The Law Commission

(LAW COM. No. 48)

FAMILY LAW

REPORT ON JURISDICTION IN MATRIMONIAL CAUSES

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) *of the Law Commissions Act* 1965

Ordered by The House of Commons *to be printed 1st August 1972*

LONDON

HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. Claud Bicknell, O.B.E.
Mr. Aubrey L. Diamond.
Mr. Derek Hodgson, Q.C.
Mr. N. S. Marsh, Q.C.

The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Conquest House, 37-38 John Street, Theobald's Road, London, WC1N 2BQ.

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THE LAW COMMISSION

Item XIX of the Second Programme

JURISDICTION IN MATRIMONIAL CAUSES

To the Right Honourable the Lord Hailsham of Saint Marylebone,
Lord High Chancellor of Great Britain

INTRODUCTION

1. Item XIX of our *Second Programme of Law Reform*[1], requires us to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification. The question with which this Report is concerned is: upon what basis should our courts exercise jurisdiction in matrimonial causes? We recommend that our courts should have jurisdiction to entertain proceedings for divorce, nullity, and judicial separation if either the husband or the wife is domiciled in England and Wales[2] or has been habitually resident here for a period of at least one year immediately before the proceedings are begun. No recommendations are made in relation to declarations of status, which will be dealt with in a later Report.

2. We also discuss shortly the question of "choice of law" in matrimonial proceedings, that is to say what system of substantive law, as regards grounds and bars, should the English courts apply? At present, English domestic law is applied in suits for divorce, judicial separation and other matrimonial proceedings, except where a question must necessarily be determined by reference to the relevant foreign law as, for example, where the validity of a foreign marriage is in issue.[3] Consultation has shown general support for the present position and we propose no change.

3. On 21 April 1970 we published a Working Paper[4] which canvassed the questions dealt with in this Report, other than those relating to nullity, and stated our provisional conclusions. Subsequently the Scottish Law Commission published a Memorandum[5] on the same topic, in which it reached the same provisional conclusions. Our Working Paper on *Jurisdiction in Suits for Nullity of Marriage*[6] proposed the same jurisdictional bases as those we had already proposed for divorce. Comment on the Working Papers has been full and very helpful. The provisional conclusions of the two Commissions have been shown to be acceptable to the great majority of those who responded to the invitation to comment. Consultation has revealed, in particular, wide support for:

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[1] Law Com. No. 14, 1968.
[2] For the sake of brevity, we will use the term "England" to refer to England and Wales.
[3] The choice of law rules in such situations are not considered in this Report: see para. 106 below.
[4] Working Paper No. 28, *Jurisdiction in Matrimonial Causes (other than Nullity)*.
[5] Memorandum No. 13, *Jurisdiction in Divorce*.
[6] Working Paper No. 38, published on 28 July 1971.

(*a*) enlarging the grounds of jurisdiction so as to include a residential qualification[7] additional to that of domicile;

(*b*) ending the dependent domicile of the wife; and

(*c*) basing jurisdiction on the domicile or a period of habitual residence of either spouse.

4. The new bases of jurisdiction which we recommend would, if implemented, extend the matrimonial jurisdiction of the English courts. To deal with any resulting problems of conflict between competing jurisdictions Working Paper No. 28 proposed the introduction of a discretionary power to stay English matrimonial proceedings in certain cases where proceedings in respect of the same marriage are pending in another country. The two Commissions have agreed upon a scheme for resolving conflicts of jurisdiction between different parts of the United Kingdom, which goes somewhat further by imposing a duty on the court to stay English divorce proceedings in certain circumstances. The recommendations we now make are based on our proposals and on the agreed scheme.[8]

PART I

JURISDICTION IN DIVORCE

THE PROBLEM

5. We deal first with divorce, which accounts for by far the greatest number of matrimonial causes.[9] Much of what is said about jurisdiction in divorce is also relevant to nullity of marriage and judicial separation. In the vast majority of divorce cases no jurisdictional problem arises. Both parties will be British subjects and citizens of the United Kingdom, who married in England and have been resident and domiciled in England all their married life. It is only in a minority of cases that a foreign element comes into the picture. But, with the ease of foreign travel, the increasing number of persons accepting employment abroad, the influx of permanent or temporary immigrants, and the outflow of permanent or temporary emigrants, this minority is growing with some rapidity. The question is: when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?

6. Two interests—that of the state and that of the parties—have to be borne in mind. Some states (including many European states) attach such importance to the principle of nationality that their courts assume jurisdiction on this ground alone. Nationality as a test of jurisdiction has great advantages, given a law of nationality which is suitable as a basis for jurisdiction. English law has not yet set any great store on the principle of nationality, but it is a possible

[7] There are, however, differences of opinion as to the length of the qualifying period: see paras. 43–46 below.

[8] Attention will be drawn below to a point of difference between the Commissions concerning their scheme: paras. 90–92 below.

[9] In 1971 of a total of 111,138 petitions filed in England and Wales, 110,017 were for divorce, 878 were for nullity, 211 were for judicial separation, and 32 were for other relief: *Civil Judicial Statistics for* 1971, Cmnd. 4982, p. 54.

basis of jurisdiction. Accordingly, we discuss its possible advantages below. Apart from the question of nationality, the state has a very practical interest in the exercise of matrimonial jurisdiction. If the members of a broken or separated family are so closely associated with our country that it is concerned with the welfare and financial needs of the spouses and their children and the regularisation of any subsequent unions, it may be desirable that our courts should be able to exercise jurisdiction.

7. When one considers the interests of the parties, a person would expect to be able to invoke the jurisdiction of our courts if, in layman's language, he belongs here. "Belonging" has two aspects: many people regard themselves as belonging here, because they are nationals or have their domicile here, though residing abroad almost permanently. Conversely, there are many who because of their residence "belong" here, even though they have not acquired an English domicile or United Kingdom citizenship. The job of law reform is therefore to formulate bases of jurisdiction which meet the interests of the state and of those who genuinely "belong here", without allowing access to our courts to transients, "forum-shoppers", and others with no real connection with the country. A subsidiary but important task is to ensure that the bases of jurisdiction are such that our decrees will be recognised abroad.

DANGERS TO BE AVOIDED

Proliferation of limping marriages

8. The expression "limping marriage" has been coined to describe a marriage recognised by one system of law but not by another. The exercise of divorce (and nullity) jurisdiction can in certain circumstances make a "limping marriage".[10] If a married man obtains in one country a divorce which is not recognised in another, his marriage is said to "limp": for in the first country it is dissolved, while in the second it is treated as still existing. Further, if relying on his divorce he marries again, the great majority of the countries which recognise his divorce will also recognise his second marriage, while countries which withhold recognition from his divorce will not. In such a case his second marriage "limps" as well as his first: for each of them is recognised in some countries but not in others. Views regarding limping marriages range between two extremes. The one is that they matter little and that, so long as a person's marriage is recognised where he lives, it is of no great importance if it is not recognised in other countries: the other is that they matter a great deal and jurisdictional criteria for divorce should be designed so as to encourage recognition by other countries, thereby increasing the likelihood that other countries will treat as valid the marriages entered into after divorce where one or both parties rely on the previous divorce to establish their capacity to marry again. Limping marriages create further troubles which can affect children and other dependants, since financial support, legitimacy and property rights may depend on whether or not a marriage is recognised.

9. Limping marriages arise from a variety of circumstances: for example, when the law of a country:—

[10] A "limping marriage" can be brought about in other ways with which this Report is not strictly concerned, *e.g.*, a marriage celebrated in one country but not recognised as valid in another because it lacks the necessary formality or because one or both of the parties are regarded in that country as lacking the capacity to marry.

(*a*) does not recognise the divorce abroad of its own nationals, or

(*b*) does not recognise the divorce of persons whose national law does not permit divorce, or

(*c*) withholds recognition unless the divorce would be recognised by the personal law[11] of the persons concerned, or

(*d*) withholds recognition unless there are grounds which would have enabled the persons concerned to have obtained a divorce in its own courts.

This catalogue (itself not exhaustive) suffices to illustrate that jurisdictional rules, however selected, cannot by themselves solve the problem of the limping marriage. But the size of the problem can be diminished if we refrain from exercising divorce jurisdiction on bases which are unlikely to secure recognition by other countries. At present many countries base jurisdiction on criteria that derive from residence or nationality or both. We base ours on domicile, a concept which our law has burdened with refinements of which foreign lawyers are justly suspicious. But this difference does not add to the sum of limping marriages to any great extent: the vast majority of people domiciled here are also resident here or are United Kingdom citizens, or both; and most countries recognise our divorces if the parties were residents or nationals or both, notwithstanding that our courts may have assumed jurisdiction on a basis of domicile.

Forum-shopping

10. Forum-shopping manifests itself in two ways. The first concerns situations where a party resorts to a jurisdiction (Nevada, for example) simply to obtain a divorce because divorce is easily obtained there. If English decrees were granted after only a short period of residence, then people might come here to obtain divorces—at any rate so long as the resulting divorces continued to be widely recognised. The second aspect of forum-shopping arises where there is resort to a jurisdiction not because divorce is easy, but because the financial consequences of a divorce are favourable to a petitioner. We have to be on guard lest the English law relating to ancillary relief in matrimonial proceedings should encourage petitioners to resort to the jurisdiction, not because of any sense of "belonging" to England, but because they want relief which they believe to be available here. However, too much importance should not be attached to the dangers of forum-shopping. Only a small minority of foreigners would find it possible to stay any length of time in England simply to obtain a divorce: their social responsibilities, ties of employment and expense will generally prohibit this, though the rich will never be deterred. It is possible that with the increasing mobility of people between countries the danger of forum-shopping may increase. While, therefore, it cannot be disregarded, it should not be treated as a major determinant in formulating jurisdiction rules.

THE PRESENT LAW

11. English law uses domicile for a number of purposes besides that of matrimonial jurisdiction. This Report is concerned only with its use as a basis

[11] "Personal law" is the law which governs a person's status and capacity. In common law countries it is usually the law of the domicile of the person concerned; in civil law countries, it is usually the law of the nationality of the person concerned.

of jurisdiction in matrimonial proceedings, and our recommendations leave untouched the law relating to estate duty and succession. Before the Matrimonial Causes Act 1857, matrimonial relief in England was obtainable only in the ecclesiastical courts and by private Act of Parliament. Ecclesiastical courts granted either what was called a divorce *a vinculo matrimonii*, but which was equivalent to the modern nullity, or a divorce *a mensa et thoro*, equivalent to the modern judicial separation. There was no judicial power to grant a divorce dissolving the marriage tie. A true dissolution of marriage was possible only by private Act of Parliament and the practice was to lodge a petition for this with the House of Lords. The House of Lords considered the petition only if a copy of the ecclesiastical court's sentence of divorce *a mensa et thoro* on the ground of adultery was first delivered at the Bar of the House. Accordingly, the basis of the Parliamentary jurisdiction was dependent on that of the ecclesiastical courts and this was based on residence. The Matrimonial Causes Act 1857, which gave to the English courts jurisdiction to decree dissolution of marriage, made no reference at all to the basis of divorce jurisdiction. Between 1857 and 1895 the position was uncertain. In *Niboyet* v. *Niboyet*[12] a majority of the Court of Appeal held that residence was sufficient. But in *Le Mesurier* v. *Le Mesurier*[13] Lord Watson, giving the advice of the Privy Council, said "according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage".[14] Since then this has been the accepted rule.

12. Avoiding refinements and undue technicality, it may be said that at birth a person acquires a domicile of origin, which (if he is legitimate) is the domicile of his father. A boy retains this during minority as a dependent domicile—one which he cannot change, though his parents can change it for him. On attaining full age, he can freely change his domicile by acquiring a domicile of choice, but if he at any time abandons one domicile of choice without obtaining another domicile of choice his domicile of origin revives. The position of a girl is the same, except that on marriage (including a marriage during her minority) she takes the domicile of her husband and during the marriage her domicile follows that of her husband and changes with his.[15]

13. The result of these technical rules is that a person may be regarded as domiciled in a country where he is not resident and even in a country where he has never been. A man may retain or revert to the domicile of origin which he acquired from his father, who may not have lived in that country for many years. A woman takes her husband's domicile on marriage and follows any changes he makes of it during the marriage, regardless of whether she continues to live with him. Thus, an Englishwoman married in England to a foreigner may find herself domiciled in a country to which she has never been and to which she has never belonged except by virtue of her marriage.

14. Domicile has for a long time attracted criticism: in particular, it is said that:—

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[12] (1878) 4 P.D. 1.
[13] [1895] A.C. 517(P.C.).
[14] *ibid.* at 540.
[15] For proposals to abolish the dependent domicile of married women and married minors, see paras. 32 and 34 below.

(*a*) it can be unfair to women, and

(*b*) it prevents our courts from providing relief to residents who, though they have resided here for a substantial length of time, have not acquired a domicile of choice (usually, because they intend ultimately to return to their country of origin).

There is also the uncertainty which flows from the emphasis on intention and from the complexity of the legal rules.

15. A series of statutes[16] has sought to mitigate some of the hardships of the strict application of the domicile principle to married women. Nothing has been done to help men. There are now two provisions which enable a wife to petition for divorce, although neither she nor her husband is domiciled in England:—

(*a*) The first, deriving from the Matrimonial Causes Act 1937, section 13, is now contained in section 40(1)(*a*) of the Matrimonial Causes Act 1965. This enables a wife to bring matrimonial proceedings, in cases of desertion by or deportation of the husband, if the husband was immediately before the desertion or deportation domiciled in England.

(*b*) The second, introduced by the Law Reform (Miscellaneous Provisions) Act 1949, section 1, is now contained in section 40(1)(*b*) of the Act of 1965. This enables the wife to petition for divorce where she is resident in England and has been ordinarily resident there for three years immediately prior to the commencement of proceedings,[17] despite the fact that the husband is not domiciled in England, provided that he is not domiciled in Scotland, Northern Ireland, the Channel Islands or the Isle of Man.

16. These *ad hoc* extensions of jurisdiction have produced a singularly untidy result. A wife may now petition after three years' ordinary residence, or where the husband deserted her or was deported while domiciled here, whereas a husband petitioner must be domiciled in this country, and cannot even cross-petition if his wife's residence is the only basis of jurisdiction. A wife cannot change her domicile and, unless her husband is domiciled here, must rely on the special rules referred to above in order to petition here; but her husband, if domiciled outside England, can change his domicile (and consequently his wife's domicile) by coming to England with the intention of living here indefinitely or permanently and either party can petition immediately he does so.

PROPOSALS FOR REFORM

The need for more than one basis of jurisdiction

17. The first question is whether English law should accept domicile as an exclusive basis of jurisdiction, subject to reforms designed to emancipate married women and married minors. Consultation has shown that an exclusive

[16] The legislation was reviewed in detail by Lord Wilberforce in *Indyka* v. *Indyka* [1969] 1 A.C. 33 at 98–103 (H.L. (E.)). Two wartime Acts, the Matrimonial Causes (Dominion Troops) Act 1919 and the Matrimonial Causes (War Marriages) Act 1944, are no longer operative.

[17] Part of the three years may be before the date of the marriage: *Navas* v. *Navas* [1970] P. 159.

test is no longer acceptable; and the reason is simply that, if it be the only basis of jurisdiction, it excludes a great number of people who by reason of established residence should be entitled to seek matrimonial relief in our courts. This conclusion gives rise to further questions—should domicile be retained at all as a basis of jurisdiction and, if it is, what additional basis of jurisdiction is required? The merit of domicile as a basis of jurisdiction is that it includes not only those who are permanently settled in England, but also those who, though living abroad, nevertheless have ties with England which are sufficiently durable to make it desirable for their matrimonial differences to be regulated by English law. But there are other possible bases of jurisdiction[18] which, if accepted, would achieve the same result. Consultation has led us to reject all but one of these possibilities, namely "nationality". It is a basis of divorce jurisdiction in many countries and is accepted by this country as a basis for recognition of foreign divorces.[19] In our view it is necessary to give serious attention to nationality as a basis of jurisdiction in matrimonial proceedings and as a possible alternative to domicile.

18. We conclude, therefore, that:—

(*a*) there is a need for more than one basis of jurisdiction;

(*b*) one of the bases of jurisdiction must be either domicile or nationality.

Domicile and not nationality

19. In many civil law countries nationality plays the role which in our law is played by domicile as a basis of jurisdiction in divorce. Like domicile, nationality normally indicates the type of relationship between a person and a country which makes it reasonable for the person to ask the courts of that country to determine his or her marital status and for the courts to grant the request. The vast majority of persons do have a close connection with the state of which they are nationals. If "belonging" is the test, nationality occupies a position very close to that now filled by domicile and entitled to consideration as a basis of jurisdiction.

