



# **The Law Commission and The Scottish Law Commission**

(LAW COM. No. 137)  
(SCOT. LAW COM. No. 88)

**PRIVATE INTERNATIONAL LAW**

**RECOGNITION OF FOREIGN NULLITY DECREES  
AND RELATED MATTERS**

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by command of Her Majesty.*

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# RECOGNITION OF FOREIGN NULLITY DECREES AND RELATED MATTERS

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# THE LAW COMMISSION

## AND

### THE SCOTTISH LAW COMMISSION

(Item XXI of the Third Programme of the Law Commission)

(Item 15 of the Third Programme of the Scottish Law Commission)

### PRIVATE INTERNATIONAL LAW

### RECOGNITION OF FOREIGN NULLITY DECREES AND RELATED MATTERS

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, and the Right Honourable the Lord Cameron of Lochbroom, Q.C., Her Majesty's Advocate*

#### PART I

#### INTRODUCTION

1.1 The Law Commission undertook in its First Programme of Law Reform<sup>1</sup> to examine, along with other matters in the field of family law, the recognition of foreign divorces, nullity decrees<sup>2</sup> and adoptions. These terms of reference were broadened in the Law Commission's Second Programme to embrace a complete review of family law.<sup>3</sup> Specific reference to recognition of foreign nullity decrees, and also to recognition of foreign marriages, is made in the Law Commission's Third Programme.<sup>4</sup> The Scottish Law Commission similarly included general proposals for an examination of family law in their Second Programme of Law Reform,<sup>5</sup> and again as part of their suggested review of Private International Law in their Third Programme.<sup>6</sup>

1.2 The main reforms that have resulted from this work are as follows. As the result of proposals from the Law Commission<sup>7</sup> and the Scottish Law Commission,<sup>8</sup> the rules as to jurisdiction in matrimonial proceedings were

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<sup>1</sup> Item XII.

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

<sup>3</sup> Law Com. No. 14 (1968): Item XIX: Family Law.

<sup>4</sup> Law Com. No. 54 (1973): Item XXI: Private International Law.

<sup>5</sup> Scot. Law Com. No. 8 (1968): Item No. 14—Family Law.

<sup>6</sup> Scot. Law Com. No. 29 (1973): Item No. 15—Private International Law.

<sup>7</sup> Law Com. No. 48 (1972).

<sup>8</sup> Scot. Law Com. No. 25 (1972).

amended by the Domicile and Matrimonial Proceedings Act 1973. The recognition of foreign divorces and legal separations was put on a statutory basis by the Recognition of Divorces and Legal Separations Act 1971, thus implementing proposals contained in a joint report of the two Law Commissions.<sup>9</sup> There has also been legislation on the question of jurisdiction over polygamous marriages,<sup>10</sup> again as a result of a report from the Law Commission.<sup>11</sup>

1.3 The two major private international law topics in the field of family law on which the two Commissions have not yet made proposals for reform are the law governing the validity of marriages and the recognition of foreign nullity decrees.<sup>12</sup> Preliminary work on both these topics was undertaken by the Law Commission as long ago as 1971.<sup>13</sup> By 1973 this work had been suspended because the Law Commission and the Scottish Law Commission had formed the view that satisfactory reform of these topics could best be achieved by international agreement.<sup>14</sup> The opportunity for the negotiation of internationally agreed solutions came with the decision that the agenda for the Thirteenth Session of The Hague Conference on Private International Law, held in 1976, should include "questions relating to the recognition abroad of decisions in respect of the existence or validity of marriages". Both Commissions played an active part in the briefing of the United Kingdom delegation to The Hague negotiations. It was hoped that the work of the Thirteenth Session would result in a convention covering the recognition not only of foreign marriages but also of foreign nullity decrees. In the event, the convention in respect of marriage which was concluded at The Hague was confined to a Convention of Celebration and Recognition of the Validity of Marriages (1978). The Conference decided not to extend it to the recognition of foreign nullity decrees. We understand that the Government does not propose that the United Kingdom should sign or ratify the Marriage Convention.<sup>15</sup>

#### 1.4 Our courts are not frequently asked to recognise foreign annulments.

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<sup>9</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970).

<sup>10</sup> Matrimonial Proceedings (Polygamous Marriages) Act 1972; for English law see now the Matrimonial Causes Act 1973, s.47. In the light of the response to their consultative document published in 1982 (Working Paper No. 83; Consultative Memorandum No. 56), the two Commissions are engaged in the preparation of a joint report, which they hope to submit later this year, upon the rules governing the capacity of English and Scottish domiciliaries to enter a marriage abroad in polygamous form.

<sup>11</sup> Law Com. No. 42 (1971).

<sup>12</sup> The Law Commission has recently published a report on Declarations in Family Matters (Law Com. No. 132 (1984)). There is a joint consultative document (Working Paper No. 68/Memorandum No. 23) on Custody of Children: Jurisdiction and Enforcement within the United Kingdom (1976) on which the preparation of a report is at an advanced stage. Both Commissions have recently published Reports on the question of granting financial relief after a foreign divorce or nullity decree: Law Com. No. 117 (1982); Scot. Law Com. No. 72 (1982), and the recommendations of the two Commissions are implemented in Parts III and IV of the Matrimonial and Family Proceedings Act 1984. See para. 1.5, below.

<sup>13</sup> The Sixth Annual Report of the Law Commission, 1970-1971, Law Com. No. 47, para. 54.

<sup>14</sup> The Eighth Annual Report of the Law Commission, 1972-1973, Law Com. No. 58, para. 49.

<sup>15</sup> The two Commissions have returned to their consideration of choice of law in marriage and have set up a Joint Working Party to assist in this task; see the Eighteenth Annual Report of the Law Commission, 1982-1983, Law Com. No. 131, para. 2.67.

In England and Wales, in 1980, 1981 and 1982, there were respectively 12, 12 and 7 petitions for declarations of validity of a foreign divorce,<sup>16</sup> but apparently none relating to the validity of a foreign annulment. Domestically, for every nullity petition presented, there were, in those years, 154, 161 and 188 divorce petitions,<sup>17</sup> and there is no reason to suppose that the ratio would be greatly different in recognition cases. Consequently it may be thought that the recognition of foreign annulments does not pose any great problem. But the courts are not the only place in which a determination of the validity of a foreign annulment may have to be made. For example, British immigration officials abroad and in the United Kingdom, officials concerned with nationality, passport, income tax or social security matters, registrars of marriages and, indeed, trustees or personal representatives, may from time to time need to determine the issue. Their task will be easier if the law can be rendered more certain and more easily ascertainable. And on the apparently few occasions on which the courts are required to decide such cases the time and expense of doing so can perhaps be very greatly reduced.<sup>18</sup> There seems now to be little real possibility of the recognition of foreign nullity decrees being the subject of international agreement. The choice is, therefore, to leave the law as it is or to make proposals for reform of our own private international law rules without any prospect of international agreement. We have no doubt that reform of our own rules is desirable. It has become more important with the changes made in the rules as to the jurisdiction of courts in the United Kingdom in nullity proceedings<sup>19</sup> and with the changes in the rules for the recognition of foreign divorces and legal separations.<sup>20</sup> As recognition of foreign nullity decrees has not yet been placed on a statutory basis, it is unclear whether the old common law rules for recognition have been, or should be, changed by analogy with those statutory developments and, if so, whether the analogy to be drawn is with the new statutory rules for nullity jurisdiction or the statutory rules for divorce recognition. It is because of the uncertainties in the present law,<sup>21</sup> and the fact that recent international initiatives have not been able to provide a solution to the problem, that we have returned to the question of the recognition of foreign nullity decrees.

1.5 There is, however, one recent development relating to the recognition not only of foreign annulments but also of foreign divorces to which we should draw attention at the outset of this report. One of the most common reasons for a court being faced with the issue as to whether a foreign divorce is to be recognised in this country is that of financial relief. If the foreign divorce is recognised here, no court in the United Kingdom has power to award financial relief.<sup>22</sup> This has provided a clear incentive to challenge

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<sup>16</sup> Judicial Statistics for those years, Table D.8(b), notes (for 1980 and 1981), and Table 4.11, notes (for 1982).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Vervaeke v. Smith* [1981] Fam. 77 was 9 days before Waterhouse J., 7 days before the Court of Appeal and ([1983] 1 A.C. 145) 3 days in the House of Lords.

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

<sup>20</sup> Recognition of Divorces and Legal Separations Act 1971.

<sup>21</sup> See, most recently, *Vervaeke v. Smith* [1983] 1 A.C. 145.

<sup>22</sup> See e.g. *Quazi v. Quazi* [1980] A.C. 744.

the validity in this country of divorces obtained abroad. Both the Law Commission and the Scottish Law Commission have recommended that the courts should have a power in appropriate circumstances to grant financial relief notwithstanding the fact that a foreign divorce, legal separation or annulment is to be recognised in England and Wales or Scotland.<sup>23</sup> Parts III and IV of the Matrimonial and Family Proceedings Act 1984 give effect to those recommendations. When it is in force, it may well be that the incidence of cases concerning the recognition of foreign matrimonial decisions will decrease quite sharply. Moreover, the fact that financial relief will, in appropriate cases, be available even if the validity of the foreign divorce or annulment is upheld may be thought to remove one possible policy argument in favour of a restrictive approach to recognition.<sup>24</sup>

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

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

1.8 We set up a small Working Party to assist us in our consideration of the law relating to foreign nullity decrees. The members of the Working Party are listed in Appendix B and we are very grateful to them for the assistance which they have given us. In the light of their advice, we prepared a joint Consultation Paper outlining the present law, the options for reform and our preferred solution. This was distributed to a limited number of consultees in April 1983 and we sought their comments by the end of July 1983. We are grateful to all those who commented and for their promptness in doing so.

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<sup>23</sup> See n. 12, above.

<sup>24</sup> See para. 1.12, below.

The names of those who commented are given in Appendix C. The reason why we distributed our consultation paper to a limited list of consultees, rather than making it more widely available through H.M.S.O., was that we formed the view that the subject-matter of the paper was likely to be of interest and concern to a rather specialised readership. We did, however, make publicly known at the time of distribution of the paper, through a Press Notice, a summary of the paper and that copies could be obtained from either Commission. This report is based very closely, at least in its earlier Parts, on our Consultation Paper.

1.9 To conclude this introduction, we should draw attention to four matters. First, throughout this report we make constant references to the common law, operative until 31 December 1971, regarding the recognition of overseas divorces, because in all essentials the principles developed mainly in relation to the recognition of divorces apply now to the recognition of annulments. We also refer frequently to the Recognition of Divorces and Legal Separations Act 1971 which, since 1st January 1972, has replaced the common law in respect of divorces and legal separations, because the option for reform which we recommend<sup>25</sup> is to base new legislation for the recognition of annulments upon the principles of the 1971 Act.<sup>26</sup> In Parts IV and VI of this report we take a detailed look at the 1971 Act and conclude that it is capable of improvement, both in the application of its principles to the recognition of annulments, and as it applies now to the recognition of divorces and legal separations. It would have been possible to have altered and expanded the 1971 Act by simply recommending amendments to it. Some of these amendments might have taken the form of minor textual amendments. However, such a course would have resulted in a situation which we do not consider would be satisfactory from the point of view of the best way to reform the law; the 1971 Act would remain but have to be read subject to the alterations made by the later statute, while the law relating to the recognition of foreign nullity decrees would be contained in the later statute which had to be read in the light of the 1971 Act. This would not be the clearest way of setting out the law, either for Parliament or for users of the legislation. We consider that the most helpful course to take is to recommend the repeal of the 1971 Act altogether and the enactment of a new statute containing all the law relating to the recognition of foreign divorces, annulments and legal separations. The details of the changes to the 1971 Act (which are mainly of a minor character) appear from the explanatory notes to the draft Bill appended to this report. We have, however, been careful to ensure that any amendments of the scheme of the 1971 Act are compatible with the United Kingdom's ratification of the Hague Convention on Recognition of Divorces and Legal Separations which the 1971 Act was designed to implement. In our view, the draft Bill provides a less complex and more comprehensive set of statutory provisions governing the recognition of matrimonial decisions. There was a strong support for this approach in the comments which we

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<sup>25</sup> See paras. 5.13-5.15, below.

<sup>26</sup> For the convenience of readers, the Act is reproduced at Appendix D.

received on our Consultation Paper.

1.10 Second, this report does not deal with declarations regarding the validity of a marriage. While many of the principles applicable to the recognition of foreign annulments must apply equally to their converse, we are not aware that any problems arise in practice regarding such declarations. In our Consultation Paper we invited comments on whether practical problems had in fact arisen in relation to the recognition of foreign declarations of validity of marriage. No such comments were received, though it was suggested that issues relating to the validity of marriage should not be dealt with in passing in this report but should be the subject of a separate enquiry. As we have mentioned earlier,<sup>27</sup> the two Commissions have taken up work again on the choice of law rules relating to the validity of marriages.

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

1.12 Fourth, examination of the rules of nullity recognition, and our limited re-examination of the present statutory rules relating to recognition of divorces and legal separations, throw up a number of detailed complex points. To some of them there is no obvious logically compelling answer. Indeed they may well illustrate a conflict between two well established sets of rules, such as those governing recognition of foreign divorces and those regulating the validity of marriages.<sup>28</sup> Good arguments may be put, and were put to us on consultation, for favouring one set of rules rather than another. The general underlying policy which we have favoured in this report is that of recognising the validity of divorces or annulments and of any later marriage entered into by the parties on the basis that they were free to do so.

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

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<sup>27</sup> See n. 15, above.

<sup>28</sup> See paras. 3.9–3.10, and 6.49, below.

## PART II

### THE PRESENT LAW AND ITS DEFECTS

#### Introduction

2.1 Although the Recognition of Divorces and Legal Separations Act 1971 largely codified the law relating to the recognition of foreign divorces and legal separations, the rules for the recognition of foreign decrees of nullity still depend on the common law.<sup>29</sup> There are relatively few decisions on the subject and a number of problems still await judicial determination.

2.2 We propose to examine concurrently the English, Scottish and Northern Ireland rules on this subject, because it is believed that in relation to the recognition of foreign decrees of nullity there are no significant differences between the three legal systems. In all three systems the starting point of the modern law is the decision of the House of Lords in a Scottish appeal, *Administrator of Austrian Property v. Von Lorang*,<sup>30</sup> where it was emphasised that a decree of nullity, even in respect of a void marriage, was as much a decree relating to status as a decree of divorce. Though it was a Scottish decision, it was unequivocally accepted, in *De Reneville v. De Reneville*,<sup>31</sup> as representing English law. Equally, in *Galbraith v. Galbraith*<sup>32</sup> Lord Wheatley referred to the decision of the House of Lords in an English appeal, *Indyka v. Indyka*,<sup>33</sup> in these terms:

“That was an English case dealing with English law, but I do not believe that different considerations and arguments would have prevailed if the case had been a Scottish one, involving as it did questions of private international law. While technically that decision is not binding on Scottish courts, the opinions expressed by their Lordships must be regarded as being of the highest standing and persuasion. While the laws of Scotland and England are separate and self-contained systems, and are accordingly capable of being different, it would be most unfortunate if the principles of recognition of foreign jurisdiction were to be different in the two countries.”<sup>34</sup>

Similarly, as regards Northern Ireland, Lord MacDermott C.J. in *Addison v. Addison*,<sup>35</sup> citing with approval *De Reneville v. De Reneville* accepted that a nullity decree was a decree relating to status.

2.3 By stressing that a decree of nullity should be regarded as a decree relating to status, the House of Lords in the *Von Lorang* case was able to

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<sup>29</sup> The limited extent to which recognition of foreign nullity decrees may be governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933 is considered in paras. 2.29 to 2.31, below.

<sup>30</sup> 1926 S.C. 598; 1927 S.C. (H.L.) 80; [1927] A.C. 641.

<sup>31</sup> [1948] P. 100, 109.

<sup>32</sup> 1971 S.C. 65.

<sup>33</sup> [1969] 1 A.C. 33.

<sup>34</sup> 1971 S.C. 65, 68.

<sup>35</sup> [1955] N.I. 1, 13.

apply to annulments the general principles then relevant to the recognition of other decisions as to status, developed in the context of the recognition of foreign divorces. The rules applicable in relation to the recognition of foreign decrees of nullity are, therefore, similar to the common law rules which applied to the recognition of foreign divorces and legal separations until the coming into force of the Recognition of Divorces and Legal Separations Act 1971. These rules are thought to include such principles as may be derived from the decision of the House of Lords in *Indyka v. Indyka*.<sup>36</sup>

2.4 As a result of their common law basis, the rules governing recognition of foreign nullity decrees make no distinction between decrees obtained elsewhere in the British Isles and those obtained overseas.<sup>37</sup> Accordingly, a Scottish or a Northern Ireland decree will be treated as foreign for the purposes of recognition by an English court and, conversely, an English decree will be treated as foreign in Scotland and in Northern Ireland.

2.5 The primary factor in determining whether or not a court in one part of the United Kingdom will recognise a foreign decree of nullity is whether, in the eyes of that court, the foreign court which granted the decree had jurisdiction to do so.<sup>38</sup> Subject to considerations of public policy, the court is not concerned either with the basis upon which the foreign court actually assumed jurisdiction over the parties<sup>39</sup> or with the grounds upon which it granted the decree.<sup>40</sup> Consequently, the English courts have been prepared to recognise a foreign decree of nullity granted on grounds unknown in this country.<sup>41</sup> Likewise they have recognised a decree granted on grounds which would amount in English law to formal invalidity, even though the marriage had been celebrated in England and was formally valid under English law.<sup>42</sup>

2.6 Other than *Addison v. Addison*<sup>43</sup> there is no Northern Ireland authority on this subject. We believe, however, that the courts in Northern Ireland would apply the same principles as those laid down by the courts in England. In addition to the *Addison* decision relating to the status of a nullity decree, further evidence relating to the law in Northern Ireland can be gleaned from the fact that section 6 of the Recognition of Divorces and Legal Separations Act 1971 (as substituted by section 2(2) of the Domicile and Matrimonial Proceedings Act 1973), which refers to the "common law rules" relating to the recognition of divorces and legal separations, applies in Northern Ireland. The fact that the "common law rules" relating to divorces and legal separations are recognised by statute as applying in Northern Ireland, coupled with the acceptance by the Northern Ireland courts that

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<sup>36</sup> [1969] 1 A.C. 33.

<sup>37</sup> Cf. the Recognition of Divorces and Legal Separations Act 1971, ss.1 and 2, which draw such a distinction.

<sup>38</sup> *Corbett v. Corbett* [1957] 1 W.L.R. 486, 490, per Barnard J.

<sup>39</sup> *Corbett v. Corbett* [1957] 1 W.L.R. 486; and see *Galbraith v. Galbraith* 1971 S.C. 65, 70-71.

<sup>40</sup> *Abate v. Abate* [1961] P. 29.

<sup>41</sup> *Mitford v. Mitford* [1923] P. 130 (mistake as to personal attributes); *Galene v. Galene* [1939] P. 237 (the clandestine nature of the marriage).

<sup>42</sup> *Galene v. Galene* [1939] P. 237.

<sup>43</sup> [1955] N.I. 1.

nullity decrees affect status, lead us to conclude that the law is similar in Northern Ireland to that in England, and that English case law would be followed by the courts in Northern Ireland. Accordingly where in this report we refer to English courts and English law, it should be taken to include also a reference to the courts and law of Northern Ireland. Where however the law of Northern Ireland differs from that of England we shall make specific reference to the Northern Ireland provisions.

## The present law

### A. Summary

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

- (a) probably, where the decree is granted in circumstances in which, *mutatis mutandis*, the English court would have jurisdiction to grant a decree;<sup>44</sup>
- (b) where the decree is granted by the courts of a country with which either party has “a real and substantial connection”;<sup>45</sup>
- (c) where the decree is granted by the courts of the parties’ common domicile<sup>46</sup> and, probably, also where it is granted by the courts of only one party’s domicile;<sup>47</sup>
- (d) probably, where the decree is granted by the courts of the habitual residence<sup>48</sup> of one of the parties and possibly also where it is granted by the courts of the parties’ common residence;<sup>49</sup>
- (e) possibly, although this now seems unlikely,<sup>50</sup> where a decree declaring a marriage to be void is pronounced by the courts of the country where the marriage was celebrated;<sup>51</sup>
- (f) where the decree, although not obtained in the country of the parties’ common domicile, would be recognised as valid by the courts of such a country.<sup>52</sup>

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

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

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<sup>44</sup> *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Merker v. Merker* [1963] P. 283; *Lepre v. Lepre* [1965] P. 52; *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77, 109 (affirmed on other grounds [1983] 1 A.C. 145). See paras. 2.10 to 2.12, below.

<sup>45</sup> *Law v. Gustin* [1976] Fam. 155; *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77, 109, 123. See paras. 2.13 to 2.15, below. Heads (a) and (b) cover many of the circumstances listed in more detail under (c) to (f).

<sup>46</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 641. See para. 2.16, below.

<sup>47</sup> *Lepre v. Lepre* [1965] P. 52. See paras. 2.17 and 2.18, below.

<sup>48</sup> See para. 2.19, below.

<sup>49</sup> See para. 2.20, below.

<sup>50</sup> See para. 2.21, below.

<sup>51</sup> *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Merker v. Merker* [1963] P. 283.

<sup>52</sup> *Abate v. Abate* [1961] P. 29. See paras. 2.22 and 2.23, below.

- (a) it was obtained by fraud;<sup>53</sup>
- (b) it offends against the rules of natural justice;<sup>54</sup>
- (c) it offends against the English ideas of “substantial justice”,<sup>55</sup> or public policy;<sup>56</sup>
- (d) the issue is already *res judicata* in England.<sup>57</sup>

It seems likely that it is also the law of Scotland that a court would refuse to recognise a decree obtained by fraud or offending against rules of natural justice. In addition, a Scottish court has declined to recognise an extra-judicial decision as to nullity, although this decision was binding under the law of the domicile of one of the parties.<sup>58</sup>

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

### B. Analysis of grounds for recognition

#### (1) Reciprocity

2.10 In *Travers v. Holley*<sup>59</sup> it was held in England that the courts must recognise foreign divorces obtained in circumstances in which, *mutatis mutandis*, the English court would have had jurisdiction to grant a decree. That principle has been extended in England to nullity decrees and has been applied in the past to secure the recognition of decrees granted by the courts of the parties' common residence<sup>60</sup> and decrees granted by the courts in the country in which the marriage was celebrated.<sup>61</sup> Despite its earlier rejection in Scotland in the case of *Warden v. Warden*,<sup>62</sup> the acceptance of the *Travers v. Holley* principle by the House of Lords in *Indyka v. Indyka* has entailed the acceptance of that principle in Scotland in relation to the recognition of foreign divorces.<sup>63</sup> Although it is no longer relevant in relation to foreign divorces,<sup>64</sup> the *Travers v. Holley* principle—as a principle of the common law—is, however, thought to be relevant in Scotland in relation to the recognition of foreign nullity decrees.

2.11 The English courts have more recently applied the reciprocity principle to the changed rules for nullity jurisdiction introduced in 1973.<sup>65</sup> This

<sup>53</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 541. See para. 2.24, below.

<sup>54</sup> *Mitford v. Mitford* [1923] P. 130, 141-142; *Merker v. Merker* [1963] P. 283, 296, 299. See para. 2.25, below.

<sup>55</sup> *Gray v. Formosa* [1963] P. 259. See para. 2.26, below.

<sup>56</sup> *Vervaeke v. Smith* [1983] 1 A.C. 145. See para. 2.26, below.

<sup>57</sup> *Vervaeke v. Smith* [1983] 1 A.C. 145. See para. 2.27, below.

<sup>58</sup> *Di Rollo v. Di Rollo* 1959 S.C. 75. See para. 2.28, below.

<sup>59</sup> [1953] P. 246.

<sup>60</sup> See para. 2.20, below.

<sup>61</sup> See para. 2.21, below.

<sup>62</sup> 1951 S.C. 508.

<sup>63</sup> *Galbraith v. Galbraith* 1971 S.C. 65.

<sup>64</sup> Recognition of Divorces and Legal Separations Act 1971, ss.3 and 6.

<sup>65</sup> Domicile and Matrimonial Proceedings Act 1973, s.5. For Scotland, see s.7 of the 1973 Act; for Northern Ireland, see the Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) (N.I.15), Article 49.

means that a foreign nullity decree will now be recognised in England where it was granted by the courts of a country in which either party was domiciled, or in which either party had been habitually resident (at least so long as the habitual residence was for one year),<sup>66</sup> immediately prior to the commencement of the proceedings in that country. The same approach is likely to be taken by the Court of Session.<sup>67</sup>

2.12 There are two features of the principle of reciprocity which ought particularly to be noted. First, the English courts have not looked to the basis upon which the foreign court actually assumed jurisdiction; "it is sufficient that facts exist which [if they related to England] would enable the English courts to assume jurisdiction".<sup>68</sup> Second, the comparison between the domestic jurisdictional rules in the foreign country, and those in this country, would appear to be made at the time of the recognition proceedings.<sup>69</sup>

## (2) *Real and substantial connection*

2.13 In *Indyka v. Indyka*<sup>70</sup> Lord Morris of Borth-y-Gest suggested that the test for recognition of a foreign divorce was whether the spouse in question had a real and substantial connection with the country in which the divorce was obtained. The same criterion was adopted by Lord Wilberforce and Lord Pearson to qualify the test of residence to ensure that the residence was effective and not fictitious. This test of real and substantial connection was accepted both in England<sup>71</sup> and in Scotland<sup>72</sup> in cases relating to the recognition of foreign divorces prior to the coming into effect of the 1971 Act. In England, it was held by Bagnall J. in *Law v. Gustin*<sup>73</sup> to be applicable to the recognition of a foreign nullity decree.<sup>74</sup> It seems probable that the Scottish courts would reach the same conclusion.

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<sup>66</sup> *Vervaeke v. Smith* [1981] Fam. 77, 109.

<sup>67</sup> The Court of Session also has jurisdiction to reduce (i.e. annul or cancel) its own decrees of declarator of marriage or declarator of nullity of marriage notwithstanding that at the time of the commencement of the proceedings for reduction the parties have no present connections with Scotland - Domicile and Matrimonial Proceedings Act 1973, s.8(3); see also the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s.20. The Court of Session, therefore, might well recognise a decree of reduction granted by a foreign court in similar circumstances.

<sup>68</sup> *Robinson-Scott v. Robinson-Scott* [1958] P. 71, 88, cited with approval by Sir George Baker P. in *Perrini v. Perrini* [1979] Fam. 84, 91-92.

<sup>69</sup> *Indyka v. Indyka* [1969] 1 A.C. 33; *Vervaeke v. Smith* [1981] Fam. 77, 109.

<sup>70</sup> [1969] 1 A.C. 33, 76-77.

<sup>71</sup> *Mayfield v. Mayfield* [1969] P. 119; *Welsby v. Welsby* [1970] 1 W.L.R. 877.

<sup>72</sup> *Galbraith v. Galbraith* 1971 S.C. 65; *Bain v. Bain* 1971 S.C. 146.

<sup>73</sup> [1976] Fam. 155, followed in *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77, 109, 123.

<sup>74</sup> Although Bagnall J. indicated ([1976] Fam. 155, 160) that the date upon which the decree was obtained is the appropriate date on which an English court should consider whether either party had a "real and substantial connection" with the country in which the decree was obtained, the point is not entirely free from doubt; see, e.g., *Indyka v. Indyka* [1969] 1 A.C. 33, 69, 76-77 and *Blair v. Blair* [1969] 1 W.L.R. 221, where it was held that a foreign divorce might be recognised even though the petitioner's connection with the country where the divorce was obtained ceased shortly before the commencement of the divorce proceedings.

2.14 It is reasonable to assume that the nature of the real and substantial connection (which Bagnall J. decided was “a question of fact, to be decided...on a consideration of all the relevant circumstances”<sup>75</sup>) may be gathered by reference to divorce recognition cases. On this basis a “real and substantial connection” for foreign nullity recognition purposes might be established, for example, by virtue of either party’s<sup>76</sup> domicile<sup>77</sup> (even though less exactly defined than by English law,<sup>78</sup>) residence<sup>79</sup> or even nationality if it is reinforced by other factors.<sup>80</sup> It is sufficient that only one spouse has a real and substantial connection with the country of the court.<sup>81</sup> However, one connecting factor which may not, by itself, be sufficient to justify recognition of a foreign nullity decree is the fact that the decree was granted by the court of the country of the celebration of the marriage. Before 1974, when the Domicile and Matrimonial Proceedings Act 1973 came into force, courts in the United Kingdom would accept jurisdiction in nullity on this basis (though following *Ross-Smith v. Ross-Smith*<sup>82</sup> the English court would do so only in the case of a marriage void *ab initio*) and accordingly would recognise a foreign decree granted on this basis.<sup>83</sup> But the 1973 Act has deprived all courts in the United Kingdom of jurisdiction on this ground, and it is questionable whether any United Kingdom court would now extend recognition to a foreign nullity decree so obtained if there were no other substantial connecting factor.<sup>84</sup>

2.15 The application of the test of “real and substantial connection” to the recognition of foreign nullity decrees may well have the same far-reaching effects in relation to nullity decrees as it had in relation to the recognition of foreign divorces prior to the 1971 Act.<sup>85</sup> This necessarily colours any analysis of the grounds of recognition accepted in earlier decisions. We proceed, nevertheless, to examine these, bearing in mind, however, that most, if not

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<sup>75</sup> [1976] Fam. 155, 159-160.

<sup>76</sup> *Mayfield v. Mayfield* [1969] P. 119.

<sup>77</sup> *Indyka v. Indyka* [1969] 1 A.C. 33.

<sup>78</sup> *Ibid.*, at pp. 111-112, *per* Lord Pearson.

<sup>79</sup> *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77; and see *Galbraith v. Galbraith* 1971 S.C. 65.

<sup>80</sup> *Indyka v. Indyka* [1969] 1 A.C. 33, 90, 104-5, 111-112; *Mayfield v. Mayfield* [1969] P. 119; *Galbraith v. Galbraith* 1971 S.C. 65, 70; *Bain v. Bain* 1971 S.C. 146, 152; *Vervaeke v. Smith* [1981] Fam. 77, 109; and see *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80, 97; [1927] A.C. 641, 670. However, it would appear that nationality by itself is not a sufficient ground for recognition of foreign nullity decrees; cf. the Recognition of Divorces and Legal Separations Act 1971, s.3(1)(b), which provides that a court in the United Kingdom will recognise an overseas divorce obtained in the country of which either spouse is a national at the date of the institution of the foreign proceedings.

<sup>81</sup> *Mayfield v. Mayfield* [1969] P. 119; *Vervaeke v. Smith* [1981] Fam. 77.

<sup>82</sup> [1963] A.C. 280. This decision was followed in Northern Ireland: *Holden v. Holden* [1968] N.I. 7.

<sup>83</sup> *Mitford v. Mitford* [1923] P. 130; *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Merker v. Merker* [1963] P. 283.

<sup>84</sup> See *Peters v. Peters* [1968] P. 275, in which recognition of a foreign divorce was refused when the only connecting factor with the country in which the divorce had been obtained was that the marriage had been celebrated there. This is consistent with the fact that the English court never had jurisdiction in divorce merely on the ground that the marriage had been celebrated in England. This issue is discussed in more detail in paras. 6.33 and 6.34, below.

<sup>85</sup> See the remarks of Lord Wheatley in *Galbraith v. Galbraith* 1971 S.C. 65, 70.

all, might be decided today on the basis of the real and substantial connection test.

### (3) *Domicile*

#### (a) *Common domicile*

2.16 It was established by the House of Lords decision in *Administrator of Austrian Property v. Von Lorang*<sup>86</sup> that the courts in both England and Scotland will recognise a decree of nullity granted by the courts of the common domicile of the parties.<sup>87</sup> This principle has been applied even where the marriage concerned was celebrated in England and was formally valid under English law.<sup>88</sup>

#### (b) *Domicile of one party*

2.17 The position as regards decrees of nullity granted by the courts of only one party's domicile is less clear. Until 1974 a woman entering into a marriage that was valid or voidable took the domicile of her husband as a matter of law and her domicile remained the same as his so long as the marriage subsisted. If, however, the marriage was void, the woman retained her own independent domicile which might or might not be the same as her husband's. As from 1 January 1974, a married woman possesses an independent domicile in all cases, not simply where her marriage is void.<sup>89</sup> Accordingly, the problem of whether an English or Scottish court should recognise a foreign annulment on the basis of only one party's domicile may arise, either where it was obtained before 1974 in respect of a void marriage, or in any case where it was obtained after the end of 1973.

2.18 Although in *Chapelle v. Chapelle*<sup>90</sup> Willmer J. took the view that a decree granted by the courts of only one party's domicile ought not to be recognised, this approach was not followed by Sir Jocelyn Simon P. in *Lepre v. Lepre*,<sup>91</sup> partly on the *Travers v. Holley*<sup>92</sup> principle and partly on the ground that courts were entitled to pronounce on the status of their own domiciliaries.<sup>93</sup> The approval of the decision in *Travers v. Holley*<sup>94</sup> by the House of Lords in *Indyka v. Indyka*<sup>95</sup> suggests that both English and Scottish

<sup>86</sup> 1927 S.C. (H.L.) 80; [1927] A.C. 641.

<sup>87</sup> In *Lepre v. Lepre* [1965] P. 52, 59, Sir Jocelyn Simon P. confirmed that the relevant date for determining the domicile of the parties is the date of the commencement of the foreign proceedings. It would seem to follow from the analogous position regarding recognition of foreign divorces that a change of domicile after that date will not affect recognition of the foreign decree: *Mansell v. Mansell* [1967] P. 306.

<sup>88</sup> *De Massa v. De Massa* (1931) [1939] 2 All E.R. 150n.; *Galene v. Galene* [1939] P. 237.

<sup>89</sup> Domicile and Matrimonial Proceedings Act 1973, s. 1.

<sup>90</sup> [1950] P. 134, 144, approved by Donovan L. J. in *Gray v. Formosa* [1963] P. 259, 270-271.

<sup>91</sup> [1965] P. 52, 61-63.

<sup>92</sup> [1953] P. 246.

<sup>93</sup> Sir Jocelyn Simon P. pointed out that a decree granted by the courts of one party's domicile should in principle be regarded as universally conclusive as to that party's marital status. It would, however, be inconsistent for the court to recognise a decree and at the same time to attribute a different status to the other party. The decree must be recognised as determining the status of both parties: [1965] P. 52, 62.

<sup>94</sup> [1953] P. 246.

