally applicable to divorces - and annulments - recognised under the common law principle.

(paragraphs 6.34 to 6.36)

7.21 The Foreign Judgments (Reciprocal Enforcement) Act 1933 probably serves little useful purpose in the field of divorce and legal separations, having regard to the 1971 Act. Equally, it would probably be to a great extent redundant in relation to annulments following the implementation of our recommendations. Nevertheless, it would be difficult to disapply the Act in these fields, and it would do no harm to preserve its application. There is also other legislation under which foreign divorces and legal separations (though probably not annulments) can be recognised. Accordingly, in any future legislation regarding the recognition of foreign divorces, annulments or legal separations a provision preserving the effect of other legislation in these fields is required, and should be modelled on section 6(5) of the 1971 Act.

(paragraphs 6.37 to 6.39)

7.22 A person whose foreign divorce or annulment is recognised in the United Kingdom should be regarded thereafter as free to remarry, in the United Kingdom or elsewhere, notwithstanding that the law of that person's domicile would not recognise the divorce or annulment as valid.

(paragraphs 6.40 to 6.47, 6.51)

7.23 A person divorced, or whose marriage is annulled, in the United Kingdom should be regarded here as being free thereafter to remarry, whether in the United Kingdom or elsewhere, notwithstanding that the law of that person's domicile would not recognise the divorce or annulment as valid.

(paragraphs 6.48, 6.51)

7.24 Conversely, a person whose foreign divorce or annulment is not recognised as valid in the United Kingdom, should not be regarded here as free to remarry, notwithstanding that the law of that person's domicile would recognise the divorce or annulment.

(paragraphs 6.49 to 6.50, 6.51)

7.25 A foreign divorce or annulment recognised as valid in the United Kingdom should be given the same effect here as it would have in the country in which it was obtained, regardless of the effect which a decree, if (in the circumstances) it could have been granted here, would have had in the United Kingdom.

(paragraph 6.52)

7.26 Recognition should be refused to a foreign divorce annulment or legal separation if it is inconsistent with a previous decision of the United Kingdom court which is being asked to recognise it -

(paragraphs 6.54 to 6.56)

or with a previous decision of another court in the British Isles.

(paragraph 6.57)

7.27 Other grounds for refusing to recognise a foreign annulment should be the same as provided in section 8(2) of the 1971 Act.

(paragraph 6.58)

7.28 A United Kingdom court recognising a foreign annulment should not be required to recognise any finding of fault or any maintenance, custody or other ancilliary order, made in the annulment proceedings.

(paragraph 6.59)

7.29 A new statute relating to the recognition of foreign annulments should have the same application to annulments obtained before the coming into effect of the Act, and to decisions reached in previous recognition proceedings before the coming into effect of the Act, as the 1971 Act has in relation to foreign divorces and legal separations.

(paragraph 6.60)

7.30 New statutory rules relating to the recognition of foreign annulments could be effected

(i) by amendment to the 1971 Act so as to include annulments within its provisions, or

(ii) by a new statute relating primarily to annulments, but also amending the 1971 Act as we have recommended above, or

(iii) by repealing the 1971 Act and replacing it with a new statute covering divorces, annulments and legal separations.

The first course would perpetuate the deficiencies of the 1971 Act which we have identified, and apply them to annulments; and we therefore reject that course. The second would result in there being separate statutory regimes for the recognition of divorces and legal separations on the one hand and annulments on the other. The third is our preferred solution, since it would provide a single comprehensive statute relating to these three matrimonial decrees, applying the same principles to the recognition of each of them. We recognise that for various reasons it may not be immediately practicable to adopt this course. We would accordingly accept the second possibility, mentioned above, as a temporary expedient, hoping for a consolidation of the two resulting statutes at the earliest possible time.