20. Nationality has an advantage over domicile in that it is far more easily ascertained in most cases. This is largely because a change of nationality involves a public act—the governmental act of naturalisation or the celebration of a marriage. Most people know what their nationality is—which cannot always be said for domicile. It is one of the few legal concepts with which the man in the street is familiar and the only one of which he has or can easily obtain some documentary evidence—a passport. It is true that cases arise of double nationality and of statelessness, whereas according to English law every person has one, and only one, domicile. But the only disadvantage of double nationality in this context is that more than one court would have jurisdiction to dissolve the same marriage; and this has been the position in English law ever since the first statutory inroad into the domicile principle was made in 1937.[20] Cases

[18] They are discussed in Working Paper No. 28, paras. 22–35, and include juriscentre and matrimonial domicile.

[19] Recognition of Divorces and Legal Separations Act 1971, s. 3, implementing the *Hague Convention on Recognition of Divorces and Legal Separations*, (1969) Cmnd. 3991; see footnote 25 below.

[20] See para. 15(*a*).

of statelessness would only matter if nationality were the sole basis for exercising divorce jurisdiction, and they would not be a major problem if there were an alternative basis of jurisdiction such as residence.

21. Since a change of nationality by naturalisation involves the formal consent of the naturalising state, nationality can be changed less easily than domicile and forum-shopping would not be a serious problem. If, as we have suggested,[21] the concept for which the law should strive is such a relationship between a country and a person that the latter truly belongs to the former, there is much to be said for a criterion which cannot be acquired without the consent of both the person concerned and the country concerned. However, the fact that nationality is less easy to change than domicile may have the result that a person retains the nationality of a country with which all other connections have long been severed.

22. There are practical difficulties about applying any nationality test in England, for there is no such thing as English nationality or citizenship. As the law stands, it would be necessary to invoke "citizenship of the United Kingdom and Colonies", a concept which embraces not only a very large number of the indigenous inhabitants of the British Isles, but also the inhabitants of certain present or former parts of H.M. Dominions who have no other connection with this country and over whose marriages it would be totally inappropriate for England to exercise jurisdiction. This difficulty in using United Kingdom nationality as a test of jurisdiction is apparent in its application to the inhabitants of the United Kingdom itself. In the United Kingdom there are three law districts—England, Scotland and Northern Ireland, each with its own legal system and its own matrimonial law. If nationality were **of itself** a test of jurisdiction in England, it would necessarily follow that, say, Scotsmen whose connections are all with Scotland and whose proper divorce forum is Scotland would have access to the English divorce court, however inappropriate it might be for that court to assume jurisdiction. Moreover, if nationality were the test of jurisdiction throughout the United Kingdom, the citizens of each of the component parts of the United Kingdom (England and Wales, Scotland and Northern Ireland) would have a choice of three courts in which to petition for divorce and might select a court in a part with which neither party has or ever had any connection. It was for these and similar reasons that the Morton Commission rejected nationality as a general basis of jurisdiction.[22]

23. Our conclusion is that it would not be practicable to introduce citizenship of the United Kingdom and Colonies as a test of jurisdiction unless additional tests were to be superimposed in order, first, to exclude persons with no connection with England other than a common citizenship and, secondly, in order to distinguish between the jurisdictions of the several parts of the United Kingdom. Various tests could be devised, but if it is a question of linking a person to a part of the United Kingdom, we think that the best test is domicile itself. If domicile were to be the additional test, the result would simply be that

[21] See paras. 6 and 7.

[22] *Royal Commission on Marriage and Divorce*, (1956) Cmd. 9678, para. 840: it "might lead to a great deal of confusion and might be thought to usurp the jurisdiction of the other countries with which England and Scotland are associated in this relationship."

domicile would remain the basis of jurisdiction—but would be limited to individuals who are citizens of the United Kingdom and Colonies. We do not think that English domiciled persons should be denied the right to petition for divorce merely because they are not United Kingdom citizens.

24. As far as persons who do not reside in England are concerned we do not consider that nationality is a more appropriate basis of jurisdiction than domicile. The principle which should in our view be maintained in any basis of jurisdiction is that of a genuine connection between a person and a particular country. There are, broadly speaking, three categories to consider:—

(i) nationals who reside abroad but retain an English domicile;

(ii) nationals who reside abroad and who have abandoned or who never had an English domicile; and

(iii) foreign nationals who reside abroad while retaining an English domicile.

In our view the first and third case have, but the second has not, a claim to call upon the courts of England to exercise matrimonial jurisdiction. We do not, therefore, regard nationality as an acceptable basis of jurisdiction in substitution for domicile. We may add that nationality is not a basis for divorce jurisdiction in any common law country: it is not a basis in New Zealand, a unitary state, nor in Australia or Canada, each a federal state with a common divorce law, where the difficulties previously mentioned do not apply.

25. We do not accept the view that a special basis of jurisdiction should be introduced to avoid hardship to certain citizens of the United Kingdom who live abroad without having retained an English domicile. The Morton Commission recommended that English and Scottish courts should have divorce jurisdiction when the petitioner:—

(*a*) is a citizen of the United Kingdom and Colonies and

(*b*) is domiciled in a country the law of which requires questions of personal status to be determined by the law of his national state and does not permit divorce to be granted on the basis of his domicile or residence.[23]

Under this recommendation it would be possible for a United Kingdom citizen to obtain a divorce in England or Scotland if he was domiciled in, for example, Spain, but not if he were domiciled in the Republic of Ireland, where also there is no divorce. This is because Irish law refers questions of personal status to the law of the domicile (not nationality). The Commission justified this distinction on the ground that in the first case the English or Scottish divorce would be recognised in Spain, but in the second case it would not be recognised in the Republic of Ireland, and would therefore create a limping marriage.[24] However, we do not think that there is any real need to introduce a special basis of jurisdiction for persons who have left England intending to live abroad permanently. They do not fall within the principles we outlined above.

26. We are left, therefore, with domicile. Domicile has long been accepted in the Commonwealth and other common law countries, both as a basis for matrimonial jurisdiction and as an important "connecting factor" in other

[23] (1956) Cmd. 9678, para. 842.
[24] *ibid.* para. 844.

fields of law (for example the law of succession). While domicile in our sense is not the basis of jurisdiction in continental countries, it is internationally recognised as a term and as a connecting factor. Article 3 of the 1968 Hague Convention on the Recognition of Divorces and Legal Separations[25] deems the expression "habitual residence" to include domicile where a state uses domicile as a test of jurisdiction. Its advantage as a basis of jurisdiction is that it embraces the great majority of those who "belong" here including those who, for business or other reasons, spend long periods abroad. The disadvantages of domicile are:—

(i) that it does not cover some who by reason of their residence have a close connection with the country; and

(ii) that it has technical refinements, such as the dependent domicile of the married woman, which may lead to hardship.

The first disadvantage will be overcome if our later recommendations to introduce a residential basis of jurisdiction are implemented. But the technical refinements which are associated with the concept in English law call for consideration if, as we recommend, domicile is to be retained as a basis of jurisdiction.

Specific proposals for the reform of domicile as a basis of jurisdiction

(a) The wife's separate domicile

27. Although a wife's nationality no longer automatically depends on that of her husband, her domicile does. The case made for the unity of the domicile of husband and wife is, first, that their matrimonial relationship should be governed by one law and, secondly, that the rule reduces the number of law districts that might have jurisdiction to dissolve the marriage. If domicile is the sole test of jurisdiction and both parties have by law the same domicile (that of the husband), there can be only one law district having jurisdiction at any one time. However, that advantage is achieved at the expense of the wife in certain cases, as when she is living in a country different from the one in which her husband is domiciled. For example, where a woman domiciled in England marries a man domiciled abroad her domicile becomes the same as his. To enable a woman in such circumstances to seek the relief of the English courts Parliament introduced the provision,[26] to which we have already referred, that she may petition if she can show three years' ordinary residence in this country.

28. There would be no need for such special statutory provisions if a married woman could in law have her own separate domicile and could rely on it to found divorce jurisdiction in England. In our Working Paper[27] we referred to earlier attempts in this country to introduce an independent domicile for married women. While this Report was being prepared the Domicile and Matrimonial Proceedings Bill was introduced in the House of Commons as a private member's Bill.[28] Under the Bill the domicile of a married woman would have been determined independently of that of her husband for all purposes; a

[25] (1969) Cmnd. 3991; hereafter referred to as "The Hague Convention on Recognition". Effect has been given to this Convention in Great Britain, although the Convention itself has not been ratified by any country: The Recognition of Divorces and Legal Separations Act 1971, implementing Law Com. No. 34 and Scot. Law Com. No. 16 (1970) Cmnd. 4542.

[26] Matrimonial Causes Act 1965, s. 40(1)(*b*); para. 15 above.

[27] No. 28, pages 58–59.

[28] 16 February 1972.

married minor would also have had an independent domicile for all purposes. The Bill failed to receive a second reading. A Working Party set up by the Lord Chancellor in May 1971[29] to consider the possibility of giving married women an independent domicile is expected to report soon. In this Report we cannot take account of any possible changes affecting dependent domicile as a whole, though, if such changes were made, they could without difficulty take the place of our recommendations which are limited to matrimonial jurisdiction.

29. The doctrine of unity of domicile, under which the wife's domicile is dependent on that of the husband, is understandably unacceptable to many women's organisations. It is criticised as ignoring the principle of sex equality embodied in Article 16(1) of the Universal Declaration of Human Rights;[30] consistently with this criticism, the Hague Convention on Recognition expressly provides that although recognition shall be given to divorces based on domicile this does not include the wife's dependent domicile. When one turns to common law countries, one finds throughout the United States of America that a married woman may have a separate domicile for the purposes of matrimonial jurisdiction; in recent years a similar rule has been adopted by statute in a number of Commonwealth countries.[31]

30. It might be suggested that, if the law provides a residential as well as a domiciliary test of jurisdiction, there is no need to split the domicile of husband and wife. But to accept the suggestion would be to perpetuate injustice. Domicile offers jurisdiction to the expatriate who cannot meet the residential test: there is no reason why women should be denied the independent enjoyment of this benefit. Furthermore, a person who can rely on an English domicile to found divorce jurisdiction does not have to satisfy any minimum period which may be required in respect of residence as a basis of jurisdiction.[32] For these reasons, we suggest that a married woman should have an independent domicile for the purpose of jurisdiction.

31. In our view, it is a necessary consequence of establishing an independent domicile for married women that a person domiciled in England should be entitled to petition the English court for divorce on the basis of his or her own domicile. If the English court's divorce jurisdiction based on domicile were limited to cases where **both** spouses were domiciled here, either spouse could, by a change of domicile, prevent the other spouse from petitioning for divorce; this would be unacceptable. The English court should also have jurisdiction when the respondent is domiciled in England. The case for basing jurisdiction on the

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[29] See *Sixth Annual Report* 1970–1971, Law Com. No. 47, para. 65; (1971) H.C.32.

[30] See the observations of Lord Denning M.R. in *Gray (orse. Formosa)* v. *Formosa* [1963] P. 259 at 267 (C.A.): "Now what is the reason for that rule, you may ask. It is the old notion that in English law a husband and wife are one: and the husband is that one. That rule has been swept away in nearly all branches of the law. At this very moment Parliament is sweeping away one of the remaining relics: it is allowing a husband and wife to sue one another in tort. The one relic which remains is the rule that a wife takes her husband's domicile; it is the last barbarous relic of a wife's servitude".

[31] *E.g.*, Australia (Matrimonial Causes Act 1959–66, s. 24), New Zealand (Matrimonial Proceedings Act 1963, s. 3) and Canada (Divorce Act 1968, s. 6(1)). The Law of Domicile Act 1970 of Kenya allows the wife an independent domicile of choice for all purposes: see s. 8(3) and (4). See also the recommendations in the *First Report of the Private International Law Committee*, (1954) Cmd. 9068, para. 18, and of the *Royal Commission on Marriage and Divorce*, (1956) Cmd. 9678, para. 825.

[32] See paras. 43–46 below.

connection with England of either the petitioner or the respondent is argued below in relation to residence[33] and what is said there is also relevant to domicile. As with residence, it has to be accepted that not all divorces based on domicile (especially the domicile of the petitioner alone)[34] will necessarily secure recognition in all foreign countries. But the number of such divorces will be small, and it is not possible to legislate so as to ensure one hundred per cent recognition abroad of our decrees.

32. *We accordingly recommend that:—*

(*a*) for the purpose of divorce jurisdiction[35] the domicile of a married woman should be determined independently of that of her husband; and

(*b*) the English courts should have jurisdiction in divorce if either the petitioner or respondent is domiciled in England at the commencement of the proceedings.

(*b*) *The married minor's domicile*

33. The question of the married minor also requires consideration. Part I of the Family Law Reform Act 1969, implementing the recommendation of the Latey Committee,[36] has reduced the age of majority from 21 years to 18 years, and all persons (other than married women) are able to acquire an independent domicile at the age of 18. The effect of our recommendation[37] would, of course, be to allow married women of 18 and over to acquire an independent domicile for the purpose of matrimonial relief. But, in addition, there are strong arguments for allowing any married minor to acquire an independent domicile for that purpose.[38] Sixteen, not eighteen, is the age at which a valid marriage can be contracted and, although it is true that parental or other consent is still required between the ages of 16 and 18, the marriage is valid in the absence of such consent and it is possible to contract a marriage without obtaining it.[39] It seems anomalous to allow a minor to contract a valid marriage but to deny him or her the power to acquire an independent domicile for the purposes of founding jurisdiction to dissolve that marriage.[40] Some Commonwealth countries, which by statute have allowed married women to acquire an independent domicile, have expressly provided that where they are minors their

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[33] See paras. 38 and 39 below.

[34] Under the *Hague Convention on Recognition*, (1969) Cmnd. 3991, a divorce based on the habitual residence or domicile of the petitioner does not have to be recognised by Contracting States, unless the residence or domicile has continued for more than one year, or the parties last habitually resided together in the granting country, or the petitioner was a national of the granting country: Articles 2(2) and (3).

[35] This recommendation is extended below to jurisdiction in nullity of marriage and judicial separation.

[36] *Report of the Committee on the Age of Majority*, (1967) Cmnd. 3342, Part I and paras. 499–504.

[37] Para. 32(*a*) above.

[38] For proposals to abolish the dependent domicile of married minors, see para. 28 above.

[39] The Latey Committee say "we feel it is desirable that any loopholes by which those under 18 can circumvent the need for consent should be closed": Cmnd. 3342, para. 504. This is a matter which we are examining in relation to our study of the Law of Marriage. The loopholes can certainly be narrowed but it is doubtful whether they can be closed completely: see the Law Commission Working Paper No. 35, *Solemnisation of Marriage in England and Wales* (June 1971).

[40] The question will rarely arise because under English law a divorce is not obtainable until the marriage has lasted for three years unless the court gives leave to petition earlier on the ground of exceptional hardship to the petitioner or of the respondent's exceptional depravity: Matrimonial Causes Act 1965, s. 2. But when it does arise it will be important.

domicile shall be determined as if they were adults.[41] Without this extra provision the married girl's domicile might remain dependent on that of her parents. But to allow a girl to acquire an independent domicile and to deny that right to a boy would introduce a novel sex discrimination. We, therefore, conclude that all married minors should be able to acquire a domicile independent of that of their parents' domicile.[42]

34. *Accordingly, we recommend* that the domicile of a married minor of either sex should, for the purposes of divorce jurisdiction, be determined as if he or she were an adult. We appreciate that this recommendation goes further than those of the Latey Committee. But we do not think that there is any conflict of policy. The Committee indicated that they had received little evidence on the question of domicile.[43] They dealt with it very briefly, and were concerned only with what the age should be for obtaining the power to change domicile. They were not concerned with and did not discuss the effect of marriage on domicile.

(*c*) *Domicile of origin*

35. In the course of consultations it was also suggested that while domicile might in most instances be a proper jurisdictional test, there is another case, apart from the domicile of dependence, where domicile does not necessarily establish any true connection between a party and a country, namely the domicile of origin. This, as we have seen,[44] can be a person's present domicile, notwithstanding that he may have no present connection with the country concerned and may never have set foot there in his life. In such a case, it is said that it is unreasonable for the English courts to exercise jurisdiction and to expect other countries to recognise the validity of a divorce granted here, and that if they do so they are likely to create a limping marriage. There is force in these arguments, but whereas the conferring upon married women and minors of a right to a separate domicile involves no alteration of the basic elements of the law of domicile, the abolition of the domicile of origin would do so. To recommend a fundamental change in the law of domicile in a Report dealing with the limited field of matrimonial jurisdiction would be to encourage confusion. It would be tantamount to recommending the co-existence of two concepts of domicile, one for matrimonial jurisdiction and one for the rest of the law. Fortunately, although the wife's domicile of dependence is not accepted by the recent Hague Convention on Recognition, the domicile of origin is. Hence, any countries which adopt the Convention will not be entitled to refuse to recognise our divorces because the domiciliary connection is a domicile of origin. Accordingly, we make no recommendations concerning the domicile of origin.