<sup>95</sup> [1969] 1 A.C. 33.

courts would now recognise foreign nullity decrees on the basis of the domicile of one party to the "marriage" in the territory of the court. All United Kingdom courts now assume jurisdiction in nullity cases on the basis that on the date when the proceedings were begun one of the parties was domiciled in the territory of the court.<sup>96</sup> Further, apart from the *Travers v. Holley* principle, a decree of nullity based on the domicile of one party alone would probably be recognised under the "real and substantial connection" test laid down in *Indyka v. Indyka*.<sup>97</sup>

#### (4) Residence

##### (a) Habitual residence

2.19 The Domicile and Matrimonial Proceedings Act 1973 provides in respect of England and Wales,<sup>98</sup> Scotland<sup>99</sup> and Northern Ireland<sup>100</sup> that courts of these countries have jurisdiction to entertain proceedings for nullity of marriage or, in Scotland, declarator of nullity of marriage, if either of the parties to the marriage was habitually resident in the country throughout the period of one year ending with the date when the action had begun, or had died before that date and had been habitually resident in the country throughout the period of one year ending with the date of death. Applying the decision in *Travers v. Holley*<sup>101</sup> to the recognition of a foreign decree of nullity,<sup>102</sup> an English court has recognised a foreign decree based jurisdictionally on similar principles,<sup>103</sup> and it seems likely that a Scottish court would do likewise. Although under the reciprocity principle the length of the habitual residence would seem to be crucial, the later developments stemming from *Indyka v. Indyka*<sup>104</sup> indicate that all that is necessary is that the residence should be of sufficient duration and quality to constitute a real and substantial connection with the country granting the decree.<sup>105</sup>

##### (b) Common residence

2.20 There are three decisions<sup>106</sup> which suggest that an English court will recognise a foreign decree of nullity which has been obtained in the country which was the spouses' common residence at the commencement of the proceedings. In all these cases the country of the spouses' common residence was also the *locus celebrationis*. It is not entirely clear from the two earlier cases<sup>107</sup> whether each of these two factors was independently a sufficient

<sup>96</sup> Domicile and Matrimonial Proceedings Act 1973 ss.5, 7; Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No. 1045) (N.I.15) Art. 49.

<sup>97</sup> [1969] 1 A.C. 33; and see *Vervaeke v. Smith* [1981] Fam. 77, 109, 123. See paras. 2.13 and 2.14, above, and para. 6.22, below.

<sup>98</sup> Sect. 5(3).

<sup>99</sup> Sect. 7(3).

<sup>100</sup> Sect. 13(3), replaced by Article 49(3) of the Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No. 1045) (N.I.15).

<sup>101</sup> [1953] P. 246.

<sup>102</sup> See para. 2.10, above.

<sup>103</sup> *Vervaeke v. Smith* [1981] Fam. 77, 108-109; and see *Perrini v. Perrini* [1979] Fam. 84, 91-92.

<sup>104</sup> [1969] 1 A.C. 33.

<sup>105</sup> See *Welsby v. Welsby* [1970] 1 W.L.R. 877; *Law v. Gustin* [1976] Fam. 155; *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77.

<sup>106</sup> *Mitford v. Mitford* [1923] P. 130; *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Merker v. Merker* [1963] P. 283.

<sup>107</sup> *Mitford v. Mitford* [1923] P. 130; *Corbett v. Corbett* [1957] 1 W.L.R. 486.

ground for recognition, or whether they had to exist together. In *Merker v. Merker*,<sup>108</sup> however, Sir Jocelyn Simon P. made it clear that, irrespective of whether the foreign decree could be recognised on the basis of its having been granted in the country of the celebration of the marriage, common residence was a sufficient connecting factor on its own; this was because an English court would itself claim jurisdiction in such circumstances. The English court does not now assume domestic nullity jurisdiction merely on the basis of the parties' common residence. It is, therefore, arguable that it will no longer afford recognition on this ground.<sup>109</sup> However, this will be of significance only in the probably rare case in which the *common* residence of both parties is not of sufficient duration or character to amount in fact to the *habitual* residence of at least one of them.<sup>110</sup>

#### (5) *Place of celebration*

2.21 As mentioned above,<sup>111</sup> in relation to the real and substantial connection test, the English courts have recognised a foreign decree of nullity of a void marriage granted by a court in the country in which the marriage was celebrated.<sup>112</sup> The basis for recognition appears to have been the principle of reciprocity.<sup>113</sup> However, neither the English nor the Scottish courts now have jurisdiction to entertain a petition for nullity on the basis that the marriage was celebrated in England or in Scotland, as the case may be, and it would therefore seem doubtful whether a foreign decree granted in similar circumstances will in future be recognised in this country.<sup>114</sup>

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

2.22 In *Armitage v. Attorney-General*<sup>115</sup> it was held that an English court was bound to recognise a foreign divorce not obtained in the country of the domicile if it would be recognised as valid in that country. The same principle was adopted in Scotland.<sup>116</sup> Following *Indyka v. Indyka*, the principle of *Armitage* was extended to apply to divorces recognised as valid in the country with which either spouse had a real and substantial connection.<sup>117</sup> In its original formulation the principle of *Armitage* was extended to apply to the recognition of foreign nullity decrees in *Abate v. Abate*,<sup>118</sup> but there is at present no authority upon whether the principle as extended, following *Indyka v. Indyka*, would be applied to nullity decrees.

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<sup>108</sup> [1963] P. 283, 297.

<sup>109</sup> This view is supported by the fact that the celebration of a voidable marriage in a foreign country was rejected as a basis for recognition once the celebration of such a marriage in this country had ceased to be a ground upon which an English court would assume domestic nullity jurisdiction; *Merker v. Merker* [1963] P. 283, 297.

<sup>110</sup> An English court will recognise a foreign decree on the basis of habitual residence; see para. 2.19, above.

<sup>111</sup> See para. 2.14.

<sup>112</sup> *Corbett v. Corbett* [1957] 1 W.L.R. 486; *Merker v. Merker* [1963] P. 283.

<sup>113</sup> *Merker v. Merker* [1963] P. 283.

<sup>114</sup> It is for consideration whether specific provision should be made, in any new statutory scheme, for the recognition of annulments on this ground: see paras. 6.33 and 6.34, below.

<sup>115</sup> [1906] P. 135.

<sup>116</sup> *McKay v. Walls* 1951 S.L.T. (Notes) 6.

<sup>117</sup> *Mather v. Mahoney* [1968] 1 W.L.R. 1773; *Messina v. Smith* [1971] P. 322.

<sup>118</sup> [1961] P. 29.

2.23 In relation to divorces and legal separations, the original *Armitage* principle was given statutory approval by the Recognition of Divorces and Legal Separations Act 1971.<sup>119</sup> In addition it was extended to include divorces, either obtained in the country of the domicile of one spouse and recognised as valid under the law of the domicile of the other spouse, or obtained elsewhere and recognised as valid under the law of the domicile of each of the spouses respectively.<sup>120</sup> There is no authority on whether this statutory analogy would be followed in relation to foreign nullity decrees. However, it has been suggested<sup>121</sup> that the principle of *Abate v. Abate*<sup>122</sup> should be extended so as to permit recognition where the parties are domiciled in different countries and the courts of either both parties,<sup>123</sup> or of only one party's,<sup>124</sup> domicile would recognise the decree.

### C. Analysis of grounds for withholding recognition

#### (1) Fraud in obtaining the foreign decree

2.24 There is no authority directly in point, although a number of cases, including *Administrator of Austrian Property v. Von Lorang*,<sup>125</sup> proceed on the assumption that courts in the United Kingdom have a discretion to withhold recognition from a foreign nullity decree obtained by fraud. Lord Phillimore's examples of fraud in that case suggest that both fraud as to the foreign court's jurisdiction and fraud as to the actual merits of the petition may be relevant, but the latter was not at common law a sufficient ground for withholding recognition from a foreign divorce.<sup>126</sup> Mere procedural errors however, falling short of fraud, will not justify recognition being withheld.<sup>127</sup>

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

2.25 Various dicta indicate that an English or Scottish court may withhold recognition from a foreign decree which offends against the rules of natural justice.<sup>128</sup> In the Scottish case of *Crabtree v. Crabtree*<sup>129</sup> Lord Moncrieff declined to recognise a Latvian decree of divorce granted in proceedings of

<sup>119</sup> Sect. 6, as substituted by s.2(2) of the Domicile and Matrimonial Proceedings Act 1973.

<sup>120</sup> A qualification of this principle, under s.16(2) of the Domicile and Matrimonial Proceedings Act 1973, must be noted in relation to extrajudicial divorces.

<sup>121</sup> Cheshire and North, *Private International Law*, 10th ed. (1979), p. 409; Morris, *The Conflict of Laws*, 2nd ed. (1980), p. 160.

<sup>122</sup> [1961] P. 29.

<sup>123</sup> If both domiciliary laws agree as to the parties' status it should in principle make no difference that the legal systems of two countries are involved rather than one.

<sup>124</sup> If, as seems likely, the courts in England and Scotland will recognise a foreign nullity decree on the basis of one party's domicile, (see paras. 2.17 and 2.18 above), then it may be that, despite the statutory rules for divorce recognition, they will recognise a nullity decree which would be recognised as valid in the domicile of one of the parties but not in the domicile of the other. See paras. 6.19-6.26, below.

<sup>125</sup> 1927 S.C. (H.L.) 80; [1927] A.C. 641. See also *Chapelle v. Chapelle* [1950] P. 134, 140; *Merker v. Merker* [1963] P. 283, 296.

<sup>126</sup> *Bater v. Bater* [1906] P. 209; *Perin v. Perin* 1950 S.L.T. 51. See now the Recognition of Divorces and Legal Separations Act 1971, s.8(2).

<sup>127</sup> *Merker v. Merker* [1963] P. 283.

<sup>128</sup> E.g., *Mitford v. Mitford* [1923] P. 130, 137, 141-142; *Merker v. Merker* [1963] P. 283, 296, 299; *Law v. Gustin* [1976] Fam. 155, 159. The Scottish authorities include *Crabtree v. Crabtree* 1929 S.L.T. 675, 676; *Scott v. Scott* 1937 S.L.T. 632; and *Perin v. Perin* 1950 S.L.T. 51, 53.

<sup>129</sup> 1929 S.L.T. 675.

which the defender had no notice and in which she had no opportunity to be heard or to be represented. The courts, however, are naturally hesitant to withhold recognition on this ground<sup>130</sup> and the mere fact that the action was undefended is not by itself a ground of challenge.<sup>131</sup>

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

2.26 That an English court might withhold recognition from a foreign nullity decree which offends against English ideas of "substantial justice" is the least well defined and the most controversial<sup>132</sup> ground for denying recognition. In *Gray v. Formosa*,<sup>133</sup> the Court of Appeal denied recognition to a Maltese decree on the ground that the Maltese *substantive* rule upon which the decree was based was offensive to English ideas of "substantial justice".<sup>134</sup> This decision goes against the principle that an English court will not inquire into the substantive merits of a decree pronounced by a foreign court of competent jurisdiction, and it was followed by Sir Jocelyn Simon P., in *Lepre v. Lepre*,<sup>135</sup> only with reluctance. More recently, in *Vervaeke v. Smith*,<sup>136</sup> despite the view that this head of non-recognition should be exercised with "extreme reserve",<sup>137</sup> this general approach was adopted by the House of Lords.<sup>138</sup> It was held that the English rule upholding the validity of an English marriage, even though the parties had never intended to live together as man and wife, embodies a rule of English public policy such that, in the circumstances of the case, a Belgian decree annulling such a marriage on the identical grounds was to be denied recognition. In Scots law there are dicta<sup>139</sup> suggesting that the court would refuse to recognise a foreign divorce when its grounds are "repugnant to the standard of morality recognised by a civilised and Christian State", but the current status of these dicta is not clear.

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<sup>130</sup> In *Mitford v. Mitford* the court was prepared to recognise a German decree, even though it was granted during wartime when the English respondent husband was unable to reach Germany ([1923] P. 130, 141); and in *Law v. Gustin* the court ignored the fact that the respondent had received only five days' notice in which to enter a defence ([1976] Fam. 155, 158).

<sup>131</sup> *Administrator of Austrian Property v. Von Lorang*, per Lord Sands in 1926 S.C. 598, 627, cited with approval by Lord Hodson in *Ross-Smith v. Ross-Smith* [1963] A.C. 280, 341.

<sup>132</sup> Carter, (1962) 38 B.Y.B.I.L. 497; Lewis, (1963) 12 I.C.L.Q. 298; Blom-Cooper, (1963) 26 M.L.R. 94; Smart, (1983) 99 L.Q.R. 24; Jaffey, (1983) 32 I.C.L.Q. 500.

<sup>133</sup> [1963] P. 259. In this case the court appears to have been particularly influenced by the social policy consideration arising out of the behaviour of the Maltese domiciled husband who, having deserted his English born wife and children, obtained a Maltese decree annulling his marriage, contracted in England, on the grounds that it has not been celebrated in Roman Catholic form. See in particular at pp. 268-269, per Lord Denning M.R. and p. 270, per Donovan L. J.

<sup>134</sup> This phrase is derived from the judgment of Lindley M.R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790.

<sup>135</sup> [1965] P. 52.

<sup>136</sup> [1983] 1 A.C. 145.

<sup>137</sup> *Ibid.*, at p. 164.

<sup>138</sup> See especially, at pp. 156-157, per Lord Hailsham of St. Marylebone L.C., and at pp. 163-167 where Lord Simon of Glaisdale catalogues six factors in the particular case warranting, in his view, the application of a public policy ground for denial of recognition to a foreign nullity decree.

<sup>139</sup> *Humphrey v. Humphrey's Trustees* (1895) 33 S.L.R. 99, 100-101; cf. *Luszczewska v. Luszczewska* 1953 S.L.T. (Notes) 73.

#### (4) *Res judicata*

2.27 In *Vervaeke v. Smith*,<sup>140</sup> the House of Lords had no hesitation in applying the doctrine of *res judicata* to deny recognition to a Belgian nullity decree, the matter in dispute having already been the subject of an English decision<sup>141</sup> upholding the validity of the marriage in question. In the particular circumstances of the case, the petitioner had sought either a declaration<sup>142</sup> as to the validity of the Belgian decree, or alternatively a declaration that her later marriage subsequent to the decree was valid.<sup>143</sup> Their Lordships held that the first matter was covered by “cause of action estoppel” and the second by “issue estoppel”. In the event both matters were regarded as *res judicata*.<sup>144</sup>

#### (5) *That the foreign annulment is extra-judicial*

2.28 It is a possible ground of non-recognition of a foreign annulment that it is extra-judicial. There does not appear to be any English authority as to whether the courts will recognise an extra-judicial annulment. One Scottish decision<sup>145</sup> would seem to suggest that such an annulment ought not be recognised, but this decision has been criticised.<sup>146</sup> Various kinds of extra-judicial divorce are capable of recognition<sup>147</sup> and we consider below<sup>148</sup> whether some forms, at least, of extra-judicial annulment should not also be capable of recognition.

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

2.29 So far it has been assumed throughout this account of the rules for the recognition of foreign nullity decrees that they are the creatures of, and are to be determined solely by reference to, the common law. It is, however, a matter of controversy as to how far judgments relating to status, including foreign nullity decrees, fall within the recognition provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.<sup>149</sup> The main provisions of

<sup>140</sup> [1983] 1 A.C. 145.

<sup>141</sup> *Messina v. Smith* [1971] P. 322.

<sup>142</sup> Under R.S.C. O.15, r.16.

<sup>143</sup> Under the Matrimonial Causes Act 1973, s.45.

<sup>144</sup> Lord Diplock suggested ([1983] 1 A.C. 145, 160) that “cause of action” estoppel is itself an application of a rule of English public policy. On that basis, it might have been subsumed, for present purposes, under the previous heading; see para. 2.26, above. Lord Simon of Glaisdale, however, at p. 161, thought that *res judicata* and public policy should be kept separate, and that is the approach adopted in this report. Furthermore, in legislation dealing with the recognition of foreign judgments the two issues of *res judicata* and public policy are usually treated separately; see, e.g., the Foreign Judgments (Reciprocal Enforcement) Act 1933, s.4(1)(a)(v) and (b); Recognition of Divorces and Legal Separations Act 1971, s.8(1) and (2)(b); Civil Jurisdiction and Judgments Act 1982, s.2, Sched. 1, Art. 27(1), (3) and (5).

<sup>145</sup> *Di Rollo v. Di Rollo* 1959 S.C. 75; contrast *Radoyevitch v. Radoyevitch* 1930 S.C. 619.

<sup>146</sup> Anton, *Private International Law* 1967, pp. 306-307.

<sup>147</sup> Cheshire and North, *Private International Law*, 10th ed. (1979), pp. 378-384; and see also *Quazi v. Quazi* [1980] A.C. 744 in relation to the recognition of extra-judicial divorces under the 1971 Act, and *Qureshi v. Qureshi* [1972] Fam. 173 regarding the recognition of extra-judicial divorces prior to 1972; see paras. 6.10 and 6.11, below.

<sup>148</sup> Para. 6.9.

<sup>149</sup> It is also theoretically possible for the recognition of a foreign nullity decree to fall within the provisions of the Matrimonial Causes (War Marriages) Act 1944; see paras. 6.46 to 6.48, below.

that Act are concerned with the registration and enforcement in the United Kingdom of final and conclusive money judgments given in the courts of countries to which the Act has been extended by Order in Council. However, section 8(1) goes further and deals with the question of the recognition of foreign judgments in the following terms:

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

2.30 It will be seen that section 8(1) is not limited in terms to money judgments but applies also to judgments to which the main provisions of the Act would have applied if a sum of money had been payable thereunder. Does this mean that section 8(1) extends to judgments relating to status such as divorce<sup>150</sup> and nullity? In 1975, Lord Reid clearly thought that the section did not extend to “judgments on status and family matters.”<sup>151</sup> Nevertheless, it is undoubtedly the case that some of the Conventions between the United Kingdom and countries to which the 1933 Act has been extended by Order in Council have been drafted on the basis that the 1933 Act does apply to family law judgments, for they include reference to “judgments in matters of family law or status (including divorces or other judgments in matrimonial causes)”.<sup>152</sup> Other Conventions specifically exclude such judgments,<sup>153</sup> while still others<sup>154</sup> make no reference to such judgments but appear to be drafted in terms which would exclude them.<sup>155</sup> The question whether the inclusion of judgments in matrimonial causes within a relevant convention meant that recognition of foreign nullity decrees fell to be governed by the rules of the 1933 Act was discussed in *Vervaeke v. Smith* which concerned the recognition in England of a Belgian nullity decree, Belgium being a country whose convention with the United Kingdom includes a specific reference to matrimonial causes.<sup>156</sup> No clear view on this issue emerges. At first instance,

<sup>150</sup> And thus falling within s.6(5) of the Recognition of Divorces and Legal Separations Act 1971 (as substituted).

<sup>151</sup> *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 617. This view is shared by Lipstein, [1981] C.L.J. 201, 203-204.

<sup>152</sup> See, e.g., the Conventions with Belgium (S.R. & O. 1936 No. 1169, Sched., Art. 4(3)(a)); Italy (S.I. 1973 No. 1894, Sched., Art. IV(3)(a)); Austria (S.I. 1962 No. 1339, Sched., Art. IV(5)(a)); Federal Republic of Germany (S.I. 1961 No. 1199, Sched., Art. IV(1)(c)); and Israel (S.I. 1971 No. 1039, Sched., Art. 4(5)).

<sup>153</sup> See, e.g., the Conventions with France (S.R. & O. 1936 No. 609, Sched., Art. 2(3)(b)); Norway (S.I. 1962 No. 636, Sched., Art. II(2)(b)); The Netherlands (S.I. 1969 No. 1063, Sched., Art. II(2)(c)); and Suriname (S.I. 1981 No. 735).

<sup>154</sup> See, e.g., the Conventions with India (S.I. 1958 No. 425); Pakistan (S.I. 1958 No. 141); the Australian Capital Territory (S.I. 1955 No. 558); Guernsey (S.I. 1973 No. 610); Isle of Man (S.I. 1973 No. 611); and Jersey (S.I. 1973 No. 612).

<sup>155</sup> By referring to Part I of the 1933 Act which is limited to money judgments. There is one Convention where it is quite unclear whether it is intended to apply to the enforcement of status judgments; see Tonga (S.I. 1980 No. 1523).

<sup>156</sup> See n. 152, above.

Waterhouse J. proceeded on the basis, agreed by the parties, that recognition of the Belgian decree was governed by the 1933 Act and the convention between Belgium and the United Kingdom.<sup>157</sup> In argument before the Court of Appeal, there was some resiling from this view, but Sir John Arnold P. had little doubt that the question of recognition of the Belgian decree did properly fall within the Act and the convention,<sup>158</sup> but the other two judges<sup>159</sup> were doubtful whether the Act and convention did properly apply to matrimonial cases such as the instant one and suggested that only money judgments in matrimonial cases fell within them. In the House of Lords, it was considered by Lord Hailsham of St. Marylebone L.C. that recognition of the Belgian decree should be denied, whether the relevant rules were those at common law, or under the 1933 Act and the convention with Belgium;<sup>160</sup> while Lord Diplock<sup>161</sup> found it unnecessary to decide whether the Belgium decree could be recognised under section 8(1) of the 1933 Act because, even if it could, other provisions of that Act<sup>162</sup> would lead him to deny recognition. The other judges did not express a view on this matter.

2.31 While there is no decisive authority on the issue, some of the conventions to which the 1933 Act applies do specifically include matrimonial causes within their ambit and it is certainly arguable that section 8(1) of the 1933 Act can, despite the fact that it "is not framed so as to yield up its meaning easily or quickly",<sup>163</sup> be reasonably interpreted as applying to the recognition of foreign nullity decrees. It must be asked, however, if it matters whether the rules for recognition of foreign decrees are to be sought from the common law or from the 1933 Act and its attendant conventions. The issue as to whether the foreign court granted the decree in such jurisdictional circumstances as will justify recognition here will be decided according to the common law rules discussed already,<sup>164</sup> whether or not the matter falls within the 1933 Act, because that Act and the relevant conventions refer such jurisdictional issues to the common law.<sup>165</sup> The grounds on which recognition may be denied to a jurisdictionally satisfactory foreign decree may, perhaps, differ slightly, depending on whether one is looking at the common law heads for withholding recognition<sup>166</sup> or those listed in the 1933 Act.<sup>167</sup> For example, a decree must be denied recognition under the 1933 Act if it was obtained by fraud<sup>168</sup> whereas this would appear to be a matter of discretion at common law.<sup>169</sup> Nevertheless, the general approach of the common law and the 1933

<sup>157</sup> [1981] Fam. 77, 103.

<sup>158</sup> *Ibid.*, at pp. 125-126.

<sup>159</sup> *Ibid.*, at pp. 126-127.

<sup>160</sup> [1983] 1 A.C. 145, 156.

<sup>161</sup> *Ibid.*, at p. 159.

<sup>162</sup> Sects. 4(1) and 8(2)(b).

<sup>163</sup> [1981] Fam. 77, 125, *per* Sir John Arnold P.

<sup>164</sup> See paras. 2.10 to 2.23, above.

<sup>165</sup> Foreign Judgments (Reciprocal Enforcement) Act 1933, s.4(2)(c) and see, e.g., the Belgian convention (S.R. & O. 1936 No. 1169, Sched., Art. 4(3)) and *Vervaeke v. Smith* [1981] Fam. 77. (The jurisdictional issue was not examined in the House of Lords: [1983] 1 A.C. 145).

<sup>166</sup> See paras. 2.24 to 2.28, above.

<sup>167</sup> Sect. 8(2)(b) applies the grounds listed in s.4(1) to this issue.

<sup>168</sup> Sect. 4(1)(a)(iv).

<sup>169</sup> See para. 2.24, above. It might also be noted, by way of analogy, that some matters which are mandatory under the 1933 Act are discretionary under the equivalent provisions in the Recognition of Divorces and Legal Separations Act 1971, s.8(2).

Act is similar on this issue of grounds for withholding recognition. We consider later<sup>170</sup> whether, in the light of the fact that the 1933 Act may apply to the recognition of some foreign nullity decrees and that there may be some, albeit minor, differences between the common law and statutory rules, it would be necessary in any reformed system of nullity recognition to allow for the preservation of the possibility of recognition under the Foreign Judgments (Reciprocal Enforcement) Act 1933.<sup>171</sup>

#### E. *The effect of a foreign nullity decree*

##### (1) *Where the decree is recognised*

2.32 A decree of nullity pronounced by a court of competent jurisdiction is a judgment *in rem* determining status, and thus demands recognition by all other courts wherever situated.<sup>172</sup> But the effect of the decree is not inevitably the same in the country in which it is recognised as it is in the country in which it was pronounced. Different legal systems may assign different consequences to the same set of circumstances. Where such differences exist on the recognition of a foreign decree, the question arises as to which consequences are to follow. There is little authority on the effect in this country of a foreign nullity decree. Such authority as there is suggests that the position is as follows.

##### (a) *Retrospective effect of foreign nullity decree*

2.33 Under English law a decree pronouncing a marriage void *ab initio* is retrospective in its operation, while a decree annulling a voidable marriage affects the parties' status only prospectively.<sup>173</sup> Where the effect of a foreign nullity decree is the same as under English law, no problem is likely to arise.<sup>174</sup> Where, however, an English court recognises a foreign decree which, although it annuls only what amounts in English law to a voidable marriage, operates retrospectively in the country in which it is granted, difficulties might arise if the English court were to treat the decree in the same way as a comparable English decree, i.e., as only prospective in effect. For instance it would mean that a second marriage, contracted during the currency of the first, voidable, marriage, would in *English* law be void for bigamy. The cases give no firm guidance on this problem, although a dictum of Viscount Haldane in the *Von Lorang* case might be taken to indicate that the foreign effect of a foreign decree should be recognised.<sup>175</sup>

<sup>170</sup> See paras. 6.41 and 6.42, below.

<sup>171</sup> It is perhaps worth noting that, when the Civil Jurisdiction and Judgments Act 1982, Sched. 1, Art. 55, is brought into force, all the existing Conventions made under the 1933 Act between the United Kingdom and Member States of the E.E.C. (i.e. those with France, Belgium, Germany, Italy and The Netherlands) will be superseded by the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in so far as they relate to the subject matter of the E.E.C. Convention. But that Convention does not apply to "the status or legal capacity of natural persons" (Art. 1(1)); and so recognition of foreign nullity decrees under bilateral Conventions made under the 1933 Act therefore remains unaffected.

<sup>172</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 641.

<sup>173</sup> Matrimonial Causes Act 1973, s.16. For Northern Ireland see the similar provision in the Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No. 1045) (N.I.15) Art. 18. In Scotland all declarators of nullity have retrospective effect.

<sup>174</sup> E.g., *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 641.

<sup>175</sup> *Ibid.*, at pp. 87 and 654-655 respectively. See also North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977), p. 267.

2.34 The internal law of Scotland does not admit that a declarator of nullity of marriage may be only prospective in effect but would, it is thought, recognise that this distinction may be admitted by other systems.<sup>176</sup> The cases do not give clear guidance on the question which system of law determines the effect to be given to the decree. It is thought, however, that the Scottish courts would attribute to any foreign decree of nullity falling to be recognised as a decree *in rem* in this respect the same effect which it has by virtue of the legal system under which the decree was pronounced.<sup>177</sup>

(b) *Capacity to remarry after a foreign nullity decree*

2.35 It follows from the decision of the House of Lords in *Administrator of Austrian Property v. Von Lorang*<sup>178</sup> that, where the parties have obtained a valid nullity decree, the courts in this country will regard them as unmarried and prima facie as free to remarry. However it is a generally accepted rule of English and of Scottish private international law that a person's capacity to marry is determined by the law of his premarital domicile.<sup>179</sup> Consequently, a conflict of rules might arise if a foreign nullity decree is recognised in this country but not in the country of the domicile of one of the spouses. This problem, which also applies to the recognition of foreign divorces, was resolved in England at common law by the decision of the Divisional Court in *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*,<sup>180</sup> where it was held that the rule relating to the parties' capacity to marry should prevail over that for divorce recognition, with the result that, although the English court might recognise a foreign divorce, the parties would not be regarded in England as free to remarry unless the divorce was recognised by the law of their domiciles. The decision in the *Arias* case was reversed by section 7 of the Recognition of Divorces and Legal Separations Act 1971, as amended by section 15(2) of the Domicile and Matrimonial Proceedings Act 1973, but only as to remarriage in the United Kingdom after a valid foreign divorce (not nullity decree). In *Perrini v. Perrini*<sup>181</sup> Sir George Baker P., having decided that a foreign nullity decree obtained in New Jersey should be recognised in this country, went on to hold that "the fact that [the husband] could not marry in Italy, the country of his domicile . . . is, in my opinion, no bar to his marrying in England where by the New Jersey decree he was free to marry. No incapacity existed in English law." No reference was made either to section 7 of the 1971 Act or to the *Arias* case in reaching this conclusion. Moreover the decision leaves in doubt what will happen where an English court recognises a foreign decree of nullity and the remarriage of one of the parties take place abroad. Similar problems arise under Scots law.<sup>182</sup>

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<sup>176</sup> See *Balshaw v. Kelly* 1967 S.C. 63.

<sup>177</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80, 87-88, 97; [1927] A.C. 641, 655-656, 670.

<sup>178</sup> 1927 S.C. (H.L.) 80; [1927] A.C. 641.

<sup>179</sup> Though see *Radwan v. Radwan (No. 2)* [1973] Fam. 35, examined in Working Paper No. 83/ Consultative Memorandum No. 56 (1982), paras. 3.4, 3.7-3.10 and 4.2.

<sup>180</sup> [1968] 2 Q.B. 956.

<sup>181</sup> [1979] Fam. 84, 92.

<sup>182</sup> See Clive, *Husband and Wife*, 2nd ed. (1982), pp. 149-152.

(c) *Ancillary relief*

2.36 There does not appear to be any authority dealing with the effect of the recognition of a foreign nullity decree upon proceedings, taken either abroad or in this country, for ancillary relief. However it seems likely that the divorce analogy would be followed, with the result that a foreign order for financial relief would be recognised only if it were final and conclusive, or fell within the statutory rules for the recognition of maintenance orders. In the converse case, where one of the parties wishes to seek financial relief in this country following a foreign decree of nullity, the English courts will decline jurisdiction on the ground that there is no subsisting marriage.<sup>183</sup> The position is effectively the same in Scotland. The Law Commission has recommended that financial relief should be available in the English courts after a foreign divorce, legal separation or annulment,<sup>184</sup> and the Scottish Law Commission has made recommendations to similar effect.<sup>185</sup> As we have indicated earlier,<sup>186</sup> the recommendations of both Commissions are implemented in the Matrimonial and Family Proceedings Act 1984.

2.37 The point should be made that a petitioner for a declarator of nullity of marriage in Scotland can obtain no financial provision of any kind, since the Scottish courts have no power to award it, even on their own declarators of nullity. The respective proposals of the two Law Commissions, mentioned in the previous paragraph, do not extend to cover cases in which the decree to be recognised is that of another court within the British Isles, it being thought that it would be inappropriate to do so where the party concerned can apply to the originating court itself with a minimum of inconvenience. The Law Commission's proposals in this field would therefore be of no assistance to an English applicant after a Scottish declarator. Nor could such an applicant obtain relief in Scotland. However, the Scottish Law Commission has made proposals in this connection also, recommending that a court granting a declarator of nullity of marriage should have the same powers in relation to financial provision as a court granting a decree of divorce.<sup>187</sup> All other courts within the British Isles have power to award financial relief on granting a decree of nullity, and this difficulty which arises at present in relation to Scotland exists nowhere else in the British Isles.

(2) *Where the decree is not recognised*

2.38 Although there is no direct authority, it would appear that the position where a foreign nullity decree is not recognised is the same as in the case of an unrecognised divorce.<sup>188</sup> Thus the parties will still be regarded as married in this country unless, under the domestic marriage law of England or Scotland, the marriage is regarded as void. However if the parties have remarried and the foreign nullity decree was recognised by the courts of their

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<sup>183</sup> *Quazi v. Quazi* [1980] A.C. 744 (divorce).

<sup>184</sup> Financial Relief after Foreign Divorce (1982) Law Com. No. 117.

<sup>185</sup> Report on Financial Provision after Foreign Divorce (1982), Scot. Law Com. No. 72.

<sup>186</sup> See para. 1.5, above.

<sup>187</sup> Report on Aliment and Financial Provision (1981), Scot. Law Com. No. 67, paras. 3.201-3.203.

<sup>188</sup> North, *The Private International Law of Matrimonial Causes in the British Isles and Republic of Ireland* (1977), pp. 268-269.

domicile at the time of their remarriage a similar conflict to that described in paragraph 2.35, above, between the English or Scottish rules for recognition and those determining the parties' capacity to marry, will arise. In this situation there is Canadian authority<sup>189</sup> to the effect that the capacity rule should prevail and that the parties should be regarded as free to marry. It has also been suggested that the existence of an unrecognised foreign decree of nullity should not create an estoppel against either party in this country.<sup>190</sup>

#### F. Classification of foreign decrees

2.39 Because the rules for the recognition of foreign decrees of divorce and nullity differ, it might occasionally be necessary for an English court to decide into which category (divorce or nullity) the foreign decree falls, in order to decide which set of recognition rules to apply. For instance in New Zealand the courts used to grant decrees of dissolution of a voidable marriage on grounds that were similar to those upon which an English court would grant a decree of nullity.<sup>191</sup> If such a decree fell for recognition in this country, it would have to be decided whether our divorce or our nullity recognition rules were to be applied to it. Although there is no direct authority, it has been suggested that any such classification should be made according to English law.<sup>192</sup>

#### Criticisms of the present law

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

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

- (i) It is not clear whether there is an underlying principle of recognition, namely the "real and substantial connection" rules stated in *Indyka v. Indyka*, or whether the law should merely be regarded as a set of *ad hoc* rules developed by case law.
- (ii) The "real and substantial connection" test<sup>193</sup> has the advantage of widening the basis of recognition of foreign decrees, thus reducing the number of "limping" marriages, i.e. marriages regarded as valid in one country but not in another. However it is an inherently vague test which in some cases may be unpredictable in its application. Furthermore, it is a test which is difficult to apply other than through the judicial process.

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<sup>189</sup> *Schwebel v. Ungar* (1963) 42 D.L.R. (2d) 622, aff'd. (1964) 48 D.L.R. (2d) 644.

<sup>190</sup> North, *The Private International Law of Matrimonial Causes in the British Isles and Republic of Ireland*, (1977), pp. 268-269; but cf. two Canadian cases, *Schwebel v. Schwebel* (1970) 10 D.L.R. (3d) 742 and *Downton v. Royal Trust Co.* (1973) 34 D.L.R. (3d) 403, 412-413, which suggest otherwise in the case of matters not central to the parties' marital status.

<sup>191</sup> Matrimonial Proceedings Act 1963 (New Zealand), s.18. Under the Family Proceedings Act 1980 (New Zealand) this type of matrimonial relief has been abolished and the courts may either make an order declaring that a marriage is void *ab initio* (ss.29-31) or make an order dissolving a marriage (ss.37-43).

<sup>192</sup> Cheshire and North, *Private International Law*, 10th ed. (1979), p. 412; and see *Turner v. Thompson* (1888) 13 P.D. 37.

<sup>193</sup> see paras. 2.13 to 2.15, above.