(paragraphs 6.61 to 6.63)

APPENDIX A

RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS ACT 1971 (C.53)

An Act to amend the law relating to the recognition of divorces and legal separations. [27th July 1971]

Act extended (N.I.) by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(1)
Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

Whereas a Convention on the recognition of divorces and legal separations was opened for signature at the Hague on 1st June 1970 and was signed on behalf of the United Kingdom on that date:

And whereas with a view to the ratification by the United Kingdom of that Convention, and for other purposes, it is expedient to amend the law relating to the recognition of divorces and legal separations:

Decrees of divorce and judicial separation granted in British Isles

Recognition in Great Britain of divorces and judicial separations granted in the British Isles.

1. Subject to section 8 of this Act, the validity of a decree of divorce or judicial separation granted after the commencement of this section shall—

[[1]if it was granted under the law of any part of the British Isles, be recognised throughout the United Kingdom].

Overseas divorces and legal separations

Recognition in Great Britain of overseas divorces and legal separations.

2. Sections 3 to 5 of this Act shall have effect, subject to section 8 of this Act, as respects the recognition in [[2]the United Kingdom] of the validity of overseas divorces and legal separations, that is to say, divorces and legal separations which—

(a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and

(b) are effective under the law of that country.

Grounds for recognition.

3.—(1) The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained—

(a) either spouse was habitually resident in that country; or

(b) either spouse was a national of that country.

(2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)*(a)* of this section shall have effect as if the

[1]Words substituted for paras. *(a) (b)* by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(2)

[2]Words substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(2)

reference to habitual residence included a reference to domicile within the meaning of that law.

(3) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the foregoing provisions of this section (except those relating to nationality) shall have effect as if each territory were a separate country.

Cross-proceedings and divorces following legal separations.

4.—(1) Where there have been cross-proceedings, the validity of an overseas divorce or legal separation obtained either in the original proceedings or in the cross-proceedings shall be recognised if the requirements of paragraph *(a)* or *(b)* of section 3(1) of this Act are satisfied in relation to the date of the institution either of the original proceedings or of the cross-proceedings.

(2) Where a legal separation the validity of which is entitled to recognition by virtue of the provisions of section 3 of this Act or of subsection (1) of this section is converted, in the country in which it was obtained, into a divorce, the validity of the divorce shall be recognised whether or not it would itself be entitled to recognition by virtue of those provisions.

Proof of facts relevant to recognition.

5.—(1) For the purpose of deciding whether an overseas divorce or legal separation is entitled to recognition by virtue of the foregoing provisions of this Act, any finding of fact made (whether expressly or by implication) in the proceedings by means of which the divorce or legal separation was obtained and on the basis of which jurisdiction was assumed in those proceedings shall—

(a) if both spouses took part in the proceedings, be conclusive evidence of the fact found; and

(b) in any other case, be sufficient proof of that fact unless the contrary is shown.

(2) In this section "finding of fact" includes a finding that either spouse was habitually resident or domiciled in, or a national of, the country in which the divorce or legal separation was obtained; and for the purposes of subsection (1)*(a)* of this section, a spouse who has appeared in judicial proceedings shall be treated as having taken part in them.

General provisions

Existing common law and statutory rules.

[[1]**6.**—(1) In this section "the common law rules" means the rules of law relating to the recognition of divorces or legal separations obtained in the country of the spouses' domicile or obtained elsewhere and recognised as valid in that country.

[1]S. 6 substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 2(2)

(2) In any circumstances in which the validity of a divorce or legal separation obtained in a country outside the British Isles would be recognised by virtue only of the common law rules if either—

(a) the spouses had at the material time both been domiciled in that country; or

(b) the divorce or separation were recognised as valid under the law of the spouses' domicile,

its validity shall also be recognised if subsection (3) below is satisfied in relation to it.

(3) This subsection is satisfied in relation to a divorce or legal separation obtained in a country outside the British Isles if either—

(a) one of the spouses was at the material time domiciled in that country and the divorce or separation was recognised as valid under the law of the domicile of the other spouse; or

(b) neither of the spouses having been domiciled in that country at the material time, the divorce or separation was recognised as valid under the law of the domicile of each of the spouses respectively.

(4) For any purpose of subsection (2) or (3) above "the material time", in relation to a divorce or legal separation, means the time of the institution of proceedings in the country in which it was obtained.