The additional basis of residence

37. We have already stated our view that there is a need for a further basis

[41] See, *e.g.*, s. 3(1) of the New Zealand Matrimonial Proceedings Act 1963, and s. 6(1) of the Canadian Divorce Act 1968.

[42] This further step has been taken in New Zealand by s. 22 of the Guardianship Act 1968: "The domicile of a minor who is or has been married shall be determined as if the minor were an adult."

[43] (1967) Cmnd. 3342, para. 499.

[44] Paras. 12 and 13 above.

of jurisdiction in addition to domicile.[45] The reason for this view is that domicile, while meeting the needs of two groups of persons, those who live in England with the intention of remaining here indefinitely and those who, though abroad, regard England as their ultimate home and intend to return to live here, fails to meet the needs of a third group, namely, those who have been living in England for some time but who have not formed an intention to remain here indefinitely. The problem is to determine how best to ensure that these people's presence in England is of the duration and nature that entitles them to invoke the matrimonial jurisdiction of our courts. Clearly, a residential qualification could do the job. Yet to base jurisdiction simply on the residence of the parties or of one of them would be unacceptable, since residence may be little more than transient presence. To allow courts to dissolve a marriage on this basis could lead to forum-shopping on a substantial scale. The problem is to find a means of defining a type of residence which can fairly be regarded as providing a sufficiently close connection with this country to justify the assumption of jurisdiction. Three questions arise:—

(*a*) Should the required residence be that of the petitioner, the respondent, either or both of them?

(*b*) What kind of residence should be required?

(*c*) What period of residence should be required?

(*a*) *Whose residence?*

38. There can, in our view, be no doubt that the residential connection of the respondent with England should suffice to give the English court divorce jurisdiction. A respondent cannot complain if the petitioner chooses to sue where he is resident. This basis of jurisdiction is recognised by the Hague Convention on Recognition (even without any period of residence being required).[46]

39. However, we think it is essential that the petitioner should be able to found jurisdiction on the basis of his or her own residential qualification. For if the respondent's residence were necessary in all cases in which jurisdiction is founded on a residential qualification, this would enable the respondent to deny relief to the petitioner by shifting his home to a distant country where the petitioner has not the means to follow; or by taking refuge in a country like Spain or the Republic of Ireland where there is no divorce; or by simply disappearing. So far as women are concerned, these situations are avoided by the present jurisdiction rules which allow a wife petitioner (but not a husband) to rely, in certain circumstances, on her own residence in England as a basis of jurisdiction.[47] It is true that if the residence of the petitioner suffices there may be a risk of forum-shopping. But this risk is present under the existing law and it can be substantially reduced by requirements as to the nature and duration of the residence.[48] A further risk is that if jurisdiction is exercised on the basis of a petitioner's residence, a non-resident respondent may be divorced in England on a ground which, perhaps, was not a ground for divorce by his or

[45] Paras. 17 and 18 above; nationality was considered as a possible alternative to domicile in paras. 19–25 above.
[46] *Hague Convention on Recognition*, (1969) Cmnd. 3991, Article 2(1).
[47] Para. 15 above.
[48] Paras. 40–46 below.

her personal law.[49] But this can also occur under the present English law[50] and has to be accepted as a lesser hardship than denying relief to a petitioner who has established the required residential links with this country. *We therefore recommend* that jurisdiction should be based on the residence of either the petitioner or the respondent. This was generally accepted by those who commented on the Working Papers.

(*b*) *Nature of residence*

40. What kind of residence should be regarded as establishing a sufficiently close connection with this country to justify the assumption of divorce jurisdiction? The residential basis of jurisdiction is to serve the needs of those who have come to live in this country without becoming domiciled here. It should not be enough for a person to have made his occasional residence in a place but, on the other hand, a residence should not be excluded because the person in question has occasionally gone away for business or pleasure. In other words, the residence which, in our view, establishes "belonging" for the purpose of jurisdiction—

(*a*) may continue despite limited periods of absence; and

(*b*) is more than occasional or casual residence, whatever the period.

41. English matrimonial law has since 1949 accepted the need of a residential basis for the exercise of matrimonial jurisdiction where a wife is the petitioner and the husband is domiciled outside the British Isles. The test required is that the wife be "ordinarily resident" for three years,[51] and has worked well. It has been construed so as to require the kind of connection with this country which we think important.[52] However, in the Working Paper, we proposed that for the future the test for jurisdiction in divorce and other matrimonial causes should be that of "habitual residence" for a period. "Habitual residence" is an expression which is now commonly used in international conventions, including the Hague Convention on Recognition. It has already found a place in our legislation,[53] and has been used by the courts in their discussion of problems of jurisdiction and recognition.[54] There would be advantages for the future, and confusion might be avoided, if a uniform test were adopted throughout the field of family law as far as possible, provided that the test connotes the kind of residential connection with a country which we regard as necessary to establish matrimonial jurisdiction.

42. We think that "habitual residence" connotes this kind of connection. It is clearly distinguishable from domicile, a necessary element of which is a

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[49] "Personal law" is explained in footnote 11 above.

[50] The respondent could also be ordered to pay maintenance to the petitioner and be deprived of the custody of the children under present law, either in divorce or other matrimonial proceedings.

[51] See now Matrimonial Causes Act 1965, s. 40(1)(*b*); see also Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 1(2) and (3).

[52] *Stransky* v. *Stransky* [1954] P. 428 is a good illustration of what we have in mind: The wife was held to have been ordinarily resident in England for three years. During that time she maintained a flat in London where the spouses had previously lived; for 15 months of the relevant period she had lived in Germany where the husband was working.

[53] Administration of Justice Act 1956, s. 4; Wills Act 1963, s. 1; Adoption Act 1968, s. 11; Recognition of Divorces and Legal Separations Act 1971, ss. 3(1) and 5(2).

[54] *Indyka* v. *Indyka* [1969] 1 A.C. 33 *per* Lord Reid at 68 (H.L. (E.)); *Angelo* v. *Angelo* [1968] 1 W.L.R. 401, 403.

particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence.[55] The Council of Europe Fundamental Legal Concepts emphasise the factual elements of residence and habitual residence:[56]

> "Rule 7. The residence of a person is determined solely by factual criteria, . . . Rule 9. In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence."

The meaning of habitual residence seems to us to be similar to that of ordinary residence.[57] To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence. It has to be conceded that whatever term is used for the purpose of matrimonial jurisdiction, it will lack sharp definition and give rise to some difficult cases. Nevertheless our view remains the same as that which was put forward in the Working Paper, and which was generally accepted by those consulted—that "habitual residence" is the appropriate term. We now turn to consider what period of habitual residence should be required.

(*c*) *Length of residence*

43. In Working Paper No. 28 we proposed that the required period of habitual residence should be one year. We took the view that if either party, or *a fortiori*, both, had habitually resided in England for twelve months or more a sufficiently close connection with England had been established. This, however, was the one point on which there was any substantial volume of disagreement amongst those we consulted. Although the majority of those who commented either expressly favoured a period of one year or did not dissent from it, there was a substantial minority, including some judges, who thought it was too short and who favoured two or even three years. It is clear that any period selected is necessarily arbitrary. Our objective is to choose a period which will distinguish between those who have and those who have not a sufficient connection with this country. We set out below the arguments in favour of a longer period than one year and those in favour of one year.

Arguments for a longer period than one year

44. (i) A period as short as one year might take in people such as the diplomatic representative, the engineer on a contract, the trainee waiter and the foreign student, whose connections with this country were not necessarily sufficiently close for their marriage and its breakdown to be a matter of real and substantial interest to this country. When we enter the Common Market increased mobility of labour between

[55] This does not mean that evidence of intention is irrelevant; it may throw light on particular facts and emphasise a person's degree of connection with a country.

[56] Council of Europe, *Committee on Legal Co-operation, Fundamental Legal Concepts* (C.C.J. (70) 37); see Resolution (72) 1 of the Committee of Ministers of the Council of Europe of 18 January 1972.

[57] See *Levene* v. *Commissioners of Inland Revenue* (1927–28) 13 T.C. 486, where Rowlatt J. at 493 said that ordinary "means ordinary in the sense that it is habitual". That was a tax case; we would not necessarily wish to import into the family law field all decisions on the meaning of residence for tax purposes.

ourselves and Europe will be inevitable and the numbers of such persons will increase.

(ii) Divorces based on a period of residence as short as one year would run the risk of being refused recognition abroad, particularly in Commonwealth countries,[58] though in the light of the *Hague Convention on Recognition of Divorces and Legal Separations*[59] there may be changes coming.

(iii) Since our divorce law is less restrictive as regards grounds and more liberal in respect of financial provision than that of some other countries, forum-shopping would be encouraged by a period as short as one year.

(iv) Hardship could be caused to a respondent who might be faced with a divorce petition in a country with which he had no connection whatever; the expense might be so great as effectively to prevent him from defending, and an unscrupulous petitioner could thereby exert unfair pressure over ancillary matters, such as custody and maintenance. Such a situation must be accepted where the petitioner has a substantial connection with England, but should not be allowed to arise if the connection is merely one year's residence.

Arguments for one year

45. (i) No period, and certainly not a period of two or three years (which are the only other periods shown in consultation to have any support) can be sufficiently long to be sure of excluding the people referred to in paragraph 44(i).

(ii) It is unrealistic to suppose that people will be able and willing to reside here for over one year merely in order to take advantage of our divorce and legal aid facilities. Few people will be able to afford to do so without obtaining work, and this is not always possible. Those who, without any intention of living here, can yet afford a year's residence here to obtain a divorce, will find better bargains elsewhere as long as so many other countries grant divorces on a considerably shorter period of residence.

(iii) *The Hague Convention on the Recognition of Divorces and Legal Separations*[60] recognises the respondent's habitual residence as a basis of jurisdiction without imposing any period. It also recognises one year's habitual residence of the petitioner as the appropriate period. This period was finally adopted after lengthy debate and discussion, which suggests something approaching a consensus that it is the right period.

Conclusion

46. Having considered these arguments, we remain of the view that persons who have been habitually resident here for one year have established a sufficient

[58] See *e.g.* the Australian Matrimonial Causes Act 1959–1966, s. 95 and the New Zealand Matrimonial Proceedings Act 1963, s. 82(1)(*b*) (two years' continuous residence in country granting divorce required for recognition).

[59] (1969) Cmnd. 3991.

[60] (1969) Cmnd. 3991; the Convention has been given effect to in Great Britain—the Recognition of Divorces and Legal Separations Act 1971, but has not yet been ratified.

connection with this country for the purpose of divorce jurisdiction. The period of one year has the support of the majority of those who commented on the Working Paper and has the analogy of the *Hague Convention on the Recognition of Divorces and Legal Separations*. No other period has any comparable support—or comparable analogy. *Accordingly, we recommend* the period of one year's habitual residence as a basis of jurisdiction.

(d) Summary of recommendations concerning residence

47. The English courts should have jurisdiction, in addition to that based on domicile, if either the petitioner or the respondent (or both) has been habitually resident in England throughout the period of one year immediately preceding the commencement of the divorce proceedings. This ground of jurisdiction should supersede the special grounds now available to a wife under section 40(1) of the Matrimonial Causes Act 1965,[61] namely where she has been deserted by the husband[62] or where he has been deported or where she has been resident in England for three years.

Cross-petitions and further petitions

48. Where a wife petitions for divorce relying on one of the special bases of jurisdiction provided by section 40(1) of the Matrimonial Causes Act 1965 her husband cannot, as the law now stands, cross-petition.[63] This difficulty would be largely solved by our recommendations, since the domicile or habitual residence for a year of either the petitioner **or** the respondent would become a basis of jurisdiction. One problem which remains would arise where the basis of jurisdiction disappears (by a change in domicile or residence) after a petition had been filed. Once proceedings for which there is jurisdiction have been started, a respondent with grounds should, in our view, be able to cross-petition either for divorce, nullity or judicial separation, and the petitioner himself should be able to apply for leave to present a further petition. It is unsatisfactory that parties should be denied the opportunity of so doing since, in effect, this prevents the court from considering all the issues between the parties. *We therefore recommend* that where the court has jurisdiction to entertain proceedings for divorce it should, notwithstanding any change in the domicile or habitual residence of the parties after the institution of the proceedings, have jurisdiction to entertain further proceedings (whether by way of further petition, cross-petition or prayer contained in an answer) for divorce, nullity or judicial separation, begun by either party to the marriage while the first proceedings are pending.[64] Our recommendation is extended below[65] to proceedings for nullity and judicial separation.

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[61] See above para. 15; as regards s. 40(2) see paras. 107–108 below.

[62] There may be a few rare cases where a wife who could petition under section 40(1)(*a*) will be excluded from petitioning under our recommendations, because she has no independent domicile in England and has not been habitually resident here for one year.

[63] *Levett* v. *Levett* [1957] P. 156; *Russell* v. *Russell and Roebuck* [1957] P. 375.

[64] This principle is accepted by Article 4 of the *Hague Convention on Recognition* and by section 4 of the Recognition of Divorces and Legal Separations Act 1971.

[65] Paras. 62 and 66 below.

PART II

JURISDICTION IN NULLITY

THE NEW APPROACH

49. The broad approach to the question of jurisdiction in nullity should, we suggested in our Working Paper,[66] be much the same as in divorce: the relief offered by the English courts should be available only to those who "belong" here. The reason is that, despite their theoretical differences, the consequences of nullity and divorce have been largely assimilated: each type of proceeding marks the end of a marriage and may be followed by proceedings concerned with children, property and financial support. Consultation shows support for this approach. Accordingly, our recommendations are founded on two basic premises. They are:—

(*a*) The fact that, in the eyes of English law (including its rules of conflict of laws leading to the application of a foreign law), a marriage is invalid should not **in itself** be sufficient to confer upon the English courts jurisdiction to annul it unless the persons concerned or one of them can be said to "belong" here.

(*b*) One or both parties to a marriage should be sufficiently connected with England, in the sense of "belonging", to make it right and proper for the English court to pronounce a judgment which finally determines their status in a way which is binding on the world, and to exercise its powers to deal with all the ancillary questions, including arrangements for their children, their financial provision and the distribution of their property.

THE PRESENT LAW

50. A decree of nullity may be of two types. It may affirm that the marriage in question was void *ab initio*, or it may annul a marriage which previously was voidable. The practical difference is that in the former case the marriage, having always been void, can be disregarded without any court order being necessary,[67] whereas in the latter the marriage is regarded as valid until formally annulled at the suit of one of the parties and the decree does not operate retrospectively.[68] Another difference is that in the case of a marriage alleged to be void anyone with a sufficient interest can petition, even after the death of one or both of the parties to the void marriage, though such cases are extremely rare. Where English domestic law governs the validity of the marriage, section 1 of the Nullity of Marriage Act 1971[69] states the grounds on which a marriage is void,[70] and section 2 the grounds on which it is voidable[71].

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[66] No. 38. *Jurisdiction in Suits for Nullity of Marriage*, 28 July 1971.

[67] But a Superintendent Registrar of Marriages may require a court decision before issuing a subsequent marriage licence permitting a person to remarry.

[68] Nullity of Marriage Act 1971, s. 5, which removes the vestiges of the retrospective effect of a decree of nullity of a voidable marriage.

[69] This implemented our *Report on Nullity of Marriage* (Law Com. No. 33); (1970) H.C. 164.

[70] *i.e.*, because the parties are within the prohibited degrees or either was under age, because essential formalities of the Marriage Acts 1949 to 1970 were not observed, because one party was already married or because the parties were not of opposite sexes.

[71] *i.e.*, because of incapacity to consummate, wilful refusal to consummate, absence of consent, mental disorder, venereal disease, or pregnancy by another man.

Where the validity of a marriage would fall to be determined by reference to a foreign law the Act does not preclude determination by that foreign law.[72] In other words, the question whether a marriage is void, voidable or wholly valid may still fall to be determined by a foreign law.

51. When the English court grants a decree of nullity, English law treats the decree as a universally binding decision as to the parties' status. This is so whether the marriage is regarded as void (in which case the decree conclusively determines an existing status) or whether it is regarded as voidable (in which case the decree conclusively changes the existing status). Moreover, in either case the court can exercise all the powers it has on granting a decree of divorce to award financial provision, whether in the form of periodical payments, lump sums, or re-allocation of capital, and to make orders relating to the custody and maintenance of children of the family.[73] In both these respects the effect of a nullity decree is identical with that of a decree of divorce.