- (iii) Authority is both limited and speculative, and it is unclear what impact the statutory rules for the recognition of foreign divorces<sup>194</sup> would have in the sphere of recognition of foreign annulments.<sup>195</sup>
  - (iv) The exact scope of the grounds for withholding recognition is unclear.<sup>196</sup> In particular, the principle of “substantial justice” as a ground for withholding recognition has been criticised as having the undesirable effect that people would not be able to adjust their lives according to the ostensible effect of the judgment as to their status pronounced by a competent court.<sup>197</sup>
- (b) Because of the uncertainty which surrounds a number of the bases upon which an English or Scottish court might grant recognition to, or withhold it from, a foreign decree, the precise status of parties will, in many cases, be uncertain. It is highly undesirable as a matter of policy that, when so many issues depend upon whether persons are married or unmarried, their status should not be as certain as possible at all times. It is not a wholly satisfactory answer that either party may obtain a declaration or declarator as to the validity of the foreign decree.<sup>198</sup> These procedures are troublesome and expensive for the people concerned.
- (c) Uncertainty in the rules governing the recognition of foreign annulments is primarily the result of their haphazard development at common law. For many years this development was part of the parallel evolution of the rules governing the recognition of foreign divorces, which themselves were affected by the rules dealing with the assumption of domestic jurisdiction in nullity and divorce. Now, however, the law on both these subjects is stated comprehensively in statutory form, by the Recognition of Divorces and Legal Separations Act 1971, and the Domicile and Matrimonial Proceedings Act 1973, respectively.

We listed in our Consultation Paper these criticisms of the rules regarding the recognition of foreign decrees of nullity and concluded that the criticisms would best be met by rationalising such rules and embodying them in statutory form. Virtually everyone who commented to us agreed both with our criticisms and with our provisional conclusion which, therefore, we confirm.

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<sup>194</sup> Recognition of Divorces and Legal Separations Act 1971.

<sup>195</sup> The introduction of new statutory rules for the assumption of jurisdiction in domestic proceedings for nullity of marriage (Domicile and Matrimonial Proceedings Act 1973) would appear to have affected the recognition rules; see *Vervaeke v. Smith* [1981] Fam. 77, 109.

<sup>196</sup> See paras. 2.24 to 2.28, above.

<sup>197</sup> *Merker v. Merker* [1963] P. 283, 301.

<sup>198</sup> In England, under R.S.C. O. 15, r. 16; in Northern Ireland, under R.S.C. (N.I.) Order 1, rule 12(c); in Scotland by a decree of declarator of status: *Makouipour v. Makouipour* 1967 S.C. 116; *Galbraith v. Galbraith* 1971 S.L.T. 139; *Bain v. Bain* 1971 S.L.T. 141; *Broit v. Broit* 1972 S.L.T. (Notes) 32.

## PART III

### THE CASE FOR REFORM

3.1 The recognition of foreign divorces and legal separations, as distinct from foreign decrees of nullity, is now governed by a comprehensive scheme of statutory rules contained in the Recognition of Divorces and Legal Separations Act 1971.<sup>199</sup> This Act enabled the United Kingdom to accede to the Convention on the Recognition of Divorces and Legal Separations adopted in 1968 by the Hague Conference on Private International Law.<sup>200</sup> This Convention sets out the grounds upon which Contracting States are required to recognise each other's divorces and legal separations. The 1971 Act, however, goes further than the terms of the Convention in a number of respects.<sup>201</sup> First, it applies to the recognition in any part of the United Kingdom of decrees of divorce and judicial separation granted by courts in the various different parts of the British Isles, the recognition of such decrees falling outside the ambit of the Convention. Secondly, it applies the same jurisdictional bases for the recognition of all divorces and legal separations obtained abroad, whether or not in countries which are parties to the Convention. These jurisdictional bases are: habitual residence of either spouse in the country in which the divorce or legal separation was obtained (and habitual residence, for these purposes, includes domicile where the state of origin uses this concept); and the fact that the divorce or legal separation was obtained in a country of which either spouse was a national.<sup>202</sup> Thirdly, the Act provides further grounds of recognition; in addition to those contained in the Convention, by preserving the common law rule that a divorce or legal separation will be recognised in the United Kingdom if it is valid according to the law of the domicile of each spouse.<sup>203</sup>

3.2 Moving the second reading of the Bill that led to the 1971 Act, the Lord Chancellor said that it was a measure whose principal object was to reduce the number of "limping" marriages,<sup>204</sup> and to alleviate their unsatisfactory consequences. It was designed to achieve "greater liberality" while "restoring certainty" to the rules of recognition. The inconsistencies caused by the operation of different recognition criteria in different legal systems,

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<sup>199</sup> As amended by the Domicile and Matrimonial Proceedings Act 1973.

<sup>200</sup> The Convention was opened for signature on 1 June 1970 and was signed on behalf of the United Kingdom on that date and was ratified by the United Kingdom on 21 May 1974. It entered into force on 24 August 1975. It is hereafter referred to as "the 1970 Hague Convention". For the complete text of the Convention, see *Conférence de la Haye de droit internationale privé: Actes et documents de la Onzième session* (1971), Vol. 1, p.241. The English text is reproduced as Appendix A in the Law Commissions' Report on the Convention (1970), Law Com. No. 34; Scot. Law Com. No. 16; and see United Kingdom Treaty Series No. 123 (1975), Cmnd. 6248.

<sup>201</sup> Article 17 specifically provides that rules of law more favourable to the recognition of foreign divorces and legal separations are permissible.

<sup>202</sup> See 1971 Act, s.3. These grounds for recognition are more favourable than those of the Convention: see Articles 2 and 3.

<sup>203</sup> 1971 Act, s.6, as substituted by the Domicile and Matrimonial Proceedings Act 1973, s.2(2). The amendments were required because the 1973 Act (s.1) provides that a wife shall retain her own domicile after marriage, and may preserve or change it independently of her husband.

<sup>204</sup> *Hansard* (H.L.), 16 February 1971, vol. 315, col. 483 (Lord Hailsham of St. Marylebone).

and “the acute misery and frustration” to which these gave rise were, however, considered only in the context of the recognition of foreign divorces and legal separations. The opportunity to make similar provision for the statutory codification of the rules relating to the recognition of foreign nullity decrees was not taken.

3.3 As we have already stated,<sup>205</sup> it was hoped that the development of the rules for the recognition of foreign decrees of nullity would, like those applicable to divorces and legal separation, be the subject of international agreement. In the event the Conventions which resulted from both the Eleventh and Thirteenth Sessions of the Hague Conference, in 1968 and 1976 respectively, did not deal with the question of foreign nullity recognition. It is important to be clear why this was so.

3.4 The proposal made at the Tenth Session of the Hague Conference (1964), for the examination in the Eleventh Session of a draft Convention on the recognition of foreign matrimonial decisions<sup>206</sup> was cast in wider terms than the subjects with which the Convention eventually dealt. In the four years which elapsed before the Convention on the Recognition of Foreign Divorces and Legal Separations was finally agreed, the question of recognition of foreign nullity decrees, although not formally abandoned by the Conference was, in the words of one commentator, “tacitly left aside”.<sup>207</sup> The Conference considered that there were formidable obstacles to international agreement on this topic, in particular the differences in social and religious philosophies of the participating states, their different jurisdictional criteria, very different methods of assuring recognition, and differences in conflicts theory and substantive law. Furthermore, the Conference considered that the recognition of foreign nullity decrees did not constitute a sufficiently serious problem to warrant consideration for inclusion in the Convention.

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

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<sup>205</sup> See para. 1.3, above.

<sup>206</sup> *Actes et documents de la Dixième session* (1965), Vol. I, p.77.

<sup>207</sup> Anton, “The Recognition of Divorces and Legal Separations”, (1969) 18 I.C.L.Q. 620, at p.623.

of nullity and those of divorce and legal separation, in the light of their respective effects on the property and maintenance rights of the former or purported spouse, and on the legitimacy, custody and support of any children of the relationship, was thought to be weakened.<sup>208</sup> As Rabel has observed,<sup>209</sup> the law of the forum, so significant for divorce, in principle is immaterial for annulment.

3.6 At the Thirteenth Session of the Hague Conference in 1976<sup>210</sup> the question was posed whether the Convention on the Celebration and Recognition of the Validity of Marriages, which was concluded at the end of that Session, should deal with the recognition of decisions as to marital status other than those covered by the Hague Convention on the Recognition of Divorces and Legal Separations of 1970. This would have included nullity decisions. Although there was agreement among the Contracting States that such decisions could be included in the Convention, in the event once again nothing was done to ensure that they were. The same reasons as those which persuaded the Eleventh Session to omit the recognition of foreign nullity decisions from the Convention that emerged at the conclusion of that Session suggested to the delegates at the Thirteenth Session that it would be inappropriate to deal with them in the 1976 Convention.

3.7 The reluctance of the 1976 Session of the Hague Conference to meet the challenge of nullity recognition is disappointing. The initiative now rests with individual states. As we have suggested earlier,<sup>211</sup> the present English and Scottish rules of recognition are unsatisfactory in several respects. In particular, we believe that the hardship, whether actual or potential, caused to those persons whose status is rendered uncertain through no fault of their own should be removed. This problem is of more than merely academic interest. The displacement of populations since the last war and the increase in mobility of people, especially manifested in their desire to obtain employment outside their country of origin, has given matrimonial law a more significant international element.

3.8 The first major question which must be considered is whether, notwithstanding the criticisms outlined in Part II, the need for reform and restatement of the law relating to recognition of foreign nullity decrees has been made out. We believe that it is difficult to make any convincing argument

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<sup>208</sup> See *Conférence de la Haye de droit international privé: Actes et documents de la Dixième session* (1965), Vol. I: *Questionnaire et Explications du Bureau Permanent*, with respect to divorce and legal separation, Preliminary Document No. 1 of January 1964, p.116, and *Réponses des Gouvernements au Questionnaire*, Preliminary Document No. 2 of September-October 1964, responses to Question 1, pp.169-233; see also Rabel *The Conflict of Laws: A Comparative Study* 2nd ed., (1958) Vol.1, pp.247, 309, 581. Similar grounds had been advanced by the Hague Conference in the course of formulating what became the Convention on Divorce in 1902. See *Actes et documents de la Deuxième Session* (1894), p.81.

<sup>209</sup> *The Conflict of Laws: A Comparative Study*, 2nd ed. (1958) Vol.1, p.582.

<sup>210</sup> See *Conférence de la Haye de droit international privé: Actes et documents de la Treizième session* (1978), Vol. III: *Questionnaire sur les conflits de lois en matière de mariage*.—Preliminary Document No. 1 of July 1974, pp.12-13 [Part IV], *Réponses des Gouvernements au Questionnaire*, Preliminary Document No. 2 of April 1975, [replies to Part IV], pp.67-102.

<sup>211</sup> See para. 2.40, above.

for the preservation of the present system of common law rules for the recognition of foreign annulments. There are, of course, important theoretical and jurisdictional differences between divorce and nullity: the former puts an end to a valid marriage, the latter declares that some fundamental bar has prevented the contracting of a marriage at all. But the end results of both divorce and nullity are not dissimilar, in that two people, ostensibly joined together by certain legal and moral obligations, are separated and released—though possibly on terms—from the claims which formerly bound them. The practical consequences of this separation are not likely to differ much whether the bonds which previously joined them were, in law, real or illusory; and it therefore seems to us that so far as possible the legal principles upon which they are separated should constitute a consistent and coherent system. To put it bluntly, they should be the same, so far as the nature of the case allows. In some jurisdictions<sup>212</sup> the consequences of a nullity decree are, even in theory, difficult to distinguish from those of divorce; and the fundamental correspondence between the two, at least in the case of voidable marriages, is increasingly recognised.<sup>213</sup> Some of the grounds on which a marriage may be annulled reflect the presence of factors which become relevant only after the marriage has taken place. The significance of this point is two-fold. First, again it blurs the distinction between dissolution and annulment. Secondly, and more pertinently, the law to determine the grounds for annulment will not necessarily be that of the personal law of the parties as at the time of their marriage, but rather as at some later date. Indeed, in an appropriate case the law of the forum might even be applied—for example, where impotence or wilful refusal to consummate the marriage is alleged.

3.9 There is, however, one aspect of the recognition of foreign annulments which may go some way to distinguish them from foreign divorces, and it is an aspect that was of concern to a number of commentators on our Consultation Paper. There is a more direct interrelation between annulment and marriage than between divorce and marriage. Divorce ends a marriage but an annulment may be merely declaratory of an existing legal fact—the invalidity of the marriage. The issue of the validity of a marriage may arise in the context of the recognition of a foreign annulment of the marriage, the relevant rules for which embody detailed jurisdictional rules; or the same issue may arise in the context of a nullity petition in the United Kingdom, again with its own detailed (but different) jurisdictional rules; or the issue may arise for decision in some other context, e.g. whether a licence to marry can be issued, where the central issue is more likely to be the operation of the choice of law rules applicable to the validity of marriage than any jurisdictional problem. This contrast between the rules for the recognition of foreign annulments and those for determining the validity of a marriage is seen most clearly in the specific context of the effect of the recognition of a foreign annulment (or

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<sup>212</sup> See, for example, Matrimonial Causes Act 1973, s.16 (voidable marriages in English law); *Aufhebung der Ehe* under West German law: see EheG, sections 28-39.

<sup>213</sup> Thus the fact that in Scotland no financial provision is available on a declarator of nullity of marriage has a theoretical justification. Nevertheless the Scottish Law Commission has recommended on practical grounds the abandonment of this rule: Scot. Law Com. No. 67 (1981), paras. 3.201 to 3.203.

divorce) on capacity to marry—an issue which is examined in more detail later in this report.<sup>214</sup> A related area of concern is whether different recognition rules should be applied depending upon whether the marriage annulled is void or voidable—it being the case that, if the marriage is void, no decree is needed to declare it so and any decree is merely declaratory.

3.10 We do not doubt that a number of difficult issues arise, as our commentators pointed out, from the interrelation of rules for nullity recognition and those for choice of law in marriage—issues which are more complex than those arising from the interrelation of divorce recognition rules and marriage choice of law rules. Nevertheless we have reached the conclusion, shared by almost all those who commented on this issue, that it is not desirable to have different sets of nullity recognition rules depending for example on whether the marriage in issue is regarded as void or voidable, or whether or not jurisdictional issues are raised. The statute book would needlessly be complicated by the type of elaborate provisions that would be required and it must be remembered that not all legal systems distinguish between void and voidable marriages and those that do rely on the distinction use it in different ways. As we have mentioned in paragraph 1.12, above, where there is a conflict between rules for nullity recognition and those relating to the law governing capacity to marry,<sup>215</sup> it is our view that the former should prevail.

3.11 The case for doing nothing is easy to state. The decision of those concerned with the negotiation of Hague Conventions in the matrimonial field not to include reform of the rules of recognition of nullity decrees has already been referred to in paragraphs 3.3 to 3.6 above. It may reasonably be argued that, in view of the relatively few cases in which foreign nullity decisions appear to have given rise to problems of recognition in courts in the United Kingdom, the existing rules are adequate and could with some justification be preserved. Indeed, at the time when Parliament had an opportunity to reform the existing rules of recognition, during its consideration of what became the Recognition of Divorces and Legal Separations Act 1971, it eschewed that opportunity, and chose instead simply to ratify the Convention on the Recognition of Divorces and Legal Separations (1970) adopted by the Hague Conference on Private International Law.<sup>216</sup>

3.12 We have no hesitation in rejecting the argument in favour of preserving the *status quo* in nullity recognition. We believe that a positive response is required to what has been described<sup>217</sup> as the imperfect state of development

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<sup>214</sup> See paras. 6.49 to 6.60, below.

<sup>215</sup> We have indicated, in n. 15 above, that both Commissions are examining the rules relating to choice of law in marriage.

<sup>216</sup> There may, of course, be many reasons why a particular statute is confined within certain limits, and not broadened to embrace other matters which could conveniently be incorporated in it. Exclusion of material does not necessarily argue that Parliament deemed it unworthy of inclusion, or that there are no good reasons for legislation in that field. Shortage of parliamentary time, or pressure on drafting resources, is frequently a more likely explanation for failure to grasp the opportunity of a wider ranging measure.

<sup>217</sup> Diey & Morris, *The Conflict of Laws*, 10th ed. (1980), vol. 1, p.380; Morris, *The Conflict of Laws*, 2nd ed. (1980), p.158.

of the law in this area, the unsatisfactory consequences of which we have already identified.<sup>218</sup> We share the view of those who have suggested<sup>219</sup> that the statutory reform of the law relating to the recognition of foreign nullity decrees is long overdue and we are fortified by the overwhelming support for this conclusion in the comments which we received on our Consultation Paper.

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

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<sup>218</sup> See para. 2.40, above.

<sup>219</sup> Carter, (1979) 50 B.Y.B.I.L. 250, 252; Collier, [1979] C.L.J. 289, 290.

## PART IV

### RECOGNITION OF DECREES OF OTHER BRITISH COURTS

#### Introduction

4.1 We are primarily concerned in this Part with the question of determining the most appropriate rules for the recognition of nullity decrees granted by other courts in the British Isles. However, we shall also take the opportunity to consider such improvements as might be made to the current rules for the recognition of decrees of divorce and judicial separation granted elsewhere in the British Isles. Under the statutory provisions<sup>220</sup> for the recognition of divorces and legal separations by United Kingdom courts a distinction is made between, on the one hand, decrees of divorce or judicial separation granted by courts in any part of the British Isles,<sup>221</sup> and, on the other, divorces and legal separations obtained overseas, that is to say outside the British Isles.<sup>222</sup> No such distinction is made in the common law rules applicable to the recognition of foreign decrees of nullity. All such decrees which have been granted or obtained outside the jurisdiction of the recognition forum are treated as being foreign, even though they may have been granted elsewhere in the United Kingdom or in any other part of the British Isles.

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

#### Recognition of nullity decrees granted within the United Kingdom

4.3 Before 1974 the jurisdiction of the English courts to entertain petitions for nullity was, it has been claimed,<sup>223</sup> one of the most vexed and difficult questions in the whole of the English conflict of laws.<sup>224</sup> Since 1974, the jurisdictional rules in matrimonial proceedings within the United Kingdom have been placed on an exclusively statutory basis by the Domicile and

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<sup>220</sup> Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973.

<sup>221</sup> Recognition of Divorces and Legal Separations Act 1971, s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15.

<sup>222</sup> Recognition of Divorces and Legal Separations Act 1971, ss.2 and 6, as amended.

<sup>223</sup> Morris, *The Conflict of Laws*, 2nd ed. (1980), pp.155-156.

<sup>224</sup> For an account of the jurisdictional rules prior to 1974 see Dicey and Morris, *The Conflict of Laws*, 9th ed. (1973), pp.344-359. These rules are summarised in North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977), pp.59-61; Cheshire and North, *Private International Law*, 10th ed. (1979), pp.394-395; Law Com. No.48 (1972): Report on Jurisdiction in Matrimonial Causes, para. 52.

Matrimonial Proceedings Act 1973.<sup>225</sup> The pre-existing common law and statutory<sup>226</sup> grounds of jurisdiction have been abolished. The 1973 Act brought about a notable simplification of the law. Section 5(3) lays down the sole jurisdictional bases for petitions of nullity of marriage before courts in England and Wales, regardless of whether the marriage was void or voidable. It provides that those courts—

“shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if)<sup>227</sup> either of the parties to the marriage—

- (a) is domiciled in England and Wales on the date when the proceedings are begun; or
- (b) was habitually resident in England and Wales throughout the period of one year ending with that date; or
- (c) died before that date and either—
  - (i) was at death domiciled in England and Wales, or
  - (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.”

This provision also applies, *mutatis mutandis*, in relation to the assumption of jurisdiction by the Court of Session in an action for declarator of nullity of marriage in Scotland <sup>228</sup> and with respect to the jurisdiction of the High Court in Northern Ireland in nullity proceedings.<sup>229</sup>

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

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<sup>225</sup> Part II (England and Wales), Part III (Scotland). Matrimonial proceedings in England and Wales cover proceedings for divorce, judicial separation or nullity of marriage and for presumption of death and dissolution of marriage: Domicile and Matrimonial Proceedings Act 1973, s.5(1). In Scotland, the consistorial causes to which the statutory jurisdictional rules apply are actions for divorce, separation, declarator of nullity of marriage, declarator of marriage, declarator of freedom and putting to silence and proceedings for presumption of death and dissolution of marriage: Domicile and Matrimonial Proceedings Act 1973, s.7(1). In Northern Ireland, the matrimonial jurisdiction of the court covers proceedings for divorce, judicial separation or nullity and presumption of death and dissolution of marriage: see the Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No. 1045) (N.I.15), Art. 49, which replaces s.13 of the 1973 Act.

<sup>226</sup> See s.17(2), and Sched. 6, repealing the relevant statutory provisions.

<sup>227</sup> But this is subject to s.5(5) which provides that the court also has jurisdiction to entertain proceedings for divorce, judicial separation or nullity, notwithstanding that the jurisdictional requirements of s.5(3) are not satisfied, if those proceedings are instituted at the time when proceedings which the court does have jurisdiction to entertain under s.5(3) are pending “in respect of the same marriage”. Thus, provided that the court has jurisdiction to entertain the original petition and that petition is still pending, the court will have jurisdiction to entertain subsequent proceedings even though there has been a change in the domicile or habitual residence of one or both of the parties to the marriage.

<sup>228</sup> Domicile and Matrimonial Proceedings Act 1973, s.7(1), (3).

<sup>229</sup> See now, Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No.1045)(N.I.15), Art. 49(1), (3).

rules.<sup>230</sup> On the other hand, the effect of the new rule has been to render identical the grounds upon which jurisdiction is assumed in nullity proceedings throughout the United Kingdom.<sup>231</sup> Furthermore, the new jurisdictional rules apply to both divorce and nullity. This avoids the anomalies of the old law under which there were different grounds of jurisdiction in nullity and divorce, even though both types of decree, despite their theoretical differences, determine or change the status of the parties and afford to them (in England and Wales and Northern Ireland, but not in Scotland<sup>232</sup>) the same opportunities for obtaining ancillary relief.

4.5 As the grounds on which courts in the United Kingdom assume jurisdiction in nullity proceedings are the same as those for divorce, it is instructive to consider the rules applicable to the recognition of divorces when trying to determine the appropriate recognition rules in respect of nullity decrees of other United Kingdom courts. Section 1 of the Recognition of Divorces and Legal Separations Act 1971, as amended, grants automatic recognition<sup>233</sup> to decrees of divorce and judicial separation granted by courts elsewhere within the United Kingdom. It is interesting to note that this regime of automatic recognition was introduced in 1971, that is to say, before the grounds of divorce jurisdiction were harmonised throughout the United Kingdom by the Domicile and Matrimonial Proceedings Act 1973. The Law Commissions thought in 1970 that it was unsatisfactory for recognition not to be afforded automatically by one United Kingdom court to the divorce decrees of another.<sup>234</sup> We think that it is similarly unsatisfactory that there is no automatic recognition of nullity decrees, and this view was generally shared on consultation. We, therefore, recommend that decrees of nullity granted in any part of the United Kingdom should (subject to one ground of non-recognition discussed in paragraph 4.6, below) be accorded automatic recognition in every other part.

4.6 Although decrees of divorce and judicial separation cannot now be denied recognition on jurisdictional grounds, under section 8(1)(a) of the Recognition of Divorces and Legal Separations Act 1971, as amended, it is provided that the validity of a decree of divorce or judicial separation granted under the law of any part of the British Isles shall not be recognised in any part of the United Kingdom if it was granted at a time when there was no subsisting marriage between the parties. On the face of it, this ground for

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<sup>230</sup> Because s.5(3) abolished the common law jurisdictional basis of the celebration of the marriage in the forum in the case of a void marriage (*Simonin v. Mallac* (1860) 2 Sw. & Tr.67; *Ross Smith v. Ross Smith* [1963] A.C. 280; *Padolecchia v. Padolecchia* [1968] P. 314). There is a further difference in that jurisdiction at common law could be based on the residence of the respondent within the jurisdiction: *Russ v. Russ (No.2)* (1962) 106 S.J. 632; *Magnier v. Magnier* (1968) 112 S.J. 233; though not on the residence of the petitioner alone: *De Reneville v. De Reneville* [1948] P.100; *Kern v. Kern* [1972] 1 W.L.R. 1224. Although under the 1973 Act, the habitual residence of either spouse founds jurisdiction, the residence must be *habitual* and must have lasted for the year immediately preceding the institution of the proceedings.

<sup>231</sup> The jurisdictional differences between judicial separation and presumption of death and dissolution of marriage have also been removed by the 1973 Act.

<sup>232</sup> See paras. 2.37, above, and 4.8, below.

<sup>233</sup> Subject, however, to the provision in s.8(1)(a) of the Recognition of Divorces and Legal Separations Act 1971, with which we deal in para. 4.6, below.

<sup>234</sup> Law Com. No.34; Scot. Law Com. No. 16 (1970), para. 51.

withholding recognition is unsuitable in the context of the recognition of a decree annulling a marriage when there is no doubt that, under the law applicable in both the jurisdictions involved, the marriage is void *ab initio*. However, the purpose of section 8(1)(a) would appear to be the more general one of applying a rule of *res judicata* to the question of the recognition of divorce decrees. Its purpose is to implement Article 9 of the 1970 Hague Convention.<sup>235</sup> The policy behind Article 9 is that a State shall not be required to recognise a foreign divorce or legal separation if to do so would be irreconcilable with a previous decision of a court of that State. Section 8(1)(a) of the 1971 Act uses rather different language. The reasons for this are discussed below,<sup>236</sup> where we conclude that in its present form section 8(1)(a) is not appropriate to annulments. There is no doubt, however, that the principle of *res judicata* is at the moment applicable to the recognition of annulments<sup>237</sup> and we recommend that *res judicata* should continue to be a discretionary ground for the denial of recognition to a nullity decree of another United Kingdom court. In other words, recognition of such a decree may be refused if, at the time when it was obtained, it was irreconcilable with a previous decision of a court in the part of the United Kingdom where recognition is sought as to the subsistence or validity of the marriage. For the reasons discussed in paragraph 6.66, below, we think that this principle of *res judicata* should also apply to a previous decision obtained in another country, but recognised or entitled to be recognised in the part of the United Kingdom where recognition of the later decree is sought. We have further concluded that similar discretionary *res judicata* rules should apply to the recognition of other United Kingdom decrees of divorce or judicial separation, i.e. a change (for reasons discussed in paragraph 6.66, below) from a mandatory to a discretionary rule; though we also propose the retention of a discretion to deny recognition to another United Kingdom divorce or judicial separation on the general ground that, at the time it was obtained, there was no subsisting marriage between the parties.

4.7 We have given consideration to the question whether there should be any other circumstances in which one court in the United Kingdom should be able to deny recognition to a nullity decree of another United Kingdom court. Possible further grounds would be breach of natural justice, and public policy. In the case of divorce decrees, however, it was thought inappropriate to provide for such grounds of non-recognition. The reason given was that "in such circumstances the complaining party should seek to have the decree set aside by the court which granted it, or on appeal from that court, and that it would be objectionable to allow a court in another part of the British Isles to refuse to recognise the decree."<sup>238</sup> This argument, in our view, holds good equally for nullity recognition and we recommend that there should be no

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<sup>235</sup> *Ibid.*, para. 12 and App. B, p.43, para. 1 of Notes on clause 8. Article 9 provides that: "Contracting States may refuse to recognize a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition is sought, or is recognized, or fulfils the conditions required for recognition, in that State."

<sup>236</sup> See paras. 6.64 to 6.66, where this question is discussed in greater detail.

<sup>237</sup> *Vervaeke v. Smith* [1983] 1 A.C. 145, see para. 2.27, above.

<sup>238</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970), para. 2 of Notes on Clause 8.

grounds for the denial of recognition to a nullity decree of another United Kingdom court other than *res judicata*.<sup>239</sup>

4.8 In paragraphs 2.36 and 2.37, above, we made the point that financial provision cannot be awarded in Scotland on a declarator of nullity, and that both Law Commissions' proposals for financial relief after foreign divorce, implemented in the Matrimonial and Family Proceedings Act 1984, do not cover divorces granted elsewhere in the United Kingdom (or the British Isles). The result could be that the automatic recognition of a Scottish declarator of nullity in other United Kingdom courts could leave a party to the marriage devoid of any hope of financial provision though she (or, perhaps, he) could have obtained such relief if—as may have been possible in the circumstances—proceedings had been brought in England or Northern Ireland.<sup>240</sup> This problem, which arises only in respect of Scotland, will disappear as and when the Scottish Law Commission's proposals<sup>241</sup> for financial provision in nullity cases are implemented.

### **Recognition of nullity decrees granted in other parts of the British Isles**

4.9 As we have seen, the grounds of jurisdiction in nullity proceedings are the same throughout the United Kingdom. With regard to the three other jurisdictions within the British Isles, the jurisdictional rules in the Isle of Man are, *mutatis mutandis*, the same as those found in the United Kingdom, namely domicile or one year's habitual residence of either spouse.<sup>242</sup> But the rules are different in the Channel Islands. In Jersey, where husband and wife still share a common domicile, the grounds of nullity jurisdiction are more restricted than in the United Kingdom. Jurisdiction depends on the domicile of the husband at the time of the desertion of the wife or his deportation, or, in the case of a petition by the wife, her three years' ordinary residence in Jersey.<sup>243</sup> In Guernsey, the principal basis of jurisdiction is that of domicile, but further bases of jurisdiction vary according to the substantive ground on which the nullity petition is based.<sup>244</sup>

4.10 Differences between the jurisdictional rules applicable in the United Kingdom and those applicable in the rest of the British Isles are similarly to be found in relation to divorce but they did not inhibit the Law Commissions from recommending in 1970 that divorce decrees granted in the Isle of Man and the Channel Islands should receive automatic recognition in the United Kingdom.<sup>245</sup> In our view, a similar approach should be adopted in relation

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<sup>239</sup> See para. 6.67, and n.423, below.

<sup>240</sup> See *Balshaw v. Kelly* 1967 S.C. 63.

<sup>241</sup> Scot. Law Com. No. 67 (1981), paras. 3.201-3.203.

<sup>242</sup> Domicile and Matrimonial Proceedings Act 1974, s.5(3).

<sup>243</sup> Matrimonial Causes (Jersey) Law 1949, as amended, Art.6. The last two grounds are the equivalent of the provisions last found in English law in the Matrimonial Causes Act 1973, s.46, but repealed by the Domicile and Matrimonial Proceedings Act 1973, s.17(2) and Sched. 6.

<sup>244</sup> Matrimonial Causes Law (Guernsey) 1939, Arts. 33 and 34. For fuller discussion of the jurisdictional rules in both Jersey and Guernsey, see North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977), pp.318-319 (Jersey), 334-338 (Guernsey).

<sup>245</sup> Law Com. No.34; Scot. Law Com. No.16 (1970), para. 51.

to nullity decrees granted anywhere in the British Isles and we recommend automatic recognition thereof, subject to provisions as to *res judicata*, as discussed in paragraph 4.6 above. The minor change there recommended in the law as to grounds for denying recognition to other United Kingdom divorces and judicial separations should also apply to such decrees obtained elsewhere in the British Isles.

4.11 It is interesting to note that in 1970 the Law Commissions expressed the view that divorce decrees granted anywhere in the British Isles should be valid throughout the British Isles, and hoped that such a proposal would be acceptable to the authorities in Northern Ireland, the Channel Islands and the Isle of Man.<sup>246</sup> The Recognition of Divorces and Legal Separations Act 1971 was extended to Northern Ireland in 1973<sup>247</sup> and similar legislation has been introduced in the Isle of Man,<sup>248</sup> Jersey<sup>249</sup> and Guernsey,<sup>250</sup> so the hope expressed by the Law Commissions has been fulfilled. If our recommendation for the automatic recognition throughout the United Kingdom of nullity decrees granted anywhere in the British Isles is acceptable, then we hope that it may also prove acceptable to the authorities elsewhere in the British Isles.

#### **Reconsideration of section 1 of the Recognition of Divorces and Legal Separations Act 1971**

4.12 When in our Consultation Paper we recommended that the rules for the automatic recognition of British divorces and judicial separations, presently to be found in section 1 of the Recognition of Divorces and Legal Separations Act 1971, should be applied to the recognition of nullity decrees, we did not re-examine the operation of section 1 of the 1971 Act. We were however, pressed on consultation to give further consideration to the fact that section 1 applies only to the recognition of divorces and judicial separations granted after the section came into force. We agree that it is right to reconsider this position and, as the draft Bill appended to this report is designed to repeal and replace the 1971 Act, we have also given thought to some matters of detail relating to section 1.

##### **(a) Retrospectivity**

4.13 The provisions in the 1971 Act for the recognition of foreign divorces apply to divorces obtained both before and after that Act came into force, subject to certain transitional and saving provisions in section 10(4). The justification for this approach is clear, namely that the jurisdictional bases for recognition are those laid down in the Act irrespective of the date on which the divorce was obtained. A similar approach was not adopted in relation to the recognition of British divorces under section 1, which is restricted to divorces granted after that Act came into force. This means that the old common law rules on divorce recognition are retained for divorces

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<sup>246</sup> *Ibid.*

<sup>247</sup> Domicile and Matrimonial Proceedings Act 1973, s.15.

<sup>248</sup> Recognition of Divorces and Legal Separations (Isle of Man) Act 1972.

<sup>249</sup> Recognition of Divorces and Legal Separations (Jersey) Law 1973.

<sup>250</sup> Recognition of Divorces and Legal Separations (Bailiwick of Guernsey) Law 1972.

granted before that date. We have concluded that it is unnecessary to continue such a divided approach to the recognition of other British divorces. For the last decade the grounds of divorce jurisdiction have been identical throughout the United Kingdom<sup>251</sup> so the position in practice is much the same as that relating to foreign divorces. The common law rules applicable to divorces granted before the 1971 Act came into force will in virtually every case have the same effect as the rules applicable to divorces recognised currently under the Act. It might be argued that a very small number of divorces could be recognised under the automatic provisions of the Act which were not granted on identical jurisdictional bases throughout the British Isles. This is true, however, of United Kingdom divorces already recognised under the 1971 Act, which came into force before the jurisdictional rules in the United Kingdom were placed on a uniform basis in the Domicile and Matrimonial Proceedings Act 1973, and of divorces granted in the Channel Islands, whose jurisdictional rules are still different from those applicable elsewhere in the British Isles. We would be particularly uneasy at leaving the common law rules applicable to nullity recognition to govern nullity decrees granted before our Bill came into force, given the number of undecided issues under those rules. It would, however, be very undesirable to have different rules as to retrospectivity applicable in the same statute to divorce and nullity. We recommend that decrees of divorce, judicial separation or nullity granted anywhere in the British Isles, whether granted before or after the 1971 Act came, or the draft Bill appended to this report comes, into force, should be recognised throughout the United Kingdom. This recommendation should, however, be subject to safeguards in relation to acquired property rights or decisions of other British courts as to the validity of any such decree prior to our proposals coming into effect. In other words, the substance of the safeguards now found in relation to the retrospective effect of recognition of foreign divorces and legal separations in section 10(4) of the 1971 Act should also be applied to the retrospective effect of recognition of British decrees.