(5) Sections 2 to 5 of this Act are without prejudice to the recognition of the validity of divorces and legal separations obtained outside the British Isles by virtue of the common law rules (as extended by this section), or of any enactment other than this Act; but, subject to this section, no divorce or legal separation so obtained shall be recognised as valid in the United Kingdom except as provided by those sections.]

S. 6 excluded by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 16(2)

Non-recognition of divorce by third country no bar to re-marriage.

7. Where the validity of a divorce obtained in any country is entitled to recognition by virtue of [[1]sections 1 to 5 or section 6(2)] of this Act or by virtue of any rule or enactment preserved by [[1]section 6(5)] of this Act, neither spouse shall be precluded from re-marrying in [[2]the United Kingdom] on the ground that the validity of the divorce would not be recognised in any other country.

Exceptions from recognition.

8.—(1) The validity of—

(a) a decree of divorce or judicial separation granted under the law of any part of the British Isles; or

[1]Words substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 2(3)

[2]Words substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(2)

(b) a divorce or legal separation obtained outside the British Isles,

shall not be recognised in any part of [[1]the United Kingdom] if it was granted or obtained at a time when, according to the law of that part of [[1]the United Kingdom] (including its rules of private international law and the provisions of this Act), there was no subsisting marriage between the parties.

(2) Subject to subsection (1) of this section, recognition by virtue of [[2]sections 2 to 5 or section 6(2) of] this Act or of any rule preserved by [[3]section 6(5)] thereof of the validity of a divorce or legal separation obtained outside the British Isles may be refused if, and only if—

(a) it was obtained by one spouse—

(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or

(b) its recognition would manifestly be contrary to public policy.

(3) Nothing in this Act shall be construed as requiring the recognition of any findings of fault made in any proceedings for divorce or separation or of any maintenance, custody or other ancillary order made in any such proceedings.

9. . . . . .

Short title, interpretation, transitional provisions and commencement.

10.—(1) This Act may be cited as the Recognition of Divorces and Legal Separations Act 1971.

(2) In this Act "the British Isles" means the United Kingdom, the Channel Islands and the Isle of Man.

(3) In this Act "country" includes a colony or other dependent territory of the United Kingdom but for the purposes of this Act a person shall be treated as a national of such a territory only if it has a law of citizenship or nationality separate from that of the United Kingdom and he is a citizen or national of that territory under that law.

[1]Words substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(2)

[2]Words inserted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 2(4)*(a)*

[3]Words substituted by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 2(4)*(b)*

(4) The provisions of this Act relating to overseas divorces and legal separations and other divorces and legal separations obtained outside the British Isles apply to a divorce or legal separation obtained before the date of the commencement of those provisions as well as to one obtained on or after that date and, in the case of a divorce or legal separation obtained before that date—

(a) require, or, as the case may be, preclude, the recognition of its validity in relation to any time before that date as well as in relation to any subsequent time; but

(b) do not affect any property rights to which any person became entitled before that date or apply where the question of the validity of the divorce or legal separation has been decided by any competent court in the British Isles before that date.

(5) Section 9 of this Act shall come into operation on the passing of this Act and the remainder on 1st January 1972.

S. 10(4) modified (N.I.) by Domicile and Matrimonial Proceedings Act 1973 (c. 45), s. 15(3)

The following provision has been omitted from the text for the reason stated below:—

s. 9 ... ... repealed by Northern Ireland Constitution Act 1973 (c. 36), s. 41(1), Sch. 6 Pt. I

APPENDIX B

MEMBERSHIP OF JOINT WORKING PARTY

*Dr. P.M. North	Law Commission
*Mr. A.E. Anton C.B.E. (until 30.9.82)	Scottish Law Commission
*Dr. E.M. Clive (after 30.9.82)	Scottish Law Commission
Mr. S.M. Cretney	Law Commission
The Hon. Lord Dunpark	Court of Session
Mr. J. Siddle	Foreign Commonwealth Offfice
Mr. P.J. Tweedale	Office of Law Reform, N. Ireland

Secretary: Mr. I.H. Maxwell, Law Commission.

*Joint Chairmen