52. Nevertheless, the present bases of jurisdiction in respect of divorce, on the one hand, and nullity on the other are very different. In the case of divorce they are at present very restrictive; except as provided in section 40(1) of the Matrimonial Causes Act 1965, the parties must be domiciled in England at the institution of the suit. In the case of nullity, however, they are relatively lax. It appears that the English courts have jurisdiction in the following cases:—

(*a*) Where at the institution of the suit both parties[74] are or either[75] is domiciled in England, or where both parties[76] are or the respondent[77] is resident in England.

(*b*) Under section 40(1) of the 1965 Act, which applies to nullity as well as to divorce,[78] in the case of proceedings by a wife:—

(i) where she has been deserted[79] by her husband or he has been deported and he was, immediately before the desertion or deportation, domiciled in England; or

(ii) where she is resident in England and has been ordinarily resident there for three years immediately preceding the commencement of

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[72] s. 4(1).

[73] Matrimonial Proceedings and Property Act 1970, ss. 2–4.

[74] *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641 (H.L. (Sc.)).

[75] As regards petitioner's domicile, see *White* v. *White* [1937] P. 111 (as explained in *De Reneville* v. *De Reneville* [1948] P. 100 at 113, 117 (C.A.)); *Mehta* v. *Mehta* [1945] 2 All E.R. 690. As regards the respondent's domicile, there is no clear English authority, but see *Ross Smith* v. *Ross Smith* [1963] A.C. 280 at 323 (H.L. (E.)); *Johnson* v. *Cooke* [1898] 2 I.R. 130 and *Aldridge* v. *Aldridge* 1954 S.C. 58. And if, as appears, the respondent's residence suffices it would be anomalous if his domicile did not. Where the marriage is voidable, the parties will necessarily have the same domicile since under English law a wife has the same domicile as that of her husband. Where the marriage is alleged to be void and the 'wife' petitions on the basis of her separate domicile, there is the logical difficulty that her domicile depends on the very matter in controversy, *viz.*, on whether the marriage is void or not, but the courts assume in her favour that she will establish her case: *White* v. *White* [1937] P. 111, and see *Garthwaite* v. *Garthwaite* [1964] P. 356 at 392, *per* Diplock L.J. (C.A.).

[76] *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115 (C.A.); *Ross Smith* v. *Ross Smith* [1963] A.C. 280 at 310, 317, 347–348 (H.L. (E.)).

[77] *Ross Smith* v. *Ross Smith, supra* at 323; *Garthwaite* v. *Garthwaite* [1964] P. 356 at 390 (C.A.). Residence of the petitioner alone does not suffice: *De Reneville* v. *De Reneville, supra.*

[78] See para. 15 above.

[79] It may be that this can have no application where the marriage is alleged to be void since, if there is no marriage, it is difficult to see how there can be legal desertion.

the proceedings and the husband is not domiciled in any part of the British Isles.

(*c*) In a case where it is alleged that the marriage is **void,** where the marriage took place in England.[80]

53. The reason for the marked difference between the grounds of jurisdiction for divorce and those for nullity is historical.[81] Nullity (like judicial separation) was a remedy available in the ecclesiastical courts; divorce, in the sense of a total dissolution of marriage, was unknown to those courts and could be obtained only by Act of Parliament. In 1857 matrimonial jurisdiction was transferred to the civil courts. In all suits, other than those for divorce, the civil courts were directed to exercise matrimonial jurisdiction on the same principles as had been applied in the ecclesiastical courts. As the ecclesiastical courts had assumed jurisdiction in those suits on the basis of residence the civil courts did likewise.[82] In divorce, a new remedy, the civil courts were free to lay down their own grounds of jurisdiction and they ultimately adopted the criterion of domicile. The anomalous consequence is that, although both decrees determine or change the status of the parties and give rise to the like power to award ancillary relief, the grounds of jurisdiction are quite different.

Criticism of the existing law

54. The two principal criticisms that we make of the existing law have already emerged, namely, that a relatively slight connection with this country may suffice to found jurisdiction in nullity and that there is no longer any justification for differentiating between jurisdiction in nullity and jurisdiction in divorce. There is a further criticism: the present jurisdiction rules are absurdly discriminatory. If the remedy sought is a decree of nullity of a voidable marriage, the wife's domicile is by law the same as that of her husband and she cannot, therefore, rely on an independent domicile as a basis of jurisdiction. Yet, if the case be that the marriage is not voidable but void, the wife has her own domicile. Finally, section 40(1) of the Matrimonial Causes Act 1965 is available only to a wife petitioner.[83] These anomalies illustrate the lack of uniform principle in the law as it now is.

The Morton Commission recommendations

55. If the principle of "belonging" and the case for equating nullity with divorce jurisdiction are accepted, it must be recognised that we shall be formulating proposals very different from those which found favour with the Morton Commission,[84] whose approach to reform was based on drawing a distinction

[80] *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayor* v. *De Barros* (1877) 3 P.D. 1; *Linke* v. *Van Aerde* (1894) 10 T.L.R. 426; *Hussein* v. *Hussein* [1938] P. 159; *Hutter* v. *Hutter* [1944] P. 95 at 102; *Padolecchia* v. *Padolecchia* [1968] P. 314. In *Ross Smith* v. *Ross Smith* [1963] A.C. 280 (H.L. (E.)) the House of Lords held that the place of celebration did not suffice if the marriage was voidable; they were equally divided on whether it sufficed if the marriage was void, and it would be open for the House of Lords to overrule the Court of Appeal on this point.

[81] Para. 11 above.

[82] Para. 52(*a*) above.

[83] Para. 52(*b*) above.

[84] *Royal Commission on Marriage and Divorce,* (1956) Cmd. 9678.

for purposes of jurisdiction between void and voidable marriage. Where a marriage was alleged to be void, the Morton Commission would have abandoned even the degree of "belonging" inherent in residence and would have conferred jurisdiction if the petitioner was either domiciled or merely present in the country at the time of the proceedings. They argued by analogy from the fact (which is beyond doubt) that:—

> "if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limitations upon the power of the court to make a declaration as to the nullity of the marriage, which will be binding on the parties themselves".[85]

56. The reasoning is, however, false because there is no true analogy. The fact that the question of the validity of a marriage can arise as an incidental issue in other proceedings where its determination binds **only those who are parties to the action** can be no sufficient reason why our courts should be empowered to make decrees *in rem* which are binding on those who are not parties.[86] If, for example, the question arises whether X qualifies to take a legacy under an English will as 'the wife of Y', the executors of the estate will have to be satisfied that she is married to Y. If they are in doubt they may refer the matter to a court, whose decision will bind only those who are parties to the court proceedings. The decision will not bind anyone else—not even X unless she is made a party. Nor should it. Only if X or Y has an adequate connection with England should our courts be entitled to make a final judgment *in rem* regarding the validity of their marriage.

57. But the recommendation itself is open to serious criticism, quite apart from the fallacious reasoning employed to sustain it. First there is the risk of forum-shopping which arises from basing jurisdiction on mere presence in England. The Morton Commission sought to meet this difficulty by proposing that the issues should be determined in accordance with the parties' personal law, in which case there would be no point in a person coming to England when he could obtain his remedy locally.[87] This argument ignores the fact that England is unusually generous in allowing financial relief to be awarded on the grant of a decree of nullity even if it is in respect of a void marriage. In some countries, including Scotland, there is no such power on the grant of any nullity decree and this has in fact led to attempted forum-shopping in England.[88] If a domiciled Scot merely had to cross the border to be able to petition in England, every wife whose marriage was void under Scottish law would petition in England if she wanted to claim maintenance.[89]

58. But there are greater difficulties in the Morton Commission proposal than the risk of forum-shopping. As far as marriages governed by English domestic law are concerned, the Nullity of Marriage Act 1971 makes it clear which

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[85] Para. 882.

[86] The Court of Appeal in *Garthwaite* v. *Garthwaite* [1964] P. 356 took the same view, see especially *per* Diplock L.J. at 395, 396.

[87] Para. 883.

[88] See, *e.g.*, *Inverclyde* v. *Inverclyde* [1931] P. 29; *Ross Smith* v. *Ross Smith* [1963] A.C. 280 (H.L. (E.)).

[89] And, if a similar rule as to jurisdiction were adopted in Scotland (as the Royal Commission recommended), every English husband would petition in Scotland in order to avoid having to pay maintenance.

grounds make a marriage void and which voidable.[90] But this applies only to marriages taking place after the commencement of the Act (1 August 1971). As regards marriages celebrated before that date, there is some doubt[91] whether absence of consent rendered a marriage void, or voidable only (as under the Act). Hence, if jurisdiction varied according to whether the marriage was void or voidable, there would be uncertainty for some time. Where the question of the validity of the marriage depended on a foreign law, and in particular on civil law the position would be far worse. Our *Report on Nullity of Marriage*[92] pointed out that in some civil law countries a marriage once formally celebrated cannot be disregarded until it has been set aside by a judicial decree.[93] Although many such marriages would be described as void by lawyers of those countries,[94] they may not be void according to our test of whether they can be disregarded without a formal decree.[95] Jurisdiction in respect of such marriages would depend on the view taken by the English court of the effect of the foreign law. The doubt and possible expense which could ensue from different bases of jurisdiction should, if possible, be avoided. There are also objections in principle to distinguishing between nullity of void and voidable marriages, or between nullity and divorce, since, as we have seen,[96] the essential effects of each type of nullity decree are identical to those of a divorce decree.

59. For all these reasons we reject the Morton Commission recommendations relating to jurisdiction in petitions for nullity of a marriage alleged to be void. We find nothing in their analysis to lead us to abandon the two premises upon which our approach to reform is based, namely, that the nullity jurisdiction of the English courts should be available only to those who "belong" here and should be equated with jurisdiction in divorce. We do agree with the Morton Commission recommendation that the basis of jurisdiction in respect of a voidable marriage "should be governed as far as possible by rules similar to those which regulate the divorce jurisdiction of the court" because "[i]n its effect on the personal status of the spouses the annulment of a voidable marriage has the same effect as the dissolution of a valid marriage".[97] Our view is that void marriages should be treated in the same way.

The place of celebration of the marriage

60. If our two premises[98] are accepted as the foundation of reform, it is

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[90] ss. 1 and 2 respectively.

[91] See Tolstoy (1964) 27 M.L.R. 385. The uncertainty is illustrated by the successive editions of *Halsbury's Laws of England*; in the first and second editions it was stated that lack of consent due to duress made a marriage void but the third edition (Vol. 12 at p. 225) states that it made it voidable.

[92] Law Com. No. 33 (1970), para. 4.

[93] *e.g.*, in Germany even a bigamous marriage cannot be disregarded without a decree: Cohn, *Manual of German Law*, Vol. I (2nd ed. 1968), paras. 487–489; see also Vol. II (2nd ed. 1971), para. 8.73.

[94] Apparently German lawyers would regard a bigamous marriage as 'void' despite what is said in footnote 93: *ibid.* Under Italian law (Civil Code, art. 128) a bigamous marriage is stated to be void but has the effect of a valid marriage, until formally annulled, with respect to any spouse who contracted it in good faith.

[95] *cf. De Reneville* v. *De Reneville* [1948] P. 100 (C.A.), where jurisdiction depended on whether French law rendered the marriage void or voidable "in the sense of the words as understood in this country" (at p. 115).

[96] Para. 51 above.

[97] (1956) Cmd. 9679, para. 892.

[98] Para. 49 above.

necessary to consider the rule that, where a marriage is alleged to be void, the English court may exercise nullity jurisdiction if the marriage was celebrated in England irrespective of where the parties are domiciled or resident. The fact that the parties married here does not of itself imply that either of them has or had any real connection with England; nor does it mean that English law will determine whether the marriage is void, since it is the law of the domicile at the date of the marriage which determines their capacity to marry. The only substantial argument for retaining this basis of jurisdiction is that the marriage may be void due to lack of essential formalities,[99] in which event the question would be governed by English internal law as the law of the place of celebration. Such cases rarely arise in practice. However, a substantial number of those who commented on Working Paper No. 38 thought that the English court is the natural forum for determining the formal validity of a marriage celebrated here. Nevertheless, our view is that a decree of nullity, with the court's wide powers to award financial provision, to transfer property and to deal with the custody and welfare of children, would be inappropriate where the only connection of the parties with this country was that the marriage was celebrated here;[100] the connection is wholly past and far too slight in itself. After further consideration our view remains that this basis of jurisdiction should not be preserved.

RECOMMENDATIONS

61. *We therefore recommend* that the English courts should have jurisdiction to annul a marriage, whether void or voidable, if either the petitioner or the respondent—

(*a*) is domiciled in England at the commencement of the proceedings, or

(*b*) has been habitually resident in England throughout the period of one year immediately preceding that date,

and that for this purpose the domicile of a married woman[1] should be determined independently of that of her husband, and that of a married minor should be determined as if he or she were an adult. If either party to the marriage dies (or if both die) before proceedings for nullity of marriage are commenced *we recommend* that the English court should have jurisdiction if that party (or either) was domiciled in England at death or had been habitually resident in England throughout the period of one year preceding the death, in addition to any jurisdiction which can be founded on the domicile or habitual residence for one year of the survivor.

62. It follows from these recommendations that the simple residence of both parties or of the respondent alone should no longer be a basis of jurisdiction, and that the fact that the marriage was celebrated in England should no longer give the English courts jurisdiction in respect of a void marriage. *We recommend* that these common law bases of jurisdiction and the bases under section 40(1)

[99] Nullity of Marriage Act 1971, s. 1(*a*)(iii); Marriage Act 1949, ss. 1, 2, 25, 49. See the Law Commission Working Paper No. 35, *Solemnisation of Marriage in England and Wales*, paras. 118–120.

[100] In Australia jurisdiction to annul a marriage on the sole ground that it was celebrated in Australia was expressly abolished in 1959: Matrimonial Causes Act 1959–1966, s. 23(5).

[1] Where the marriage is void the wife's domicile does not, under present law, become dependent on that of her husband; this recommendation therefore affects only those cases where the marriage is alleged to be voidable.

of the Matrimonial Causes Act 1965 be abolished. Our earlier recommendation concerning jurisdiction to entertain further proceedings (para. 48) should also apply where proceedings for nullity of marriage are pending.

PART III

JURISDICTION IN JUDICIAL SEPARATION AND OTHER MATRIMONIAL PROCEEDINGS

JUDICIAL SEPARATION

63. The English court has jurisdiction to entertain proceedings for judicial separation:—

(*a*) where both parties are domiciled in England;[2]

(*b*) where both parties[3] are, or the respondent alone[4] is, resident[5] in England;

(*c*) in the case of proceedings by a wife, where the wife has been deserted by the husband or where the husband has been deported from the United Kingdom and the husband was, immediately before the desertion or deportation, domiciled in England.[6]

Ground (*a*) was introduced by judicial decisions as part of the development of the concept of domicile as a basis for matrimonial jurisdiction. Ground (*b*) was the ground on which the ecclesiastical courts exercised jurisdiction which was transferred by statute to the Divorce Court.[7] Ground (*c*) was first introduced by the Matrimonial Causes Act 1937, section 13 to enable a wife, who could not bring herself within ground (*a*) or (*b*) because her husband had left England and changed his domicile, to bring matrimonial proceedings including proceedings for judicial separation. Thus, in the case of judicial separation, unlike divorce, the courts were never shackled to the concept of domicile as the sole basis of jurisdiction.

64. The main reasons for preserving the remedy of judicial separation are that it provides relief, where grounds exist, for those who have religious or conscientious objections to divorce;[8] and that it provides relief during the first three years of marriage, when divorce is not usually available. Judicial separation is today regarded as the equivalent of divorce for those who cannot or do not want to sever the marriage tie. Although a decree does not change the partners' marital status, it declares their status with binding force and affects their mutual obligations. On granting a decree the court has the same powers as on a divorce to make orders for financial provision and relating to the custody and maintenance of children of the family. All the factors which we considered relevant to

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[2] *Eustace* v. *Eustace* [1924] P.45.
[3] *Graham* v. *Graham* [1923] P.31.
[4] *Sinclair* v. *Sinclair* [1968] P. 189, 199 (C.A.).
[5] Continuous presence is not essential; a party, though physically abroad, may be regarded as still resident in England: *Sinclair* v. *Sinclair*, above.
[6] Matrimonial Causes Act 1965, s.40(1)(*a*).
[7] Matrimonial Causes Act 1857, s.22; Supreme Court of Judicature (Consolidation) Act 1925, s.32.
[8] *Royal Commission on Marriage and Divorce*, (1956) Cmd. 9678, para. 303.

jurisdiction in divorce are equally relevant to judicial separation. The English court should, in our view, have jurisdiction in judicial separation in any case where it would (apart from the three year bar) have jurisdiction in divorce. All the recommendations in paragraphs 32, 34 and 46 above should therefore extend to judicial separation.