(b) *Matters of detail*

4.14 The draft Bill appended to this report<sup>252</sup> makes clear what was, we are confident, intended in section 1 of the 1971 Act, namely that it applied to all decrees granted in the British Isles. The use in section 1 of the phrase "granted under the law of any part of the British Isles" raised a doubt, which we wish to resolve, that the section could be applied to a foreign divorce in which the foreign court had applied the law of some part of the British Isles. We have also taken the opportunity to make it clear that the automatic recognition to be afforded in one part of the United Kingdom is of a decree granted by a court of civil jurisdiction. Recognition of all extra-judicial

<sup>251</sup> Domicile and Matrimonial Proceedings Act 1973, ss. 5 and 7. For Northern Ireland, see now Matrimonial Causes (Northern Ireland) Order 1978, (S.I. No. 1045) (N.I.15), Art.49. They are also the same in the Isle of Man: Domicile and Matrimonial Proceedings Act 1974 (Isle of Man), s.5.

<sup>252</sup> Clause 1 of our draft Bill refers to the British Islands, unlike section 1 of the 1971 Act which refers to the British Isles. This minor change has been made in order to take advantage of the definition of British Islands in the Interpretation Act 1978, s.5 and Sched. 1, thus avoiding any need to define British Isles in our Bill. Needless to say, the definition of British Islands in the 1978 Act is the same as that of British Isles in the 1971 Act, s.10(2).

divorces or annulments which might be obtained within the British Isles is excluded, thereby maintaining the policy currently embodied in section 16(1) of the Domicile and Matrimonial Proceedings Act 1973 (which is discussed further in paragraph 6.30, below). We have, however, thought it right to follow the policy of section 16(3) of the 1973 Act and preserve the validity of any extra-judicial divorce obtained in the British Isles before 1 January 1974 (when section 16 came into force) which would be recognised here because recognised at common law in the country of domicile. The form of the draft Bill appended to this report is such that section 16 of the 1973 Act can be repealed.

## PART V

### RECOGNITION OF NULLITY DECREES OBTAINED OUTSIDE THE BRITISH ISLES

#### Introduction

5.1 We must now consider the recognition by United Kingdom courts of decrees of nullity which have been obtained overseas, that is to say, outside the British Isles. There would seem to be two main approaches to this question which might be adopted.<sup>253</sup> The first is to grant recognition to the foreign decree if the court pronouncing it had assumed jurisdiction in circumstances which, had they applied in relation to the United Kingdom, would have entitled a court in the United Kingdom to assume jurisdiction. Following the Domicile and Matrimonial Proceedings Act 1973 the effect of this approach would be that a court in the United Kingdom would recognise the nullity decree of a foreign court if either of the parties to the marriage in question had been domiciled within the jurisdiction of the foreign court on the date when the action was commenced; or had been habitually resident within the jurisdiction for one year immediately before that date; or had died, and had either been domiciled within that jurisdiction at the date of death or had been habitually resident within that jurisdiction for one year immediately before the death.<sup>254</sup> This approach to the problem is along the same lines as those developed for divorce recognition by English common law before 1972,<sup>255</sup> but modified by the statutory rules of jurisdiction prevailing after the 1973 Act came into force.<sup>256</sup>

5.2 The second approach is to base the recognition of foreign nullity decrees on the same principles as now apply to the recognition of foreign divorces and legal separations. These principles are codified by the Recognition of Divorces and Legal Separations Act 1971 (as amended), which gives effect within the United Kingdom to the provisions of the 1970 Hague Convention. We have mentioned the reasons why the Convention (and thus the 1971 Act) did not extend to the recognition of nullity decrees.<sup>257</sup> These considerations, of course, need not inhibit action by the United Kingdom to bring nullity decrees within the same system as obtains for divorce and legal separation if it should seem expedient to do so.

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

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<sup>253</sup> We discuss a third approach, which is really a variant of one of the two main ones, in para. 5.12, below.

<sup>254</sup> See Domicile and Matrimonial Proceedings Act 1973, ss.5(3), 7(3), and the Matrimonial Causes (Northern Ireland) Order 1978, (S.I. 1978 No. 1045)(N.I.15), Art.49(3).

<sup>255</sup> See e.g., *Travers v. Holley* [1953] P. 246; *Robinson-Scott v. Robinson-Scott* [1958] P. 71; *Indyka v. Indyka* [1969] 1 A.C. 33. Although this approach of English law was developed in relation to divorce, the same view has since been taken in relation to nullity proceedings: *Law v. Gustin* [1976] Fam. 155; *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77; see paras. 2.10 to 2.14, above.

<sup>256</sup> See *Vervaeke v. Smith* [1981] Fam. 77, 109.

<sup>257</sup> See paras. 3.3-3.6, above.

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

5.4 The English common law developed rules of recognition of foreign matrimonial decrees based on reciprocity of jurisdiction. These rules were developed primarily in the field of divorce recognition, though they have in recent years been extended to the recognition of foreign nullity decrees.<sup>258</sup> The foreign decree would be recognised by the English court if the foreign court had assumed jurisdiction in circumstances in which, had they applied in respect of England and Wales, the English court would have been entitled to assume jurisdiction.<sup>259</sup> Though frequently, and conveniently, referred to as a rule of jurisdictional reciprocity, there was in fact no true reciprocity about it. It was, as the late Professor Sir Otto Kahn-Freund pointed out,<sup>260</sup> a case of "I will accept what you do as long as you act as I act", and not "I will accept what you do as long as you accept what I do". This was made particularly clear in *Robinson-Scott v. Robinson-Scott*<sup>261</sup> in which the question arose whether recognition should be given to a Swiss decree of divorce where the jurisdiction of the Swiss court had been based on the concept that a wife could maintain her own domicile, separate from that of her husband. The wife had resided within the area of the Swiss court for at least eight years before the commencement of proceedings, and the court had assumed jurisdiction on the basis that she possessed a Swiss domicile. Karminski J. held that the actual grounds on which the foreign court had assumed jurisdiction were immaterial if the factual situation was such that the English court would have been entitled to exercise jurisdiction in equivalent circumstances. On this basis the Swiss decree was to be recognised.

5.5 Reciprocity as a basis for recognition of a foreign divorce was considered by the House of Lords in *Indyka v. Indyka*.<sup>262</sup> Their Lordships did not think that reciprocity of jurisdiction was, by itself, a wholly satisfactory ground of recognition. The jurisdiction of the English courts had been extended by Parliament for reasons which had no necessary application to the question of recognition of decrees of foreign courts. Parliament had not legislated generally for recognition of foreign decrees, and "... the courts' decisions as regards recognition are shaped by considerations of policy which may differ from those which influence Parliament in changing the domestic law".<sup>263</sup> Moreover, there were many possible bases on which a foreign court might reasonably exercise jurisdiction: the English rules were neither the only reasonable ones nor necessarily the best.<sup>264</sup> Their Lordships were accordingly "unwilling to accept either that the law as to recognition of foreign divorce (still less other) jurisdiction must be a mirror image of our own law or that the pace of recognition must be geared to the haphazard movement of our legislative process."<sup>265</sup> Our own jurisdiction in a similar matter should be

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<sup>258</sup> Paras. 2.10-2.12, and 2.19, above.

<sup>259</sup> *Travers v. Holley* [1953] P. 246.

<sup>260</sup> *The Growth of Internationalism in English Private International Law* (1960), p. 29.

<sup>261</sup> [1958] P. 71; and see *Gwyn v. Mellen* (1979) 101 D.L.R. (3d) 608, 619.

<sup>262</sup> [1969] 1 A.C. 33.

<sup>263</sup> [1969] 1 A.C. 33, 106 *per* Lord Wilberforce.

<sup>264</sup> *Ibid.*, *per* Lord Morris of Borth-y-Gest at p. 76; *per* Lord Pearson at p. 111.

<sup>265</sup> *Ibid.*, *per* Lord Wilberforce at p. 106.

regarded "as only an approximate test of recognition with a right in our courts to go further when this is justified by special circumstances in the petitioner's connection with the country granting the decree."<sup>266</sup> The decree of a foreign court should accordingly be recognised wherever there was a "real and substantial connection"<sup>267</sup> between the petitioner<sup>268</sup> and the country or territory in which that court was exercising jurisdiction.

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

5.7 It is clear from a number of cases<sup>269</sup> that the law as developed in relation to divorces does also apply to annulments. *Law v. Gustin*<sup>270</sup> is of particular interest in the present connection. The petitioner there had resided in the country exercising jurisdiction (the state of Kansas) for "rather less than 12 months" at the time of commencement of the proceedings. Even under the Domicile and Matrimonial Proceedings Act 1973 the English court would not have had jurisdiction to hear the matter in similar circumstances, and therefore on the application of a reciprocity test the court could not have recognised the foreign decree. Nevertheless Bagnall J., having reviewed all the circumstances, including (it would appear) those *after* as well as before the granting of the decree, felt able to hold that there was a sufficiently real and substantial connection between the petitioner and the State of Kansas to warrant recognition of the decree by the English court.

5.8 *Law v. Gustin*,<sup>271</sup> therefore shows that a statutory rule based on strict reciprocity of jurisdiction would be narrower in its application than the present common law.<sup>272</sup> The facts in that case were no doubt unusual and, because the jurisdiction of courts in the United Kingdom is now, following the 1973 Act, a liberal one, there would probably be very few cases in which such a rule proved by comparison with the existing common law to be disadvantageous to a petitioner. Nevertheless there seems to be no good reason for taking a step backwards from the present state of the law to an earlier one. Moreover the principles on which such a step would have to be taken were considered at length and rejected in *Indyka*.<sup>273</sup> The mirror-image

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<sup>266</sup> *Ibid.*, per Lord Pearce at p. 87.

<sup>267</sup> *Ibid.*, per Lord Wilberforce at p. 105; per Lord Pearson at p. 111.

<sup>268</sup> Or the respondent, see *Mayfield v. Mayfield* [1969] P. 119.

<sup>269</sup> E.g., *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 641; *Merker v. Merker* [1963] P. 283; *Law v. Gustin* [1976] Fam. 155; *Perrini v. Perrini* [1979] Fam. 84; *Vervaeke v. Smith* [1981] Fam. 77.

<sup>270</sup> [1976] Fam. 155.

<sup>271</sup> *Ibid.*

<sup>272</sup> But see Morris, *The Conflict of Laws*, 2nd ed. (1980) p. 160, where it is suggested that the case would today be decided in the same way, but on the ground that the petitioner had acquired her own domicile in the State of Kansas.

<sup>273</sup> [1969] 1 A.C. 33; see para. 5.5, above.

idea was there held to be insufficient. Nothing has happened since which could be held to justify a change of mind. To revert to straight jurisdictional reciprocity as a basis for the recognition of foreign annulments would therefore be to adopt a solution which has already been found wanting.

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

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

(a) habitually resident in,<sup>274</sup> or

(b) a national of, the country or territory in which the divorce was obtained.<sup>275</sup> The common law rules, as developed in *Travers v. Holley*<sup>276</sup> and *Indyka*,<sup>277</sup> are abolished.<sup>278</sup> However, the other common law principle, that the country of domicile has jurisdiction to determine matters of status,<sup>279</sup> is preserved as a requirement of recognition where the foreign divorce would not otherwise fall to be recognised under the Act.<sup>280</sup> Accordingly, in addition to the grounds mentioned above, a foreign divorce is to be recognised if it was obtained in the country in which the parties were domiciled when the proceedings were commenced, or would have been recognised as valid under the law of the parties' domicile, or respective domiciles.<sup>281</sup>

5.10 Inclusion of nullity decrees within a statutory framework similar to that which now obtains for divorce and legal separations would give rise to no problems that we can see. It would also follow the pattern in a number of Commonwealth jurisdictions, such as for example Australia<sup>282</sup> and New Zealand,<sup>283</sup> of treating the recognition of divorces and annulments under common statutory rules.<sup>284</sup>

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<sup>274</sup> "Habitual residence" includes "domicile" where the country concerned bases its jurisdiction on the concept of domicile (s.3(2) of the 1971 Act).

<sup>275</sup> Sect. 3(1).

<sup>276</sup> [1953] P. 246.

<sup>277</sup> [1969] 1 A.C. 33.

<sup>278</sup> This is the effect of s.6(5) of the 1971 Act.

<sup>279</sup> See paras. 2.16-2.18, and 2.22-2.23, above.

<sup>280</sup> Recognition of Divorces and Legal Separations Act 1971, s.6.

<sup>281</sup> *Ibid.* The present form of this section is different from that originally enacted in the 1971 Act. It was amended by the Domicile and Matrimonial Proceedings Act 1973, s.2(2), to take account of the fact that a wife could have a domicile independent of that of her husband.

<sup>282</sup> Family Law Act 1975, s.104, as amended by the Family Law Amendment Act 1983. The main purpose of the amendments to s.104 is to extend that section to the recognition of legal separations and to make such other amendments as will enable Australia to accede to the Hague Convention on the Recognition of Divorces and Legal Separation (1970); see Family Law Council Annual Report 1982-83, para. 197.

<sup>283</sup> Family Proceedings Act 1980, s.44.

<sup>284</sup> For further examples, see McClean, *Recognition of Family Judgments in the Commonwealth* (1983), Chap. 3.

5.11 To examine in detail, for the purposes of this report, the merits of the divorce framework would, however, be superfluous, since it already exists and will continue to exist, by virtue of international agreement, for by far the greater number of foreign matrimonial decrees requiring to be recognised by courts in the United Kingdom. Nullity decrees form only a small proportion of the whole.<sup>285</sup> In the circumstances it seems to us that the main consideration must be whether there is any reason why annulments should *not* be governed by a similar statutory regime to that which applies at present in respect of divorces and legal separations.

5.12 We can see no such reason. A decree of nullity is a decree *in rem*, affecting the status of the parties, their situation both as between themselves individually and as between them on the one hand and the world on the other, in much the same way as a divorce.<sup>286</sup> To the question of recognition of foreign annulments, the common law applied (and continues to apply) similar rules to those which were developed before 1972 in respect of the recognition of foreign divorces. When the common law made no real distinction between the rules for the recognition of foreign annulments and those for the recognition of foreign divorces, it is hard to see any objection *in principle* to their inclusion within the same general *statutory* framework. It must, however, be asked whether there are any major provisions in the Recognition of Divorces and Legal Separations Act 1971 which would be incompatible with, or unsuited to, its extension to annulments. We do not believe that any major provision of the 1971 Act is so incompatible, though a number of minor details of the 1971 Act are not wholly apt for the recognition of annulments and these are discussed further in Part VI. We have also just raised the question whether any provisions of the 1971 Act are unsuitable for application to nullity recognition. It is in this context that we must examine a suggestion made to us in comments on our Consultation Paper which is a variant of the approach presently under review. It amounts to applying most, but not all, of the provisions of the 1971 Act to nullity recognition. In particular, under this suggestion, foreign annulments would, unlike foreign divorces, not be recognised on the jurisdictional basis that either party was a national of, or was domiciled in the foreign sense of that term in, the country in which the annulment was obtained.<sup>287</sup> The arguments in favour of such an approach are that these jurisdictional bases were included in the 1971 Act by reason of our international obligations as parties to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, that they would not have been included for any other reason and that it is neither necessary nor desirable to extend them to nullity recognition. It was argued, in particular, the nationality may provide an insufficient jurisdictional link, sometimes providing only a fortuitous connection; though, as we point out in paragraph 6.24, below, the same can be said of a domicile of origin. We see some force in these arguments but not such as to lead us to change the provisional view expressed in our Consultation Paper, which was based on consistency and simplicity, that all the

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<sup>285</sup> See para. 1.4, above.

<sup>286</sup> *Administrator of Austrian Property v. Von Lorang* 1927 S.C. (H.L.) 80; [1927] A.C. 641, and see para. 3.8, above.

<sup>287</sup> Cf. Recognition of Divorces and Legal Separations Act 1971, s.3(1)(a),(2).

jurisdictional bases applicable to divorce recognition should be equally applicable to nullity recognition. There are a number of reasons for our adhering to our original approach. The rules in the 1971 Act relating to nationality and domicile in the foreign sense are wider than is required under our obligations in respect of the 1970 Convention. They are wider as the result of a recommendation to that effect made by the two Law Commissions,<sup>288</sup> which was regarded as desirable on several grounds, including the interests of simplicity and certainty.<sup>289</sup> We do not think that a statutory scheme of recognition under which foreign annulments are recognised on some, but not all, of the jurisdictional bases applicable to the recognition of foreign divorces and legal separations will contribute anything to the clarity or simplicity of the law, nor have we identified significant reasons why courts in the United Kingdom should be less generous in their recognition of foreign annulments than of foreign divorces. Furthermore, it must not be forgotten that much of the civil law world adopts nationality as its pre-eminent jurisdictional basis and so a significant proportion of foreign annulments where recognition is in issue in the United Kingdom may have been obtained on that basis. To deny recognition will lead to what has been described as a "limping marriage", i.e. one where its parties are regarded as married in one country and not in another. Although this problem cannot be eradicated, it is desirable, as we said in 1970 when examining the rules for divorce recognition,<sup>290</sup> that it should be minimised.

## Conclusion

5.13 We have concluded that it is desirable to provide a single statutory regime for the recognition of foreign divorces, annulments and legal separations and we so recommend. Such a regime should make no arbitrary distinction between decisions in matrimonial causes which, whatever their basis in legal theory, are allied in their relation to a common subject matter, and, at least in England and Wales and Northern Ireland,<sup>291</sup> hardly differ in their practical consequences. We can see no reason for continuation of the distinction in treatment which does exist at present. It has come about more by historical accident than by intention, and it serves no purpose. To perpetuate it, by providing a different statutory regime for the recognition of foreign annulments, would, it seems to us, be equally pointless.

5.14 It is also worth pointing out that the policy of the Recognition of Divorces and Legal Separations Act 1971 is very close to *Indyka v. Indyka*,<sup>292</sup> though stated with the greater precision of a statute. The grounds of recognition set out by the 1971 Act are very wide. Nationality of, or habitual residence or domicile in, the country in which the divorce was obtained will ensure<sup>293</sup> recognition of the foreign divorce in the United Kingdom. It is unlikely that a "real and substantial connection"<sup>294</sup> with the country in which the divorce

<sup>288</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970), para. 30.

<sup>289</sup> *Ibid.*, paras. 27-29.

<sup>290</sup> *Ibid.*, paras. 29(a) and (c).

<sup>291</sup> Though not at present in Scotland; see para. 2.37, above.

<sup>292</sup> [1969] 1 A.C. 33. See para. 5.5, above.

<sup>293</sup> Subject to the grounds of non-recognition contained in s.8 of the Act.

<sup>294</sup> See para. 5.5, above.

was obtained would not in practice fall within one or more of those grounds. It is possible to envisage circumstances in which some such connection may have ceased shortly before the commencement of the proceedings which resulted in the decree, thereby removing the case from the ambit of the Act, yet in which the same connection might have been enough for recognition under the common law. But we think that such a situation will be rare, and if it exists may be regarded as a reasonable price to pay for the greater certainty of a statute. There is also a problem posed, in this connection, by the domicile requirements of section 6 of the Act, which we discuss below.<sup>295</sup> On balance, however, we believe that the statutory framework for divorce reflects the common law sufficiently closely to meet any charge of going backwards, such as may in our view be levelled at the reciprocity of jurisdiction test.<sup>296</sup>

5.15 In our view, therefore, there is really no suitable alternative policy to the inclusion of annulments within a framework based upon that of the Recognition of Divorces and Legal Separations Act 1971. We recommend, therefore, that this course be adopted. As has been pointed out earlier,<sup>297</sup> we have concluded that it would be better not just to amend the 1971 Act to add provisions relevant to nullity but rather to replace that Act with new legislation applicable to the recognition of divorces, annulments and legal separations. In Part VI we shall consider the detailed provisions that are needed for the recognition of foreign annulments and also a number of amendments to the existing law as it applies to the recognition of foreign divorces and legal separations.

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<sup>295</sup> See paras. 6.19-6.26, 6.30, below.

<sup>296</sup> See para. 5.8, above.

<sup>297</sup> See para 1.9, above.

## PART VI

### IMPLEMENTING OUR CONCLUSIONS: CONSEQUENTIAL CONSIDERATIONS

#### Introduction

6.1 Several issues arise out of our recommendation that a new system of recognition of foreign annulments should be based on that now in force in respect of foreign divorces and legal separations. These issues mostly fall under one of three questions: which, if any, of the provisions of the Recognition of Divorces and Legal Separations Act 1971 would not be equally applicable to the recognition of annulments; what, if any, additional provision needs to be made for annulments; and what changes are desirable in the rules currently applicable to the recognition of foreign divorces and legal separations? Although we have decided that it is desirable for the draft legislation which implements the recommendations in this report to be in the form of a new composite Bill covering divorce, annulment and legal separation, rather than a Bill merely providing amendments to the 1971 Act, we think that a consideration, section by section, of the 1971 Act is perhaps the best way of examining the various detailed issues which fall to be reviewed. For convenience, the 1971 Act, as amended by the Domicile and Matrimonial Proceedings Act 1973, is printed in its entirety in Appendix D.

#### Recognition of decrees granted in the British Isles

6.2 Section 1 of the 1971 Act provides for the recognition within the United Kingdom of decrees of divorce and judicial separation granted in any part of the British Isles. We have proposed that the same rules should apply in respect of nullity decrees and that certain amendments, mainly with regard to retrospectivity, should be made to the effect of that section.<sup>298</sup> Automatic recognition of decrees is made subject to section 8 of the Act. We shall consider this further below.<sup>299</sup>

#### Recognition of foreign decrees

##### A. *“Overseas” decrees; and decrees obtained outside the British Isles*

6.3 The 1971 Act divides foreign divorces and legal separations into two categories: “overseas” divorces and legal separations, and divorces and legal separations “obtained in a country outside the British Isles”.<sup>300</sup> This dichotomy is at first sight obscure, and its basis unclear. To the uninitiated they may both appear to be the same thing. But this is far from being the case. An “overseas” divorce<sup>301</sup> is necessarily one obtained in a country outside the British Isles, but not all divorces so obtained will qualify as an

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<sup>298</sup> See Part IV, above.

<sup>299</sup> See paras. 6.62 to 6.68, below.

<sup>300</sup> See, respectively, s.2 and s.6(2) of the Act.

<sup>301</sup> For convenience we shall throughout this discussion refer only to “divorces” but the same points apply also to legal separations.

“overseas” divorce. In order to be so described a divorce must have been obtained in a country outside the British Isles –

- (a) by means of judicial or other proceedings; and
- (b) it must be effective under the law of the country in which it was obtained.<sup>302</sup>

A divorce not complying with both of these requirements is not an “overseas” divorce, and cannot be recognised as valid under sections 2 to 5 of the Act. Nevertheless such a divorce, though not an “overseas” divorce, might be recognised under section 6 as a divorce obtained in a country outside the British Isles.<sup>303</sup>

6.4 This dichotomy results from the requirements of the 1970 Hague Convention to which the Act gives effect. The Convention sets minimum standards of recognition, but does not forbid the more favourable treatment of foreign divorces should any signatory state wish to accord it. Section 6 of the 1971 Act provides more favourable treatment within the United Kingdom by preserving the old common law rule<sup>304</sup> that a divorce obtained in the country of the parties’ domicile at the time it was obtained, or one which is recognised in that country, should be recognised also by a United Kingdom court. Such a divorce may not fall for recognition under sections 2 to 5 of the Act, either because it fails to comply with the defining characteristics of an “overseas” divorce as laid down by section 2, or because it fails to satisfy the jurisdictional requirements of section 3. For example, a foreign divorce may not be “effective under the law of [the country in which it was obtained]”, as required by section 2(b), and yet it may be recognised by the law of the parties’ domicile in another country. In *Har-Shefi v. Har-Shefi (No. 2)*<sup>305</sup> an Englishwoman married, in Israel, a man domiciled in that country. They came to England for a short while and the wife there received a *gett*, or bill of divorcement, at the Beth Din, the court of the Chief Rabbi in London. A *gett* is not effective in English law to dissolve a marriage. It is, however, valid under Israeli law, no matter where the *gett* is pronounced. The English court therefore recognised the divorce as valid, since it was valid according to the law of the husband’s domicile.<sup>306</sup>

6.5 In our view, new rules for the recognition of foreign annulments should preserve the general policy of the existing common law rule that a decree obtained in the country of the domicile will be recognised here.<sup>307</sup> But we do not think that a provision modelled on section 6 of the 1971 Act is the

<sup>302</sup> A divorce may be recognised in the United Kingdom even though it is not effective under the law of the country in which it was obtained: see para. 6.4, below. But in such case it will not be recognisable as an “overseas” divorce.

<sup>303</sup> Though there is a requirement at common law that, in the case of a judicial divorce or annulment, the court which granted it was competent under its own law to do so: *Adams v. Adams* [1971] P.188 (divorce); *Papadopoulos v. Papadopoulos* [1930] P.55 (nullity); cf. *Pemberton v. Hughes* [1899] 1 Ch. 781 (divorce); *Merker v. Merker* [1963] P.283 (nullity).

<sup>304</sup> *Le Mesurier v. Le Mesurier* [1895] A.C. 517; *Armitage v. Attorney-General* [1906] P.135; *McKay v. Walls* 1951 S.L.T (Notes) 6.

<sup>305</sup> [1953] P.220.

<sup>306</sup> By reason of the Domicile and Matrimonial Proceedings Act 1973, s.16(1) such a divorce would not now be recognised as valid in England and Wales if obtained after 1973.

<sup>307</sup> *Le Mesurier v. Le Mesurier* [1895] A.C. 517.

only, or necessarily the best, way to do this. As originally drafted section 6 achieved its purpose simply by providing that the Act was “without prejudice” to the recognition of divorces under the common law rule. The amendments made by the Domicile and Matrimonial Proceedings Act 1973 greatly extended, and complicated, the section. Neither the original wording, nor the amended wording, could employ the term “overseas divorces and legal separations”, because this term was defined in section 2 in connection with the application of the Convention rules of recognition embodied in section 3, and the common law rule was wider than the Convention rules.<sup>308</sup> Thus it was thought necessary to create a second category of divorces and legal separations.

6.6 In our view it is desirable not to reproduce in new legislation the two-fold classification of the 1971 Act. The 1971 Act is not easy to understand, particularly for those who do not know the background. To them, the distinction between “overseas divorces” and “divorces obtained in a country outside the British Isles” is not immediately apparent and is apt to be confusing. We do not think that the recognition rules based on domicile, as now found in the amended section 6 of the 1971 Act, constitute an altogether happy piece of drafting, and we would be reluctant to see it perpetuated in a new statute. Moreover it is questionable whether the present form of section 6, and the policy behind it, accords well with the policy of the rest of the Act, and whether it ought not to be amended. This question we consider in detail below.<sup>309</sup> We propose there certain alterations to the policy of the section, which will have the effect of amending the common law rule of recognition to the point at which it can no longer be preserved as such. Instead, a new and more specific provision is required, and in its drafting it has been possible to avoid reference to “the common law rules”, which expression, in what is intended to be a self-contained code, we think is undesirable. We have been able, in the light of our proposals for amendment of the domicile recognition rule contained in section 6 of the 1971 Act, to recommend not only that the main provisions of the 1971 Act should be applied to recognition of foreign annulments, but also to recommend the simplification of the 1971 Act as it now applies to the recognition of divorces and legal separations. In particular, we have been able to avoid the perpetuation of the two-fold distinction between “overseas divorces” and “divorces obtained outside the British Isles”.<sup>310</sup>

#### *B. Decrees obtained “by means of judicial or other proceedings”*

6.7 Section 2 of the 1971 Act sets out two conditions with which a divorce must comply in order that it may be capable of recognition as an overseas divorce. The first of these, in paragraph (a), is that it shall have been obtained “by means of judicial or other proceedings” in any country outside the British Isles. This provision is necessary because not all divorces are obtained by judicial proceedings. In Israel, for example, the civil courts have no

<sup>308</sup> But cf. clauses 2 and 6 of the draft Bill appended to Law Com. No. 34; Scot. Law Com. No. 16 (1970) (at pp.36 and 40 respectively), on which the 1971 Act was based.

<sup>309</sup> See para. 6.19 to 6.30, below.

<sup>310</sup> See para. 6.36, below, for our suggested formulation; and see clauses 2 and 3 of the draft Bill in Appendix A.

matrimonial jurisdiction: questions of family law are determined by the personal religious law of the parties, which in the case of Jews, means the Rabbinical Courts. In some Muslim countries there need be no proceedings before a court or indeed any other body at all. But it is desirable that such divorces should be recognised in other countries, provided they satisfy the relevant conditions. The words "... or other proceedings" are necessary to this end.<sup>311</sup>

6.8 An overseas divorce or legal separation can therefore be recognised under the 1971 Act if, among other requirements, it has been obtained by means of some "proceedings", whether or not those proceedings were, in form or substance, judicial. It is necessary however that there shall have been some procedure which, if complied with, will result in a divorce according to the law by which that procedure is established.<sup>312</sup> (That is not to say that it would necessarily thereby be an effective divorce *according to the law of the country in which it was obtained*.<sup>313</sup>) Two separate issues arise for consideration:

- (i) Should statutory provision be made, similar to that applicable to divorce recognition, for the recognition of foreign extra-judicial annulments?
- (ii) Should there be any amendment to the present requirement, in section 2(a) of the 1971 Act, that the divorce or legal separation (or, in future, annulment) be obtained by judicial or other proceedings?

(i) *Extension to extra-judicial annulments*

6.9 Inasmuch as nullity of marriage is a question of law, the legal effect of particular facts which must be alleged and proved, it is difficult to conceive of an annulment being obtainable except after an inquiry of some kind, by a tribunal established for that purpose. An annulment is therefore unlikely to be obtainable without "proceedings" designed to that end. But such proceedings need not necessarily be judicial, that is to say, carried out by the judicial organs of the state. They might easily be extra-judicial, for example in an ecclesiastical tribunal; or they could conceivably be administrative, conducted by an official of the state administration. In our Consultation Paper we expressed the view that there is no reason to exclude from recognition by United Kingdom courts annulments obtained otherwise than through the ordinary judicial processes of the foreign country in question, merely on that ground. Almost all those who commented to us agreed with this conclusion, which in fact accords with the law in Australia on the recognition of foreign annulments.<sup>314</sup> We recommend that, if other criteria of recognition are

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<sup>311</sup> See *Quazi v. Quazi* [1980] A.C. 744

<sup>312</sup> *Quazi v. Quazi*, above.

<sup>313</sup> See, for example, *Har-Shefi v. Har-Shefi* (No.2) [1953] P.220, the facts of which are set out in para. 6.4, above.

<sup>314</sup> Family Law Act 1975, s.104(10).

satisfied, an annulment extra-judicially obtained should be as capable of recognition as a divorce similarly obtained.<sup>315</sup>

(ii) *Amendment of the requirement of "judicial or other proceedings"*

6.10 The second issue to be considered in the context of examining the requirement under section 2 of the 1971 Act that a divorce or legal separation be obtained by "judicial or other proceedings" is whether this phrase is in need of amendment or explanation. There is no doubt that, since the 1971 Act came into force, its application to extra-judicial divorces has been a source of some difficulty and judicial disagreement.<sup>316</sup> Difficulty centres on the degree of formality required of a foreign extra-judicial divorce in order to satisfy the requirement that there be "proceedings". An Israeli Jewish Rabbinical divorce by *gett*<sup>317</sup> and Muslim talak divorces obtained under the Pakistan Muslim Family Laws Ordinance 1961<sup>318</sup> have been recognised. The former involves proceedings before a religious court. The latter requires notice of the pronouncement by the husband of the talak to be given to a specified official and to the wife. The official has to convene an arbitration council to try to effect a reconciliation and the divorce does not become effective until 90 days have elapsed after the delivery of the notice to the official. There is also some authority that a consensual divorce (a khula), obtained under classical Muslim law, in which the wife's proposal of divorce is consented to by the husband, when made in writing and attested by two witnesses, will be recognised as satisfying the requirement of "proceedings" in the 1971 Act.<sup>319</sup> Most difficulty has centred, however, on classical Muslim divorce by talak, where the husband pronounces "I divorce you" three times, orally or in writing.<sup>320</sup> Recognition of such divorce obtained in Kashmir has

<sup>315</sup> Cf. *Di Rollo v. Di Rollo* 1959 S.C.75. Here an annulment pronounced by an ecclesiastical court was not recognised though it appears to have been valid by the law of the domicile. Our proposals would involve the statutory reversal of this decision. The opportunity is being taken by the Law Commission to make a minor amendment to s.18A of the Wills Act 1837, which was added by s.18(2) of the Administration of Justice Act 1982. Section 18A of the 1837 Act governs the effect on a will of "a decree of a court [which] dissolves or annuls [a] marriage or declares it void". These words are probably apt to cover not only an English divorce or annulment, but also one obtained abroad and recognised in England and Wales, provided that it is "a decree of a court." Extra-judicial divorces, or annulments, are however excluded. It would appear from the Law Commission's consultations on this issue that there was no reason of policy for the exclusion of extra-judicial divorces or annulments; and so the appropriate amendment to s.18A of the Wills Act 1837 is included in the draft Bill appended to this report, as Appendix A (see clause 10), to make it clear that the provisions of that section extend to divorces and annulments obtained elsewhere, including where relevant those obtained extra-judicially, and recognised in England and Wales.

<sup>316</sup> *Quazi v. Quazi* [1980] A.C. 744; and see *Broit v. Broit* 1972 S.C. 192; *Radwan v. Radwan* [1973] Fam. 24; *Chaudry v. Chaudry* [1976] Fam. 148; *R. v. Registrar General of Births, Deaths and Marriages, Ex parte Minhas* [1977] Q.B.1; *Viswalingham v. Viswalingham* [1979] 1 F.L.R. 15; *Sharif v. Sharif* [1980] 10 Fam. Law 216; *Zaal v. Zaal* (1982) 4 F.L.R. 284; *Chaudhary v. Chaudhary* (1983) 4 F.L.R. 794; *R. v. Immigration Appeal Tribunal, Ex parte Secretary of State for the Home Department* [1984] 2 W.L.R. 36, affirmed, *sub nom. R. v. Secretary of State for the Home Department, Ex parte Fatima* [1984] 2 All E.R. 458.

<sup>317</sup> *Broit v. Broit* [1972] S.C. 192

<sup>318</sup> *Quazi v. Quazi* [1980] A.C. 744; and see *Chaudhry v. Chaudhry* [1976] Fam. 148.

<sup>319</sup> *Quazi v. Quazi* [1980] A.C. 744, 824.

<sup>320</sup> In *Viswalingham v. Viswalingham* [1979] 1 F.L.R. 15, the Court of Appeal held that the bringing to an end of a marriage, under the law of Malaysia, by the husband's change of religion from Hindu to Muslim did not constitute a divorce at all within the meaning of the 1971 Act, and certainly did not involve "proceedings" within the meaning of that Act.

been refused by Wood J., even though effective under the law in Kashmir to dissolve the marriage, because it was considered not to involve any “proceedings”,<sup>321</sup> and he has also refused recognition to a similar divorce obtained in Iraq.<sup>322</sup> On the other hand, Bush J. has held that a classical “bare” talak, obtained in, and effective under the law of, Dubai did satisfy the requirement of “proceedings” under the 1971 Act,<sup>323</sup> though he denied recognition to it on grounds of public policy, under section 8(2) of the Recognition of Divorces and Legal Separations Act 1971.

6.11 A number of those who commented on our Consultation Paper urged that further consideration be given to the application of the Recognition of Divorces and Legal Separations Act 1971 to extra-judicial divorces. We are persuaded that some amendment of the present law is desirable to make clear, for example, that “bare” talaks satisfy the requirement of recognition that they have been obtained by “proceedings”. We recommend, therefore, that the phrase “judicial or other proceedings” should, in relation to a foreign country, include acts which constitute the means by which a divorce, annulment or legal separation may be obtained in that country and are done in compliance with the procedure required by the law of that country.<sup>324</sup> This does not necessarily mean that all such extra-judicial divorces will necessarily be recognised in this country. It may still be appropriate to deny recognition on any of the grounds now contained in section 8 of the 1971 Act<sup>325</sup> and, in particular, on the ground that recognition would manifestly be contrary to public policy.<sup>326</sup> For the sake of completeness, we should also make it clear that we recommend that the requirement that a divorce, annulment or legal separation be obtained by “judicial or other proceedings” should apply whatever be the jurisdictional basis of recognition. This will have the effect that the requirement applies to a divorce, etc. obtained in the country of the domicile as that term is used in this country.<sup>327</sup>

### C. Decrees “effective under the law” of the country in which obtained

6.12 The second condition laid down by section 2 of the 1971 Act, with which a foreign divorce must comply if it is to be capable of recognition, is that it must be “effective under the law of [the] country [in which it is

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<sup>321</sup> *Chaudhary v. Chaudhary* (1983) 4 F.L.R. 794.

<sup>322</sup> *Sharif v. Sharif* (1980) 10 Fam. Law 216. The learned judge also took a similar view of a “bare” talak in *Quazi v. Quazi* (1980) A.C. 744, 766-777, 779.

<sup>323</sup> *Zaal v. Zaal* (1982) 4 F.L.R. 284. He expressly disagreed (at p.228) on this issue with the decision of Wood J. in *Sharif v. Sharif* [1980] Fam. Law 216. In *R. v. Immigration Appeal Tribunal, Ex parte Secretary of State for the Home Department* [1984] 2 W.L.R. 36, 40, 43 Taylor J. (obiter) preferred the approach of Bush J. to that of Wood J., though the Court of Appeal expressed no opinion on this point: [1984] 2 All E.R. 458, 463.

<sup>324</sup> It might be noted that, in Australia, the rules for the recognition of foreign divorces and annulments contained in s.104 of the Family Law Act 1975 apply to divorces and annulments “effected whether by decree, legislation or otherwise.” (s.104(10)).

<sup>325</sup> See paras 6.62 to 6.68, below.

<sup>326</sup> As in *Zaal v. Zaal* (1982) 4 F.L.R. 284, 288-289; and see *Quazi v. Quazi* (1980) A.C. 744, 783 (Wood J.); *Chaudhary v. Chaudhary* [1983] 4 F.L.R. 794, 802-803.

<sup>327</sup> We make no proposals for reform of the 1971 Act in relation to “trans-national” divorces, etc., i.e. those where the proceedings take place in more than one country, in view of the clarification of the law provided by the Court of Appeal in *R. v. The Secretary of State for the Home Department, Ex parte Fatima* [1984] 2 All E.R. 458.

obtained]”.<sup>328</sup> These words are required by the terms of the 1970 Hague Convention, to which the Act gives effect in the United Kingdom. However, this requirement of effectiveness does not, at the moment, in terms apply to recognition on the domicile basis under section 6 of the 1971 Act. The main reason for this is that section 6 applies not only to divorces obtained in the country of the domicile but also to those obtained elsewhere and recognised in the country of domicile. In the case, for example, of an extra-judicial divorce by talak it was not thought necessary for the talak to be effective both under the law of the country where it was pronounced and under the law of the country of the parties’ domiciles where it was recognised. Three questions now arise for examination. The first is whether the requirement of effectiveness currently applicable to divorce recognition under sections 2 to 5 of the 1971 Act is appropriate to be extended to nullity recognition. We have no doubt that a requirement similar to that for divorce recognition should be applied. Only in this way can annulments be placed on the same footing as divorces and legal separations, which we believe it should be the policy to achieve. We recommend that it should be a requirement of the recognition of a foreign annulment that it was effective under the law of the country in which it was obtained.

6.13 The second question is whether it is possible or appropriate to apply the requirement that a foreign divorce or legal separation (or now annulment) be “effective under the law of the country where it was obtained” to recognition on the domicile basis. Considerable simplification of the recognition rules would be assisted if such an approach were possible. Under the present law, it is not possible because section 6 of the 1971 Act embodies the common law rule in *Armitage v. Attorney-General*<sup>329</sup> under which recognition in the country of the domicile of a divorce or annulment obtained elsewhere suffices for recognition in this country. We recommend later in this report<sup>330</sup> that the *Armitage* rule should be abandoned for the recognition of divorces, annulments and legal separations. One effect of this recommendation will be that there will be no legal obstacle to applying the effectiveness requirement to recognition on the domicile basis. Are there other grounds for not extending this requirement to the domicile basis of recognition? It was suggested on consultation that one or two leading cases might well be decided differently if the effectiveness requirement extended to domicile-based recognition, but that the statutory reversal of such decisions was a small price to pay for the greater simplicity and certainty (in the case of nullity recognition) which would be afforded by such a change. We agree. It does not seem justifiable to have conditions for recognition differing according to the relevant jurisdictional basis in issue. We recommend that a foreign divorce, annulment or legal separation obtained in the country of the domicile should only be recognised here if it was effective under the law of that country.

6.14 The third question to be examined in the context of section 2(b) of the 1971 Act is that of the meaning to be given to the words “effective under

<sup>328</sup> 1971 Act, s.2(b). We examine in paras. 6.14 to 6.16, below, problems arising from the meaning of the word “country”.

<sup>329</sup> [1906] P.135.

<sup>330</sup> See para. 6.29, below.

the law of [the] country” in which it is obtained. This is not a matter which was considered in our Consultation Paper but it is one which has given rise to different interpretations of the scope of the 1971 Act and which a number of our consultees urged should be resolved. As we are proposing the repeal and replacement of the 1971 Act, we are persuaded that this matter ought to be examined in this report. In a sense the problem involves the interrelation of section 2(b) with the provision in section 3(1)(b) of the 1971 Act that a divorce obtained in a country of which either party is a national is to be recognised.

6.15 An example might serve to illustrate the problem. An American national obtains a divorce in the state of Nevada, a state in which, for the sake of argument, neither he nor his wife is habitually resident or domiciled (in the sense in which that term is used either in Nevada or in this country). Recognition depends on section 3(1)(b) of the 1971 Act – namely, that he was a national of the “country” in which the divorce was obtained. Does this mean a national of Nevada or of the U.S.A.? Section 3(3) of the 1971 Act provides the answer in that it states that where a country (e.g. the U.S.A.) comprises several territories (e.g. New York, Nevada etc.) section 3 is to be applied as if the reference to a “country” was to one of the “territories” – *except in the case of the provisions of section 3 relating to nationality*.<sup>331</sup> This makes it clear that, in the above example, a divorce in Nevada will be recognised in the United Kingdom, so far as the requirements of section 3 are concerned, if either spouse was an American national. Is it as clear that the requirements of section 2(b) are also satisfied? The divorce must be effective under the law of the *country* where it was obtained. Does “country” here mean Nevada or the U.S.A. and, if it means the U.S.A., is a divorce which is effective in Nevada still effective “under the law of the U.S.A.” (even if not effective *throughout* the U.S.A.)? Section 3(3) is of no assistance because it only applies to the earlier provisions of section 3. Views are divided amongst the academic authorities as to the operation of section 2(b) in relation to nationality. On one view,<sup>332</sup> a Nevada divorce obtained by an American national will only be recognised in this country if the divorce is recognised *throughout* the U.S.A., i.e. “country” in section 2(b) has the same meaning as in section 3 in relation to nationality and requires effectiveness throughout the whole federal state. On another view,<sup>333</sup> the Nevada divorce only needs to be effective in Nevada, even if “country” in section 2(b) means the U.S.A., because “under the law of the U.S.A.” divorce is a state and not a federal matter.

6.16 In our view, the present uncertainty should not be perpetuated in any new legislation on the recognition of divorces, annulments and legal separations. It seems to us to be undesirable that the word “country” should be capable of different meanings within the same statute, as is arguable in the

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<sup>331</sup> We would propose the inclusion of similar provisions in the legislation to implement the recommendations in this report, thereby covering also recognition of overseas annulments and, in the case of divorces, annulments and legal separations, recognition on the basis of domicile as used in this country: see clause 6(a)(i) of the draft Bill appended to this report as Appendix A.

<sup>332</sup> Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), pp.349–351.

<sup>333</sup> Clive, *Husband and Wife*, 2nd ed. (1982), pp.654–656.

case of sections 2(b) and 3 of the 1971 Act. If effectiveness were to be required only under the law of Nevada, it would tend to deprive the exclusion of nationality in section 3(3) of most of its effect. It would also mean that a Nevada divorce might be recognised in the United Kingdom, though denied recognition in the rest of the U.S.A. Our solution to this problem is to recommend that, where a divorce, annulment or legal separation is recognised on the basis of nationality, effectiveness should be required throughout the state of which the spouse in question is a national. Effectiveness under the law of some territory within the state should not suffice.<sup>334</sup> This is unlikely to lead to denial of recognition because most federal countries have uniform divorce laws (e.g. Australia, Canada, Switzerland) or uniform jurisdictional rules or make provision for giving full faith and credit throughout the federal country to a divorce, etc. obtained in one territory thereof.

#### *D. Jurisdictional bases for recognition*

##### *(i) Bases contained in the 1971 Act*

##### *(a) Habitual residence, nationality, and domicile in the foreign sense*

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

- (a) either spouse was habitually resident in the country in which the divorce was obtained; or
- (b) either spouse was domiciled<sup>335</sup> in the country in which the divorce was obtained, provided that that country uses the concept of domicile as a ground of jurisdiction; or
- (c) either spouse was a national of that country.

This is the central part of the entire scheme of recognition of "overseas divorces." We suggested in our Consultation Paper that the same grounds should apply to the recognition of annulments. We have already discussed,<sup>336</sup> and given our reasons for rejecting, the argument put to us by one commentator that nationality and domicile in the foreign sense of the term should not be introduced as jurisdictional bases for nullity recognition. The great majority of our consultees agreed with our proposal that divorce and nullity recognition should be founded on the same jurisdictional bases. This is what we now recommend in relation to habitual residence, nationality<sup>337</sup> and domicile in the foreign sense of the term.

<sup>334</sup> We believe that our recommendation is compatible with the terms of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. Although Art. 13 states that, in the case of a federal state, any reference in the Convention to "the law of the State of origin" is to be construed as a reference to the law of the individual territory within the federal state in which the divorce or legal separation was obtained, the requirement of effectiveness (from which section 2(b) of the 1971 Act is derived) is laid down by Art. 1 of the Convention. It does not require legal effectiveness under "the law of the State of origin" (thereby attracting the definition in Art. 13) but rather provides that the divorce or legal separation be obtained in a "Contracting State" and be "legally effective there". There seems little doubt that, were the U.S.A. to ratify the Convention, it would be the U.S.A., and not Nevada, which would be the Contracting State.

<sup>335</sup> Domicile is to be determined according to the law of the foreign country: s.3(2).

<sup>336</sup> See para. 5.12, above.

<sup>337</sup> Special provision is made in section 10(3) of the 1971 Act to deal with particular problems of nationality which arise in relation to colonies or other dependent territories. It will be necessary to make similar provision in the legislation to implement the recommendations in this report, see clause 12(2) of the draft Bill appended to this report as Appendix A.

6.18 There is one minor change which we think might be made to the formulation of the existing jurisdictional rules as they apply to the recognition of foreign divorces and legal separations and as they will apply under our recommendation in paragraph 6.17, above, to the recognition of foreign annulments. Section 3 of the Recognition of Divorces and Legal Separations Act, in affording recognition to divorces and legal separations obtained in the country in which either spouse was domiciled in the sense in which that term is used in the country in which the divorce or legal separation was obtained, provides in section 3(2) the additional requirement that that country uses the concept of domicile, in its sense of the term, as a ground of jurisdiction in matters of divorce or legal separation. This requirement is drawn directly from Article 3 of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations and, at first sight, it appears to provide an appropriate limitation on divorce recognition. It is, however, on further analysis an illogical provision when viewed in the light of the breadth of the Recognition of Divorces and Legal Separations Act 1971, and especially of the recognition of extra-judicial divorces thereunder. There is no equivalent limitation on the recognition of divorces obtained in the country of the nationality or habitual residence of either spouse. Furthermore the limitation has no real effect in excluding the recognition of divorces obtained in countries with a very liberal concept of domicile (e.g. 24 hours residence) if domicile is a jurisdictional basis there. Finally, the limitation operates rather strangely in the case of extra-judicial divorces in that an extra-judicial divorce effectively obtained in the country of the domicile in the foreign sense will be recognised if domicile in that sense is a jurisdictional basis for divorce, even though not for the actual divorce under consideration in this country. What is unsatisfactory about the present qualification of domicile is its link with the jurisdictional rules of the foreign country. It is, however, desirable to confine domicile in the foreign sense to its use in matters of divorce, legal separation and nullity. This will avoid difficulty should the foreign country have different concepts of domicile for family law matters and for commercial matters. We have concluded that the limitation in section 3(2) of the Recognition of Divorces and Legal Separations Act 1971, namely that a divorce or legal separation obtained in the country of the other party's domicile (in the sense of that term under the law of that country) should only be recognised if domicile in that sense was a ground of jurisdiction in divorce or legal separation, should not be preserved in new legislation governing the recognition of foreign divorces, annulments and legal separations. We recommend, however, that recognition on the basis of domicile, in the sense of that term in the country where the divorce, annulment or legal separation was obtained, should be restricted to the concept of domicile there used in matters of family law.<sup>338</sup>

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<sup>338</sup> This recommendation is compatible with the obligations of the United Kingdom as a party to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. In so far as the recommendation departs from the terms of Art. 3, it does so by widening the basis of recognition (i.e. by dropping the jurisdictional link), which is permitted under Art. 17 of the Convention; and the limitation to the use of domicile in family law matters accords with the terms of Art. 3 and the reference there to the use of domicile in matters of divorce and legal separation.

## (b) *Domicile*

6.19 We must now look ahead and examine section 6 of the 1971 Act to consider whether, and to what extent, the provisions of that section should apply to annulments, and whether any amendment to those provisions is desirable in relation to the recognition of divorces and legal separations. In section 6, the 1971 Act expressly preserves the old common law rule that a divorce or legal separation will be recognised in England if it was obtained in the country of the parties' domicile; or, if not obtained in the country of the parties' domicile, would be recognised there. With effect from 1 January 1974 a wife may retain her own domicile on marriage, and can preserve or change it independently of her husband.<sup>339</sup> The wife's domicile of dependence is abolished. This enactment necessitated amendments to section 6 of the 1971 Act, which was drafted on the premise that the domicile of a married couple was the domicile of the husband. The effect of the amendments is that, where the parties' domiciles are not the same, a divorce which was obtained in the country of the domicile of one of them will be recognised in the United Kingdom if it is also recognised in the country of the domicile of the other. Similarly, where the divorce was obtained in a country which was not the domicile of either party, it will be recognised in the United Kingdom if it would also be recognised in the country of the domicile of each of the parties. It is of course possible that the circumstances of any particular case may enable a divorce to be recognised both under sections 2 to 5 of the Act and under section 6, but it seems to be the intention<sup>340</sup> that section 6 shall apply only where the necessary conditions for recognition under sections 2 to 5 are not satisfied.

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

- (1) Where a divorce, obtained by judicial or other proceedings, is valid according to the law of the country in which it has been obtained it will be recognised by a United Kingdom court if either spouse was, at the time the proceedings were begun:
  - (a) a national of that country, or
  - (b) habitually resident in that country, or
  - (c) domiciled in that country in the sense in which 'domicile' is understood there.<sup>341</sup>
- (2) Where a divorce cannot be recognised because condition (1), above, is not fulfilled, or because none of the grounds 1(a) to 1(c) is available, it will nevertheless be recognised by a United Kingdom court if<sup>342</sup>:
  - (a) it was obtained in the country of the domicile<sup>343</sup> of both spouses, or
  - (b) it was obtained in the country of the domicile of one spouse and would be recognised as valid in the country of the domicile of the other, or

<sup>339</sup> Domicile and Matrimonial Proceedings Act 1973, ss.1, 17(5).

<sup>340</sup> See s.6(2).

<sup>341</sup> Provided that country uses that concept of domicile as a ground of jurisdiction.

<sup>342</sup> So long as any common law requirements of effectiveness are satisfied, see n. 303, above.

<sup>343</sup> In s.6 the concept of domicile is that understood by a court in the United Kingdom.

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

6.21 It emerges clearly from this juxtaposition of these sections that the recognition requirements of section 3 may be satisfied by the personal circumstances of only one of the spouses, but those of section 6 must be satisfied by those of both of them. Section 3, of course, implements the 1970 Hague Convention (though in fact it provides more favourable treatment than the Convention demands). Section 6 applies the common law rule of recognition based on domicile, and at the time when it was drafted the domicile of husband and wife was the same and inseparable. It would therefore have been meaningless to have drafted the section in terms of one domicile only. This would not have been the case after 1 January 1974, when the Domicile and Matrimonial Proceedings Act 1973 came into force. The amendments made by that Act to Section 6 were the minimum necessary to meet the new circumstances in which a wife possessed her own domicile independent of that of her husband. There are, however, two possible changes of policy which must be examined. The first is whether it is desirable to continue for the recognition of divorces and legal separations (or apply under a statutory regime of nullity recognition) the requirement of reference to the domicile<sup>344</sup> of *both* parties. There are three reasons why a change of policy in relation to this first issue might be desirable, and these should be considered.

6.22 The first reason is that under the rule in *Indyka v. Indyka*,<sup>345</sup> which would have applied to a divorce before the 1971 Act came into force, and applies now to annulments, it seems unlikely that a United Kingdom court would today refuse to recognise an annulment obtained in the country of the domicile of one of the parties.<sup>346</sup> Let us take the following example. H is a British Citizen, domiciled in England. His wife W was domiciled in France before her marriage there. She is a Polish national. After their marriage, both spouses become habitually resident in Belgium, but W never loses her French domicile. The marriage breaks down and W, whilst still habitually resident in Belgium, successfully petitions the French court for annulment of her marriage on the ground of formal invalidity. Given that W has retained her French domicile, we think it hardly conceivable that the court would not hold that there was a sufficiently real and substantial connection between W and France to warrant the recognition of the French decree. And certainly under the rule in *Travers v. Holley*<sup>347</sup> a foreign nullity decree obtained in circumstances in which one spouse was domiciled in the jurisdiction of the foreign court would, since 1 January 1974, be recognised in England.<sup>348</sup> Section 6 of the 1971 Act would however require that the decree be recognised not only by the law of the domicile of W but also by that of H and the decree could not be recognised anywhere in the United Kingdom unless this were

<sup>344</sup> It might be argued, as one of our consultees did, that the law of domicile is in a far from satisfactory state, and we should mention that the Law Commissions have undertaken an examination of the law of domicile.

<sup>345</sup> [1969] 1 A.C. 33; see para. 5.5, above.

<sup>346</sup> See *Lepre v. Lepre* [1965] P. 52, 61–62.

<sup>347</sup> [1953] P. 246.

<sup>348</sup> See the judgment of Waterhouse J. in *Vervaeke v. Smith* [1981] Fam. 77.

established. This requirement seems in itself to be a backward step and an unnecessary narrowing of the provisions of the existing law.<sup>349</sup>

6.23 The second reason lies in the results of the application of the section 6 provisions to the facts of this example. The decree obtained in the country of the domicile of one spouse must be regarded as valid under the law of the domicile of the other in order that it may be recognised in England. But the law of the domicile of H is English law and whether or not English law will recognise the decree is the very question under examination. There is a circuitry of reasoning here which cannot be resolved, and it is generally thought<sup>350</sup> that in such circumstances the decree could not be recognised in England under section 6. It is, in our view, wrong that in this by no means inconceivable situation the recognition of the decree should be precluded simply by a logical conundrum. Moreover, it is possible that in the particular circumstances mentioned the decree could not be recognised under a nullity equivalent of section 3 of the 1971 Act either, since W is not a French national and has not, since her marriage, been habitually resident in France. If this were so the annulment could not be recognised at all under an Act which would be intended to facilitate the recognition of foreign annulments, though it would undoubtedly be recognised under the existing common law.

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

6.25 Against all this it might be said that if a divorce, or an annulment, is regarded as valid in the country of the domicile of one spouse, but not in that of the other, the marriage is already a "limping marriage". Recognition

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<sup>349</sup> See paras. 2.17 and 2.18, above, for a discussion of the present law on this point.

<sup>350</sup> See Cheshire & North, *Private International Law*, 10th ed. (1979), p.373; Morris, *The Conflict of Laws*, 2nd ed. (1980), p. 149.

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

6.26 We think, therefore, that there are convincing arguments for changing the provisions contained in section 6 of the 1971 Act. We recommend that a divorce, annulment or legal separation obtained in the country of the domicile of one spouse alone should be recognised in the United Kingdom.

6.27 The second issue of policy, adverted to in paragraph 6.21, above, arises essentially as a consequence of the recommendation in the previous paragraph. Section 6 of the 1971 Act provides for the recognition of divorces on the domicile basis in two different kinds of case. The first is where the divorce is obtained in the country of the domicile. The second is where, though not obtained in the country of the domicile, the divorce is recognised as valid in that country. This amounts to a statutory preservation of the rule in *Armitage v. Attorney-General*.<sup>351</sup> Originally this rule, when introduced in 1971, only provided for recognition in this country if the divorce was recognised in the country of the spouses' common domicile. When, by section 1 of the Domicile and Matrimonial Proceedings Act 1973, it became possible for a married woman to have a domicile independent of that of her husband, section 6 of the 1971 Act in its application of the *Armitage* rule had to be amended. It now provides that a divorce or legal separation will be recognised if obtained in the country of the domicile of one spouse and recognised in that of the other,<sup>352</sup> or if obtained in the domicile of neither but recognised in the domicile, or domiciles, of both.<sup>353</sup> If, under our recommendations in paragraph 6.26, above, a divorce, annulment or legal separation is to be recognised here if obtained in the country of the domicile of *one* spouse, there is no need to retain the first of the two provisions just mentioned.

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<sup>351</sup> [1906] P. 135, which also applies to nullity recognition; see para. 2.22, above.

<sup>352</sup> Sect. 6(3)(a) (as substituted by the Domicile and Matrimonial Proceedings Act 1973, s.2(2)).

<sup>353</sup> Sect. 6(3)(b) (as substituted).

6.28 Is it desirable to retain for divorce, or to apply by statute to nullity, the rule that a divorce which is not recognised under any other provision of the 1971 Act or an annulment will be recognised if it is obtained in neither of the spouses' domiciles but is recognised in both? This is likely to be a rare case,<sup>354</sup> and commentators on our Consultation Paper pressed on us the argument that the present state of the law is illogical and really an accident of history, and, furthermore, as we acknowledged in our Consultation Paper, it is not easy to accept that a divorce should be recognised here if obtained in the country of the domicile of one spouse and yet still require recognition under the *Armitage* rule to be dependent on recognition in the country of both spouses' domiciles. If, however, one takes that step and allows recognition here if the divorce is recognised (though not obtained) in the country of one spouse's domicile, why should not a similar rule, based on the *Armitage* principle, be introduced in the case of a divorce recognised in the country of which one spouse was a national or in which one spouse was habitually resident?<sup>355</sup>

6.29 We are not convinced that it is necessary, or desirable, to extend the *Armitage* principle to recognition of divorces or annulments obtained in the country of the nationality or the habitual residence.<sup>356</sup> Furthermore, in the light of our earlier recommendation that recognition should be given to a divorce or annulment obtained in the country of one spouse's domicile, we are persuaded that the *Armitage* rule no longer serves a useful purpose. We do not wish to recommend its retention in a statutory scheme of rules for nullity recognition. We do not think that, in the light of our other recommendations and the width of the current rules of divorce recognition, it is necessary or desirable to retain the *Armitage* rule for recognition of divorces or legal separations obtained in a country with which neither party was, at the time of the proceedings, connected by domicile, nationality or habitual residence. We recommend that a foreign divorce, annulment or legal separation should no longer be recognised in this country simply on the basis that it is recognised in (though not obtained in) the country of the spouses' domiciles.<sup>357</sup>

6.30 The consequence of the recommendation to abolish the *Armitage* rule is that it is possible to simplify the law on divorce and nullity recognition in two significant respects.<sup>358</sup> The first is that, coupled with other recommen-

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<sup>354</sup> Especially as it must also be a divorce whose recognition is not excluded by s.16 of the Domicile and Matrimonial Proceedings Act 1973; see para. 6.30, below.

<sup>355</sup> By analogy with s.3 of the 1971 Act.

<sup>356</sup> Though cf. the Australian Family Law Act 1975, s.104(8).

<sup>357</sup> We discuss, in para. 6.70, below, the extent to which this proposal should be given retrospective effect and conclude that recognition should continue to be given to a divorce or legal separation, obtained before our recommendations become law, which would be recognised under the *Armitage* principle contained in section 6 but which would not be recognised under the recommendations in this report.

<sup>358</sup> In our Consultation Paper we examined detailed amendments to the *Armitage* rule as applied by s.6 of the 1971 Act, in particular whether the time at which one must determine whether the divorce would be recognised in the country of the domiciles should be laid down by statute. With our recommendation that the *Armitage* rule should be retained no longer, these issues fall away.

datations in this report in for example paragraphs 6.11 and 6.13 above, it is no longer necessary to retain the complex distinction in the 1971 Act between overseas divorces, governed by the provisions of sections 2-5 of the Act, and divorces obtained outside the British Isles governed by section 6. This has meant that the draft Bill appended to this report is simpler than the 1971 Act in this respect. The second way in which it has proved possible to simplify the law in consequence of the abandonment of the *Armitage* rule concerns section 16 of the Domicile and Matrimonial Proceedings Act 1973. Section 16(1) provides, in effect, that an extra-judicial divorce obtained in the British Isles shall not be recognised anywhere in the United Kingdom, even though recognised as valid in the country of the spouses' domiciles. If the *Armitage* principle is generally abandoned, then there is no other basis on which a divorce could be recognised in the circumstances covered by section 16(1). We are confident, as are those whom we have consulted specifically on this issue, that section 16(1) can be repealed when our other recommendations are implemented. We have in mind, in particular, the restriction of the recognition of other British divorces, etc. to decrees granted by courts of civil jurisdiction and the preservation of the validity of extra-judicial divorces obtained in this country, before section 16 came into force, and recognised here at common law,<sup>359</sup> as discussed in para. 4.14. above. In addition to recommending the repeal of section 16(1), we think that section 16(2) of the 1973 Act can also be repealed. The purpose of this provision was to prevent evasion of section 16(1) by leaving England temporarily to obtain an extra-judicial divorce which would be recognised in the country of the domicile.<sup>360</sup> Section 16(2) provides that an extra-judicial divorce obtained outside the British Isles which would not be recognised under sections 2 to 5 of the 1971 Act shall not be recognised under the domicile rules contained in section 6 of that Act if both parties were habitually resident in the United Kingdom for one year immediately preceding the foreign divorce. Insofar as this provision is, as it was designed to be, merely ancillary to section 16(1), there is no justification for its retention once the *Armitage* principle is abandoned both for overseas divorces and for divorces obtained in the British Isles. However, as drafted, section 16(2) goes a little wider than is necessary to prevent evasion of section 16(1). Section 16(1) can only apply to divorces which would be recognised by reason of the *Armitage* principle; but section 16(2) also denies recognition to foreign extra-judicial divorces obtained in, as well as recognised in, the country of the domicile. Once the *Armitage* rule has been abandoned, we see no need to continue to deny recognition to such extra-judicial divorces. No dissent from this view was expressed by those whom we consulted on this issue. We recommend that section 16 of the Domicile and Matrimonial Proceedings Act 1973 be repealed and be replaced only in so far as the recognition of other British divorces, annulments and legal separations is to be restricted to decrees granted by a court of civil jurisdiction.

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<sup>359</sup> E.g. *Qureshi v. Qureshi* [1972] Fam. 173.

<sup>360</sup> Hansard (H.L.), 11 March, 1971, vol. 316, col. 215; (H.L.), 8 June 1973, vol. 343, cols. 319-321; (H.C.), 20 July 1973, vol. 860, cols. 1086-1088.

(ii) *Bases of jurisdiction apart from the 1971 Act*

6.31 Are there any other jurisdictional bases on which a foreign annulment – as opposed to a foreign divorce – deserves recognition? In our view there are two further jurisdictional bases which require examination.

(a) *Annulment obtained after the death of either or both of the spouses*

6.32 It is possible under the law of the various parts of the United Kingdom for a person other than a spouse to bring nullity proceedings,<sup>361</sup> and the jurisdictional rules of courts in the United Kingdom in nullity proceedings have been so drafted as to cover the case where a nullity petition is brought by someone other than a spouse, and irrespective of whether either or both of the spouses is still alive. In the case of a spouse who has died, the general jurisdictional requirements of domicile or habitual residence are satisfied if they were satisfied at the date of the death of the spouse.<sup>362</sup> Provision needs to be made to deal with the similar issue which can arise if a court in the United Kingdom is asked to recognise a foreign annulment obtained after the death of either, or both, spouses. In our view, it should follow the general pattern of our domestic jurisdictional rules, namely satisfaction of the appropriate jurisdictional requirement as at the date of the spouse's death. We recommend that the jurisdictional requirements, for the recognition of a foreign annulment, of domicile, habitual residence or nationality, should, in the case of proceedings commenced after the death of either or both of the parties to the marriage, be regarded as satisfied if they were satisfied by a party at the date of his death. Clause 3(2) of the draft Bill in Appendix A gives effect to this recommendation.

(b) *Place of celebration of the marriage*

6.33 Before the Domicile and Matrimonial Proceedings Act 1973 came into force, the common law in England,<sup>363</sup> Scotland<sup>364</sup> and Northern Ireland<sup>365</sup> had previously allowed the assumption of jurisdiction on the sole ground that the marriage had been celebrated there (but, at least in England<sup>366</sup> and Northern Ireland,<sup>367</sup> only where the marriage was alleged to be void and not where it was said to be merely voidable). In *Merker v. Merker*<sup>368</sup> the reciprocity principle based on *Travers v. Holley*<sup>369</sup> was applied so as to require the recognition of a foreign decree annulling a void marriage where the only ground of jurisdiction was that the marriage had been celebrated within the forum. Following the Domicile and Matrimonial Proceedings Act 1973 it is doubtful whether a foreign annulment of a void marriage would now be recognised here if the foreign court had assumed jurisdiction solely on this

<sup>361</sup> Cretney, *Principles of Family Law*, 3rd ed. (1979), pp. 31-32; Clive, *Husband and Wife*, 2nd ed. (1982), p.123.

<sup>362</sup> Domicile and Matrimonial Proceedings Act 1973, ss.5(3)(c), 7(3)(c); Matrimonial Causes (Northern Ireland) Order, (1978 S.I. No. 1045) (N.I.15), Art. 49(3)(c).

<sup>363</sup> *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67.

<sup>364</sup> *Miller v. Deakin* 1912 1 S.L.T. 253; *MacDougall v. Chitnavis* 1937 S.C. 390; *Prawdzic-Lazarska v. Prawdzic-Lazarski* 1954 S.C. 98.

<sup>365</sup> *Addison v. Addison* [1955] N.I. 1.

<sup>366</sup> *Ross Smith v. Ross Smith* [1963] A.C. 280.

<sup>367</sup> *Holden v. Holden* [1968] N.I. 7.

<sup>368</sup> [1963] P. 283. See also *Corbett v. Corbett* [1957] 1 W.L.R. 486.

<sup>369</sup> [1953] P. 246. See paras. 2.10 to 2.12, above.

basis. But the question arises whether, in a new statutory scheme applicable to the recognition of foreign nullity decrees, there should be specific provision made for recognition on this ground.

6.34 There are arguments for the view that a court of the country of the celebration of the marriage is well placed to pronounce upon its validity. Where the defect in the marriage consists in a failure to observe the necessary forms it is difficult to contest that that court is indeed the most appropriate to determine that issue. And where other questions arise relating to capacity or consent the court of the place of celebration may be no less fitted than others to decide the matter. It is not suggested under such arguments that that court should, in any case, have exclusive jurisdiction, but only that it might equally with others be competent to determine these issues, and may in some cases be more convenient. Nevertheless, in our view (and this view was shared by almost all those who commented on our Consultation Paper) there should be no such ground of recognition in a new statutory scheme. Although there is no logical reason why grounds of recognition of foreign decrees should not be wider than the rules of domestic jurisdiction, it would in our view be anomalous to recognise a foreign nullity decree solely because it is the decree of the court of the country of the celebration of the marriage, while denying to our own courts jurisdiction on that ground. Except in cases of formal invalidity, which are probably a small proportion of all cases of nullity, there is no obvious reason why the court of the place of celebration should, as such, have any jurisdiction to pronounce upon the question of nullity, though it may be no less actually competent to do so than other courts. And of course the law of the place of celebration can be applied by any other court where it is requisite to do so. The court of the domicile and the court of the habitual residence have evident claims to jurisdiction which the, possibly fortuitous, court of the place of celebration has not. An alteration of our own jurisdictional rules should not now, we think, be lightly undertaken, and should depend on there being shown to exist some genuine mischief which can only thus be remedied. We have no evidence of any such mischief, and, in its absence, no adequate reason to alter our domestic rules of jurisdiction in this regard. Equally there is no reason to afford recognition to foreign annulments solely on this basis.

#### *E. Formulation of grounds of recognition*

6.35 The recommendations which we have made in the foregoing paragraphs (as to the jurisdictional circumstances on which recognition should be based and as to the scope of new statutory recognition rules) have as frequently been framed in the context of reform of the rules relating to recognition of divorces and legal separations as in the context of the introduction of new statutory provisions for nullity recognition. It might be convenient at this stage to summarise the recognition rules as they would be in the light of our earlier recommendations.

6.36 Our recommendations would have the result that a foreign divorce, annulment or legal separation obtained outside the British Isles, by means of judicial or other proceedings, would be recognised in the United Kingdom if:

it was effective under the law of the country in which it was obtained, and either party to the marriage<sup>370</sup> was, at the date of the commencement of the proceedings<sup>371</sup> in that country,

(a) habitually resident in, or

(b) domiciled in,<sup>372</sup> or

(c) a national of,  
that country.

The major differences from the structure of the 1971 Act are that (i) it is no longer necessary to distinguish between “overseas divorces” (governed by sections 2 to 5) and “divorces obtained outside the British Isles” (governed by section 6); (ii) the rules relating to recognition on the basis of domicile are greatly simplified (the present section 6) and included with the other jurisdictional bases; (iii) it is possible to abandon the preservation, currently in section 6, of reference to the “common law rules”; and (iv) the criteria currently in section 2 of the 1971 Act defining the types of divorce, legal separation or annulment falling within the rules applicable to “overseas divorces etc.” have been extended to all those falling within the new recognition scheme.