65. There are, however, two bases for jurisdiction in petitions for judicial separation which are not covered by our recommendations concerning divorce, namely, the residence of both parties in England and the residence of the respondent alone in England. Although in Working Paper No. 28[9] we proposed that in the case of judicial separation the respondent's residence in England should continue to be a basis of jurisdiction in addition to the bases recommended for divorce, on further consideration our view has changed. At one time judicial separation was applied for as a means of obtaining maintenance on a more generous scale than was available in the magistrates' courts, but now an alternative remedy is available for this purpose.[10] It is our view that there are now no grounds on which to draw any distinction between divorce and judicial separation for the purpose of jurisdiction.

66. *We therefore recommend* that the court should have jurisdiction to hear proceedings for judicial separation if either the petitioner or the respondent is domiciled in England at the commencement of the proceedings or has been habitually resident in England throughout the period of one year immediately preceding that date. For this purpose the domicile of a married woman should be determined independently of that of her husband and that of a married minor should be determined as if he or she were an adult. The existing common law and statutory jurisdiction founded on residence should cease to apply. Our recommendation concerning jurisdiction to entertain further proceedings should apply in the case of proceedings for judicial separation (para. 48 above).

Declarations

67. We are leaving for later consideration the question of jurisdiction in proceedings for declarations as to status under section 39 of the Matrimonial Causes Act 1965 or under the Rules of the Supreme Court, Order 15, rule 16. Our reason is that the present law relating to declarations, including in particular the relationship between proceedings under section 39 and those under Order 15, is in need of comprehensive review. Jurisdiction in respect of declarations cannot be sensibly considered until this is done. We, therefore, propose to deal in a separate Working Paper with the whole problem of declarations in family law, including the question of jurisdiction.

Neglect to Maintain

68. Under section 6 of the Matrimonial Proceedings and Property Act 1970 a wife (and in some circumstances a husband) may apply for periodical payments

[9] Para. 87.
[10] Matrimonial Proceedings and Property Act 1970, s.6 (replacing a provision first introduced by the Law Reform (Miscellaneous Provisions) Act 1949): see para. 68 below.

if the other spouse has wilfully neglected to provide reasonable maintenance for her or for a child. Section 6(2) provides that "the court shall not entertain an application under this section unless it would have jurisdiction to entertain proceedings by the applicant for judicial separation". Our recommendations concerning judicial separation[11] would, by virtue of section 6(2), be applied to applications under section 6, and the bases of jurisdiction which have been abolished for judicial separation would also be abolished for section 6. In particular, the residence of the respondent (or of both parties) would no longer be sufficient for applications under section 6. However, the remedy under section 6 does not effect the status of the parties; nor does the section confer the same powers to deal with property as a court has on granting a decree of judicial separation.[12] We regard it as important that the less extensive form of financial support provided by the section should be available even though neither party has established a connection with this country sufficient to give the court jurisdiction in divorce, nullity or judicial separation. *We therefore recommend* that the residence[13] of the respondent at the commencement of the proceedings should remain a basis of jurisdiction for section 6 applications, in addition to the bases already recommended for divorce, nullity and judicial separation.

Variation of Maintenance Agreements

69. Under sections 13-15 of the Matrimonial Proceedings and Property Act 1970 the court is empowered to vary the financial arrangements made in a maintenance agreement during joint lives or after the death of one spouse. During the lifetime of both parties the court has jurisdiction under section 14 if each of the parties is either domiciled or resident in England.[14] Where a maintenance agreement provides for the continuation of payments under the agreement after the death of one of the parties, the court under section 15 has jurisdiction to vary it if that party died domiciled in England.

70. We do not recommend any change in the present bases of jurisdiction. Nor do we think that there would be any advantage to be derived from introducing an independent domicile for married women or married minors until such time as proposals to give them an independent domicile for all purposes[15] can be implemented.[16]

Presumption of Death and Dissolution of Marriage

71. Under section 14 of the Matrimonial Causes Act 1965 a spouse may petition the court to presume that the other party to the marriage is dead and to dissolve the marriage. Although such a decree may not be technically a divorce, it

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[11] See para. 66 above.

[12] Under s.6(6) of the Matrimonial Proceedings and Property Act 1970 the court may order lump sum or periodical payments, but not transfers or settlements of property.

[13] For the meaning of "residence" see *Sinclair* v. *Sinclair* [1968] P.189, 199; this basis will be relied on only in cases where neither spouse is domiciled in England or has been habitually resident here for one year.

[14] s.14 implemented Law Com. No. 25, paras. 94-96. Prior to the 1970 Act the court had jurisdiction only when both parties were domiciled or both were resident in England.

[15] Including purposes of succession; the devolution of personal property is governed by the law of the domicile.

[16] See para. 28 above.

77. Accordingly, our Working Paper made proposals to introduce a new discretionary power to stay English matrimonial proceedings when proceedings in respect of the same marriage are pending in another country.[26] We also proposed that the petitioner in the English proceedings should be under a duty to disclose in the petition any proceedings relating to the marriage of the parties pending elsewhere.[27] Consultation has revealed general support for these proposals. The matrimonial proceedings which should, in our view, be subject to the discretionary power are those for divorce, nullity of marriage or judicial separation or for a declaration as to matrimonial status. In deciding whether to impose a stay the court should be given a wide discretion to decide what is fair, having regard to all relevant factors, such as the connection of the parties or the marriage with either forum and any delay, expense or inconvenience involved in taking parties or witnesses to another forum.

78. *We therefore recommend* that where matrimonial proceedings of the kinds referred to above are pending in England and—

(*a*) other proceedings relating to the same marriage are continuing in a country outside England, and

(*b*) the court considers that the balance of fairness, including convenience, as between the parties to the marriage is such that it would be appropriate for those other proceedings to be disposed of first,

the court should have power in its discretion to stay the English proceedings.[28] The discretion should be exercisable either on the application of a party or of the court's own motion.[29] Once the trial of the main issues in the English proceedings has begun there should, with one exception,[30] be no further power to stay those proceedings. However, a party should be permitted to contest jurisdiction without losing the opportunity to apply for a stay and a preliminary trial on a question of jurisdiction ought not therefore to bring to an end the court's discretionary power to stay the English proceedings.

79. To ensure that the court has before it all the information necessary to enable it to consider whether to exercise its discretionary power to stay proceedings, *we recommend* that a special statutory duty be imposed on the petitioner[31] in English matrimonial proceedings to disclose proceedings outside England (whether in the British Isles or abroad) relating to or affecting the marriage in question; if the court is satisfied that a breach of duty has been committed by the petitioner it should be able to exercise its discretionary power to stay the English proceedings by reference to the proceedings which were not disclosed even after the trial of the main issues in the English proceedings has begun. In addition, *we recommend* that rules of court should extend to all

[26] Working Paper No. 28, paras. 67 and 68. This power would not affect the powers referred to in the preceding paragraph.

[27] See now Matrimonial Causes Rules 1971, rule 9(1) and (3) and Form 2(9). We recommend below that this requirement be given greater force by the imposition of a statutory duty on the petitioner, breach of which would entail a special sanction: para. 79 below.

[28] Where the English proceedings are for more than one kind of relief, *e.g.*, for divorce and nullity, the court should have power to stay part only of the English proceedings if it thinks fit.

[29] Working Paper No. 28, p. 34, footnote 59.

[30] Para. 79 below.

[31] Including the petitioner in cross-proceedings.

parties to English matrimonial proceedings the provision, at present applicable only to the petitioner,[32] requiring disclosure of other proceedings in England or elsewhere in respect of or affecting the marriage.

80. In some countries matrimonial proceedings, including proceedings for divorce and legal separation, are brought before an administrative body.[33] In our view it would in certain cases be appropriate to require such proceedings to be disclosed to the English court.[34] It does not follow that the court would necessarily exercise its discretion to stay English proceedings by reference to the foreign proceedings, but there might be cases where it would consider a stay appropriate, having regard to the balance of fairness as between the parties. *We therefore recommend* that the duty to disclose and the court's discretionary powers should, where appropriate, be extended to proceedings which are not proceedings in a court.

Stay as of right in respect of conflicting proceedings within the British Isles

81. Our Working Paper canvassed at some length the possibility of laying down stricter rules to avoid conflicts of jurisdiction between England and other parts of the British Isles.[35] At that time we were unable to propose a workable scheme for this purpose. After further consideration the two Law Commissions are agreed in recommending that, in the event of a divorce suit proceeding in England or Scotland at a time when a divorce or nullity suit is pending elsewhere in the British Isles, the English or Scottish court should, in certain circumstances, be under an obligation to stay its divorce suit. In the course of consultation, the President of the Family Division informed the Law Commission that, in his view, inter-United Kingdom conflicts could be effectively resolved by the exercise of a discretionary power to stay. Appreciating, however, the importance attached in Scotland to the need for an obligatory stay, he indicated that he would accept such a stay, provided that one party asked for it and that the law was so formulated that the law district with which the marriage was most closely connected was the one in which the proceedings were allowed to continue.[36] There are powerful arguments, which we set out below, in favour of an obligatory stay in certain circumstances: but the most important reason for recommending one is the necessity for uniform rules[37] in England and Scotland. Accordingly, *we recommend* that, in certain circumstances, a stay as of right should be available to a party to an English divorce suit when divorce or nullity proceedings are also in being in another part of the British Isles.

82. The arguments for a stay as of right are as follows. First, such conflicts between different law districts of the British Isles are likely to be more numerous and, when they occur, more embarrassing judicially than conflicts between

[32] Matrimonial Causes Rules 1971, rule 9(1), Form 2(9).
[33] Sometimes the administrative hearing is preliminary to proceedings in a court.
[34] See the Recognition of Divorces and Legal Separations Act, 1971 s.2(*a*).
[35] Working Paper No. 28, paras. 70-80. Unlike the system we now recommend, which operates when proceedings are pending in two countries, the rules proposed in the Working Paper were designed to prevent proceedings being started in one country while proceedings were pending in another country in respect of the same marriage.
[36] See paras. 85-92 below.
[37] The difference of opinion to which we have referred (see paras. 90-92 below) does not, in our view, detract from the substantial uniformity between the English and Scottish recommendations.

English and foreign proceedings. Secondly, legal advisers and their clients are entitled to a greater certainty in the law that determines their choice of forum within the British Isles than a mere discretionary power to stay can give. A wrong choice may well lead to delay, additional expense for the parties and embarrassment for the court. Finally, in considering whether to exercise its discretionary powers of stay, the degree of connection between the parties to the marriage and a particular forum is only one of several factors to which the court may have regard in assessing the balance of fairness; but as between parts of the British Isles we regard it as important that in a case of competition the country most closely connected with the marriage should exercise jurisdiction.

83. Our recommendations are made on the assumption that they will be implemented simultaneously with the parallel recommendations made by the Scottish Law Commission. They are not, however, limited to cases where matrimonial proceedings are pending in England and in Scotland, but apply uniformly where there are proceedings in England and proceedings in any other part of the British Isles. We believe this approach is desirable to reduce the effect of conflicts of jurisdiction, even if reciprocal provision is not made in any of those other countries[38] (apart from Scotland). We hope that the competent authorities in those countries will consider whether to adopt similar rules to those we recommend.

84. The objective of the recommendations we now put forward is to state clearly which of two or more competing forums within the British Isles is to continue to exercise matrimonial jurisdiction in respect of a particular marriage and which proceedings are to be stayed. The stay would operate as of right, and without reference to the court's discretion, thus avoiding the uncertainties referred to above.[39] The main issues to be decided in connection with the stay are: the factors indicating priority of jurisdiction; the kind of proceedings which should be involved in the stay; and whether the stay should be imposed by the court of its own motion or only if a party to the marriage applies for it.

(*a*) *The selection of the factors*

85. Priority of jurisdiction should, in accordance with the principle stated above, go to that country most closely connected with the marriage, that is to say the country to which the marriage might be said to "belong". If a petitioner who is entitled to proceed in, say, England is nevertheless to have his proceedings stayed, he should know with certainty the circumstances in which his right will be statutorily curtailed. The advantage of a precise rule is that it eliminates over the area of its operation the uncertainty inherent in a rule where the decision to stay depends entirely on the court's discretion. But there are further advantages: the parties know which of two possible forums will be regarded as having priority and that, in the absence of agreement between them, proceedings brought in the inappropriate forum would run the risk of being stayed should there be concurrent proceedings in the proper forum.

86. In cases of conflict between England and another part of the British Isles it has to be assumed that a basis of jurisdiction exists in both countries, that is

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[38] Northern Ireland, the Channel Islands and the Isle of Man.
[39] Para. 82 above.

to say that one or other spouse is either domiciled or has the necessary residential qualification in each country at the time each of the two sets of proceedings is commenced. One has, therefore, to seek some further connecting factor to indicate that proceedings should be permitted to continue in one country rather than the other. It seems to us that a very important factor is the place where the spouses last resided together. However, since the last residence together in a country may have been very short, we regard it as important to add the further requirement that one of the parties should have been habitually resident in that country for a minimum period of one year prior to the separation. Our selection is admittedly arbitrary, but the Scottish Law Commission as well as ourselves think that this requirement, combined with that of the place of the last residence together, provides a reasonable criterion for the exercise of jurisdiction when the conflict is between two British law districts, each of which in fact has jurisdiction.

(b) The proceedings subject to the stay

87. Conflicts of jurisdiction are most likely to arise where divorce proceedings in England are in conflict with divorce proceedings in another part of the British Isles. Where the conflict is between divorce proceedings and nullity proceedings, ordinarily the nullity should take precedence over the divorce, for if there is no marriage there can be no dissolution. Our view is, therefore, that subject to the necessary requirements being fulfilled English divorce proceedings should be stayed in favour of divorce or nullity proceedings pending in another part of the British Isles.

88. We considered whether the stay should apply to English nullity proceedings where proceedings for divorce or nullity are pending in another part of the British Isles. As it is usually appropriate for nullity proceedings to take precedence over divorce proceedings, we do not consider that a nullity suit in England should be subject to a stay as of right in favour of divorce proceedings. Where the conflict is between nullity proceedings in England and in another part of the British Isles, conflicts of jurisdiction can arise under the present law since nullity jurisdiction is based on either domicile or residence; in practice this has not given rise to any problems. Our view is, therefore, that nullity proceedings in England should not be subject to the stay as of right in favour of proceedings in another part of the British Isles. If appropriate, the court could use its discretion to impose a stay of English nullity proceedings exercising the discretionary power recommended earlier.[40]

89. As far as proceedings for judicial separation and declarations as to matrimonial status are concerned, the existing bases of jurisdiction can, in theory, give rise to conflicts of jurisdiction between England and other parts of the British Isles. But in fact few, if any, such conflicts arise and there have been no difficulties in practice; the changes of jurisdiction which we have recommended for judicial separation are not likely to cause any great increase in conflicts between such proceedings in England and matrimonial proceedings in another part of the British Isles. Our view is that proceedings for judicial separation and declarations should not be subject to the stay as of right, but should, where conflicts arise, be considered by the court under its discretionary power.[40]

[40] Para. 78 above.

(c) Should the court have power to impose the stay of its own motion?

90. A further question is whether the court should impose the stay of its own motion[41] or whether the stay should operate only on the application of a party to the marriage. This is the principal point of which we take a different view from the Scottish Law Commission.

91. The Scottish Law Commission's view is that the stay as of right should operate "*ex proprio motu*", that is to say on the initiative of the court, whether or not a party applies for it. Their arguments are that, unless the duty to take the initiative is imposed upon the court, there will be cases in which parties will fail to apply for the stay. In the event of such a failure, there would be not only the embarrassment and expense of concurrent litigation in the two countries, but also the risk that the effective decree would be given not by the court of the country most closely connected with the marriage, but by the court which was the first to reach a decision. Further, if the court is under a duty in specified circumstances to impose a stay, parties and their legal advisers will be careful not to bring their case in the "wrong" court.

92. Our approach, however, begins with the recognition that the problem is not one of jurisdiction but of ensuring justice to a respondent. The problem arises only because both countries have jurisdiction—if the parties cannot agree on the choice of forum, a decision must be made for them. If, therefore, proceedings are in being in two countries and one party seeks a stay in one country, it appears to us just and consistent with the thinking on which our approach to the overall problem of jurisdiction is based, that proceedings should be allowed to continue in the country which is most closely connected with the marriage and not in the other country. On the other hand, if a party prefers to take no further step in his proceedings outside England and is content to allow the English court (which has jurisdiction) to determine the issues between him and his spouse, we think it right to allow the English divorce proceedings to continue, even if England is not the country most closely connected with the marriage. Moreover, we think that in practice there is unlikely to be any difference between a stay on application by a party and one imposed by the court: the petitioner in one set of proceedings is likely to be the respondent in the other proceedings and in the vast majority of cases he would take advantage of the stay provisions to ensure that his own proceedings were successfully concluded first. In any event, the fear that the respondent might apply for a stay would act as a disincentive to a petitioner bringing proceedings in the "wrong" forum, that is to say not in the country most closely connected with the marriage.