#### F. *Cross-proceedings and proof of facts*

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

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

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<sup>370</sup> I.e., to the marriage proceedings, which may have had no legal effect.

<sup>371</sup> Or, in the case of an annulment after the death of one or both spouses, if the jurisdictional requirement was satisfied at the date of death.

<sup>372</sup> I.e., “domicile” in either the sense in which the term is used in the foreign country in matters of family law or in the relevant part of the United Kingdom.

6.39 The structure of the 1971 Act, with its two-fold classification of divorces, has resulted in the application of sections 4 and 5 to "overseas divorces" only. They do not apply to divorces recognised under the preserved common law domicile rules. We said in our Consultation Paper that we could see no reason why they should not. None of our consultees disagreed with the conclusion that the substance of section 4(1) of the 1971 Act should be extended both to annulments and to divorces whose recognition falls to be governed by the domicile basis. One effect of our recommendation that a two-fold classification of divorces and annulments, as in the 1971 Act at present, is no longer needed in that it is very much simpler to give section 4(1) general application. Similarly, it seems to us right to apply the principles of section 4(2) of the 1971 Act (on conversion of legal separation into divorce) to all overseas legal separations recognised in the United Kingdom, whatever the jurisdictional basis of recognition. We do, however, propose three minor amendments to the law as presently to be found in section 4. First, it should be made clearer than is now the case in section 4(1) that, in the case of cross-proceedings, although the date on which the jurisdictional requirements must be satisfied is varied to allow such satisfaction at the date either of the original proceedings or of the cross-proceedings, that is the only requirement of recognition which is varied. All the others must still be satisfied. Secondly, in relation to conversion of a legal separation into a divorce, currently dealt with in section 4(2) of the 1971 Act, it should be made clear that the conversion must be effective in the country in which the legal separation was obtained, as Articles 1 and 5 of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations would seem to require. The requirement of effectiveness should also incorporate the change recommended in paragraph 6.16, above in relation to the nationality basis of jurisdiction, namely effectiveness throughout the state of which the spouse is a national. Thirdly, it should be made clear that reference to the "country" in which a legal separation is obtained includes reference to a territory within that country when recognition of the legal separation is based on the connecting factors of habitual residence or domicile, following the approach of section 3(3) of the 1971 Act.

6.40 Turning now to section 5, we expressed the view in our Consultation Paper that it was appropriate to apply that section not only to annulments but also to extend it to recognition on the common law domicile basis, presently found in section 6 of the 1971 Act. This received general support on consultation, although some anxiety was expressed as to whether it was appropriate to apply section 5 to a finding of domicile in the sense in which the term is used in this country, because a determination of domicile in our sense is a matter of law for our courts. We did not, and do not, intend that a court in this country is to be bound by a foreign determination that a person is domiciled there, in the sense in which the term 'domicile' is used in this country. On the other hand, we believe that there is no reason why a foreign

finding of fact, relevant to the determination of domicile, such as that the person in question had lived in the foreign country for a very long period and had expressed the intention never to leave it, should not be subject to the principles currently to be found in section 5(1) of the 1971 Act. However the draft legislation appended to this report<sup>373</sup> makes it clear that a "finding of fact" in the foreign court does not include a finding as to domicile there in the sense in which the term is used in this country. It also makes clear<sup>374</sup> that reference in this provision to the "country" in which a person is habitually resident or domiciled includes reference to a territory within that country, again following the approach of section 3(3) of the 1971 Act.

### G. *Other recognition legislation*

#### (i) *Saving for other legislation*

6.41 Section 6 of the 1971 Act, which we have discussed at length in paragraphs 6.19 to 6.30, above, not only preserves the common law rules for the recognition of foreign divorces and legal separations, but it also preserves, by the use of general words in subsection 6(5), the effect of any other enactments under which foreign divorces and legal separations may be required to be recognised. In Part II of this report we considered the effect of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in this field.<sup>375</sup> We concluded that, though the matter is not entirely free from doubt, that Act, and some of the various Conventions made under it, do extend to judgments in matters of family law or status. The operation of the 1933 Act, and any other legislation relevant in this field, is preserved in relation to the recognition of divorces and legal separations by section 6(5). In our Consultation Paper, we raised the question whether there is a continued need for subsection 6(5) and whether it should be repeated in any enactment relating to annulments.

6.42 There was general, though not unanimous, agreement that the retention of a rule preserving recognition under other statutory provisions was desirable in the case of divorce. Only in this way can the continued effect of recognition under the Foreign Judgments (Reciprocal Enforcement) Act 1933 be preserved. We have indicated earlier<sup>376</sup> that there should be one statute dealing with recognition of divorces, annulments and legal separations and we recommend that provision should be made therein to preserve the effect of any other enactments under which such matrimonial decisions fall to be recognised.

#### (ii) *Repeal of obsolete legislation*

6.43 One of the tasks of the Law Commission and the Scottish Law Commission<sup>377</sup> is to recommend the repeal of obsolete and unnecessary enactments. This is usually done in the form of joint Statute Law Revision

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<sup>373</sup> See clause 5(2).

<sup>374</sup> See clause 6(c).

<sup>375</sup> See paras. 2.29 to 2.31, above.

<sup>376</sup> See para. 1.9, above.

<sup>377</sup> See Law Commissions Act 1965, s.3(1).

Reports,<sup>378</sup> but the opportunity is also taken in reports on detailed matters of law reform to recommend the repeal of obsolete legislation relevant to the area of law under review. In this context we consider two statutory provisions concerned with divorce jurisdiction and the recognition of divorces and annulments, namely the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 and the Matrimonial Causes (War Marriages) Act 1944 and recommend their repeal.

(a) *Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950*

6.44 This series of three statutes,<sup>379</sup> which apply to all three parts of the United Kingdom, was passed to deal with the problem of expatriates who became resident, but not domiciled, in India and in other British territories and wished to get divorced.<sup>380</sup> The Acts provide that a court in a dependent territory to which the Acts are extended by Order in Council may exercise divorce jurisdiction, and make ancillary orders for custody or maintenance, in respect of British subjects who are domiciled in any part of the United Kingdom as if the parties were domiciled in that territory. The grounds for divorce must be those on which a decree could be granted by the High Court in England. The petitioner must be resident in the territory at the time of presenting the petition and the territory must be the place where the parties last resided together. Furthermore, the marriage must have been celebrated or the adultery, cruelty or crime complained of must have been committed in the territory. A decree or order under the Acts is required to be transmitted to and registered in the court of the domicile in the United Kingdom and then takes effect as if granted or made by that court; it is therefore a process of automatic recognition.

6.45 This legislation is obsolete and unnecessary for several reasons. It is based on and limited to the concept of domicile as the test of divorce jurisdiction and has been overtaken by the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. Secondly, it is cast in terms which take no account of changes in substantive divorce law nor of the fact that a married woman may have a domicile independent of her husband. Thirdly, with one exception, all the territories to which the Acts once applied have become independent and at that point the Acts ceased to apply to them.<sup>381</sup> The one exception is Hong Kong. However, our consultations with

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<sup>378</sup> See e.g. Statute Law Revision: Tenth Report (1980), Law Com. No. 106, Scot. Law Com. No. 63.

<sup>379</sup> Indian and Colonial Divorce Jurisdiction Act 1926; Indian and Colonial Divorce Jurisdiction Act 1940; Colonial and Other Territories (Divorce Jurisdiction) Act 1950.

<sup>380</sup> In *Keyes v. Keyes and Gray* [1921] P. 204 it was held that divorce courts in India had no jurisdiction to decree dissolution of a marriage between parties not domiciled in India although the marriage was celebrated and the parties were resident in India and the acts of adultery relied on were committed within the jurisdiction of the Indian courts. The decision caused confusion in India, where some courts refused to entertain divorce petitions brought by Europeans not domiciled there while others took a contrary view although recognising that any decrees they granted would not be recognised in this country.

<sup>381</sup> The legislation granting independence to India, Pakistan and Ceylon (1947), Kenya (1963), Malawi and Zambia (1964) and Singapore (1966) made provision for the completion of proceedings pending at the date of independence. This provision is no longer needed in view of the time which has elapsed since independence.

the appropriate authorities in this country and in Hong Kong have shown that the Acts are a dead letter in that jurisdiction. Jurisdictional rules in divorce are provided, in Hong Kong, by section 3 of the Matrimonial Causes Ordinance and no reliance is placed by the Hong Kong courts on the Acts of 1926 to 1950. Consequently no divorces are now granted in Hong Kong which fall for registration in the United Kingdom under the provisions of these Acts. All those whom we consulted agreed that the Acts could properly be repealed and we so recommend. We also recommend the repeal of the references to these Acts in the legislation conferring independence on the countries to which they formerly applied. Clause 9(4) and (5)(c) of the draft Bill expressly provide for the continued recognition of divorces obtained in the past under the statutes now recommended for repeal.

(b) *Matrimonial Causes (War Marriages) Act 1944*

6.46 Sections 1 and 2 of this Act extended the jurisdiction of the High Court in England and the Court of Session in Scotland to grant decrees of divorce or nullity in the case of marriages celebrated on or after 3 September 1939 and before 1 June 1950 by providing that the court should have jurisdiction if the wife was domiciled before marriage in England or Scotland, respectively, and the husband was domiciled overseas. Section 3 empowered the Parliament of Northern Ireland to pass equivalent legislation extending the jurisdiction of the High Court in Northern Ireland.<sup>382</sup> These jurisdictional provisions, which applied only to petitions for divorce or nullity commenced before 1 June 1955, have long been spent.<sup>383</sup>

6.47 Section 4 provided for the recognition in what were then British courts<sup>384</sup> of divorces or annulments granted by virtue of the 1944 Act, the equivalent legislation in Northern Ireland or a law of another jurisdiction which was declared by Order in Council to make jurisdictional provision substantially corresponding to that made by the 1944 Act for Great Britain. Between 1945 and 1949 some 13 laws passed by other legislatures were declared<sup>385</sup> to have made provision in these terms. The extended jurisdiction under these laws, like that of the courts here, was only exercisable for a short period after the war and it has therefore long ceased to be possible to obtain a divorce or annulment under these laws for the purpose of the 1944 Act. It would not be proper now to make further Orders in Council and the machinery for this purpose is obsolete.

6.48 The Matrimonial Causes (War Marriages) Act 1944 is a complicated piece of legislation but it now relates only to the recognition of divorces and

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<sup>382</sup> The power was exercised by the enactment of section 3 of the Marriage and Matrimonial Causes Act (Northern Ireland) 1946 in relation to proceedings commenced before 1 January 1951. This section was repealed by the Domicile and Matrimonial Proceedings Act 1973, s.17(2) and Sched. 6.

<sup>383</sup> Sections 1 and 2 were repealed by the Statute Law (Repeals) Act 1975. Section 3 was repealed by the Northern Ireland Constitution Act 1973, s.41(1) and Sched. 6, Part I and also by the Domicile and Matrimonial Proceedings Act 1973, s.17(2) and Sched. 6.

<sup>384</sup> In 1944 these included courts in the United Kingdom and in many territories which have since become independent.

<sup>385</sup> See S.R. & O. 1945 No. 1276; 1946 No. 896; 1946 No. 2019; S.I. 1948 No. 111; 1948 No. 864; 1948 No. 1331; 1948 No. 2073; 1949 No. 1050.

annulments granted 30 years ago. We are satisfied that it can be repealed so far as it forms part of the law of the United Kingdom<sup>386</sup> and we recommend accordingly. Clause 9(4) and (5)(d) of the draft Bill expressly provide for the continued recognition by courts in the United Kingdom of divorces and annulments obtained in the past under the 1944 Act.

### Capacity to marry

6.49 Section 7 of the 1971 Act deals with capacity to marry in the United Kingdom after recognition of a divorce in accordance with the Act. It is provided that, where the validity of a divorce obtained in any country (whether in the British Isles or abroad) is entitled to recognition, neither spouse shall be precluded from re-marrying in the United Kingdom on the ground that the validity of the divorce would not be recognised in any other country. The question arises whether a similar provision is desirable in relation to annulments,<sup>387</sup> and to what extent, if any, modifications to it, in respect both of annulments and of divorces, are required. This is a complicated matter because it involves consideration of the effect of the recognition of divorces and annulments on capacity to marry, both in this country and abroad; and it leads on to a consideration of the effect of United Kingdom divorces and nullity decrees on such capacity to marry;<sup>388</sup> and of the effect of the non-recognition of foreign divorces and annulments on capacity to marry.<sup>389</sup> It also provides the most striking example of an issue already referred to in this report,<sup>390</sup> namely whether priority should be given to the rules relating to divorce or nullity recognition or to the rules governing choice of law relating to marriage. We have already indicated our general preference that the former should prevail.<sup>391</sup>

6.50 The common law position in England as to the effect on capacity to re-marry of the recognition of a divorce, before the coming into force of the 1971 Act, is exemplified by the decision in *R. v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias*.<sup>392</sup> The facts of this case were as follows:

H was an Italian national domiciled in Switzerland who married W, also a Swiss national. Their marriage was dissolved by a divorce from the Swiss courts. Under Swiss law, capacity to marry was governed by the law of the nationality. W, now a single woman under Swiss law, had remarried in Switzerland. H wished to remarry but the law of *his* nationality, Italy, did not recognise the Swiss divorce. H and his fiancée, a Spanish national domiciled in Switzerland, therefore came to England to marry, planning to return to Switzerland. The marriage registrar refused a licence on the ground that H lacked capacity to marry according to Swiss law, the law of

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<sup>386</sup> The repeal will not affect the 1944 Act so far as it forms part of the law of a country outside the United Kingdom. See clause 13(4) of the draft Bill.

<sup>387</sup> It might be noted that the Australian equivalent of s. 7 of the 1971 Act – s. 104(9) of the Family Law Act 1975 – applies to nullity, as well as to divorce, recognition.

<sup>388</sup> See para. 6.57, below.

<sup>389</sup> See para. 6.60, below.

<sup>390</sup> See paras. 1.12, 3.9-3.10, above.

<sup>391</sup> See para. 1.12, above.

<sup>392</sup> [1968] 2 Q.B. 956.

his domicile; whereupon H's fiancée applied for an order of mandamus to compel the issue of the licence.

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

6.51 This rule was reversed by section 7 of the 1971 Act with regard to persons re-marrying within the United Kingdom after a foreign divorce. Where the divorce is entitled to recognition under the Act, neither spouse is to be precluded from re-marrying in the United Kingdom merely because the divorce would not be recognised in some other country – even if that other country happens to be the domicile of the spouse concerned. The 1971 Act does not, however, apply to divorces and legal separations obtained in the British Isles before 1 January 1972, when the Act came into force. Suppose, for example, that H and W are domiciled in the Republic of Ireland, but W had been resident in Scotland for three years when, in 1970, she successfully raised an action for divorce. That divorce will be recognised in England under the common law, not under the 1971 Act. Accordingly section 7 of the Act would be inapplicable, and the English court might apply the pre-existing common law rule to any question regarding the right of H or W to re-marry in England. W, if by now she has acquired a domicile in Scotland, or in England, would be free to marry. H, still domiciled in Ireland, would not. It is, on the other hand, possible (and perhaps more likely) that the court would apply the principle of section 7 of the 1971 Act by analogy, and hold that H, too, was free to re-marry in England. The position is uncertain.

6.52 Where a spouse whose divorce is required to be recognised in the United Kingdom re-marries abroad, any question concerning the validity of the re-marriage will fall to be determined under the common law and not under the 1971 Act, because section 7 of the Act applies only to re-marriage in the United Kingdom. Again, it is not certain whether a United Kingdom court would apply the principle of the *Arias Case*,<sup>393</sup> or section 7 of the 1971 Act by analogy. In the former case the court would hold that, if the divorce would not be recognised by the law of their respective domiciles, neither H nor W could validly contract a subsequent marriage, notwithstanding the recognition of the divorce in the United Kingdom. In the latter case the subsequent marriage would be regarded as valid.

6.53 Recognition of all foreign nullity decrees is at the moment a matter for the common law. There is no equivalent of the 1971 Act. There was no direct authority on the effect of recognition of a foreign nullity decree on capacity to remarry until the recent decision of Sir George Baker P. in *Perrini*

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<sup>393</sup> *Ibid.* See para. 6.50, above; but see now *Lawrence v. Lawrence*, *The Times* 18 July 1984 where Lincoln J. adopted a third approach, namely the application of the law of the country with which the marriage had a real and substantial connection, to the capacity of divorced spouses to remarry abroad.

v. *Perrini*<sup>394</sup> which was decided without reference either to the analogy of section 7 of the 1971 Act or, more significantly, to the *Arias Case*. In *Perrini* H was domiciled in Italy where he married W1 in 1957. In 1961 W1 obtained a decree of nullity from a court in New Jersey, where she had lived for some years. This decree was not recognised in Italy. H, still domiciled in Italy, then married W2 in England. W2 sought a nullity decree on the ground of H's bigamy. The petition was refused. The President decided that the American nullity decree should be recognised in England because, at the time of the American proceedings, W1 had a "real and substantial connection" with New Jersey. In so doing he was following earlier authority on the recognition at common law of foreign divorces<sup>395</sup> and nullity<sup>396</sup> decrees. He then went on to say, without reference to any authority, "once recognised [the decree] must be taken to have declared the pretended marriage a nullity, with each party free to [re]marry." This answer is consistent with the approach of section 7 of the 1971 Act (which is restricted to recognition of divorces) but inconsistent with the *Arias Case*.

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

6.55 The first question to ask is: why was the 1971 Act restricted to marriage in the United Kingdom? The 1971 Act was preceded by a joint Report of the two Law Commissions in which the substance of what is now section 7 is discussed.<sup>397</sup> Section 7 is intended to implement Article 11 of the 1970 Hague Convention, which provides as follows:

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

It was accepted by the Law Commissions that Article 11 was incompatible with English law in the form of the *Arias Case*, and with what was perceived to be Scots law also.<sup>398</sup> Section 7 was the legislative provision proposed to ensure that our law was consistent with the 1970 Hague Convention. However, the draft clause 7 proposed by the Law Commissions was not limited to remarriage in the United Kingdom; it contained no reference to where the second marriage took place.<sup>399</sup> It is, perhaps, unfortunate that the

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<sup>394</sup> [1979] Fam. 84.

<sup>395</sup> *Indyka v. Indyka* [1969] 1 A.C. 33.

<sup>396</sup> *Law v. Gustin* [1976] Fam. 155; and see now *Vervaeke v. Smith* [1981] Fam. 77, 109, 123 (this issue was not discussed in the House of Lords: [1983] 1 A.C. 145).

<sup>397</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970), para. 13.

<sup>398</sup> Report on The Marriage Law of Scotland (1969), Cmnd. 4011, para. 77, Case (f).

<sup>399</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970), p.40.

Bill ultimately submitted to Parliament contained the limiting words, though the more limited wording of section 7 would nevertheless appear to be justified by the Convention. On the other hand there is a possible ambiguity in Article 11. Does it mean only that a State is not to preclude a spouse from re-marrying *in that State*; or does it extend to precluding recognition of a subsequent marriage *wherever it takes place*?

6.56 There would seem, in the past, to have been general agreement as to the policy that where a divorce or annulment is recognised in this country, the parties should be free to remarry, whether here or abroad, even though regarded as incapable by the law of their domicile because of non-recognition there of the divorce or annulment. In our view that is the right policy to adopt. We recommend that, where the validity of any divorce or annulment, whether obtained elsewhere in the British Isles or overseas, is entitled to recognition in any part of the United Kingdom the fact that the divorce or annulment would not be recognised elsewhere should not preclude either spouse, under the law of that part of the United Kingdom, from re-marrying in that part of the United Kingdom, nor cause the marriage of either spouse, whether it takes place in that part of the United Kingdom or elsewhere, to be treated as invalid.

6.57 A further problem might arise if a divorce or annulment *granted in one part of the United Kingdom* were not to be recognised by the law of the domicile of one or both of the spouses. Should the spouse, the law of whose domicile did not recognise the divorce, be regarded in that part of the United Kingdom as being free to re-marry? We have no hesitation in answering that question in the affirmative and it would, in our view, be desirable to provide expressly to this effect,<sup>400</sup> a view which drew clear support in the comments on our Consultation Paper. Indeed, it is quite possible that this approach might have been adopted in relation to English divorce decrees under the Matrimonial Causes Act 1965, section 8(1) of which provided that "where a decree of divorce has been made absolute . . . either party to the former marriage may marry again." This provision was, however, repealed without re-enactment in the Matrimonial Causes Act 1973, though there was no intention in that repeal adversely to affect the right to re-marry after an English divorce.<sup>401</sup>

6.58 We also recommend a consequential amendment of the Marriage (Scotland) Act 1977. Section 3(5) of that Act requires a party to a marriage to be solemnised in Scotland who is not domiciled in any part of the United Kingdom to submit, if practicable, a certificate issued by the competent authority in the state of his domicile to the effect that he is not known to be subject to any legal incapacity (in terms of the law of that state) which would prevent his marrying. This requirement is subject to two provisos (which are not relevant to the present discussion) and we think that it should be subject

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<sup>400</sup> In the light of the much criticised decision in *Breen v. Breen* [1964] P.144, which may be read as indicating the opposite.

<sup>401</sup> Reasons for the decision to repeal s.8(1) of the 1965 Act are to be found in Law Com. No. 51 (1972), pp. 17-19.

to a further proviso to the effect that it does not apply where the party is capable of re-marrying in the United Kingdom by virtue of the provision recommended above but is unable to obtain a certificate of no impediment from the state of his domicile because that state does not recognise the validity of the divorce or annulment in question. If this consequential amendment is not made, there would be a conflict between the statutory freedom to marry where a divorce or annulment has been granted in Scotland or is entitled to recognition in Scotland and the administrative requirement of the production of a certificate of no impediment to marry from the state of the domicile.

6.59 These proposals would make recognition in the United Kingdom of a foreign divorce or annulment the conclusive factor in determining the capacity of the spouses to contract a subsequent marriage. Where the divorce or annulment was recognised in any part of the United Kingdom each spouse would be free to remarry there, and a court in that part of the United Kingdom would recognise and accept a marriage entered into elsewhere regardless of whether the law of the domicile of either spouse recognised the divorce or annulment. Where the divorce or annulment was *obtained* in any part of the United Kingdom, either spouse could remarry there, and a court in that part of the United Kingdom would recognise and accept a marriage elsewhere, regardless of the view taken of the divorce or annulment by the law of the domicile of either spouse. In our view this rule has the merits of simplicity, certainty and consistency, though it has to be accepted that it marks a further departure from the tradition of the common law that status is exclusively to be determined by the law of the domicile.

6.60 We discussed in our Consultation Paper the question of what effect the *non-recognition* in the United Kingdom of a foreign divorce or annulment should have on the capacity to re-marry of either spouse, if the divorce or annulment is recognised as valid by the law of the domicile. Our provisional conclusion was that it would be desirable to provide that a person whose foreign divorce or annulment is not recognised as valid in the United Kingdom should not be regarded as free to re-marry (whether in the United Kingdom or elsewhere) notwithstanding that the law of, for example, his domicile recognised the divorce or annulment. There was considerable opposition on consultation to this proposal and it has persuaded us not to proceed with it and to make no recommendation on this matter in this report. It may be of interest to note that, in Australia, although the relevant legislation<sup>402</sup> deals with the effect of recognition of foreign divorces and annulments on capacity to marry (as we have recommended in paragraphs 6.49-6.59, above) it is silent on the question of the effect of non-recognition. There are a number of reasons for our decision not to recommend legislation on this issue. No problem of conflict between recognition and marriage rules is likely, in practice, to arise in the case of a re-marriage in the United Kingdom because of the general rule that, even if the parties have capacity

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<sup>402</sup> Family Law Act 1975, s.104(9).

under the relevant foreign law, capacity under the law of that part of the United Kingdom in which they wish to marry would also seem to be required.<sup>403</sup> It would not be satisfactory to lay down a general rule of priority of the recognition rule in a case where the parties' divorce is recognised in the country of their domicile at the time of their marriage but later the question of the recognition of that divorce falls for decision in England. Our current, and proposed, rules for the recognition of foreign divorces and annulments are such that it will be rare for such a foreign order to be denied recognition in the United Kingdom. If it is denied recognition this is most likely to be because recognition would be contrary to public policy<sup>404</sup> and it has been argued that a decision taken against recognition in such a case ought not to be a bar to the recognition of the validity of a remarriage elsewhere. Indeed, as we recognise divorces obtained in the country of the domicile and the law governing capacity to marry is probably determined by the domiciliary law, the likelihood of a conflict of rules is limited indeed.<sup>405</sup> We have decided, therefore, as the issue is not one of any practical significance, to follow the Australian precedent and not to recommend a provision to deal with the effect of non-recognition on capacity to marry.

### **The general effect of a foreign decree**

6.61 We discussed in Part II, above,<sup>406</sup> the effect of a foreign nullity decree when recognised in this country. Such authority as there is suggests that the decree should be given the same effect in this country as it had in the country in which it was obtained. In our view this is a desirable approach, but we have concluded, in the light of the comments made on our Consultation Paper that express legislative intervention is unnecessary. This is a matter which may best be left to judicial development.

### **Exceptions to recognition**

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

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

- (1) it *must* be withheld where, according to the law of that part of the United Kingdom in which recognition is sought, there was, at the time

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<sup>403</sup> Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), pp. 299-301.

<sup>404</sup> See Recognition of Divorces and Legal Separations Act 1971, s.8(2)(b) (as amended by the Domicile and Matrimonial Proceedings Act 1973, s.2(4)).

<sup>405</sup> The problem would only arise where the divorce is recognised in the domicile of one, but not both parties or where the domicile has changed between the date of the divorce and of the remarriage: see, e.g., *Schwebel v. Ungar* (1964) 48 D.L.R. (2d) 644.

<sup>406</sup> See paras. 2.32-2.37.

the divorce or separation was obtained, no subsisting marriage between the parties;

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

The first ground applies both to divorces and legal separations granted in the British Isles and to those obtained in a country outside the British Isles. The second and third grounds apply only to divorces and legal separations obtained outside the British Isles. To what extent should these provisions be applicable to annulments or be amended in relation to recognition of divorces and legal separations?

6.64 The first ground, which is set out in section 8(1) of the 1971 Act, is obviously inappropriate to annulment, since an annulment may merely confirm that the marriage bond never existed. But, as we have pointed out earlier,<sup>407</sup> section 8(1) is intended to give effect to Article 9 of the 1970 Hague Convention, which is drafted in rather different terms:

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

The words “incompatible with a previous decision determining the matrimonial status of the spouses” were thought by the two Law Commissions, reporting on the Convention, to be liable to give rise to difficulties.<sup>408</sup> Accordingly what was considered to be a narrower, but more precise, formulation of the Convention principle,<sup>409</sup> was adopted for the 1971 Act. Since the only previous decision incompatible with a subsequent divorce is likely to be a prior divorce or annulment, the reformulation would seem to be justified.

6.65 The broad concept behind Article 9 of the 1970 Hague Convention is, however, fully applicable to annulments. An example directly in point is to be found in the recent case of *Vervaeke v. Smith*.<sup>410</sup> The petitioner sought recognition in England of a Belgian decree of nullity obtained in 1972. She had previously tried, and failed, to obtain an annulment in England of the same marriage.<sup>411</sup> The Belgian decree had been granted on facts which in the earlier English proceedings had been held insufficient to annul the marriage. Recognition of the Belgian decree was refused at first instance,<sup>412</sup> again by

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<sup>407</sup> See para. 4.6, above.

<sup>408</sup> Law Com. No. 34; Scot. Law Com. No. 16 (1970), para. 12, and App. B, p.43, para. 1 of Notes on clause 8.

<sup>409</sup> *Ibid.*

<sup>410</sup> [1983] 1 A.C. 145.

<sup>411</sup> *Messina v. Smith* [1971] P.322.

<sup>412</sup> [1981] Fam. 77.

the Court of Appeal<sup>413</sup> and finally by the House of Lords.<sup>414</sup> Among the various grounds advanced by the three courts for refusing recognition to the Belgian decree, that of *res judicata* was common to them all. The case is a clear application of the principle of Article 9 of the Convention, and we recommend that specific provision should be made for refusal of recognition of an annulment on this ground. It is arguable that the doctrine of *res judicata* is but a special instance of public policy,<sup>415</sup> for which provision is in fact already made in section 8(2)(b) of the 1971 Act. It may be so; but in our view, having been provided with the model in Article 9 of the Convention, it would be sensible to follow it, if only for the avoidance of doubt. In our view the most appropriate way in which this result should be achieved is by replacing section 8(1) of the 1971 Act (which currently applies to divorces and legal separations) with two separate provisions.

6.66 The first provision should apply the principle of *res judicata* to the recognition of all divorces, annulments and legal separations, whether granted elsewhere in the British Isles (as recommended in paragraphs 4.6 and 4.10, above) or obtained overseas. This will have the effect that recognition may be refused to any such divorce, annulment or legal separation if, at the time when it was obtained, it was irreconcilable with a previous decision, of a court in the part of the United Kingdom in which recognition is sought, as to the subsistence or validity of the marriage. Such a provision will apply the same *res judicata* rule to divorce and legal separation as to nullity and the only change in relation to divorces and legal separations is that denial of recognition will be discretionary rather than mandatory. We have concluded that it is more appropriate for a *res judicata* rule to be discretionary. This is in accord with Article 9 of the 1970 Hague Convention, and follows the present approach to *res judicata* in the recognition of foreign annulments. It is, however, necessary to extend the *res judicata* rule beyond irreconcilability with a previous decision of the court in the part of the United Kingdom in which recognition is sought. The *res judicata* rule contained in Article 9 of the 1970 Hague Convention applies also to previous decisions obtained in a country other than that in which recognition is sought, but which are recognised or entitled to be recognised in that country. The *res judicata* rule should, in the case of divorce, nullity and legal separation, extend to this further situation. We recommend, therefore, that recognition of a divorce, annulment or legal separation may be refused in any part of the United Kingdom if, at the time when it was obtained, it was irreconcilable with a previous decision, as to the subsistence or validity of the marriage, made by a court in that part of the United Kingdom or made elsewhere<sup>416</sup> and recognised, or entitled to be recognised, in that part of the United Kingdom. The second provision which we believe to be desirable applies only to the recognition of divorces and legal separations and not to annulments. Under

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<sup>413</sup> *Ibid.*

<sup>414</sup> [1983] 1 A.C. 145.

<sup>415</sup> *Ibid.*, p. 160 (*per* Lord Diplock).

<sup>416</sup> This will include prior divorces or annulments, whether obtained elsewhere in the British Isles and recognised under the recommendations in Part IV of this report, or obtained overseas and recognised under the recommendations in this Part.

the Recognition of Divorces and Legal Separations Act 1971,<sup>417</sup> a divorce or legal separation must be denied recognition if it was obtained at a time when, under the law of the part of the United Kingdom where recognition is sought (including its rules of private international law), there was no subsisting marriage between the parties. Much of the substance of this ground for denying recognition is covered by the *res judicata* rule which we have just recommended. That does not, however, cover all the ground. There may, for instance, be cases where under our private international law rules we have never regarded the marriage as valid, but there has been no intervening divorce or annulment. We have concluded, therefore, that the substance of this ground for denying recognition should be retained in the case of divorces and legal separations but we have reached the conclusion that, because of the clear overlap with the *res judicata* rule,<sup>418</sup> it would be more appropriate for it to follow the approach of that rule and be a discretionary, rather than mandatory, ground, and we so recommend.

6.67 Section 8(2)(a) of the 1971 Act, which permits non-recognition on the ground that one spouse was not given proper notice of, or permitted to take part in, the original proceedings, appears to conform to the existing common law as it relates to annulments.<sup>419</sup> The reported cases nearly all concern divorce rather than nullity, but here, as elsewhere, the same general principles are likely to apply to all matrimonial causes.<sup>420</sup> Section 8(2)(b) permits refusal of recognition on the ground of public policy. Here there is clear authority – if any were needed – that this is the present law relating to nullity.<sup>421</sup> We think that public policy is a sufficiently wide concept to include non-recognition on the ground of fraud, at any rate where the fraud is substantial.<sup>422</sup> Accordingly, in our view, section 8(2) of the 1971 Act is in principle as applicable to annulments as to divorces and similar provision should be made in a new recognition scheme for annulments. We do not think that any additional grounds of non-recognition are required. It should be noted that section 8(2), unlike section 8(1), applies only to divorces obtained outside the British Isles; and so it should be with annulments. Within the British Isles, questions of breach of natural justice are best dealt with by the court in which the original proceedings are brought: and since public policy will generally be the same throughout the British Isles,<sup>423</sup> it is not an appropriate ground for refusing recognition in one part of the United Kingdom to a decree obtained elsewhere in the British Isles.

6.68 Section 8(3) of the 1971 Act, following Article 1 of the Hague Convention on the Recognition of Divorces and Legal Separations (1970), provides that in recognising a divorce or legal separation, whether granted

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<sup>417</sup> Sect. 8(1).

<sup>418</sup> See above.

<sup>419</sup> See para. 2.25, above.

<sup>420</sup> See, e.g. *Mitford v. Mitford* [1923] P.130.

<sup>421</sup> *Vervaeke v. Smith* [1983] 1 A.C. 145.

<sup>422</sup> See para. 2.24, above.

<sup>423</sup> But perhaps not always. Compare the different approaches of the English and Scottish courts towards marriages of convenience, as exemplified in *Vervaeke v. Smith* [1983] 1 A.C. 145 (England) and *Orlandi v. Castelli* 1961 S.C. 113; *Mahmud v. Mahmud* 1977 S.L.T. (Notes) 17 and *Akram v. Akram* 1979 S.L.T. (Notes) 87 (Scotland).

elsewhere in the British Isles or obtained overseas, a court in the United Kingdom shall not be required to recognise findings of fault made in the original proceedings, or any maintenance, custody or other ancillary order made in such proceedings.<sup>424</sup> We think that such a provision should apply also to annulments, and we recommend that it should be repeated in new legislation relating to their recognition.<sup>425</sup>

### Retrospective effect

6.69 The final section of the 1971 Act, section 10,<sup>426</sup> deals, as is normal, with citation, some definitions<sup>427</sup> and commencement. It also contains transitional provisions. These relate to the effect of the Act on divorces and legal separations obtained before the Act came into force. Sub-section 10(4) states generally that the Act applies to all overseas divorces and legal separations, obtained before as well as after the commencement date. Then, in paragraph (a) the sub-section provides that recognition of, or a refusal to recognise, a divorce or legal separation has effect in relation to any time, whether before or after the Act came into force. Paragraph (b) of the sub-section provides, however, that the provisions of the Act do not affect any property rights to which a person became entitled before the commencement date; and do not apply where the validity of the divorce or legal separation has already been the subject of a decision by a competent court in the British Isles before that date.<sup>428</sup> We recommend that similar provision should be made in respect of the recognition of annulments.

6.70 There is, however, one further matter concerning retrospectivity for which we think it is desirable to make specific provision.<sup>429</sup> We have recommended, in paragraph 6.29 above, that the rule in *Armitage v. Attorney-General*<sup>430</sup> should no longer apply to the recognition of foreign divorces and legal separations under section 6 of the 1971 Act. The effect of this recommendation, when coupled with our further recommendation<sup>431</sup>

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<sup>424</sup> This does not affect the recognition of, for example, maintenance orders either at common law or under any other statute, such as the Maintenance Orders Act 1950, the Maintenance Orders (Reciprocal Enforcement) Act 1972, or the Civil Jurisdiction and Judgments Act 1982.

<sup>425</sup> We have referred in paras. 1.5 and 2.36, above, to the fact that both the Law Commission (Law Com. No. 117 (1982)) and the Scottish Law Commission (Scot. Law Com. No. 72 (1982)) have recommended that the courts should have power, in appropriate cases, to grant financial relief where a foreign divorce or annulment is recognised in this country. The Matrimonial and Family Proceedings Act 1984 implements these recommendations.

<sup>426</sup> Section 9 of the 1971 Act related to Northern Ireland and was repealed by the Northern Ireland Constitution Act 1973, s.41(1) and Sched. 6, Part I.

<sup>427</sup> We have indicated earlier (see n. 252, above) that it is not necessary in the draft Bill appended to this report to retain the definition of "British Isles" currently found in s.10(2) of the 1971 Act.

<sup>428</sup> Sect. 10(4)(b) as drafted might be read as providing that the 1971 Act does not apply at all if there is a prior decision of another British court. In Clause 9(2) of the draft Bill (which is the counterpart of s.10(4)(b)) it is made clear that effect is to be given to that earlier decision.

<sup>429</sup> We have also recommended in paragraph 4.14, above, that the exclusion from recognition of extra-judicial divorces obtained in the British Isles should follow the policy of section 16(3) of the Domicile and Matrimonial Proceedings Act 1973 and preserve the validity of any such divorces obtained before that Act came into force (i.e. before 1 January 1974).

<sup>430</sup> [1906] P.135.

<sup>431</sup> See para. 6.26, above.

that a divorce or legal separation obtained in the country of the domicile of only one spouse should be recognised, is that our recognition rules will, to a very limited extent, be narrowed. Recognition will no longer be given to a divorce or legal *séparation* obtained in a country in which neither spouse is domiciled but which is recognised in the country, or countries, of their domiciles.<sup>432</sup> We do not think that it would be appropriate to deny recognition to any such divorces or legal separations obtained before legislation to implement the recommendations in this report came into effect and which would otherwise be recognised here, and we so recommend.<sup>433</sup>

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<sup>432</sup>Sect. 6(2)(b), 3 (b) of the 1971 Act.

<sup>433</sup> We discuss, in the Notes to Clause 9(5)(b) of the draft Bill appended to this report, the detailed interrelation of this recommendation with the provisions of section 16 of the Domicile and Matrimonial Proceedings Act 1973.

## PART VII

### SUMMARY OF RECOMMENDATIONS

7.1 We conclude this report with a summary of our recommendations. Where appropriate, we identify the relevant clauses in the draft Recognition of Divorces, Annulments and Legal Separations Bill (contained in Appendix A to this Report) intended to give effect to particular recommendations.

7.2 Our recommendations are as follows:

- (1) We believe it is difficult to make any convincing argument for the preservation of the existing system of common law rules for the recognition of foreign annulments. The present common law rules are uncertain and should be abolished and replaced by a comprehensive statutory scheme.  
(paragraphs 3.8, 3.12 and 3.13)
- (2) The new statutory scheme should provide, in one statute applicable to the whole of the United Kingdom, rules governing the recognition of divorces, annulments and legal separations. The Recognition of Divorces and Legal Separations Act 1971 should be repealed and replaced with such a comprehensive new statute.  
(paragraphs 1.7 and 1.9 and Clause 13(2), (4) and Schedule)
- (3) Decrees of nullity granted in any part of the United Kingdom should (subject to (4), below) be accorded automatic recognition in every other part.  
(paragraph 4.5 and Clause 1(2))
- (4) A United Kingdom court should have a discretion to refuse to recognise a nullity decree of another United Kingdom court on the ground of *res judicata*, i.e., that when the decree was obtained, it was irreconcilable with a previous decision of a court in the part of the United Kingdom where recognition is sought, or with a decree obtained elsewhere and recognised or entitled to be recognised in that part.  
(paragraph 4.6 and Clause 8(1))
- (5) There should be a similar discretion to deny recognition to a decree of divorce or judicial separation of another United Kingdom court. There should also be a discretion to deny recognition to such a decree on the ground that, at the time when it was obtained, there was no subsisting marriage between the parties.  
(paragraph 4.6 and Clause 8(1) and (2))
- (6) There should be no other ground for refusing automatic recognition to the decree of another United Kingdom court.  
(paragraph 4.7)

- (7) Decrees granted in the Isle of Man and the Channel Islands should receive similar automatic recognition in the United Kingdom subject to denial of recognition on grounds similar to those in (4) and (5) above.  
(paragraph 4.10 and Clauses 1(2) and 8(1) and (2))
- (8) The statutory rules governing the recognition of nullity decrees granted elsewhere in the British Isles should apply to decrees granted both before and after the legislation to implement our recommendations comes into force, subject to safeguards in relation to acquired property rights or prior decisions of other British courts.  
(paragraph 4.13 and Clause 9(1) and (2))
- (9) The rules for the recognition of decrees of divorce and judicial separation granted elsewhere in the British Isles, currently to be found in section 1 of the Recognition of Divorces and Legal Separations Act 1971, should apply to decrees granted before, as well as after, that Act (and the legislation to implement our recommendations) comes into force; subject to the same safeguards as are mentioned in (8), above.  
(paragraphs 4.13 and Clause 9(1), (2) and (3))
- (10) The statutory provisions to implement recommendations (3), (7) and (8) above, whilst modelled on section 1 of the Recognition of Divorces and Legal Separations Act 1971, should, in the interest of clarity, be cast in slightly different form. In particular, the recognition of divorces, annulments and judicial separations granted in the British Isles should be limited to decrees of a court of civil jurisdiction, subject to the preservation of the common law rules for the recognition of extra-judicial divorces obtained in the British Isles before 1 January 1974.  
(paragraph 4.14 and Clauses 1 and 9(4) and 5(a))
- (11) The basis for recognition of foreign nullity decrees in the United Kingdom should not be reciprocity of jurisdiction in the foreign court.  
(paragraph 5.8)
- (12) The statutory rules for recognition of foreign nullity decrees in the United Kingdom should be modelled on those applicable to the recognition of foreign divorces and legal separations, contained in the Recognition of Divorces and Legal Separations Act 1971.  
(paragraphs 5.13 to 5.15)
- (13) In producing one comprehensive statute covering the rules for the recognition of divorces, annulments and legal separations, the opportunity should be taken to improve the rules currently applicable to the recognition of divorces and legal separations under the Recognition of Divorces and Legal Separations Act 1971.  
(paragraphs 1.9 and 6.1)

- (14) The dichotomy between “overseas divorces” and “divorces obtained in a country outside the British Isles” contained in the Recognition of Divorces and Legal Separations Act 1971 is confusing and should be avoided in new legislation on the recognition of divorces, annulments and legal separations.  
(paragraphs 6.3 and Clause 2)
- (15) A foreign annulment should, subject to (17) below, be capable of recognition by a court in the United Kingdom even if it is not obtained by means of judicial proceedings. An annulment obtained, for example, from a religious authority should not be refused recognition simply on that account.  
(paragraph 6.9 and Clause 3(1)(a)(i))
- (16) Section 18A of the Wills Act 1837, which governs the effect on a will of a divorce or annulment of a marriage, should be amended to make it clear that the provisions of that section extend to divorces or annulments obtained elsewhere (including, where relevant, those obtained extra-judicially) and recognised in England and Wales.  
(paragraph 6.9, and note 315, and Clause 10)
- (17) The requirement, currently found in section 2(a) of the Recognition of Divorces and Legal Separations Act 1971, that an overseas divorce be obtained by “judicial or other proceedings” should apply to all jurisdictional bases for the recognition of foreign divorces, annulments and legal separations; and the phrase “judicial or other proceedings” should, in relation to a foreign country, include acts which constitute the means by which a divorce, annulment or legal separation may be obtained in that country and are done in compliance with the procedure required by the law of that country.  
(paragraph 6.11 and Clauses 3(1)(a)(i) and 12(1))
- (18) The requirement, currently found in section 2(b) of the Recognition of Divorces and Legal Separations Act 1971, of effectiveness under the law of the country in which the divorce etc. was obtained should be applied to the recognition of a foreign annulment.  
(paragraph 6.12 and Clause 3(1)(a)(ii))
- (19) The requirement of effectiveness under the law of the country where the divorce etc. was obtained should be extended, in the case of the recognition of divorces, annulments and legal separations, to recognition on the jurisdictional basis of domicile, as that term is understood in the recognition forum.  
(paragraph 6.13 and Clause 3(1)(a)(ii), (b) and 3(3))
- (20) The uncertainty as to the effect of sections 2 and 3 of the Recognition of Divorces and Legal Separations Act 1971 in the application of the requirement of effectiveness where the jurisdictional basis

of recognition is that of the nationality of one of the parties should be resolved by providing that a divorce, annulment or legal separation obtained in a territory forming part of a state of which either party was a national should have to be effective throughout the whole state, and not just the territory thereof, before it can be recognised in any part of the United Kingdom.

(paragraph 6.16 and Clause 6(a)(ii) and (b)(ii))

- (21) The jurisdictional bases for recognition of foreign divorces and legal separations, set out in section 3 of the Recognition of Divorces and Legal Separations Act 1971, should (subject to (22), below) apply also to the recognition of foreign annulments.  
(paragraph 6.17 and Clause 3(1)(b))
- (22) The limitation in section 3(2) of the Recognition of Divorces and Legal Separations Act 1971 that a divorce or legal separation obtained in the country of either party's domicile, in the sense of that term under the law of that country, should only be recognised if domicile in that sense was a ground of jurisdiction in divorce or legal separation should not be preserved in new legislation governing the recognition of foreign divorces, annulments and legal separations; but domicile in the foreign sense should be restricted to the concept of domicile used in the foreign country in matters of family law.  
(paragraph 6.18 and Clause 3(3))
- (23) The principle of the common law, that domicile is appropriate to determine a person's status, should be preserved, and recognition afforded to an annulment obtained in the country of the domicile.  
(paragraphs 6.19 to 6.30)
- (24) The approach of section 6 of the Recognition of Divorces and Legal Separations Act 1971 which in relation to domicile requires reference to the domicile of both spouses should be abandoned. A divorce, annulment or legal separation obtained in the country of the domicile of one spouse alone should be recognised in the United Kingdom.  
(paragraph 6.26 and Clause 3(1)(b), (3))
- (25) A foreign divorce, annulment or legal separation should no longer be recognised in the United Kingdom simply on the basis that it is recognised in (though not obtained in) the country of the spouses' domiciles.  
(paragraph 6.29)
- (26) Section 16 of the Domicile and Matrimonial Proceedings Act 1973 should be repealed and be replaced only insofar as the recognition of other British divorces, annulments and legal separations is to be restricted to decrees granted by a court of civil jurisdiction.  
(paragraph 6.30 and Clauses 1, 13(2) and the Schedule))

- (27) The jurisdictional requirements, for the recognition of a foreign annulment, of domicile, habitual residence or nationality, should in the case of proceedings commenced after the death of either or both of the parties to the marriage, be regarded as satisfied if they were satisfied by a party to the marriage at the date of his death.  
(paragraphs 6.32 and Clause 3(2))
- (28) The fact that an annulment has been obtained in the country in which the marriage was celebrated should not be a ground for recognition of the annulment in the United Kingdom.  
(paragraphs 6.33 and 6.34)
- (29) The principles of section 4(1) of the Recognition of Divorces and Legal Separations Act 1971, dealing with cross-proceedings, should be extended to the recognition of foreign annulments and of all foreign divorces and legal separations, whatever the jurisdictional basis of recognition. It should be made clear that the principles of section 4(1) do not affect requirements for recognition other than the date on which the jurisdictional requirements have to be satisfied.  
(paragraph 6.39 and Clause 4(1))
- (30) The principles of section 4(2) of the Recognition of Divorces and Legal Separations Act 1971, dealing with the conversion of a legal separation into a divorce, should apply to all legal separations recognised in the United Kingdom, whatever the jurisdictional basis of recognition. It should be made clear that the conversion must be effective in the country where the legal separation was obtained (including the amendment to the requirement of effectiveness recommended in (20), above) and that a "country" can include a territory which is part thereof when recognition of the legal separation is based on the connecting factors of habitual residence or domicile.  
(paragraph 6.39 and Clauses 4(2) and 6(b))
- (31) The principles of section 5 of the Recognition of Divorces and Legal Separations Act 1971, dealing with proof of facts relevant to recognition, should be extended to recognition of foreign annulments and of all foreign divorces and legal separations, whatever the jurisdictional basis of recognition, with the proviso that, for the purposes of that section, a "finding of fact" in a foreign court shall not include a finding as to domicile in the same sense in which the term is used in this country. It should be made clear that, in this context, reference to the "country" in which a person is habitually resident or domiciled includes a territory which is part thereof.  
(paragraph 6.40 and Clauses 5 and 6(c))
- (32) The rule, currently found in section 6(5) of the Recognition of Divorces and Legal Separations Act 1971, preserving the effect of

recognition of foreign divorces or legal separations under other statutory provisions should be retained and applied to the recognition of foreign annulments.

(paragraph 6.42 and Clause 2(b))

- (33) The Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 (and references to these Acts in other legislation) and the Matrimonial Causes (War Marriages) Act 1944 are obsolete and should be repealed; though provision should be made for the continued recognition of divorces and annulments obtained in the past and recognised under these statutes.

(paragraphs 6.43 to 6.48 and Clauses 9(4), (5)(c) and (d), 13(2) and the Schedule))

- (34) Where the validity of any divorce or annulment (whether obtained elsewhere in the British Isles or overseas) is entitled to recognition in any part of the United Kingdom the fact that the divorce or annulment would not be recognised elsewhere should not preclude either spouse, under the law of that part of the United Kingdom, from remarrying in that part, nor cause the marriage of either spouse, whether taking place in that part of the United Kingdom or elsewhere, to be treated as invalid.

(paragraph 6.56 and Clause 7)

- (35) Where a divorce or annulment is granted in any part of the United Kingdom, neither spouse should be regarded, under the law of that part of the United Kingdom, as incapable of remarrying on the ground that the divorce or annulment would not be recognised in any other country.

(paragraph 6.57 and Clause 7)

- (36) The Marriage (Scotland) Act 1977 should be amended so as to provide that section 3(5) thereof (which requires a party to a marriage in Scotland to submit a certificate of legal capacity to marry from the authorities in the state of his domicile) does not apply where a person is capable of remarrying in the United Kingdom by reason of (34) or (35) above, but cannot obtain a certificate of no impediment because the state of his domicile does not recognise the divorce or annulment.

(paragraph 6.58 and Clause 11)

- (37) Legislative intervention, to provide generally that a foreign annulment, when recognised in any part of the United Kingdom, should be given the same effect as an annulment obtained in that part, is unnecessary.

(paragraph 6.61)

- (38) Recognition of a divorce, annulment or legal separation under the proposed legislation may be refused in any part of the United Kingdom if, at the time when it was obtained, it was irreconcilable

with a previous decision, as to the subsistence or validity of the marriage, made by a court in that part of the United Kingdom or made elsewhere and recognised or entitled to be recognised in that part of the United Kingdom.

(paragraph 6.66 and Clause 8(1))

- (39) Recognition of a divorce or legal separation may be refused in any part of the United Kingdom if it was obtained at a time when, according to the law of that part of the United Kingdom (including its rules of private international law), there was no subsisting marriage between the parties.

(paragraph 6.66 and Clause 8(2))

- (40) Other grounds for refusing recognition to a foreign annulment should be the same as those currently provided, in relation to foreign divorces and legal separations, by section 8(2) of the Recognition of Divorces and Legal Separations Act 1971, namely want of notice of the proceedings, failure to provide reasonable opportunity to take part in the proceedings, or that recognition would manifestly be contrary to public policy.

(paragraph 6.67 and Clause 8(3))

- (41) A court in the United Kingdom, in recognising an annulment, should not be required (as it is not now required when recognising a divorce or legal separation) to recognise any finding of fault or any maintenance, custody or other ancillary order made in the annulment proceedings.

(paragraph 6.68 and Clause 8(4))

- (42) New legislation applicable to the recognition of annulments should apply to annulments obtained before as well as after the date on which the legislation comes into force, subject to the same provisos as currently apply to the recognition of foreign divorces and legal separations (in section 10(4) of the Recognition of Divorces and Legal Separations Act 1971) relating to entitlement to acquired property rights and prior decisions of other British courts.

(paragraph 6.69 and Clause 9(1) and (2))

- (43) Amendment of the law relating to the recognition of foreign divorces and legal separation should also have similar retrospective effect to that outlined in (42) above, save where it amounts to the withdrawal of recognition, as in the case of recognition on the basis that a divorce or legal separation was recognised in the country of the spouses' domiciles (see (25) above). In such cases the new rules should not apply so as to affect the validity of any divorce or legal separation obtained before the legislation to implement these recommendations comes into force.

(paragraph 6.70 and Clause 9(4) and (5)(b), and (e))

*(Signed)* Ralph Gibson, *Chairman,*  
*Law Commission*  
Brian Davenport  
Julian Farrand  
Brenda Hoggett  
Peter North

J. G. Gasson, *Secretary*

Peter Maxwell, *Chairman*  
*Scottish Law Commission*  
R. D. D. Bertram  
E. M. Clive  
John Murray  
C. G. B. Nicholson

R. Eadie, *Secretary*  
19 July 1984

## APPENDIX A

### RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS BILL

#### ARRANGEMENT OF CLAUSES

*Clause*

*Divorces, annulments and judicial separations granted in the British Islands*

1. Recognition in United Kingdom of divorces, annulments and judicial separations granted in the British Islands.

*Overseas divorces, annulments and legal separations*

2. Recognition in the United Kingdom of overseas divorces, annulments and legal separations.
3. Grounds for recognition.
4. Cross-proceedings and divorces following legal separations.
5. Proof of facts relevant to recognition.

*Supplementary provisions*

6. Modifications of ss.3 to 5 in relation to countries comprising territories having different systems of law.
7. Non-recognition of divorce or annulment in another jurisdiction no bar to remarriage.
8. Refusal of recognition.
9. Provisions as to divorces, annulments etc. obtained before commencement of Act.
10. Effect of divorces and annulments on wills.
11. Amendment of Marriage (Scotland) Act 1977.
12. Interpretation.
13. Short title, repeals, extent and commencement.

Schedule: Repeals

*Recognition of Divorces, Annulments and Legal Separations Bill*

**DRAFT  
OF A  
BILL**

To amend the law relating to the recognition of annulments; to re-enact with amendments the provisions of the Recognition of Divorces and Legal Separations Act 1971; to make further provision with respect to the effect of divorces and annulments on wills; and for connected purposes.

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:—

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Recognition in  
United  
Kingdom of  
divorces,  
annulments  
and judicial  
separations  
granted in the  
British  
Islands.

*Divorces, annulments and judicial separations granted in the British  
Islands*

1.—(1) Subject to section 9(4) and (5)(a) of this Act, no proceedings in any part of the British Islands shall be regarded in any part of the United Kingdom as validly dissolving or annulling a marriage unless instituted in a court of civil jurisdiction.

(2) Subject to section 8 of this Act, the validity of any divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands shall be recognised throughout the United Kingdom.

## EXPLANATORY NOTES

### *Clause 1*

1. *Clause 1* provides for the automatic recognition of divorces, annulments and judicial separations granted by courts anywhere in the British Islands. It also denies recognition to extra-judicial divorces and annulments obtained in the British Islands.

2. *Subsection 1(1)*, whose effect is similar to that of section 16(1) of the Domicile and Matrimonial Proceedings Act 1973, makes clear (following the recommendation in paragraph 4.14 of the report) that it is only to divorces and annulments granted by civil courts that recognition is to be given, thus paving the way for the repeal, in clause 13(2) and the Schedule, of section 16 of the 1973 Act. Because of the absence of evidence of extra-judicial legal separations, subsection 1(1) does not extend to them. No definition is provided in the Bill of "British Islands" (unlike the Recognition of Divorces and Legal Separations Act 1971 where a definition of British Isles is provided in section 10(2)), because the Interpretation Act 1978, section 5 and Schedule 1 provides the following identical definition: "the United Kingdom, the Channel Islands and the Isle of Man." It is made clear by clause 12(1) that reference to a "part of the United Kingdom", here and elsewhere in the Bill, means England and Wales or Scotland or Northern Ireland.

3. *Subsection 1(2)* implements the recommendations in paragraphs 4 and 5 and 4.10 of the report that automatic recognition should be given throughout the United Kingdom to nullity decrees obtained anywhere in the British Islands. The subsection combines this reform of the law with a restatement of the rule, currently found in section 1 of the Recognition of Divorces and Legal Separations Act 1971, that similar automatic recognition of divorce and judicial separation decrees of British courts be accorded throughout the United Kingdom. The phrase "granted by a court . . . in any part of the British Islands" is, as is pointed out in paragraph 4.14 of the report, adopted in preference to "granted under the law of" as used in section 1 of the 1971 Act.

4. Clause 8, to which subsection 1(2) is made subject, provides certain grounds for the non-recognition of decrees of divorce, nullity and judicial separation obtained in the British Islands.

5. It is made clear by clause 12(1), below, that the term "annulment", used in subsection 1(2), includes both a decree and a declarator of nullity of marriage.

6. Clause 1 applies to decrees obtained in the British Islands, whether obtained before or after the Bill comes into effect and, in the case of divorces and judicial separations, whether obtained before or after the coming into force of the Recognition of Divorces and Legal Separations Act 1971: see clauses 9(1) and (3), below. However, the denial of recognition in subsection 1(1) is made subject to clause 9(4) and 5(a), below, which have the effect that clause 1(1) does not apply to a divorce (and only a divorce) obtained before 1974 and recognised as valid at common law.

*Recognition of Divorces, Annulments and Legal Separations Bill*

*Overseas divorces, annulments and legal separations*

Recognition in  
the United  
Kingdom of  
overseas  
divorces,  
annulments  
and legal  
separations.

2. Subject to sections 8 and 9 of this Act, the validity of a divorce, annulment or legal separation obtained in a country outside the British Islands (in this Act referred to as an overseas divorce, annulment or legal separation) shall be recognised in the United Kingdom if, and only if, it is entitled to recognition—

(a) by virtue of sections 3 to 6 of this Act, or

(b) by virtue of any enactment other than this Act.

## EXPLANATORY NOTES

### *Clause 2*

1. This clause provides that an overseas divorce, annulment or legal separation, i.e. one obtained outside the British Islands, shall only be recognised if it is entitled to recognition under clauses 3 to 6 of the Bill or by virtue of any other enactment. This has the effect of excluding the recognition of overseas annulments under the existing common law rules, thus implementing the general recommendation in paragraph 3.13 of the report that the recognition of foreign annulments should be placed on a statutory basis. As recommended in paragraphs 6.3 and 6.30 of the report, it avoids the confusing two-fold definition in the Recognition of Divorces and Legal Separations Act 1971 of "overseas divorces and legal separations" and "divorces and legal separations obtained in a country outside the British Isles".

2. The effect of *paragraph (a)* in relation to the present law as to recognition of overseas divorces and legal separations is that recognition on the basis of domicile in the sense in which that term is used in the United Kingdom (see clause 3, below) will be governed by the same provisions as currently apply under the Recognition of Divorces and Legal Separations Act 1971 to recognition on the basis of habitual residence, nationality, or domicile in the foreign sense of the term. Subject to that, paragraph (a) preserves the present exclusion of common law rules as to the recognition of overseas divorces and legal separations.

3. *Paragraph (b)* preserves in relation to the recognition of overseas divorces and legal separations, and extends to overseas annulments, their recognition under any other enactment, in accordance with the recommendation in paragraph 6.42. The number of relevant other enactments will be reduced by the repeal of the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 and the Matrimonial Causes (War Marriages) Act 1944, as recommended in paragraphs 6.43 to 6.48, and as provided for in clause 13(2) and the Schedule, below.

4. Clause 2 is made subject to clauses 8 and 9. Clause 8 provides certain grounds for the non-recognition of overseas divorces, annulments and legal separations. Although clause 2 lays down the only grounds for recognition, this is made subject to clause 9 which preserves, by subsections 9(4) and (5), the recognition of the validity of various other overseas divorces, annulments and legal separations.

5. It is made clear, by clause 12(1), that the references here and elsewhere in the Bill to overseas annulments include any decree or declarator of nullity of marriage, however expressed.

6. Clause 2, as elsewhere in the Bill, refers to overseas separations as *legal separations*; whereas clause 1, in relation to separation decrees granted in the British Islands, refers to them as *judicial separations*. The reason for the difference in terminology is that recognition under clause 1 is limited to decrees of courts of civil jurisdiction in the British Islands, whereas overseas separations may, within the terms of the Hague Convention on the Recognition of Divorces and Legal Separations (1970), include those obtained by, for example, administrative rather than judicial proceedings.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Grounds for  
recognition.

3.—(1) The validity of an overseas divorce, annulment or legal separation shall be recognised if—

(a) the divorce, annulment or legal separation—

- (i) was obtained by means of judicial or other proceedings; and
- (ii) is effective under the law of the country in which it was obtained; and

(b) at the date of commencement of the proceedings either party to the marriage—

- (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or
- (ii) was domiciled in that country; or
- (iii) was a national of that country.

(2) In the case of an overseas annulment obtained in proceedings commenced after the death of one or both of the parties to the marriage, subsection (1)(b) above shall be treated as complied with if a deceased party to the marriage—

- (a) was at death habitually resident in the country in which the annulment was obtained; or
- (b) was at death domiciled in that country; or
- (c) was at death a national of that country.

(3) For the purposes of subsections (1)(b)(ii) and (2)(b) above, a party to the marriage shall be treated as domiciled in the country in which the overseas divorce, annulment or legal separation was obtained if he was domiciled in that country either according to the law of that country in family matters or according to the law of that part of the United Kingdom in which the question of recognition arises.

## EXPLANATORY NOTES

### *Clause 3*

1. This clause lays down the main criteria and jurisdictional bases for the recognition in the United Kingdom of "overseas divorces, annulments and legal separations", which are defined in clause 2 as those obtained in a country outside the British Islands. The meaning of "country" is further explained, in clause 6(a), below, in relation to countries comprising several territories, and in clause 12(2), below, in relation to a colony or other dependent territory of the United Kingdom.

2. *Subsection 3(1)(a)(i)* lays down as a requirement of recognition that the overseas divorce, etc. was obtained by means of judicial or other proceedings in, by reason of clause 2, a country outside the British Islands. This requirement is currently to be found in section 2(a) of the Recognition of Divorces and Legal Separations Act 1971 and the effect of subsection 3(1)(a)(i) is, following the recommendation in paragraph 6.9 of the report, to extend the requirement to the recognition of overseas annulments, thereby making it clear that an extra-judicial annulment which falls within the words of the subsection may be recognised. Clause 12(1), implementing the recommendation in paragraph 6.11, provides further explanation of the meaning of "judicial or other proceedings" and this marks a change from the 1971 Act. Following the recommendation in paragraph 6.11 of the report, subsection 3(1)(a)(i) also extends the requirement of section 2(a) of the 1971 Act to overseas divorces and legal separations where the jurisdictional basis of recognition is domicile in the sense in which that term is used in the United Kingdom.

3. *Subsection 3(1)(a)(ii)* lays down as a requirement of recognition that the overseas divorce, etc. was effective in the country where it was obtained. This requirement is currently to be found in section 2(b) of the Recognition of Divorces and Legal Separations Act 1971 and the effect of subsection 3(1)(a)(ii) is, following the recommendations in paragraphs 6.12 and 6.13 of the report, to extend this requirement both to overseas annulments and to overseas divorces and legal separations where the jurisdictional basis of recognition is domicile in the sense in which that term is used in this country. Where recognition is based on the nationality basis of jurisdiction the requirement of effectiveness must, under clause 6(a)(ii), below, in the case of a country comprising several territories, be satisfied in terms of effectiveness throughout the whole country and not just the territory where the divorce, etc. was obtained.

4. *Subsection 3(1)(b)* contains similar jurisdictional rules for the recognition of overseas divorces, annulments and legal separations to those to be found in section 3(1) of the Recognition of Divorces and Legal Separations Act 1971. The main differences are that subsection 3(1)(b), following the recommendation in paragraph 6.17 of the report, extends to the recognition of foreign annulments and to recognition on the basis of domicile in the sense in which that term is used in the United Kingdom (see subsection 3(3), below). This has the effect that a foreign divorce or legal separation will in future be recognised if

## EXPLANATORY NOTES

### *Clause 3 (continued)*

obtained in the country of only one spouse's domicile (see the recommendation in paragraph 6.26), but will no longer be recognised if obtained in the domicile of neither spouse but recognised in the domicile, or domiciles, of both (see the recommendation in paragraph 6.29). There are saving provisions, in clause 9(4) and 5(b) and (e) below, for overseas divorces and legal separations obtained before the Bill comes into force and which would have been recognised on this latter basis. Subsection 3(1)(b) and other provisions of the Bill refer to a "party to the marriage", rather than to a "spouse", which is the terminology of the Recognition of Divorces and Legal Separations Act 1971. The change was made because of the extension of the scope of that Act by the Bill to include annulments. Although some annulments may be of void marriages, the phrase "party to the marriage" is considered apt for such cases, following the precedent of sections 5(3) and 7(3) of the Domicile and Matrimonial Proceedings Act 1973.

5. The reference in subsection 3(1)(b) to the date of the commencement of the proceedings as the date on which the appropriate jurisdictional connection must be satisfied is modified by subsection 3(2), below, in cases of recognition of overseas annulments if one or both spouses has died before the overseas proceedings were commenced. The meaning of domicile in subsection 3(1)(b) is further explained in subsection 3(3), below. The reference to nationality is qualified in subsection 12(2), below.

6. *Subsection 3(2)* applies only to the recognition of overseas annulments and, for the reasons set out in paragraph 6.32 of the report, adapts the date on which the jurisdictional requirement in subsection 3(1)(b) has to be satisfied (the date of the commencement of the proceedings) in the case of an annulment obtained after the death of one or both of the spouses. In such a case, the date of the death of the spouse with whom the jurisdictional link is to be established is substituted for the date of commencement of the proceedings overseas.

7. *Subsection 3(3)* makes it clear that the reference to the domicile basis of jurisdiction in subsections 3(1)(b)(ii) and 3(2)(b) refer to two alternative concepts of domicile. First, an overseas divorce, etc. will be recognised if it was obtained in the country of either party's domicile in the sense in which that term is used in the foreign country in matters of family law. For the reasons given in paragraph 6.18 of the report, this marks a change in relation to the recognition of overseas divorces and legal separations from the provision in section 3(2) of the Recognition of Divorces and Legal Separations Act 1971, where domicile in the foreign sense may only be relied on if it there constitutes a jurisdictional ground in matters of divorce or legal separation. The second concept of domicile is that used in the part of the United Kingdom where the question of recognition arises, and its inclusions within the general provisions of subsection 3(1), by virtue of subsection 3(3), enables effect to be given to the recommendations in paragraphs 6.3 and 6.30 that

## EXPLANATORY NOTES

*Clause 3 (continued)*

separate treatment of recognition on this domicile basis (as is now found in section 6 of the Recognition of Divorces and Legal Separations Act 1971) need not be retained.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Cross-proceedings and divorces following legal separations.

4.—(1) Where there have been cross-proceedings, the validity of an overseas divorce, annulment or legal separation obtained either in the original proceedings or in the cross-proceedings shall be recognised if—

- (a) the requirements of sub-paragraph (i) or of sub-paragraph (ii) or of sub-paragraph (iii) of subsection (1)(b) of section 3 of this Act are satisfied in relation to the date of the commencement either of the original proceedings or of the cross-proceedings, and
- (b) the validity of the divorce, annulment or legal separation is otherwise entitled to recognition by virtue of the provisions of this Act.

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

## EXPLANATORY NOTES

### *Clause 4*

1. *Subsection 4(1)* embodies the substance of a provision already found in section 4(1) of the Recognition of Divorces and Legal Separations Act 1971. It has been extended, in accordance with the recommendation in paragraph 6.39 of the report, to recognition of overseas annulments and to the recognition of foreign divorces and legal separations on the jurisdictional basis of domicile as that term is used in the United Kingdom. It has been made explicit, as was implied in section 4(1) of the 1971 Act, that, although the date at which the jurisdictional requirements of subsection 3(1)(b) must be satisfied is varied in the case of cross-proceedings, all other requirements of recognition must be satisfied.

2. *Subsection 4(2)* has similar effect to section 4(2) of the Recognition of Divorces and Legal Separations Act 1971. It applies merely to the conversion of legal separations into divorce; but, following the recommendations in paragraph 6.39 of the report, subsection 4(2) is slightly wider than its counterpart in the 1971 Act in that it applies to recognition on the basis of domicile as that term is used in the United Kingdom, as well as, in accordance with the present law, to the other jurisdictional bases listed in subsection 3(1)(b). Subsection 4(2) also makes clear that the conversion must be effective in the country in which the legal separation was obtained. Modification of subsection 4(2) is made by clause 6(b), below, in relation to countries comprising territories having different systems of law.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Proof of facts  
relevant to  
recognition.

5.—(1) For the purpose of deciding whether an overseas divorce, annulment or legal separation is entitled to recognition by virtue of sections 3 and 4 of this Act, any finding of fact made (whether expressly or by implication) in the proceedings by means of which the divorce, annulment or legal separation was obtained and on the basis of which jurisdiction was assumed in those proceedings shall—

- (a) if both parties to the marriage took part in the proceedings, be conclusive evidence of the fact found; and
- (b) in any other case, be sufficient proof of that fact unless the contrary is shown.

(2) In this section “finding of fact” includes a finding that either party to the marriage—

- (a) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or
- (b) was under the law of that country domiciled there; or
- (c) was a national of the country in which the divorce, annulment or legal separation was obtained.

(3) For the purposes of subsection (1)(a) above, a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them.

## EXPLANATORY NOTES

### *Clause 5*

This clause is in broadly similar terms to section 5 of the Recognition of Divorces and Legal Separations Act 1971. The main differences, implementing the recommendation in paragraph 6.40 of the report, are, first, that the clause extends to overseas annulments and also to recognition on the basis of domicile as used in the United Kingdom. Secondly, this extension to the domicile basis has required *subsection 5(2)* not to include within the term "finding of fact" a finding by the foreign court as to domicile in the sense in which the term is used in the United Kingdom. Modification of clause 5(2) is made by clause 6(c), below in relation to countries comprising territories having different systems of law.

*Recognition of Divorces, Annulments and Legal Separations Bill*

*Supplementary provisions*

Modifications  
of ss.3 to 5 in  
relation to  
countries  
comprising  
territories  
having  
different  
systems of law.