93. *Our recommendations are* that the English court should be under an obligation to stay divorce proceedings[42] on the application of a party to the marriage at any time before the beginning of the trial (other than a trial as to jurisdiction) if—

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[41] As in the case where the court has discretionary power to impose a stay: see para. 78 above.

[42] If the English proceedings are for more than one kind of relief, *e.g.*, divorce and nullity, the stay as of right should be limited to the divorce.

(*a*) proceedings for divorce or nullity in respect of the same marriage are continuing in another part of the British Isles, and

(*b*) the parties last resided together in that part, and

(*c*) either party to the marriage had been habitually resident in that part throughout the period of one year immediately preceding the date on which the spouses last resided together.[43]

In order to prevent conflicts of jurisdiction arising in the transitional stage, we further recommend that if, when our recommendations concerning jurisdiction come into force, proceedings for divorce or nullity are pending in another part of the British Isles, the English court should not while those proceedings are pending have jurisdiction to entertain divorce proceedings in respect of the same marriage. It is unnecessary to make any separate recommendations about the duty of parties to disclose proceedings in another part of the British Isles, as this is already covered by our earlier recommendations.[44]

Removal of a stay of English matrimonial proceedings

94. Where English matrimonial proceedings are stayed under either of the powers we have recommended, by reference to proceedings in another country, the purpose of the stay is to enable those other proceedings to be disposed of first. Therefore, if those other proceedings have been stayed or concluded or if there has been unreasonable delay in prosecuting them, *we recommend* that the English court, on application, should have power in its discretion to discharge the stay of the English proceedings. If the other proceedings have ended in a decree of divorce or nullity, that will normally conclude the matter in issue in the English suit. Even so there may be outstanding questions of costs to be determined; as these may concern parties other than the spouses, *we recommend* that any party to the English proceedings should be able to apply for the removal of the stay.

95. *We further recommend* that once a stay as of right imposed on English divorce proceedings has been discharged, no further stay of that kind should be imposed on those proceedings. The court's power to impose a further discretionary stay should continue to be exercisable,[45] whether or not a discretionary stay or a stay as of right has been imposed previously and discharged.

Ancillary orders

96. When a discretionary stay is imposed by reference to proceedings in a country outside the British Isles it is unnecessary to make any specific provision to deal with ancillary orders. All these matters can be considered by the court at the time it imposes the stay, in the exercise of its powers to deal with ancillary matters on the application of a party. It would have regard to the nature of the foreign proceedings and any orders made by the foreign court or powers exercisable by it, but there is no need to make any recommendation to cover this. During the operation of the stay the English court would be in the same

[43] Alternatively, where the parties were still residing together in that part on the date when the English proceedings were commenced, if either party habitually resided in that part for a period of one year preceding that date.

[44] Para. 79 above.

[45] After the trial has begun the discretionary power of stay is exercisable only in special circumstances: see paras. 78–79 above.

position as if the stay had been granted under its existing powers (for example, where a party failed to comply with an order concerning security for costs).

97. A different position arises where a discretionary stay or a stay as of right of English matrimonial proceedings is imposed under our recommendations by reference to proceedings in another part of the British Isles. Here, we think, special provisions are needed to deal with ancillary orders made in the English proceedings,[46] in order to ensure so far as possible that everything is dealt with in the country where proceedings are continuing. Our consideration of ancillary orders is limited to cases where both courts normally have power to make them: in effect, to cases where English proceedings for divorce, nullity or judicial separation are stayed by reference to proceedings in another part of the British Isles for divorce, nullity or judicial separation.

98. In proceedings of those kinds the English court has power to make certain ancillary orders before the beginning of the trial. These powers may, in general, be exercised at any time up to the determination of the suit and in some cases orders made under the powers may continue in force thereafter.[47] The interim orders which may be made include an order for maintenance pending suit, or for maintenance or custody of or access to a child, or an order prohibiting the removal of a child out of the jurisdiction (that is to say England), or an order directing one spouse to leave the matrimonial home or not to molest the other spouse. Clearly all these orders should not automatically lapse upon the imposition of a stay, for unless the other court had already made an order there would be a hiatus during which no order would be in force. This may not always matter since an order, when made, could sometimes operate retrospectively, but the absence of an order might be crucial in other cases, as where the order is not to molest a spouse or not to remove a child out of the jurisdiction.

99. On the other hand, provided that the parties were given sufficient time to make the necessary application to the other court, there would, with one exception referred to below, be advantages in the automatic lapse of English ancillary orders at the end of a specified period. Thereafter, the possibility of concurrent conflicting orders would disappear. We think that the period of three months would be adequate for this purpose: any longer period would tend to defeat the object in view, namely the concentration of the proceedings with all ancillary matters in one court. In the interim period the English court should not normally make any new ancillary order of the types outlined above. This would be an extra encouragement to the parties to transfer all ancillary matters to the other court. However, the English court would have its ordinary powers to enforce vary or discharge orders which remain in force, and, in case an emergency situation should arise, the English court should, we think, have power to make ancillary orders and to grant an extension of the period of three months.

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[46] We are not here concerned with orders made under s.17 of the Married Women's Property Act 1882 or under the Matrimonial Homes Act 1967, as these are made in independent proceedings.

[47] Where a stay is granted after decree (*i.e.*, under the recommendation in para. 79) additional powers are exercisable; but the orders cannot come into effect until the decree is made absolute: Matrimonial Proceedings and Property Act 1970, s.24(1).

100. If the court in the other country made an ancillary order either before the stay of the English proceedings or during the three months, then provided that order dealt with the same subject matter as any English order, we think the English order should cease to have effect. For example, once an order of the other court dealing with interim maintenance for the spouse had come into effect, an English order dealing with interim maintenance for the spouse should automatically lapse; but if the English order also dealt with the custody or maintenance of a child this part of the order should remain in force until the other court dealt with custody of that child (in which case the English custody order should lapse) or maintenance of that child (in which case the English maintenance order should lapse).

101. One type of order which we consider should be excluded from any provisions as to lapse is an injunction ordering one spouse not to molest the other spouse or to stay out of the matrimonial home. On the other hand, an injunction restraining a person from removing a child out of England or out of the custody, care or control of another person should lapse at the end of three months, whether it is part of a custody order or is a separate order, and the English court should not make any further order of this nature, except in an emergency. It should, however, lapse when the other court makes a custody order.

102. *We therefore recommend* that when English proceedings for divorce, nullity or judicial separation are stayed because proceedings for divorce, nullity or judicial separation in respect of the same marriage are continuing in another part of the British Isles[48]:—

(*a*) All orders for financial provision (for example, maintenance pending suit) and orders concerning children (for example, maintenance, custody, access, education) should lapse after three months or upon an order of the other court in respect of the same subject matter coming into force, whichever first occurs.

(*b*) Subject to (*c*) below, the court should not make any order for financial provision or concerning children during the three month period or thereafter save to enforce an existing order or to vary or discharge an order.

(*c*) In an emergency the court should be able to make an order during the three month period and to extend that period, but not beyond the date on which any order in respect of the same subject matter made by the other court comes into force.

(*d*) Except in an emergency the court should not grant any injunction relating to the removal of a child from England or from the custody of any person; any injunction of this kind already in force should lapse after three months unless extended in an emergency.

(*e*) Other injunctions, such as those restraining one spouse from molesting the other, should not be affected by the stay.

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[48] These recommendations apply only where the stay is granted in relation to other proceedings in the British Isles under either of the stay powers recommended earlier and not when the court exercises any staying powers it may have under present law. For this reason it is important that the order imposing the stay should state expressly that it is made under the statutory powers.

CHOICE OF LAW

103. There is a further question which we discussed in the Working Paper: should English courts continue to apply English domestic law in divorce proceedings despite the fact that the marriage was a foreign one and that the personal laws of the parties are foreign? While the husband's domicile in England was the only basis upon which English courts assumed divorce jurisdiction, the question whether the petitioner's or the respondent's personal law should be applied could not arise. The law of the forum was English, the law of the domicile was English and the personal law of the husband (and therefore of the wife) was English. When section 13 of the Matrimonial Causes Act 1937 introduced a basis of jurisdiction wider than domicile (permitting a deserted wife whose husband is not domiciled in England to sue in certain circumstances), it was silent on whether the English courts should apply English law or the law of the husband's domicile. It was generally assumed that English law would be applied and in *Zanelli*[49] the Court of Appeal confirmed this assumption by holding that a deserted wife whose husband (and therefore she also) was domiciled in Italy, where there was no divorce, was able to petition for divorce in England, although the question whether English law should be applied was not directly argued.

104. When we proposed the further extension of the bases of jurisdiction it was necessary to examine whether in proceedings for divorce English law should continue to be applied to the exclusion of foreign law.[50] There are likely to be many complexities involved in the search for the "proper law" of a marriage where the case contains a foreign element. Even in an undefended case there may be additional expense: for example, an expert may have to be called to prove the foreign law. While it is true that a choice of law principle, which means in effect that the personal law will be applied whatever the forum, should discourage forum-shopping, its complexities and expense may deter not only the "forum-shopper" but also others who are justified in resorting to our courts.

105. It is our strongly held view that practical considerations should prevail and that, notwithstanding the theoretical arguments to the contrary, the grounds of, and defences to, a divorce suit heard in this country should continue to be those of English law: consultations showed this view to have widespread support. Of course, it does not follow that consideration of other laws is totally ignored in divorce proceedings. In determining whether there is a marriage to dissolve both the law of the place of celebration (as regards formalities) and the personal laws of the parties (as regards capacity) will be relevant. In deciding whether the respondent's conduct is such that the petitioner cannot reasonably be expected to live with him, the "mores" of the parties' foreign community may possibly have to be considered. The effect of a foreign decree may be relevant to desertion.[51] But in deciding what are the grounds for divorce and what are the defences or bars to the grant of a decree, English courts should, in our view, continue to apply English domestic law. The reasons given for this conclusion apply equally to proceedings for judicial separation and to the matrimonial proceedings dealt with in Part III. Here, too, the grounds for and

[49] *Zanelli* v. *Zanelli* (1949) 64 T.L.R. 556.
[50] For further discussion, see Working Paper No. 28, paras. 81–84.
[51] *Tursi* v. *Tursi* [1958] P. 54.

defences to the proceedings should continue to be governed exclusively by English domestic law.

106. Different considerations apply in those cases of nullity where the object of the suit is to determine whether a married state has ever been created. If the marriage has been celebrated abroad the validity of the marriage *qua* formalities must, almost inevitably, depend upon the law of the place of celebration. If the parties are foreigners their personal law (whether that be regarded as the law of their domicile or the law of their nationality) must decide whether they have capacity to marry or to marry each other. We leave for later discussion in a separate Report the difficult question of what foreign law should be chosen to determine questions regarding the validity, formal and essential, of marriages which, because of some foreign element as to the place of celebration or the parties' domicile, cannot be governed exclusively by English domestic law.

107. Our conclusions are, therefore, that the extension of the existing bases of jurisdiction in matrimonial proceedings does not require any change in the rules under which English domestic law applies to all proceedings for divorce, judicial separation and other proceedings, apart from nullity. We would, however, draw attention to two enactments: section 14(5) of the Matrimonial Causes Act 1965,[52] which applies to proceedings for presumption of death and dissolution of marriage, and section 40(2)[53] of that Act, which applies to matrimonial proceedings entertained under section 40(1).[54] Both these enactments apply where the court has jurisdiction to entertain proceedings on the basis of the wife petitioner's residence in England, though neither spouse is domiciled in England. They are in the same terms and provide that:—

> "the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings".

108. Under our earlier recommendations section 40(1) is to be replaced by new residential bases of jurisdiction. This gives rise to the question whether a provision similar to section 40(2) is needed for cases where these new bases are relied on to found jurisdiction. Our view is that this provision is unnecessary. It has no application to proceedings for nullity of a void marriage since it is the domicile at the time of the marriage which is relevant to capacity to marry and to other factors affecting validity. In its application to other proceedings the meaning of section 40(2) is obscure.[55] As far as divorce and judicial separation are concerned, it appears to state the policy which we support. But the Divorce Reform Act 1969 leaves no scope for the application of anything but English law to divorce proceedings;[56] the position with regard to judicial separation,[57] and to proceedings under section 14 is the same: English law only can apply. *We therefore recommend* that sections 14(5) and 40(2) be repealed and not replaced.

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[52] Introduced by the Law Reform (Miscellaneous Provisions) Act 1949, s. 1(3) and (4).
[53] Originally introduced by the Law Reform (Miscellaneous Provisions) Act 1949 s. 1(4).
[54] See paras. 15, 52(*b*) and 63(*c*) above for the application of s. 40(1) to divorce, nullity and judicial separation respectively.
[55] For a criticism of this enactment see Morris, *The Conflict of Laws* (1971), pp. 167–168.
[56] Existing case law also supports this proposition: *Zanelli* v. *Zanelli* (1949) 64 T.L.R. 556; para. 103 above.
[57] Divorce Reform Act 1969, s. 8; Matrimonial Causes Act 1965, s. 12.

PART V

SUMMARY OF RECOMMENDATIONS

Divorce, nullity and judicial separation

(1) The English court should have jurisdiction to entertain proceedings for divorce, nullity (whether the marriage is alleged to be void or voidable) or judicial separation if either the petitioner or the respondent—

(*a*) is domiciled in England at the commencement of the proceedings; or

(*b*) has been habitually resident in England throughout the period of one year immediately preceding the commencement of the proceedings (paragraphs 32(*b*), 47, 61 and 66).

(2) For the purpose of the above proceedings, the domicile of a married woman should be determined independently of that of her husband (paragraphs 32(*a*), 61 and 66) and that of a married minor should be determined as if he or she were an adult (paragraphs 34, 61 and 66).

(3) If either party to the marriage dies (or if both die) before proceedings for nullity of that marriage are commenced the court should have jurisdiction if that party (or either) was domiciled in England at death or had been habitually resident in England throughout the period of one year preceding the death in addition to any jurisdiction which can be founded on the domicile or habitual residence for one year of the survivor (paragraph 61).

(4) Where the court has jurisdiction to entertain proceedings for divorce, nullity or judicial separation it should, notwithstanding any change in the domicile or habitual residence of the parties after the institution of the proceedings, have jurisdiction to entertain further proceedings (whether by way of further petition, cross-petition or prayer contained in an answer) for divorce, nullity or judicial separation begun by either party to the marriage while the first proceedings are pending (paragraphs 48, 62 and 66).

(5) The bases of jurisdiction set out above should be the exclusive bases of jurisdiction in proceedings for divorce, nullity and judicial separation, and section 40(1) of the Matrimonial Causes Act 1965 should be repealed (paragraphs 47, 62 and 66).

(6) In proceedings for divorce and judicial separation the grounds and defences should continue to be exclusively those of English law; sections 14(5) and 40(2) of the Matrimonial Causes Act 1965 are unnecessary and should be repealed (paragraphs 105 and 108).

Other matrimonial procedures

(7) The English court should have jurisdiction to entertain an application under section 6 of the Matrimonial Proceedings and Property Act 1970 for maintenance based on neglect to maintain whenever it would have jurisdiction to entertain proceedings for judicial separation; it should also continue to have jurisdiction in respect of such applications when the respondent is resident in England at the commencement of the proceedings (paragraph 68).

(8) The English court should have jurisdiction to entertain proceedings for presumption of death and dissolution of marriage under section 14 of the Matrimonial Causes Act 1965 if when the proceedings are begun the petitioner is domiciled in England, or has been habitually resident in England throughout the period of one year preceding that date (paragraph 73).

(9) For the purpose of the proceedings referred to in recommendations (7) and (8) the domicile of a married woman should be determined independently of that of her husband and that of a married minor should be determined as if he or she were an adult (paragraphs 68 and 73).

Conflicts of jurisdiction

(10) The English court should have a discretion to stay proceedings for divorce, judicial separation, nullity of marriage or for a declaration as to matrimonial status of its own motion or on the application of a party if—

(*a*) other proceedings relating to the same marriage are continuing in a country outside England, whether in the British Isles or abroad, and

(*b*) the court considers that the balance of fairness, including convenience, as between the parties to the marriage is such that it would be appropriate for those other proceedings to be disposed of first (paragraph 78).

(11) The power of the English court to impose a discretionary stay under recommendation (10) should be exercisable at any time up to the beginning of the trial in England (other than a trial as to jurisdiction) and in special circumstances (see recommendation (16)) at any time thereafter while the proceedings are continuing (paragraph 78).

(12) The English court should be under an obligation to stay divorce proceedings on the application of a party to the marriage at any time before the beginning of the trial (other than a trial as to jurisdiction) if—

(*a*) proceedings for divorce or nullity in respect of the same marriage are continuing in another part of the British Isles, and

(*b*) the parties last resided together in that part, and

(*c*) either party to the marriage had been habitually resident in that part throughout the period of one year immediately preceding the date on which the spouses last resided together (alternatively, where the parties were still residing together in that part on the date when the English proceedings were commenced, if either party habitually resided in that part for a period of one year preceding that date) (paragraph 93).