6. In relation to a country comprising territories in which different systems of law are in force in matters of divorce, annulment or legal separation—

(a) section 3 of this Act shall have effect subject to the following modifications—

(i) in the case of a divorce, annulment or legal separation the recognition of the validity of which depends on whether the requirements of subsection (1)(b)(i) or (ii) or subsection (2)(a) or (b) of section 3 of this Act are satisfied, that section (except subsections (1)(b)(iii) and (2)(c)) shall have effect as if each territory were a separate country;

(ii) in the case of a divorce, annulment or legal separation the recognition of the validity of which depends on whether the requirements of subsection (1)(b)(iii) or subsection (2)(c) of section 3 of this Act are satisfied, subsection (1) of that section shall have effect as if for paragraph (a)(ii) there were substituted the following paragraph—

“(ii) is effective throughout the country in which it was obtained”

(b) section 4 of this Act shall have effect subject to the following modifications—

(i) in the case of a legal separation, the recognition of the validity of which depends on whether the requirements of subsection (1)(b)(i) or (ii) of section 3 of this Act are satisfied, subsection (2) of section 4 shall have effect as if each territory were a separate country;

(ii) in the case of a legal separation the recognition of the validity of which depends on whether the requirements of subsection (1)(b)(iii) of section 3 of this Act are satisfied, subsection (2) of section 4 shall have effect as if for the words “is effective under the law of that country” there were substituted the words “is effective throughout that country”,

(c) paragraphs (a) and (b) of section 5(2) of this Act shall each have effect as if each territory were a separate country.

## EXPLANATORY NOTES

### *Clause 6*

1. This clause makes modifications of clauses 3 to 5 to provide for the case where the country with which the jurisdictional connection, under clause 3(1)(b), is established is one which comprises several territories which have different systems of law.

2. *Subsection 6(a)(i)* This modifies clause 3(1)(b) and (2) and preserves the effect of the provision in section 3(3) of the Recognition of Divorces and Legal Separations Act 1971 that in relation to recognition on the basis of habitual residence or domicile in the foreign sense, where a country (such as the U.S.A.) has separate territories (e.g. New York or California) with separate systems of family law, the jurisdictional connection should be with the territory and not with the country. However, subsection 6(a)(i) goes further and, following the recommendation in paragraph 6.15, note 331 of the report, extends this to recognition of overseas annulments and to recognition on the basis of domicile as the term is used in the United Kingdom (under subsections 3(1)(b)(i) and (ii), 3(2)(a) and (b)). Where, however, recognition is on the basis of nationality (under subsections 3(1)(b)(iii) and 3(2)(c)), the policy of section 3(3) of the 1971 Act is maintained and the connection must be with the country and not with an individual territory.

3. *Subsection 6(a)(ii)*, following the recommendation in paragraph 6.16 of the report, clarifies (because the Recognition of Divorces and Legal Separations Act 1971 was thought to be unclear on this issue) the relation between the requirement of effectiveness in subsection 3(1)(a)(ii) and the jurisdictional basis of nationality, under subsections 3(1)(b)(iii) and 3(2)(c), where the overseas divorce, etc. was obtained in one of the territories of a federal country such as the U.S.A. whose separate territories have their own rules of family law. The combined effect of these provisions is that, where an overseas divorce obtained in such a federal country falls for recognition on the jurisdictional basis of nationality, the nationality connection must be with the federal country as a whole and the divorce, etc. must be effective throughout the whole federal country.

4. *Subsection 6(b)*, which has no counterpart in section 4 of the Recognition of Divorces and Legal Separations Act 1971, makes modifications to clause 4(2) following the pattern of the modifications to clause 3 made by subsection 6(a). This is in accordance with the recommendations in paragraph 6.39 of the report. The effect of *subsection 6(b)(i)* is that, in the case of recognition of a legal separation for the purposes of the conversion rule in clause 4(2), the jurisdictional links with a "country" based on domicile and habitual residence (but not on nationality) may be satisfied by a link with a "territory" within the "country". The effect of *subsection 6(b)(ii)* is that, in the case of the recognition of a legal separation for the purposes of clause 4(2) based on the jurisdictional connection of nationality, the requirement of effectiveness in clause 4(2) requires effectiveness throughout the whole country of the nationality.

5. *Subsection 6(c)*, in accordance with the recommendations in paragraph 6.40 of the report, modifies clause 5(2) following the pattern of the modifications made to clause 3 by subsection 6(a)(i), above. Subsection 6(c) makes clear (as section 5 of the Recognition of Divorces and Legal Separations Act 1971 does not) that references to "country" in subsections 5(2)(a) and (b) may include references to a "territory" within that "country". This modification does not apply to findings as to nationality under subsection 5(2)(c).

*Recognition of Divorces, Annulments and Legal Separations Bill*

Non-recognition of divorce or annulment in another jurisdiction no bar to remarriage.

7. Where, in any part of the United Kingdom, a divorce or annulment has been granted by a court of civil jurisdiction or the validity of a divorce or annulment is recognised by virtue of this Act, then the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from re-marrying in that part of the United Kingdom or cause the re-marriage of either party (wherever the re-marriage takes place) to be treated as invalid in that part.

## EXPLANATORY NOTES

### *Clause 7*

1. This clause deals with the effect of the recognition of a divorce or annulment on the capacity of either party to remarry. It goes further than section 7 of the Recognition of Divorces and Legal Separations Act 1971 (which only applies in terms to marriages in the United Kingdom) in that not only does it apply to the recognition of annulments, but it extends to capacity to remarry whether in the United Kingdom or elsewhere, following a divorce or annulment. This implements the policy explained in paragraph 6.56 of the report. The clause applies both to British and to overseas divorces and annulments recognised in any part of the United Kingdom. This means, therefore, that if, for example, a Scottish or a French divorce or annulment is recognised in England or Wales under clause 1 and clause 2 respectively, the fact that the divorce or annulment is not recognised in the Republic of Ireland where the parties are domiciled will not affect the validity in England of any remarriage by one of the parties, whether the remarriage takes place in England, elsewhere in the United Kingdom or overseas.

2. By including within its terms all divorces and annulments entitled to recognition under the Bill, this clause applies also to those divorces and annulments recognised by reason of an enactment whose effect is preserved by clause 2(b), above and by reason of the recognition rules preserved by clause 9(4) and (5), below.

3. This clause also implements the policy explained in paragraph 6.57 of the report that a divorce or annulment granted in any part of the United Kingdom should have the same effect in that part on a party's capacity to remarry as a divorce or annulment obtained elsewhere and recognised in that part.

*Recognition of Divorces, Annulments and Legal Separations Bill*

*Refusal of  
recognition.*

**8.—(1)** Subject to section 9 of this Act, recognition of the validity of—

- (a) a divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands,
- (b) an overseas divorce, annulment or legal separation, may be refused in any part of the United Kingdom if the divorce, annulment or separation was granted or obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the marriage of the parties previously given (whether before or after the commencement of this Act) by a court of civil jurisdiction in that part of the United Kingdom or by a court elsewhere and recognised or entitled to be recognised in that part of the United Kingdom.

(2) Subject to section 9 of this Act, recognition of the validity of a divorce or judicial separation granted by a court of civil jurisdiction in any part of the British Islands or of an overseas divorce or legal separation may be refused in any part of the United Kingdom if the divorce or separation was granted or obtained at a time when, according to the law of that part of the United Kingdom (including its rules of private international law and the provisions of this Act), there was no subsisting marriage between the parties.

(3) Subject to section 9 of this Act, recognition by virtue of section 2 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—

(a) it was obtained—

- (i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or
- (ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or

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

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

## EXPLANATORY NOTES

### Clause 8

1. This clause lays down the only grounds on which a divorce, annulment or separation, which satisfies the other provisions of the Bill, may be denied recognition in the part of the United Kingdom in which the recognition issue is raised. It is modelled on section 8 of the Recognition of Divorces and Legal Separations Act 1971 but extended to cover the recognition of annulments, which extension has necessitated specific provision being made, in subsection 8(1), for the doctrine of *res judicata*.

2. *Subsection 8(1)*, in conferring a discretion on a court in any part of the United Kingdom to deny recognition to a divorce, annulment or separation on the basis of *res judicata*, implements the recommendations in paragraphs 4.6 and 4.10 of the report, in relation to the recognition of other British decrees, (falling within subsection 8(1) (a)) and the recommendation in paragraph 6.66 of the report in relation to the recognition of overseas divorces, etc. (falling within subsection 8(1) (b)).

3. The discretion to deny recognition applies whether the divorce, etc. was irreconcilable with a previous decision of the court of the part of the United Kingdom in which recognition is sought, or with a court decision obtained elsewhere and recognised in that part. So, for example, a French divorce obtained by a petitioner who is a French national will be denied recognition in England if either there is a prior English decree annulling the marriage or a prior Scottish decree to similar effect, which decree falls to be recognised in England under clause 1 of the Bill.

4. The provisions of subsection 8(1) are subject to the provisions of clause 9 of the Bill, below, which, inter alia, preserve the validity of divorces, etc. when the recognition of such validity has already been decided by a competent court in the British Islands before the Bill comes into force.

5. *Subsection 8(2)*, which re-enacts the substance of section 8(1) of the 1971 Act, applies to the recognition of divorces and separations, not annulments, whether granted elsewhere in the British Islands or obtained overseas. Subsection 8(2) is, like subsection 8(1), above, also made subject to clause 9 of the Bill for the reasons given in note 4, above.

6. There is an overlap between subsections 8(1) and (2). If a marriage has already been dissolved or annulled, whether in a part of the United Kingdom or elsewhere, before the divorce was obtained whose recognition is in issue in that part, the effect of the earlier decision on the recognition of the later divorce will fall both within the specific provisions of subsection 8(1) and the more general provisions of subsection 8(2). However, as explained in paragraphs 4.6. and 6.66 of the report, the general provision in subsection 8(2) is inappropriate in the case of



## EXPLANATORY NOTES

### *Clause 8 (continued)*

recognition of annulments. Its retention is necessary (notwithstanding subsection 8(1)) in the case of the recognition of divorces and separations in certain cases where there is no subsisting marriage between the parties at the time of the divorce, etc., according to the law of that part of the United Kingdom where recognition is sought, as, for example, where the marriage is regarded as void ab initio, but no nullity decree has ever been granted (and so subsection 8(1) is inapplicable). Subsection 8(2), unlike section 8(1) of the 1971 Act, confers a discretion to deny recognition, rather than a mandatory provision to that effect.

7. Both subsections 8(1) and (2) apply to the recognition of the validity of two kinds of separation – judicial separations granted in the British Islands and legal separations obtained overseas. Once separately identified at the beginning of each subsection, they are then simply described as “separations”.

8. *Subsection 8(3)* provides three further discretionary grounds for denying recognition to an overseas divorce, annulment or legal separation in addition to failure to fulfil the other requirements of recognition laid down earlier in the Bill. It does not apply to the recognition of other British divorces, etc. As explained in paragraph 6.67 of the report, this subsection makes virtually identical provision to that to be found in section 8(2) of the Recognition of Divorces and Legal Separations Act 1971. The extension to the recognition of foreign annulments, including those obtained after the death of one or both spouses (see subsection 3(2), above) has necessitated the deletion of the reference in section 8(2) of the 1971 Act to the divorce, etc. being “obtained by one spouse”.

9. Subsection 8(3) is made subject to clause 9 of the Bill which, *inter alia*, preserves (in subsection 9(5)) the recognition of the validity of various divorces, etc. obtained at times before the Bill comes into force. Subsection 8(3) does not provide (as does the equivalent provision in the 1971 Act: section 8(2)) that the listed grounds of non-recognition are the only ones available. The various discretionary grounds listed in clause 8 are, in fact, the only ones available in the case of a divorce, etc. otherwise recognised under the Bill, but this result flows from clause 2, above.

10. *Subsection 8(4)*, for the reasons given in paragraph 6.68 of the report, makes provision similar to that found in section 8(3) of the Recognition of Divorces and Legal Separations Act 1971. Subsection 8(4), like section 8(3), applies both to the recognition of other British divorces, etc. and those obtained overseas.

*Recognition of Divorces, Annulments and Legal Separations Bill*

*Provision as to divorces, annulments etc. obtained before commencement of Act.*

**9.—(1) The provisions of this Act shall apply—**

**(a) to a divorce, annulment or judicial separation granted by a court of civil jurisdiction in the British Islands before the date of the commencement of this Act, and**

**(b) to an overseas divorce, annulment or legal separation obtained before that date, as well as to one granted or obtained on or after that date.**

**(2) In the case of such a divorce, annulment or separation as is mentioned in subsection (1)(a) or (b) above, the provisions of this Act shall require or, as the case may be, preclude the recognition of its validity in relation to any time before that date as well as in relation to any subsequent time, but those provisions shall not—**

**(a) affect any property to which any person became entitled before that date, or**

**(b) affect the recognition of the validity of the divorce, annulment or separation if that matter has been decided by any competent court in the British Islands before that date.**

**(3) Subsections (1) and (2) above shall apply in relation to any divorce or judicial separation granted by a court of civil jurisdiction in the British Islands before the date of the commencement of this Act whether granted before or after the commencement of section 1 of the Recognition of Divorces and Legal Separations Act 1971.**

1971 c. 53.

**(4) The validity of any divorce, annulment or legal separation mentioned in subsection (5) below shall be recognised in the United Kingdom whether or not it is entitled to recognition by virtue of any of the foregoing provisions of this Act.**

**(5) The divorces, annulments and legal separations referred to in subsection (4) above are—**

**(a) a divorce which was obtained in the British Islands before 1st January 1974 and was recognised as valid under rules of law applicable before that date;**

**(b) an overseas divorce which was recognised as valid under the Recognition of Divorces and Legal Separations Act 1971 and was not affected by section 16 (2) of the Domicile and Matrimonial Proceedings Act 1973 (proceedings otherwise than in a court of law where both parties resident in United Kingdom);**

1971 c.53.

1973 c.45.

**(c) a divorce of which the decree was registered under section 1 of the Indian and Colonial Divorce Jurisdiction Act 1926;**

1926 c.40.

**(d) a divorce or annulment which was recognised as valid under section 4 of the Matrimonial Causes (War Marriages) Act 1944; and**

1944 c.43.

**(e) an overseas legal separation which was recognised as valid under the Recognition of Divorces and Legal Separations Act 1971.**

## EXPLANATORY NOTES

### *Clause 9*

1. This clause deals generally with the recognition of divorces, annulments and legal separations granted or obtained before the Bill comes into force. It is modelled on section 10(4) of the Recognition of Divorces and Legal Separations Act 1971. Unlike that provision, the clause applies to the recognition of annulments as well as of divorces and legal separations.

2. *Subsection 9(1)* follows the policy of the 1971 Act in preserving the retrospective effect of that Act in relation to the recognition of overseas divorces and legal separations, i.e. applying to those obtained both before and after the 1971 Act came into force. That approach is extended in a number of ways in *subsection 9(1)(b)*. In respect of overseas divorces and legal separations, the recognition provisions of the Bill apply to those obtained both before the 1971 Act came into force and, subject to subsections 9(4) and (5), below, to those obtained before the Bill comes into force. As discussed in paragraph 6.69 of the report, a similar approach is adopted to the recognition of overseas annulments.

3. The application in subsection 9(1) of the recognition provisions of the Bill to divorces, etc. obtained before as well as after the Bill comes into force extends (for the reasons given in paragraph 4.13 of the report), in *subsection 9(1)(a)*, to the recognition of other British divorces, annulments and judicial separations, though again subject to subsections 9(4) and (5). Subsection 9(3), below makes specific provision for British divorces, etc. granted before section 1 of the Recognition of Divorces and Legal Separations Act 1971 came into force.

4. It has been assumed in the paragraphs above that the effect of subsection 9(1) is to afford recognition to divorces, etc. granted or obtained before the Bill comes into force. The effect of subsection 9(1) is, however, that the rules on the preclusion of recognition also have similar retrospective effects. This has significance in two respects. First, the Bill replaces the common law rules for the recognition of annulments with statutory rules and recourse to the common law will no longer be permitted (see clause 2, above). To the very limited extent that the Bill's recognition rules are narrower than the common law rules, recognition will be precluded, following the similar approach of the Recognition of Divorces and Legal Separations Act 1971. Secondly, the Bill amends the rules for the recognition of British divorces and judicial separations granted before the 1971 Act came into force and the rules for the recognition of overseas divorces and legal separations obtained both before and after the 1971 Act came into force. The preclusive effect of subsection 9(1) will not affect British decrees of divorce and judicial separation because clause 1 substitutes a general rule of automatic recognition. The validity of certain extra-judicial divorces obtained in the British Islands before 1974 is preserved by subsections 9(4) and (5)



## EXPLANATORY NOTES

### *Clause 9 (continued)*

(a), below. In the case of overseas divorces and legal separations, in so far as the recognition rules of the Bill are narrower than those of the 1971 Act, subsections 9(4) and (5)(b), (e), below, preserve the validity of such divorces and legal separations obtained before the Bill comes into force.

5. *Subsection 9(2)* makes the recognition, or denial of recognition, of both British and overseas divorces, annulments and separations, granted or obtained before the Bill comes into force, subject to the two provisos in paragraphs (a) and (b), both of which have direct counterparts in section 10(4)(b) of the Recognition of Divorces and Legal Separations Act 1971, as is discussed in paragraphs 4.13 and 6.69 of the report.

6. *Subsection 9(3)* makes clear the implementation of the policy explained in paragraph 4.13 of the report, that not only should the Bill (as in subsection 9(1)) apply to the recognition of British nullity decrees granted before the Bill comes into force, but the law should be changed in relation to the recognition of British decrees of divorce and judicial separation. The Recognition of Divorces and Legal Separations Act 1971 only applies to such decrees granted after section 1 of that Act came into force; and subsection 9(3) of the Bill, in conjunction with subsection 9(1)(a), effects a change by applying clause 1 of the Bill (subject to the provisos in subsection 9(2)) to British decrees of divorce and judicial separation granted at *any* time before, as well as after, the Bill comes into force.

7. *Subsection 9(4)* preserves the recognition of the validity of certain divorces, annulments and legal separations obtained before the Bill comes into force. They are listed in subsection 9(5) and constitute exceptions to the retrospective preclusive effect of subsections 9(1) and (2), above.

8. *Subsection 9(5)* lists five categories of divorce, annulment or legal separation obtained before the Bill comes into force the recognition of whose validity is preserved by subsection 9(4). The first category (explained in paragraph 4.14 of the report) is contained in *subsection 9(5)(a)*. This has the effect that an extra-judicial divorce obtained in the British Islands before 1st January 1974 (the date on which the Domicile and Matrimonial Proceedings Act 1973 came into force) and which is recognised as valid in the country of the spouses' domicile will continue to be recognised in the United Kingdom. Such extra-judicial divorces were not dealt with in the Recognition of Divorces and Legal Separations Act 1971, but they were denied recognition by section 16(1) of the Domicile and Matrimonial Proceedings Act 1973, the substance of which provision is re-enacted in clause 1(1), above. However, section 16 of the 1973 Act only denied recognition to such British extra-judicial



## EXPLANATORY NOTES

### *Clause 9 (continued)*

divorces obtained after the Act came into force: see section 16(3). Subsection 9(5)(a) preserves the same rule and thus qualifies the effect of the denial of recognition in clause 1(1), above, which is otherwise given retrospective effect by subsection 9(1).

9. The second category (explained in paragraph 6.70 of the report) is contained in *subsection 9(5)(b)*. This ensures that, in so far as the Bill narrows the rules for the recognition of overseas divorces, it should not so affect the recognition of such a divorce obtained before the Bill comes into force. The main effect of subsection 9(5)(b) will be to preserve the recognition of divorces obtained in a country in which neither spouse was domiciled but which is recognised in the country (or countries) of their domicile, in the sense in which the term is used in the United Kingdom. This basis of recognition, under section 6(3)(b) of the 1971 Act, does not, for the reasons given in paragraph 6.29 of the report, find any place in the Bill. The reason for the exception from the preservation of the recognition of such divorces of divorces affected by section 16(2) of the Domicile and Matrimonial Proceedings Act 1973 is as follows. As explained in paragraph 6.30 of the report, section 16(1) of the 1973 Act denied recognition to extra-judicial divorces obtained in the British Islands after 1973; and section 16(2), which was designed to prevent evasion of section 16(1), also denied recognition to extra-judicial divorces obtained overseas after 1973 which would otherwise be recognised in the United Kingdom under section 6 of the Recognition of Divorces and Legal Separations Act 1971, provided both parties had been habitually resident in the United Kingdom for the year preceding the overseas divorce proceedings. In preserving the recognition of the validity of divorces obtained before the Bill comes into force which would be recognised under section 6 of the 1971 Act, subsection 9(5)(b) also preserves the qualification on the recognition of divorces obtained after 1973 contained in section 16(2) of the 1973 Act, the effect of section 16(1) having been preserved in relation to divorces obtained after 1973 by clauses 1(1) and 9(5)(a).

10. *Subsection 9(5)(c)*, as recommended in paragraph 6.45 of the report, provides for the continued recognition of divorces registered under section 1 of the Indian and Colonial Divorce Jurisdiction Act 1926, which Act is repealed by clause 13(2) and the Schedule. Virtually all divorces obtained overseas and falling within the provisions of the 1926 Act will fall to be recognised under the main provisions of the Bill; but section 1(1)(c) of that Act takes the "residence" of the petitioner as its jurisdictional criterion and it is possible that such residence might not be held to satisfy the "habitual residence" test of clause 3(1)(b)(i), above. The reference in subsection 9(5)(c) to "divorces registered under section 1" of the 1926 Act also includes divorces falling within the provisions of the Indian and Colonial Divorce Jurisdiction Act 1940 and the Colonial and Other Territories (Divorce Jurisdiction) Act 1950, both of which are also repealed by clause 13(2) and the Schedule.



## EXPLANATORY NOTES

### *Clause 9 (continued)*

11. *Subsection 9(5)(d)*, as recommended in paragraph 6.48 of the report, provides for the continued recognition of divorces and annulments granted under the scheme established by the Matrimonial Causes (War Marriages) Act 1944. Most such divorces and annulments will be recognised under the main provisions of the Bill, but not all, as in the case of a wife who satisfies the requirement of the 1944 Act (i.e., under section 4, the requirement of a provision of a foreign jurisdictional rule substantially corresponding to the jurisdictional rule in section 1(2)) of being domiciled at the time of her marriage in the country where divorce or annulment was obtained, but does not satisfy the requirement of clause 3(1)(b)(ii) of the Bill of being domiciled there at the time of the divorce or annulment.

12. *Subsection 9(5)(e)* applies to the recognition of overseas legal separations the same rule as subsection 9(5)(b) applies to the recognition of overseas divorces, save that, because section 16 of the Domicile and Matrimonial Proceedings Act 1973 did not apply to legal separations, no saving provision for the effect of section 16(2) is here required.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Effect of  
divorces and  
annulments  
on wills.  
1837 c.26.

**10.** In subsection (1) of section 18A of the Wills Act 1837 (effect of a decree of divorce or nullity of marriage on wills)–

- (a) after the word “court” there shall be inserted the words “of civil jurisdiction in England and Wales”; and
- (b) for the words “or declares it void” there shall be substituted the words, “or his marriage is dissolved or annulled and the divorce or annulment is entitled to recognition by virtue of the Recognition of Divorces and Legal Separations Act 1984”.

## EXPLANATORY NOTES

### *Clause 10*

1. This amendment to section 18A of the Wills Act 1837 (itself introduced by section 18(2) of the Administration of Justice Act 1982) is intended, for the reasons given in paragraph 6.9, note 315, of the report, to make clear that the effects on a will or bequest of the dissolution or annulment of the testator's marriage (as provided for in section 18A of the 1837 Act) shall apply whether the divorce or annulment was granted in England and Wales or was recognised in England and Wales by virtue of this Bill.

2. As provided by clause 13(3), below, this clause only applies to England and Wales.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Amendment  
of Marriage  
(Scotland) Act  
1977.  
1977 c.15.

**11.—(1)** In proviso (ii) to section 3(5) of the Marriage (Scotland) Act 1977 (certificate as to capacity to marry)—

- (a) after the word “above” there shall be inserted the word “(a)”; and
- (b) at the end there shall be added the words “or (b) if no such certificate has been issued only by reason of the fact that the validity of a divorce or annulment granted by a court of civil jurisdiction in Scotland or entitled to recognition in Scotland under section 1 or 2 of the Recognition of Divorces, Annulments and Legal Separations Act 1984 is not recognised in the state in which the certificate would otherwise have been issued.”

(2) In section 26(2) of the said Act of 1977 there shall be inserted in the appropriate alphabetical position the following definition—  
“annulment” includes any decree or declarator of nullity of marriage, however expressed.’

## EXPLANATORY NOTES

### *Clause 11*

1. The Marriage (Scotland) Act 1977 requires a person who intends to be married in Scotland and who is not domiciled in any part of the United Kingdom to submit, if practicable, a certificate issued by a competent authority in the state of his domicile to the effect that he is not known to be subject to any legal incapacity under the law of that state which would prevent his marrying. It would be wrong, however, if this administrative requirement were to prevent the marriage in Scotland of someone who was free to marry by virtue of clause 7, above. Clause 11 is accordingly designed (following the recommendation in paragraph 6.58 of the report) to ensure that a person whose divorce or annulment was granted in Scotland or is recognised in Scotland, and who accordingly is free under clause 7 to remarry in Scotland, shall not be prevented from marrying in Scotland by the requirement to submit a certificate under section 3(5) of the 1977 Act.

2. As provided by clause 13(3), below, this clause only applies to Scotland.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Interpretation.

**12.—(1) In this Act—**

**“annulment” includes any decree or declarator of nullity of marriage, however expressed;**

**“judicial or other proceedings”, in relation to a country outside the British Islands, includes acts which constitute the means by which a divorce, annulment or legal separation may be obtained in that country and are done in compliance with the procedure required by the law of that country;**

**“part of the United Kingdom” means England and Wales, Scotland or Northern Ireland.**

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

## EXPLANATORY NOTES

### *Clause 12*

1. *Subsection 12(1)* provides three definitions. The inclusion within "annulment" of "any decree or declarator of nullity of marriage" has the effect that not only does clause 1 cover all British decrees of nullity, but where, as in clauses 8 and 9 above, the same rules apply to govern both the recognition of British and overseas "annulments", the latter term includes all British nullity decrees. The definition is non-exclusive.

2. The phrase "judicial or other proceedings" used in subsection 3(1)(b), above is amplified in subsection 12(1). The reasons for the introduction of this definition, which has no counterpart in the Recognition of Divorces and Legal Separations Act 1971, are explained in paragraph 6.11 of the report. The definition is non-exclusive.

3. The definition of "part of the United Kingdom" is self explanatory.

4. *Subsection 12(2)* is in the same terms as section 10(3) of the Recognition of Divorces and Legal Separations Act 1971. The purpose of this provision (referred to in paragraph 6.17, note 337 of the report) is two-fold. First, it makes clear that a reference to "country" in earlier provisions of the Bill (e.g. clauses 2 and 3) includes a colony or other dependent territory. Secondly, it has the effect that the references to nationality in, for example, clause 3 only apply, in the case of a dependent territory, if it has a law of citizenship or nationality independent of that of the United Kingdom.

*Recognition of Divorces, Annulments and Legal Separations Bill*

Short title,  
repeals, extent  
and com-  
mencement.

**13.—(1)** This Act may be cited as the Recognition of Divorces, Annulments and Legal Separations Act 1984.

(2) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

(3) Section 10 of this Act extends to England and Wales only and section 11 of this Act extends to Scotland only.

(4) Except as otherwise provided by subsection (3) above, this Act extends throughout the United Kingdom.

(5) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

## EXPLANATORY NOTES

### *Clause 13*

1. *Subsections 13(1) and 13(5)* are self explanatory.
2. *Subsection 13(2)*. This gives effect to the repeal of the enactments listed in the Schedule.
3. *Subsection 13(4)*. The Bill extends to all three parts of the United Kingdom, as recommended in paragraph 1.7 of the report, subject to the limitations in *subsection 13(3)*. This provision makes clear that clause 10 above, amending the Wills Act 1837, is limited to England and Wales; and clause 11, amending the Marriage (Scotland) Act 1977, is limited to Scotland. A further effect of subsection 13(4) is that repeal of the Matrimonial Causes (War Marriages) Act 1944 (see subsection 13(2) and the Schedule) only has effect so far as that Act forms part of the law of the United Kingdom, as recommended in paragraph 6.48 of the report.

## Section 13(2).

## SCHEDULE

## REPEALS

Chapter	Short title	Extent of repeal
16 & 17 Geo. 5. c.40.	Indian and Colonial Divorce Jurisdiction Act 1926.	The whole Act.
3 & 4 Geo. 6. c.35.	Indian and Colonial Divorce Jurisdiction Act 1940.	The whole Act.
7 & 8 Geo. 6. c.43.	Matrimonial Causes (War Marriages) Act 1944.	The whole Act.
10 & 11 Geo. 6. c.30.	Indian Independence Act 1947.	Section 17.
11 & 12 Geo. 6. c.3.	Burma Independence Act 1947.	Section 4(3).
11 & 12 Geo. 6. c.7.	Ceylon Independence Act 1947.	Section 3. In Schedule 2, paragraph 9.
14 Geo. 6. c.20.	Colonial and Other Territories (Divorce Jurisdiction) Act 1950.	The whole Act.
8 & 9 Eliz. 2. c.52.	Cyprus Act 1960.	In the Schedule, paragraph 14.
8 & 9 Eliz. 2. c.55.	Nigeria Independence Act 1960.	In Schedule 2, paragraph 14.
9 & 10 Eliz. 2. c.16.	Sierra Leone Independence Act 1961.	In Schedule 3, paragraph 15.
10 & 11 Eliz. 2. c.1.	Tanganyika Independence Act 1961.	In Schedule 2, paragraph 15.
10 & 11 Eliz. 2. c.23.	South Africa Act 1962.	In Schedule 3, paragraph 9.

Chapter	Short title	Extent of repeal
10 & 11 Eliz. 2. c.40.	Jamaica Independence Act 1962.	In Schedule 2, paragraph 14.
10 & 11 Eliz. 2. c.54.	Trinidad and Tobago Independence Act 1962.	In Schedule 2, paragraph 14.
10 & 11 Eliz. 2. c.57.	Uganda Independence Act 1962.	In Schedule 3, paragraph 13.
1963 c.54.	Kenya Independence Act 1963.	Section 7.
1964 c.46.	Malawi Independence Act 1964.	Section 6.
1964 c.65.	Zambia Independence Act 1964.	Section 7.
1966 c.29.	Singapore Act 1966.	Section 2.
1969 c.29.	Tanzania Act 1969.	Section 2. In section 4(3), the words "or the Divorce Jurisdiction Acts". Section 7(1).
1971 c.53.	Recognition of Divorces and Legal Separations Act 1971.	The whole Act.
1973 c.45.	Domicile and Matrimonial Proceedings Act 1973.	Sections 2, 15 and 16.

## **SCHEDULE**

1. This lists the enactments repealed by clause 13(2). The repeal of sections 2 and 15 of the Domicile and Matrimonial Proceedings Act 1973, which amend the Recognition of Divorces and Legal Separations Act 1971, is consequential on the repeal of the 1971 Act. The repeal of section 16 of the 1973 Act is made possible by the decision, explained in paragraph 6.29 of the report, no longer to recognise overseas divorces, etc. on the basis that they were recognised in, though not obtained in, the country of each spouse's domicile; and by the inclusion in clause 1(1) of the restriction that the only divorces and annulments obtained in the British Islands which are to be recognised are those of courts of civil jurisdiction.

2. The repeal of the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950 has made it possible also to repeal, as recommended in paragraph 6.45 of the report, the references to those Acts in the sixteen statutes conferring independence on the countries to which they formerly applied.

## **APPENDIX B**

### **MEMBERSHIP OF JOINT WORKING PARTY**

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

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

**\*Joint Chairmen**

## APPENDIX C

### List of persons and organisations who commented on the Law Commissions' Consultation Paper (1983)

The Rt. Hon. Sir John Arnold,  
President of the Family Division  
The Hon. Mr Justice Balcombe  
C. J. Barton, Esq.  
Adrian Briggs, Esq.  
Mrs E. B. Crawford  
M. C. Davey, Esq.  
Professor P. M. Bromley  
The Rt. Hon. Lord Justice Dunn  
The Rt. Hon. Lord Emslie,  
The Rt. Hon. Lord Fraser of Tullybelton  
Foreign and Commonwealth Office  
General Register Office  
General Register Office for Scotland  
Professor R. H. Graveson  
Master Heatley  
The Hon. Mr Justice Hollings  
Home Office  
A. J. E. Jaffey, Esq.  
The Law Society  
The Law Society of Scotland  
Professor K. Lipstein  
Lord Chancellor's Department  
Professor J. D. McClean  
Dr. J. H. C. Morris  
Northern Ireland Court Service  
Mrs M. P. Pilkington  
Principal Registry of the Family Division  
The Senate of the Inns of Court and the Bar  
P. A. Stone, Esq.  
The Hon. Mr Justice Waterhouse  
The Hon. Mr Justice Wood

## APPENDIX D

### RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS ACT 1971<sup>434</sup> (C.53)

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

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

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

Decrees of divorce and judicial separation granted in British Isles.

1. Subject to section 8 of this Act, the validity of a decree of divorce or judicial separation granted after the commencement of this section shall if it was granted under the law of any part of the British Isles, be recognised throughout the United Kingdom.

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

#### Overseas divorces and legal separations

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

Recognition in Great Britain of overseas divorces and legal separations.

- (a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and
- (b) are effective under the law of that country.

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

Grounds for recognition.

- (a) either spouse was habitually resident in that country; or
- (b) either spouse was a national of that country.

(2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)(a) of this section shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.

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

<sup>434</sup> As amended by the Domicile and Matrimonial Proceedings Act 1973.

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

Cross-  
proceedings  
and divorces  
following  
legal  
separations.

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

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

Proof of facts  
relevant to  
recognition.

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

- (a) if both spouses took part in the proceedings, be conclusive evidence of the fact found; and
- (b) in any other case, be sufficient proof of that fact unless the contrary is shown.

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

### General provisions

Existing  
common law  
and statutory  
rules.

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

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

- (a) the spouses had at the material time both been domiciled in that country; or
- (b) the divorce or separation were recognised as valid under the law of the spouses’ domicile,

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

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

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

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

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

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

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

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

8.—(1) The validity of –

- (a) a decree of divorce or judicial separation granted under the law of any part of the British Isles;
- or
- (b) a divorce or legal separation obtained outside the British Isles,

Exceptions from recognition.

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

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

- (a) it was obtained by one spouse –
  - (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

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

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

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

9. ....

Short title,  
interpretation,  
transitional  
provisions and  
commencement

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

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

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

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

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

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

(5) Section 9<sup>435</sup> of this Act shall come into operation on the passing of this Act and the remainder on 1st January 1972.

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<sup>435</sup> Sect. 9 was repealed by the Northern Ireland Constitution Act 1973, s.41(1) and Sched. 6, Part I.

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