(13) If on the date when our recommendations concerning jurisdiction come into force proceedings for divorce or nullity are pending in another part of the British Isles, the English court should not, while those proceedings are pending, have jurisdiction to entertain divorce proceedings in respect of the same marriage (paragraph 93).

(14) Where English matrimonial proceedings are for more than one kind of relief (for example, for divorce and nullity) the court should have power to stay part only of the English proceedings if it thinks fit (paragraph 78, footnote 28).

(15) The rules of court which require a petitioner to disclose in the petition proceedings in any court in England and Wales or elsewhere in respect of or affecting the marriage in question should be extended to all parties to matrimonial proceedings in England (paragraph 79).

(16) A special statutory duty should be imposed on the petitioner in English matrimonial proceedings to disclose proceedings in another country relating to or affecting the marriage in question; if the court is satisfied that a breach of duty has been committed by the petitioner it should be able to exercise the discretionary power to stay the English proceedings (recommendation (10)) at any time during those proceedings by reference to the proceedings which were not disclosed (paragraph 79).

(17) For the purposes of recommendations (10), (15) and (16), proceedings in another country should, where appropriate, include proceedings which are not in a court (paragraph 80).

(18) The court should on the application of any party to the English proceedings have power in its discretion to discharge a stay imposed under recommendation (10) or (12) if the proceedings in the other country have been stayed or concluded or if there has been unreasonable delay in prosecuting them (paragraph 94).

(19) If a stay as of right (that is to say under recommendation (12)) imposed in respect of English divorce proceedings has been removed, no further stay as of right should be imposed on the English proceedings (paragraph 95).

(20) Where English proceedings for divorce, nullity or judicial separation are stayed because proceedings for divorce, nullity or judicial separation in respect of the same marriage are continuing in another part of the British Isles—

(*a*) all orders for financial provision (for example, maintenance pending suit) and orders concerning children (for example, maintenance, custody, access, education) should lapse after three months or upon an order of the other court in respect of the same subject matter coming into force, whichever first occurred;

(*b*) subject to (*c*) below, the court should not make any order for financial provision or concerning children during the three month period or thereafter save to enforce an existing order or to vary or discharge an order;

(*c*) in an emergency the court should be able to make an order during the three month period and to extend that period, but not beyond the date on which any order in respect of the same matter made by the other court comes into force;

(*d*) except in an emergency, the court should not grant any injunction relating to the removal of a child from England or from the custody of any person; any injunction of this kind already in force should lapse after three months unless extended in an emergency;

(*e*) other injunctions, such as those restraining one spouse from molesting the other, should not be affected by the stay (paragraph 102).

We append draft clauses to give effect to these recommendations.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
AUBREY L. DIAMOND.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
28 July 1972

APPENDIX

Matrimonial Causes (Jurisdiction) Bill

DRAFT

OF A

BILL

TO

A.D. 1972.

MAKE further provision with respect to the jurisdiction of the High Court and a county court to entertain matrimonial proceedings and with respect to the staying of matrimonial proceedings; and for purposes connected with the matters aforesaid.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Jurisdiction in certain matrimonial proceedings.

1.—(1) Subject to subsections (3) and (4) of this section and section 3(2) of this Act, the court shall have jurisdiction to entertain—

(*a*) proceedings for divorce or judicial separation if and only if either of the parties to the marriage in question is domiciled in England and Wales on the date when the proceedings are begun or was habitually resident there throughout the period of one year ending with that date;

(*b*) proceedings for nullity of marriage if and only if either of the said parties is domiciled or was habitually resident as mentioned in the preceding paragraph or died before the date when the proceedings are begun and either was on the date of the death domiciled in England and Wales or had been habitually resident there throughout the period of one year ending with the date of the death;

1965 c. 72.

(*c*) proceedings for death to be presumed and a marriage to be dissolved in pursuance of section 14 of the Matrimonial Causes Act 1965 if and only if the petitioner is domiciled or was habitually resident as mentioned in paragraph (*a*) above.

Clause 1

1. *Clause* (1) implements the recommendations in Parts I, II and III of the Report concerning the jurisdiction of English courts to entertain proceedings for divorce, nullity of marriage, judicial separation and certain other matrimonial proceedings. In general, jurisdiction will in future depend exclusively on the domicile in England and Wales of either spouse or the habitual residence in England and Wales for one year of either spouse. A married woman and a married minor will have an independent domicile for the purpose of jurisdiction. The case for retaining domicile as a basis of matrimonial jurisdiction, for allowing a married woman an independent domicile and for allowing the domicile of either spouse to found jurisdiction is set out in paragraphs 27–32 of the Report, and that for allowing a married minor an independent domicile for the purpose of jurisdiction in paragraphs 33–34. The case for introducing one year's habitual residence of either spouse as a basis of jurisdiction is set out in paragraphs 37–47. *Clause* (1) applies only to proceedings commenced after the Bill comes into force (see *clause* 3(2)).

2. *Subsection* (1)(*a*) implements paragraphs 32, 47 and 66 of the Report and provides that the bases of jurisdiction in divorce and judicial separation are to be the domicile in England and Wales or one year's habitual residence there of either spouse on the date when the proceedings are begun. At present jurisdiction in divorce depends on the domicile of the spouses (a wife's domicile by law is the same as that of her husband) or, in certain cases, on the residence of the wife petitioner (paragraphs 11–16 of the Report). Under *subsection* (2) a wife's domicile will be determined independently of that of her husband and in cases where her domicile differs from his it will be possible in future to base jurisdiction on the domicile of either spouse. A married minor will also have an independent domicile. The existing residential bases of jurisdiction are replaced by new rules under which a spouse will be able to rely on his own habitual residence for one year in England and Wales or on that of the other spouse.

3. The present bases of jurisdiction in judicial separation are set out in paragraph 63 of the Report. The Bill makes the same changes in the domicile rules as in the case of divorce and substitutes the new basis of one year's habitual residence in England and Wales by either spouse for the existing residential bases of jurisdiction at common law and under statute.

4. *Subsection* (1)(*b*) implements paragraphs 61 and 62 of the Report. It applies to nullity of marriage the same bases of jurisdiction as those applied by *subsection* (1)(*a*) to divorce and judicial separation. The present jurisdiction in nullity is described in paragraph 52 of the Report. In the case of a void marriage the wife's domicile does not, under present law, depend on that of her husband and the domicile in England and Wales of either spouse may found jurisdiction; in the case of a voidable marriage, however, a wife's domicile is by law the same as that of her husband. Under *subsection* (2) a wife's domicile will be determined independently of that of her husband for the purpose of jurisdiction; *subsection* (1)(*b*) makes the domicile of either spouse a basis of jurisdiction in all nullity cases. The existing residential bases of jurisdiction in nullity are, as in the case of divorce and judicial separation, replaced by the test of one year's habitual residence in England and Wales by either spouse.

5. The common law rule under which the court may entertain a petition for nullity in respect of a marriage alleged to be void if the marriage took place in England and Wales is excluded by *subsection* (1)(*b*) (paragraphs 52, 60 and 62 of the Report). A petition for nullity of a marriage alleged to be void may be brought after the death of one party or of both parties (paragraph 50 of the Report). *Subsection* (1)(*b*) therefore provides that where a spouse has died before the presentation of the petition the domicile or one year's habitual residence in England and Wales of that spouse at the date of death shall found

jurisdiction, in addition to any jurisdiction which can be founded on the domicile or habitual residence of the survivor (if any).

6. *Subsection* (1)(*c*) implements paragraph 73 of the Report and applies to proceedings under section 14 of the Matrimonial Causes Act 1965. Where a party to a marriage has disappeared and is believed to be dead the other spouse may petition for death to be presumed and the marriage to be dissolved. In future a petitioner, whether a husband or a wife, will be able to rely on his or her own habitual residence in England and Wales for one year, whereas at present only a wife petitioner may rely on her residence to found jurisdiction. The domicile of the petitioner remains a basis of jurisdiction and for this purpose a married woman and a married minor will have an independent domicile (*subsection* (2)).

(2) For the purposes of the preceding subsection a person's domicile shall, if the person's first or only marriage (whether valid or void) took place when he or she was a minor, be determined as if the person had attained full age on the day of the marriage and a woman's domicile shall be determined without regard to any rule of law providing for her domicile at any time to be the same as that of her then husband.

(3) Where the court has—

(*a*) by virtue of paragraph (*a*) or (*b*) of subsection (1) of this section; or

(*b*) by virtue of this subsection,

jurisdiction to entertain proceedings for divorce, judicial separation or nullity of marriage but apart from this subsection has not jurisdiction to entertain other proceedings for divorce, judicial separation or nullity of marriage which are begun in respect of the marriage in question by either party to the marriage while the first-mentioned proceedings are pending, then, subject to the following subsection, the court shall have jurisdiction to entertain the other proceedings.

(4) No proceedings for divorce in respect of a marriage shall be entertained by the court by virtue of subsection (1)(*a*) or (3) of this section while proceedings for divorce or nullity of marriage begun before the date of the commencement of this Act are pending in Scotland, Northern Ireland, the Channel Islands or the Isle of Man in respect of the marriage; and provision may be made by rules of court as to when for the purposes of this subsection proceedings were begun or are pending in any of those countries.

1970 c. 45.

(5) At the end of subsection (2) of section 6 of the Matrimonial Proceedings and Property Act 1970 (which provides that the court shall not entertain an application for maintenance under that section unless it would have jurisdiction to entertain proceedings by the applicant for judicial separation) there shall be added the words "or unless the respondent is resident in England and Wales on the date when the application is made".

Clause 1 (*continued*)

7. *Subsection* (2) implements paragraphs 32(*a*), 61 and 66 of the Report. Under present law the domicile of a minor is the same as that of the parent, and the domicile of a married woman is the same as that of her husband (paragraphs 12, 13, 27–33 of the Report). *Subsection* (2) changes these rules for the purpose of jurisdiction in certain proceedings by permitting the domicile of a married minor to be determined as if he or she were of full age, and that of a married woman to be determined independently of that of her husband. The proceedings in question are petitions for judicial separation, divorce, nullity of marriage and presumption of death and dissolution of marriage.

8. *Subsection* (3) implements paragraphs 48, 62 and 66 of the Report. It applies where there has been a change in the domicile or habitual residence of one or both spouses after proceedings for divorce, judicial separation or nullity of marriage are begun by virtue of *clause* 1. If all bases of jurisdiction have ceased to exist after the proceedings are begun neither spouse can under present law bring further proceedings or cross-proceedings. In such a case *subsection* (3) provides that where there is jurisdiction to entertain proceedings for divorce, judicial separation or nullity the court shall have jurisdiction to entertain further proceedings for divorce, judicial separation or nullity begun in respect of the same marriage while the original proceedings are pending. If by virtue of *subsection* (3) the court has jurisdiction to entertain such further proceedings, then even if the original proceedings are no longer pending the court will under *subsection* (3) have jurisdiction to entertain later proceedings begun while the further proceedings are pending. Proceedings may be by way of a cross-petition, a further petition or a prayer for relief in an answer.

9. *Subsection* (4) implements the latter part of paragraph 93 of the Report. It is a transitional provision and its effect is that where divorce or nullity proceedings begun in another part of the British Isles (Scotland, Northern Ireland, the Channel Islands or the Isle of Man) **before** this Bill comes into force are pending, divorce proceedings cannot be begun in England and Wales **after** this Bill comes into force until the pending proceedings have been disposed of. The reference to *clause* 1(3) is necessary to prevent a petitioner from taking advantage of *subsection* (3) to avoid the operation of *subsection* (4), *e.g.* by bringing proceedings for judicial separation and then bringing further proceedings for divorce.

10. *Subsection* (5) implements paragraph 68 of the Report. The present jurisdiction in respect of applications for financial provision under section 6 of the Matrimonial Proceedings and Property Act 1970 on the ground of neglect to maintain is the same as that in respect of proceedings for judicial separation. The combined effect of *subsections* (1)(*a*) and (2) and of section 6 of the Matrimonial Proceedings and Property Act 1970 as amended by *subsection* (5) is that the court will have jurisdiction to entertain proceedings under section 6 where, on the date when the proceedings are begun—

(*a*) either party to the marriage is domiciled in England and Wales or has been habitually resident there for one year; or

(*b*) the respondent is resident in England and Wales.

Stays of matrimonial proceedings.

2.—The provisions of the Schedule to this Act shall have effect with respect to the staying of proceedings for divorce, judicial separation, nullity of marriage or a declaration as to the validity or subsistence of a marriage and with respect to the other matters mentioned in that Schedule; but nothing in that Schedule—

(*a*) requires or authorises a stay of proceedings which are pending when this Act comes into force; or

(*b*) prejudices any power to stay proceedings which is exercisable by the court apart from this Act.

EXPLANATORY NOTES

Clause 2

Clause 2 introduces the Schedule which provides for English matrimonial proceedings to be stayed in certain circumstances when proceedings in respect of the same marriage are pending in another country. The need for such provisions is explained in paragraphs 75–76 and 81–82 of the Report; the court's present powers to stay proceedings are referred to in paragraph 76.

Supplemental. 1967 c. 56.

3.—(1) In this Act "the court" means the High Court and a divorce county court within the meaning of the Matrimonial Causes Act 1967; but nothing in this Act shall be construed as removing any limitation imposed on the jurisdiction of a county court by virtue of section 1 of that Act.

(2) Nothing in this Act affects the court's jurisdiction to entertain any proceedings begun before the date of the commencement of this Act.

(3) It is hereby declared that the purposes mentioned in section 7(1) of the said Act of 1967 (which provides for the making of matrimonial causes rules) include the purposes of this Act except the purposes of the Schedule to this Act as it applies in relation to proceedings for a declaration as to the validity or subsistence of a marriage.

(4) Subject to subsection (2) of this section the following enactments are hereby repealed, that is to say—

1965 c. 72.

(*a*) in the Matrimonial Causes Act 1965, in section 14(1) the words "subject to the next following subsection", section 14(2) and (5) and section 40; and

1971 c. 44.

(*b*) in section 7(2) of the Nullity of Marriage Act 1971 the words from the beginning to "and" where it first occurs.

Clause 3

1. *Subsection* (1) defines "the court" for the purposes of the Bill as the High Court and a divorce county court and preserves the present limitations imposed by section 1 of the Matrimonial Causes Act 1967 on the jurisdiction of the latter (*i.e.* that a divorce county court may hear only undefended matrimonial causes).

2. *Subsection* (2) preserves the existing rules of jurisdiction for proceedings begun before the Bill comes into force.

3. *Subsection* (3) makes it clear that the authority established by section 7(1) of the Matrimonial Causes Act 1967 to make matrimonial causes rules has power to make rules for the purposes of this Bill. There is an exception in respect of proceedings for a declaration as to the validity or subsistence of a marriage (which come within the provisions of the Schedule). The latter proceedings are governed by the Supreme Court Rules (Order 90, rules 13–15). Rules of court will be required to give effect to the Schedule and to supplement *clause* 1(4).

4. *Subsection* (4) repeals, as regards proceedings begun after this Bill comes into force, the following enactments:—

(*a*) (i) Section 14(2) and (5) of the Matrimonial Causes Act 1965, which set out the present bases of jurisdiction in respect of petitions for death to be presumed and a marriage to be dissolved. These rules are replaced by *clause* 1(1)(*c*) of the Bill. Section 14(5) also specifies the law to be applied in those proceedings. The reasons for the repeal of this part of the enactment are set out in paragraphs 107 and 108 of the Report. The words in section 14(1) which refer to section 14(2) are also repealed.

(ii) Section 40(1) of the Matrimonial Causes Act 1965, which provides for the court to have jurisdiction to entertain certain matrimonial proceedings by a wife where the husband is not domiciled in England. Section 40(1), and the existing common law bases of jurisdictions which section 40(1) supplements, are replaced by *clause* 1(1) of the Bill (paragraphs 47, 62 and 66 of the Report).

(iii) Section 40(2) of the Matrimonial Causes Act 1965 which specifies the law to be applied to certain proceedings under section 40(1). The reasons for repealing section 40(2) are set out in paragraphs 107 and 108 of the Report.

(*b*) That part of section 7(2) of the Nullity of Marriage Act 1971 which amends section 40(1) of the Matrimonial Causes Act 1965. Section 40 is repealed by the Bill.

Short title, commencement and extent.

4.—(1) This Act may be cited as the Matrimonial Causes (Jurisdiction) Act 1972.

(2) This Act shall come into force on such date as the Lord Chancellor may appoint by order made by statutory instrument.

(3) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Clause 4

1. *Subsection* (1) contains the usual provisions as to short title.

2. *Subsection* (2) provides for the Bill to come into force on an appointed day. Rules of court will be needed to give effect to the Schedule and to supplement *clause* 1(4).

3. *Subsection* (3) deals with territorial extent. A parallel Bill is annexed to the Scottish Law Commission Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status. The two Bills are complementary and should come into force on the same date (paragraph 83 of the Report).

SCHEDULE

STAYS OF MATRIMONIAL PROCEEDINGS ETC.

Duty to furnish particulars of certain proceedings

Sections 2, 3(3).

1. While any relevant proceedings are pending in the court and the trial or first trial in the proceedings has not begun, it shall be the duty of each person who is a petitioner in the proceedings to furnish, in such manner and to such persons and on such occasions as may be prescribed by rules of court, such particulars as may be so prescribed of any proceedings of which he knows which are continuing in a country outside England and Wales and which are in respect of the marriage in question or may affect the validity or subsistence of that marriage.

SCHEDULE

General

The Schedule implements Part IV of the Report and applies to proceedings begun in England and Wales after the Bill comes into force. The power to make rules for the purpose of the Schedule is referred to in *clause* 3(3).

Paragraph 1

1. *Paragraph* 1 implements paragraph 79 of the Report. It imposes a duty on every petitioner in "relevant proceedings" to disclose to the court certain proceedings which are continuing in a country outside England and Wales and which concern the marriage in question in English proceedings. "Relevant proceedings" are proceedings (including cross-proceedings) for divorce, judicial separation, nullity of marriage or a declaration as to the validity or subsistence of a marriage of the petitioner (*paragraph* 6(1)). The duty on the petitioner continues up to the beginning of the trial or first trial (see note 2 to *paragraph* 2) in the English proceedings; the consequences of a breach of duty are set out in *paragraph* 3(3).

Obligatory stays

2.—(1) Where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in the court it appears to the court on the application of a party to the marriage in question—

(*a*) that in respect of the marriage proceedings for divorce or nullity of marriage are continuing in a specified country; and

(*b*) that the parties to the marriage have resided together after the celebration of the marriage; and

(*c*) that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun is in the specified country in question; and

(*d*) that either of the said parties was habitually resident in that country throughout the year ending with the date on which they last resided together before the day on which the proceedings in the court were begun,

it shall be the duty of the court, subject to paragraph 4(2) below, to order that the proceedings in the court be stayed.

(2) References in the preceding sub-paragraph to the proceedings in the court are, in the case of proceedings which are not only proceedings for divorce, to the proceedings so far as they are proceedings for divorce.

Paragraph 2

1. *Paragraph* 2 implements paragraph 93 of the Report. Under *sub-paragraph* (1) the court is under an obligation to impose a stay of English divorce proceedings on the application of a party to the marriage in question if proceedings for divorce or nullity are pending in another part of the British Isles and the conditions set out in *paragraphs* (*a*) to (*d*) are satisfied.

2. The application for a stay of the English divorce proceedings must be made and determined before the beginning of the trial or first trial. Thereafter the duty to impose a stay under *paragraph* 2(1) lapses. The expression "first trial" makes it clear that the duty to impose a stay is not revived if a new trial is ordered on appeal (see also *paragraph* 6(1) as to the separate trial of an issue).

3. *Sub-paragraph* (2) provides that where the English proceedings include proceedings for divorce and proceedings for other relief (*e.g.* nullity), the court is to stay only the divorce proceedings.

Discretionary stays

3.—(1) Where before the beginning of the trial or first trial in any relevant proceedings which are continuing in the court it appears to the court—

(*a*) that any proceedings in respect of the marriage in question or which may affect the validity or subsistence of that marriage are continuing in a country outside England and Wales; and

(*b*) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in the country outside England and Wales to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of relevant proceedings,

the court may then if it thinks fit order that the proceedings in the court be stayed or, as the case may be, that those proceedings so far as they consist of proceedings of that kind be stayed.

(2) In the case of any proceedings so far as they are proceedings for divorce, the court shall not exercise the power conferred on it by the preceding sub-paragraph while an application under the preceding paragraph in respect of the proceedings is pending.

(3) If, at any time after the beginning of the trial or first trial in any relevant proceedings which are pending in the court, the court declares by order that it is satisfied that a person has failed to perform the duty imposed on him in respect of the proceedings by paragraph 1 of this Schedule, sub-paragraph (1) of this paragraph shall have effect in relation to the relevant proceedings and the other proceedings in respect of which the declaration is made as if the words "before the beginning of the trial or first trial" were omitted; but no action shall lie in respect of the failure of a person to perform such a duty.

EXPLANATORY NOTES

Paragraph 3

1. *Sub-paragraph* (1) implements paragraph 78 of the Report and provides a discretionary power for the court to stay "relevant proceedings" (see *paragraph* 6(1)) where proceedings in respect of or affecting the same marriage are continuing abroad and the requirements of *paragraph* (*b*) are satisfied. The court may impose a stay even though no application is made to the court for that purpose. The discretionary stay power can be exercised at any time up to the beginning of the trial or first trial (see note 2 to *paragraph* (2)). Thereafter, the power can be exercised only where *sub-paragraph* (3) applies.

2. Where the English proceedings include proceedings for more than one kind of matrimonial relief (*e.g.* nullity and divorce) the court may stay part of the proceedings (*e.g.* divorce) while allowing another part of the proceedings (*e.g.* nullity) to continue.

3. *Sub-paragraph* (2) prevents the court from staying divorce proceedings under *sub-paragraph* (1) while an application for an obligatory stay is pending under *paragraph* (2).

4. *Sub-paragraph* (3) implements paragraph 79 of the Report and provides for the consequences of a breach by a petitioner of the duty imposed by *paragraph* (1) to disclose certain proceedings in another country relating to the marriage in question in the English proceedings. Where, after the beginning of the trial of the English proceedings, the court is satisfied that there has been a breach of duty by the petitioner the discretionary power to stay under *paragraph* 3(1) may be exercised, by virtue of *sub-paragraph* 3(3), at any time during the pendency of the English proceedings but only in relation to the proceedings in another country which the petitioner knew of but did not disclose before the trial. No civil remedy is to be available to any person as a result of a breach of the duty to disclose.

Supplemental

4.—(1) Where an order staying any proceedings is in force in pursuance of paragraph 2 or 3 above the court may if it thinks fit, on the application of a party to the proceedings, discharge the order if it appears to the court that the other proceedings by reference to which the order was made are stayed or concluded or that a party to those other proceedings has delayed unreasonably in prosecuting those other proceedings.

(2) If the court discharges an order staying any proceedings and made in pursuance of paragraph 2 above, the court shall not again stay those proceedings in pursuance of that paragraph.

EXPLANATORY NOTES

Paragraph 4

1. *Sub-paragraph* (1) implements paragraph 94 of the Report and provides for the court to have discretion in certain circumstances to discharge a stay imposed under *paragraphs* (2) or (3) of the Schedule on the application of a party to the English proceedings.

2. *Sub-paragraph* (2) implements paragraph 95 of the Report and provides that where a stay of English divorce proceedings has been imposed by the court under *paragraph* 2 and subsequently discharged, no further stay of the English divorce proceedings may be imposed under *paragraph* 2 though the power to impose a further stay under *paragraph* 3 remains.

5.—(1) Subject to sub-paragraph (4) below, the provisions of sub-paragraphs (2) and (3) below shall apply where proceedings for divorce, judicial separation or nullity of marriage are stayed by reference to proceedings in a specified country for divorce, judicial separation or nullity of marriage; and in this paragraph—

"custody" includes access to the child in question;

"education" includes training;

1970 c. 45.

"lump sum order" means any order so far as it is authorised by virtue of section 3(2)(*c*) of the Matrimonial Proceedings and Property Act 1970 (which relates to the making of lump sum payments for children);

"the other proceedings", in relation to any stayed proceedings, means the proceedings in a specified country by reference to which the stay was imposed;

"relevant order" means any order so far as it is authorised by virtue of any of the following enactments, namely sections 1, 3(2)(*a*) and (*b*) and 18(1)(*a*) of the said Act of 1970 (which relate to the making of periodical payments for spouses and children and orders for the custody and education of children) and, except for the purposes of sub-paragraph (3) below, any order restraining a person from removing a child out of England and Wales or out of the custody, care or control of another person;

"stayed" means stayed in pursuance of this Schedule.

(2) Where any proceedings are stayed, then, without prejudice to the effect of the stay apart from this paragraph,—

(*a*) the court shall not have power to make a relevant order or a lump sum order in connection with the stayed proceedings except in pursuance of paragraph (*c*) of this sub-paragraph; and

(*b*) subject to the said paragraph (*c*), any relevant order made in connection with the stayed proceedings shall, unless the stay is previously removed or the order previously discharged, cease to have effect on the expiration of the period of three months beginning with the date on which the stay was imposed; but

(*c*) if the court considers that for the purpose of dealing with circumstances needing to be dealt with urgently it is necessary during or after that period to make a relevant order or a lump sum order in connection with the stayed proceedings or to extend or further extend the duration of a relevant order made in connection with the stayed proceedings, the court may do so and the order shall not cease to have effect by virtue of paragraph (*b*) above.

Paragraph 5

1. *Paragraph* 5 implements paragraph 102 of the Report and deals with the effect of a stay on ancillary orders made in English proceedings and on the court's power to make such orders. The provisions of *paragraph* 5 apply where proceedings in England and Wales for divorce, judicial separation or nullity are stayed by reference to proceedings in the British Isles for divorce, judicial separation or nullity. (As to other cases, see paragraph 96 of the Report.)

2. *Sub-paragraph* (1) defines certain terms used in *paragraph* 5. In particular it defines the types of ancillary order which are affected by the imposition of a stay (see paragraph 98 of the Report). These orders are as follows:—

(*i*) orders for periodical payments to be made by one spouse to the other until the determination of the suit (Matrimonial Proceedings and Property Act 1970, s. 1);

(*ii*) orders for periodical payments to be made or secured by one party to the marriage for the benefit of or to a child of the family (1970 Act, s. 3(2)(*a*) and (*b*));

(*iii*) orders for lump sum payments to be made by one party to the marriage to or for the benefit of a child of the family (1970 Act, s. 3(2)(*c*));

(*iv*) orders for the custody and education of any child of the family under the age of 18 (1970 Act, s. 18; under section 27(1) of the 1970 Act "custody" includes access to the child in question and "education" includes training and these meanings have been incorporated in *paragraph* 5 of the Schedule); and

(*v*) orders restraining a person from removing a child out of England and Wales or out of the custody, care or control of another person.

An order under category (*i*), (*ii*) or (*iv*) above is defined in *paragraph* 5(1) as a "relevant order" and an order under (*iii*) above as a "lump sum order". Injunctions affecting children are "relevant orders" except for the purpose of *sub-paragraph* (3); other injunctions are not affected by *paragraph* 5 (paragraphs 101 and 102(*d*) of the Report).

3. The effect of *sub-paragraph* (2) is that where *paragraph* 5 applies the English court may not make any of the orders mentioned in *paragraphs* (*i*) to (*v*) above except in an emergency. Any order already made continues in force for a maximum period of three months and then ceases to have effect (unless extended in an emergency).

(3) Notwithstanding anything in sub-paragraph (2) above, where any proceedings are stayed and at the time when the stay is imposed an order is in force, or at a subsequent time an order comes into force, which was made in connection with the other proceedings and provides for any of the four following matters, namely, periodical payments for a spouse of the marriage in question, periodical payments for a child, the custody of a child and the education of a child, then, on the imposition of the stay in a case where the order is in force when the stay is imposed and on the coming into force of the order in any other case,—

(*a*) any relevant order made in connection with the stayed proceedings shall cease to have effect in so far as it makes for a spouse or child any provision for any of the said matters as respects which the same or different provision for that spouse or child is made by the other order;

(*b*) the court shall not have power in connection with the stayed proceedings to make a relevant order containing for a spouse or child provision for any of the matters aforesaid as respects which any provision for that spouse or child is made by the other order; and

(*c*) if the other order contains provision for periodical payments for a child, the court shall not have power in connection with the stayed proceedings to make a lump sum order for that child.

(4) If any proceedings are stayed so far as they consist of relevant proceedings of a particular kind but are not stayed so far as they consist of relevant proceedings of a different kind, sub-paragraphs (2) and (3) above shall not apply to the proceedings but, without prejudice to the effect of the stay apart from this paragraph, the court shall not have power to make a relevant order or a lump sum order in connection with the proceedings so far as they are stayed; and in this sub-paragraph references to relevant proceedings do not include proceedings for a declaration.

(5) Nothing in this paragraph affects any power of the court—

(*a*) to vary or discharge a relevant order so far as the order is for the time being in force; or

(*b*) to enforce a relevant order as respects any period when it is or was in force; or

(*c*) to make a relevant order or a lump sum order in connection with proceedings which were but are no longer stayed.

4. *Sub-paragraph* (3) applies where an order mentioned in *paragraphs* (*i*) to (*iv*) above has been made by the English court before the stay. If an order dealing with the same subject matter made in the "other proceedings" has come into effect before the English proceedings are stayed, the English order ceases to have effect on the imposition of the stay. If the order in the "other proceedings" is made after the English proceedings are stayed, the English order, so far as it relates to the same subject matter, ceases to have effect when the other order comes into force. For example, that part of an English order providing for periodical payments for a spouse ceases to have effect if the other order makes any provision for payments to that spouse (see paragraph 100 of the Report). A lump sum order in favour of a child and an injunction concerning a child ((*v*) above) are not affected by *sub-paragraph* (3).

5. A further effect of *sub-paragraph* (3) (*b*) and (*c*) is that once an order has been made in the "other proceedings" the emergency power (*sub-paragraph* (2) (*c*)) ceases to be exercisable in regard to the subject matter of the order in those "other proceedings". For example, if the order in the "other proceedings" provides for periodical payments to be made to a spouse, the emergency power of the English court to make an order for periodical payments for that spouse can no longer be exercised. If the order in the "other proceedings" provides for periodical payments to be made to a child, the emergency power of the English court ceases both as regards periodical payments **and** lump sum orders.

6. *Sub-paragraph* (4) applies where part only of the English proceedings is stayed (*e.g.*, where divorce proceedings are stayed but nullity proceedings continue); its effect is that the English court cannot make any relevant or lump sum orders in connection with that part of the proceedings which is stayed. However, so long as part of the English proceedings (for divorce, nullity of marriage or judicial separation) continues orders already in force are not affected and fresh orders can be made in connection with the continuing proceedings.

7. *Sub-paragraph* (5) preserves such powers as the English court may have to vary, discharge or enforce a relevant order and makes it clear that when a stay of English proceedings is removed the court's powers to make relevant orders or lump sum orders are no longer restricted by *paragraph* 5.

6.—(1) In this Schedule—

"relevant proceedings" means any proceedings so far as they are of one or more of the five following kinds, namely, proceedings for divorce, judicial separation, nullity of marriage, a declaration as to the validity of a marriage of the petitioner and a declaration as to the subsistence of such a marriage;

"specified country" means any of the following countries, namely, Scotland, Northern Ireland, Jersey, Guernsey and the Isle of Man (the preceding reference to Guernsey being treated as including Alderney and Sark); and

references to the trial or first trial in any proceedings do not include references to the separate trial of an issue as to jurisdiction only;

and proceedings in the court are continuing for the purposes of this Schedule if they are pending and not stayed.

(2) Any reference in this Schedule to proceedings in a country outside England and Wales is to proceedings in a court in such a country and to any other proceedings in such a country which are of a description prescribed for the purposes of this paragraph by rules of court; and provision may be made by rules of court as to when proceedings of any description in such a country are continuing for the purposes of this Schedule.

EXPLANATORY NOTES

Paragraph 6

1. *Sub-paragraph* (1) defines certain terms for the purposes of the Schedule. "Relevant proceedings" is defined for the purposes of *paragraphs* 1, 3 and 5. "Specified country" is defined for the purposes of *paragraphs* 2 and 5. The reference to Guernsey includes Alderney and Sark to cover cases where proceedings are continuing in Guernsey and the parties had resided together in either Alderney or Sark, since all proceedings relating to Alderney and Sark take place in Guernsey.

2. *Sub-paragraph* (1) also implements part of paragraph 78 of the Report and makes it clear that a party to proceedings in England and Wales may contest the jurisdiction of the English court without bringing to an end the court's power to impose a stay of the English proceedings under *paragraphs* 2 or 3(1) of the Schedule.

3. *Sub-paragraph* (2) implements paragraph 80 of the Report; rules may provide that matrimonial proceedings brought in a country outside England and Wales before a body other than a court shall be proceedings for the purposes of the Schedule. It also provides for rules of court to specify when proceedings in respect of a relevant marriage or which may affect the validity or subsistence of that marriage are continuing in a country outside England and Wales.

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